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Firemen: Licensees Or Invitees? - Aravanis v. Eisenberg

Firemen: Licensees Or Invitees?

Aravanis v. Eisenberg[1]

The plaintiff, a municipal fireman, responded to a telephoned report by defendants of a fire in their home. When plaintiff arrived on the scene, the fire was localized in the basement of the defendant's home. While plaintiff was in the basement carrying out his duties as a fireman, there was a sudden flash and the plaintiff was severely burned over extensive portions of his body. He brought suit for the injuries thus sustained, charging that defendants' negligence in improperly storing a flammable liquid was the cause of the injuries.[2]

The uncontraverted evidence showed that the fire was started when one of the defendants caused a tool from his work bench to fall upon a glass jug filled with acetone, which burst and spilled the liquid on the basement floor.[3] The acetone came in contact with the pilot light of a nearby water heater and, being a highly volatile substance, it ignited. Judge Prendergast, sitting in the Superior Court of Baltimore City, instructed the jury as follows:

> To summarize then, . . . I suggest that you first ascertain whether the fire was started by negligence on the part of the defendant, Lloyd A. Eisenberg. If you find that it was, then you should next inquire as to whether he had stored a quantity of flammable liquid, described as acetone, in such a place and under circumstances likely to create an unusually hazardous condition in the event that the fire should occur, and if so whether these conditions were the proximate cause of the intense heat, the accumulation of gasses and other factors said to have produced plaintiff's injury. If you should resolve these problems in favor of the plaintiff you must still consider whether Eisenberg knew, or in the exercise of reasonable care, should have known that the resulting injury could probably result from his acts. If you find that he knew or should have known and anticipated the danger and that it was unusual and not ordinarily to be expected in his home, then you may conclude that he was negligent and in that event your verdict should be in favor of the plaintiff as against him.
>
> On the other hand, if you do not find that he was negligent in having quantities of flammable liquids in his house or that any negligence on his part was the proximate cause of the injury or that Eisenberg did not know or should not have been aware of the resultant danger in the exercise of ordinary care, then in any of those events your verdict should be for the defendants.[4]

1. 237 Md. 242, 206 A.2d 148 (1965).

2. MONTGOMERY COUNTY CODE ch. 86, §§ 86-59 and 86-61 (1960) establishes certain storage requirements for flammable liquids, including acetone, when such liquids are stored in a residential dwelling.

3. *Id.* at 247, 206 A.2d at 151.

4. *Id.* at 255-56, 206 A.2d at 155-56.

The jury returned a verdict for defendants, and plaintiff appealed, contending that he was entitled to the rights of an invitee. In affirming the verdict, the Maryland Court of Appeals held that "the trial judge's instructions to the jury were as favorable to the appellant as they could have been even if his contentions as to his status as an invitee at the time of his injuries were correct."[5] The court went on to say: "The portion of the Judge's charge which has been quoted did not in express terms refer to the plaintiff in the situation postulated as an invitee *but the duty which the Judge told the jury the property owner had to the plaintiff under the conditions set forth was the duty which a property owner owes to an invitee; . . . .*"[6]

This decision raises the question whether a fireman is now to have the status of a mere licensee or whether he is to enjoy the favored stature of an invitee when upon the property of another in the course of his duties as a fireman. The common law duty owed by a property owner to a person who is injured on his property is determined entirely by the now archaic "pigeon-holing technique"; *i.e.*, a person on the land of another is given a classification of either trespasser, licensee or invitee, and for every arbitrary label there follows a corresponding duty owed.

A trespasser has been defined as "a person who enters or remains upon land in the possession of another without a privilege to do so created by the possessor's consent or otherwise."[7] It can be said that "the owner of land in Maryland owes no duty with respect to the condition of his land to a trespasser, or even to a licensee, whose presence upon the land is known to him, except to abstain from willful or wanton misconduct."[8]

The Court of Appeals of Maryland has defined a licensee as "one privileged to enter another's land by virtue of the possessor's consent, for the licensee's own purposes."[9] At common law, the duty owned by an occupier of land to a licensee was to refrain from intentional, or willful or wanton, misconduct toward him.[10] However, the landowner's duty to a licensee has been expanded so that the general view now is that he is liable for injuries resulting from conditions on his land if he has reason to know of the condition and if he should realize that it involves an unreasonable risk of harm which a licensee would not be expected to discover.[11] But the Maryland Court of Appeals, up until the principal case, has reiterated the ancient doctrine

5. *Id.* at 256, 206 A.2d at 155.

