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Torts: Negligence: Policeman in Performance of Duties Allowed Recovery as Invitee

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case that any such regulation will have to provide for some method of assisting needy children before it will be allowed. The important point to remember here is that AFDC is intended to benefit children and not the children's mothers. Any regulation which terminates this aid for a reason other than need or act of the individual child himself would be wholly illogical unless the child is provided for in some other manner. The majority opinion is restricted to the issue of a mother's immorality in respect to the termination of aid. Although Justice Douglas' opinion was broader than necessary for a determination of this case, his argument is appealing and may be important in future problems in this area.

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Torts: Negligence—Policeman In Performance of Duties Allowed Recovery As Invitee: In *Cameron v. Abatiell*[1] a city policeman was injured when steps leading to the back door of a business building collapsed while he was following his usual routine of checking for fires. The Vermont Court, in determining the liability of the owner, was concerned with the status of a policeman rightfully on the premises in the performance of his duties. The court held that the policeman was entitled to recover from the possessor of the premises, since he enjoyed the status of a business invitee. The court stated:

> In this case, as in cases of a public employee, the policeman covering the Center Street beat could reasonably be anticipated and expected not only as to time (in the evening after closing hours) but also as to the exact place. Thus, the defendants had a reasonable opportunity to make the premises safe or to warn the plaintiff of any dangerous condition. It was within the reasonable foresight of the defendants of what was likely to happen if the steps leading to the rear door became in disrepair. The plaintiff was not using the stairway to the rear door in an emergency in the discharge of his police duties. His entry on the steps was not to make an arrest or chase a thief or burglar. The circumstances of this case distinguish it from those cases arising in other jurisdictions which deny recovery.
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> [W]e conclude that the relationship between the plaintiff and defendants is in essence that of a business visitor, or invitee, on the premises. Accordingly, the rules of protection from injury applicable to such class of persons are controlling.[2]

However, the majority of American courts have classified policemen entering premises in performance of their duties as mere licencees.[3]

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[1] 241 Ad.2d 310 (Vt. 1968).

[2] *Id.* at 314-15.

[3] *See* Louisville & N. R.R. Co. v. Griswold, 241 Ala. 104, 1 So. 2d 393 (1941); Pincock v. McCoy, 48 Idaho 227, 281 P. 371 (1929); Carroll v. Hemenway, 315 Mass. 45, 51 N.E.2d 952 (1943); Scheurer v. Trustees of the Open Bible Church, 175 Ohio St. 163, 192 N.E.2d 38 (1963). *See* Note, 28 CORNELL L. Q. 232 (1943).

The case of *Davy v. Greenlaw*[4] expresses the position taken by most jurisdictions:

> At common law, policemen . . . by the great weight of authority, are held to have only the rights of mere licensees to whom the property owner if he knows of their presence owes only a duty to warn of dangers which he knows and which are not open to ordinary observation.[5]

A question arises, then, as to what the differences and controlling rules are if a policeman is classified in one instance as an invitee and in another as a licensee. An invitee, according to the Restatement of Torts, may be either a public invitee or business visitor. A public invitee is a person who is invited to enter or remain on the land as a member of the public.[6] 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 the land.[7]

The Restatement distinguishes between two types of business visitors. The first type includes persons who are invited to come upon the land for a purpose connected with the business for which the land is held open to the public, as where a person enters a shop to make a purchase.[8] The second type includes those who come upon the land not open to the public, for a purpose connected with the business which the possessor conducts upon the land, or for a purpose connected with their own business which is connected with any purpose, business or otherwise, for which the possessor uses the land.[9]

A licensee, as defined by the Restatement, "[I]s a person who is privileged to enter or remain on land only by virtue of the possessor's consent."[10] Social guests, members of the possessor's household, and one whose presence upon the land is solely for his own purpose are commonly placed in this category.

The court further distinguishes the duties owed by the possessor to an invitee or licensee on the basis of whether the negligence consisted of a dangerous condition or dangerous activity. In *Cameron,* the court was principally concerned with a dangerous condition—a step in disrepair. In section 343 of the Restatement of Torts, entitled "Dangerous Conditions Known to or Discoverable by Possessor," a possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he:

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[4] 101 N.H. 134, 135 A.2d 900 (1957).
[5] *Id.* at 134, 135 A.2d at 901.
[6] Restatement (Second) of Torts § 332 (1965).
[7] *Id.*
[8] *Id.*, § 332, comment *e* at 179.
[9] *Id.*, § 332, comment *e* at 180.
[10] *Id.*, § 330.

