LIMITATION OF TORT ACTIONS UNDER ALABAMA LAW: DISTINGUISHING BETWEEN THE TWO-YEAR AND THE SIX-YEAR STATUTES OF LIMITATION

I. INTRODUCTION

During the Nineteenth and early Twentieth centuries, Alabama courts used England's common law system of pleading. In 1852, the Alabama Legislature passed a six-year statute of limitations for all actions in trespass against the person or property. The statute relied on Nineteenth Century common law pleading and torts analysis.[1] In 1973, Alabama adopted the modern rules of civil procedure.[2] Concurrently, modern torts evolved from a causation-based system to a fault-based system. However, while civil procedure and torts have evolved, the six-year statute of limitations remains a product of the Nineteenth Century.

II. WHY WORRY ABOUT COMMON LAW WRITS?

Under common law pleading, one could bring actions for trespass and trespass on the case to remedy injuries to oneself or one's property. Although Alabama has adopted rules of civil procedure which eliminate the common law writs, the distinction between trespass and case remains crucial in determining the statute of limitations for certain personal and property injuries.[3] Section 6-2-34 provides for a six-year statute of limitations for, among other torts:

> (1) Actions for any trespass to person or liberty, such as false imprisonment or assault and battery; and
> (2) Actions for any trespass to real or personal property.[4]

On the other hand, section 6-2-38(l) provides a two-year statute of limitations for, among other things: "[a]ll actions for any injury to the person or rights of another not arising from contract" and not enumerated in another section.[5]

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1. Act of Feb. 5, 1852 (codified at ALA. CODE § 2477 (1852)).
2. Alabama Supreme Court Order of Jan. 3, 1973.
3. *See, e.g.*, Citizens Bank & Sav. Co. v. Wolfe Sales Co., 394 So. 2d 941, 943 (Ala. 1981) ("The Alabama Rules of Civil Procedure abolishing common law forms of action and replacing them with one form of action did not . . . eliminate the distinctions between trespass and trespass on the case insofar as those distinctions make a difference in the applicable statute of limitations.").
4. ALA. CODE § 6-2-34 (1993).
5. *Id.* § 6-2-38 (l).

Under English common law, trespass on the case was a catch-all remedy for any cause of action for which there was not an existing legal form.[6] Thus, the distinction between trespass actions under section 6-2-34 and actions falling under section 6-2-38 turns on whether the wrongful conduct constitutes an action for trespass or trespass on the case.[7] Unfortunately, the fuzzy distinction between the two writs has led to inconsistencies in the law. As applied, the current section 6-2-34 fails to adhere to the public's expectations, yields inconsistent and inefficient results, and forces judges to assume the role of the jury.

III. HISTORICAL DISTINCTIONS BETWEEN TRESPASS AND CASE

In early English common law, trespass was the method to seek damages for any "*direct* physical interference with the person or property of another."[8] Case probably originated from the Statute of Westminster, enacted in 1285 A.D.:[9]

> And whensoever from henceforth it shall fortune in the Chancery that in one Case a Writ is found and in like Case falling under like Law and requiring like Remedy, is found none, the Clerks of the Chancery shall agree in making the Writ; or the Plaintiffs may adjourn it until the next Parliament, and let the Cases be written in which they cannot agree, and let them refer themselves until the next Parliament, by Consent of men learned in the Law, a Writ shall be made, lest it might happen after that the Court should long time fail to minister Justice unto Complainants.[10]

The last clause of the statute reveals the government's intent to furnish a means of recovery for all wrongs, even those that did not fit within the established writs.

In determining whether a cause of action was in trespass or in case, the courts looked to "whether the case presented facts

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6. *See* JOHN JAY MCKELVEY, PRINCIPLES OF COMMON-LAW PLEADING § 80 (2d ed. 1917).

7. *See, e.g.*, Wint v. Alabama Eye & Tissue Bank, 675 So. 2d 383, 386 (Ala. 1996).

8. MCKELVEY, *supra* note 6, § 47.

9. MCKELVEY, *supra* note 6, § 80.

10. Statute of Westminster II, 13 Edw. I, c.24 (1285), *reprinted in* MCKELVEY, *supra* note 6, § 80.

which constituted a 'cause of action' in [whatever] form attempted to be used. This was more than a matter of pleading, it was a question of remedial right."[11] Thus, instead of notice pleading, a plaintiff needed to allege as many facts as possible in order for his writ of trespass to withstand a demurrer.

An action for trespass required the following elements:

(1) actual or implied force;
(2) direct (immediate) causation; and
(3) actual or constructive possession of the property (property actions only).[12]

In order to have a claim for trespass, the plaintiff needed to allege that the defendant either applied force or directed that force.[13] Examples of actual force include battery and carrying away goods. Courts implied force in injuries to real property (trespass quare clausum fregit) and false imprisonments.[14] However, courts refused to imply force in injuries to intangibles, such as reputation.[15] Due to the force requirement, courts did not recognize trespass actions premised solely on vicarious liability.[16] Instead, a plaintiff seeking remedy in trespass was compelled to establish that the defendant-employer/master ordered the tortious conduct or committed some act leading directly to the tortious conduct.[17]

Whether an action lay in trespass or case often depended on causation. For trespass, courts required that the injury be an immediate, rather than consequential, result of the alleged conduct.[18] English courts frequently cited the example of a log on a highway for illustrating the difference between trespass and case: "if at the time of [the log] being thrown it hit any person, it is trespass; but if after it be thrown, any person going along

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11. BENJAMIN J. SHIPMAN, SHIPMAN ON COMMON-LAW PLEADING § 27 (3d ed. 1923).
12. *Id.* § 35.
13. *See, e.g.*, Wilson v. Smith, 10 Wend. 324 (N.Y. Sup. Ct. 1833) (interpreting English law).
14. *See* SHIPMAN, *supra* note 11, § 36.
15. *See* SHIPMAN, *supra* note 11, § 39.
16. *See* SHIPMAN, *supra* note 11, § 37.
17. *See, e.g.*, Sharrod v. London & North W. Ry. Co., 4 Ex. 580 (1849), *reprinted in* WALTER WHEELER COOK ET AL., CASES ON PLEADING AT COMMON LAW 11 (1923).
18. *See* SHIPMAN, *supra* note 11, § 36.

the road receive an injury by falling over it as it lies there, it is case."[19]

Common law also required the plaintiff to be in actual or constructive possession of the injured property.[20] While general ownership of personal property implied possession, English courts refused to imply such possession of real property.[21] Unless the plaintiff (or his servant) had actual possession or the right to immediate posession at the time of injury, his remedy lay in case.[22] Thus, plaintiffs holding a mere reversionary interest sought remedy in case.[23]

Contrary to later Alabama interpretations, trespass actions included some actions for negligence.[24] Plaintiffs seeking redress for negligent conduct involving direct force had the option of seeking remedy in case or in trespass.[25] However, victims of wilful conduct could only seek remedy in trespass.[26] Different treatment of negligence and wilfulness by English courts probably caused the later addition of intent by Alabama courts.

