Michigan Law Review

Volume 35 | Issue 7

1937

TORTS - ARE FIREMEN AND POLICEMEN LICENSEES OR INVITEES?

Michigan Law Review

TORTS — ARE FIREMEN AND POLICEMEN LICENSEES OR INVITEES? — The status of the fireman or policeman who enters on the land of another in the performance of duty, under a right conferred by the law, has quite generally been held to be that of a licensee, to whom the landowner owes no greater duty than to refrain from wilful, wanton misconduct. This places such visitors in the second group of the usual classification, which designates persons present on the land of another as trespassers, licensees (bare licensees, gratuitous licensees, social guests), and invitees (business visitors).[1] A recent case so holding is *Aldworth v. F. W. Woolworth Co.*,[2] where the plaintiff, a municipal fireman, standing on a fire escape of a building occupied by the

[1] TORTS, RESTATEMENT, §§ 329-332 (1934). The Restatement divides all persons on the land of another into trespassers and licensees, then subdivides the latter into "Gratuitous Licensees" and "Business Visitors."

[2] (Mass. 1936) 3 N. E. (2d) 1008.

defendant and fighting a fire in an adjoining building, was injured due to the negligent condition of the fire escape. The reasons given by the court in this case, and by its predecessors for similar holdings, are that the fireman enters under no invitation, express or implied, that his right to enter is conferred by law by reason of "overruling necessity," and that in case of such necessity the occupant would have no right to exclude him.[3] No distinction is drawn between the status of a fireman who enters premises to fight a fire on the premises entered and one who enters in order to fight more advantageously a fire in adjoining premises. The fact that the landowner called the fire department does not constitute an invitation, as the fireman's right to enter exists independently of the call and would exist to an equal degree if a stranger had sent in the alarm.[4] But where the fireman is under no duty to enter the building and his right to enter depends solely on the owner's invitation, as in answer to a call to a fire outside of the city limits, he is an invitee and the occupant is responsible to him for an injury caused by a negligent condition of the premises.[5] Where the landowner has been guilty of active negligence toward the fireman, he is liable for the injury caused.[6] This is the generally accepted rule and its mutations.

The origin of the rule that a fireman is a licensee only may be traced through the cases directly to a much-quoted paragraph in

[3] As to fireman: Gibson v. Leonard, 143 Ill. 182, 32 N. E. 182 (1892); Woodruff v. Bowen, 136 Ind. 431, 34 N. E. 1113 (1893); Beehler v. Daniels, 18 R. I. 563, 29 A. 6 (1894), 19 R. I. 49, 31 A. 582 (1895); Hamilton v. Minneapolis Desk Mfg. Co., 78 Minn. 3, 80 N. W. 693 (1899); Eckes v. Stetler, 98 App. Div. 76, 90 N. Y. S. 473 (1904); New Omaha Thomson-Houston Electric Light Co. v. Anderson, 73 Neb. 84, 102 N. W. 89 (1905); Lunt v. Post Printing & Pub. Co., 48 Colo. 316, 110 P. 203, 30 L. R. A. (N. S.) 60 (1910); Pennebacker v. San Joaquin Light & Power Co., 158 Cal. 579, 112 P. 459, 31 L. R. A. (N. S.) 1099 (1910); Drake v. Fenton, 237 Pa. 8, 85 A. 14 (1912); Eckert v. Refiners' Oil Co., 17 Ohio App. 221 (1923); Steinwedel v. Hilbert, 149 Md. 121, 131 A. 44 (1925); Todd v. Armour & Co., 44 Ga. App. 609, 162 S. E. 394 (1932).

In general the courts apply exactly the same reasoning to find that the status of a policeman on the land of another is that of a licensee merely. Creeden v. Boston & Me. R. R., 193 Mass. 280, 79 N. E. 344 (1906); Casey v. Adams, 234 Ill. 350, 84 N. E. 933 (1908); Thrift v. Vandalia R. R., 145 Ill. App. 414 (1908); Burroughs Adding Machine Co. v. Fryar, 132 Tenn. 612, 179 S. W. 127 (1915); Brennan v. Keene, 237 Mass. 556, 130 N. E. 82, 13 A. L. R. 628 at 629 (1921); Pincock v. McCoy, 48 Idaho 227, 281 P. 371 (1929).

