

3-1966

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### Recommended Citation

Donald W. Fish, Landowner's Negligence Liability to Persons Entering as a Matter of Right or Under a Privilege of Private Necessity, 19 *Vanderbilt Law Review* 407 (1966)  
Available at: <https://scholarship.law.vanderbilt.edu/vlr/vol19/iss2/6>

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# NOTES

## Landowner's Negligence Liability to Persons Entering as a Matter of Right or Under a Privilege of Private Necessity

### I. INTRODUCTION

In modern tort law, the liability of occupiers of land for their negligence depends in the first instance upon the status of the plaintiff upon the premises. This status generally determines the level of duty which the occupier owes him, and a vast body of case law has developed dealing with the many aspects of the question. Of the myriad classes of persons to whom some duty of care may be owed by an occupier, perhaps those who enter the premises by virtue of a legal right, and irrespective of the consent of the occupier, present the most elusive problems in analysis. It is the purpose of this article to investigate the liability of occupiers of land to the following broad categories of persons who enter the premises as of legal right: (1) firemen and policemen acting in their official capacities, (2) other public employees acting in the scope of their employment, and (3) persons who enter the premises pursuant to a privilege for the purpose of saving persons or property from harm.

### II. OCCUPIERS' LIABILITY TO FIREMEN AND POLICEMEN

The courts have approached the fireman and the policeman cases from the same point of view that has been employed in land possessor cases generally, and these officers have thus been held to be licensees in the overwhelming majority of cases.<sup>1</sup> However, while in many cases the courts' refusal to allow recovery may have been justified, commentators have for many years regarded this rationale as unsound.<sup>2</sup> For example, it has been observed that it is incongruous to say that

1. *E.g.*, *Roberts v. Rosenblatt*, 146 Conn. Supp. 110, 148 A.2d 142 (Sup. Ct. 1959); *Baxley v. Williams Constr. Co.*, 98 Ca. App. 662, 106 S.E.2d 799 (1958); *Scheuer v. Trustees of Open Bible Church*, 175 Ohio St. 163, 192 N.E.2d 38 (1963); *cf.* *Walker Hauling Co. v. Johnson*, 110 Ga. App. 620, 139 S.E.2d 496 (1964) (fireman from neighboring town who was injured while voluntarily fighting fire caused by occupier's negligence stated a cause of action under rescue doctrine); *Mistelske v. Kravco, Inc.*, 88 Pa. D. & C. 49, (C.P. 1953) (fireman implied invitee as to dangers not created by fire); *Buckeye Cotton Oil Co. v. Campagna*, 146 Tenn. 389, 242 S.W. 646 (1922) (fireman answering call outside city limits held to be invitee); *Prosser, Business Visitors and Invitees*, 26 MINN. L. REV. 573, 603-11 (1942); *RESTATEMENT (SECOND), TORTS* § 345 (1965).

2. *Bohlen, The Duty of a Landowner Towards Those Entering His Premises of Their Own Right*, 69 U. PA. L. REV. 340-44 (1921); *Prosser, supra* note 1, at 610.

a fireman on the defendant's premises to fight a fire cannot be an invitee because there has been no invitation, but that he is a licensee even though in reality the occupier has not granted him permission to enter.<sup>3</sup> If the courts have occasionally appeared to be groping, it is reasonably clear that they have been striving to find the proper level of duty to impose upon occupiers of land with reference to firemen and policemen who come upon the premises in the performance of their duty. Clearly they are not trespassers, since they are rightfully on the land. On the other hand, it has long been contended that to impose upon occupiers the duty owed to invitees would bring about unjust results. Firemen and policemen enter premises at any hour and at unpredictable places,<sup>4</sup> and occupiers have generally not been required to anticipate their presence in remote or private sections of their premises.<sup>5</sup> This state of the law derives originally from the historical immunities which were conferred upon possessors of land at common law, and which continue to wield considerable influence, perhaps beyond logical justification under modern conditions. In more recent years some courts have apparently concluded that the classification of licensee ill fits firemen and policemen and have declared them to be *sui generis*.<sup>6</sup> This change in classification has not, however, resulted in widespread change in the duty owed them.<sup>7</sup> Indeed, it is difficult to conceive of a meaningful level of duty which would fit neatly between the duty owed to licensees and that owed to invitees. For the reasons already suggested,

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3. *Ibid.*

4. Prosser, *supra* note 1, at 610: "It is worthy of note that in every one of the cases in which recovery has been denied to such plaintiffs, some such element of unusual and unexpected entry has been present."

5. *Baxley v. Williams Constr. Co.*, *supra* note 1, at 669, 106 S.E.2d at 805: "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 is not in the best interest of society to impose." See PROSSER, *TORTS* § 61, at 407 (3d ed. 1964) [hereinafter cited as PROSSER].

6. *E.g.*, *Buren v. Midwest Indus., Inc.*, 380 S.W.2d 96 (Ky. App. 1964); *Shypulski v. Waldorf Paper Prods. Co.*, 232 Minn. 394, 45 N.W.2d 549 (1951); *Jackson v. Volveray Corp.*, 82 N.J. Super. 469, 198 A.2d 115 (App. Div. 1964); *Larson v. First Nat'l Bank*, 37 Misc. 2d 678, 236 N.Y.S.2d 297 (Sup. Ct. 1962).

7. Thus in *Shypulski v. Waldorf Paper Prods. Co.*, *supra* note 6, at 402, 45 N.W.2d at 553, the court said, "[W]e believe that the better rule by far is that landowners 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." This is the same level of duty adopted by the *Restatement* in regard to licensees. *RESTATEMENT (SECOND), TORTS* § 342 (1965).

firemen and policemen have generally not been allowed to recover for their injuries to the same extent as have other public employees who are injured while on premises in the discharge of their duties.<sup>8</sup> There have developed, however, certain types of factual situations in which the courts have responded favorably to actions brought by firemen and policemen.

For the sake of convenience, the cases will be considered here as they fall into one or more of the following factual classifications: (1) dangerous conditions on the premises—not related to the fire in case of firemen; (2) dangerous activities on the premises—not related to the fire in case of firemen; (3) negligent maintenance of the premises so as to increase the likelihood of fire; (4) unusually dangerous substances and conditions on the premises that have either caused the fire or which are made more immediately dangerous by the fire.<sup>9</sup>

#### A. *Dangerous Conditions on the Premises*

The typical case of defective floors or stairways unknown to the occupier of the premises, may be used to illustrate the situation in which a fireman or policeman will usually not be allowed to recover for injuries suffered thereby.<sup>10</sup> The fact that he is a licensee excuses the occupier from any duty to discover the danger,<sup>11</sup> and the plaintiff takes the premises as he finds them. There is one important exception to this rule. If the dangerous condition exists on a part of the premises "then held open to the public," the occupier owes to the fireman and policeman the same duty owed to an invitee.<sup>12</sup> The *Restatement of Torts* has adopted this principle in its second edition<sup>13</sup> and there would seem to be little question as to its merit. It is important to notice, however, that there is a paucity of decisional authority to support it.<sup>14</sup> The New York Court of Appeals established the doctrine in 1920 in the case of *Meiers v. Fred Koch Brewery*.<sup>15</sup>

8. PROSSER § 61, at 406-07.

9. This is not to say that four distinct lines of authority have developed. As will be seen, in many cases the various factors are intermingled.

10. Another situation illustrated in a recent decision is ice on a sidewalk. *Roberts v. Rosenblatt*, *supra* note 1.

11. RESTATEMENT (SECOND), TORTS § 342, comment *d* (1965).

12. *Meiers v. Fred Koch Brewery*, 229 N.Y. 10, 127 N.E. 491 (1920); *Taylor v. Palmetto Theater Co.*, 204 S.C. 1, 28 S.E.2d 538 (1943).

13. RESTATEMENT (SECOND), TORTS § 345 (1965).

14. In addition to the cases cited in note 12 *supra*, there is apparently only the following: *Learoyd v. Godfrey*, 138 Mass. 315 (1885) (policeman injured when he fell into a well near a common passageway in a building in which the owner leased portions to various tenants).

15. *Supra* note 12. In this case a fireman was injured by falling into a coal pit in a driveway which was used by those who had business with the defendant as a means of access to defendant's buildings. The court was extremely careful in articulating the ground of its holding. "[B]ut we limit our decision to the precise facts before us. To

The New York courts,<sup>16</sup> as well as courts in other jurisdictions,<sup>17</sup> have subsequently not allowed the rule to be expanded. Nevertheless, in a case which does come within what is now the *Restatement* rule, there will likely be a jury question as to the exercise of reasonable care by the occupier,<sup>18</sup> subject of course to the defenses normally available in invitee cases. Certainly, the defendant's liability should be entirely dependent upon satisfactory proof of negligence, and the plaintiff should not be assured of recovery simply because he is labeled an invitee.<sup>19</sup>

It is equally clear that classifying a fireman or a policeman as a licensee should not be tantamount to directing a verdict for the defendant.<sup>20</sup> The more enlightened view of the *Restatement*<sup>21</sup> recog-

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the case of one not a licensee entering business property as of right over a way prepared as a means of access for those entitled to enter who is injured by the negligence of the owner in failing to keep that way in a reasonably safe condition for those using it as it was intended to be used." *Id.* at 17, 127 N.E. at 493.

16. *Larson v. First Nat'l Bank*, *supra* note 6. In this case a policeman was injured when he fell on construction debris on bank premises while making a night patrol. In denying recovery, the court stated that the fact that bank patrons used the portion of the lawn where the plaintiff was injured as a shortcut during business hours did not constitute it an ordinary means of access where there was available a defined and prepared means of access. See also *Beedenbender v. Midtown Properties, Inc.*, 4 App. Div. 2d 276, 164 N.Y.S.2d 276 (1st Dep't 1957) (policeman injured while patrolling rear yard of business premises when he climbed a fence and fell into a depression on the other side; recovery denied).

17. *Scheuer v. Trustees of Open Bible Church*, *supra* note 1, in which a policeman was denied recovery for injuries sustained when he fell into an unlighted excavation extending into a driveway on church premises as he approached the church building to investigate a reported burglary. The court did not actually distinguish the *Meters* case, but rather held the plaintiff to be a licensee as a matter of law, relying strongly on its belief that injured policemen and firemen should be compensated for their injuries exclusively from public funds.

18. See generally James, *The Functions of Judge and Jury in Negligence Cases*, 58 YALE L.J. 667 (1949); RESTATEMENT (SECOND), TORTS §§ 328B, C (1965).

19. *Baxley v. Williams Constr. Co.*, *supra* note 1 (concurring opinion). In this case a fireman fell into an open hole while fighting a fire at a construction project where there were numerous excavations and obstacles to free access. While the majority opinion held the plaintiff to be a licensee, and therefore not entitled to a duty of reasonable care, the concurring opinion argued that a sounder basis for the holding would be that under the circumstances "ordinary care" did not compel the defendants to mark the hole, and that they were therefore not negligent. In most cases, however, the court cannot be expected to take the question of reasonable care from the jury, and the jury can probably be expected to interpret "reasonable care" as requiring some effort to make the premises safe under most circumstances.

