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LANDOWNERS’ LIABILITY TO INJURED FIREFIGHTERS IN ILLINOIS—WASHINGTON V. ATLANTIC RICHFIELD CO.

When a firefighter is properly performing his job and is injured due to the property owner’s negligence, a question concerning the landowner’s liability arises. Seventeen years ago the Illinois Supreme Court affirmed a jury’s finding of liability on the part of the landowner in Dini v. Naiditch.¹ The court held that “an action should lie against a landowner for failure to exercise reasonable care in the maintenance of his property resulting in the injury or death of a fireman rightfully on the premises, fighting the fire at a place where he might reasonably be expected to be.”² The decision is recognized for its elevation of the firefighter's status from licensee³ to invitee⁴ in Illinois. Yet of equal importance is the court’s finding that the duty of care to maintain the premises includes compliance with certain fire safety ordinances.⁵

1. 20 Ill.2d 406, 170 N.E.2d 881 (1960). Plaintiffs were city firemen who were injured while fighting a fire at defendants’ hotel. A defectively attached stairway collapsed and plaintiffs were buried in burning debris. Evidence of violation of fire safety ordinances was presented and a jury verdict returned in favor of plaintiffs. The verdict was set aside by the trial judge. On direct appeal, the Illinois Supreme Court reinstated the verdict for plaintiffs, finding both common law negligence and violation of the ordinances as alternative bases of liability. In reaching its decision, the court stated:

[From the evidence previously noted that defendants failed to provide fire doors or fire extinguishers, permitted the accumulation of trash and litter in the corridors, and had benzene stored in close proximity to the inadequately constructed wooden stairway where the fire was located, the jury could have found that defendants failed to keep the premises in a reasonably safe condition and that the hazard of fire, and loss of life fighting it, was reasonably foreseeable.]

Id. at 417, 170 N.E.2d at 886.

2. Id. at 416-17, 170 N.E.2d at 886.

3. A licensee is usually described as one who comes upon the land with the landowner’s consent, but for his own purposes. The landowner owes the licensee a duty to refrain from willfully or intentionally injuring him. See, e.g., W. PROSSER, THE LAW OF TORTS 376 (4th ed. 1971).

4. An invitee has been described as one who is invited upon the land for the landowner’s purposes and to whom the landowner owes a duty of reasonable care to make the premises safe. See, e.g., W. PROSSER, THE LAW OF TORTS 385-86 (4th ed. 1971). Before Dini, the issue of landowner’s liability to firefighters for negligently maintaining the premises had not been considered since 1892 in Gibson v. Leonard, 143 Ill. 152, 32 N.E. 182 (1892). Gibson stood for the rule that a fireman had only licensee status in Illinois and the landowner had only to refrain from willfully or intentionally harming him once he was on the property fighting the fire. The Illinois Supreme Court in Dini overruled Gibson and the appellate cases which applied the outdated licensee concept. For a detailed discussion of the development of the law in regard to firemen’s status, see Dini v. Naiditch, 20 Ill.2d 406, 413-21, 170 N.E.2d 881, 884-88 (1960).

5. Liability additionally was based on defendant’s violations of fire safety ordinances. The code provisions were general in nature and were “intended to prevent a disastrous fire or loss of
Dini was the law of liability in fireman injury cases until late in 1976 when the Illinois Supreme Court handed down its opinion in Washington v. Atlantic Richfield Co.\(^6\) (Arco). In that opinion, the court held that a firefighter does not have a cause of action against a property owner when he is injured fighting a fire which the landowner negligently caused, even where the landowner has violated fire safety laws. This holding has significantly diluted the Dini ruling, which was valued for its breadth and progressiveness.\(^7\) Application of the holding yields a result which is similar to the result which occurs in much more restrictive jurisdictions.\(^8\) This appears to be a far cry from the intention of the Illinois Supreme Court in 1960 when it rendered the Dini decision.

The purpose of this Note is to examine the reasoning employed by the court in reaching its decision in Arco. It will also discuss the effect of the decision on Illinois negligence law and will suggest how and why the court should have reached a different result. Finally, it will recommend alternatives which hopefully will be taken into consideration by the Illinois courts and legislature.

**Arco's Facts and Reasoning**

Two Chicago firemen were injured while fighting a fire at defendant ARCO's gas station. The evidence indicated that a defective shut-off valve on a gasoline pump had failed to operate, causing gasoline to overflow and collect under and around a customer's car. "No Smoking" signs were not posted. In the presence of a station attendant, the customer lit a cigar and discarded the lighted match into the spilled gasoline, thus causing the fire. The plaintiffs were summoned to the scene in their official capacity and were burned by...
flaming gasoline which was expelled from the tank of the customer’s auto by heat-induced pressure.9

The firemen filed an action in the Illinois Circuit Court of Cook County against the gas station owner and others.10 As in Dini, the plaintiffs alleged both common law negligence and violation of Illinois statutes11 and city ordinances12 as bases for liability. The complaint stated that the defendants were negligent in using a defective pump, failing to prevent the gas tank from overflowing, and permitting the customer to smoke while the car was being filled. When presented with the issue, the Illinois Supreme Court reversed an appellate court decision13 and reinstated the circuit court’s grant of summary