IV. DEVELOPMENT OF TRESPASS AND CASE IN ALABAMA

Alabama courts made two substantive changes to the English common law definition of trespass: (1) courts required wanton intent;[27] and (2) courts expanded the definition of "direct" causation to include substantially certain consequences in property cases.[28] To the definition of "case," the supreme court has added a possession requirement because of modern standing.[29] Finally, Alabama courts have attempted to refine the vague

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19. Leame v. Bray, K.B., 1803; 3 East 593, 60, *reprinted in* WALTER WHEELER COOK ET AL., CASES ON PLEADING AT COMMON LAW 9 (1923).

20. This requirement has, for the most part, been replaced by modern standing requirements. *See* section IV(E).

21. *See* SHIPMAN, *supra* note 11, § 37.

22. *See* SHIPMAN, *supra* note 11, § 37.

23. *See* SHIPMAN, *supra* note 11, § 37.

24. *See* SHIPMAN, *supra* note 11, § 36.

25. Wilson v. Smith, 10 Wend. 324, 328 (N.Y. Sup. Ct. 1833) (interpreting English law).

26. *See id.*

27. *See infra* note 38 and accompanying text. *But see infra* notes 41-57 and accompanying text.

28. *See infra* notes 62-66 and accompanying text.

29. *See infra* notes 103-109 and accompanying text.

force element in the areas of personal injury and master/servant liability.[30]

A. Intent

1. Additional Element of Intent.—In Alabama, the emphasis on causality, rather than intent, remained intact in the early 1800s. In *Rhodes v. Roberts*,[31] the Alabama Supreme Court noted that "whenever the injury is direct and immediate, whether it proceed from design, or negligence, trespass will lie."[32] Even as late as 1934, the supreme court, in *Pan American Petroleum Co. v. Byars*,[33] emphasized causation:

> The true distinction between trespass and trespass on case lies in the directness or immediate character of the injury. An injury is to be regarded as immediate, and therefore a trespass, only when it is directly occasioned by, and is not merely a consequence resulting from, the act complained of.[34]

In 1852, the Alabama legislature first enacted the six-year statute of limitations for actions in trespass.[35] Within a decade, Alabama courts began to shift to an emphasis on the defendant's culpability.[36] In 1934, several years after the *Byars* decision, the Alabama Supreme Court completely shifted its focus from causality to intent. In *Crotwell v. Cowan*,[37] the supreme court redefined a trespass action to require (1) a direct causal link; (2) an application of force; and (3) a level of intent higher than that required in negligence actions:

> Under the common law, the foundation for civil liability for injuries to persons and property consequent upon the *unintentional* application of force, whether the act be affirmative or omissive, is negligence, and the appropriate common law action is case . . . . But when force is *intentionally* applied by direct affirmative act it

30. *See infra* notes 67-84 and accompanying text.
31. 1 Stew. 145 (1827).
32. *Rhodes*, 1 Stew. at 146.
33. 153 So. 616 (Ala. 1934).
34. *Pan Am. Petroleum Co.*, 153 So. at 619.
35. ALA. CODE § 2477 (1852).
36. *See, e.g.*, Bell's Adm'r v. Troy, 35 Ala. 184 (1859) (holding that a count for wilfulness was in trespass, while a count for negligence was in case).
37. 198 So. 126 (Ala. 1940).

> is trespass and the appropriate action for the recovery of damages therefore is trespass.[38]

In *Womble v. Glenn*,[39] the supreme court again noted "where the damage results as a proximate consequence of negligence, trespass on the case would lie."[40]

2. The Fall of the Intent Requirement?—The early requirement of wantonness was relaxed in more modern cases. In the 1972 case of *City of Fairhope v. Raddcliffe*,[41] an Alabama appellate court suggested that the 1940s opinions had been interpreted too literally: "[I]t is not the descriptive words 'willful or wanton' which determine an act to be in trespass, but whether the act producing injury was one of application of direct force."[42] Finally, in *Sasser v. Dixon*,[43] the Alabama Supreme Court apparently restored the common law causation terminology.[44] In *Sasser*, the court stated that an action for trespass requires only "a direct and immediate force with direct and immediate injuries."[45]

However, the confusion over the intent requirement has continued, because the issue has been relitigated several times since *Raddcliffe* and *Sasser*. In a series of decisions in 1979-1984, Alabama courts repeatedly adhered to the doctrine that little, if any, intent is required for a trespass action. In *Cochran v. Hasty*,[46] an appellate court stated that "the presence or absence of the descriptive term 'wanton' is not the proper guidepost in distinguishing the two actions," and analyzed the issue by addressing whether the alleged conduct constituted the

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38. *Crotwell*, 198 So. at 127 (emphasis added).
39. 54 So. 2d 715 (Ala. 1951).
40. *Womble*, 54 So. 2d at 718.
41. 263 So. 2d 682 (Ala. Civ. App. 1972).
42. *Raddcliffe*, 263 So. 2d at 685.
43. 273 So. 2d 182 (Ala. 1973).
44. In *Strozier v. Marchich*, Justice Jones declares that *Sasser* completely restored common law terminology, eliminating the need for intent. 380 So. 2d 804, 808 (Ala. 1980) (Jones, J., dissenting). However, the Alabama Supreme Court's persistent quoting of cases requiring intent suggests that the controversy may not be over.
45. *Sasser*, 273 So. 2d at 185.
46. 378 So. 2d 1131 (Ala. Civ. App. 1979).

application of direct force.[47] In *W.T. Ratliff Co. v. Henley*,[48] the supreme court held "the *intent* [sic] to do the act" was sufficient to invoke the six-year statute of limitations.[49] In *Brown v. Schultz*,[50] the Alabama Supreme Court stated that the level of intent alleged was irrelevant, and noted that the distinction between the two forms of action lay in whether there was an act of direct force producing injury or damage.[51]

In the last decade, Alabama courts have been so inconsistent that both plaintiffs and defendants have legitimate arguments for whether intent is required. In *Stocks v. CFW Construction Co.*,[52] the supreme court, while addressing a blasting case, noted that the "general classification of negligence actions" falls within the scope of the shorter statute of limitations.[53] Yet one year later in *Lovell v. Acrea*,[54] the Alabama Supreme Court stated:

> The true distinction between trespass and trespass on the case lies in the directness or immediate character of the injury. An injury is to be regarded as immediate, and therefore a trespass, only where it is directly occasioned by, and is not merely a consequence resulting from, the act complained of." Lovell argues that the direct/indirect test is not, or at least should not be, the true distinction between trespass and trespass on the case. Instead, says Lovell, the distinction should be based on whether the tort was intentional or negligent. That this is not the law of this State is evident.[55]

