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Torts—Property Owner's Liability For Injuries to Public Employees

P, a policeman, was injured when he fell into an open excavation on the premises of the defendant church, while investigating for reported prowlers at night. *P* recovered damages in a negligence action and *D* appealed. *Held*, reversed, judgment for defendants, a policeman entering upon private property in the performance of his duty without express or implied invitation is a mere licensee and the owner correspondingly owes him no duty except to refrain from injuring him by active negligence or wilful and wanton conduct. *Scheurer v. Trustees of the Open Bible Church*, 192 N.E.2d 38 (Ohio 1953).

Courts have long been troubled concerning the landowners' and occupants' duty to public officers and servants who enter upon private premises in performance of their duties. It is often difficult to classify such individuals into any of the three broad categories by which the law determines the status of the one entering upon the land—trespasser, licensee, or invitee. Since the entry is privileged, it can be agreed that the public servant is not a trespasser, but the problem arises in attempting to call him either licensee or invitee. The distinction is important because the law charges the occupant with greater duty toward the latter; he must make the premises safe for the invitee, or at least warn him of any danger of which he, the owner, knows or has reason to know. The two classes have generally been differentiated on the theory that the licensee is one who enters with the possessor's consent, but no more, while the invitee is one who comes for an economic purpose of the occupant, or at least in response to an implied invitation and assurance that the premises have been made safe for him. PROSSER, TORTS §§ 77-78 (2d ed. 1955).

Using the "economic purpose" rule as a guide, courts have deemed it reasonable to place several kinds of public employees in the invitee class. The case of *Paubel v. Hitz*, 339 Mo. 274, 96 S.W.2d 369 (1936) involved a postman who was injured on private premises while performing his employment, and the court accorded him the status of a business visitor, although recovery was denied on other grounds. Long before even the *Paubel* holding, it had been held that providing a direct pecuniary advantage to the occupier was not a requisite to being an invitee; rather a mere possible or indirect economic benefit was sufficient. Thus garbage collectors, water

meter readers, and even tax collectors, were classified as invitees. *Anderson & Nelson Distilling Co. v. Hair*, 103 Ky. 196, 44 S.W. 658 (1898); *Finnegan v. Fall River Gas Works*, 159 Mass. 311, 34 N.E. 523 (1893); *Toomey v. Sanborn*, 146 Mass. 28, 14 N.E. 921 (1888). However, when the injured party was a fireman, or, as in the instant case, a policeman, the courts have with few exceptions held these individuals to be no more than licensees. Since the work of the police or fireman would certainly confer an economic benefit upon the landowner equal to that bestowed by the tax collector, the distinction is based upon the grounds that collectors, inspectors, postmen, etc., come upon the premises at regular hours and intervals, by the usual entrances, and thus their coming is to be reasonably expected. The policeman or fireman may enter at odd hours and by unusual means; therefore, to charge the owner with the duty to prepare for such irregular visits would place too great a burden on property owners. PROSSER, *op. cit. supra* § 78, Annot., 86 A.L.R.2d 1205 (1962).

Some writers and judges expressed dissatisfaction with the strict early rule. One view was that the basis for distinction, though basically sound, could be modified in some situations. In *Meiers v. Fred Koch Brewery*, 229 N.Y. 10, 127 N.E. 491 (1920), the court took the position that if a fireman does enter the premises by the usual entrances open to the public, he should be given the same protection as the business invitee. This holding was cited with approval in 69 U. PA. L. REV. 142, 237, 340, (1921) and 35 MICH. L. REV. 1157 (1937), in which both writers agreed that regarding usual means of entrance the property owner already owed a duty to someone, so it would not be increasing the property owner's burden to include the fireman in the protection afforded to the business visitor when the fireman arrives at the usual entrances. The Pennsylvania law review comment did emphasize that it would be a mistake to give the fireman invitee status on all parts of the premises since this would be requiring too much of the property owner. A recent New York case involving a policeman re-affirmed the modification theory set forth in the *Meiers* decision. *Larson v. First Nat'l Bank*, 37 Misc. 2d 678, 236 N.Y.S.2d 297 (Sup. Ct. 1962). See PROSSER *op. cit. supra* § 78.

