William & Mary Law Review

Volume 5 (1964)
Issue 2

Article 11

April 1964

Torts - Policeman as Licensee

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TORTS

Policeman as Licensee

On July 10, 1963, the Ohio Supreme Court reversed two lower court decisions by ruling that a policeman, in the performance of his duty, could not recover after falling into an unguarded and unlighted excavation.[1] The excavation was on the defendant's premises and the plaintiff was on the property during the night while investigating a possible break-in. The court decided as per the majority rule, that a policeman is a mere licensee on privately owned premises and enters not by express or implied invitation but under authority of law. It is all but universally held[2] that the owner of property is not liable for the personal injuries of a licensee unless a statute to protect such people is violated[3] or if there is willful or wanton misconduct or some affirmative act of negligence.[4] None of these conditions were present in the case in point.

In most of the early decisions which involved personal injuries to licensees the courts felt that the owner of the premises should not be liable unless the injury was intentional, willful or wanton.[5] However, a more humane and reasonable outlook has been taken recently and the courts have held that the owner of such premises must warn a licensee of any "traps" or concealed dangerous conditions.[6] The owner is now also held liable for any active acts of negligence by him or his agents.[7] There is a trend toward broadening the class of people who are now considered invitees or "business guests." Public employees, such as meat inspectors,[8] building inspectors,[9] garbage collectors,[10] post-

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1 Scheurer v. Trustees of Open Bible Church, 192 N.E.2d 38.
2 *Prosser on Torts*—2nd Ed., p. 461 and cases cited.
Restatement of Torts—Sec. 341.
C.J.S.—65—Negligence—p. 482 and cases cited.
3 Meiers v. Fred Kock Brewery, 229 N.Y. 10, 127 N.E. 491, 13 A.L.R. 633 (1920).
4 Penn. R. Co. v. Vitti, Admr., 111 Ohio St. 670, 677, 146 N.E., 96 (1924).
5 O'Brien v. Union Freight R. Co., 209 Mass. 449, 95 N.E. 861 (1911); Cleveland, C., C. & St. L. R. Co. v. Potter, 1925, 113 Ohio St. 591, 150 N.E. 44 (1925).
6 Smith v. Southwest Missouri R. Co., 1933, 333 Mo. 314, 62 S.W.2d 761 (1933).
7 Supra note 4.
8 Swift & Co. v. Schuster, 10 Cir. 1951, 192 F.2d 615.
9 Fred Howland, v. Morris, 143 Fla. 189, 196 So. 472 (1940).
10 Toomey v. Sanborn, 146 Mass. 28, 14 N.E. 921 (1888).

men,[11] and meter readers[12] have been given the same protection as invitees. The importance of this is that an occupier of private property owes the duty of ordinary care to make the premises safe for the invitees[13] and, therefore, the policeman in *Scheurer* v. *Trustees of the Open Bible Church* would have been able to recover had he been considered an invitee. This problem has yet to be considered in Virginia. However, there is no reason to believe that the Virginia courts would rule contra to the majority.

It seems odd to include all public employees other than policemen (and firemen)[14] in the class of invitees while so noticeably refusing this privilege to the officers of the law. A licensee is defined as one who

> ". . . is on the premises by permission or sufferance only, and *not* by virtue of any business or contractual relation with the owner or occupant inuring to the mutual benefit of both . . ."
>
> ". . . and in that he is a licensee, or may be inferred to be such, only where his entry or presence on the premises is merely in his *own* interest and for his *own* purposes, benefit, convenience, or pleasure, or on business with others than the owner of the premises, so that the *distinction (between an invitee and a licensee) turns largely on the nature of the business that brings the person on the premises*, rather than the words or acts of the owner which precede his coming." [15]

From this widely accepted definition it is difficult to understand why the policeman is not classified as an invitee. It is quite obvious that the policeman, while performing his official function, is not on the premises for his *own* pleasure or benefit. Rather, the person who benefits from his presence is the property owner. Although his presence does not make foreseeable any economic gain, it is highly possible that he will prevent an economic *loss* to the owner.