9. The facts of the case are set out at 66 Ill.2d at 104-05, 361 N.E.2d at 282-83.
10. The defendants in the suit were Atlantic Richfield Co., the owner of the gasoline station, Porter Sledge, the lessee and operator of the station, Richard Yeater, the station attendant, and Charles Walker, the customer.
11. The Illinois Fire Safety Law provides in part:

No person, being the owner, occupant or lessee of any building or other structure . . . shall permit such building or structure by reason of . . . lack of proper repair, or any other cause to become especially liable to fire, or to become liable to cause injury or damage by collapsing or otherwise. And no person . . . shall keep . . . on such premises, combustible or explosive material or inflammable conditions, which endanger the safety of said buildings or premises . . .

ILL. REV. STAT. ch. 127½, § 9 (1975).

It shall be unlawful for any person . . . to keep . . . or use any crude petroleum . . . or other like volatile combustibles . . . in such a manner or under such circumstances as will jeopardize life or property.

Id. § 153.

12. The Fire Safety Regulations of the Municipal Code of Chicago provides in part:

[O]ils, paints, varnishes and similar fluids having a flash point above one hundred fifty degrees Fahrenheit . . . shall, if stored in any building used for other purposes, in quantities exceeding ten barrels aggregate, be placed in approved metal tanks, and shall be drawn only by use of approved pumps or other approved devices.

MUNICIPAL CODE OF CHICAGO ch. 90, § 30 (1971).

Flammable liquids shall be drawn from tanks by pumps or other systems, which shall be equipped with controlling apparatus and pipe shall be so arranged as to control the quantity of discharge and to prevent leakage.

Id. ch. 90, § 101.

Smoking or the carrying of a lighted cigar, pipe or cigarette is prohibited; (a) in every hazardous use room, building or premises.

Id. ch. 90, § 62.

Standard ‘No Smoking’ signs shall be conspicuously posted in every room, building or premises where smoking is prohibited.

Id. § 63.

It shall be unlawful to continue the use of or occupy any building, structure or place which does not comply with those provisions of this code which are intended to prevent a disastrous fire or loss of life in case of fire.

Id. § 3.

13. 36 Ill. App.3d 344, 342 N.E.2d 271 (1976). The appellate court determined that since there were factual issues upon which liability could have been imposed, the trial court had erred in granting a summary judgment for defendants. Special attention was given to the finding
The supreme court denied plaintiffs recovery despite an acknowledgement that firefighters were invitees by virtue of the Dini decision.15

Following a series of appellate court cases,16 the Illinois Supreme Court narrowly limited Dini to its facts and held that the Dini rule of liability did not apply to cases in which the firefighter's injury was due to the landowner's negligent creation of the fire. The court stated that the landowner's negligence must be unrelated to the cause of the fire in order for a fireman to recover damages.17 According to this interpretation, a firefighter has a cause of action only when the alleged negligence is in the maintenance of the premises, and "maintenance" was found not to include compliance with fire safety laws.18

The court also relied upon its own opinion in Fancil v. Q.S.E. Foods, Inc.19 and upon fireman injury cases from other jurisdictions in which landowners were not held liable for negligently creating a fire.20 In Fancil, a wrongful death action was brought against a storeowner by the wife of a deceased policeman. The officer had been fatally shot by a burglar while conducting a routine security check of the storeowner's premises. In her complaint, plaintiff alleged that the defendant had a duty to protect the invitee policeman from foreseeable criminal acts of third parties and that he had been negligent in disconnecting the mercury lamp which had provided exterior illumination during the officer's prior security checks. Relying upon the "inherent risk doctrine,"21 the court found that officer Fancil was that the defendants had violated certain fire safety laws and that such violations were the proximate cause of the injuries to the plaintiffs. Id. at 349-50, 342 N.E.2d at 275-76.


15. 66 Ill.2d 103, 105-06, 361 N.E.2d 282, 283-84 (1976).


17. 66 Ill.2d at 108, 361 N.E.2d at 285.

18. Id.


21. See RESTATEMENT (SECOND) OF TORTS § 343 (1965), which provides:

A possessor of land is subject to liability for physical harm caused to his invitees by
owed no duty of reasonable care, and that therefore the complaint failed to state a cause of action.

Lastly, the Arco court used the doctrine of assumption of risk to deny recovery to the firemen. The court stated that the function of firefighters was to deal with fires and that they assumed the attendant risks. Therefore, at common law, a landowner was under no obligation to protect firefighters from injuries resulting from performance of this function. And, in answer to the plaintiffs' second claim, the court noted that the common law was not changed by statutes or ordinances designed only for fire prevention and control.

**ANALYSIS OF THE COURT'S REASONING**

Certain difficulties are encountered in attempting to understand the court's reasoning in Arco. First, the court made an artificial distinction between negligence in the failure to maintain the property and negligent creation of the fire. Second, the court relied primarily upon distinguishable appellate court decisions for an interpretation of its own earlier decision. Third, emphasis was placed upon decisions from other jurisdictions which clearly have been distinguished from Dini. Fourth, the court mistakenly claimed to follow its reasoning in Fancil, a case which does not lend support to the defendant in Arco. Finally, the court should not have applied the doctrine of assumption of risk as an absolute bar to recovery in this case.