[4] Lunt v. Post Printing & Pub. Co., 48 Colo. 316, 110 P. 203, 30 L. R. A. (N. S.) 60 (1910).

[5] Buckeye Cotton Oil Co. v. Campagna, 146 Tenn. 389, 242 S. W. 646 (1922).

[6] Houston Belt & Terminal Ry. v. O'Leary, (Tex. Civ. App. 1911) 136 S. W. 601; Cameron v. Kenyon-Connell Commercial Co., 22 Mont. 312, 56 P. 358 (1899).

Cooley on *Torts*,[7] the first case in the field[8] having cited only Cooley as authority for the proposition. In this work Judge Cooley does not distinguish between bare licensees and business invitees, but includes all forms of permission to enter upon the land of another, whether by mere consent or by invitation in which the landowner has an interest, under the headings of "Express Licenses" and "Implied Licenses." He includes the invitation of the retail dealer to the public to enter his shop for the examination of his goods under the heading of Implied Licenses.[9] It may be seen that he used the term "licensee" in a broad sense, covering the modern meanings of both "business invitee" and "bare licensee." His paragraph on the right of a fireman, therefore, is not authority for a holding that, as contrasted with those of an invitee, the rights of a fireman are those of a bare licensee. It is only authority for saying that a fireman enters as of right and does not decide whether the right is that of what is now called a licensee or of an invitee. The many courts which have cited and followed Cooley as authority for a decision that a fireman is a bare licensee seem to have been under a misconception as to the sense in which he used the word.

Aside from the weakness of the authority, the reasoning which assumes that a fireman is not an invitee because there has been no invitation, is not a trespasser because he enters as of right, and therefore must be a licensee, is questionable. To the same extent that the status of an invitee depends on an invitation, the status of a licensee depends on the consent of the land occupant.[10] In the case of a fireman or policeman who enters quite independently of either invitation or consent it is highly illogical to say that he cannot be an invitee because there has been no invitation, but can be a licensee even though there has been no permission.

The basis behind the usual arbitrary classification of a fireman as a bare licensee being dubious, it remains to be considered to what class such public officers, armed with a legal right to enter another's prem-

[7] "The third class of licenses comprehends those cases in which the law gives permission to enter a man's premises. This permission has no necessary connection with the owner's interest, and is always given on public grounds. An instance is where a fire breaks out in a city. Here the public authorities, and even private individuals, may enter upon adjacent premises as they may find it necessary or convenient in their efforts to extinguish or to arrest the spread of the flames. The law of overruling necessity licenses this, and will not suffer the owner of a lot to stand at its borders and exclude those who would use his premises as vantage ground in staying the conflagration." COOLEY, TORTS, 1st ed., 313 (1880).

[8] Gibson v. Leonard, 143 Ill. 182, 32 N. E. 182 (1892).

[9] COOLEY, TORTS, 1st ed., 303 (1880).

[10] Meiers v. Fred Koch Brewery, 229 N. Y. 10, 127 N. E. 491, 13 A. L. R. 628 at 633 (1920).

ises, belong. Since Judge Cooley's day there has taken place a considerable refinement of the law concerning the status occupied by various persons on another's land, and the duties of the landowner to them. The fundamental principle behind the distinction between the classes of trespasser, licensee, and invitee is not the form of words in which the right is conferred, but rather the extent of the interest of the land occupant in the presence of the visitor on his land; for the courts stand ready to find that one who has been formally invited to enter the premises is really only a social guest and therefore a licensee,[11] while one to whom no word has been said may be found to be an invitee by implied invitation if he enter the premises for a purpose connected with the occupant's business.[12] In general, one who enters the land of another for his own pleasure or benefit is a licensee if permission can be found or implied; and one who enters the land of another for the benefit of the occupant, or the mutual benefit of both, is an invitee, an invitation being implied, regardless of anything said or done beforehand.[13]