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[11] Paubel v. Hitz, 1936, 339 Mo. 274, 96 S.W.2d 369 (1936).
[12] Sheffield Co. v. Phillips, 1943, 69 Ga. App. 41, 24 S.E.2d 834 (1943).
[13] *Prosser on Torts*—2nd ed.—p. 452.
[14] Steinwedel v. Hilbert, 149 Md. 121, 131 A. 44 (1925); Aldworth v. F. W. Woolworth Co., 295 Mass. 344, 3 N.E.2d 1008 (1936).
[15] *C.J.S.*—65—Neg., p. 481 (emphasis added).

In *Scheurer* v. *Trustees of the Open Bible Church* the court, realizing this enigma, attempted to meet it with these solutions: the policeman is by precedent held to be a licensee; the policeman enters the premises under authority of law and therefore may enter at unforeseeable times when the owner could not conceivably know of his presence or give warning of hidden dangers; the service which the policeman performs is to the community as a whole and therefore the community, and not the individual, should be penalized if injury should be sustained in the line of duty.[16] The first explanation (stare decisis) is valid only if retained because it is the logical and reasonable view, or if to change it would mean destroying many rights commonly accepted today. But this, of course, is not to say that when a precedent follows time to illogic it should still be preserved. Indeed, it would appear that the policeman-licensee doctrine is doing just that, if it were not for the second and strongest point in its behalf which the court stated in *Scheurer*.

Invitees are allowed to recover for personal injuries they sustain without fault because it is deemed that they are "invited" to enter premises which are impliedly safe for their occupation.[17] This duty of affirmative care imposed upon the owner of the premises is the obligation he owes for the benefit which he receives. The major difference between the invitee and the policeman is that the invitee is *expected* to be on the premises and so can be warned of any hazards; of course, this is nearly impossible as to a policeman who may enter at any time and under the most unusual conditions. The owner in the latter case has little opportunity to protect himself by offering warning. "A man who climbs in through a basement window in search of a fire or a thief cannot expect any assurance that he will not find a bulldog in the cellar." [18]

The court's third point was that society should pay if the policeman is injured. Ohio accomplishes this by including the police under Workmen's Compensation. This, however, would appear to be more of a justification than an argument. Although

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16 Scheurer v. Trustees of Open Bible Church, *op. cit.*
17 *Prosser on Torts*, *op. cit.*, p. 454;
Restatement of Torts, Sec. 332, 343, comment a.
18 *Prosser on Torts*, *op. cit.*, p. 462.

it is true that society in general does benefit from the policeman's services it is a more concrete service to the individual property owner he is protecting at the moment of the policeman's injury. The dissenting opinion in *Scheurer* urged, too, that damages recovered under Workmen's Compensation are usually for less than those obtained through a personal action for negligence.[19]

Only Illinois has thus far completely rejected the policeman-licensee doctrine in favor of a policeman-invitee rule. That Supreme Court stated,

> ". . . it is our opinion that since the common-law rule labelling firemen (policemen) as licensees is but an illogical anachronism, orginating in a vastly different social order, and pock-marked by judicial refinements, it should not be perpetuated in the name of '*stare decisis*'. That doctrine does not confine our courts to the 'Calf Path', nor to any rule currently enjoying a numerical superiority of adherents. '*Stare decisis*' ought not to be the excuse for decision where reason is lacking." [20]

But, "Although," as Prosser states, "there has been long continued criticism from legal writing directed at the rule denying recovery to firemen and policemen, with occasional dissenting opinions, and even doubts expressed by the majority applying the rule, the Illinois case (*Dini* v. *Naiditch*) thus far stands alone in rejecting it outright." [21]

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[19] Scheurer v. Trustees of Open Bible Church, *op. cit.*
[20] Dini v. Naiditch, 20 Ill. 2nd. 406, 170 N.E.2d 881 (1960).
[21] Prosser and Smith, *Cases and Materials on Torts*, p. 528.