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DUTY OF LANDOWNER OR OCCUPIER TO FIREMEN DISCHARGING THEIR DUTIES

The law places those who come upon the premises of another in three classes: invitees, licensees and trespassers. Upon such classification depends the degree of care that must be exercised toward each by the landowner or occupier.¹

In the majority of jurisdictions, the rule is that in the absence of a statute or municipal ordinance, a member of a public fire department who, in an emergency, enters a building in the exercise of his duties is a mere licensee under a permission to enter given by law.² However, there is authority to the effect that a fireman, under certain circumstances, may be considered an invitee.³

As a general rule, a person is a "licensee," as that term is used in the law of negligence, where his entry or use of the premises is permitted, expressly or impliedly, by the owner or person in control thereof.⁴ The licensee takes the premises as he finds them and the possessor is under no obligation to make the premises safe for his reception. However, the possessor must warn him of any latent defects or of any dangerous change in the condition of the premises of which he actually knows.⁵

The "invitee" may be defined as a person who goes on the premises of another in answer to the express or implied invitation of the owner or occupant or for their mutual advantage.⁶ The invitee is placed upon a higher footing than is the licensee in that the owner or occupant owes the invitee the duty of exercising reasonable care to keep the property in a safe condition.⁷

A. RECOVERY DENIED

Firemen have been denied recovery on various bases, perhaps the most prevalent of which is that they qualify only as licensees and that the facts

¹ E.g., *Haley v. Deer*, 135 Neb. 459, 282 N.W. 389 (1938).

² *Pennebaker v. San Joaquin Light & Power Co.*, 158 Cal. 579, 112 Pac. 459 (1910); *Lunt v. Post Printing & Publishing Co.*, 48 Colo. 316, 110 Pac. 203 (1910); *Gibson v. Leonard*, 143 Ill. 182, 32 N.E. 182 (1892).

³ *Zuercher v. Northern Jobbing Co.*, 243 Minn. 166, 66 N.W. 2d 892 (1954); *Clinkscals v. Mundkowski*, 183 Okla. 12, 79 P. 2d 562 (1938); *Meiers v. Fred Koch Brewery*, 229 N.Y. 10, 127 N.E. 491 (1920).

⁴ E.g., *Christensen v. Weyerhaeuser Timber Co.*, 16 Wash. 2d 424, 133 P. 2d 797 (1943).

⁵ Prosser, *Torts* § 77 (2d ed., 1955).

⁶ E.g., *Wilson v. Goodrich*, 218 Iowa 462, 252 N.W. 142 (1934).

⁷ E.g., *Olderman v. Bridgeport-City Trust Co.*, 125 Conn. 177, 4 A. 2d 646 (1939).

of the case fail to support the contention that the defendant has been guilty of the breach of any common-law duty owed a licensee.⁸

In *Anderson v. Cinnamon*,⁹ for example, plaintiff was injured when the porch of an apartment building owned by the defendants collapsed while he and other firemen fighting a fire in the building were on the porch. One of the defendants was on the premises during the fire but did not know the firemen were going on the porch before they did so. In denying recovery to the plaintiff, the Supreme Court of Missouri said:

. . . The duty of a possessor of land to firemen is the same as to licensees, who enter with his permission. Firemen enter under a license given by law, primarily for the benefit of the public generally, although the possessor may also be benefited by their work. . . . [T]he licensee takes the premises as he finds them, except for wantonness or some form of intentional wrong as active negligence of the possessor.¹⁰

The Nebraska Supreme Court referred to a fireman or individual fighting a fire on the premises of an owner or occupant as a "bare licensee" to whom the owner or occupant owes no greater duty than to refrain from injuring him by wilful or wanton negligence or a designed injury or by a hidden danger or peril known to the owner or occupant but unknown to or unobservable by the fireman in the exercise of ordinary care.¹¹ The decedent in this case was a professional, paid fireman who volunteered to serve with a group of volunteer firemen.

