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Firemen's Recovery From Negligent Landowners

Kenneth D. Stern*

The right of a fireman or policeman to recover from a negligent landowner for injuries suffered while the fireman or policeman is on the landowner's property in an official capacity is a question which has produced a variety of answers by the various courts. While surveys of the law in this area are available, it appears that a study of the rationale underlying the various arguments dealing with the matter is called for. Because of the basic similarity in the circumstances which justify the entrance of both policemen and firemen onto private property (namely, a danger to the public and to private persons and property), and because of the duty incumbent on both to answer that call, the general law surrounding the rights of both is similar, and in many respects identical. If any valid differentiation can be made, it would appear to lie in the fact that injuries to firemen often relate to the existence of the fire itself, which is the primary reason for the fireman's entrance onto the property in the first place. For that reason, this article concerns itself with the principal cases dealing with suits for injuries or death to firemen, and considers "policemen cases" only where they appear to be pertinent to the development of trends in the general field.

The "Licensee" Question

It has been common for courts to classify the fireman as a licensee while he is in the course of fighting a fire. Courts have held that the "permission" necessary for the fastening of licensee status is either given or implied by law. Perhaps the most cogent judicial argument in favor of any such distinction.

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1 See especially Annot., 86 A.L.R.2d 1205, and 6 De Paul L. Rev. 97 (1956-7).
2 See Scheurer v. Trustees of Open Bible Church, 175 Ohio St. 163, 192 N.E.2d 38 (1965), which involved a policeman as plaintiff, who sought to distinguish himself from firemen in order to avoid classification as a licensee. The court refused to draw any such distinction.

of classifying firemen as licensees appears in Baxley v. Williams Construction Co.:

The plaintiff occupied the status of a licensee (citing Todd v. Armour & Co.). We are requested to overrule this (Todd) case as being outmoded and the enunciation of an inhumane rule. We think the Todd decision is right. The rule is not based on the idea that a fireman is an inferior person who is not entitled to the same protection as other citizens invited upon premises by owners or others having control thereof. The rule is based on sound public policy. In the first place the right of a fireman to go upon premises to extinguish a fire is based on the permission of the law and not an invitation of the owner or occupier even if the owner or occupier turns in the alarm. Such a permission is one which the occupier or owner may not deny. The basic reason for the rule is that it is impossible to forecast the precise place where or time when the fireman's duties may call him, and to require an owner or occupier of premises to exercise at all times the high degree of care owed to an invitee in order to guard against so remote and unpredictable an injury would be an intolerable burden which it is not in the best interest of society to impose. (citing Anderson v. Cinnamon and Mulcrone v. Wagner.)

It has been said that if a fireman, because of his status as a licensee, could not recover from the landowner on whose premises he has been injured, then he ought not to be able to recover if the fire was caused by the negligence of someone other than the landowner, since "exempting (the landowner) from liability, but holding liable all others whose negligence starts the fire, is out of accord with the normal principle that the status of the injured party should not be controlled by the status of the wrongdoer." Yet, another jurisdiction has held that the fireman's licensee status is available for use as a defense only to those "in ownership or control of the place" where the fireman's injury occurred, and is not available to a party whose negligence caused the injury while the fireman was fighting a blaze on another's property.

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6 98 Ga. App. 662, 106 S.E.2d 799, 805 (1958). The court pointed out, however, that the premises involved were not open to the public. Had the injury occurred on a public passageway or other area which the fireman could reasonably have expected to have been kept in a good state of repair, and which the fireman was putting to its normal use, the result might have been different. See the discussion of "The 'Public Area' Rule," infra.

7 Supra, n. 3.

8 365 Mo. 304, 282 S.W.2d 445 (1955).

9 Supra, n. 3.


11 Texas Cities Gas Co. v. Dickens, 158 S.W.2d 1010 (1941), aff'd 140 Tex. 433, 168 S.W.2d 208, 211 (1943), where the Texas Supreme Court said, "The exemption of the (Continued on next page)
And where the fireman’s injury or death is caused by personal property on the landowner’s premises, as where a gasoline truck on the premises explodes, the landowner’s liability to a licensee fireman is the same, “because the rule with respect to the duty toward a licensee is not confined to real property but applies to personal property as well.”

The requirement of the landowner’s consent or invitation as a prerequisite to the classification of one as a licensee has given rise to serious questioning of the wisdom of attempting to use this classification when dealing with the fireman entering premises in the line of duty. In Meiers v. Fred Koch Brewery, an often cited 1920 New York case involving injuries sustained by a fire chief who, acting in response to a fire alarm, fell into an unguarded coal pit situated at the end of a driveway used by the public, it was said:

Here, assume there was no invitation, yet the plaintiff rightfully enters the premises. His right is not based on consent. No consent is necessary. No refusal of consent would avail. There is no implication as to what was intended by permission, for none was given. Certainly, not by the owner, unless by a strained construction of the facts he is held to have given it because the law requires him to give it. But, even if so, consent is but one side of the shield. Acceptance is the other. The plaintiff never voluntarily accepted permission to enter with the consequences that follow. As to him there was no consent. There was a command. Under such circumstances it is a misuse of terms to call him a bare licensee.

It was virtually inevitable that firemen and policemen would eventually be removed from the strict “licensee” classification. Yet courts were, and still are, reluctant to go so far as to call them “invitees.” The only logical alternative was to say that “firemen, policemen and similar personnel have a status sui generis . . . Any rule that flatly categorizes firemen with trespassers disregards the fact that firemen, unlike trespassers, enter rightfully. Any rule that flatly categorizes firemen with invitees or licensees disregards the fact that firemen, unlike either of the latter, may enter premises without invitation or license of the owner. . . Since firemen have the unique status just described, it follows that the duties owed

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to them may properly be unique."14 The *sui generis* rule is being accepted today15 and is leading to a more explicit delineation of the duties owed by the landowner to a policeman or fireman.16

When a fire company responds to a call outside the city limits, where it has no duty to respond and no right to enter the owner's premises without an invitation, the firemen are *invitees*, even where they are ordinarily considered licensees.17 The same is true when a fire chief, answering a call outside his own jurisdiction, "presses" into service a man not a fireman, even if the fire chief himself would have been a licensee.18

Courts hesitate, generally for the reasons stated in the *Baxley* case,19 to classify a fireman as an invitee. A 1953 Pennsylvania Common Pleas decision,20 however, said that a fireman, crushed under a falling elevator counterweight, had been an "implied invitee" at the time.21 The landmark Illinois case of *Dini v. Naiditch*22 also extended to firemen the rights of an invitee.23

Aside from the questions of consent, invitation and right to enter, the matter of *benefit* is often used to determine the legal status of one on another's land. It has been said that even though a fireman enters for the benefit of the owner or occupant of a building, he is performing what is basically a *public function* which outweighs any private benefit to the occupant, and that a fireman is, therefore, a licensee.24 In holding a fireman to be a licensee, the Colorado Supreme Court said that firemen en-

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16 The Beedenbender and Miller cases (supra, n. 15) both limit the landowner's duties to a fireman under the *sui generis* rule to: a) keeping publicly-used premises (used as means of access) in a reasonably safe condition, and b) warning the fireman of an unusual and dangerous condition of which the landowner is or should be aware. And this same 2-duty rule was applied in Aravanis v. Eisenberg, supra, n. 3, which says that a fireman is a licensee *except* where these duties are violated. The "Public Area" and "Unusual Hazard" rules are discussed later in this article.
17 Buckeye Cotton Oil Co. v. Campagna, 146 Tenn. 389, 242 S.W. 646 (1922).
18 Clinkscales v. Mundkoski, 183 Okl. 12, 79 P.2d 562 (1938). The court here actually ignored the question of the status of a fireman who voluntarily answers a call outside his jurisdiction.
19 *Supra*, n. 6. See excerpt from opinion in text.
21 However, it had been determined as a matter of fact that the floor supporting the counterweight would have given way even in the absence of the fire, and the question of a fireman's recovery for injuries from hazards resulting from the fire itself was therefore not considered.
23 The case is discussed in the brief section on the Illinois rule, infra.
24 *Supra*, n. 3.
ter premises, "not in discharge of any private duty due from them to the occupant, but of a public duty which they owe to the public." And the court pointed out that "in populous cities," firemen are more concerned about preventing the spread of a blaze from the burning property than they are with preserving the property itself, although its preservation "also concerns them." 26