6. *Id.* at 256, 206 A.2d at 156. (Emphasis added.)

7. RESTATEMENT (SECOND), TORTS § 329 (1965). See also PROSSER, TORTS § 58 (3d ed. 1964), and 2 HARPER AND JAMES, TORTS § 27.3 (1956).

8. Duff v. United States, 171 F.2d 846, 850 (4th Cir. 1949); *accord,* Benson v. Baltimore Traction Co., 77 Md. 535, 26 Atl. 973 (1893). See also Pellicot v. Keene, 181 Md. 135, 28 A.2d 826 (1942); Gordon Sleeprite Corp. v. Waters, 165 Md. 354, 168 Atl. 846 (1933); Steinwedel v. Hilbert, 149 Md. 121, 131 Atl. 44 (1925).

9. Crown Cork and Seal Co., Inc. v. Kane, 213 Md. 152, 157, 131 A.2d 470, 472 (1957), quoting from Peregoy, Use of Himself and Globe Indemnity Co. v. Western Md. R.R. Co., 202 Md. 203, 207, 95 A.2d 867, 869 (1953).

10. 2 HARPER AND JAMES, *op. cit. supra* note 7, § 27.10.

11. See RESTATEMENT (SECOND), TORTS § 342 (1965); PROSSER, *op. cit. supra* note 7, § 60; 38 AM. JUR. *Negligence* § 104 (1941); Annot. 55 A.L.R.2d 525 (1957).

that the duty owed to a licensee is to refrain from "willful or wanton misconduct or entrapment."[12]

In Maryland an invitee has been equated to a business visitor and defined as "one invited or permitted to enter or remain upon land for a purpose connected with or related to the business of the occupant."[13] The prevailing view is that the occupant of land has a duty to use reasonable care to make the premises safe for an invitee, or a duty to see that the premises are reasonably safe.[14] Maryland law is in accord with the prevailing view.[15] It is generally recognized that an invitee is entitled to a higher duty of care than that owed to a licensee because of the economic benefit an occupant derives from the presence of the invitee on his premises.[16] Maryland has also recognized this "economic benefit theory."[17]

The majority of courts hold a fireman to be a licensee when injured on property not held open to the public,[18] and the law of Maryland until the principal case was in accord.[19] It would seem logical that if the "economic benefit theory" were applied in such cases, the result would be to classify firemen as invitees, for they certainly confer an economic benefit upon occupiers of property. Nevertheless, most courts have said that other considerations outweigh the pecuniary benefit conferred upon the landowner. Chief among these considerations is the idea that to classify firemen as invitees would place a burden of care upon the occupier amounting to a hardship, since firemen are likely to enter the premises at unusual and unknown times and upon areas of the property not typically open to persons ordinarily classified as invitees.[20] But the law of torts regards the duty owed by one person to another as a rule of reasonableness, and the burden of taking reasonable precautions under the circumstances is unlikely to amount to a hardship. It is further pointed out, as it was in the principal case,[21] that firemen are covered by workmen's compensation

12. Levine v. Miller, 218 Md. 74, 78-79, 145 A.2d 418, 421 (1958); Crown Cork and Seal Co., Inc. v. Kane, 213 Md. 152, 157, 131 A.2d 470, 472 (1957). However, in *Levine* the court said, "or a licensee to whom was owed the duty of a warning of *hidden danger*, . . ." 218 Md. at 77, 145 A.2d at 420. (Emphasis supplied.)

13. See note 9 *supra*.

14. PROSSER, *op. cit. supra* note 7, § 61; 2 HARPER AND JAMES, *op. cit. supra* note 7, § 27.12; 65 C.J.S. *Negligence* § 45 (1950); 38 AM. JUR. *Negligence* § 131 (1941); RESTATEMENT (SECOND), TORTS § 343 (1965).

15. Nalee, Inc. v. Jacobs, 228 Md. 525, 529, 180 A.2d 677, 679 (1962); Smith v. Bernfeld, 226 Md. 400, 406, 174 A.2d 53, 55 (1961); Evans v. Hot Shoppes, Inc., 223 Md. 235, 239-41, 164 A.2d 273, 276 (1960); Williams v. McCrory Stores, 203 Md. 598, 604, 102 A.2d 253, 256 (1953); Peregoy, Use of Himself and Globe Indemnity Co. v. Western Md. R.R. Co., 202 Md. 203, 207, 95 A.2d 867, 869 (1953).