"Again, in 1987, the Alabama Supreme Court emphasized the other two requirements for trespass: "[t]he test for whether a complaint states a cause of action for trespass or for trespass on the case is whether the tort was committed by a direct application of force or was accomplished indirectly."[56] Thus, an Ala-

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47. *Cochran*, 378 So. 2d at 1133.
48. 405 So. 2d 141 (Ala. 1981).
49. *Ratliff*, 405 So. 2d at 146.
50. 457 So. 2d 388 (Ala. 1984).
51. *See Brown*, 457 So. 2d at 390.
52. 472 So. 2d 1044 (Ala. 1985).
53. *Stocks*, 472 So. 2d at 1046.
54. 500 So. 2d 1082 (Ala. 1986).
55. *Lovell*, 500 So. 2d at 1083 (quoting in part Sasser v. Dixon, 273 So. 2d 182, 183 (Ala. 1973) (citation omitted)).
56. Archie v. Enterprise Hosp. & Nursing Home, 508 So. 2d 693, 695 (Ala.

bama court should not per se bar a three-year-old negligence action.[57]

Although the supreme court has not applied the intent requirement to recent cases, its ambiguous dicta have left hope for defendants wishing to dismiss three-year old negligence actions. Often, Alabama courts will simply cite many inconsistent decisions summarily and state that the case before the court is one of trespass.[58] Since *Sasser*, the Alabama Supreme Court has heard only claims involving a wanton intent; the court has not applied the six-year statute to negligence claims in the past twenty years.

B. Causation

The second major change in common law trespass analysis has been limited to property actions. While personal injury litigants still face the narrow direct causation requirement for trespass, those seeking recovery for injuries to property now enjoy a more liberal causation standard.

At first, the Alabama Supreme Court retained England's narrow meaning of causation. In *Parsons v. Tennessee Coal, Iron, & Railroad Co.*,[59] the defendant deposited debris from his mining camp into a stream, which carried the debris onto the plaintiff's land. The court held that the two counts for negligence against the defendant and his employees were in case.[60] The supreme court reasoned that the flow of the stream was an intervening agency, making the injury consequential.[61] Thus, nature, although reasonably foreseeable, qualified as an intervening agency for the purposes of causation.[62]

1987).

57. *But see* Henson v. Celtic Life Ins. Co., 621 So. 2d 1268, 1274 (Ala. 1993) (suggesting that regardless of intent, claims for negligence and wantonness will always fall under the two-year statute of limitations).

58. *See, e.g.*, Eidson v. Johns-Ridout's Chapels, 508 So. 2d 697, 699-701 (Ala. 1987) (citing with approval not only supreme court precedent requiring wanton intent but also a treatise defining trespass in terms of direct causation and force).

59. 64 So. 591 (Ala. 1914).

60. *Parsons*, 64 So. at 591.

61. *See id.*

62. *See also* Pan Am. Petroleum Co. v. Byars, 153 So. 616 (Ala. 1934) (holding that an action for the pollution of a stream, later resulting in injury to the

In 1974, however, the Alabama Supreme Court adopted the Restatement view and expanded its definition of "direct" causation. In *Rushing v. Hooper-McDonald*,[63] the sublessee of a fishpond sued when the defendant's asphalt slid downhill into the pond. In upholding the action for trespass, the supreme court remarked:

> [i]t is not necessary that the asphalt or foreign matter be thrown or dumped directly and immediately upon the plaintiff's land[,] but . . . it is sufficient if the act is done so that it will to a *substantial certainty* result in the entry of the asphalt or foreign matter onto the real property that the plaintiff possesses.[64]

Thus, had the *Parsons* case been decided in the 1970s, the court probably would have found the action to be in trespass.

Later, courts limited the "substantial certainty" test to exclude actions for the overflow of water from a dam. In *Cochran v. Hasty*,[65] landowners sued their neighbor for causing or allowing water to back up onto their property. Plaintiffs alleged that in constructing a dam for his pond, the defendant flooded the plaintiffs' land. The court held that the claim was governed by the shorter statute of limitations, noting that "the action is in case when the overflow or pollution is the consequence of an obstruction on the property of the defendant."[66]

While this expansion and contraction of "direct causation" caused much litigation in property actions, the supreme court has retained England's narrow interpretation in personal injury actions.[67] The interaction between the force and causation elements requires this result: while force is implied in property actions, actual force is still required in personal injury actions.

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plaintiff's soil, was in case).

63. 300 So. 2d 94 (Ala. 1974).

64. *Rushing*, 300 So. 2d at 97 (emphasis added).

65. 378 So. 2d 1131 (Ala. Civ. App. 1979).

66. *Id.* at 1134.

67. *See* Brown v. Shultz, 457 So. 2d 388 (Ala. 1984).

C. Force

1. Personal Injury Actions.—In the context of personal injury, "force" requires an action on the person, as contrasted with an omission when there is a duty to act.[68] Generally, a mere nonfeasance cannot be regarded as forcible.[69] Unfortunately, the vagueness of the misfeasance/nonfeasance standard provides a loophole for creative pleaders; many fact patterns can be characterized either as an act or as an omission. The inconsistencies resulting from this dilemma are explored in section V-*B*.

The wording of section 6-2-34 has caused confusion over its applicability to intentional torts. The six-year statute notes that false imprisonment, assault, and battery are actions for "trespass to person or liberty."[70] This would imply that all intentional torts qualify as actions for trespass; however, the Alabama Supreme Court has held that the tort of outrage can be governed by the two-year statute of limitations.[71]

In *Eidson v. Johns-Ridout's Chapels*,[72] relatives of the deceased viewed the deceased in a small box among garbage cans.[73] The relatives sued the funeral home under theories of breach of contract, trespass, and outrage.[74] The Alabama Supreme Court held that the trespass and outrage claims were time-barred.[75] The court reasoned that the actions of the defendant in allowing the plaintiffs to view the deceased in such a manner involved "neither actual nor implied force directed upon

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68. *Brown*, 457 So. 2d at 391 (Ala. 1984) (citing Sasser v. Dixon, 273 So. 2d 182 (Ala. 1973)).

69. Eidson v. Johns-Ridout's Chapels, Inc., 508 So. 2d 697, 701 (Ala. 1987) (citing SHIPMAN, *supra* note 11, § 39).

70. ALA. CODE § 6-2-34 (1996).

71. Because courts examine the statute of limitations issue on a case-by-case basis, there may exist fact patterns which would invoke the six-year statute of limitations for the tort of outrage. However, the Alabama Supreme Court's strong language in *Archie v. Enterprise Hospital & Nursing Home*, 508 So. 2d 693, 695 (Ala. 1987), suggests that all outrage claims are governed by the two-year statute of limitations. The court said as much in *Jenkins v. United States Fidelity and Guar. Co.*, 698 So. 2d 765, 768 n.5 (Ala. 1997).