Yet courts in recent years have been increasingly disposed toward considering the benefits which accrue to the landowner whose burning property is entered by firemen. In Meiers v. Fred Koch Brewery, the lower court spoke of the fireman as discharging "a public duty on the premises beneficial to the owner." 26 The affirming opinion of the New York Court of Appeals acknowledged the interests of the landowner as an individual, "quite apart from his interests as one of the public." 27 The following year, an Ohio Court of Appeals asserted the existence of the landowner's private benefit in such cases, and went so far as to say that in cases "where there are no adjoining properties near enough to be in danger by the fire, the benefit resulting from (the fireman's) labor accrues wholly to the owner." 28 At the very least, courts tend to acknowledge the landowner's personal benefit, even if only to refer to it as "an incident of the protection which the public gives," 29 or as "incidental" to firemen "performing a duty owed to the public." 30 The more progressive view is that "firemen obviously confer on landowners economic and other benefits which are a recognized basis for imposing the common-law duty of reasonable care." 31

Safety Statutes

As a general rule, breach of a statutory duty will constitute conclusive evidence of negligence where the plaintiff is a member of the class sought to be protected, 32 but "the cases are not uniform as to whether a fireman is protected by a statute or ordinance requiring safety guards or precautions." 33 (In any event, an act which is wrongful merely be-

27 Supra, n. 13, 127 N.E. at 492.
31 Dini v. Naiditch, supra, n. 22.
33 Aravanis v. Eisenberg, supra, n. 3, in which the court pointed out that the question of negligence resulting from a statutory violation will be given judicial consideration only if raised by the plaintiff, since, "in Maryland, violations of a statute or ordinance are evidence of negligence, but do not constitute negligence per se."
cause it violates a statute must be shown to have been "the proximate [in the sense of reasonably foreseeable] cause of the accident."\(^\text{34}\)

**Exclusion from Protected Class**

Whether a fireman falls within the class sought to be protected usually is determined by factual circumstances in each case, rather than by some all-inclusive rule of law. For example, where a fireman sought to recover for injuries sustained while he was fighting a fire caused by negligent operation of the defendant's locomotive, and based his action on a statute fastening liability on railroads for damages to persons or property from fires set by its locomotives, the court said that such a statute "applies only to those so situated that as to them the operation of the railroad constitutes an extra fire hazard," and "does not apply to firemen . . . whose exposure results from an attempt to extinguish the fire."\(^\text{35}\) In a similar case, a fireman who fell when a poorly-maintained fire escape which he used as a platform from which to fight a fire on adjacent property sought to avail himself of a statute requiring the maintenance of means of escape from fires. The court held that the plaintiff was not entitled to the statute's protection since he had not been using the fire escape for the purpose designated in the statute, and was thus not in the protected class.\(^\text{36}\) It has been said that a fireman assumes the risk of violations of safety statutes, except as to "unusual hazards known to the property owner or occupant but unknown to him,"\(^\text{37}\) although this is by no means a universal rule (see following sections on "Inclusion" and "Assumption of Risk."). Where a safety statute expressly limits its scope to a given class of persons, not including firemen acting in the line of duty, a fireman will be precluded from recovering thereunder.\(^\text{38}\)

**Inclusion Within Protected Class**

If an ordinance in a municipal building code is so general in nature as to indicate that it was intended for the protection of "all persons lawfully within the designated buildings," it will be construed to protect a policeman or fireman entering the premises in the line of duty, since such

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34 Daggett v. Keshner, *supra*, n. 32.
36 Aldworth v. F. W. Woolworth Co., *supra*, n. 5, 3 N.E.2d at 1010.
38 Kelly v. Henry Muhs Co., 71 N.J.L. 358, 59 A. 23 (Sup.Ct. 1904). Here, a fireman fell through an open elevator shaft. A statute requiring elevators in factories to be protected referred to "the employment, safety (and) health . . . of operatives." (emphasis added); Eckes v. Stetler, *supra*, n. 3, wherein an elevator fell through a hatchway left open in violation of ordinance and injured the plaintiff fireman, who sued under a statute which gave a cause of action either to the board of fire commissioners (under a statute) or to the fire commissioner (by charter), but not to individual firemen. Said the court, "It has long been the settled law that, where a statute confers a right and therein prescribes a particular method of procedure for the enforcement of it, such provision furnishes the exclusive remedy, and must be followed." (90 N.Y.S. at 476-7).
a person has entered "in a lawful way for a legitimate purpose . . . and had a right to assume and act upon the assumption that the defendants were affording him the protection prescribed by the ordinance." This rule is well-founded in reason and was, as early as 1883, explicitly stated by the Massachusetts Supreme Court:

Even if (firemen and policemen) must encounter the danger arising from neglect of such precautions against obstructions and pitfalls as those invited or induced to enter have a right to expect, they may demand, as against the owners or occupants, that they observe the statute in the construction and management of their building.

As a general rule, where an act is enjoined or forbidden under a statutory penalty, and the failure to do the act enjoined or the doing of the act forbidden has contributed to an injury, the party thus in default is liable therefor to the party injured.

The rule that a statute or ordinance, "general in its terms," which seeks to regulate the maintenance of realty or other actions of owners or occupiers of land, for the safety of persons lawfully on the premises, is now widely held to include firemen, who have a right to rely on the assumption that all landowners are in compliance. However, in some jurisdictions which continue to hold a fireman to be a licensee, the existence of statutes general in nature will ordinarily not accrue to the benefit of a fireman, since, in such jurisdictions

The rule is 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 a fireman except those proximately resulting from willful or wanton negligence or a designed injury. (Emphasis added.)

39 Racine v. Morris, 201 N.Y. 240, 94 N.E. 884, 866 (1911), aff'g 136 App.Div. 467, 121 N.Y.S. 146. (emphasis added). See also discussion of this opinion at n. 98, infra.

40 Parker v. Barnard, supra, n. 29, 135 Mass. at 119-20. (A policeman, investigating the premises because an outer door had been left open at night, fell down an unguarded elevator shaft. The court, to explain its rationale in permitting recovery, said, "Were the case at bar that of a fireman . . . [injured in the line of duty] . . . he would have just ground of complaint that the protection which the statute had made it the duty of the owners or occupants to provide had not been afforded him."

41 Id; Racine v. Morris, supra, n. 39. Drake v. Fenton, 237 Pa. 8, 85 A. 14 (1912); Bandoz v. Daigger & Co., 255 Ill. App. 494 (1930) (This was under the now-forsaken Illinois rule that firemen are licensees); Carlock v. Westchester Lighting Co., 288 N.Y. 345, 197 N.E. 306 (1935); Maloney v. Hearst Hotels Corp., 274 N.Y. 106, 8 N.E.2d 296 (1937); Campbell v. Pure Oil Co., 15 N.J.Misc. 723, 194 A. 873 (1937); Dini v. Naiditch, supra, n. 22, which set the new Illinois rule. (See the discussion on Illinois, infra.)

Assumption of Risk, Unusual and Hidden Hazards and the Duty to Warn

All of the foregoing is nothing more than a review of attempts by the courts to use settled rules of law to deal with the fireman’s right of recovery, involving repeated references to licensee or sui generis status, discussions of “consent” and “invitation,” and the raising of the issue of whether firemen are within a class intended for protection by legislative enactments. But the courts go beyond these limiting frameworks and consider not only the question of a fireman’s relation to a landlord, but also the status of the two as individuals, just as though there were nothing unique in a fireman’s relation to the landowner or occupier. In order to do so, they must first justify their circumvention of the normally limiting status of the fireman.