By creating an artificial distinction between fire-related negligence (which was not found to be a breach of the duty to maintain the premises in a safe condition) and non-fire-related negligence (which was viewed as a breach of duty), the Arco court exhibited a mere

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22. 60 Ill.2d at 560, 328 N.E.2d at 542.
23. 66 Ill.2d at 109, 361 N.E.2d at 285.
24. Id. at 106, 361 N.E.2d at 284.
25. Id.
26. Id. at 108-09, 361 N.E.2d at 285.
27. Id. at 108, 361 N.E.2d at 284.
28. The court briefly discusses its application of the doctrine, a treatment which is insufficient, considering the impact on the outcome of the case. 66 Ill.2d at 109, 361 N.E.2d at 285.
superficial adherence to Dini. The Dini court clearly did not wish to recognize a definition of “maintenance” which would prohibit recovery where the landowner’s negligence caused the fire. This is evident from its direction that compliance with fire safety laws be treated no differently than any other facet of the duty to maintain the property.\(^{29}\) Since the distinction does not appear in the Dini decision, and since Dini has been recognized for its broad holding,\(^{30}\) one can view the Arco distinction as a deliberate attempt by the Illinois Supreme Court to bar a firefighter’s right to recovery in situations where private plaintiffs and other public employees would not be burdened with such a restriction. This distinction is neither sound nor just, since firemen have invitee status in Illinois and therefore are owed the same duty of care as any other injured invitee.\(^{31}\)

A further problem is presented by the supreme court’s heavy reliance upon appellate court decisions in which recovery was denied to firemen suffering fire-related injuries. Because of the factual similarities between Arco and Dini, particularly as to the statutory

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29. See 20 Ill.2d at 421, 170 N.E.2d at 888, where the court states that “the safety ordinances herein deal only with the maintenance of the premises.”

30. See J. PAGE, THE LAW OF PREMISES LIABILITY (1976), in which the author, discussing the general rule that negligent setting of a fire does not give rise to a cause of action on behalf of an injured fireman, states that “the Supreme Court of Illinois appeared to cast some doubt on this rule in Dini v. Naiditch.” Id. at 102; Note, Landowner’s Negligence Liability to Persons Entering as a Matter of Right or Under a Privilege of Private Necessity, 19 VAND. L. REV. 407 (1966), recognizing that decisions were unanimous until Dini in 1960, with even the very liberal jurisdictions denying liability for negligent maintenance of property which contributes to the creation of a fire. In regard to Dini, the author states:

    The decision has generally been interpreted to mean that a fireman may recover from the occupier who negligently allows a fire to occur which in turn is the proximate cause of the fireman’s injury. . . . [It has not been followed in the few cases which have subsequently arisen in other jurisdictions.


31. When a non-firefighter is injured in a negligently caused fire and is given invitee status, he is owed a duty of reasonable care by the landowner to keep the premises safe from fire. The jury decides whether or not the landowner behaved unreasonably in the creation of the fire. A firefighter has been given this same status in Illinois, but it is meaningless if his case is always to be automatically kept from the jury when he is injured by the fire.
violations, one would logically expect the supreme court to rely upon its own precedential decision in *Dini*. However, the court chose to rely upon three lower court cases which are clearly distinguishable from *Dini* and *Arco* in their facts. In two of these cases, the landowner had not violated any fire safety laws, as was the case in *Arco*, and in the third, the statutory violation was not the proximate cause of the fireman's injury. Furthermore, each appellate decision relied upon the preceding ones and upon court decisions of other states. Once the first court created the bar to recovery in cases of negligently caused fire, the succeeding courts perpetuated this unfortunate narrowing of the respected and well-reasoned supreme court decision in *Dini*.

32. *Netherton v. Arends*, 81 Ill. App.2d 391, 225 N.E.2d 143 (4th Dist. 1967). In *Netherton*, plaintiff-fireman was injured when he inhaled smoke produced by a fire. Plaintiff alleged that the fire resulted from several negligent acts or omissions by the defendant-landowner. Finding that the smoke was no different than the smoke normally present during fires, the court held that the plaintiff had no cause of action against the defendant. *Id.* at 396, 225 N.E.2d at 146. *Netherton* is significant because it was the first Illinois decision in which the distinction between fire-related and non-fire-related negligence was drawn.

*Erickson v. Toledo, Peoria & Western R.R.*, 21 Ill. App.3d 546, 315 N.E.2d 912 (1st Dist. 1974). In *Erickson*, plaintiff, a volunteer fireman, was injured when a tank car, owned by defendant-railroad, caught fire and exploded. Plaintiff brought suit alleging that the defendant's negligence caused the fire. However, the appellate court denied recovery, holding that the plaintiff had failed to make out a cause of action against the railroad. *Id.* at 549, 315 N.E.2d at 915.