20. In some cases of even relatively recent vintage, the courts have declared the duty of an occupier toward a licensee to be to refrain from wilful or wanton injury, *Anderson v. Cinnamon*, 365 Mo. 304, 282 S.W.2d 445 (1955); or from allowing "pitfalls, mantraps, and things of that kind" to exist. *Baxley v. Williams Constr. Co.*, *supra* note 1, at 669, 106 S.E.2d at 805. See *Carroll v. Hemenway*, 315 Mass. 45, 51 N.E.2d 952 (1943), in which a policeman was denied recovery, the court holding that he was a licensee and could not recover "on the ground of negligence, whether ordinary or gross"; *Aldworth v. F. W. Woolworth Co.*, 295 Mass. 344, 3 N.E.2d 1008 (1936).

21. RESTATEMENT (SECOND), TORTS § 342 (1965). The language of the *Restatement* expresses the duty in the alternative, that is, either to make safe or to warn.

nizes that even the licensee is owed a warning of conditions which involve unreasonable risk of harm and which are known to the occupier if he knows of the licensee's presence and has opportunity to warn. This concept has been correctly applied in some cases,<sup>22</sup> unwisely circumscribed in others,<sup>23</sup> and apparently ignored in others.<sup>24</sup> A more difficult question is presented when the occupier knows of the dangerous condition but is not present or is unaware of the presence of the fireman or policeman. Under such circumstances, the prevailing rule apparently is that the existence of the danger does not itself violate a duty to the fireman or policeman unless it can be said to amount to a trap or to wilful or wanton misconduct.<sup>25</sup> And, insofar as firemen and policemen are concerned, these latter terms are employed most frequently only as a preface to holding them inapplicable.<sup>26</sup> The current status of this doctrine is difficult to evaluate properly in broad outline. It is true that, with possibly one special exception to be discussed later, the presence of firemen and policemen on official missions cannot realistically be termed foreseeable. Moreover, as mentioned before, immunity for land

22. *Shypulski v. Waldorf Paper Prods. Co.*, *supra* note 6, in which the court overruled defendant's demurrer to plaintiff's allegation that defendant's officers and employees were present at the fire, that they knew of the dangerous condition of a certain wall, and that they failed to warn the plaintiff fireman so that he might avoid being injured by its collapse. The court classified the plaintiff as *sui generis*, but the duty it outlined in regard to him was the same as the modern view of the duty owed to licensees. Cf. *Beedenbender v. Midtown Properties*, *supra* note 16; *Davy v. Greenlaw*, 101 N.H. 134, 135 A.2d 900 (1957), in which the courts acknowledged the modern rule to be correct, but in which it failed to inure to the benefit of the plaintiffs under the facts involved.

23. *Anderson v. Cinnamon*, *supra* note 20. The court distinguished between cases in which the defendant had knowledge of the presence of explosives and those in which he had knowledge of a deteriorated structural condition on the premises. In the former the defendant was said to be under a duty to warn; in the latter he was under no such duty. It should be noted, however, that in this case the defendant apparently did not realize that the plaintiff intended to go upon the weakened balcony until he was already there. As further justification for its position, the court said, "It would also be likely to interfere with the operations of the firemen in fighting the fire for a possessor to undertake to tell them where to go and where not to go." *Id.* at 309, 282 S.W.2d at 448.

24. See note 20 *supra*.

25. See, e.g., *Schwab v. Rubel Corp.*, 286 N.Y. 525, 37 N.E.2d 234 (1941), in which the defendant's employee failed to warn the plaintiff-fireman of a hole left during renovation of the premises. In holding that the jury could have found that the condition existed to the knowledge and resultant responsibility of the defendants, the court stated, "It may be that had the employee failed, there would have been no liability. We do not pass on that." *But see* *Mistelske v. Kravco, Inc.*, *supra* note 1, in which a fireman was designated an "implied invitee" by the trial court for purposes of determining defendant's liability for injuries caused by a falling elevator counter-balance. The higher court affirmed the jury's verdict for defendant. *Jackson v. Ververay Corp.*, *supra* note 6, in which the court said that a fireman could recover for undue risks created by conditions including open elevator shafts, storage of dangerous substances and other conditions independent of the fire itself.

26. *Supra* note 20. *But see* *Bandosz v. Daigger & Co.*, 255 Ill. App. 494 (1930).

occupiers is still an influential concept in the law and its vitality appears to be strong despite gradual inroads over the years.<sup>27</sup> Nevertheless, an appealing case can be made for the imposition of some greater duty upon occupiers than is presently recognized. The rationale of the *Restatement* rule that firemen and policemen are owed the same duty owed to invitees while on parts of the premises held open to the public appears to be that the public officer is entitled to rely upon the appearance of safety created by the occupier in anticipation of visits by the public.<sup>28</sup> It should be noted, however, that the public officer may not fit precisely within the *Restatement* definition of invitee.<sup>29</sup> He will normally not enter for a purpose for which the premises are held open to the public, nor for a purpose connected with business dealings with the occupier. Certainly this is not to say that his visit is of no interest or benefit to the occupier, but clearly the relationship is different from that contemplated by the *Restatement* in its definition of invitees. The duty owed to him arises because the reasons given for denying liability for injuries suffered on private premises—no opportunity for the occupier to foresee his presence and to make the premises safe—do not exist. In effect, then, firemen and policemen are given the benefit of a duty owed to the public, and the occupier's total duty of care is not increased by being extended to cover plaintiffs who enter on official duty.

This reasoning also has utility when the occupier's duty is analyzed with reference to parts of the premises not held open to the public. Particularly is this true of commercial or industrial premises where the occupier is under a duty to exercise reasonable care to maintain passageways, and the like, in a reasonably safe condition for employees.<sup>30</sup> While the presence of a fireman or policeman on official

27. The *Restatement* continues to express the general rule concerning trespassers to be that there is no duty either to put and keep the land in a reasonably safe condition or to carry on activities so as not to endanger them. *RESTATEMENT (SECOND), TORTS* § 333 (1965). There immediately follow, however, a number of exceptions to the rule under which the law will prefer the welfare of even a trespasser to the occupier's untrammelled right to use his premises as he sees fit. *Id.* at §§ 334-39.

28. *Id.*, § 345, comment *e*.

29. *Id.*, § 332.

"Invitee Defined

(1) An invitee is either a public invitee or a business visitor.

(2) A public invitee is a person who is invited to enter or remain on land as a member of the public for a purpose for which the land is held open to the public.

(3) A business visitor is a person who is invited to enter or remain on land for a purpose directly or indirectly connected with business dealings with the possessor of land."

30. *RESTATEMENT (SECOND), AGENCY* § 492 (1958). The fact that the defendant's employees might be under a workmen's compensation plan which constitutes their exclusive remedy against their employer would not eliminate his common law duty to provide a safe place to work.

duty may not be foreseeable, the presence of employees and perhaps others to whom a duty of reasonable care is owed may be foreseeable. Thus, to allow the fireman or policeman to benefit from the duty already existing would not impose an additional burden on the occupier.<sup>31</sup> The thrust of this reasoning is that the cases should be made to turn on questions of fact, including the question whether the occupier was under a duty with reference to any class of persons. Where the evidence raises questions concerning which reasonable minds might differ, the jury should be permitted to have the case with instructions containing at least the following elements: The plaintiff must have been in the place where he was injured in an official capacity, and because his presence there was reasonably necessary to the discharge of his duty; and the place must have been one concerning which the occupier owed a duty of reasonable care to some class of persons. If the jury finds that the occupier was under a duty of care under the circumstances, they would then proceed to try the issues of liability and damages. If the jury finds, or if under the evidence the court directs, that the occupier was under no duty of care of the level owed to invitees, he might still be held to the same duty owed to licensees.<sup>32</sup> Thus, the occupier of a private dwelling would generally be under no duty to make his attic stairs safe for firemen, because he would not usually anticipate the presence of persons other than members of his family in the attic.<sup>33</sup> In relating the duty owed to firemen and policemen to an existing duty owed

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31. This statement is certainly true in a general sense. However, it can also be argued that to allow recovery by persons who are not in the actual class of those whose presence the occupier can foresee increases the likelihood of a successful action against him by simply expanding the number of potential plaintiffs, and thereby increasing the probability that one of them will suffer injury. In this respect, the rule regarding public premises is distinguishable from the present situation. In that case the occupier is on notice that an indeterminate number of people, most of whom are strangers, will visit his premises, while those who are permitted to go into the private sections of the premises may be a relatively small and familiar group. It must be remembered, however, that the basis of any action for injury would be negligence, and that the defendant would, under the suggestions offered here, be held to the same standard of care applicable in relation to his employees or others to whom a duty of care is owed. Therefore, through the exercise of reasonable care to discover defects and correct them, the occupier would have fulfilled his duty to any class of persons, firemen and policemen included.

32. See note 21 *supra* and accompanying text.

33. Here again, the total situation would determine the occupier's duty. The fact that the speculative presence of a repairman in the attic would give rise to a duty would not entitle the jury to find for the plaintiff in the absence of evidence that the actual presence of invitees was reasonably foreseeable. Moreover, where the occupier could reasonably foresee the presence of only social guests in his house, there would be no duty to a fireman other than the duty owed licensees. See *Roberts v. Rosenblatt*, *supra* note 1, in which a fireman was denied recovery when he fell on a sidewalk leading to an apartment house while answering an alarm on a wintry night. The reasoning of the decision would be applicable in connection with a private dwelling.



to others, it also becomes necessary to evaluate the standard of care which should be required of the occupier. For example, the interior of a manufacturing plant may be reasonably safe for employees who are familiar with the environment, but full of hidden danger to the fireman who has never been there before. Balancing the interest of the occupier in making profitable use of the premises against that of the plaintiff in passing safely on his mission, it would appear that the occupier should be held to no greater standard of care with reference to firemen or policemen than he is required to exercise in connection with the class to whom the primary duty is owed. If, therefore, the condition is one which the reasonably prudent employee would have detected and avoided, the plaintiff-fireman should not recover, and the jury should be so instructed. Again, situations may frequently arise in which the fireman or policeman enters the premises at night, or at other times when the occupier has no reason to expect that anyone will be present. This is, of course, the basic situation which has provided the rationale for denial of liability in the cases.<sup>34</sup> As a general proposition, the rule of non-liability appears to be sound under circumstances in which safety depends, for example, upon a degree of illumination which is normally provided only when the presence of people should be expected.<sup>35</sup> However, where the injury is caused by a latent defect, such as a weakened floor, which could have been discovered by reasonable inspection, and where the fact that the premises were closed did not increase the risk, the plaintiff should not be barred. It should be borne in mind that the justification for this line of reasoning is that these plaintiffs are not only privileged to be upon the premises, but are compelled by their duty to be there, and that the occupier by hypothesis has a duty to exercise reasonable care with regard to a class of persons whose presence is foreseeable. Therefore, the plaintiff should be entitled to assume that the ways which have apparently been provided for movement through the premises by those entitled to be there are reasonably safe for him as well.<sup>36</sup> Of course, the fireman may frequently be required to go beyond the bounds of safety in discharging his duty, and in such cases the occupier should be allowed to rely upon the defenses

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34. See note 4 *supra*.