It clearly cannot be said as a matter of law that the decedent as a fire patrolman assumed the risk of being killed in a gas explosion which resulted from the fire he officially attended. Such a risk was not ordinarily incident to the discharge of his duties nor did he have any actual or constructive knowledge of it with full appreciation of the special dangers confronting him.

* * * * *

It is one thing to say that a fireman who has gone into a danger zone must take what he gets, and quite another to say that a person who stops short of the danger zone cannot recover because he is a fireman.43

Thus, the courts relieve from liability the land occupier on whose property a fireman is injured, “where the injuries arise from a usual hazard which is the only reason for his being on the premises and which it is the very nature of his calling to encounter, absent some special factor,” 44 but where the “special factor” exists, the fireman can recover.

43 Ruhl v. City of Philadelphia, 346 Pa. 214, 29 A.2d 784, 787 (1943). (Emphasis added). And 16 years later, a Pennsylvania Common Pleas Court applied that distinction to deny recovery for personal injuries resulting in total disability to a fire chief who inhaled gas leaking from an abandoned refrigerator, while he was attempting to seal off the leak. The court reasoned:

If this were a hidden danger arising from some special or unforeseen negligence of defendants and not ordinarily incident to his duties, plaintiff’s position would be tenable, but the complaint here specifically sets forth that plaintiff was informed and fully aware of the fact that gas was escaping from some source in defendants’ building and concedes that before entering the premises he attempted to protect himself from the known present danger by placing a wet cloth over his face. We must find, then, under the authorities, that plaintiff assumed the risk of the danger. (emphasis added.)


44 Krauth v. Geller, supra, n. 15. The court held that assumption of risk exists unless the landowner is culpable of “negligence with respect to conditions creating undue risks of injury beyond those inevitably involved in firefighting . . . (W)here liability is found the emphasis is not upon culpability with respect to the inception of the fire but rather with respect to other risks . . . .” (emphasis added). This is the “undue risk” rule followed in Jackson v. Velveray Corp., 82 N.J.Super. 469, 198 A.2d 115, 118 (1964), where the court said:

It is important to understand what is meant by “undue risks of injury beyond (Continued on next page)
When the land occupier's negligence merely starts the fire and creates no "unusual hazards known to the property owner or occupant but unknown to (the fireman)," recovery is generally denied since "the trained fire fighter is equally cognizant of and better able to evaluate the unpredictable dangers involved" in the fire itself. The Nebraska Supreme Court has said that a fireman, to show that his injuries were caused by something other than dangers incidental to the fire itself, must prove "that his injuries were designed or proximately caused by willful or wanton negligence of such owner or occupant or by some hidden danger or peril upon the premises, known by the occupant or owner but unknown by the fireman . . . , and not, if reasonable opportunity is given, disclosed to such persons or their superiors, who were unable to observe the same by exercising ordinary care. Therefore, it is immaterial whether or not the fire was started by negligence . . . ." The rule, which re-

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those inevitably involved in fire fighting" (citing the Krauth case). We take the phrase "inherently involved" to mean "inherent." There are certain risks inherent in fire fighting: smoke, flame, and the like. The collapse of a floor, ceiling or wall of a burning building, without more, is a hazard a fireman must ordinarily anticipate. Undue risk beyond these inherent hazards is something more. It includes hidden perils, such as an open elevator shaft, storage of dangerous substances, and other conditions independent of the fire itself. (emphasis added).

An earlier (1937) New Jersey case, Campbell v. Pure Oil Co., supra, n. 41, 194 A. at 875, cited in Jackson v. Velveray, had said:

It cannot be said that a fireman has no protective rights whatever while engaged in the pursuit of his employment. It is contemplated that a fireman in the performance of his duty shall endeavor to extinguish fires however caused and encounter those risks and hazards which are ordinarily incidental to such an undertaking and which may reasonably be expected to exist in the situation in which he places himself. It does not follow that a fireman must be deemed as a matter of law to have voluntarily assumed all hidden, unknown, and extra-hazardous dangers which in the existing conditions would not be reasonably anticipated or foreseen. (emphasis added).

And for a well-reasoned argument in this regard, see Smith v. Twin State Gas & Electric Co., supra, n. 10, 144 A. at 62.

45 Buren v. Midwest Industries, Inc., supra, n. 15, citing Suttie v. Sun Oil Co., 15 Pa. D. & C. 3 (1931), which held, "The dangers incident to a fire and the risks involved in the effort to extinguish it are assumed by a fireman when he enters in the performance of his duty," since the fire itself is a "known and obvious danger," but that a defect which "existed independently of the fire and was neither created by nor an incident of it," constituted a "danger unknown and therefore unassumed." But the court was speaking of those risks which are necessarily incident to the act of fighting the fire. In its decision, the court, in discussing injuries to a fireman arising out of the landowner's negligence apart from the starting of the fire, referred to the earlier case of Drake v. Fenton, supra, n. 41, to illustrate the distinction. And it has been said, with regard to negligence which merely causes the fire without expanding the danger beyond that normally to be expected, that a fireman knowing that fires will occur from various causes, some culpable and some not, undertakes the work of extinguishing all fires without reference to how they were caused. The chance of injury in doing such work is necessarily assumed by him. This assumption arises from the nature and terms of the contract he made. He agreed to fight all such fires as should occur . . . (His contract) . . . establishes an express assumption of the risk here involved, and bars any recovery therefor.


moves the restrictions which a doctrinaire "licensee" classification im-
poses, is said to apply only where the property owner (or occupier) has
failed to warn of hidden dangers, or is guilty of statutory violation(s).47
As Maryland's highest court said in 1965:

It is when the fireman sustains injuries after the initial period of
his anticipated risk, or from perils not reasonably foreseeable as
part of that risk, that the justice of continuing to regard him as a
licensee only is questioned.48

Another factor may soon be widely dealt with in this regard. In
Jackson v. Velveray Corp., the court held, in denying recovery to a fire-
man, that an owner or occupant of land may be protected by a rule of
non-liability in some instances not only for creating a fire, but also for
negligence in causing its spread, "such as ordinary negligence in house-
keeping which tends to promote the spread of a fire after its inception
from other causes. Indeed, the two situations are often indistinguishable.
Correspondingly, the exception to the foregoing rule, namely, an owner's
or occupier's liability for creating undue risks of injury beyond those in-
evitably involved in firefighting, applies not only to the start of the fire
but also to its spread, e.g. cases involving the storing of a dangerous sub-
stance." 49

**Extension of the "Unusual Hazard" Rule**

Whether something constitutes an unusual hazard may depend on
the circumstances. It almost goes without saying that there are times
when the type of realty, or the use to which it is being put, is ample evi-
dence of what otherwise would be considered an unusual hazard. Thus,
gasoline stored at a garage does not constitute an unusual hazard of
which a fireman ought to be warned, since the storage of gasoline at a
garage is a matter of common knowledge.50 Yet, there may be other fac-
tors which supersede this ordinarily reasonable rule. In a 1964 Missouri
wrongful death action, the court dealt with a situation wherein the plain-
tiff's decedent, a fireman, had died while fighting a blaze at the defend-
ant's gasoline storage plant and filling station. The fireman had, of
course, been well aware of the existence of the stored gasoline. He was,
however, ignorant of the fact that one of the oil storage tanks was
equipped with an inadequate vent, which constituted a hidden defect,

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47 Aravanis v. Eisenberg, *supra*, n. 3, citing Scheurer v. Trustees of Open Bible
Church, *supra*, n. 2; Krauth v. Geller, *supra*, n. 15, Baxley v. Williams Construction
Co., *supra*, n. 6, which refused to classify firemen as invitees, and insisted on retain-
ing the licensee characterization; Anderson v. Cinnamon, *supra*, n. 8.