33. *Horcher v. Guerin*, 94 Ill. App.2d 244, 236 N.E.2d 576 (2d Dist. 1968). In *Horcher*, plaintiff-fireman was injured when a piece of glass struck his eye after he had broken a locked window to ventilate a burning building owned by defendants. Plaintiff alleged that the defendants were negligent in maintaining the building and in failing to obey an ordinance which prohibited obstruction to windows. The court held (1) that negligence in the maintenance of the building which causes a fire is not actionable and (2) that the violation of the ordinance was not the proximate cause of plaintiff's injury. *Id.* at 249, 236 N.E.2d at 579-80.

34. The *Netherton* court stressed the defective stairway in *Dini* and analogized it to a defective wall in *Shypulski v. Waldorf Paper Products Co.*, 232 Minn. 394, 45 N.W.2d 549 (1951), and a hole in the ground in *Meiers v. Fred Koch Brewery*, 229 N.Y. 10, 127 N.E. 491 (1920); 81 Ill. App.2d at 394, 236 N.E.2d at 145. In reality, the *Dini* court was not mainly concerned with the faulty stairway but with the violation of the fire safety laws which may well have been the cause of the fire.

The *Horcher* court relied upon the dissent by Justice Klingbiel in *Dini*, 20 Ill.2d at 436-37, 170 N.E.2d at 895-96, and upon *Krauth v. Geller*, 31 N.J. 270, 157 A.2d 129 (1960), and *Jackson v. Velveray Corp.*, 82 N.J. Super. 469, 198 A.2d 115 (1964), which have been recognized as representing a different philosophy than *Dini*. See notes 37-42 and accompanying text infra.

The *Erickson* court, a division in the First District other than the one in which *Arco* was decided, relied upon *Krauth, Netherton* and *Horcher* as well as *Buren v. Midwest Indus.*, Inc., 380 S.W.2d 96 (Ky. 1964) and *Spencer v. B.P. John Furniture Corp.*, 255 Or. 359, 467 P.2d 429 (1970), which have been distinguished from *Dini*.


Close scrutiny of the decisions from sister states cited by the Arco court exposes a third weakness in the decision: the clearly inappropriate use of Krauth v. Geller, a New Jersey case decided the same year as Dini. In Krauth, the plaintiff, a fireman, was injured while extinguishing an overheated salamander (portable stove) which was burning unattended in a house still under construction. When he mistook layers of smoke for steps, the plaintiff fell from a balcony with no railing. The plaintiff brought suit against the landowner, but the New Jersey Supreme Court denied recovery. The case, which involved no statutory violation, has been recognized as representing the New Jersey Supreme Court's more conservative position on landowner's liability to firefighters, in contrast to the holding of the Illinois Supreme Court in Dini.

The Krauth case is clearly distinguishable from Dini. First, a fireman does not have invitee status in New Jersey as he does in Illinois. Second, although no statutory violation was alleged by the plaintiff in Krauth, the New Jersey court hinted that there might be liability for a statutory violation. Finally, the Krauth court ruled against the plaintiff fireman on two major grounds: (1) the assumption of risk doctrine, which was not mentioned in Dini; and (2) the policy that imposition of liability for injury to firefighters would be too great a burden on landowners. If, in Arco, the Illinois Supreme Court was actually reaffirming Dini, it should have relied directly on that decision. By citing Krauth, the court circumvented Dini.

1975), the court reversed the trial court's denial of summary judgment for the defendants against the plaintiff-fireman. Great reliance was placed upon Horcher, Erickson and Fancil. No violation of statute was involved and the court stressed that the rule in Bandosz v. Daigger, 255 Ill. App. 494 (1st Dist. 1930), that an injured fireman may recover where he is injured because of the landowner's willful and wanton misconduct was still valid and unchanged by Erickson, Horcher, or Fancil. The Marquart court could not find any willful or wanton misconduct on the part of the landowner and, therefore, denied the plaintiff's recovery. 30 Ill. App.3d at 434, 333 N.E.2d at 560-61.

Also, in Young v. Toledo, Peoria & Western R.R., 46 Ill. App.3d 167, 360 N.E.2d 978 (3rd Dist. 1977), the most recent case on landowner liability to injured firemen, the plaintiff's suit was dismissed for failure to state a cause of action.

38. Id.
39. See note 30 supra.
40. 31 N.J. at 272-73, 157 A.2d at 130. The New Jersey Supreme Court noted that a fireman was neither a licensee nor an invitee but rather sui generis or in a class by himself. Id.
41. Id. at 274, 157 A.2d at 131. The court suggests that authority exists to support a finding of liability for negligence where a statute has been violated. However, it seemingly interprets those decisions to allow recovery only where such violation involves an "undue risk of injury." Id.
42. Id. at 273-74, 157 A.2d at 131 (1960).
In addition, the court referred to decisions from states whose courts have adopted the *Krauth* philosophy. These courts implicitly or explicitly acknowledged that the *Dini* rule was more progressive, but nevertheless declined to follow it. The *Arco* court's reliance on Illinois appellate decisions based on the *Krauth* philosophy is also questionable since those jurisdictions refused to follow the *Dini* ruling. Under these circumstances, the *Arco* court's emphasis, direct and indirect, on the out-of-state opinion in question is extremely disconcerting.