35. In any case, however, the reasonableness of the occupier's act or failure to act would of necessity depend upon all the surrounding circumstances. Thus, in *Meiers v. Fred Koch Brewery*, *supra* note 12, it appeared that the plaintiff fell into a hole in a driveway at night. The occupier had apparently installed lights but they were not burning at the time. The court did not specifically find that the premises were open to the public at the time of the accident, but relied upon the fact that the driveway was the normal means of public access.

36. For a good discussion of the relative merits of the "invitation" and the "economic benefit" theories of occupiers' duty in invitee cases, see *Prosser, supra* note 1.

of contributory negligence and assumption of risk.<sup>37</sup>

There have been a number of cases in which firemen and policemen have been injured by falling into elevator shafts,<sup>38</sup> or by falling on defective fire escapes.<sup>39</sup> Conditions of such extremely hazardous nature perhaps warrant special consideration here. It is urged that occupiers should be held to a duty of taking reasonable steps to provide adequate safety precautions insofar as unusually dangerous conditions are concerned.<sup>40</sup> The utility of such a condition in an unguarded state may occasionally be important, but this would not generally be so. Where the expense or inconvenience of providing a barricade or a light, or some other reasonable device, is slight when compared with the likelihood that serious injury or death will be the result of any accident connected with the condition, the occupier should be under a duty to provide such precautions. In this regard, the general criteria of reasonable care under all the circumstances would enable the jury to evaluate the risk by emphasizing the degree of harm that would probably be suffered rather than the foreseeability that people would encounter the condition.<sup>41</sup> Therefore, while the occupier's duty might still be properly related to classes of persons whose presence was foreseeable, this factor would be less important in connection with the type of condition being considered here because the unforeseeable nature of the fireman's presence would be relatively less important. Moreover, the duty would not ordinarily be unduly burdensome upon the occupier, because he would normally know or have reason to know of the existence of such a condition.<sup>42</sup> He would be subject to liability

37. Thus, if a fireman climbs over a safety barricade in order to obtain a better vantage point from which to direct a hose onto a blaze, he has assumed the risk inherent in removing the measure of safety provided by the occupier. See generally PROSSER § 67, at 450-69.

38. See, *e.g.*, denying liability on common law grounds, *Hamilton v. Minneapolis Desk Mfg. Co.*, 78 Minn. 3, 80 N.W. 693 (1899); *Beehler v. Daniels*, 18 R.I. 563, 29 Atl. 6 (1894).

39. *Aldworth v. F. M. Woolworth Co.*, 295 Mass. 344, 3 N.E.2d 1008 (1936). The court there held that the fireman could not recover on a common law theory of ordinary negligence, but must show wilful or reckless conduct.

40. It may well be that few modern courts would deny recovery as a matter of law in an open elevator shaft case. See discussion of *Jackson v. Volveray Corp.* *supra* note 6. See also *Scottish Rite Supreme Council v. Jacobs*, 266 F.2d 675 (D.C. Cir. 1959).

41. See generally James, *The Nature of Negligence*, 3 UTAH L. REV. 275, 279-86 (1953).

42. RESTATEMENT (SECOND), TORTS § 342 (1965). The duty owed to licensees rests, of course, upon knowledge of their presence or upon the presence of facts which would put a reasonable man on notice as to their presence. Under the reasoning suggested here, however, even though the presence of the fireman is unknown or unforeseen, the jury might still find negligence if the condition was sufficiently dangerous to any class of persons whose presence could be reasonably anticipated in close proximity to the condition.

only for failure to exercise reasonable care, and would have available the defenses of contributory negligence and assumption of risk.<sup>43</sup> Concededly, the ideas here expressed would require most cases to be sent to the jury, with the likely consequence that there would be more judgments for the plaintiff.<sup>44</sup> However this may be, it is clear that proper results can be reached only by analyzing individual cases in terms of narrow distinctions rather than in broad classifications which perhaps bespeak more than anything else a grudging reluctance to further erode traditional immunities.

Although no cases were found in which the courts have expressly done so, it is submitted that another exception needs to be grafted on the general rule that firemen and policemen are licensees except while on parts of the premises held open to the public.<sup>45</sup> Commercial and industrial premises, and certain multiple family dwellings, are customarily required, by statute or otherwise, to maintain points of access other than public entrances for use by firemen on emergency calls. The fireman entering by such access should be safe in assuming that it has been maintained in a reasonably safe condition. Thus, while a fireman who enters the basement of a private dwelling may be required to take the premises as he finds them, one who ascends a ladder to an upper window in a warehouse which has been marked for use in emergencies should be able to assume that he will not step onto a floor immediately inside that is too weak to support his weight.<sup>46</sup> The question of course arises as to how far into the building the defendant's duty should extend. While an answer definite in terms of space is impossible to formulate, it would not seem unreasonable to extend the duty to those parts of the premises, such as aisles and passageways which are adjacent to the

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43. Cases may arise in which the injury is sustained because the fireman is blinded by smoke or is otherwise distracted by the fire and fails to exercise the care he might otherwise have taken. This may present a question of proximate cause, in addition to the question of reasonable care, and should normally be for the jury. Cf. *Krauth v. Celler*, 31 N.J. 270, 157 A.2d 129 (1960), where a fireman was denied recovery when he stepped off an inside balcony in a building under construction. There was no guard rail and the fireman's vision was obscured by smoke.

It is obvious that professional firemen assume a high degree of risk in connection with their employment. However, the courts have in several cases drawn a distinction between the risks inherent in fighting fires and unusual hazards not reasonably foreseeable. There is clearly developing an attitude to permit recovery for injuries involving the latter situation. See, e.g., *Mistelske v. Kravco, Inc.*, *supra* note 1; *Jackson v. Volveray Corp.*, *supra* note 6.

44. James, *supra* note 18, at 68.

45. See note 12 *supra*; RESTATEMENT (SECOND), TORTS § 345 (1965).

46. The rationale underlying the occupier's duty would be analagous to that applied in the preceding discussion of public premises and other parts of premises in which the occupier owes a duty to some class of persons. The fireman should be entitled to assume that the place of designated access is reasonably safe for his use. *Id.*, § 345, comment e.

point of entry, and over which it is foreseeable that the fireman will move in finding his bearings in unfamiliar surroundings. There would in no case be imposed any greater duty than reasonable care, either to make safe or to make obvious,<sup>47</sup> and the defendant would have available the defenses of independent intervening cause—such as dangers created by smoke or fire, contributory negligence, and assumption of risk.<sup>48</sup> In this context the occupier's duty would go directly to the fireman irrespective of a duty owed to others, even though the element of foreseeability might be incapable of more precise definition than is embodied in the phrase "in case of fire." As the plaintiff moved away from the place of entry, however, he would enter sections of the premises in which any duty to him would need to be determined in light of the duty owed to others, as has been previously discussed. It is readily conceded that this approach to the question of the occupier's duty would require close supervision by the courts, and that in the absence of such supervision juries might well be unable to deal effectively with the narrow distinctions suggested. However, the court could normally effect the proper supervision by careful instructions concerning the occupier's duty to exercise reasonable care to maintain fire entrances and adjacent areas in a reasonably safe condition, and by further instructions concerning the possible duty existing toward other persons if the injury actually occurred in another area of the premises. Despite the practical difficulties involved in any move toward emphasizing justice in the individual case, it is urged that the courts should be willing to assume the greater burden inherent in the more tightly reasoned approach.<sup>49</sup>

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47. *Id.*, §§ 343, 343A. The *Restatement* provides that there is no liability to an invitee for physical harm caused them by activities or conditions on the land whose danger is known or obvious to him, unless the possessor should anticipate the harm despite the knowledge or obviousness. In an area apparently made safe for firemen entering in an emergency, this principle should be applied, not as it would be in situations in which the attention of a casual observer might be distracted from an otherwise obvious danger, but to more serious conditions where the total appearance of the place effectively diverts the plaintiff's attention from a danger which would be obvious if he were permitted an opportunity for more leisurely observation.

48. See notes 42 *supra* & 56 *infra* and accompanying text. The majority rule clearly is that firemen may not recover for injuries caused by the foreseeable hazards created by fire.

49. See generally James, *supra* note 18, at 676-78. "The other main job confronting the tribunal as a whole in accident cases is to evaluate the conduct of the parties, in the light of the circumstances, in terms of its legal consequences. . . . It alone determines what the broad rules of substantive law are, and which ones may be applicable to the case at hand. . . . But each case also involves a more specific evaluation of the conduct in the concrete situation with which it deals; a determination of specific standards of conduct for the parties under the circumstances of the actual case. . . . Now it is perfectly clear that rules of law could be so formulated and so administered as to exclude the jury from making these evaluations." *Id.* at 676.

### B. *Dangerous Activities*

The occupier owes to the fireman and policeman a duty to carry on his activities with reasonable care so as not to injure him, subject to the responsibility imposed upon the officer to be alert for his own safety.<sup>50</sup> There is little authority on this question. In one case a policeman was held to be more than a licensee when he went upon railroad premises in pursuit of a suspected criminal and was killed when hit by a train.<sup>51</sup> Generally, the fireman or policeman would seem to be in the same position as any other licensee when he enters the premises with the knowledge of the occupier, insofar as the occupier's activities are concerned.<sup>52</sup> Moreover, he will be considered an invitee while on parts of the premises "then held open to the public."<sup>53</sup> In regard to activities, such as the operation of machinery, which are carried on in remote parts of the premises away from the surveillance of the occupier, much the same reasoning previously advanced in connection with dangerous conditions would apply. It may be that in many, if not most, situations the occupier will be represented at or near operating machinery by an employee who would be responsible for giving suitable warning or taking other reasonable steps to avoid injury to firemen and policemen. Where there is no representative present, it would not seem unreasonable to require that dangerous operations be made known by signs, lights, or other suitable means. The same factors of foreseeability should be weighed in assessing the danger of an activity, and the same considerations with regard to the inconvenience of providing safeguards should be weighed in establishing the occupier's duty to make it safe.

The degree of danger from an activity may be so great as to bring it within the category of nuisance. The best illustration of this principle is perhaps a situation involving blasting. In one case, a policeman who was a veteran supervisor of blasting operations was killed while on assignment to supervise quarry blasting on premises with which he was familiar. The court allowed recovery on the ground that the operation was a nuisance, and it was not necessary to prove negligence on the part of the occupier in order to impose liability.<sup>54</sup>

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50. RESTATEMENT (SECOND), TORTS § 341 (1965).

51. *Ryan v. Chicago & N. W. Ry.*, 314 Ill. App. 65, 42 N.E.2d 128 (1943).

52. The occupier is apparently held to the same standard of care applicable in general negligence cases insofar as his activities and known licensees or invitees are concerned. RESTATEMENT (SECOND), TORTS §§ 341, 341A (1965).