49 Jackson v. Velveray Corp., *supra*, n. 44 (emphasis added). Yet this is an unusual
analogy, and, in the opinion of this writer, not likely to be widely accepted, since
most factors which hasten the spread of a fire are readily apparent, not hidden.

increasing the ordinary hazard beyond its normal degree and producing a hazard that the plaintiff's decedent "was not bound to accept as a usual hazard of his profession." The court said, "(T)he law does not compel firemen in fighting a fire to assume all possible lurking hazards and risks." It has even been held that, where a fireman, exercising "ordinary prudence" for a man of his knowledge and experience, believes that a hazard has subsided and no longer presents a danger to him, he is not guilty of contributory negligence in ignoring the danger, and that defense is therefore not available for use by defendants whose own negligence resulted in the hazard and the fireman's injuries or death.

The fact that a fireman imperils his personal safety in performing his duties cannot be said to be contributory negligence as a matter of law. His "conduct must be viewed in the light of the conditions and circumstances then existing. . . . (He is) not treated as assuming obscure and unknown risks, which are not naturally incident to the occupation and which, in the existing conditions, would not be reasonably observed and appreciated." Where the evidence is not clear as to whether a fireman should have been aware of the danger which caused his injuries, the issues of assumption of risk and contributory negligence are facts for the jury.

51 Bartels v. Continental Oil Co., 384 S.W.2d 667, 669 (Mo. Sup. Ct. 1964). Plaintiff's decedent, fighting a fire at defendant's storage plant and filling station, was engulfed in a ball of flame when an improperly-vented storage tank exploded. The court held that a fireman could not be expected to know of such a hidden defect. And see also Lamb v. Sebach, 52 Ohio App. 362, 3 N.E.2d 686 (1935), discussed infra, in the section on Ohio. The facts were very similar to the Bartels case.

52 In this case, a carload of fireworks in a railroad yard.

53 Houston Belt & Terminal Ry. Co. v. O'Leary, 136 S.W. 601, 606 (Tex.Civ.App. 1911). The plaintiff's decedent had heard several explosions which had emanated from the car, but felt that the danger of explosion therefrom had ceased by the time he approached an adjacent oil car. He had been warned of the danger of explosion by the defendant's employees, but decided on his own that the danger had subsided. Notwithstanding the warning, and his classification as a licensee, his estate was allowed to recover since, the court said, the defendant had been guilty of continuing negligence: "the negligent act which caused the explosion will be regarded as having been committed at the time of the occurrence of each explosion." The court used this reasoning to circumvent the defense of intervening cause. See also Smith v. Twin State Gas & Electric Co., supra, n. 10. In that case, the defendant gas company's lines were thought to be leaking, and there was a possibility that the leak extended onto the premises in question, which were owned by a third party. The gas company, which knew of the possibility, took no action to investigate. Plaintiff's decedent, a fire chief, did. In his inspection, seeing that there was apparently very little gas present, he lit a match, which was determined to be accepted and proper procedure under the circumstances. Appearances proved misleading, and the resultant explosion killed the fire chief. His estate recovered, the court reasoning that he had had good reason to believe that the gas was present in very small quantity, but that the gas company, which dealt with the product, should have known better, and should have warned of the danger.

54 Campbell v. Pure Oil Co., supra, n. 41, 194 A. at 876.

55 Texas Cities Gas Co. v. Dickens, supra, n. 11; Osborne v. Tennessee Electric Power Co., 158 Tenn. 278, 12 S.W.2d 947, 951 (1929).
The Duty to Warn

Where a landowner knows of a fire hazard on his premises, the entrance onto the premises of a fire official for the purposes of checking into the matter "might reasonably and naturally be expected under the conditions which existed, and of which the defendant (landowner) had knowledge." 56 As a result, although the negligent party will not be liable for injuries resulting from dangers ordinarily incidental to the fire itself, he will be held answerable in damages where an obvious danger is hazardous beyond the foreseeable degree, provided that he had "superior knowledge of the (increased) chance of danger," unless he warns the firemen thereof. A fireman is entitled to warning, by a negligent and knowledgeable party, of a "special danger," which converts "the danger of which the risk was assumed into one which in a fair way it may be said the (fireman) did not bargain for in his contract of service," since a fireman's employment contract includes "no assumption of an unknown extrahazardous character" of the dangers present. 57 But where a fireman has the opportunity to apprise himself of the existence, nature and extent of dangers, as where they are "open and obvious and observed" by him, there is no duty to warn. That duty exists only as to "defects or conditions in the nature of hidden dangers." 58

(I)f the owner knows of the presence on the premises of officially privileged persons, such as firemen or policemen, is cognizant of a dangerous condition thereon, and has reason to believe that they are unaware of the danger, he has a duty to warn them of the condition and of the risk involved. 59

If the landowner or occupier reasonably mistakes one danger for another, this alone will not impose liability. For example, where a defendant landowner, a publishing company which used nitric acid in its printing process, mistook escaping acid fumes for smoke and turned in a fire alarm, it was held that there was no duty to warn responding firemen of either the existence or dangerous nature of nitric acid fumes. 60 "The warning required is such as a person of ordinary care and prudence would give under like or similar circumstances." 61

If a landowner falsely assures firemen that an open and obvious condition is not dangerous, knowing that it is, as where he tells them that gasoline storage barrels are empty when in fact he knows they are filled,

56 Smith v. Twin State Gas & Electric Co., 144 A. 783, 784 (1929) (hearing on Motion for Rehearing arising out of same case at 83 N.H. 439, 144 A. 57).
57 Id. (original case), at 144 A. 62.
59 Beedenbender v. Midtown Properties, Inc., supra, n. 15, 164 N.Y.S.2d at 281 (which involved a policeman). For a larger excerpt from this well-reasoned opinion, see the discussion of New York, (infra).
61 Mason Tire & Rubber Co. v. Lansinger, supra, n. 28.
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... is answerable in damages for injury or death to the fireman even if they are considered licensees. In justification of the imposition of the duty to warn, the Supreme Court of Minnesota has said:

Certainly, no meritorious reason can be advanced to justify the view that a property owner, with knowledge of a hidden peril, should be allowed to stand by in silence when a word of warning might save firemen from needless peril. The burden of a duty to warn of hidden perils falls lightly upon the landowner in comparison with the cost of his silence, which is frequently measured in the lives and limbs of firemen and in the sorrow and suffering of their families. Although firemen assume the usual risks incident to their entry upon premises made dangerous by the destructive effect of fire, there is no valid reason why they should be required to assume the extraordinary disk of hidden perils of which they might easily be warned. . . . (L)andowners and occupants alike owe a duty to firemen to warn them of hidden perils where the landowner or occupant has knowledge of the peril and the opportunity to give warning.

When there is a duty to warn, it will generally be fulfilled by giving warning to the first fireman to enter the premises, since to require actual warning to each firefighter would impose "too great a burden" on the landowner. To be actionable, the failure to fulfill the duty must have been a "proximate cause of the accident" causing the injury. The most frequent cases involving hidden and unusual hazards arise in those cases involving the storage or handling of explosive materials or substances either in a place where their existence, or the degree of the hazard presented, cannot reasonably be anticipated, or in a manner not commensurate with the degree of care which such storage or handling requires, or in such place or manner as to violate a safety statute, ordinance or regulation. In fact, it has been said that "the explosive mate-

62 Clinkscales v. Mundkoski, supra, n. 18.
63 Shypulski v. Waldorf Paper Products Co., supra, n. 14, 45 N.W.2d at 553.
65 Mason Tire & Rubber Co. v. Lansinger, supra, n. 28.
69 Cameron v. Kenyon-Connell Commercial Co., 22 Mont. 312, 56 P. 358 (1899); Pinson v. Young, 100 Kan. 452, 164 P. 1102 (1917); Bandosz v. Daigger & Co., supra, n. 41; Maloney v. Hearst Hotels Corp., supra, n. 34; Campbell v. Pure Oil Co., supra, n. 41; Dini v. Naiditch, supra, n. 22; Walker Hauling Co. v. Johnson, supra, n. 68; Rogers v. Cato Oil & Grease Co., supra, n. 58.