In an earlier Nebraska case, on identical facts and arising out of the same fire,¹² the plaintiff was a member of the volunteer group that the decedent in the later case had volunteered to help. In other words, the later decision involved a fireman who volunteered, while the earlier involved a volunteer fireman. In any event, the defendant was making a trailer tank delivery of gasoline and fuel oil to bulk receiving tanks of an oil association at the latter's plant when a fire broke out on the truck. The unit was driven down the road where it continued to burn. The volunteer fire de-

⁸ *Anderson v. Cinnamon*, 282 S.W. 2d 445 (Mo., 1955); *Wax v. Co-operative Refinery Ass'n*, 154 Neb. 805, 49 N.W. 2d 707 (1951); *Mulcrone v. Wagner*, 212 Minn. 478, 4 N.W. 2d 97 (1942); *Aldworth v. F. W. Woolworth Co.*, 295 Mass. 344, 3 N.E. 2d 1008 (1936); *Steinwedel v. Hilbert*, 149 Md. 121, 131 Atl. 44 (1925); *Clark v. Boston & M.R.R.*, 78 N.H. 428, 101 Atl. 795 (1917); *Pennebaker v. San Joaquin Light & Power Co.*, 158 Cal. 579, 112 Pac. 459 (1910); *Lunt v. Post Printing & Publishing Co.*, 48 Colo. 316, 110 Pac. 203 (1910); *New Omaha Thomson-Houston Electric Light Co. v. Anderson*, 73 Neb. 84, 102 N.W. 89 (1905); *Woodruff v. Bowen*, 136 Ind. 431, 34 N.E. 1113 (1893); *Gibson v. Leonard*, 143 Ill. 182, 32 N.E. 182 (1892); *Todd v. Armour & Co.*, 44 Ga. App. 609, 162 S.E. 394 (1932); *Volluz v. East St. Louis Light & Power Co.*, 210 Ill. App. 565 (1918).

⁹ 282 S.W. 2d 445 (Mo., 1955).

¹⁰ *Ibid.*, at 447.

¹¹ *Wax v. Co-operative Refinery Ass'n*, 154 Neb. 805, 49 N.W. 2d 707 (1951).

¹² *Fentress v. Co-operative Refinery Ass'n*, 149 Neb. 355, 31 N.W. 2d 225 (1948).

partment of which the plaintiff was a member was summoned to fight the fire. The plaintiff, an experienced fire fighter with knowledge of oil fires and explosions, was injured when the trailer tank exploded. Although the court made no attempt to assign to the plaintiff a formal status as licensee or other, it denied recovery on the ground that “. . . in the absence of any statute or ordinance prescribing a duty on the part of the owner of premises to members of a public fire department, the owner is not liable for injuries to such fireman except those proximately resulting from willful or wanton negligence or a designed injury,”¹³ citing with approval the case of *New Omaha Thomson-Houston Electric Light Co. v. Anderson*.¹⁴

In the Minnesota decision of *Mulcrone v. Wagner*, a member of the St. Paul bureau of fire prevention was injured when he stumbled on a faulty stair tread and fell down a stairway in the defendant's building while making a fire inspection of the premises.¹⁵ Firemen were held to be licensees. Following the rule laid down forty-two years earlier in *Hamilton v. Minneapolis Desk Mfg. Co.*,¹⁶ the court said that the owner or occupant of a building owes no duty to keep it in a reasonably safe condition for members of a public fire department who might, in the exercise of their duties, have occasion to enter the building. It is interesting to note that both the *Hamilton* and *Mulcrone* courts considered the rule harsh but that they agreed it was up to the legislature and not the judiciary to change it.

A Worcester fireman, who was injured when he fell from a defective fire escape on the defendant's building, which fire escape he was using as a vantage point from which to fight a fire in a nearby building, was denied recovery on the ground that the entry of a fireman upon a premises is by virtue of a permission implied by law and constitutes him a licensee. Consequently, the plaintiff could not recover on the ground of ordinary negligence but was required to show wilful, wanton or reckless conduct in the absence of a violation of a statute.¹⁷

In *Clark v. Boston & M.R.R.*,¹⁸ a fireman injured while fighting a fire set by the defendant's locomotive was denied recovery. The court construed the plaintiff's connection with the fire to have arisen solely from his own act in coming into contact with it after it was set, and termed him an “intervenor” to whom one who created the situation owed no “anticipatory duty.” The court likened the situation to that of a “land owner and licensee.”