(a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and

(b) should expect that they will not discover or realize the danger or will fail to protect themselves against it, and

(c) fails to exercise reasonable care to protect them against the danger.[11]

On the other hand, under section 342 of the Restatement, entitled "Dangerous Conditions Known to Possessor," a possessor of land is subject to liability for physical harm caused to licensees by a condition on the land if, but only if,

(a) the possessor knows or has reason to know of the condition and should realize that it involves an unreasonable risk of harm to such licensees, and should expect that they will not discover or realize the danger, and

(b) he fails to exercise reasonable care to make the condition safe, or to warn the licensees of the condition and the risk involved, and

(c) the licensees do not know or have reason to know of the condition and the risk involved.[12]

Thus, the basic difference between sections 342 and 343 is that the possessor of land has no duty to prepare a safe place for the licensee's reception or to inspect the land to discover possible, or even probable, dangers. His only duty is to disclose dangerous conditions known to him. On the other hand, an invitee is entitled to expect that the possessor will take reasonable care to ascertain the actual condition of the premises, that the land has been prepared and made ready and safe for his reception, or that the possessor will give warning of the actual condition and the risk involved therein.

The Restatement also defines the liability of a possessor of land in relation to those entering in the exercise of a privilege and independently of the possessor's consent. Section 345 of the Restatement says:

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

(2) The liability of a possessor of land to a public officer or employee who enters the land in the performance of his public duty, and suffers harm because of a condition of a part of the land held open to the public, is the same as the liability to an invitee.[13]

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[11] *Id.*, § 343.
[12] *Id.*, § 342.
[13] *Id.*, § 345.

In effect, this section suggests that a policeman calling during business hours at a store or an office to make an inquiry should be classified as an invitee, whereas if he comes at midnight or enters by the fire escape, or enters in pursuit of a criminal, his classification is that of a licensee. The distinction seems to lie in the time, place, and regularity of the officer's visit.[14]

However, as Professor William Prosser has stated, "[T]he courts have encountered considerable difficulty in dealing with public officials who come upon the land in exercise of a legal privilege and the performance of a public duty. Such individuals do not fit very well into any of the more or less arbitrary categories which the law has established."[15]

The question remains as to why, in most instances, policemen are classified licensees. A host of positions has been advanced in support of the licensee categorization. The same arguments likewise apply to firemen who have, in most instances, been categorized as licensees.[16] The most logical reason put forth is that policemen are likely to enter the premises at unforeseeable times, upon unusual parts of the premises, and under circumstances of emergency where care in the preparation for their visit cannot be reasonably expected.[17] In support of this contention, one author has stated:

> The broad range of such a duty, the impossibility of forecasting the precise point to which the officer's duties may call him, the infrequency of his probable visits, all clearly preclude the idea that the balance of social benefit can require such a serious restriction on the owner's use of his land, or justify the imposition of such a burden on his exchequer, to prevent so vague a risk of so improbable an injury.[18]

The same author further states that:

> It would be an obviously unreasonable burden to impose on landowners to require them to keep the whole of their premises in such condition as to make every part of it safe for those whose unusual and exceptional right of entry may never accrue.[19]

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[14] Prosser, *Business Visitors and Invitees*, 26 MINN. L. REV. 573, 611 (1942).

[15] W. PROSSER, LAW OF TORTS § 61, at 405 (3d ed. 1964).

[16] *See* Roberts v. Rosenblatt, 146 Conn. 110, 148 A.2d 142 (1959); Baxley v. Williams Constr. Co., 98 Ga. App. 662, 106 S.E.2d 799 (1958); Aldworth v. F. W. Woolworth Co., 295 Mass. 344, 3 N.E.2d 1008 (1936); Hamilton v. Minneapolis Desk Mfg. Co., 78 Minn. 3, 80 N.W. 693 (1899); Anderson v. Cinnamon, 365 Mo. 304, 282 S.W.2d 445 (1955); Krauth v. Geller, 31 N.J. 270, 157 A.2d 129 (1960); Note, 48 GEO. L. J. 187 (1959). *Contra*, Dini v. Naiditch, 20 Ill. 2d 406, 170 N.E.2d 881 (1960).