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rial cases are a good example of what is meant by letting one go into hidden peril." 70

The "Public Area" Rule

If there is one major consideration responsible for the courts' growing tendency to disregard legal technicalities in order to permit recovery by firemen (and policemen) who are injured by the negligence of landowners and occupiers, that consideration would have to be that the circumstances surrounding the entry onto the land often are similar to those involving the entry thereon by members of the general public. The distinction is clearly delineated at 2 Restatement of Torts 2d 226 (1965): where it is provided:

Section 345. Persons Entering in the Exercise of a Privilege

(1) Except as stated in Subsection (2), the liability of a possessor of land to one who enters the land only in the exercise of a privilege, for either a public or private purpose, and irrespective of the possessor's consent, is the same as the liability to a licensee.

(2) The liability of a possessor of land to a public officer or employee who enters the land in the performance of his public duty, and suffers harm because of a condition of a part of the land held open to the public, is the same as the liability to an invitee.

Such a view was held by the Supreme Judicial Court of Massachusetts in 1885 when it permitted recovery by a police officer for injuries sustained when he stepped into an open well concealed from view by a high curbing. The officer had come onto the property at the request of a tenant of the defendant, for the purpose of arresting another who was disturbing the peace. The area where he was injured was open and gave the impression of being a common approach to one of the buildings on the property. Said the court, "If the appearance of the premises is such as to point out a certain open space as the mode of approach, while it may not be the defendant's duty to take care of the whole open space as an approach, his duty to keep safe the approach offered, whatever it is, is as great as if it were a wrought avenue." 71 The basic reason for such a stand on the issue is that "the owner can reasonably anticipate" that an officer or fireman will use an existing passageway on the premises, and the owner will therefore be liable for injuries resulting from "the carelessness of the owner in failing to warn (the fireman) of an unsafe passageway." 72

The rule would not apply where, for example, the porch on the side of a building collapses while being used as a platform from which firemen are fighting a fire, since the porch would not have been "used as it

70 Anderson v. Cinnamon, supra, n. 8.
72 Meiers v. Fred Koch Brewery, supra, n. 26, 167 N.Y.S. at 743.
was intended to be used.” 73 In other words, the rule is applicable only as to areas “ordinarily utilized for passage through the premises.” 74

Yet, the factors precluding the use of the rule are factual in nature, and do not depend on whether the jurisdiction classifies firemen as licensees, *sui generis* or invitees. 75

**Implementation of the Rationale: Three Approaches**

Having thus reviewed the rationale underlying the ability of firemen to recover for injuries sustained as a result of the negligence of landowners and occupiers, we may now consider the means by which the reasoning involved is implemented to make reality as just as the theory which purports to serve it. To be considered are three jurisdictions whose approaches differ greatly: Ohio, Illinois and New York.

**Ohio**

Our own State has always had the rule that a fireman (or policeman) on the premises in the line of duty is a licensee. 76 The rule was recently affirmed by the Ohio Supreme Court, 77 which stated the grounds under which recovery may be had:

Reasoning and experience support the public policy that the duty of an owner of private premises toward policemen and firemen who come upon his premises by authority of law in the performance of their official duties and suffer injury should be only that duty owed to a licensee, and that the owner should only be liable where such

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73 Anderson v. Cinnamon, *supra*, n. 8, 282 S.W.2d at 448, refusing to follow Schwab v. Rubel Corp., *supra*, n. 64, and saying that Missouri law does not require a warning to licensees regarding known dangers, short of those constituting unusual hazards. The Anderson case further held that the possessor of land was not shown to have known that firemen would use the porch, and his failure to warn them after they went onto the porch was not active negligence and thus not actionable.

74 Beedenbender v. Midtown Properties, Inc. and Miller v. Roman Catholic Church of St. Stephen, both *supra*, n. 15.

75 Taylor v. Palmetto Theater Co., 204 S.C. 1, 28 S.E.2d 538 (1943). In an ingeniously worded petition, the plaintiff, a fireman injured while fighting a fire in a theater passageway, managed to satisfy the South Carolina Supreme Court that the defendant had owed him the same duties it owed the general public, since the case involved a pitfall in a public passageway which could be expected to be used by all “persons lawfully entering the premises for a public or private purpose.” The court said (at 28 S.E.2d 541), “In the circumstances alleged in the complaint, the fact that the appellant was a fireman, and in the discharge of his duties as such, should not limit his cause of action to the right or permission to enter the premises of respondent extended by the law.” (And this in a state which, to this day, classifies a fireman as a licensee. See Baxley v. Williams Construction Co., *supra*, n. 6.)

76 Mason Tire & Rubber Co. v. Lansinger, 15 Ohio App. 310, 20 Ohio L. R. 577 (1921), aff’d on app. on procedural grounds, 108 Ohio St. 377, 140 N.E. 770 (1923); Eckert, Admr. v. Refiners Oil Co., 17 Ohio App. 221 (1923); Cities Service Oil Co. v. Dixon, 14 Ohio L. Abs. 203 (Ohio App. 7th Dist. 1932); Cities Service Oil Co. v. Sause, 14 Ohio L. Abs. 429 (Ohio App. 7th Dist. 1932), error dism’d 128 Ohio St. 43, 190 N.E. 408; James v. Cities Service Oil Co., *supra*, n. 67; City of Youngstown v. Cities Service Oil Co., 66 Ohio App. 97, 31 N.E.2d 876 (1940). (All the cases involving Cities Service Oil Co. arose out of the same incident.)

77 In Scheurer v. Trustees of Open Bible Church, 175 Ohio St. 183, 192 N.E.2d 38 (1963). See n. 2, *supra*.
injury is inflicted by willful or wanton misconduct, or an active act of negligence, or by a violation of a duty created by statute or ordinance (for the benefit of policemen or firemen), or where a hidden trap caused the injury or where the owner had knowledge of the presence of the policeman or fireman on the premises and the opportunity to warn him of the danger and failed to do so.\(^{78}\)

In Ohio, there is no recovery where negligence merely started the fire and created no unforeseeable hazards.\(^{79}\) However, a hidden hazard, absent warning, \emph{will} justify recovery.\(^{80}\) A warning, of course, "is not necessary where the danger is open and can be seen,"\(^ {81}\) and a fireman who could not know of a dangerous condition cannot be said to have assumed the risk thereof.\(^ {82}\) Whether something constitutes a "reasonable warning" depends on

the facts and circumstances of the case—the language used, the conduct, the tone of voice, the facts and circumstances surrounding the same, the time of giving the warning, and whether or not it was reasonable, so as to give the party warned an opportunity to act upon the warning in order to save himself.\(^ {83}\)

And the warning must be "such as a person of ordinary care and prudence would give under like or similar circumstances."\(^ {84}\) Knowledge on the part of, or warning to, the captain or other members of the fire department normally would be notice to all other members of a dangerous condition.\(^ {85}\) The duty to warn arises where there exists a condition which could reasonably be anticipated as hazardous to firefighters, if the danger is unknown to them and "could not be discovered with ordinary care under the then existing circumstances."\(^ {86}\)

\(^{78}\) \textit{Id.}, 192 N.E.2d at 43. The court in \textit{Scheurer} refused to agree with the liberal ruling in \textit{Dini v. Naiditch}, the landmark Illinois case discussed under the heading of \textit{Illinois}, \textit{infra}, and said that the State of Ohio had long held firemen and policemen to be licensees. Yet a vigorous dissent by Judge Rankin Gibson urged the overruling of the licensee rule in favor of an invitee classification, basing his contention on the fact that building inspectors, revenue agents, health inspectors, sanitary inspectors, safety inspectors, garbage collectors, city water-meter readers, United States postmen, tax collectors, and customs collectors have all been given the rights of invitees or classed as such.