¹³ *Ibid.*, at 227.

¹⁴ 73 Neb. 84, 102 N.W. 89 (1905).

¹⁵ 212 Minn. 478, 4 N.W. 2d 97 (1942).

¹⁶ 78 Minn. 3, 80 N.W. 693 (1899).

¹⁷ *Aldworth v. F. W. Woolworth Co.*, 295 Mass. 344, 3 N.E. 2d 1008 (1936).

¹⁸ 78 N.H. 428, 101 Atl. 795 (1917).

Another case where a fireman was termed a licensee and recovery denied was that of *Pennebaker v. San Joaquin Light & Power Co.*¹⁹ The intestate was killed while fighting a fire, by contact with wires of the defendant lighting company in the back yard of the burning premises. It did not appear that the defendants had any exact knowledge of the location of the fire,²⁰ and the current which killed the decedent was one which would not ordinarily endanger life. The defendant was held not negligent so as to make it liable for the decedent's death because it had no actual knowledge that the fire had felled dangerous wires. The court, in defining the defendant's duty, said that "[i]n the absence of ordinance or statute changing the common-law rule in this regard, a fireman entering a building under imperative public necessity is but a licensee, who assumes the risks as he finds them, and to whom the owner of the premises owes no special duty to maintain these premises in a safe condition."²¹

Even the fact that the defendant himself turned in the alarm has been held not to constitute the fireman who responds an invitee.²² In a well-reasoned decision, the Colorado Supreme Court held that the right of a fireman to enter the premises is created by law and exists *before* the alarm is sounded, and that, "[w]hen the right to enter is dependent upon an invitation, express or implied, that creates the right to enter, and without the invitation the right does not exist. Hence as an alarm does not create the right to enter, and the right exists independent of the alarm, it cannot be an invitation."²³ The court concluded that firemen are only licensees and that there is ordinarily no duty to a licensee except to refrain from wilful or wanton injury to him and to use reasonable care to prevent injury to him after discovering his danger.

The owner of a building on which twelve firemen were standing while engaged in extinguishing a fire therein when the roof gave way and carried all of them to their deaths in the basement below was also absolved of liability on the licensee theory, the court saying that "[t]he owner

¹⁹ 158 Cal. 579, 112 Pac. 459 (1910).

²⁰ They knew within a wide area where it was located but the court felt that to require the defendant to turn off the lights and power in such a wide area during a night fire such as this might cause damage from panic greater than the fire damage it was sought to prevent.

²¹ *Pennebaker v. San Joaquin Light & Power Co.*, 158 Cal. 579, 112 Pac. 459, 463 (1910). Accord: *New Omaha Thomson-Houston Electric Light Co. v. Anderson*, 73 Neb. 84, 102 N.W. 89 (1905).

²² *Lunt v. Post Printing & Publishing Co.*, 48 Colo. 316, 110 Pac. 203 (1910). The defendant, on seeing nitric acid fumes resembling smoke emitted from the etching room of its establishment, turned in a fire alarm and plaintiff's husband, a fireman, went into the room and there breathed the fumes of the acid causing his ultimate death from traumatic pneumonia.