53. *Id.* § 345.

54. *Starkel v. Edward Ralf Co.*, 142 Conn. 336, 114 A.2d 199 (1955). See also *Cameron v. Kenyon-Connell Commercial Co.*, 22 Mont. 312, 56 Pac. 358 (1899) (firemen killed by powder explosion where defendants had stored greater quantity of the explosive than permitted by statute).

### C. *Negligent Maintenance of Premises*

It is with reference to the negligent maintenance of the premises, which makes fire more likely to occur, that the fireman faces his most formidable resistance to recovery. With rare exception, even the most liberal courts deny liability for such negligence.<sup>55</sup> This general rule appears to be sound. The fact that the occupier's negligence in allowing a fire hazard to develop may be the direct cause of the plaintiff's injury does not obviate the basic consideration that the foreseeability of such negligence is one of the reasons why the plaintiff's job exists.<sup>56</sup> The decisions were unanimous on this point until 1960. In that year the Supreme Court of Illinois decided the case of *Dini v. Naiditch*,<sup>57</sup> in which firemen were allowed to recover, both on common law negligence grounds and on a finding of statutory violation, for injuries and death suffered while fighting a fire in a hotel in which the operator had been negligent in maintaining fire safety standards. The court did not expressly classify the plaintiffs as invitees, but it clearly implied that they were such in its rejection of the general rule that they are licensees,<sup>58</sup> and in its holding that the defendants owed a duty of care to maintain the premises in a reasonably safe condition to prevent fire from which it was foreseeable that injury and loss of life would result. The decision has generally been interpreted to mean that a fireman may recover from the occupier who negligently allows a fire to occur which in turn is the proximate cause of the fireman's injury. While Dean Prosser has expressed his approval of *Dini*,<sup>59</sup> it has not been followed in the few cases which have subsequently arisen in other jurisdictions.<sup>60</sup> It thus appears that the general rule is well entrenched, and from language in recent opinions it would appear likely to remain so. It may well be, however, that a case as appealing

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55. *Aravanis v. Eisenberg*, 237 Md. 242, 206 A.2d 148 (1965); *Buren v. Midwest Indus., Inc.*, *supra* note 6; *Krauth v. Geller*, *supra* note 43; *Jackson v. Volveray Corp.*, *supra* note 6.

56. *Krauth v. Geller*, *supra* note 43, at 274, 157 A.2d at 131: "Probably most fires are attributable to negligence, and in the final analysis the policy decision is that it would be too burdensome to charge all who carelessly cause or fail to prevent fires with the injuries suffered by the expert retained with public funds to deal with those inevitable, although negligently created, occurrences. Hence, for that risk, the fireman should receive appropriate compensation from the public he serves, both in pay which reflects the hazard and in workmen's compensation benefits for the consequences of the inherent risks of the calling."

57. 20 Ill. 2d 406, 170 N.E.2d 881 (1960).

58. *Id.* at 415, 170 N.E.2d at 885: "In reviewing the law on this issue, we note further that this legal fiction that firemen are licensees to whom no duty of reasonable care is owed is without any logical foundation."

59. PROSSER § 61, at 407.

60. *Aravanis v. Eisenberg*, *supra* note 55; *Buren v. Midwest Indus.*, 380 S.W.2d 96 (Ky. App. 1964); *Jackson v. Volveray Corp.*, 82 N.J. Super. 469, 198 A.2d 115 (App. Div. 1964).

on its facts as *Dini* would persuade another jurisdiction to follow Illinois' lead. The image of the operator of a hotel who allows such a state of disrepair to develop that it appears he is indifferent to the danger in which he places his paying guests, let alone public officials, is not the same as that of an occupier who, albeit negligent in a given situation, may not present so gross a picture.

*D. Unusually Dangerous Substances or Conditions Which Have Either Caused the Fire or Are Made More Dangerous by the Fire.*

Closely parallel to the cases which hold that firemen and policemen are owed a duty of warning of unusually dangerous conditions not connected with fires are the cases which permit recovery for injuries due to unusually dangerous agencies and conditions which may have been aggravated by the fire. In fact, the law is perhaps more fully developed on this latter point than on the former, since some jurisdictions apparently allow recovery in the one but not in the other.<sup>61</sup> The justification for allowing recovery under such circumstances is that, while firemen assume the risks inevitably present in their occupation, they do not assume risks of unusual hazards, most frequently of an explosive nature, which are not reasonably to be anticipated in the place where they are fighting the fire.<sup>62</sup> The general duty of the occupier is to issue a warning of such hazards if he realizes the risk involved and has opportunity to warn.<sup>63</sup> Firemen are still required to assess the situation in which they find themselves, however, and may not be entitled to a warning in circumstances where they should anticipate the danger or where they can actually see it. Thus, presence of gasoline in a basement in which fire has broken out and an explosion has occurred may constitute an unusual hazard concerning which the occupier is under a duty to warn if he has opportunity to do so.<sup>64</sup> On the other hand, firemen who are called to combat a fire at a garage may be held to have assumed the risk of a gasoline explosion because

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61. Compare *Bartel's v. Continental Oil Co.*, 384 S.W.2d 667 (Mo. 1964), with *Anderson v. Cinnamon*, *supra* note 20.

62. This line of reasoning was approved in *Aravanis v. Eisenberg*, *supra* note 55; *Buren v. Midwest Indus.*, *supra* note 60; *Krauth v. Geller*, *supra* note 43; *Campbell v. Pure Oil Co.*, 194 Atl. 873 (N.J. 1937); *Jackson v. Volveray Corp.*, *supra* note 60; *Lamb v. Sebach*, 52 Ohio App. 362, 3 N.E.2d 686 (1935).

63. *Aravanis v. Eisenberg*, *supra* note 55; *Bartel's v. Continental Oil Co.*, *supra* note 61; See generally RESTATEMENT (SECOND), TORTS § 342 (1965).

64. *Jenkins v. 313-321 W. 37th St. Corp.*, 284 N.Y. 397, 31 N.E.2d 503 (1940). Compare *Rogers v. Cato Oil & Grease Co.*, 396 P.2d 1000 (Okla. 1964) (fireman denied recovery for injuries sustained when stacked oil drums fell, spilling burning oil on him, court held that the peril was open and obvious to the plaintiff) and *Bennett v. Kurland*, 21 Pa. D. & C. 2d 587 (C.P. 1959) (fireman denied recovery on grounds of assumption of risk for injuries caused by gas leaking from an old refrigerator; he had been called to investigate the leak).

storage of the fuel is commonplace in garages.<sup>65</sup> It is apparent that many fires on premises will involve both the hazards inherent in any fire plus unusual hazards not reasonably foreseeable. In cases where these two classes of perils may be separately and distinctly identified, the occupier's duty to warn of the unusual hazard will not contravene the general rule of assumption of risk of ordinary hazards. Thus, where a fire is being fought at a petroleum storage facility, there will be numerous hazards which a fireman must anticipate as best he can. If, however, a storage tank is equipped with safety valves too small to allow the heat-expanded gases inside to escape, the fireman may be owed a warning of the possibility that the tank might leave its moorings and rocket.<sup>66</sup> Other cases may arise in which the separation of usual hazards from unusual hazards for purposes of analysis would be a difficult task. A close question may exist as to whether the presence of the substance which proved to be extra-hazardous was to be anticipated under the circumstances, this determination of course being the key to the general rule of assumption of risk for firemen.<sup>67</sup> A more subtle distinction is required in cases in which the presence of the dangerous substance is not to be anticipated, but in which it is present and actually creates the fire but does not give rise to any further danger, such as unexpected flashing or explosion. Here, under the general rule, logic would seem to require a holding of non-liability on the ground of assumption of risk, even assuming the occupier's negligence in storing the inflammable substance.<sup>68</sup> If, however, there is explosion or flashing, the occupier may be liable for injuries suffered thereby if he has failed to issue a warning.

The foregoing discussion describes the general approach of the courts to the question of unusual hazards in connection with fires. However, this line of reasoning has been developed in the main from factual situations in which the occupier or his agents were present

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65. *Gannon v. Royal Properties*, 285 App. Div. 131, 136 N.Y.S.2d 129 (1st Dep't), *aff'd*, 309 N.Y. 819, 130 N.E. 2d 616 (1954).

66. This was the situation in *Bartel's v. Continental Oil Co.*, *supra* note 61. Here the fireman was outside the premises at the time of the explosion. The court based its holding on the ground that he was owed a warning of the unusually dangerous condition, and made determination of his status as an invitee or licensee. It appears reasonably certain that the court would have reached the same result if the fireman had been on the premises at the time of the accident.

67. This was the situation in *Gannon v. Royal Properties*, *supra* note 65. See also *Jackson v. Volveray Corp.*, *supra* note 60, in which the court stated that this question is normally for the jury.

68. No cases were found in which it was necessary for the court to rule on this precise question. However, the doctrine of *Diui v. Naiditch*, *supra* note 57, would apparently allow recovery in this situation. See note 60 *supra* and accompanying text, for discussion of the attitude of most courts on this issue. It would seem that the jury would be entitled to decide close questions concerning whether the injury was caused by normal fire danger or unexpected flashing, *etc.*



at the time of the accident and at least arguably had an opportunity to issue a verbal warning.<sup>69</sup> Where they were present, the duty to warn was quite properly imposed. However, if the occupier's duty is only to warn, as the cases have frequently stated,<sup>70</sup> in the occupier's absence there could be no recovery unless the duty to warn could be said to include the posting of a warning sign or device. Since there is a clear relationship between the duty to warn and the foreseeability of harm from the hazard,<sup>71</sup> an evaluation of this factor in a case where the occupier was absent might indicate that a sign or other device should have been provided. Of course, in most cases where the occupier is present, the warning closely follows the realization of peril, and the probability of harm may be measured in minutes. In the example of the undersize vents in oil storage tanks, serious harm in the event of fire is highly foreseeable and the occupier might well be required to warn by means of signs or other devices even if he was not present during a fire.<sup>72</sup> Possible support for the idea that the courts will not restrict the duty of occupiers to the giving of a warning can be found in at least three recent decisions. In these cases the courts alluded to the "negligence" of the defendant in allowing the allegedly unusual hazard which caused the injury to exist.<sup>73</sup> True, the courts may have used the term "negligence" in the

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69. *E.g.*, Aravanis v. Eisenberg, *supra* note 55; Bartel's v. Continental Oil Co., *supra* note 61; Jackson v. Velveray Corp., *supra* note 60; Jenkins v. 313-321 W. 37th St. Corp., *supra* note 64; Lamb v. Sebach, *supra* note 62.

70. *Ibid.*

71. The cases cited in note 69 *supra* contain extended discussions of this principle and hold it to be fully applicable in firemen cases. It derives from the general rules concerning licensees and invitees expressed in the *Restatement*. RESTATEMENT (SECOND), TORTS §§ 342, 343 (1965).