The court also mentioned the almost identical 1917 N.Y. case of \textit{Meiers v. Fred Koch Brewery}, \textit{supra}, n. 26, but ignored that case's application of the Public Area Rule. The rule, if applied in \textit{Scheurer}, would have required a finding for plaintiff, who fell at night into an unguarded pit in a driveway.\(^ {79}\)

\(^{80}\) \textit{Cities Service Oil Co. v. Dixon}; \textit{Cities Service Oil Co. v. Sause}; \textit{James v. Cities Service Oil Co.}, (all \textit{supra}, n. 76); \textit{Scheurer v. Trustees of Open Bible Church}, \textit{supra}, n. 77.

\(^{81}\) \textit{Cities Service Oil Co. v. Dixon}, \textit{supra}, n. 76.

\(^{82}\) \textit{Ibid.}\(^ {83}\) \textit{Mason Tire & Rubber Co. v. Lansinger}, \textit{supra}, n. 28, 140 N.E. at 771 (Ohio Sup. Ct.).

\(^{84}\) \textit{Id.}, par. 3 of the syllabus in the opinion of the Court of Appeals, 15 Ohio App. at 310.

\(^{85}\) \textit{Cities Service Oil Co. v. Sause} and \textit{Mason Tire & Rubber Co.}, both \textit{supra}, n. 76.

\(^{86}\) \textit{Mason Tire & Rubber Co. v. Lansinger} (App.), \textit{supra}, n. 76.
The Ohio Supreme Court has expressly refused to permit recovery by a policeman or fireman who suffers injury other than as provided for in the general rule as to liability to licensees. In such case, "the owner of the premises is not liable," and the fireman or policeman is limited to such recovery as he may obtain under Ohio's workmen's compensation law (Ohio Rev. Code § 4123.01), less any amount received from a municipally-established and -maintained pension fund (§ 4123.02).

Outside of the limiting instances, if the circumstances warrant, an Ohio fireman will benefit from a reasonable interpretation of the facts and obtain recovery. In a case bearing a strong resemblance to Bartels v. Continental Oil Co., the plaintiff fireman answered a call to fight a fire on the defendant's premises which contained four gasoline storage tanks whose existence was apparent. The tanks were in line, and the blaze raged over and around the first in line. That tank had a two-inch vent, considered adequate to allow gas vapors to escape. The other three tanks, more distant from the fire, bore vents of inadequate size, less than the two-inch size customary in the trade. The properly-vented tank survived the ordeal, but the number 2 tank, which the fire eventually reached, exploded, inflicting serious injuries on the plaintiff. The court held that "it surely was a question of fact for the jury to determine whether it was or was not the affirmative act of the defendants in restricting the size of the vent on Tank No. 2 that caused the plaintiff's injury, and which was the proximate cause thereof."

Ohio, then, adheres to the old-line common law restriction placing firemen and policemen in the licensee class, but, within the limitations imposed by that restriction, seeks to permit recovery.

87 Scheurer v. Trustees of Open Bible Church, supra, n. 77. See text at n. 78 for the rule.

88 Ibid. Gibson, J., in his dissent (supra, n. 78), argues that firemen and policemen ought not to be limited to recovery under those sections, since "the fact that a workman is covered by workman's compensation has not prevented him from maintaining an action to recover damages for his injuries inflicted by a third-party tortfeasor." It also should be noted that the deduction provision of 4123.02 is applicable only to the policemen or firemen themselves, and a widow or other dependent of a deceased fireman or policeman is able to collect the entire Workmen's Compensation death award in addition to anything received from a municipal pension fund. Akron v. Moore, 9 Ohio App.2d 33, ___ N.E.2d ___ (1967).

89 Supra, n. 51.

90 Lamb v. Sebach, 52 Ohio App. 362, 3 N.E.2d 686 (1935). The reduction in size of the vents reduced their effectiveness as a safety device by 97%, and created a hazard both unnecessary and unforeseeable to the firefighters. The inadequate vents were maintained in contravention of an order from a deputy state fire marshal to maintain all vents at the 2-inch size. Defendants' purpose in violating the order was "to prevent wastage of gasoline." In addition, when the firemen arrived, the defendants assured them there was "no danger." It is questionable whether, with less explicit evidence of the defendants' malfeasance, the plaintiff could have recovered. Nowhere does the Ohio court use the "increased hazard" reasoning which was the basis of the decision in the Bartels case.
Illinois: Dini v. Naiditch

In 1892, the Supreme Court of Illinois classified firemen as licensees. The case before the court dealt with a fireman who worked for a fire insurance patrol company who responded to a fire alarm on the defendant's property. While descending with five of his fellow firemen in an elevator which was the only means of access to the basement, he sustained injuries to his leg when the rope holding the counterweight broke, and the falling weight drove his leg through the floor. The Court said that the landowner had been "under no obligation to (plaintiff) to either keep his building and premises in a safe condition or construct and maintain his hoist or elevator in such manner as that it could be safely used," and upheld the trial court's directed verdict for the defendant.

The court reasoned, "(H)ere there was not even a license from appellee; the only license was from the law. And so he (plaintiff) had no right to conclude that there was an assurance from (the landowner) that either the premises or the elevator were safe." The licensee classification thereafter was the law in Illinois until 1960. In that year, the case of Dini v. Naiditch rejected the licensee classification and overruled Gibson v. Leonard and the cases which had relied on it. The court said:

(W)e note that this legal fiction that firemen are licensees to whom no duty of reasonable care is owed is without any logical foundation. . . . It is highly illogical to say that a fireman who enters the premises quite independently of either invitation or consent cannot be an invitee because there has been no invitation, but can be a licensee even though there has been no permission. The lack of logic is even more patent when we realize that the courts have not applied the term "licensee" to other types of public employees required to come on another's premises in the performance of their duties, and to whom the duty of reasonable care is owed. If benefit to the landowner is the decisive factor, it is difficult to perceive why a fireman is not entitled to that duty of care, or how the landowner derives a greater benefit from the visit of other public officials, such as postmen, water meter readers and revenue inspectors, than from the fireman who comes to prevent the destruction of his property.

Consequently, it is our opinion that since the common-law rule labelling firemen 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."

91 Gibson v. Leonard, 143 Ill. 182, 32 N.E. 182.
92 Id., 32 N.E. at 184.
93 See Eckels v. Maher, 137 Ill.App. 45 (1907); Casey v. Adams, 234 Ill. 350, 84 N.E. 933 (1908); Thrift v. Vandalia R.R. Co., 145 Ill.App. 414 (1908); Volluz v. East St. Louis Light & Power Co., 210 Ill.App. 565 (1918). Yet recovery could be had had there been active negligence, as where a land occupier handled and stored benzol in a manner which was in violation of statute and ordinance, resulting not only in the first explosion, which caused the fire, but a second, which fatally injured the fireman. Bandosz v. Digger & Co., 255 Ill.App. 494 (1930).
95 Id., 170 N.E.2d at 885-6.
... Stare decisis ought not to be the excuse for decision where reason is lacking.

The court then agreed with the Meiers case, supra, and 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." 96

Thus, the Supreme Court of Illinois, in one swift motion, exemplified the use of reason to discard stare decisis in favor of justice. While the Court did not explicitly declare firemen to be invitees, it did, in effect, extend to them the rights of invitees where their injuries could have been anticipated by the negligent landowner.

New York

Reform has not been limited to the common law. If there is one place in our nation where our underpaid and, often, unappreciated firefighters have received both judicial and legislative acknowledgment of their contribution to society, that place is New York.