The court's reliance on *Fancil v. Q.S.E. Foods, Inc.* generates further criticism, not only because *Fancil*'s facts are distinguishable from those in *Arco*, but also because that decision follows the Illinois appellate decisions discussed above. No statutory duty existed in *Fancil*. The plaintiff merely asserted that defendant had breached an alleged duty of reasonable care to protect the deceased police officer by failing to light the area around his store as usual. Such a duty certainly must be considered remote when compared to the duty allegedly owed to the firefighters in *Arco*. If the court had interpreted *Dini* properly, the statutory violations in *Arco* would have provided an independent basis of liability. The *Fancil* decision serves as a warning to lower courts that they must determine if there are any statutory violations before determining the duty owed.

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44. In Hass v. Chicago & N.W. Ry. Co., 48 Wis.2d 321, 327, 179 N.W.2d 885, 888 (1970), the Wisconsin Supreme Court was primarily concerned with the burden on the landowner, as in *Krauth*. In Spencer v. B.P. John Furniture Corp., 255 Or. 359, 363, 467 P.2d 429, 431 (1970), Justice Holman, after a discussion of *Krauth* and the assumption of risk doctrine, clearly distinguished *Dini* from *Krauth*, stating:

> The most notable authority cited as holding contrary to the above rule of non-liability is *Dini* v. Naiditch . . . [which] has been widely cited as holding that an owner or possessor of property is liable to a fireman for injuries suffered while fighting a negligently caused fire.

*Id.* He then decided to follow the more conservative New Jersey view, relying on assumption of risk and public policy.

The courts in Chesapeake and Ohio Ry. Co. v. Crouch, 208 Va. 602, 607-09, 159 S.E.2d 650, 653-55 (1968) and Buren v. Midwest Indus., Inc., 380 S.W.2d 96, 98 (Ky. 1964), proceeded in a similar manner, recognizing the distinction between the Illinois and New Jersey rules. They too preferred to follow the New Jersey rule. The *Buren* court expressly stated that it did not follow *Dini* in allowing recovery where the cause of the fireman's injury was also the negligent cause of the fire. 380 S.W.2d at 99.

45. 60 Ill.2d 552, 328 N.E.2d 538 (1975).

46. See text at notes 19-22.

appeared to recognize that liability may be imposed where an unreasonable risk to the fireman is created by the landowner’s statutory violation. Fancil does not preclude recovery in Arco, in which the defendants blatantly violated the fire safety laws.

The final serious flaw in the Illinois Supreme Court’s reasoning in Arco concerns the use of the doctrine of assumption of risk. In effect, the use of this doctrine automatically negated any duty which the landowner may have owed to the firemen regarding the maintenance of the premises in a safe condition. Yet the court’s application of the doctrine is neither logical nor appropriate, considering the circumstances of the Arco case. It is not logical because the court classified the firemen as invitees to whom a certain duty of reasonable care was owed. In allowing assumption of risk to remove that duty, the court, in effect, denied that classification to firemen.

Use of the doctrine of assumption of risk is inappropriate for two reasons. First, there is a growing trend in the United States to abolish the use of absolute bars to recovery. These were especially harsh on those plaintiffs who had acted reasonably, as was the case in Arco. Influential commentators have encouraged the abolition of

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48. See 60 Ill.2d at 554, 328 N.E.2d at 539-40, where the court points out at the outset of its opinion that:

This action is brought on a theory of common law negligence. The complaint alleges the violation of a duty established by statute or ordinance. Necessary to recovery is the existence of a duty or an obligation requiring one to conform to a certain standard of conduct for the protection of another against an unreasonable risk.

49. “In its simplest and primary sense, assumption of risk means that the plaintiff, in advance, has given his consent to relieve the defendant of an obligation of conduct toward him, and to take his chances of injury from a known risk arising from what the defendant is to do or to leave undone.” W. Prosser, The Law of Torts 440 (4th ed. 1971).


[N]ow and then a court prefers to base its judgment on assumption of risk. This is done on the basis that if the danger is open and obvious the defendant owed the plaintiff no duty. This is incompatible with good theory if in fact there was a duty to make the premises reasonably safe . . . and the . . . [landowner] failed to do so.

Id. at 85. In Edgar, Voluntary Assumption of Risk in Texas Revisited—A Plan for its Abolition, 26 Sw. L.J. 849 (1972), the author states that:

To say that plaintiff is willing to encounter a danger is entirely different from saying that he consents to the injury resulting from it. It cannot be said, with intellectual honesty, that defendant owed plaintiff ‘no duty’ or that plaintiff consented or assented to the injury. The most that can be said is that plaintiff acted unreasonably. He may be contributorily negligent, either in law or in fact.

Id. at 853.

51. Such absolute bars include contributory negligence and the rigid common law classifications of trespasser, licensee, and invitee. The defense of contributory negligence allows the defendant to prevent the plaintiff from recovering any amount of damages if it can be proven that the plaintiff was negligent in the least bit in contributing to his own injury. In order to combat the harsh effects of such a defense, courts and legislatures are adopting comparative negligence systems which allow some recovery in proportion to each party’s degree of fault. At
the assumption of risk doctrine as such a bar, and several states have abolished or limited the application of the doctrine in all negligence cases. Illinois has followed this trend in the past by confining the defense of assumption of risk to cases involving express consent or contractual or employment relationships. Regarding


The rigid common law classifications of trespasser, licensee, and invitee also have created harsh results for plaintiffs who have acted reasonably. For the judicial response, see note 64 infra.