72. Bartel's v. Continental Oil Co., *supra* note 61; Lamb v. Sebach, *supra* note 62. In these cases, however, the question did not arise because the occupiers or their agents were present and had opportunity to warn of the danger.

73. See, *e.g.*, Aravanis v. Eisenberg, *supra* note 55, at 248-50, 206 A.2d at 154-56. In this case the occupier had stored an explosive chemical in a container which he accidentally tipped over, starting the fire. In the plaintiff-fireman's action for injuries suffered when the residue of the chemical in the container flashed, the court charged the jury in part to the effect that, if they found that because of the defendant's negligence there existed a danger greater than that which is normally to be found in a private dwelling, he would be under a duty to warn the plaintiff of that danger. Jackson v. Velveray Corp., *supra* note 60. In reviewing the proceeding in the trial court, the court cited and relied upon Krauth v. Geller, *supra* note 43, for the proposition that occupiers are subject to liability for their negligence in connection with conditions creating undue risks of injury. Further, in reinstating the jury's verdict for the defendant, the court held that they could have resolved the question of defendant's negligence in storing chemicals in his favor from the evidence in the record. Presumably they might also have resolved the question against him. Buren v. Midwest Indus., Inc., 380 S.W.2d 96 (Ky. App. 1964), in which the court suggested that the presence of explosives may give rise to liability either on the basis of an unusual hidden hazard or of continuing active negligence. In this case the court affirmed a judgment entered notwithstanding the verdict for the defendant.

sense that the defendant's conduct merely failed to comply with the standard of care deemed reasonable under the circumstances, and not in the sense that the defendant also violated a duty owed to the plaintiff.<sup>74</sup> This reasoning would of course permit the duty to be placed at a different level from the "negligent" conduct—specifically, the giving of a personal warning if there is opportunity to do so.<sup>75</sup> However, it is submitted that if the fireman is required to go upon the premises at a time when the occupier is neither present nor represented, he should not be barred from recovery if in fact the occupier has allowed to exist unannounced an unusually dangerous situation which the fireman will probably not perceive, and from which it is foreseeable that firemen will suffer serious injury or death in case of fire.<sup>76</sup> It is clear in some of the decisions that the courts were guided by this reasoning, at least with reference to known hazards.<sup>77</sup> Moreover, it is believed that in the cases in which the courts employed the term "negligence" in the manner discussed earlier, recovery would have been allowed despite the absence of the occupier or lack of opportunity to warn.

There may be on the horizon yet a further extension of the occupier's duty, to include the exercise of reasonable care to discover unusual hazards of the type presently under consideration. The duty to discover is of course the essential element of the duty owed to invitees in the law of landowners' liability.<sup>78</sup> A recent decision by a

74. See PROSSER § 30, at 146-47.

75. See generally RESTATEMENT (SECOND), TORTS §§ 281, 282 (1965).

76. The occupier's duty in this situation should be determined with reference to the likelihood of danger in the event of fire. The jury should normally be permitted to decide the question of reasonable care, as well as the question whether the injury was caused by a hazard which should have been anticipated by the plaintiff. See notes 62-65 *supra* and accompanying text.

77. *Campbell v. Pure Oil Co.*, 15 N.J. Misc. 723, 194 Atl. 873 (1937), involved firemen injured while outside premises by explosion allegedly caused in part by defendant's negligence in permitting large quantities of oily, greasy, and gaseous substances of a highly inflammable nature to accumulate. It was not shown that the defendant was present or represented at the time, and the court did not mention this as a prerequisite to a finding of liability. The case came up on appeal from a denial by the trial court of defendant's motion to strike the complaint. The denial was affirmed. See also *Maloney v. Hearst Hotels Corp.*, 274 N.Y. 106, 8 N.E.2d 296 (1937) (recovery by fireman affirmed; death was caused by explosion of paint and chemical compounds stored contrary to city ordinance; holding was based entirely on this ground, with the court expressly reserving the question of common law liability); *Cf. Bandosz v. Daigger & Co.*, 255 Ill. App. 494 (1930) (defendant's storage of flammable liquids in quantities exceeding amount permitted by city ordinance termed wilful and wanton misconduct). *Texas Cities Gas Co. v. Dickens*, 136 S.W.2d 1010 (Tex. Civ. App. 1949) (utility company, not the occupier, sued by firemen for failure to turn off gas to burning building, thus creating increased hazard); *Houston Belt & Terminal Ry. Co. v. O'Leary*, 136 S.W. 601 (Tex. Civ. App. 1911) (fireman killed by explosion of fireworks in boxcar held to be licensee, but entitled not to be injured through defendant's "active negligence").

78. RESTATEMENT (SECOND), TORTS § 343 (1965).

Maryland court appears to set the stage for this kind of recovery, although in that case there was a jury verdict for the defendant.<sup>79</sup> The court suggested without deciding that, just as an invitee may exceed the scope of his invitation and thereby become a licensee, one in the position of a fireman may make the transition from licensee to invitee if he is faced with an unusual hazard created by the occupier's negligence.<sup>80</sup> Following this line of analysis, the court approved the trial court's charge to the jury that if, after meeting the ordinary risk inevitable in fighting fires in private dwellings, the fireman was faced with an unusual danger created by the negligence<sup>81</sup> of the occupier, and of which he knew, or should have known,<sup>82</sup> the fireman was entitled to be warned of such danger. In further outlining the steps in the trial court's instructions, the court approved the trial court's summary that if the defendant had stored an inflammable liquid under circumstances in which he knew or in the exercise of reasonable care would have known that his acts would probably result in injury in the event of fire, and if the danger created was unusual and not ordinarily to be expected in defendant's home, then the jury could find that he was negligent and their verdict should be for the plaintiff. The court held that this charge was as favorable to the plaintiff as the facts would allow, and refused to upset the jury's verdict for the defendant. It appeared that the defendant was present when the fireman was injured and had full knowledge of the presence of the chemical. The appellate court's decision does not disclose the ground upon which the jury's verdict for the defendant was based. In the face of the jury's verdict, one may perhaps feel emboldened to advocate the proposition that any such case should be given to the jury, and that the duty to exercise reasonable care to discover extraordinarily dangerous agencies or substances can be imposed with discretion.<sup>83</sup> As in the earlier discussion

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79. *Aravanis v. Eisenberg*, *supra* note 55.

80. *Id.* at 154.

81. See note 73 *supra* and accompanying text.

82. It is unclear whether the court, in allowing the jury to find a duty to discover the hazard, was referring to discovery of its physical presence or to realization of its potential harm. It would seem that since in this case the defendant was present and apparently knew of the presence of the chemical (he had been using it just prior to the fire), the trial court may have been referring to knowledge of its explosive characteristics. If this be true, the defendant's duty would seem to be the same as is owed to licensees, *i.e.*, he would have "had reason to know" of the dangerous propensities of the chemical and should have given warning. RESTATEMENT (SECOND), TORTS § 342 (1965). On the other hand, the duty to discover the presence of the hazard may be greater in its burden on the occupier, and may be the same as the typical duty owed to invitees.

83. No suggestion is made that the statistics cited by Professor James do not provide a reasonably accurate estimate of the long run results of allowing firemen cases to go to the jury. James, *The Functions of Judge and Jury in Negligence Cases*, 58 YALE L.J. 667, 687 (1949).

of unusual dangers not connected with fire,<sup>84</sup> the objective should be to require the occupier to be reasonably careful in the handling of the inordinately dangerous situation. In a given case, the utility of a highly dangerous situation may justify the occupier in retaining it with a suitable sign or other device installed as a warning. Again, where the utility of the condition would be unaffected by a relatively inexpensive effort to make it reasonably safe, a warning might be insufficient if it were foreseeable that the fireman would either not receive the warning, or would be unable to react in time to avoid injury, or would be reasonably compelled by his duty to proceed into the danger zone despite the warning.<sup>85</sup> The determination of a case would of necessity rest on a close analysis of the facts rather than on broad concepts of duty owed to traditional classes of persons.

### III. LIABILITY BASED ON FAULT AND PUBLIC COMPENSATION

As discussed earlier, one important reason behind the courts' reluctance to allow recovery in firemen and policemen cases is the fear that to require occupiers to anticipate their presence in all parts of the premises would create an undue inhibition upon use of their land.<sup>86</sup> There is another reason. The argument is that public fire and police departments exist to deal with the emergencies which inevitably arise in modern society. Their service is to the public in a primary sense, even when they are rendering aid upon the private property of an individual. Their efforts, including the risks of personal harm which they assume, inure to the benefit of all the people, and their compensation, including compensation for injury and death in the line of duty, should come from public funds.<sup>87</sup> This argument cannot be

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84. See notes 28-44 *supra* and accompanying text.

85. This level of duty may be owed to invitees under RESTATEMENT (SECOND), TORTS § 343A (1965). By effecting a balance between utility, expense of correction, and foreseeability of harm, the imposition of this duty with reference to firemen would not be burdensome.

86. The dangers involved in allowing recovery have also been variously expressed with reference to different factual situations. Thus, in *Anderson v. Cinnamon*, 365 Mo. 304, 309, 282 S.W.2d 445, 448 (1955), the court held that the occupier was under no duty to warn a fireman of a defective porch because "it would also be likely to interfere with the operations of the firemen in fighting the fire for a possessor to undertake to tell them where to go and where not to go." Dean Prosser has termed as "preposterous rubbish" the argument that potential tort liability to firemen would deter an occupier from sounding the alarm in case of fire. PROSSER § 61, at 407.

87. This view is set out and approved in *Scheuer v. Trustees of Open Bible Church*, 175 Ohio St. 163, 170, 192 N.E.2d 38, 46 (1963): "It appears to be the sound and settled public policy in this state that the problem should be handled [by compensating injured public officers from a system of workmen's compensation], and it has seldom if ever been challenged in the General Assembly by policemen and firemen and their organizations. As a matter of fact, their approach to the problem has been through the Workmen's Compensation Act."

gainsaid insofar as it pertains to the usual risks inherent in their occupations. The only valid rebuttal exists with reference to those hazards which are not normally associated with the risks of their calling. In such cases, firemen and policemen should not be penalized because of their occupations, neither should all the people be expected to bear the burden created by the negligent acts or omissions of a few.<sup>88</sup> Even though the liability of occupiers be established along the lines herein suggested, there will remain a wide range of circumstances in which the fireman and policeman will have no compensation for injuries except that provided by the public.

#### IV. LIABILITY BASED ON VIOLATION OF STATUTES

In many of the fireman and policeman cases, plaintiffs' counsel have been properly alert to the possibility of basing the occupier's liability upon some statute or ordinance, usually one which prescribes standards for the storage of dangerous substances,<sup>89</sup> or for the maintenance of other safety standards.<sup>90</sup> The courts are faced with a multi-faceted problem in such cases.<sup>91</sup> Among them there is obviously the question of whether the statute covers the factual situation before the court. Where this can be decided in the negative, no further consideration will be given the statute as a primary ground of liability.<sup>92</sup> Where the statute does cover the situation, the courts generally attempt to decide whether the plaintiff is among the class of persons for whose benefit the statute was enacted. The early cases usually involved statutes pertaining to conditions on the premises such as elevator shafts, fire escapes, and the like, and they were construed conservatively by the courts.<sup>93</sup> In later cases, there has appeared a greater willingness to find the plaintiff to be within the protection of statutes pertaining

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88. *Id.* at 46. In his dissent, Gibson, J. pointed out that a fireman or policeman who is injured by the negligent operation of a motor vehicle can maintain an action against the tortfeasor, workmen's compensation notwithstanding.