²³ *Ibid.*, at 206.

of a building in a populous city does not owe it as a duty, at common law, independent of any statute or ordinance, to keep such building safe for firemen, or other officers who in a contingency may enter the same under a license conferred by law."²⁴

Members of fire insurance patrols and fire insurance salvage corps units have been held to share the licensee status of firemen. In Illinois, for instance, a member of the Chicago fire insurance patrol was injured through the faulty operation of an elevator on the defendant's premises while he was in the building to spread tarpaulins on the defendant's goods and thereby prevent water damage to them. The plaintiff was deemed a "mere licensee" and denied recovery.²⁵ A member of the Fire Insurance Salvage Corps of Baltimore who, while on the premises where a fire had originated to save property endangered by fire, fell into an open and unguarded elevator shaft and was injured, was accorded the same treatment.²⁶

Other courts, though often reluctant to clearly define the status of firemen have denied recovery on various other grounds.²⁷

In the recent case of *Gannon v. Royal Properties*,²⁸ for example, a gasoline explosion in a burning garage was held not to be an "unusual hazard" the knowledge of the existence of which would impose upon the owner the duty to give warning of the peril to firemen entering the building to extinguish the fire. Gasoline, said the court, is known by everybody to be stored about a garage.

"Considerations of public policy" prevented the predication of any liability of a property owner to a fireman upon negligence causing a fire in *Suttie v. Sun Oil Co.*²⁹ The property owner whose own negligence caused the fire, it was reasoned, may otherwise be tempted to defer calling the fire department and help himself until perhaps greater danger to the public would be threatened. Public policy, said the court, requires firemen to look to their employer for proper compensation for injuries.

²⁴ *Woodruff v. Bowen*, 136 Ind. 431, 34 N.E. 1113, 1117 (1893).

²⁵ *Gibson v. Leonard*, 143 Ill. 182, 32 N.E. 182 (1892).

²⁶ *Steinwedel v. Hilbert*, 149 Md. 121, 131 Atl. 44 (1925).

²⁷ *Gannon v. Royal Properties*, 285 App. Div. 131, 136 N.Y.S. 2d 129 (1954); *Fentress v. Co-operative Refinery Ass'n*, 149 Neb. 355, 31 N.W. 2d 225 (1948); *Buckeye Cotton Oil Co. v. Campagna*, 146 Tenn. 389, 242 S.W. 646 (1922); *Glander v. Milwaukee Electric R. & Light Co.*, 155 Wis. 381, 144 N.W. 972 (1914); *Litch v. White*, 160 Cal. 497, 117 Pac. 515 (1911); *Kelly v. Henry Muhs Co.*, 71 N.J.L. 358, 59 Atl. 23 (S. Ct., 1904); *Eckes v. Stetler*, 98 App. Div. 76, 90 N.Y. Supp. 473 (1904); *Baker v. Otis Elevator Co.*, 78 App. Div. 513, 79 N.Y. Supp. 663 (1903); *Hamilton v. Minneapolis Desk Mfg. Co.*, 78 Minn. 3, 80 N.W. 693 (1899); *Woods v. Miller*, 30 App. Div. 232, 52 N.Y. Supp. 217 (1898); *Behler v. Daniels*, 19 R.I. 49, 31 Atl. 582 (1895); *Suttie v. Sun Oil Co.*, 15 Pa. D. & C. 3 (1931).

²⁸ 285 App. Div. 131, 136 N.Y.S. 2d 129 (1954).

²⁹ 15 Pa. D. & C. 3 (1931). Actually, the doctrine of assumption of risk as well as considerations of public policy defeated the plaintiff's claim here.

A city fireman under no duty to look after fires outside city limits, has been termed an invitee as to a property owner outside the city limits who requests his aid in fighting a fire.³⁰ The property owner was held bound to use reasonable care to invitees and warn of latent dangers of which he had knowledge. However, since the defect involved here was deemed patent and because of the presence of conjecture as to the exact cause of the accident, liability was not imposed on the defendant.