Firemen in New York have not always found it possible to recover for injuries sustained as a result of a landowner's negligence. In 1904, a fireman, while fighting a fire on the defendant's premises, was crushed under an elevator which fell through a hatchway left open in violation of an ordinance. A statute permitted recovery (for violations of such safety statutes) by the board of fire commissioners, but made no provision for recovery by firemen themselves. The appellate court ruled that there was no ground for recovery outside the statute, and that the statute itself was limited to the board of commissioners. 97 Yet relief was not long in coming. Seven years later, a case arose wherein a policeman, checking a partly-open door in defendant's building at night, stepped through the door and died when he fell down an unguarded elevator shaft. As in the Eckes case, the open shaft constituted violation of an ordinance, which required that elevator shafts be guarded by closed guards or gates and by adequate trapdoors. The court held that the officer's next of kin could use the ordinance violation to show negligence.98

96 Id. at 886.
98 Racine v. Morris, 136 App.Div. 467, 121 N.Y.S. 146, aff'd, 201 N.Y. 240, 94 N.E. 864 (1911). See also excerpt from opinion in text. It is noteworthy that the decision of the Appellate Division was rendered at a time when it was held that policemen and firemen "on private premises in the performance of duty . . . are both licensees by operation of law," and that therefore "this action by the next of kin of officer cannot be sustained upon the principles of the common law," but "it can be sustained upon

(Continued on next page)
In 1920, New York was finally confronted with its landmark case, *Meiers v. Fred Koch Brewery*, a case in which there was no statute on which to rely. The plaintiff, fire chief of a small town, had answered an alarm of fire on the defendant's property. He proceeded on foot down a driveway intended for public usage in the ordinary course of defendant's business, and fell in the darkness into an unguarded open coal pit situated at the driveway's end. The Appellate Division allowed recovery for injuries thereby sustained, holding that the owner reasonably could have anticipated the use of the public driveway by the plaintiff, and *owed the plaintiff the duty to warn* him of the unsafe passageway. The Court of Appeals dismissed defendant's contention that plaintiff was not there to confer any benefit to defendant, and therefore had to be limited to the status of a licensee. The court further used an "assumption of risk" line of reasoning to invalidate the defense that no consent had been given to the fireman to enter.

The *Meiers* case, significant though it was, nonetheless was limited to an injury involving a public passageway the use of which could have been anticipated, and arising out of a hazard utterly unconnected with the fire itself. In *Maloney v. Hearst Hotels Corp.*, the New York Court of Appeals dealt with an action for the wrongful death of a fireman killed by an explosion of "paints, lacquers, benzine, gasoline, turpentine, alcohol, and other highly volatile and explosive liquids," all of which had been stored on the defendant's premises in violation of municipal ordinances. The court held that the defendant had fastened liability upon himself by his failure to observe the ordinances, which "were enacted for the benefit of firemen as well as guests in the hotels; at least firemen entering into the premises had a right to assume that the law in this particular had been complied with."

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the theory that . . . the enactment of the Building Code . . . has added to the duties which the defendant owed to the decedent at common law a further duty which they (sic) violated and upon which negligence may be predicated." (121 N.Y.S. at 150). Thus, the court used a legislative enactment (a municipal ordinance which was ratified by the state legislature, and thus had the import of a state statute) in order to circumvent an outmoded rule of the common law. 100

100 Id., 127 N.E. at 492. "(The plaintiff fireman) was, it is true, engaged in a public service. Incidentally, however, this service requires him to protect the owner's property. The interests of the latter as an individual are involved quite apart from his interests as one of the public. The fireman's purpose 'is connected with the business in which the occupant is engaged,' although he also has higher and greater ends to serve. . . ."

103 Citing, as authority, Racine v. Morris, supra, n. 98, and Carlock v. Westchester Lighting Co., 268 N.Y. 345, 197 N.E. 306 (1935), which permitted recovery for the death of a fireman electrocuted when, while inspecting premises of a third party, he came into contact with high tension wires that were closer to the building than permitted by ordinance.
The "duty to warn" was discussed in Jenkins v. 313-321 W. 37th St. Corp. A large quantity of gasoline from adjoining property had seeped into a basement room in defendant's building. When a fire broke out in that room, plaintiff was among those who responded. He and several other firemen were descending the stairs into the room when the gasoline exploded. An agent of the defendant landowner had been present when the fire broke out and was aware of the danger of explosion, but he failed to warn the firemen although he knew of their arrival. The Court of Appeals conceded that "the presence of gasoline in the quantity indicated would not, under ordinary circumstances, constitute an unusual hazard," but said that the gasoline's "presence in a closed room in which a fire was burning and where an explosion had occurred [prior to the firemen's arrival] presented a situation on which the jury might predicate a finding of unusual hazard. If such a danger existed, to the knowledge of the defendant or its agent, the defendant was under a duty if it had opportunity to give warning of the peril." 104

The Jenkins case, in applying the "unusual hazard rule," first used in Meiers, to dangers connected with the fire itself, gave the New York courts a precedent that they were not to ignore. A case arose wherein a fireman fell through a floor opening which was concealed from his view only by the smoke generated by the fire. The Court of Appeals held that the trial court should have given to the jury the questions of 1) whether there was an unusual hazard, 2) whether the defendants knew or should have known of it, and 3) whether defendants had given plaintiff "a proper and definite warning of the peril." 105

New York, thus, was attempting to qualify its rule as to unusual hazards by stressing the need for the consideration of factual context in determining whether an unusual hazard existed at a fire. In a 1954 case in which a fireman sued for injuries sustained when a stored automobile's gas tank exploded during a fire at the defendant's gas station, the court held that there was no unusual hazard and thus no duty on the part of the defendant to warn the plaintiff. 106 The court felt that, since

104 284 N.Y. 397, 31 N.E.2d 503, 504 (1940).
105 Schwab v. Rubel Corp., 286 N.Y. 525, 37 N.E.2d 234, 236 (1941) wherein the court stated:

Clearly it was a question of fact whether there was here presented a situation constituting an unusual hazard, within the meaning of the Jenkins case, to one privileged to enter the building for a public purpose. (Citing Restatement of the Law of Torts, Section 345). A jury could have found that the condition existed to the knowledge, and resultant responsibility, of the defendants in view of testimony as to continued presence on the premises (of employees of defendants).

* * * * *

(I)t was not necessary for the warning to be given to each and every officer or fireman who entered the room. Warning to the first to enter would have been sufficient.

it is common knowledge that all garages have gasoline stored on the premises, the firemen should have taken such special actions and precautions as the known presence of the gasoline warranted.

The most explicit enunciation of the rights of firemen as against negligent owners and occupiers of land was made in 1957, in Beedenbender v. Midtown Properties, Inc., a case involving a suit by a policeman. The court said:

Policemen and firemen do not readily fit the categories either of licensee or invitee. Both licensee and invitee enter upon the premises with the consent of the owner—one is tolerated, the other solicited. In the case of policemen and firemen, consent is irrelevant. It makes no difference if their entrance is permitted or invited since, if the conditions calling for their entry exist, they enter the premises as of right. The landowner is not free to give or withhold his consent, as he may with invitees and licensees, nor are the policemen and firemen free to enter or refrain from entering, as they may choose. They act neither by permission nor by invitation. They act by command. (citing Meiers v. Fred Koch Brewery, supra, note 99.)

Hence, policemen and firemen must be treated neither as invitees nor as licensees but as a special class, sui generis, privileged to enter the land for a public purpose irrespective of consent. Whether they have entered to rout a prowler or to fight a fire on the same or on the adjacent premises whether they have been summoned by the owner or enter of their own volition, the duties owed them do not vary. The duties are twofold. First, the owner is obliged to use reasonable care to keep in safe condition those parts of the premises which are utilized as the ordinary means of access for all persons entering thereon (citing Meiers case). Second, if the owner knows of the presence on the premises of officially privileged persons, such as firemen or policemen, is cognizant of a dangerous condition thereon, and has reason to believe that they are unaware of the danger, he has a duty to warn them of the condition and of the risk involved. (citing Jenkins case, supra, note 104 and Schwab v.

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N.Y. 819, 130 N.E.2d 616 (1955). But there is no reason to doubt that New York would have allowed recovery had conditions at the defendant's gas station contained factors which increased the hazard to a level beyond that which a fireman would reasonably expect to find at a gasoline station. See the cases of Bartels v. Continental Oil Co., (Mo. 1964, supra, n. 51) and Lamb v. Sebach (Ohio 1935, supra, n. 90).