16. PROSSER, *op. cit. supra* note 7, at 396.

17. Peregoy, Use of Himself and Globe Indemnity Co. v. Western Md. R.R. Co., 202 Md. 203, 207, 95 A.2d 867, 869 (1953). See Kalus v. Bass, 122 Md. 467, 89 Atl. 731 (1914).

18. PROSSER, *op. cit. supra* note 7, § 61; 2 HARPER AND JAMES, *op. cit. supra* note 7, § 27.14; 2 BENOIT AND FRUMER, PERSONAL INJURY — ACTIONS — DEFENSES — DAMAGES, Buildings, Etc., § 1.11[1]; Annot., 86 A.L.R.2d 1205, 1210 (1962) *et seq;* Note, 47 CORNELL L.Q. 119 (1961).

19. Steinwedel v. Hilbert, 149 Md. 121, 131 Atl. 44 (1925).

20. *See* Shypulski v. Waldorf Paper Products Co., 232 Minn. 394, 397, 45 N.W.2d 549, 551 (1951); BOHLEN, STUDIES IN THE LAW OF TORTS 193-94 (1926); PROSSER *op. cit. supra* note 7, at 406-07; 2 HARPER AND JAMES, *op. cit. supra* note 7, at 1501-02; Note, 26 COLUM. L. REV. 116 (1926); Note, 22 MINN. L. REV. 898 (1938).

21. 237 Md. at 251, n.1, 206 A.2d at 153, n.1.

statutes.[22] This would be a valid consideration if workmen's compensation provided an adequate recovery, but generally, benefits under workmen's compensation do not approach present-day personal injury judgments. It is difficult to say that these considerations outweigh the "economic benefit" derived from the extinguishment of a fire and prevent a fireman from being classified as an invitee.

Some courts have said that if firemen were considered invitees, landowners would hesitate to report fires on their premises for fear of tort liability. As Professor Prosser has stated, this argument "is surely preposterous rubbish."[23] When a landowner's life and property are threatened by fire, he will hardly be concerned with possible liability to firemen classified as invitees. He will probably be totally unaware of the distinction between licensees and invitees in the first place.

The irrationality of relegating firemen to the status of licensees becomes most apparent in light of the fact that the courts have employed the "economic benefit theory" to place many other public officials in the invitee category.[24] It is wholly untenable to hold that a fireman,[25] who by express invitation is called to extinguish a fire at the risk of his own life, confers less of an economic benefit upon a landowner than does a liquor tax collector or a building inspector.

Recognizing that the licensee label, when applied to a fireman is not only harsh but illogical, a few courts have strained judicial logic by adding exceptions and refinements to the general rule and have found firemen to be invitees under certain factual circumstances. A 1922 Tennessee case[26] said that firemen are licensees when fighting a fire within the city limits of their employ; however, when they are called outside the limits of the city to put out a fire, they are entitled to the preferred position of an invitee. New York has held[27] that a fireman is owed the same duty as that owed to an invitee when the injury takes place on the part of the defendant's property that is open

22. Lunt. v. Post Printing & Pub. Co., 48 Colo. 316, 110 Pac. 203 (1910).

23. PROSSER, *op. cit. supra* note 7, at 407.

24. Swift & Co. v. Schuster, 192 F.2d 615 (10th Cir. 1951) (meat inspector); Robey v. Keller, 114 F.2d 790 (4th Cir. 1940) (building inspector); Wilson v. Union Iron Works Dry Dock Co., 167 Cal. 539, 140 Pac. 250 (1914) (customs collector); Fred Howland, Inc. v. Morris, 143 Fla. 189, 196 So. 472 (1940) (building inspector); Sheffield Co. v. Phillips, 69 Ga. App. 41, 24 S.E.2d 834 (1943) (meter reader); Anderson & Nelson Distilling Co. v. Hair, 103 Ky. 196, 44 S.W. 658 (1898) (United States Alcoholic Beverage tax collector); Low v. Grand Trunk Ry. Co., 72 Me. 313 (1881) (customs collector); Finnegan v. Fall River Gas Works, 159 Mass. 311, 34 N.E. 523 (1893) (meter reader); Gordon v. Cummings, 152 Mass. 513, 25 N.E. 978 (1890) (United States postman); Toomey v. Sandborn, 146 Mass. 28, 14 N.E. 921 (1888) (garbage collector); Jennings v. Industrial Paper Stock Co., 248 S.W.2d 43 (Mo. App. 1952) (health inspector); Paubel v. Hitz, 339 Mo. 274, 96 S.W.2d 369 (1936) (United States postman); Boneau v. Swift & Co., 66 S.W.2d 172 (Mo. App. 1934) (livestock inspector). See also cases collected in Annot., 128 A.L.R. 1021 (1940). See Notes, 26 COLUM. L. REV. 116 (1926); 22 MINN. L. REV. 898 (1938); 2 MO. L. REV. 110 (1937).