If we accept benefit to the landowner as the determining factor of the invitee, and it is generally so conceded, it is difficult to see on what basis, aside from stare decisis, it can be held that a fireman or policeman is a mere licensee. Can it be questioned that a fireman who enters a building at night for the purpose of putting out a fire, or a policeman who, finding the door unlocked, enters the building to make sure that thieves are not at work inside is there for a purpose beneficial to the owner? Certainly both putting out fires and apprehending burglars are purposes in which the owner of the premises has a direct and financial interest. It has been argued[14] that because these public

[11] Southcote v. Stanley, 1 H. & N. 247, 156 Eng. Rep. 1195 (1856); Greenfield v. Miller, 173 Wis. 184, 180 N. W. 834, 12 A. L. R. 980 at 982 (1921).

[12] Fleischmann Malting Co. v. Mrkacek, (C. C. A. 7th, 1926) 14 F. (2d) 602; L. E. Meyers' Co. v. Logue's Admr., 212 Ky. 802, 280 S. W. 107 (1926).

[13] "It will be found that the distinction between a visitor who is a mere licensee and one who is on the premises by invitation turns on the nature of the business that brings him there, rather than on the words or acts of the owner which precede his coming." Pauckner v. Wakem, 231 Ill. 276 at 279-280, 83 N. E. 202 (1907). " 'The principle appears to be that invitation is inferred where there is a common interest or mutual advantage, while a license is inferred where the object is the mere pleasure or benefit of the person using it,' " quoted from CAMPBELL, NEGLIGENCE, in Bennett v. Louisville & N. R. R., 102 U. S. 577 at 584-585, 26 L. Ed. 235 (1880).

[14] Lunt v. Post Printing & Pub. Co., 48 Colo. 316 at 325, 110 P. 203, 30 L. R. A. (N. S.) 60 (1910), where the court says, "When the right to enter is dependent upon an invitation, it is the 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. . . . The occupant may stand at the boundary of his premises and forbid the entrance of firemen thereon, and he may attempt to keep the firemen

officers enter under a right conferred by the law and it would not avail the occupant to stand at the border of his premises and object, the implication of an invitation is rebutted. It is not to be presumed, however, that landowners habitually burn down their buildings for the purpose of collecting insurance, which would seem to be the only circumstance in which the entrance of the fireman would not be a benefit to the occupant. The law should not recognize that the putting out of a fire would not be a benefit to the occasional criminal. When we fall back on benefit to the landowner as the criterion of an invitee, and consider that those persons who would exclude the fireman from their premises are probably not deserving of recognition in law, the argument loses its force. The very existence of municipal fire and police departments is a strong indication that the law-abiding majority want protection from fire and thieves. While the benefit to the landowner would, concededly, be the greatest where the fire is on his own property, it does not follow that he derives no benefit from the entry of a fireman for the purpose of fighting a fire next door. Surely he is interested in controlling the fire so that it will not spread to his property.

Professor Harper has adopted this view point and advocates the denomination of firemen and policemen as invitees, with the correspondingly increased duties to them on the part of the landowner, saying:[15] "The question cannot be regarded as settled, but the weight of reason seems to be entirely with the latter view [i.e., that which regards them as invitees]. Such a person enters by reason of a social duty that the law should protect. All occupiers of land should share the burden incident to the discharge of these obligations by public employees." Professor Bohlen, on the other hand, has taken the stand that this would put too great a burden on the landowner,[16] requiring him to keep all parts of his premises shipshape against the possible visit of such a person, although he considers[17] that the New York Court of Appeals reached a proper conclusion in the case of *Meiers v. Fred Koch Brewery*.[18] This case, although a leading one in the field,

therefrom, yet the firemen may brush him aside and with impunity enter the premises over his protests, in discharge of their duty. So that the occupant has no more to do with permitting the firemen to enter than any other of the public."