Even without any deviation from the strict rule, it has been recognized that in certain situations the circumstances will be such that the injured party is obviously an invitee. For example, a city fireman

answering a call outside the city limits was treated as an invitee in *Buckeye Cotton Oil Co. v. Campagna*, 146 Tenn. 389, 242 S.W. 646 (1922). In another case, a police officer who was injured while standing guard outside a stadium to prevent fights was held an invitee because he was there at the express request of university officials. *Leahy v. State*, 46 N.Y.S.2d 310 (Ct. Cl. 1944). The expressed invitation also was the deciding point for a similar holding in *Williams v. St. L.—S.F. Ry. Co.*, 176 Okla. 465, 56 P.2d 815 (1936).

Presently, in jurisdictions which have encountered the problem, only one state, Illinois, has rejected the licensee concept and given the police and firemen invitee status. The Illinois court in *Dini v. Naiditch*, 20 Ill.2d 406, 170 N.E.2d 881 (1960), felt that times had changed since the establishment of the common-law rule and that *stare decisis* alone was not sufficient reason to maintain an out-dated view.

In earlier comments on the question, it has been urged by several writers that the police and firemen should be declared invitees in all instances, apparently on no other grounds than the social "injustice" implied by excluding them from the protection given to other public servants, and regardless of the increased burden on the landowner. 35 MICH. L. REV., *supra*, 2 MO. L. REV. 110 (1937). Also, a writer in 22 MINN. L. REV. 898 (1938), appeared to advocate a flexible rule applicable to each case, in which the visitor's status would be determined by: (1) the benefit accruing to the owner, and (2) the foreseeability of the visitor's presence at the particular situs of the injury.

In the principal case, the Ohio court discussed the social aspects inherent in the established majority rule—specifically the idea of possible "unfairness" in making the policeman bear the burden of a loss suffered through no fault of his own. But, said the court, the Ohio legislature had made a moot point of the question because policemen and firemen had been included in the Ohio workmen's compensation coverage, thus shifting the burden of loss to all taxpayers. A dissenting judge argued that workmen's compensation coverage should have no effect on an injured party's right to recover from a wrong-doer. (The same dissent protested the absurdity of treating a tax collector or safety inspector as a business guest while excluding a policeman from that category.)

The West Virginia Supreme Court of Appeals has apparently not been presented with a case similar to the case at bar. Without the sometimes restrictive bonds of precedent, West Virginia would be free to adopt the reasonable New York view, which appears to best satisfy the problem of balancing property and personal interest.

Victor Alfred Barone

ABSTRACTS

Federal Courts—Abstention Doctrine—Preserving Right to Federal Determination of Constitutional Issue

Ps, graduates of schools of chiropractic, sought to practice in Louisiana without complying with the educational requirements of the Louisiana Medical Practice Act. LA. STAT. ANN. TIT. 37, §§ 1261-1290 (1952). *Ps* brought this action against *D* in the federal district court for an injunction and a declaration that the Act violated the fourteenth amendment. The district court refused to hear the case until the state court could determine the applicable issues of state law. *Ps* submitted all the legal issues, both state and federal, to the state court. The state intermediate appellate court held that the Act applied to chiropractors and, as applied to *Ps*, it did not violate the fourteenth amendment. *Ps* attempted to return the proceedings to the federal district court but the district court upheld *D*'s motion that the courts of Louisiana had passed on the federal issues raised, and thus the proper remedy was by appeal to the United States Supreme Court. *Held*, reversed. The district court should rule on the merits of whether the Act violated the fourteenth amendment. Although *Ps* submitted their claims to the state court for decision, *Ps* did not forego their right to return to the federal district court when *Ps*' actions were based on a mistaken view that they were required to litigate their federal claims in the state court. *England v. Louisiana State Bd. of Medical Examiners*, 84 Sup. Ct. 461 (1964).

One of the biggest problems that has arisen is the subsequent course of a case once the abstention doctrine has been applied. In theory the doctrine does not involve the abdication of federal jurisdiction but only the postponement of its exercise until the state issues are determined. *Harrison v. NAACP*, 360 U.S. 167 (1958). Frequently, the complaining party, after the abstention doctrine has