89. *E.g.*, *Buren v. Midwest Industries, Inc.*, *supra* note 73; *Rogers v. Cato Oil & Grease Co.*, *supra* note 64.

90. *E.g.*, *Carroll v. Hemenway*, 315 Mass. 45, 51 N.E.2d 952 (1943) (action based in part on alleged violation of statute pertaining to elevator shafts); *Davy v. Greenlaw*, 101 N.H. 134, 135 A.2d 900 (1957) (action based in part on alleged violation of statute requiring maintenance of adequate fire escapes).

91. See generally James, *Statutory Standards & Negligence in Accident Cases*, 11 L.A. L. REV. 95 (1950).

92. *Rogers v. Cato Oil & Grease Co.*, *supra* note 64; *Beendenberder v. Midtown Properties, Inc.*, 4 App. Div. 2d 276, 164 N.Y.S.2d 276 (1st Dep't 1957).

93. See, *e.g.*, denying liability, *Litch v. White*, 160 Cal. 497, 117 Pac. 515 (1911); *Hamilton v. Minneapolis Desk Mfg. Co.*, 78 Minn. 3, 80 N.W. 693 (1899); *Kelly v. Henry Muks Co.*, 71 N.J.L. 358, 59 Atl. 23 (1904). See also, all allowing recovery, *Racine v. Morris*, 136 App. Div. 467, 121 N.Y.S. 146, (1st Dep't) *aff'd*, 201 N.Y. 240, 94 N.E. 864 (1911); *Drake v. Fenton*, 237 Pa. 8, 85 Atl. 14 (1912).

to specific hazards such as storage of chemicals, but the case law on the point remains sparse.<sup>94</sup> Insofar as general fire safety statutes are concerned, *Dini v. Naiditch*<sup>95</sup> apparently stands alone among recent authorities in allowing recovery based on failure to maintain a general level of housekeeping consistent with the requirements of a statute.<sup>96</sup> This type of situation presents to the courts a subtle policy choice. The language of a statute pertaining to general fire safety standards may be as susceptible of interpretation to include firemen as a statute pertaining to dangerous conditions such as elevator shafts.<sup>97</sup> The court is therefore faced with choosing a policy to be furthered as a basis for its holding on the statute itself. Where the legislature has not clearly directed the statute to the protection of firemen,<sup>98</sup> it would seem more consistent with the general view of assumption of the risk of ordinary hazards to hold that the statute does not include firemen within its protection, at least insofar as it does not purport to establish standards with reference to extra-hazardous things such as explosives. In regard to the latter concept, public policy would tend to favor a more liberal construction with reference to firemen, as has been seen.<sup>99</sup> A liberal policy of statutory construction should also be employed with reference to statutes establishing standards for guarding of elevator shafts, fire escapes, and the like, as well as for safety appliance

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94. Thus, in *Aravanis v. Eisenberg*, *supra* note 55, the trial court charged the jury that if they found that the defendant had violated a statute pertaining to the storage and handling of volatile chemicals, and if they further found that the violation was a proximate cause of the plaintiff's injury, he would be entitled to recover. The jury's verdict was for the defendant. Again, in *Maloney v. Hearst Hotels Corp.*, *supra* note 77, the New York Court of Appeals affirmed a judgment for a fireman who was killed by an explosion of paint and chemical compounds which had been stored by the defendant contrary to a city ordinance. The affirmance was based entirely on the statute, the court holding that the statute was enacted for the benefit of firemen as well as guests in the hotel.

95. 20 Ill. 2d 406, 170 N.E.2d 881 (1960).

96. In *Buren v. Midwest Indus., Inc.*, *supra* note 73, the court stated that fire ordinances are for the protection of all who in their rightful pursuits are affected "involuntarily" by a fire, and refused to follow *Dini*.

97. In *Dini* the court relied upon the language of the fire safety statute that it was "intended to prevent a disastrous fire or loss of life in case of fire . . ." to demonstrate that firemen were within its coverage, *Dini v. Naiditch*, *supra* note 95, at 418, 170 N.E.2d at 886.

98. For a statute which expressly creates a civil cause of action for firemen under certain circumstances, see N.Y. MUNIC. LAW § 205A. The New York courts apparently administer this statute somewhat conservatively insofar as requiring it to be specifically asserted and pleaded is concerned. *Sicolo v. Prudential Savings Bank*, 2 Misc. 2d 889, 151 N.Y.S.2d 295 (Sup. Ct. 1956), *aff'd*, 4 App. Div. 790, 165 N.Y.S.2d 222 (2d Dep't 1957), *rev'd on other grounds*, 5 N.Y.2d 254, 157 N.E.2d 284, 184 N.Y.S.2d 100 (1959). However, firemen bringing an action under the statute need not prove freedom from contributory negligence, and assumption of risk is not a defense. *Carroll v. Pellicio Bros., Inc.*, 44 Misc. 2d 832, 255 N.Y.S.2d 771 (1964).

99. See notes 61-85 *supra* and accompanying text.

regulations for machinery.<sup>100</sup> There appears to be no sound reason why the fireman's or policeman's work should necessarily preclude his being included in the protection which the legislature has required the occupier to provide with reference to conditions unrelated to dangers created directly by fire.

Even though firemen and policemen be within the class of persons intended to be protected by a statute, there may be further obstacles to its use as the sole basis for liability. For example, the injury involved may not have been within the intendment of the statute. A thorough inquiry into this matter is not within the scope of this note, but it is submitted that a reasonably broad construction should be given. Thus, it should make no difference, absent an express declaration or clear implication to the contrary in the statute, that the plaintiff injured on a defective fire escape was a policeman in pursuit of a burglar rather than a fireman investigating a blaze.<sup>101</sup> Again, the court must deal with the relationship between the statutory standard and the standard of care which appears reasonable under the facts of the case. It is urged that in most cases there should be no diminution of the standard simply because the plaintiff is a fireman or policeman. The prima facie negligence rule adopted by the *Restatement Second* appears to be the best reasoned approach to the problem.<sup>102</sup>

#### V. INSPECTORS AND OTHER PUBLIC EMPLOYEES

Like firemen and policemen, inspectors and other public employees frequently enter the premises pursuant to a privilege conferred by law and irrespective of the consent of the occupier.<sup>103</sup> Unlike firemen and policemen, however, the courts have generally held them to be invitees.<sup>104</sup> It is obvious that at least one of the obstacles to classifying firemen and policemen as invitees will frequently not be present in the case of inspectors and other public employees. While the presence of members of the former group on emergency calls is not reasonably

100. Of course, if the language of the statute specifies the exclusive class or classes of persons intended to be benefited by its terms, the court cannot force an interpretation to include firemen or policemen. Thus, a statute may declare itself to be for the benefit of employees, or of guests in the case of public accommodations.

101. *Davy v. Greenlaw*, 101 N.H. 134, 135 A.2d 900 (1957). In this case it did not appear that the court would have found even a fireman to be within the statutory class.

102. *RESTATEMENT (SECOND), TORTS* §§ 286-288G (1965).

103. *Id.*, § 345.

104. See *PROSSER* § 61, at 405-06. "Where it can be found that the public employee comes for a purpose which has some connection with business transacted on the premises by the occupier, he is almost invariably treated as an invitee." *Id.* at 406. *But see Mulcrone v. Wagner*, 212 Minn. 478, 4 N.W.2d 97 (1942) (fire inspector who slipped on defective stairway held to be licensee, following general rule that firemen are licensees. Court refused to distinguish firemen cases involving emergency situations).

foreseeable in most instances, members of the latter are more likely to enter during regular business hours, and to confine their visits to more predictable portions of the premises. Thus, the imposition upon the occupier of the duty owed to invitees works no unjust hardship, as the courts have feared would be the case in connection with firemen and policemen.<sup>105</sup>

Since the courts have established a pattern of viewing inspectors as invitees, most of the cases have been concerned with the standard of care required and the defenses available to the defendant. General principles of negligence are followed.<sup>106</sup> A number of cases have involved plaintiffs who were permanently stationed on the premises, and the courts have tended to evaluate the duty as being to provide a safe place to work.<sup>107</sup> In other cases where the plaintiffs have been visitors on the premises, the courts have treated them as they would ordinary business visitors.<sup>108</sup> The scope of the invitation has apparently not been at issue in most cases.<sup>109</sup> Certainly, it would seem that

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105. See note 5 *supra*.

106. See generally James, *The Nature of Negligence*, 3 UTAH L. REV. 275 (1953).

107. *E.g.*, *Swift & Co. v. Schuster*, 192 F.2d 615 (10th Cir. 1951) (similar facts decided in same way under Utah law); *Cudahy Packing Co. v. McBride*, 92 F.2d 737 (8th Cir. 1937) (meat inspector allowed to recover for injuries sustained when he fell on a ladder which had been placed at a site on the premises where the stairs were being repaired. Plaintiff was enroute from his office to the killing floor, and apparently did not know of the availability of an alternative route); *Miller v. Pacific Constructors, Inc.*, 68 Cal. App. 2d 529, 157 P.2d 57 (1945) (federal inspector injured while performing duties inside dam project when a bulkhead gave way due to insecure fastening; court looked to terms of U.S. Government contract in holding that the plaintiff was in the position of an invitee); *Fred Howland, Inc. v. Morris*, 143 Fla. 189, 196 So. 472 (1940) (city building inspector allowed to recover for injuries caused by falling on defective scaffolding at construction site; the court stated that his position was similar to that of a government meat inspector in a privately owned meat packing plant); *Storment v. Swift & Co.*, 5 Ill. App. 2d 417, 125 N.E.2d 697 (1955) (federal meat inspector injured when he slipped on grease and fat on the killing floor where he was engaged in carrying out his duties). The court held that the issue of liability was for the jury, saying "It is apparent that the defendant company had a duty to maintain its premises in a reasonably safe condition; and conduct its operations in a reasonably safe manner for the performance of the work of plaintiff, since his presence and duties require him to be on the premises. . . . Knowledge of the working conditions which might involve some risk did not, as a matter of law, under the facts, constitute contributory negligence." *Id.* at 422, 125 N.E.2d 699; *Knight v. Swift & Co.*, 338 S.W.2d 795 (Mo. 1960) (U.S. Government meat inspector allowed to recover for injuries suffered by falling on a defective stairway, the condition of which he was aware; court applied Illinois law).

108. Thus, in *Jennings v. Industrial Paper Stock Co.*, 248 S.W.2d 43 (Mo. App. 1952), the plaintiff, a health inspector, who went into the furnace room without waiting for a light to be provided and fell into a furnace pit, was barred from recovery on the grounds of contributory negligence. See also *Robey v. Keller*, 114 F.2d 790 (4th Cir. 1940) (local citizen who was in position of leadership in having new community library constructed held to be invitee of contractor when she went upon the site for purposes of inspection).