52. See J. PAGE, THE LAW OF PREMISES LIABILITY 95-98 (1976); Edgar, Voluntary Assumption of Risk in Texas Revisited—A Plan for its Abolition, 26 SW. L.J. 849, 875 (1972); Green, Assumed Risk as a Defense, 22 LA. L. REV. 77 (1961); James, Assumption of Risk: Unhappy Reincarnation, 78 YALE L.J. 185 (1968). In another article, James, Assumption of Risk, 61 YALE L.J. 141 (1952), Professor James stated that "[e]xcept for express assumption of risk, the term and the concept should be abolished. It adds nothing to modern law except confusion."Id. at 169. See also Wade, The Place of Assumption of Risk in the Law of Negligence, 22 LA. L. REV. 5 (1961), in which the author noted that:

Accuracy in the law of negligence would probably be advanced if the term were eradicated . . . Then the true issues involved would be more clearly presented and the determinations . . . could be more accurately and realistically rendered.

Id. at 14.

Its disadvantages lie primarily in its obfusatory nature. It may either prevent an accurate analysis by the court of the real problems involved in reaching the decision, or permit the court to write an opinion which eludes or covers up the real basis of the decision.

Id. at 15.


54. See Barrett v. Fritz, 42 Ill.2d 529, 248 N.E.2d 111 (1969). In Barrett, the court held that the giving of an assumption of risk instruction to the jury in cases other than those involv-
fireman injury cases, the *Dini* court did not mention the doctrine at all, nor did the *Fancil* court hold that policemen and firemen assume all risks of injury in all circumstances.\(^5\) Furthermore, in other decisions involving the violation of a fire safety law, Illinois courts have not permitted assumption of risk to remove the case from a jury.\(^5\) Thus, reference to the growing trend and to prior Illinois cases would seem to indicate that the use of assumption of risk is inappropriate in a case such as *Arco*.

A second reason for the inappropriateness of the use of the doctrine of assumption of risk in *Arco* is public policy. Public policy is often mentioned by the courts in fireman injury cases to justify denial of recovery.\(^5\) The policy argument expressed by the *Arco* court was that "since most fires occur because of negligence, to hold a landowner liable to a fireman would impose a heavy and unreasonable burden upon the owner."\(^5\) However, countervailing public policy supports the position of the injured firemen. Firemen come within the purview of the statutes and ordinances in question.\(^5\) These laws were enacted to protect lives and prevent fires—purposes which are

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poorly served by court decisions permitting landowners to flout fire safety laws. The lives of firemen are as much in need of protection as the lives of non-firemen. In fact, there is great social utility in protecting those who come to the rescue of others in trouble. The legal system should encourage people to pursue occupations which render such aid. In permitting defendants to escape liability for violation of fire laws the legal system does nothing to encourage such a pursuit.

Additionally, the public has a genuine interest in effective fire prevention which should be encouraged. The Arco decision, however, fails to encourage landowners to contribute to their own safety and that of the public. The ruling permits them to "knowingly ignore dangerous conditions on their premises" and "reflects an improper attitude in regard to society's obligation toward . . . [fire] control."60 The court does not explain why the burden on the landowner would be unreasonable. In the Arco case, it would not have been costly to fix the pump, post signs, and prevent the spillage. Whatever the cost of compliance, regardless of the landowner's financial status, the cost of lives lost and property damaged due to landowner negligence would be much greater.

SUGGESTIONS FOR CHANGE

The supreme court's decision reinstating the trial court's summary judgment had the effect of denying plaintiffs the opportunity for a complete adjudication of their claims and thus defeated what should be a major object of our judicial system. This situation can be avoided in the future if either the judiciary or the legislature adopts the various available means of assuring full consideration of the circumstances of each case. This would include the removal of rigid rules of law which serve only to bar deserving plaintiffs from being properly heard. The primary factor in deciding whether liability attaches to a landowner who negligently creates a fire in which another is killed or injured should be the landowner's behavior, not the plaintiff's common law status or his occupation. Some suggestions as to how this might be accomplished include: (1) the abolition of the common law classifications of invitee, licensee, and trespasser61 as automatic determinants of the duty owed by the landowners to those who are injured on their property; (2) the abolition of the assumption


61. A trespasser is defined as "a person who enters or remains upon land in the possession of another without a privilege to do so, created by the possessor's consent or otherwise." Restatement (Second) of Torts, § 329 (1965).
of risk doctrine as a defense in negligence cases; (3) the abolition of the "firemen's rule" which the Arco court appears to have adopted; and (4) the enactment of legislation which specifically allows an injured fireman a cause of action against a landowner who has violated fire safety laws resulting in the creation of a fire.