72. 508 So. 2d 697 (Ala. 1987).

73. *Id.* at 698.

74. *Id.* at 699.

75. *Eidson*, 508 So. 2d at 701.

the persons of the plaintiffs."[76] The supreme court noted that injuries to intangibles do not include force.[77] Thus, implied force may be limited in its applicability to the enumerated torts of Alabama Code section 6-2-34.

The force issue often arises in the context of the employment relationship. The Alabama Supreme Court has apparently shut the door on employer liability for unsafe working conditions brought more than two years after occurrence.[78] In *Brown v. Schultz*,[79] an employee sued his employer for failure to correct a defect in his work environment; the plaintiff alleged that the defendant had wantonly or recklessly failed to furnish him with a reasonably safe place to work.[80] The Alabama Supreme Court held that the claim was time-barred for failure to allege the application of force.[81]

Similarly, in *Sasser v. Dixon*,[82] employees sued a fellow employee for failing to use proper safety measures.[83] The Alabama Supreme Court dismissed the claim as time-barred.[84] The court reasoned that the injuries "were the consequence of an omission of a duty to act" rather than a misfeasance.[85] Thus, employees injured on the job should bring their claims within two years, or plead the facts in a more artful manner.

The Alabama Supreme Court has further used the force requirement, in concert with the direct causation requirement, to bar actions for wrongful interference with business relationships. In *Sparks v. McCrary*,[86] a storeowner accused the defendant of threatening his customers, thereby creating lost profits.[87] The Alabama Supreme Court held that the action was in case. The court reasoned that the alleged conduct did not involve "actual or constructive assumption of possession [of the

76. *Id.*
77. *Id.* (quoting SHIPMAN, *supra* note 11, § 39).
78. *See* Brown v. Schultz, 457 So. 2d 388 (Ala. 1984).
79. 457 So. 2d 388 (Ala. 1984).
80. *Id.* at 389.
81. *Brown*, 457 So. 2d at 391.
82. 273 So. 2d 182 (Ala. 1973).
83. *Id.* at 183.
84. *Sasser*, 273 So. 2d at 185-86.
85. *Id.* at 185.
86. 47 So. 332 (Ala. 1908).
87. *Id.* at 333.

plaintiff's property] or force in any form."[88] The supreme court failed to view the fact that the wrongful conduct occurred in the plaintiff's store as significant to the issue of force.[89] Thus, the force element requires force upon the injured *res*, rather than force upon the plaintiff's property. Because a business relationship is intangible (rendering the application of force an impossibility), this type of claim should always be governed by a two-year statute of limitations.[90] Therefore, actions for wrongful interference with business relationships should be brought within two years.

2. Property Injury Actions.—The law implies force in every injury to real property (trespass quare clausum fregit).[91] This rule may bring surprising results when similar conduct injures persons and property. Suppose, for example, that D leaves toxic chemicals on his land.

Hypothetical #1

The chemicals are placed on the top of a hill and, as a result of rain, wash down to P's land, causing injury.

Hypothetical #2

The chemicals are placed near a work site. D fails to clean up the mess before P, D's employee, begins work. P becomes ill.

Suppose each plaintiff discovers his injury six months after the wrong has been committed. Five years later, both wish to sue D. In the first situation, P can recover for his injury five years later, because the "force" is implied.[92] In hypothetical #2, P cannot recover for his injury five years later because D has

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88. *Sparks*, 47 So. at 334.

89. *Id.*

90. In *Teng v. Saha*, 477 So. 2d 378 (Ala. 1985), the supreme court cited *Sparks* in applying the shorter limitations period to an action for wrongful interference with an employment relationship. *Id.* at 379. *Teng* and *Sparks* should bar older claims involving interference with any business relationship.

91. Eidson v. Johns-Ridout's Chapels, 508 So. 2d 697, 700 (Ala. 1987) (quoting SHIPMAN, *supra* note 11, § 39). Because any injury to personal property must involve some actual misfeasance upon the property, the force requirement is unnecessary in actions for injuries to personal property.

92. *See Edison*, 508 So. 2d at 700.

merely failed to provide a safe working environment (nonfeasance).[93] Which of these outcomes seems more offensive? This problem of failure to meet the public's expectations is discussed in section V-A.

D. Vicarious Liability

Alabama courts have adhered to English precedent regarding master-servant liability. In *Southern Bell Telephone & Telegraph Co. v. Francis*,[94] one justice stated the rule as follows:

> [I]f an agent or servant, in and about the business of the principal or master, commits a trespass upon the person or property of another, in the immediate presence of the principal or master, it will be presumed that it was done by the direction of the latter, who will be liable for the trespass, unless it is affirmatively shown that he did not coerce or direct the act, but did what he lawfully should to prevent it. . . . So, also, if a principal or master direct his agent or servant to do an act which is in itself unlawful, and, in its commission, an injury is done to another, or if the act commanded, if done without injury to another, is, in itself, not unlawful, yet is of such a nature that the natural and probable effect or result of its performance is injury to another, and, in its performance, such injury is done, he who gave the command, in either case, is a trespasser.[95]

Thus, the employer must (1) be in the immediate presence of the employee when tortious conduct occurs or (2) command the employee to commit the tortious conduct in order to invoke the six-year statute of limitations.[96] Later, the supreme court clarified the standard to require that the employer directed, aided, participated in, or ratified the alleged tortious conduct of the employee.[97] This requirement likely arises from the force element. In a pure respondeat superior case, the defendant is guilty of nonfea-

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93. *See Brown*, 457 So. 2d at 391.

94. 19 So. 1 (Ala. 1896).

95. *Francis*, 19 So. at 3-4 (Head, J., concurring).

96. Similar principles apply where a person's animals enter another's property. *See, e.g.*, Ryall v. Allen, 38 So. 851, 853 (Ala. 1905) (holding that an action alleging the defendant voluntarily or knowingly permitted his stock to trespass on the plaintiff's land was in trespass).

97. *See* Wint v. Alabama Eye & Tissue Bank, 675 So. 2d 383, 386 (Ala. 1996).

sance, not malfeasance. Thus, trespass requires at least ratification of the alleged wrongful conduct; in ratifying, directing, aiding, or participating in the conduct, the defendant commits an affirmative act rather than a mere omission.