107 4 App. Div. 2d 276, 164 N.Y.S.2d 276, aff'd without opinion, 5 App. Div. 2d 980, 173 N.Y.S.2d 988 (1958). The plaintiff had been searching at night for a prowler in a certain building, and, in walking toward the back thereof, came upon a wall blocking the alley. The wall, erected by the owner of adjacent property, blocked the egress of persons who would have used the fire escape of the first building. An ordinance required a landowner to provide clear egress away from a fire escape to the street. Citing the ordinance as evidence of the joint negligence of both landowners, whom he joined as defendants, the plaintiff sought to recover for injuries he sustained when he attempted to scale the wall. The court ruled that the statute did not require a landowner to provide egress for those using a fire escape on adjacent premises of another.

108 It is interesting that the court was, at the same time, relieving the adjacent property owner involved in this case of his duty to the policeman in this instance. The distinction, of course, is in that the case was dealing with a statutory duty, while the court at this point was discussing a common-law duty, the former being restricted by the language of the statute involved.
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Rubel Corp., supra, note 105). The owner owes no duty to those privileged to enter irrespective of consent to safeguard those parts of his property not ordinarily utilized for passage through the premises, or to discover potential dangers therein, for the entry thereon by such persons under unusual conditions at any hour of the day or night is not reasonably foreseeable. (Defendants') back yard fence was not the ordinary exit or entrance from their premises. Hence there cannot be spelled out any common-law duty on the part of the appellants (landowners) to maintain that fence, and the door in it, at all times as a safe passageway so that in an emergency plaintiff could pass readily from one back yard to another.

Any duty of appellants must rest upon the obligation to warn. It cannot be said, however, that the duty to warn existed as a matter of law. The very existence of that duty was a question of fact for the determination of the jury. Before it could be found that such a duty existed, the jury would first have to find that the (circumstances) presented an unusual hazard; that (defendant) . . . knew of the hazard; and that he had reason to believe that plaintiff . . . would not discover the danger for himself.

Even if the jury were to find that warning should have been given, and that it was not, there would still remain for its determination, among other things, the question of whether the failure to give warning was in fact the proximate cause of the accident.109 (Emphasis added.)

Not content with allowing the right of a fireman to recover from a negligent owner or occupier of land to be determined by the courts alone, the City of New York enacted an ordinance110 which provides for recovery by a fireman for injuries which he has received while fighting a fire, where such injuries are, directly or indirectly, the result of the violation of any legislative or administrative safety regulation imposed by any level of government, from federal down to municipal, and such recovery is to be had "in addition to any other right of action or recovery under any other provision of law." When this ordinance is used as the basis for suit by a fireman, suit may be brought after the expiration of the statute of limitations for suits brought otherwise than under this ordinance.111 Moreover, recovery thereunder may be had even though the violation resulted merely in the starting of the fire, rather than in the creation of a dangerous condition which confronted the fireman after his

109 The Beedenbender sui generis reasoning was followed by Larson v. First Natl. Bank of Mt. Vernon, 37 Misc.2d 678, 226 N.Y.S.2d 297 (Sup.Ct. 1962), which involved a policeman who, while checking for a prowler behind the defendant's bank, walked across the lawn, slipped on a pile of rock and debris, and fell. The court, in holding for the defendant, distinguished the facts from the Meiers case in that the bank lawn did not constitute an ordinary means of access to the premises. See also Miller v. Roman Catholic Church of St. Stephen, 24 App. Div. 2d 603, 262 N.Y.S.2d 361 (1965). 110 Sec. 205-a, General Municipal Law.
arrival. When the suit is brought under the ordinance, the defendant
cannot avail himself of the usual defenses of assumption of risk or con-
tributory negligence.

A Proposal for a Reasonable Solution

It would appear that two conclusions can reasonably be drawn from
the experience of the courts and society in their attempts to seek justice
for fire and police officials:

1) The courts, try as they may to be just, are still entangled in a web
of stare decisis and antiquated technicalities which delay, and
often deny, justice; and

2) That which may take courts decades to accomplish through the
common law, which is so very slow to change, may be achieved
overnight by legislative bodies, whether state or municipal.

In the hope that reasonable rules of law will one day be universally
available for the advantage of our dedicated and underpaid public serv-
ants, to whom serious injuries can mean a lifetime of suffering without
adequate compensation, this writer respectfully suggests to the legisla-
tures of our several states the following statute, based on common-law
reasoning, which is presently being studied by the Ohio General Assem-
bly after having been introduced as House Bill 426 by the Hon. Frank J.
Gorman, State Representative from the 55th District.

(A) Whenever a policeman or fireman who, in the course of his
duties, is on privately-owned premises, suffers injury or death
proximately caused, in whole or in part, by:

1) Negligent construction or maintenance of any part of the realty
which is ordinarily used by the general public, or by the own-
ers or occupiers of the realty or by their agents, employees or
servants, either as a means of access to and from the property,
or both, or which may reasonably be anticipated by the owner
or occupier as a route to be traversed by any of the above-
named classes of individuals; or by

2) The creation or maintenance, or both, of any condition the
existence of which could not reasonably have been foreseen by
the policeman or fireman, but whose existence could reason-
ably have been foreseen by the said owner or occupier as haz-
ardous to any policeman or fireman on the premises in the line
of duty; or by

113 Ibid. and Nykanen v. City of New York, 14 N.Y.2d 697, 250 N.Y.S.2d 53, 199 N.E.2d
155 (1964).

a recovery by a policeman under Sec. C19-153.0 of the Administrative Code of the
City of New York for injuries sustained as a result of a fire set by arsonists, to whom
defendant, in violation of above regulation, had sold gasoline. (Ordinance expressly
provided for recovery for personal injuries resulting from such wrongful sale.) The
court said that proximate causation between the violation and the injury need not
be established, but some causal relation between the two must exist.
3) The violation of any statute, ordinance, or administrative regulation intended to safeguard human life or limb, regardless of whether such statute, ordinance or regulation is intended for the protection of the general public or of any specified class, and if the latter, regardless of whether such class includes policemen or firemen, and regardless of whether any branch of government has issued citations, notices, or warnings for violations thereof prior to the time of the injury or death in question;

and where, in addition, neither the said owner or occupier nor his or their agents, employees or servants has given to said fireman or policeman such notice, either actual or constructive, as would apprise him of both the nature and extent of the condition, prior to his coming onto the premises or near enough thereto to be injured as a result of the said condition or violation, and where the condition or violation is not otherwise known to the policeman or fireman,

THEN, such policeman or fireman, or his representative, shall have a cause of action against the owner or occupier, or other parties, or against any combination thereof, as provided in provision (D) of this section, for the injury or death so sustained.

(B) Fire prevention statutes, ordinances and regulations shall be considered within the purview of (A) (3).

(C) Under no circumstances shall the policeman or fireman be considered guilty of contributory negligence merely because of his willingness to assume the ordinary and foreseeable hazards of his occupation.

(D) Where it cannot be determined whether the control of the premises in regard to the condition involved was in the owner or the occupier, or where such control was joint and concurrent, then both the owner and occupier shall be jointly and severally liable under this statute; but where such control was clearly that of one party to the exclusion of the other, then solely the party in control shall be liable. And where the act or omission of a party not either owner or occupier has contributed to any condition or violation under (A) of this section, then such party shall be jointly and severally liable along with all other liable parties.

(E) A cause of action authorized by this statute shall exist independent of, and without reference to, any payments or recoveries to which such policeman or fireman may be entitled by Workmen's Compensation laws or by any pension funds, or both, and the amount of recovery in such cause of action shall be unaffected thereby. No mention of any such payments or recoveries shall be permitted by the court in any action arising under this section.

(F) This statute shall not negate or diminish any rights which policemen or firemen have under the common law of this state, with regard to injuries or death occurring prior to the effective date hereof.