109. The question might be more appropriately expressed in terms of the extent to which the plaintiff's duty requires him to move about the premises. It should arise



the inspector has no real benefit from his status as invitee if, in the area where his duty compels him to be, he loses that status.<sup>110</sup> On the other hand, if the occupier must exercise reasonable care to make the premises safe to receive a public employee whose purpose it is to explore remote and private sections thereof, he may appear to be in the same position which has caused the courts to refuse to classify firemen as invitees under similar circumstances. It should be noted, however, that an inspector's visit can normally be more easily anticipated, both as to time and place.<sup>111</sup> Of course, in any appropriate case, the jury should be allowed to determine whether the plaintiff was indeed in the necessary exercise of his duty, and this factor might well be determinative of the case. As to assumption of risk by inspectors, there is perhaps some analogy to the fireman cases.<sup>112</sup> No cases on the point were found, but it would seem that where inspectors are required to evaluate the safety of some potentially dangerous installation, such as electrical apparatus, they assume the risk that it will be found unsafe.<sup>113</sup> Any other rule might involve the occupier in an endless cycle of potential liability, unless he was in a position to correct the danger himself.<sup>114</sup>

There are other public employees whose duties require them to visit private premises in an official capacity, but who may not enjoy a broad privilege unrelated to the possessor's consent.<sup>115</sup> Thus, a meter reader representing a public utility will normally be an invitee while carrying out his normal duties, but his right to enter may

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more frequently in the inspector cases than in the fireman cases, because the fireman's duties may well require his presence anywhere, while the inspector would normally need to visit only a limited, or at least pre-determined area. The issue was raised in *Cudahy Packing Co. v. McBride*, *supra* note 107, but was resolved in favor of the plaintiff. See generally 2 HARPER & JAMES, TORTS § 27.12, at 1485-86 (1956).

110. Probably few modern courts would allow this to happen under most circumstances. RESTATEMENT (SECOND), TORTS § 345, comment *c* (1965), adopts the view that public inspectors, *etc.* may be invitees because their entry is for purposes closely connected with the business of the occupier, and is not solely pursuant to a privilege conferred by law.

111. As to reasonable care in connection with extra-hazardous conditions, the same reasoning may be applied to inspectors as was applied to firemen and policemen. See notes 38-43 *supra*.

112. See notes 55-60 *supra* and accompanying text.

113. Further analogy may be found in discussion of assumption of risk in connection with master and servant cases. See 2 HARPER & JAMES, TORTS 21.4, at 1178-79.

114. Two qualifications should be made to this statement. There may be a distinction for this purpose between a repairman whose job is to correct defects, and the public inspector who merely seeks to detect them. It is suggested, however, that the distinction is unsubstantial for the purposes of this discussion. Again, it is conceded that there may arise situations in which an unusual danger will exist, one that the plaintiff would not reasonably foresee. There may be liability in such cases, and there may be an analogy to the extra-hazardous situation in the firemen cases. See notes 61-85 *supra* and accompanying text.

115. See note 110 *supra*.

be characterized as contractual and therefore more analogous to the business visitor situation than to entry as of right.<sup>116</sup> Postmen delivering mail are also classified as invitees, but the occupier can refuse them admittance under most circumstances.<sup>117</sup> Other miscellaneous public employees are customarily treated as business visitors,<sup>118</sup> and the liability of occupiers to them partakes of the general law concerning invitees. It therefore appears that the law is settled as to the duty owed to public employees other than firemen and policemen, and the imposition of the duty is fully justified on moral and legal grounds.<sup>119</sup>

VI. OCCUPIERS' LIABILITY TO PERSONS WHO ENTER PURSUANT  
TO A PRIVILEGE FOR THE PURPOSE OF SAVING PERSONS  
OR PROPERTY FROM HARM

The remainder of this article will be directed toward an investigation of the duty of occupiers to persons who enter the premises under a privilege of private necessity. The privilege arises generally under circumstances in which persons or property on the premises are in danger, or when entry upon the premises is reasonably necessary to avoid some danger from without.<sup>120</sup> It exists irrespective of the consent of the occupier, and has developed in the common law primarily as a defense to actions for trespass by occupiers.<sup>121</sup> The privilege is conditional, and does not necessarily relieve the one entering under it from liability for actual damages inflicted by his entering or remaining on the premises from liability for trespass,<sup>122</sup> but the occupier may himself be liable to the entrant if he resists the entry or expels him in violation of his privilege.<sup>123</sup> For the purposes of this inquiry, primary emphasis will be directed to the occupier's liability for negligence, and not to the question of whether there exists a

116. *Sheffield Co. v. Phillips*, 69 Ga. App. 41, 24 S.E.2d 834 (1943). See also *Miller v. Pacific Constructors, Inc.*, *supra* note 107; *Fred Howland, Inc. v. Morris*, *supra* note 107.

117. *Paulbed v. Hitz*, 339 Mo. 274, 96 S.W.2d 369 (1936).

118. *Dillon v. Socony Mobil Oil Co.*, 9 App. Div. 2d 835, 192 N.Y.S.2d 818 (3d Dep't 1959) (sealer of weights and measures).

119. See generally Green, *The Duty Problem in Negligence Cases*, 29 COLUM. L. REV. 255, 270-75 (1929).

120. The extent of the privilege is defined in RESTATEMENT (SECOND), TORTS § 197 (1965). A similar privilege to enter premises exists in cases of public necessity. *Id.*, § 196; 1 HARPER & JAMES, TORTS §§ 1.16-1.22, at 46-64. See generally Bohlen, *Incomplete Privilege to Inflict Intentional Invasions of Property and Personality*, 39 HARV. L. REV. 307 (1925).

121. *Ibid.*

122. *Vincent v. Lake Erie Transp. Co.*, 109 Minn. 456, 124 N.W. 221 (1910). *But see* RESTATEMENT (SECOND), TORTS, § 197, comments *e* & *j* (1965).

123. *Depue v. Flatou*, 100 Minn. 299, 111 N.W. 1 (1907); *Ploof v. Putman*, 81 Vt. 471, 71 Atl. 188 (1908).

privilege to enter under the facts. Therefore, except where noted to the contrary, the plaintiff will be assumed not to be a trespasser.

#### A. *Entry To Aid Persons or Property in Danger on Premises*

The first aspect of occupiers' liability which will be considered in this section involves what is frequently described as the doctrine of rescue. Broadly stated, the doctrine imposes liability upon one who by his negligence places persons or property in danger under circumstances in which it is foreseeable that another will be induced to attempt a rescue, and the rescuer is injured in the attempt.<sup>124</sup> The concept is a general theory of negligence liability, and is not limited to application in land occupier cases.<sup>125</sup> However, when applied to such situations, it is apparent that the theory may furnish the plaintiff with both a privilege to enter the premises and a theory of negligence upon which to predicate the occupier's liability if he suffers injury.<sup>126</sup>

The duty of an occupier to one who attempts a rescue on his premises may be viewed in two ways. First, the rescuer may be an invitee or licensee on the premises in his own right, and may therefore be entitled to a level of duty commensurate with that status.<sup>127</sup> Liability for injuries suffered by such a person may well depend upon whether the occupier has been negligent with reference to conditions

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124. *Walker Hauling Co. v. Johnson*, 110 Ga. App. 620, 624, 139 S.E.2d 496, 499 (1964): "Where a defendant's negligent act, of commission or omission, has created a condition or situation which involves urgent and imminent peril and danger, to life or property, of himself or of others, those acts of negligence are also negligence in relationship to all others who, in the exercise of ordinary care for their own safety, under the circumstances, short of rashness and recklessness, may attempt, successfully or otherwise, to rescue such endangered life or property, by any means reasonably appropriate to the purpose; and insofar as the proximate cause of any injuries that a rescuer sustains as a result of his efforts is concerned, the chain of causation remains intact, since it is reasonably to be anticipated that, once such peril to life or property is initiated and brought into being by the negligence of a defendant, reasonable attempts will be undertaken to alleviate and nullify the consequences of such peril." See Cardozo's expression of the doctrine in *Wagner v. International Key Co.*, 232 N.Y. 176, 133 N.E. 437 (1921).

125. In modern cases, the concept is applied frequently to vehicle accident situations. See, e.g., *Woodruff v. Weis Butane Gas Co.*, 225 Ark. 114, 279 S.W.2d 564 (1955); *Guy v. Blanchard Funeral Home*, 85 Ga. App. 823, 70 S.E.2d 117 (1952); *Hammonds v. Haven*, 280 S.W.2d 814 (Mo. 1955).

126. Interestingly enough, no rescue cases were found in which it appeared that the occupier was seeking damages for trespass against the plaintiff.

127. Obviously, in such a case the plaintiff's privilege to be on the premises might derive primarily from the occupier's consent, although in the true rescue situation, presumably the occupier could not withdraw his consent during the existence of the emergency. For examples of cases in which the plaintiff was both invitee and rescuer, see *Grigsby v. Coastal Marine Serv.*, 235 F. Supp. 97 (W.D. La. 1964); *Parnell v. Security Elevator Co.*, 174 Kan. 643, 258 P.2d 238 (1953); *Mitchell v. Pettigrea*, 65 N.M. 137, 333 P.2d 879 (1958). In these cases, however, the defendants' liability appeared to be based largely on the rescue theory.

or activities on the premises, thereby creating a cause of action in the plaintiff apart from any consideration of the rescue doctrine.<sup>128</sup> Secondly, the duty to a rescuer may be viewed as it relates directly to the rescue doctrine, and this is the subject of central focus here. It has already been indicated that in rescue cases the occupier's duty to the rescuer has as a basic premise a duty to the one rescued. Therefore, if the one rescued would not have a cause of action against the occupier if he sustained injury from the danger, the rescuer will have no cause of action.<sup>129</sup> On the other hand, while it is generally said that there must be negligence toward the one rescued in order for there to be negligence toward the rescuer,<sup>130</sup> the courts apparently do not always specifically find that the occupier was negligent in allowing the first party to be placed in peril before allowing the rescuer to recover.<sup>131</sup> Moreover, the rescuer will not be barred from recovery by the contributory negligence of the one rescued.<sup>132</sup> Neither

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128. *Gruetzemacher v. Billings*, 348 S.W.2d 952 (Mo. 1961), where an occupier was held not liable to woman who ran onto premises to rescue child from possible injury, and was injured when she cut through a flower bed and fell over a post upon exiting the premises. Regardless of plaintiff's status while effecting the rescue, she became no more than a licensee when she went into the flower bed. It might also be argued in such a case that the occupier's negligence toward the one rescued was not the proximate cause of the plaintiff's injury.