In *Wint v. Alabama Eye Tissue Bank*,[98] the Alabama Supreme Court hinted at what type of conduct would meet the ratification or more test. In *Wint*, a patient's family sued an eye bank under theories of conversion and trespass for taking the patient's eyes after death. The plaintiff asserted two theories to support her contention that the defendant eye bank ratified its employee's alleged conduct: (1) ratification occurred when an employee of the defendant received a telephone call notifying him of the patient's death and of the family's wishes not to donate the patient's eyes; or (2) ratification occurred when an unknown employee of the defendant sold the patient's eyes.[99] In rejecting both theories, the supreme court suggested what may be necessary to establish an action for trespass:

> (1) the alleged ratification must occur at the time of or after the tort itself;
> (2) some affirmative conduct is required by the defendant (mere nonfeasance after notice of the tortious conduct may not be sufficient); and
> (3) the plaintiff must produce "substantial evidence" to establish the ratification ("mere speculation or conjecture... is not sufficient to establish corporate ratification . . . ").[100]

The court implicated that even a sales receipt from the defendant would have been "substantial evidence" of ratification for the purposes of withstanding a motion for summary judgment.[101]

In *Hatfield v. Spears*,[102] the plaintiff successfully pleaded his way into the six-year statute of limitations while charging the defendant's employees with the tortious conduct. In all three counts of his complaint, the plaintiff alleged that the defendant "intentionally caused employees" to commit the wrongful tort.

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98. 675 So. 2d 383 (Ala. 1996).
99. *Wint*, 675 So. 2d at 386-87.
100. *Id.*
101. *See id.* at 387 (commenting on the absence of evidence to support plaintiff's allegation that a sale occurred).
102. 380 So. 2d 262 (Ala. 1980).

The supreme court characterized those counts as charging the defendant "with actually directing or aiding in the commission of a trespass" so that the six-year statute of limitations applied.[103]

E. Actual or Implied Possession (Property Actions Only)

Trespassory conduct must occur while the plaintiff is in possession of the property. In the landlord-tenant context, a tenant may always sue in trespass for damages to the leasehold.[104] A landlord, on the other hand, may invoke the six-year statute of limitations only where the damages are of a permanent nature.[105] However, modern standing requirements have, in some cases, replaced the possession element to trespass actions.

In order for a justiciable case or controversy to be before a court, a plaintiff must have standing to sue.[106] To have standing, the plaintiff "'must allege an injury directly arising from or connected with the wrong alleged.'"[107] Thus, when property has been damaged, a plaintiff seeking recovery must allege that he or she has been injured by the property damage. In general, only a plaintiff in possession of the damaged property can allege such an injury.

The Alabama Supreme Court has recognized the overlap between standing and possession. In *AmSouth Bank v. City of Mobile*,[108] the City of Mobile constructed a parking facility on property located adjacent to the plaintiffs' leased property. Dur-

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103. *Spears*, 380 So. 2d at 264.

104. *See, e.g.*, AmSouth Bank v. City of Mobile, 500 So. 2d 1072 (Ala. 1986) (noting that any cause of action for trespass belonged to the tenant).

105. *See AmSouth Bank*, 500 So. 2d at 1072. Note that a lessor of personal property does not experience the same restrictions as the lessor of real property. A lessor of personal property always has "possession" of the property because his general ownership of the property implies possession. *See* text accompanying notes 20 and 21 *supra*. The Alabama Supreme Court has not addressed the potential overlap between standing and possession in the context of personal property trespass actions.

106. *Ex parte* Blue Cross & Blue Shield of Alabama, 582 So. 2d 469, 474 (Ala. 1991).

107. *Ex parte Blue Cross*, 582 So. 2d at 474 (quoting 1 NEWBERG ON CLASS ACTIONS § 319 (2d ed. 1985)).

108. 500 So. 2d 1072 (Ala. 1986).

ing the construction, the defendants damaged the plaintiffs' building, and the landowners sued. The trial court held that the claims did not fall under the six-year statute of limitations. The supreme court affirmed, holding that (1) the landlords' claim for temporary damages was in case; (2) the tenant's potential claim for temporary damages was in trespass; and (3) the landlords had no standing to bring a claim for the permanent damages to the leasehold.[109] Thus, because trespass is a wrong relating to possession, a landlord has no standing to bring claims for damages to his leasehold until he or she regains possession of the leasehold.[110]

V. WHY WE NEED A NEW SIX-YEAR STATUTE OF LIMITATIONS

Statutes of limitation serve to preserve the accuracy of the factfinding process and to promote certainty in the administration of affairs.[111] In calculating the time for such statutes, the legislature should weigh (1) the nature of the subject and purpose of the statute of limitations and (2) the difficulties of litigants in presenting their claims.[112] However, the distinction between the six and two-year statutes of limitations bears no relation to the logic suggested above by legal scholars.

A. Section 6-2-34 Fails to Preserve the Public's Expectations

In the promotion of certainty in the administration of affairs, the public likely expects that less culpable conduct would be protected by a shorter limitations period, just as more reprehensible conduct would be vulnerable to high punitive awards. This result would offer plaintiffs with claims involving a higher burden of proof a longer limitations period while giving less culpable tortfeasors the certainty of a shorter limitations period.

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109. *AmSouth*, 500 So. 2d at 1074-75.

110. Presumably the applicable statute of limitations would not begin to toll until the plaintiff resumed possession. If not, landlords would have to rely on their tenants to bring suits for damages to the leasehold. The supreme court did not address this issue; however, many states have statutory provisions to this effect.

111. *See* CALVIN W. CORMAN, LIMITATION OF ACTIONS § 1.1 (1991).

112. *See id.*

However, Alabama Code section 6-2-34 fails to enforce such expectations as to when a claim may be barred. A claim for wantonness, for example, may invoke a two-year statute of limitations while a claim for negligence could invoke a six-year statute of limitations.[113] Thus, plaintiffs may be unfairly surprised to discover that the intentional conduct of a tortfeasor is protected by the two-year statute of limitations.

B. Section 6-2-34 Undermines Judicial Certainty

The requirement of misfeasance is vague at best. Most fact patterns can be characterized as either a misfeasance or nonfeasance. Thus, section 6-2-34 demands a detailed, factual analysis in order to determine which statute of limitations applies; this case-by-case analysis often requires artificial distinctions in order to draw a line between trespass and case. For example, recovery for intentional torts such as invasion of privacy and false imprisonment lie in trespass, yet outrage and slander invoke the two-year statute of limitations due to lack of force.[114] Consider the following cases:

(1) In *Disheroon v. Brock*,[115] a deputy sheriff unlawfully entered an elderly woman's home, causing emotional distress. The Alabama Supreme Court affirmed a judgment for the plaintiff's action for trespass, holding that recovery in trespass could be had for pain, fright, mental suffering, shame and humiliation, inconvenience, and invasion of privacy.[116]

(2) In *Engle v. Simmons*,[117] a debt collector entered a pregnant woman's home and made verbal threats as to what he intended to do in collecting the claim against her husband. As a result, the woman had a miscarriage. The supreme court reversed the judgment for the defendant, noting "[t]he plaintiff here was in her home, . . . and any unlawful entry or invasion thereof, which

113. *See* Snell v. G.D. Sedle, 595 F. Supp. 654, 657 (N.D. Ala. 1984) (noting that wantonness results in 1 year statute of limitations); Balan v. E.E. Ball, 446 So. 2d 39, 40 (Ala. 1984) (stating that attorney negligence results in six-year statute of limitation).