[17] *See* Shypulski v. Waldorf Paper Products Co., 232 Minn. 394, 45 N.W.2d 549 (1951); Restatement (Second) of Torts § 345, comment *c* at 228 (1965); Note, 26 COLUM. L. REV. 116 (1926); Note, 22 MINN. L. REV. 898 (1938).

[18] Bohlen, *The Duty of a Landowner Towards Those Entering His Premises of Their Own Right*, 69 PENN. L. REV. 142, 351 (1920).

[19] *Id.* at 350-51.

Policemen have also been classified as licensees because possessors of land might be deterred from calling such officials if their tort liability or imposed duty were extended.[20] However, it is unlikely that a possessor of land, even if he knew the extent of his legal duties, would be deterred by fear of tort liability when a threat to his life or property was imminent.[21]

It has been further argued that policemen enter premises under a license conferred by law, primarily for the benefit of the public, and that this privilege is the implied permission necessary to classify such officers as licensees.[22] The contention that such entry is licensed by the public interest is often referred to as the "law of overruling necessity."[23] Policemen are not invitees because they are not invited by the possessor of the land. This line of reasoning has been criticized as follows:

> If the public officer is not an "invitee" because his right to enter does not depend on an invitation extended to him and because he enters, even if summoned by the owner, in the performance of his duty as public officer and not in acceptance of the invitation, it is equally clear that he is not a "licensee" of the owner, since his entry is no more referable to a permission than to an invitation.[24]

Both licensees and invitees enter upon the premises with the consent of the possessor; the former are tolerated and the latter are solicited. In the case of policemen, consent is irrelevant since, if the conditions calling for their entry exist, they enter the premises as of right. They act neither by permission nor invitation.[25]

Courts have not, generally, placed other types of public officials, who are not required to enter on a premises in performance of their duties, in the category of licensee. Those who enter land in the exercise of a privilege conferred by authority of law, regardless of the possessor's consent, may have the status of an invitee. If they come for a purpose directly or indirectly connected with the business of the possessor, they are entitled to the greater protection afforded invitees under the rules stated in sections 341A and 343 of the Restatement. Thus, a building[26] or safety inspector[27] who enters business premises to perform his public duties is an invitee since his presence is closely connected

[20] Shypulski v. Waldorf Paper Products Co., 232 Minn. 394, 397-98, 45 N.W.2d 549, 551 (1951).
[21] 2 F. HARPER AND F. JAMES, THE LAW OF TORTS § 27:14, at 1503 (1956).
[22] *See* Comment, 35 MICH. L. REV. 1157 (1937).
[23] Burroughs Adding Machine Co. v. Fryar, 132 Tenn. 612, 179 S.W. 127 (1915).
[24] Bohlen, *supra* note 18, at 344.
[25] Meiers v. Fred Koch Brewery, 229 N.Y. 10, 127 N.E. 491 (1920).
[26] *See* Miller v. Pacific Constructors, Inc., 68 Cal. App. 2d 529, 157 P.2d 57 (1945); Fred Howland, Inc. v. Morris, 143 Fla. 189, 196 So. 472 (1940); Henryetta Constr. Co. v .Hanis, 408 P.2d 522 (Okla. 1968).
[27] *See* Cudahy Packing Co. v. McBride, 92 F.2d 737 (8th Cir. 1937); Hyatt v. Murray, 101 Minn. 507, 112 N.W. 881 (1907); Mitchell v. Barton & Co., 126 Wash. 232, 217 P. 993 (1923).

with the business conducted there and may even be indispensable to it. The same is true of public officials who enter a private residence for the purpose of some business with the possessor. This includes a garbage collector[28] or water meter reader.[29] It is not necessary that the presence of the visitor be in any way of pecuniary advantage to the possessor. A tax[30] or customs collector[31] who enters to perform his public duty is an invitee. The basis for classifying such officials as invitees is well expressed by an Ohio court:

> The entry of public employees, other than policemen and firemen, occurs during regular business hours, and such entry can reasonably be anticipated not only as to time, but also as to place. The owner has a reasonable opportunity to make the premises safe or to warn them of any dangerous condition.[32]

However, one author has criticized the blanket classification of public officials as invitees:

> The functions of building inspector, revenue agent, or health inspector are thrust upon the occupier by the compulsion of law as an unsought and often resented price of building or of doing business. The freedom of choice to admit or exclude the visitor that is so essential to ordinary invitation is entirely lacking; the only benefit that accrues to the occupier is the fruit of compulsion.[33]

Although most courts continue strictly to classify policemen as licensees, some courts have departed from the rigidity of the rule. The most notable departure is an Illinois case that dealt with the status of firemen and, by reference, of policemen. In the case of *Dini v. Naiditch*[34] a fireman was injured by the collapse of a wooden staircase while fighting a blaze in the defendant's hotel. The Supreme Court of Illinois said that a fireman rightfully on the premises of another may recover for the possessor's failure to exercise reasonable care in the maintenance of his property when the injury occurred in a part of the premises where firemen might reasonably be expected to be present. The court rejected the rigidity of classifying firemen as licensees in all circumstances:

> [I]t is our opinion that since the common-law rule labelling firemen as licensees is but an illogical anachronism, originating in a vastly different social order and pock-marked by judicial re-

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[28] Toomey v. Sanborn, 146 Mass. 28, 14 N.E. 921 (1888).
[29] *See* Sheffield Co. v. Phillips, 69 Ga. App. 41, 24 S.E.2d 834 (1943); Kennedy v. Heisen, 182 Ill. App. 200 (1913).
[30] Anderson & Nelson Distilling Co. v. Hair, 103 Ky. 196, 44 S.W. 658 (1898).
[31] Wilson v. Union Iron Works Dry Dock Co., 167 Cal. 539, 140 P. 250 (1914).
[32] Scheurer v. Trustees of the Open Bible Church, 175 Ohio St. 163, 171, 192 N.E.2d 38, 43 (1963).
[33] 2 F. HARPER AND F. JAMES, *supra* note 21, at 1500.
[34] Dini v. Naiditch, 20 Ill. 2d 406, 170 N.E.2d 881 (1960). *See also* Note, 47 CORNELL L. Q. 119 (1961); Note, 14 VAND. L. REV. 1541 (1961).

finements, it should not be perpetuated in the name of "stare decisis." That doctrine does not confine our courts to the "Calf-Path," nor to any rule currently enjoying a numerical superiority of adherents. "Stare decisis" ought not be the excuse for a decision where reason is lacking.[35]

CONCLUSION

Attempting to classify policemen as licensees in all circumstances is antithetical to the law's characteristic flexibility. A rational approach to the problem is to classify policemen according to the factual situation of each case.

In *Cameron,* the decision to classify the policeman as an invitee evidenced a rational approach. First, the plaintiff's presence on the premises was as a visitor in the interest of public safety, but primarily for the protection of the defendant's property. A regular pattern of activity had been established. Thus, in this case a serious objection to classifying policemen as invitees is eliminated, the impossibility of forecasting the precise place to which the officer's duties may call him and the infrequency of his improbable visits. Secondly, the policeman, when descending defendant's staircase, did not do so in an unusual manner or in an emergency situation. Thus, the circumstances of this case differentiate it from those cases arising in other jurisdictions which deny recovery. Under these particular circumstances, the officer had a right to assume that the premises, aside from obvious dangers, were reasonably safe for the purpose for which he was upon them and that proper precautions had been taken to make them so.

Cameron establishes that it is the nature of the service, and not the official designation of the person rendering it, which should determine the relationship and resulting liability of the parties. The case does not represent a radical departure, but rather a rational analysis of the facts of the case in the light of the law as the court viewed it.

MARTIN L. GREENBERG

Contracts: Infant's Disaffirmance; Infant's Right to Void: In *Kiefer v. Fred Howe Motors, Inc.*,[1] the plaintiff, an emancipated, twenty-year-old minor, married, and employed on a full-time basis, purchased a second-hand station wagon from the defendant, Fred Howe Motors, Inc. After paying the full purchase price of $412.00 and signing the defendant's standard sales contract,[2] the plaintiff took possession of the vehicle. Some time later, the minor experienced difficulty with the auto which he claimed was caused by a cracked block. After the dealer failed

[35] 170 N.E.2d at 885-86.

[1] 39 Wis. 2d 20, 158 N.W.2d 288 (1968).

[2] The sales contract contained the following clause: "I represent that I am 21 years of age or over and recognize that the dealer sells the above vehicle upon this representation." *Id.* at 28, 158 N.W.2d at 292.