In his dissent in Arco, Justice Dooley advocated the abolition of the common law categories which have been used to determine what duty is owed to a plaintiff by the landowner-defendant, a position for which there is ample support. Such a change in Illinois law would result in the application of the same general standard of reasonable care in landowner cases as is applied in all other negligence cases, allowing all of the circumstances of the occurrence to be

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62. The rule is:

[Where the defendant's negligence, whether active or passive, creates an apparent risk, which is of the type usually dealt with by firemen, and which is the cause of the fireman's presence, and which is the direct cause of the fireman's injury, the defendant is not liable to the fireman. Scott v. E.L. Yeager Constr. Co., 12 Cal. App.3d 1190, 1199, 91 Cal. Rptr. 232, 238 (4th Dist. 1970).

63. 66 Ill.2d 118, 361 N.E.2d at 289 (Dooley, J., dissenting).

64. England abolished the distinction between licensee and invitee in the Occupiers' Liability Act, 1957, 5 & 6 Eliz. 2, c. 31, 55, 20th Century Statutes 831. The states which have followed this example include Massachusetts in Mounsey v. Ellard, 363 Mass. 693, 707, 297 N.E.2d 43, 51 (1973); Minnesota in Peterson v. Balach, 294 Minn. 161, 164, 199 N.W.2d 639, 642 (1972); Wisconsin in Antoniewicz v. Reszczynski, 70 Wis.2d 836, 856-57, 236 N.W.2d 1, 11 (1975).


65. In those states which have abolished the common law categories (see note 64 supra), the test is usually stated as whether, in the maintenance of his property, the landowner has acted as a reasonable person under the circumstances, in view of the probability of injury to others. Legal status may have some bearing on the question of liability, but it is not determinative. Basso v. Miller, 40 N.Y.2d 233, 241, 386 N.Y.S.2d 564, 568, 352 N.E.2d 868, 872 (1976).
taken into consideration,\textsuperscript{66} usually by a jury.\textsuperscript{67} Considering the Illinois Supreme Court’s remarks on common law status in \textit{Dini},\textsuperscript{68} it seems likely that the court was inviting the legislature to make such a change, or was seriously contemplating undertaking the task itself. The time has come for Illinois to strip away the shield of immunity held by the landowner as to the duty to exercise reasonable care under the circumstances. As one court aptly stated, “[t]he principle of stare decisis is not meant to keep a stranglehold on developments which are responsive to new values, experiences and circumstances.”\textsuperscript{69}

Justice Dooley also opposed the application of the assumption of risk defense in fireman injury cases.\textsuperscript{70} The doctrine automatically bars plaintiffs who have behaved reasonably from recovering from defendants who have caused the injury through their unreasonable conduct. This result is contrary to the concept of negligence liability, which is based on fault, and has met with widespread disapproval.\textsuperscript{71} Where the plaintiff is free from fault, he should be permitted to present his case.\textsuperscript{72}

If assumption of risk is not abolished as a defense in negligence cases, Illinois should at least take steps to eliminate what appears to be a “firemen’s rule” as created by the court in \textit{Arco}. The rule, a

\begin{itemize}
  \item \textsuperscript{66} The factors which may be taken into consideration include: (1) foreseeability of harm; (2) certainty of plaintiff’s injury; (3) nexus between defendant’s conduct and the injury; (4) moral blame; (5) the policy of preventing future harm; (6) the burden on the defendant and the consequences to the community of imposing liability; and (7) the availability, cost and prevalence of insurance. Turkington, \textit{Torts: Toward a General Negligence Standard for the Owner/Occupier}, 22 \textit{DEPAUL L. REV.} 29, 31 (1972).
  \item \textsuperscript{67} Of course, the initial question of whether plaintiff has established sufficient facts to infer negligence remains one for the trial court. However, once this is established to the court’s satisfaction, the question whether the plaintiff’s conduct amounts to negligence is “inherently a question for the fact trier.” Basso v. Miller, 40 N.Y.2d 233, 242-43, 386 N.Y.S.2d 564, 568, 352 N.E.2d 868, 872-73 (1976).
  \item \textsuperscript{68} 20 Ill.2d at 416, 170 N.E.2d at 885-86, where the court states:
    
    [I]t is our opinion that since the common law rule . . . is but an illogical anachronism, originating in a vastly different social order, and pock-marked by judicial refinements, it should not be perpetuated in the name of ‘stare decisis’. . . . ‘Stare decisis’ ought not to be the excuse for decision where reason is lacking.
  \item \textsuperscript{69} Smith v. Arbaugh’s Restaurant, Inc. 469 F.2d 97, 105 (D.C. Cir. 1972).
  \item \textsuperscript{70} 66 Ill.2d at 110-11, 361 N.E.2d at 286 (Dooley, J., dissenting).
  \item \textsuperscript{71} See notes 52-53 supra.
  \item \textsuperscript{72} James, \textit{Assumption of Risk: Unhappy Reincarnation}, 78 \textit{YALE L.J.} 185, 195 (1968). Professor James states that:
    
    The increasing judicial rejection of the assumption of risk doctrine reflects a recognition that this defense is inconsistent with newer policies which underlie the imposition of a duty to take care of others that extends beyond merely warning them.
\end{itemize}
\textit{Id.} at 192.
more specific version of the assumption of risk doctrine, has been stated as follows:

[W]here the defendant's negligence, whether active or passive, creates an apparent risk, which is of the type usually dealt with by firemen, and which is the cause of the fireman's presence, and which is the direct cause of the fireman's injury, the defendant is not liable to the fireman.  