114. *See, e.g.*, W.T. Ratliff Co. v. Henley, 405 So. 2d 141, 144-45 (Ala. 1981); Cochran v. Hasty, 378 So. 2d 1131, 1133 (Ala. Civ. App. 1979).

115. 105 So. 899 (Ala. 1925).

116. *Disheroon*, 105 So. at 901.

117. 41 So. 1023 (Ala. 1906).

produced physical injury to her, *whether by direct personal violence, or through nervous excitement* the proximate result of the wrongful acts of the defendant, was a wrong for which she is entitled to recover."[118]

(3) In *Lovell v. Acrea*,[119] work supervisors ordered an employee to perform tasks which the supervisors knew or should have known would re-injure the employee's weak back. The Alabama Supreme Court held that the defendants' orders did not constitute force for the purpose of trespass.[120] The court distinguished *Engle* and *Disheroon* on the basis that the conduct in those cases "was *culpable* in itself, whereas the conduct of [the supervisors] was not."[121] The court noted that Lovell was not abused or threatened, except with the loss of his job.[122]

(4) In *Vest v. Speakman*,[123] plaintiff sued defendant for slander, assault, and battery. The Alabama Supreme Court held that an action for slander is always in case;[124] the fact that the slander was connected with assault and battery (culpable conduct) was irrelevant.[125]

(5) In *Eidson v. Johns-Ridout's Chapels, Inc.*,[126] relatives of the deceased viewed the deceased in a small box among garbage cans. The relatives sued under theories of breach of contract, trespass, and outrage. The Alabama Supreme Court held that the trespass and outrage claims were time-barred.[127] The court cited Shipman's treatise on common law pleading for the notion that injuries to intangibles are in case.[128]

The rule? There may or may not be a trespass form of action available for intangible harm to the person. In making vague morality decisions based on "culpability" and by citing numerous inconsistent cases and sources in opinions, the Alabama Supreme Court has left civil litigants guessing. The judicial system needs clear rules, not unpredictable analysis.

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118. *Engle*, 41 So. at 1024 (emphasis added).
119. 500 So. 2d 1082 (Ala. 1986).
120. *Lovell*, 500 So. 2d at 1084.
121. *Id.* (emphasis added).
122. *See id.*
123. 44 So. 1017 (Ala. 1907).
124. *Vest*, 44 So. at 1017.
125. *See id.*
126. 508 So. 2d 697 (Ala. 1987).
127. *Eidson*, 508 So. 2d at 701.
128. *See id.* at 700-01.

C. Section 6-2-34 Promotes Confusion Between the Tort of Trespass and the Trespass Cause of Action

Because Alabama courts look to the facts alleged, rather than the facts necessary to prove each legal theory, courts often analyze the statute of limitations issue complaint by complaint (rather than looking at each claim). Ordinarily, where one set of facts gives rise to more than one cause of action, a court will examine each legal theory on its face, dismissing some and leaving others. However, Alabama courts seem to forget that modern complaints may contain multiple theories for a single cause of action. This problem was most evident in *W.T. Ratliff Co. v. Henley*,[129] where the Alabama Supreme Court confused the concepts of trespass forms of action and torts of trespass.

In *Ratliff*, a corporation's mining operations washed sand and gravel onto the plaintiff's property. The plaintiff sued for negligence, wantonness, continuing trespass, and nuisance. The supreme court held that the complaint was governed by the six-year statute of limitations.[130]

The court began its analysis by reciting the historical distinctions between trespass and case.[131] The court noted that under traditional notions of direct causation, this action would lie in case.[132] However, the supreme court cited *Borland v. Sanders Lead Co.*,[133] which established a cause of action for the tort of indirect trespass. The elements of indirect trespass are:

> (1) an invasion affecting an interest in the exclusive possession of [plaintiff's] property;
> (2) an intentional doing of the act which results in the invasion;
> (3) reasonable foreseeability that the act done could result in an invasion of the plaintiff's possessory interest; and
> (4) substantial damages to the *res*.[134]

The court reasoned that, because the alleged facts fit the tort of

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129. 405 So. 2d 141 (Ala. 1981).
130. *Ratliff*, 405 So. 2d at 146.
131. *Id.* at 144-45.
132. *Id.* at 145.
133. 369 So. 2d 523 (Ala. 1979).
134. *Ratliff*, 405 So. 2d at 145 (quoting *Borland*, 369 So. 2d at 529).

indirect trespass, the complaint must be in trespass.[135] The supreme court overlooked the essential nature of a nuisance claim: nuisance claims involve an injury to the use and enjoyment of property, not an injury to the possession.[136] According to this new analytical scheme, many legal theories can be placed under the six-year statute via crafty pleading of the facts.[137]

D. Section 6-2-34 is Inconsistent with Modern Tort Law

In early negligence cases, courts used the misfeasance/nonfeasance standard to determinine whether a defendant breached his duty of care.[138] Thus, liability was established on the basis of whether the conduct constituted an act or an omission, regardless of culpability of conduct. Courts reasoned that misfeasance created a new harm, while nonfeasance left the plaintiff no worse off than before.[139] Over the last century, courts have recognized that certain omissions are as culpable as affirmative negligence.[140] Courts have allowed recovery for nonfeasance where there exists a "definite relation between the parties, of such a character that social policy justifies the imposition of a duty to act."[141]

In Alabama, however, courts have not considered relationships between the parties for purposes of determining whether an action for trespass exists. If we now impose tort liability for nonfeasance in these cases, why not allow the interpretation of "trespass" to reflect the times? Modern tort liability hinges on culpability of conduct, not nonfeasance versus misfeasance. For example, punitive damages are generally allowed on the basis of

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135. *See Ratliff*, 405 So. 2d at 145-46.

136. *See Borland*, 369 So. 2d at 529. Since nuisance claims involve an injury for use and enjoyment of property, they were traditionally brought under trespass on the case. *See, e.g.*, Birmingham Waterworks Co. v. Martini, 56 So. 830 (Ala. Ct. App. 1911). By ignoring the individual nuisance claim, the *Ratliff* court overruled this practice.

137. To our embarrassment, some first year property professors show this case to their students as a joke about Alabama's courts.

138. *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 56 (5th ed. 1984).

139. *See id.*

140. *See id.*

141. *Id.* at 374.

the intent of the actor, rather than misfeasance characterization.[142] Controversies between employer and employee demonstrate that the supreme court fails to examine whether such a relationship imposing a duty to act exists in determining the statute of limitations issue.[143] Thus, while modern torts have evolved, our statute of limitations remains a product of the Nineteenth Century.