25. Note that policemen are treated virtually the same as firemen with regard to the invitee or licensee issue. PROSSER, *op. cit. supra* note 7, § 61; 2 HARPER AND JAMES, *op. cit. supra* note 7, § 27.14.

26. Buckeye Cotton Oil Co. v. Campagna, 146 Tenn. 389, 242 S.W. 646. See also, Mistelske v. Kravco, Inc., 88 Pa. D.&C. 49 (1953), where, in instructions which were approved, the fireman was referred to as an implied invitee.

27. Meiers v. Fred Koch Brewery, 229 N.Y. 10, 127 N.E. 491, 13 A.L.R. 633 (1920).

to the public.[28] Another line of cases avoids using the terms "licensee" and "invitee" and thus places the fireman in a status *sui generis*.[29]

In the instant case, the Court of Appeals said that "the trial judge's instructions to the jury were as favorable to the appellant as they could have been even if his contentions as to his status as an invitee at the time of his injuries were correct."[30] But a careful reading of Judge Prendergast's instructions shows that the jury was instructed as to the duty that is owed to a licensee under the prevailing view rather than the duty that is owed to an invitee. The instructions are couched in terms of "an unusually hazardous condition" or "dangers" that are "unusual and not ordinarily to be expected," and not in terms of "reasonably safe" premises. It is true that the magic word "reasonable" is uttered by the lower court, but such use is only in the context of whether the defendant in the exercise of reasonable care should have known of the proximate results of his negligence. As was stated previously, under the majority rule a licensee is owed the duty to be warned of the unusual hazards or conditions known to the occupant of the premises, if said occupant has the opportunity to make such a warning.

At the same time the Court of Appeals was approving instructions giving a fireman the status of a licensee, it quoted at length and evidently with approval the case of *Dini v. Naiditch*.[31] There, it was held "that since the common-law rule labeling firemen as licensees is but an illogical anachronism, originating in a vastly different social order, and pock-marked by judicial refinements, it should not be perpetuated in the name of 'stare decisis'."[32]

Thus, the principal case is susceptible to either of two interpretations: (1) that firemen in Maryland are henceforth to be classified as invitees; or (2) that firemen are still to be considered licensees but the duty owed to them will henceforth be the expanded duty that is owed to licensees under the majority rule, since the well-worn phrase "to refrain from willful or wanton misconduct" was conspiciously absent from Judge Prendergast's instructions.[33] The Court of Appeals has left to future cases the question of which of these two interpretations it ultimately will follow.

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28. See RESTATEMENT (SECOND), TORTS § 342(2) (1965), set out in full at 154 of the opinion.

29. Shypulski v. Waldorf Paper Products Co., 232 Minn. 394, 45 N.W.2d 549 (1951); Krauth v. Geller, 31 N.J. 270, 157 A.2d 129 (1960); Beedenbender v. Midtown Properties, Inc., 4 App. Div. 2d 276, 164 N.Y.S.2d 276 (1957).

30. 237 Md. at 256, 206 A.2d at 155.

31. 20 Ill. 2d 406, 170 N.E.2d 881, 86 A.L.R.2d 1184 (1960). The English courts had previously so held. Merrington v. Ironbridge Metal Co., [1952] 2 All E.R. 1101; Hartley v. Mayoh, [1953] 2 All E.R. 525.

32. 170 N.E.2d at 885.

33. It should be noted, however, that the instructions endorsed by the court were prejudicial to the plaintiff's alleged right of recovery. The jury was first directed to determine whether or not the fire was started by the negligence of the defendant, 237 Md. at 255, 206 A.2d at 155. By the general rule the cause of the fire is immaterial to the plaintiff fireman's right of recovery; it is the ensuing perils not anticipated by the fireman after the start of the blaze and the proximate causes of these unforeseen and unanticipated hazards that are relevant to the inquiry. The instant case recognized this general principle, *Id.* at 251–52, n.2, 206 A.2d at 153–54, n.2, but yet it indorsed instructions that asked the jury to determine if the defendant's negligence was the cause of the fire. This instruction could only have been prejudicial to the defendant, since it was uncontroverted that defendant's negligence was the cause of the blaze.