The effect of such a rule is the wholesale barring of innocent plaintiffs' causes of action. This injustice should be eliminated, since it is based upon the rationale that a fireman is a licensee and that he impliedly assumes the risks of his occupation. Either the courts or the legislature should ensure that a fireman's cause of action is not barred where fire safety laws are violated and the violation proximately causes the injury. Gasoline station operators, factory owners and other such commercial property owners are often the worst offenders, and their negligence creates a great risk of the loss of numerous lives, including those of firefighters.

Finally, legislation could be drawn to assure plaintiff-firefighters a cause of action where, as in Arco, the landowner violated fire safety laws which resulted in fire. Such legislation should alleviate the Illinois Supreme Court's fear that general imposition of liability to firemen might place too great a burden upon the average homeowner to keep his home safe from fire hazards. The cause of action could be restricted to violations committed by commercial property owners. However, it is suggested that Dini be allowed its full effect, permitting causes of action for negligence by all persons in the maintenance of their property. This would not be strict liability, since it would merely allow the jury to examine the facts and determine whether the defendant has acted reasonably under the circumstances. No matter what the burden, the potential loss of lives ought to warrant such an application of Dini.

Under the laws of at least three states, the plaintiff could have presented his case to a jury, who could have given proper consideration

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75. See, e.g., Cooper v. Goodwin, 478 F.2d 653 (D.C. Cir. 1975). In Cooper, the court noted that: Rather than rely on rigid labels and rules of law to provide the illusion of certainty and fairness, we choose the jury as the mature institution to take account of the infinite variety of fact situations which affect the reasonableness of human conduct.

Id. at 656.
to all of the circumstances. New York, for example, has abolished the common law classifications\(^7\) and applies a general standard of care in landowner liability cases. Also, comparative negligence\(^7\) has replaced contributory negligence.\(^8\) The General Municipal Laws of New York also provide for a civil cause of action against a landowner whose safety ordinance violation results in injury to a firefighter.\(^7\) In Texas, although the common law categories have been retained, the voluntary assumption of risk defense is not available in negligence actions,\(^8\) nor is there a "firemen’s rule" to bar recovery.\(^8\) Rather, the Texas courts "are even willing to indulge in strained reasoning to permit such recoveries [to firemen]."\(^8\) California, the first state to eliminate the common law classifications,\(^8\) no longer recognizes the assumption of risk doctrine in negligence cases and has adopted a comparative negligence system.\(^8\) In addition, according to a recent California case, the "firemen’s rule" has been dissolved.\(^8\) Hopefully, Illinois will choose to adhere to some of these same policies in the near future.

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77. Comparative negligence is a method which permits the plaintiff who is contributorily negligent to recover damages, but apportions those damages according to the degree of negligence of the two parties. See W. PROSSER, THE LAW OF TORTS 433-39 (4th ed. 1971).
78. Contributory negligence is "conduct on the part of the plaintiff, contributing as a legal cause to the harm he has suffered, which falls below the standard to which he is required to conform for his own protection." W. PROSSER, THE LAW OF TORTS 416-17 (4th ed. 1971). When the plaintiff is found to be contributorily negligent, regardless of the degree of negligence, he is barred from recovery.
82. Harris v. Atchison, Topeka & Santa Fe R.R., 538 F.2d 682, 686 (5th Cir. 1976).
84. See Bartholomew v. Klinger, 53 Cal. App.3d 975, 980-81, 126 Cal. Rptr. 191, 194 (2d Dist. 1975), where the court explained:
Since the application of the comparative negligence rule (in Nga Li v. Yellow Cab Co., 13 Cal.3d 804, 119 Cal. Rptr. 853, 532 P.2d 1226 (1975)), the defense of assumption of risk appears no longer available to absolve the possessor of land totally of his duty with respect to persons engaged in these professions.
85. Bartholomew v. Klinger, 53 Cal. App.3d 975, 126 Cal. Rptr. 191 (2d Dist. 1975), which involved a policeman injured on defendant’s premises while performing his job. Defendant claimed that California had a “Firemen’s Rule.” The Bartholomew court found that Rowland and Yellow Cab had undercut the rationale behind the rule and that it may no longer exist in California. Id. at 980-81, 126 Cal. Rptr. at 194.
CONCLUSION

In Illinois, firemen, like other invitees, are owed a duty of reasonable care by landowners in the maintenance of their property. This duty should include keeping the premises free from fire hazards in compliance with the law. When the invitee, who is free from any contributory negligence, is injured as a result of the landowner's negligence, he has a cause of action against the landowner. A fireman should be no exception. *Dini v. Naiditch* is clear on this point. If the court had actually followed *Dini* in deciding *Arco*, a contrary result would have been reached. Unfortunately, the court used an artificial and meaningless distinction to avoid following *Dini*, and one must now wonder what, if anything, is left of that decision. Hopefully, the future will bring enlightenment on this matter as well as more sensible judicial craftsmanship than is found in *Arco*.

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