E. Section 6-2-34 Requires Judges to Make Jury Decisions

The Alabama Supreme Court has held that the issue of proximate cause is ordinarily a jury question.[144] In *Thetford v. City of Clanton*,[145] the supreme court defined proximate cause as follows:

> Proximate cause is an act or omission that in a natural and continuous sequence, unbroken by any new independent causes, produces the injury and without which the injury would not have occurred. The requirement of foreseeability is imposed to preclude a finding of liability when the defendant's conduct was part of the causal chain of events leading to the injury but the resulting injury could not have been reasonably anticipated by the defendant.[146]

Sound familiar? With the expansion of the "direct causation" element in property injury claims to include those injuries which are substantially certain to result, the causation element approaches proximate causation.

Suppose, for example, that D leaves asphalt on top of a hill on his land. P lives at the bottom of the hill. Suppose that D lives in Arizona, where rain comes twice a year. If rain washes the asphalt onto P's land, can P recover five years later? Was the rain a substantial certainty? What about if D lives in Alabama, and the weatherman reported that no rain was expected

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142. *See* ALA. CODE § 6-11-20 (Supp. 1997).

143. *See supra* notes 94-102 and accompanying text.

144. *See* Peters v. Calhoun County Comm'n, 669 So. 2d 847, 850 (Ala. 1995) ("While the issue of foreseeability in the context of an intervening cause may be decided as a matter of law, . . . it is more commonly a question for the trier of fact.").

145. 605 So. 2d 835 (Ala. 1992).

146. *Thetford*, 605 So. 2d at 840.

for a week?

Cases such as the hypothetical presented above invoke issues of proximate causation and direction causation to trespass as well as jury questions and questions of law. The overlap between the two concepts necessitates the usurpation of the jury's power by judges in analyzing statute of limitations issues.

Because all torts require proximate causation, the direct causation element of trespass is no longer necessary. If a jury determines that an injury was not a proximate result of the defendant's conduct, then an action for case is barred nonetheless. The only function such a requirement serves is to force a judge to overstep his bounds in making a factual determination. Only in extreme cases should a judge be determining proximate causation.[147]

F. Section 6-2-34 is Incompatible with Modern Notice Pleading

Under common law pleading, whether a complaint was in trespass or case depended "not so much upon the form of allegation adopted by the pleader, as upon the facts alleged, and the conclusion which the law draws from those facts."[148] On the other hand, the modern rules of civil procedure demand only notice pleading in most actions. Because the statute of limitations issue is based not on the legal theory as much as the artful pleading of the facts, the current scheme often requires costly discovery before a time-barred claim can be dismissed.

VI. SUGGESTED REVISIONS TO SECTION 6-2-34

The inconsistent results of section 6-2-34 demand a new rewording.[149] Other states offer more predictable statutes of

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147. *See, e.g., Peters*, 669 So. 2d at 850.

148. Parsons v. Tennessee Coal, Iron, & R. Co., 64 So. 591 (Ala. 1914).

149. The suggested revisions to ALA. CODE § 6-2-34 (1993) implicate the following provisions of the statute:

(1) Actions for any trespass to person or liberty, such as false imprisonment or assault and battery;

(2) Actions for any trespass to real or personal property;

(3) Actions for the detention or conversion of personal property;

(4) Actions founded on promises in writing not under seal;

limitations which the Alabama legislature can follow.[150] However, if the legislature does nothing, the Alabama Supreme Court should re-examine its interpretation of trespass actions in light of the problems illustrated above.

A. Legislative Solutions

1. Delineate Unenumerated Claims According to the Thing Injured.—Some states provide one statute of limitations for injuries to property and one for injuries to the person.[151] This scheme takes the guesswork from the judge and allows determinations to be made on the face of the complaint. Thus, it satisfies the goals of judicial efficiency and certainty. Furthermore, the scheme prevents judges from taking on jury functions.

SUGGESTED REVISIONS TO SECTION 6-2-34:

Replace §§ 6-2-34(1), (2), (4) and (9) with:
"Actions for injuries to personal or real property."

OR

Replace §§ 6-2-34(1), (2), and (3) with:
"Actions for tortious injuries to personal or real property."

2. Delineate Unenumerated Claims According to Tort vs. Contract.—Some states provide catch-all statutes of limitations for torts and for contracts.[152] In theory, this scheme should also promote judicial efficiency and certainty. One problem with this

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. . .
(9) Actions upon any simple contract or specialty not specifically enumerated in this section.

150. Alabama is the only state to retain the trespass/case distinction in its statutes of limitations.

151. *See, e.g.*, TENN. CODE ANN. §§ 28-3-104 to 105 (1997) (requiring actions for personal injuries to be commenced within one year and actions for injuries to personal and real property to be commenced within three years), *and* GA. CODE ANN. §§ 9-3-30, -33 (1997) (requiring actions for personal injuries to be commenced within two years and actions for injuries to personal and real property to be commenced within four years).

152. *See generally* CONN. GEN. STAT. § 52-584 (requiring actions for personal injury and damage to property be brought within three years).

scheme, however, is the modern emergence of the "contort."[153] Many breach of contract actions allow a tort action, and some jurisdictions require tort-like proof to establish contract actions.[154] Thus, this scheme may be undesirable in Alabama as the boundaries between tort and contract become less clear.

SUGGESTED REVISION TO SECTION 6-2-34:

Delete §§ 6-2-34(1), (2), and (3).

3. Group All Unenumerated Claims Together.—Some states avoid the "contorts" issue by simply placing all unenumerated claims (which may include tort and contract actions, generally) together in one statute of limitations.[155] Like the first solution, this scheme allows a judge to determine the statute of limitations from the face of the complaint. Its simplicity satisfies the goals of judicial certainty and efficiency for statutes of limitations.

SUGGESTED REVISION TO SECTION 6-2-34:

Delete §§ 6-2-34(1), (2), (3), (4), and (9).

OR

Delete §§ 6-2-34(1), (2), (3), (4) and (9) and replace with: "Actions for false imprisonment, assault, and battery."

OR

Delete §§ 6-2-34(1), (2), and (3).

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153. *See* Tad Armstrong, *Punitive Damages and Breach of Contract: Mr. Corbin, Say It Isn't So*, 85 ILL. B.J. 74 (1997).

154. For further discussion on the overlapping boundaries of contracts and torts, see Michelle Kirstin Hart, *Tort or Contract?: New Jersey's Simultaneous Expansion and Dilution of Contract Theory*, 26 RUTGERS L.J. 495 (Winter 1995) and Matthew J. Barrett, Note, *"Contort": Tortious Breach of the Implied Covenant of Good Faith and Fair Dealing in Noninsurance, Commercial Contracts—Its Existence and Desirability*, 60 NOTRE DAME L. REV. 510 (1985).

155. *See* MISS. CODE ANN. § 15-1-49(1) (1998) ("All actions for which no other period of limitation is prescribed shall be commenced within three (3) years next after the cause of such action accrued, and not after.").