The presence of contributory negligence will, of course, preclude recovery,³¹ nor will the defendant be held liable when the plaintiff is injured where there could be no reasonable expectation of his presence,³² or where it does not appear that he entered by any way which was reasonable to anticipate he would take.³³

Where the plaintiff is deemed not one of the class of persons for whose benefit a statute was passed, he cannot predicate liability for his injury on violation of that statute;³⁴ nor can one not vested with a remedy by virtue of a statute bring an action thereon in his own name.³⁵

B. RECOVERY ALLOWED

One of the leading cases in the minority group that allows recovery for firemen is the New York case of *Meiers v. Fred Koch Brewery*,³⁶ an action for personal injuries by the chief of the Dunkirk, New York, fire department. Over its property from the street in front, beside its building, giving access to a stable in the rear, the defendant had built a paved driveway. Back, 150 feet, across half of this pavement, ran an unguarded coal hole. The driveway was used by the defendant and by those who had business with it. One evening the barn caught fire. The plaintiff walked up the unlighted driveway to get to the barn, fell into the hole, and was injured. The court did not clearly define the status of firemen in that it specifically denied that the plaintiff was a trespasser or a licensee yet seemed reluctant

³⁰ *Buckeye Cotton Oil Co. v. Campagna*, 146 Tenn. 389, 242 S.W. 646 (1922).

³¹ *Glander v. Milwaukee Electric R. & Light Co.*, 155 Wis. 381, 144 N.W. 972 (1914).

³² *Litch v. White*, 169 Cal. 497, 117 Pac. 515 (1911). There was no duty on the building owner to maintain his awnings strong enough for firemen to walk on. Accord: *Woods v. Miller*, 30 App. Div. 232, 52 N.Y. Supp. 217 (1898). The plaintiff, while groping his way in dense smoke, on the roof of a burning building, stepped over a low parapet or coping and fell into an opening on the premises of the adjoining owner, the defendant. *Prosser, Business Visitors & Invitees*, 26 Minn. L. Rev. 573, 610 (1942).

³³ *Baker v. Otis Elevator Co.*, 78 App. Div. 513, 79 N.Y. Supp. 663 (1903).

³⁴ *Kelly v. Henry Muhs Co.*, 71 N.J.L. 358, 59 Atl. 23 (S. Ct., 1904). Elevator shafts are required to be guarded for the benefit of employees, not firemen; *Behler v. Daniels*, 19 R.I. 49, 31 Atl. 582 (1895); *Gibson v. Leonard*, 143 Ill. 182, 32 N.E. 182 (1892).

³⁵ *Eckes v. Stetler*, 98 App. Div. 76, 90 N.Y. Supp. 473 (1904). The remedy was held to be vested in the board of fire commissioners or in the fire commissioner, but not in an individual fireman.

³⁶ 229 N.Y. 10, 127 N.E. 491 (1920).

to place its holding on the factor of implied invitation. However, it was held that the duty of "reasonable care under all the circumstances" existed and was owing to the plaintiff. The decision was expressly limited to ". . . the case of one not a licensee, entering business property as of right over a way prepared as a means of access for those entitled to enter, who is injured by the negligence of the owner in failing to keep that way in a reasonably safe condition for those using it as it was intended to be used."³⁷

Other cases that have allowed recovery to firemen have proceeded upon the theory that firemen are invitees and that the defendant has breached the common-law duty owed an invitee.³⁸

In *Zuercher v. Northern Jobbing Co.*³⁹ the plaintiff, a volunteer fireman, was invited upon the defendant's premises to deliver and put into operation a sump pump which the defendant had purchased from the fire department with the understanding that the department would deliver and install the pump in working order. Carbon monoxide gas inhaled by the plaintiff while he was helping to install the pump caused a heart ailment known as a myocardial infarction. The court held that the plaintiff was on the premises as an invitee, but more specifically as a "business visitor."⁴⁰

In *Clinkscales v. Mundkowski*⁴¹ the deceased, though not a member of the city fire department, was serving with it when killed while fighting a fire on the defendant's farm outside the city. The court held that the deceased was an invitee of the defendant and allowed recovery because the defendant had violated his duty of ordinary care.

*Taylor v. Palmetto Theater Co.*⁴² involved a situation wherein the plaintiff, while in the performance of his duties as a fireman and fighting a fire in buildings adjacent to the defendant's, fell into a pit maintained by the defendant in a passageway. In his complaint, the plaintiff alleged an invitation extended to the general public to use the passageway and that he entered thereon as a member of the general public, although in the discharge of his duties as a fireman, and was, therefore, an invitee or licensee. The court sustained the complaint and said that simply because the plaintiff was a fireman and in the discharge of his duties as such should not

³⁷ *Ibid.*, at 493.