129. Thus, where two licensees are on the same land together, and one encounters a dangerous condition concerning which the occupier owes him no duty, the other will not be able to recover against the occupier for injuries sustained in an attempt to rescue his friend. *Brady v. Chicago & N.W. Ry.*, 265 Wis. 618, 62 N.W.2d 415 (1954) (two children killed when they fell from a railroad bridge into a river, while one was attempting to save the other; court held them to be licensees); *Ryan v. Towar*, 128 Mich. 463, 87 N.W. 644 (1901) (doctrine applies to the trespassers as well).

130. See note 123 *supra*.

131. There would probably be little doubt as to the determination of this threshold question in most cases. Thus, in *Clayton v. Blair*, 254 Iowa 372, 117 N.W.2d 879 (1962), tenants died while attempting to arouse other tenants to warn them of fire in apartment house, allegedly caused by negligently installed wiring. The appellate court opinion reversed a jury verdict for defendant because of trial court's refusal to give instruction on rescue doctrine. The jury verdict was apparently based on contributory negligence. *Brock v. Peabody Co-op Equity Exch.*, 186 Kan. 657, 352 P.2d 37 (1960), involved a mother asphyxiated by poisonous gas used to exterminate pests in warehouse when she rushed to rescue her young son who was helpless inside. Trial court's action in sustaining defendant's demurrer on ground of contributory negligence reversed. It is interesting to note that concurrently with this case, there was another action on behalf of the dead child on grounds of attractive nuisance. *Shank v. Peabody Co-op. Equity Exch.*, 186 Kan. 648, 352 P. 2d 41 (1960). See also *Parnell v. Security Elevator Co.*, *supra* note 127, in which the court said that the defendant's liability to one whom he had asked to go to the rescue of a boy in a grain storage pit did not depend upon how the boy came to be in the dangerous situation. The plaintiff was an invitee on the premises. However, in *Silbernagel v. Voss*, 265 F.2d 390 (7th Cir. 1959), the court found that the defendant was negligent to one who fell from a ladder on the premises, and that he was also negligent to the plaintiff who went to her rescue.

132. *Brock v. Peabody Co-op. Equity Exch.*, *supra* note 131. See also *Truitt v. Hays*, 33 Pa. D. & C.2d 453 (C.P. 1963).

will be barred solely because the one rescued suffered no harm.

It is perhaps in connection with two-party rescue situations that correct analysis of the occupier's duty is most important. Professor Bohlen some years ago detected the error in the tendency of a few courts to assume that this duty ran to the one endangered, and then extended somehow to the rescuer.<sup>133</sup> If this were true, a rescuer could not recover from one who had placed himself in peril because the defendant would have no cause of action against himself for his own negligence. This problem was troublesome to a few courts,<sup>134</sup> but it now appears to be settled that the defendant's duty runs directly to the rescuer, and his cause of action is based on the defendant's conduct in creating the situation in which it was foreseeable that someone would attempt the rescue. Thus, a rescuer may recover from one who endangers himself, whether negligently<sup>135</sup> or deliberately,<sup>136</sup> under circumstances in which harm from a rescue attempt is foreseeable.<sup>137</sup>

An important question in any rescue case is whether the plaintiff-rescuer was guilty of contributory negligence. Manifestly, one who voluntarily places himself in a dangerous situation is not exercising the degree of care for his own safety which the law ordinarily requires as a requisite for recovery in a negligence action. Equally manifest, however, is the fact that the tort claim which has been the subject of the foregoing discussion will be illusory if the defendant has

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133. BOHLEN, *STUDIES IN THE LAW OF TORTS* 569 n.33 (1926). "The right to recover cannot be based solely upon the wrongful conduct of the defendant toward the person imperiled. To give one person a right of action, it is not enough that he is harmed by an act which is wrongful towards another. The act must be wrongful to the person injured as at least tending to create an undue risk of injury to him. Nor has the rescuer any interest in the person rescued such as a husband has in the services of his wife or a master in the services of his servant. His right to recover is, therefore, not derived from the wrong to the person imperiled. Thus the rescuer is not barred by the contributory negligence of the person whom he attempts to rescue . . ." *Ibid.*

134. *E.g.*, *Dan v. Bryan*, 49 Tenn. App. 250, 354 S.W.2d 483 (W.S. 1961); *Saylor v. Parsons*, 122 Va. 679, 98 N.W. 500 (1904).

135. *Carney v. Buyea*, 271 App. Div. 338, 65 N.Y.S.2d 902 (4th Dep't 1946), *aff'd*, 296 N.Y. 1056, 73 N.E.2d 120 (1947) (landowner rescued by tenant's guest from being struck by her own car which she had negligently parked without securely setting brake); *Ruth v. Ruth*, 213 Tenn. 82, 372 S.W.2d 285 (1963) (court expressly held that the fact that the action is brought against the person being rescued does not bar application of rescue doctrine).

136. *Talbert v. Talbert*, 22 Misc. 2d 782, 199 N.Y.S.2d 212 (Sup. Ct. 1960) (son stated a cause of action for injuries sustained in rescuing his father from suicide attempt.)

137. Thus, in *Betz v. Glaser*, 355 S.W.2d 611 (Mo. App. 1964), the occupier was not liable to one who, while sawing an overhanging tree limb, fell to the ground and was injured when he attempted to prevent the limb from falling on the occupier as she walked underneath. The court held that the occupier could not have reasonably foreseen the harm to the plaintiff.

available the defense of contributory negligence based on the normal standard of conduct. Plaintiffs are not so penalized, and the rule appears to be clearly established that the plaintiff will not be barred unless his conduct was rash or reckless.<sup>138</sup> It is submitted that this standard should be related both to the degree of harm with which the party sought to be rescued is threatened, and to the reasonableness of the plaintiff's belief that he can effect a rescue. Thus, where one is observed in danger of slipping on a patch of ice on the premises, the plaintiff may not be justified in dashing into a highway in the path of oncoming traffic in an effort to reach the person and prevent the fall. Again, if the plaintiff observes another engulfed in flame and pinned beneath the fallen debris of a burning building, he may be acting unreasonably if he moves into the danger zone in an attempt to rescue. Where only property is in danger, the plaintiff should be held to a higher standard of care than he would in rescuing persons.<sup>139</sup> If the situation involves action by the plaintiff to save both property and persons, he should be given the benefit of the lower standard on the presumption that his efforts were directed primarily to saving people, unless there is clear evidence to the contrary.<sup>140</sup>

In summary, occupiers of land may be subject to liability to those who enter their premises in an attempt to rescue persons or property, including the occupier, who have been placed in danger by the occupier's negligence or design. The occupier may avoid liability by showing that the plaintiff's rescue attempt or harm therefrom was not foreseeable under the circumstances, or that the person rescued would have had no cause of action against him if he had been injured, or that the plaintiff acted rashly under the circumstances. The doctrine appears to be generally well developed, and demonstrates a proper concern by the law in fixing the responsibility for ultimate harm at the point of ultimate cause.

#### B. *Entry Upon Premises for the Purpose of Protecting Persons or Property From Danger Without*

It has previously been shown that the law recognizes a privilege for persons to enter the premises of others in an effort to reach safety from some outside danger.<sup>141</sup> Apparently, the exercise of this

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138. The principle is discussed in *Walker Hauling Co. v. Johnson*, *supra* note 124; *Clayton v. Blair*, *supra* note 131, *Brock v. Peabody Co-op. Equity Exch.*, *supra* note 131.

139. See *Eufemia v. Pacifico*, 24 App. Div. 2d 673, 261 N.Y.S. 2d 100 (3d Dep't 1965).

140. *Ellmaker v. Goodyear Tire & Rubber Co.*, 372 S.W.2d 650 (Mo. App. 1963) (effort to stop automobile from rolling off premises into street).

141. See note 119 *supra* and accompanying text.

privilege has not played a significant role insofar as occupiers' liability is concerned. No cases were found in which the occupier was sued on grounds of negligence by one who entered solely pursuant to the privilege.<sup>142</sup> The language of the *Restatement* appears to include such plaintiffs in the category of licensees unless they are injured on a part of the premises then held open to the public, in which case they would be owed the same duty owed to invitees.<sup>143</sup> This is, of course, the same section which is applicable to firemen and policemen, but the language is probably more nearly adequate as it relates to the class of plaintiffs presently being considered. It will be remembered that certain extensions of the occupier's duty were suggested in connection with firemen and policemen in order to give them the benefit of the duty owed to any other class of persons.<sup>144</sup> The justification for such reasoning was that the plaintiff's entry was not only privileged but was also mandatory, was usually made in situations of emergency, and was frequently of real benefit to the occupier. Plaintiffs who enter to seek safety for themselves or their property, on the other hand, present an entirely different situation. A desirable policy may be served by treating such persons as invitees while on public portions of the premises; that is, that occupiers who purport to keep their premises safe for the public should be held responsible if they fail to exercise reasonable care to make the actual condition conform to the appearance. Beyond this, one who enters seeking refuge for himself or his property should be entitled to no higher duty than that owed to licensees. To be sure, this duty should conform to the modern view of the *Restatement* which requires of the occupier considerably more than to merely refrain from willfully or wantonly inflicting injury.<sup>145</sup> In any event, it is apparently rare indeed for one who enters solely under the privilege to attempt to maintain a negligence action against the one whose premises have provided him with refuge.

## VII. CONCLUSION

The law of landowners' liability has developed upon the basic assumption that the occupier has the initiative to invite persons to enter his premises and to exclude or expel those who are not wel-

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142. In *Rossi v. Del Duca*, 344 Mass. 66, 181 N.E.2d 591 (1962), a child was granted recovery on ground of strict statutory liability to injuries suffered by a dogbite on the defendant's premises. The plaintiff had entered the premises to escape other dogs which were following her down the street. The court relied upon *RESTATEMENT (SECOND), TORTS* § 197 (1965), to determine that she was not a trespasser and was therefore entitled to the statute's protection.

143. *Id.*, § 345. The same duties would apparently be owed to persons who enter to retrieve their property from the premises. *Id.*, comment *a*.

144. See notes 30-44 *supra* and accompanying text.

145. *RESTATEMENT (SECOND), TORTS* §§ 342-45 (1965).

come. However, as is true in the application of many general rules in our legal order, an anomaly exists in connection with persons who are privileged to enter irrespective of the occupier's consent. Of the various classes of persons who are so privileged, the greatest confusion in judicial analysis has arisen in connection with firemen and policemen who come in emergencies and move throughout the premises in the discharge of their duties. The older consensus seemed to resolve all difficulties in favor of the occupier, but the more recent decisions reveal a changing attitude concerned with examining the facts in each individual case. The occupier may no longer be virtually heedless of the danger his premises may hold for the public officer. It is further suggested that the extensions and modifications of liability which have been discussed will assess the occupier no more than is just in a complex and interdependent society.

Other public employees have long stood in a more favorable light, and their cases are part of the broader law of occupiers' liability. The interesting interrelation between the privilege of private necessity and occupiers' liability has not been extensively developed, as only few cases have arisen. Those involving the doctrine of rescue have generally been properly decided, and reflect the awareness of modern law that public stability in a dense society demands personal responsibility for reasonably foreseeable chain reactions.

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