4. Delineate Unenumerated Claims According to Intent.—The legislature may best promote the public's expectations by replacing "trespass to the person/property" with "actions involving a wanton intent." Thus, more culpable conduct would invoke a longer statute of limitations. Judges would no longer be forced to regularly determine proximate cause issues or to sift through facts carefully shaped to form a misfeasance. Also, the intent standard comports to modern notions of tort law; culpability should increase the limitations period as it increases damage recovery. Most importantly, the more predictable limitations period would promote certainty in the judicial system.

One could argue, however, that this solution places the statute of limitations issue in the hands of the jury, as intent is a factual issue. However, judges regularly dismiss claims for wantonness made by plaintiffs trying to receive punitive damages.[156] One could also argue that a jury could be influenced unfairly if they knew that the lack of such intent would bar the plaintiff's recovery. This problem already exists in the determination of punitive damages. Whether this is a valid concern depends on one's faith in the jury system.

SUGGESTED REVISION TO SECTION 6-2-34:

Replace §§ 6-2-34(1), (2), (3), (4), and (9) with:
"All actions involving wanton intent."

Solutions #1 and #3 would be easiest to implement and best accomplish the goals of a statute of limitations. Solution #2's use of the contract-tort distinction may prove difficult as the boundaries between tort and contracts overlap. Solution #4 is less desirable because of the unclear distinctions between negligence and wantonness; determining the intent of the tortfeasor may require costly discovery. Although Solution #4 may best conform to the public's expectations, the concerns for judicial certainty and economy override the need to conform to the public's expectations. For this reason, the legislature should adopt solution #1 or #3.

156. *See, e.g.*, Larkin v. Brown, 41 F.3d 387, 389 (8th Cir. 1994).

B. Judicial Solutions

Should the legislature fail to act, the judiciary could redefine "trespass" to accomplish the goals of judicial efficiency and certainty.

1. Restore the 1940s Version of Trespass.—Some defendants have argued the intent element be re-added to the elements of trespass.[157] This solution would better comport with modern tort notions of culpability. However, the solution fails to solve the inconsistency and inefficiency dilemmas. Judges would still be deciding causal issues; the case-by-case analysis would produce inconsistent results; and many claims would require discovery before being dismissed.

2. Eliminate All Elements Other Than Intent.—In *Strozier v. Marchich*,[158] Justice Jones' dissenting opinion suggested that the trespass/case distinction be reduced to a question of intent.[159] As previously established, the elements of force, direct causation, and possession are either unnecessary or inefficient. If the judiciary reinterpreted "trespass" as involving solely actions with a wanton intent in section 6-2-34, many of the inherent problems in section 6-2-34 analysis would be alleviated. This solution is the judicial equivalent of legislative solution #4.

VII. CONCLUSION

Plaintiffs with claims older than two years should not overlook the provisions of section 6-2-34. Case law has established that some unenumerated torts *can* fit under the six-year statute.[160] Distinguishing between the six-year and two-year statute of limitations requires an analysis of the common law writs of trespass and case. In general, facts involving direct causation and a misfeasance should invoke the six-year statute of limitations. Appendix I contains a chart to guide litigants through the statutes.

Vague standards and changes in the way courts analyze

157. *See, e.g.*, Lovell v. Acrea, 500 So. 2d 1082, 1083 (Ala. 1986).
158. 380 So. 2d 804 (Ala. 1980).
159. *Strozier*, 380 So. 2d at 809 (Jones, J., dissenting).
160. *See, e.g.*, W.T. Ratliff Co. v. Henley, 405 So. 2d 141 (Ala. 1981).

trespass offer loopholes for litigants to invoke different limitation periods. Appendix II offers suggestions as to how civil litigants may increase their chances of invoking a more favorable limitations period. The analytical framework which courts apply to section 6-2-34 yields several problems. First, the distinctions between trespass and case bear little or no relation to the public's expectations. Second, the loopholes mentioned above undermine judicial certainty. Third, the existence of trespass as a tort leads to confusion over limitations analysis. Fourth, the current trespass form of action fails to reflect modern trends in tort law. Fifth, the direct causation element forces judges to make jury decisions regarding proximate cause. Finally, the in-depth analysis is inefficient and incompatible with modern notice pleading. For these reasons, the legislature or judiciary should reform section 6-2-34 to better satisfy the goals of a statute of limitations.

Linda Suzanne Webb

APPENDIX I: QUICK GUIDE TO APPLICATION OF THE SIX AND THE TWO-YEAR STATUTES OF LIMITATIONS

	TRESPASS (6 YEARS)*	CASE (2 YEARS)
CAUSATION	Direct	Indirect
FORCE	• Personal Injury Misfeasance (rather than nonfeasance) required. • Property Injury Force is implied.	Not Required
INTENT	• Act must be volitional. No other intent is required.**	Not Required
VICARIOUS LIABILITY	• Not allowed. Employer must ratify, direct, aid, or participate in the alleged conduct.	Allowed

* Because standing has, for the most part, superseded the possession requirement for trespass actions, "possession" has been omitted from this chart. See section IV-*E* for an explanation of the overlap between the two concepts.

** Alabama case law is still unclear on this issue. A good argument can be made that an intent to achieve the result (i.e., recklessness or wantonness) is required in order for a claim to fit under the six-year statute of limitations.

APPENDIX II: STRATEGY FOR LAWYERS NEEDING A LONGER OR SHORTER STATUTE OF LIMITATIONS

Tips for Plaintiffs Needing the Six-Year Statute:

- Label your complaint "Complaint for Trespass."
- Shape the facts to imply a misfeasance rather than a nonfeasance. Example: D was negligent/wanton in his upkeep of equipment, resulting in P's injury; *not* D failed to repair the equipment, resulting in P's injury.
- Be sure to allege that a defendant employer ratified/directed/aided/participated in the alleged conduct of his employees.
- Undercut opposing authority by noting that analysis should be based on the individual facts. If the same legal claim invoked the two-year statute of limitations in a prior case, distinguish the facts of that case.
- If you find cases that apply the six-year statute of limitations to the legal theory at issue, argue that judicial certainty demands similar treatment for all such claims. (Ask the court to abandon its case-by-case analysis.)

Tips for Defendants Needing the Two-Year Statute:

- Cite to current Alabama case law approving of 1920s Alabama case law (this may eliminate claims for negligence).
- Shape the facts to imply a nonfeasance rather than a misfeasance.
- Remind the court to look beyond the label "Complaint for Trespass" to the facts alleged.
- Make public policy arguments as to why plaintiffs should get the benefit of a six-year statute of limitations only for very culpable conduct (wanton) and establish that the alleged facts do not support a claim involving wanton intent.
- Undercut opposing authority by noting that analysis should be based on the individual facts. If the same legal claim invoked the six-year statute of limitations in a prior case, distinguish the facts of that case.

- If you find cases that apply the two-year statute of limitations to the legal theory at issue, argue that judicial certainty demands similar treatment for all such claims. (Ask the court to abandon its case-by-case analysis.)