³⁸ *Zuercher v. Northern Jobbing Co.*, 243 Minn. 166, 66 N.W. 2d 892 (1954); *Clinkscales v. Mundkowski*, 183 Okla. 12, 79 P. 2d 562 (1938).

³⁹ 243 Minn. 166, 66 N.W. 2d 892 (1954).

⁴⁰ The term is defined in 65 C.J.S. § 43(1) as "a person who is invited or permitted to enter or remain on land in the possession of another for a purpose directly or indirectly connected with business dealings between them."

⁴¹ 183 Okla. 12, 79 P. 2d 562 (1938).

⁴² 204 S.C. 1, 28 S.E. 2d 538 (1943).

limit his cause of action to the right or permission to enter the premises extended by law. The inference was that if, on trial, the plaintiff could *prove* that the general public used the passageway with the defendant's knowledge and consent, he can recover as an invitee or licensee.⁴³

At least one court felt that firemen should enjoy a status all their own. The Minnesota Supreme Court in *Shypulski v. Waldorf Paper Products Co.*⁴⁴ said that firemen, entering upon the premises of another in response to a call of duty are not trespassers, licensees or invitees. They have a status *sui generis* since they enter under license of law to perform a duty owed to the public and the landowner's consent to entry is immaterial.⁴⁵

Some courts, even though they went along with the majority holding that firemen are licensees, have allowed them recovery because the defendant was guilty of a breach of the common-law duty owed licensees.⁴⁶

In referring to firemen as "gratuitous licensees," the court in *James v. Cities Service Oil Co.*⁴⁷ held that if a fireman is exposed to a "hidden danger" of which the owner knows, it is the owner's duty to notify the fireman unless the fireman has knowledge of the danger or has had reasonable opportunity to discover the same. This case involved the explosion of a gasoline storage tank that occurred after the defendant's employees had fled, without warning the firemen who arrived on the scene of certain dangerous conditions that they knew existed therein.

In a separate decision, the city whose firemen responded to that fire was allowed reimbursement for wages, and medical and hospital expenses paid the injured firemen on the ground that the same duty was owed by the defendant to the city as licensees as was owed to the firemen as licensees and that the doctrine of "hidden dangers" applied equally to both.⁴⁸

The possession of quantities of flammable liquids in excess of those allowed by city ordinance has been held to constitute wilful and wanton conduct that amounts to a violation of the duty owed a fireman, though only a licensee by operation of law, killed by a flashback of the burning liquid.⁴⁹

Similarly, where a railroad company delivering a freight car containing fireworks, and with knowledge of its contents and its liability to explode

⁴³ The factual situation and treatment of this case bear a strong resemblance to those involved in the Meiers case, *supra* note 36.

⁴⁴ 232 Minn. 394, 45 N.W. 2d 549 (1951).

⁴⁵ *Ibid.*

⁴⁶ *James v. Cities Service Oil Co.*, 66 Ohio App. 87, 31 N.E. 2d 872 (1939); *Bandosz v. Daigger & Co.*, 255 Ill. App. 494 (1930); *Houston Belt & Terminal Ry. Co. v. O'Leary*, 136 S.W. 601 (Tex. Civ. App., 1911).

⁴⁷ 66 Ohio App. 87, 31 N.E. 2d 872 (1939).

⁴⁸ *City of Youngstown v. Cities Service Oil Co.*, 66 Ohio App. 97, 31 N.E. 2d 876 (1940).