[15] HARPER, TORTS, § 96 (1933).

[16] Bohlen, "The Duty of a Landowner Towards Those Entering His Premises of Their Own Right," 69 UNIV. PA. L. REV. 142, 237, 340 at 350-351 (1921), reprinted in BOHLEN, STUDIES IN THE LAW OF TORTS, 156 at 193-194 (1926): "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."

[17] Bohlen, op. cit. note 16. The article is a discussion of this case.

[18] 229 N. Y. 10, 127 N. E. 491, 13 A. L. R. 628 at 633 and note (1920).

stands practically alone in its holding that the landowner is liable to a fireman for a negligent condition of a prepared way of approach to to the premises, putting him as to this part of the premises in the class of an invitee, and inferring that as to the remainder he is to be treated as a licensee. Although the court carefully restricts the decision in this case to the facts before it, the reasoning involved could well be extended to make the fireman an invitee as to the entire premises. Rejecting the theory that the fireman is a bare licensee, the court holds that "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" may recover damages from the occupant,[19] in effect extending to the fireman the duty which could previously only have been claimed by an invitee. The principle involved seems to be that as the landowner was under a duty to someone to keep this portion of his premises reasonably safe, the protection of the duty will be extended to the fireman. Once established, why cannot this principle be extended to all parts of the premises as to which the landowner is under a duty to anyone to maintain them in a reasonably safe condition? Inasmuch as the landowner is under a duty to someone, notably employees,[20] to keep most of his entire premises in a safe condition, there would seem to be an answer to the contention that considering a fireman an invitee places too great a burden on the landowner. The answer is that it does not increase the burden on the landowner, there being already a duty to maintain the premises in a safe condition, but merely extends the protection of a duty already in existence.

Although the courts have nearly universally applied the epithet "licensee" to firemen and policemen who are on another's premises in the performance of their duties, they have been able to find that, in the case of other types of public employees, there is sufficient advantage to the landowner to justify calling the visitor an invitee. Thus postmen have quite generally been included in this category,[21] as has a water-meter reader,[22] a municipal offal collector,[23] a customs

[19] Id. at p. 17.

[20] Baltimore & Potomac R. R. v. Mackey, 157 U. S. 72, 15 S. Ct. 491 (1895); Union Pac. Ry. v. O'Brien, 161 U. S. 451, 16 S. Ct. 618 (1896); Kreigh v. Westinghouse, Church, Kerr & Co., 214 U. S. 249, 29 S. Ct. 619 (1909).

[21] Paubel v. Hitz, (Mo. 1936) 96 S. W. (2d) 369; Sutton v. Penn, 238 Ill. App. 182 (1925); Gordon v. Cummings, 152 Mass. 513, 25 N. E. 978, 9 L. R. A. 640 (1890).

[22] Finnegan v. Fall River Gas Works, 159 Mass. 311, 34 N. E. 523 (1893).

[23] Toomey v. Sanborn, 146 Mass. 28, 14 N. E. 921 (1888).

inspector,[24] and a revenue inspector.[25] In just what way the landowner derives a greater benefit from the visit of one of these officials than from the visit of a fireman to prevent the destruction of his property is difficult to see.

It is submitted that, inasmuch as the authority for denominating firemen and policemen licensees is not in point, the reason of the rule is unsound, the rule disregards the fundamental principle of benefit to the landowner, and a contrary rule would not unreasonably add to the burden of the landowner, firemen and policemen who enter another's premises in performance of their duties should be considered as invitees and the landowner should be liable to them for an injury caused by an unsafe condition of the premises.

[24] Low v. Grand Trunk Ry., 72 Me. 313, 39 Am. Rep. 331 (1881).

[25] Anderson & Nelson Distilleries Co. v. Hair, 103 Ky. 196, 44 S. W. 658 (1898).