⁴⁹ *Bandosz v. Daigger & Co.*, 255 Ill. App. 494 (1930).

from concussion, placed the car at a place in its yards where it would be subjected to impact from other cars and a fire broke out in the car, the railroad was held liable for the death of a fireman who responded and was killed in an ensuing explosion of the car.⁵⁰ Though the fireman was termed a licensee, “. . . where a person is rightfully upon the premises of another, even as licensee, he has the right to require of the proprietor that he so conduct himself as not to injure him through his active negligence.”⁵¹ Another case in the same jurisdiction thirty years later was said to involve similar facts and to be controlled by the same rule of law, except that the plaintiff was held *not* to be a licensee as to the defendant. However, here too, recovery was allowed.⁵²

A New Jersey decision that classified the decedent fireman a licensee nonetheless refused to absolve the defendant of liability because the latter was not a landowner.⁵³ The court felt that the exemption of the landowner from liability as to trespassers and licensees is necessary to secure him the beneficial use of his land, but that no reason exists for extending the exemption to the case where the rights of the defendant have not been interfered with. The plaintiff was electrocuted when he went up into the tower of the city hall to extinguish a fire that had broken out there and came into contact with a metal pipe which, unknown to him, was charged with a deadly current of electricity that had escaped from wires installed and maintained by the defendant electric company for the purpose of furnishing light from its street lighting system to lamps in the tower. The decedent was not upon property either owned or controlled by the defendant at the time of the occurrence.

Another fireman electrocuted by coming into contact with wires of the defendant utility company, here in a public alley, was held entitled to a “high degree of care” by those operating electric light and power lines.⁵⁴

Liability for death or injury of firemen has, on occasion, been successfully predicated upon violation of a statutory duty.⁵⁵

In *Maloney v. Hearst Hotels Corp.*,⁵⁶ the defendant, in violation of a

⁵⁰ *Houston Belt & Terminal Ry. Co. v. O'Leary*, 136 S.W. 601 (Tex. Civ. App., 1911).

⁵¹ *Ibid.*, at 602.

⁵² *Texas Cities Gas Co. v. Dickens*, 156 S.W. 2d 1010 (Tex. Civ. App., 1949). The defendant gas company failed to cut off the gas supply to a burning building in time to avert an injury to the plaintiff, a fireman directing a hose stream therein from the curb line.

⁵³ *Barnett v. Atlantic City Electric Co.*, 87 N.J.L. 29, 93 Atl. 108 (S. Ct., 1915). Accord: *City of Shreveport v. Southwestern Gas & Electric Co.*, 145 La. 680, 82 So. 785 (1919).

⁵⁴ *Gannon v. Laclede Gaslight Co.*, 145 Mo. 520, 47 S.W. 907 (1898).

⁵⁵ *Maloney v. Hearst Hotels Corp.*, 274 N.Y. 106, 8 N.E. 2d 296 (1937); *Drake v. Fenton*, 237 Pa. 8, 85 Atl. 14 (1912).

⁵⁶ 274 N.Y. 106, 8 N.E. 2d 296 (1937).

New York city ordinance, maintained a paint shop in the subcellar of its hotel wherein were stored large quantities of paints and other explosive liquids. A fire broke out in the subcellar and the city fire department was called. Plaintiff's intestate, a fireman, was killed by an explosion in the paint room. The court, in allowing recovery for his wrongful death based on violation of the ordinance, held that the ordinance had been enacted for the benefit of firemen as well as for hotel guests.

A Pennsylvania statute requiring that elevator shafts be kept closed and guarded was involved in the case of *Drake v. Fenton*⁵⁷ where the plaintiff, a Philadelphia fireman, was injured when he fell through an open and unguarded elevator shaft in a warehouse owned and occupied by the defendant. In holding that there was no liability on the defendant at common law because the plaintiff was a licensee, the court defined the statute violated by the defendant as one intended to afford protection to city officers such as firemen, who at any time may be required to come on the premises.

Where a dangerous condition exists in a building to the knowledge of the owner or his agent, presenting an "unusual peril" to persons entering thereon, it is the duty of the owner, if he had the opportunity, to give warning of the peril to firemen about to enter the building in response to an alarm of fire therein.⁵⁸

Similarly, the doctrine of assumption of risk has been held inapplicable to "hidden, unknown and ultrahazardous dangers" encountered by firemen on the premises in response to an alarm, although it is contemplated that firemen encounter those risks ordinarily incidental to extinguishing fires.⁵⁹

The storage of a large quantity of explosive powder within city limits has been held to represent a "public nuisance" and render the possessor liable for the death of a city fireman killed by an explosion of the powder while fighting a fire on the premises.⁶⁰

CONCLUSION

An analysis of the foregoing decisions leads one to conclude that the courts, in cases of this type, are striving for a legal and equitable balance between the rights of the landowner or occupier of land and the rights of one lawfully upon his premises.

⁵⁷ 237 Pa. 8, 85 Atl. 14 (1912).

⁵⁸ *Jenkins v. 313-321 W. 37th St. Corp.*, 284 N.Y. 397, 31 N.E. 2d 503 (1940), rehearing denied 285 N.Y. 614, 33 N.E. 2d 547 (1941). Gasoline that had seeped into a sump pit ignited. Accord: *Schwab v. Rubel Corp.*, 286 N.Y. 525, 37 N.E. 2d 234 (1941). An unenclosed shaft in dense smoke was termed an "unusual hazard."

⁵⁹ *Campbell v. Pure Oil Co.*, 15 N.J. Misc. 723, 194 Atl. 873 (1937). Accord: *Smith v. Twin State Gas & Electric Co.*, 83 N.H. 439, 144 Atl. 57 (1928).

⁶⁰ *Cameron v. Kenyon-Connell Commercial Co.*, 22 Mont. 312, 56 Pac. 358 (1899).

Although the owner is sovereign over his land, he has the duty to consider the safety of all those who, having the right or privilege to enter his premises, may be expected to enter it. The "commonly accepted formula in America" that divides those to whom this obligation is owed into "licensees" and "invitees" depends upon whether their right to enter is by virtue of permission or of invitation.⁶¹ If such is the case, it seems illogical to hold, as most courts have, that a fireman *cannot* be an *invitee* because there has been no *invitation*, but that he *can* be a *licensee* even though there has been no *permission*.⁶²

If we accept *benefit to the landowner* as the determining factor of the invitee, it is equally difficult to see on what basis it can be held that a fireman is a mere licensee.⁶³ It is absurd to say that a fireman who comes to extinguish a blaze in the defendant's building confers no benefit on the defendant.⁶⁴

Perhaps the real reason why firemen seem to be set apart as a class to whom no duty is owed to inspect and prepare the premises is that they enter at unforeseeable moments, upon unusual parts of the premises, and under circumstances of emergency, where care in preparation cannot reasonably be looked for. As Professor Bohlen has stated:

It would be an obviously unreasonable burden to impose on landowners to require them to keep the whole of their premises in such condition as to make every part of it safe for those whose unusual and exceptional right of entry may never accrue. . . . [T]he balance of social benefits can[not] require such a serious restriction on the owner's use of his land, or justify the imposition of such a burden on his exchequer, to prevent so vague a risk of so improbable an injury.⁶⁵

⁶¹ Bohlen, *The Duty of a Landowner Towards Those Entering His Premises of Their Own Right*, 69 U. Pa. L. Rev. 142, 237, 340 (1921).

⁶² *Are Firemen & Policemen Licensees or Invitees?*, 35 Mich. L. Rev. 1157 (1937).

⁶³ *Ibid.*, at 1160.

⁶⁴ Prosser, *Torts* § 78 at 461 (2d ed., 1955); Prosser, *Business Visitors & Invitees*, 26 Minn. L. Rev. 573, 608-611 (1942).

⁶⁵ Bohlen, *op. cit.* supra note 61, at 350-51.

EXCLUSIVE SALES RIGHTS GIVEN TO REAL ESTATE BROKERS

When a real estate broker is employed to sell property, one of two types of agreement is entered into; the first being a general listing whereby the broker is given the bare right to sell the owner's property with the broker receiving a commission for producing a purchaser. The second is a so-called "exclusive" agreement of one kind or another whereby the broker is given the exclusive agency to sell, or exclusive right to sell, for a stipulated period of time—the broker's commission being due when or if a purchaser is found.