SCHOOL OF LAW
CASE WESTERN RESERVE UNIVERSITY

Case Western Reserve Law Review

Volume 38 | Issue 1 Article 12

1987

Equal Protection and the Fireman's Rule in Ohio

Julianne Palumbo

EQUAL PROTECTION AND THE FIREMAN'S RULE IN OHIO[1]

The Ohio firemen's rule prevents firemen and policemen from recovering against tortfeasors for personal injuries arising from the tortfeasor's ordinary negligence. While several jurisdictions have abolished the rule, Ohio persists in applying it, although it does so in an arguably inconsistent manner. This Note suggests that the rule violates Ohio's Constitution and the author further argues that Ohio courts should shift the current basis of liability.

UNDER OHIO COMMON LAW, firemen and policemen cannot recover against tortfeasors for personal injuries suffered as a result of the tortfeasor's ordinary negligence.[2] The fireman's rule is still in effect in Ohio, and its underlying theory has remained unchanged from the date of its adoption in 1923.[3]

While a few states have abolished the fireman's rule,[4] other states have adopted new legal theories for maintaining it.[5] These

---

1. *See* Note, *Torts*, 34 DRAKE L. REV. 1109, 1119 n.99 (1984-86) [hereinafter *Torts*]. *See also,* Comment, *An Examination of the California Fireman's Rule*, 6 PAC. L.J. 660 (1975) [hereinafter *Examination*]; Note, *Torts*, 14 SETON HALL L. REV. 759 (1983-84); Comment, *Torts*, 18 RUTGERS L.J. 261 (1986).

2. Scheurer v. Trustees of Open Bible Church, 175 Ohio St. 163, 192 N.E.2d 38 (1963); Gray v. Ohio Gas & Borg-Warner, No. 84AP-399, slip op. (Ohio Ct. App. June 18, 1985); Eckert v. The Refiners Co., 17 Ohio App. 221 (1923).

It should be mentioned at the outset that the fireman's rule applies to firemen and policemen alike. *See Scheurer*, 175 Ohio St. at 166, 192 N.E.2d at 41. For the sake of brevity, the examples throughout this Note will refer only to firemen. It should be understood that everything stated applies to policemen as well. The author has used firemen to simplify the illustrations as policemen respond to a larger variety of situations than do firemen.

3. The status of licensee was first applied to firemen and policemen in *Eckert*, 17 Ohio App. at 221.

4. The fireman's rule was abolished in Oregon by the Supreme Court's decision in Christensen v. Murphy, 296 Or. 610, 678 P.2d 1210 (1984). *See generally* Comment, *Torts — Abolition of the Fireman's Rule in Oregon and What It May Mean for Tennessee*, 15 MEM. ST. U.L. REV. 312 (1985) [hereinafter *Oregon Abolition*].

The rule may also have been abolished in Minnesota by that state's supreme court in Lang v. Glusica, 393 N.W.2d 181 (Minn. 1986) (fireman's rule cannot bar recovery by a police officer for injuries received through the intentional or negligent acts of another). However, the majority of jurisdictions still apply the fireman's rule.

5. California and Minnesota are two of the states which have adopted new theories for maintaining the fireman's rule. The following law review articles provide good historical discussions of the modification and development of the fireman's rule rationale: *See Torts*, *supra* note 1; *Oregon Abolition*, *supra* note 4; Comment, *The Fireman's Rule: Defining It's Scope Using the Cost Spreading Rationale*, 71 CALIF. L. REV. 218 (1983) [hereinafter *Cost Spreading*]; *Examination*, *supra* note 1; Note, *Assumption of the Risk and the Fireman's Rule*, 7 WM. MITCHELL L. REV. 749 (1981) [hereinafter *Assumption of Risk*]; *California Supreme Court Review*, 10 PEPPERDINE L. REV. 167 (1982); Note, *The New Minnesota Fireman's Rule*

new theories take the forms of assumption of the risk[6] and public policy cost spreading rationales.[7] Ohio, on the other hand, relies upon the traditional notions of liability of landowners to entrants upon their property in upholding the fireman's rule.[8] Because firemen and policemen acquire the right to enter property by virtue of authority granted by the state, they ought to fall between the classifications of licensee and invitee.[9] However, Ohio common law has placed them in the licensee category, thereby relinquishing firemen's rights of recovery against a property owner for ordinary negligence which they would have enjoyed as invitees.[10]

This Note examines the firemen's rule as it stands in Ohio today and argues that it is outdated and applied inconsistently. Further, this Note will show that the fireman's rule operates in violation of the equal protection provision of the Ohio Constitution and will urge the Ohio courts to shift the basis upon which liability is currently predicated, to one which will promote fairness and consistency in this area of tort law.

I. THE NATURE OF THE FIREMAN'S RULE IN OHIO

A. *The Development of Ohio's Fireman's Rule*

In 1921, the Ohio Supreme Court restated the duty owed by a landowner to a licensee in *Hannan v. Ehrlich.*[11] A landowner owes a licensee a duty not to injure him wilfully or wantonly and to warn

—*An Application of the Assumption of Risk Doctrine:* Armstrong v. Mailand, 64 MINN. L. REV. 848 (1980) [hereinafter *Minn. Fireman's Rule*].

6. *See, e.g.*, Armstrong v. Mailand, 284 N.W.2d 343 (Minn. 1979). *See generally Assumption of Risk, supra*, note 5 (discussing Minnesota Supreme Court's decision to replace "the old 'fireman's rule,' with a modern rule based upon primary assumption of the risk"); *but see Minn. Fireman's Rule, supra* note 5 (a criticism of the Minnesota Supreme Court's decision of the assumption of risk policy justification for abandonment of the fireman's rule).

7. *See Cost Spreading, supra* note 5.

8. *See* Scheurer v. Trustees of Open Bible Church, 175 Ohio St. 163, 192 N.E.2d 38 (1963) (police officer entering private property in order to carry out his official duty is a licensee to whom the landowner is not liable for ordinary negligence); Gray v. Ohio Gas & Borg-Warner, No. 84AP-399, slip op. (Ohio Ct. App. June 18, 1985) (fireman is a licensee to whom no duty is owed for ordinary negligence). *See also* Eckert v. The Refiners Co., 17 Ohio App. 221 (1923) (fireman responding to fire alarm is a licensee on the premises, and owner of the premises has a duty to exercise ordinary care only after discovering him in peril); Terlesky v. Miller, 28 Ohio Op. 2d 85, 193 N.E.2d 289 (1963) (policeman not owed duty of care because of his status as a "mere licensee").

9. *Sheurer*, 175 Ohio St. at 176, 192 N.E.2d at 46 (Gibson, J., dissenting).

10. *Id.* at 171, 192 N.E.2d at 46.

11. 102 Ohio St. 176, 131 N.E. 504 (1921) (child killed while playing in a sand bank on private property was a licensee to whom no greater duty was owed in spite of his minor status).

him of hidden dangers.[12]

In the later case of *DiGildo v. Caponi*,[13] which posed similar facts, the court reaffirmed the classification system as a basis for determining the duty owed by landowners to entrants on their land.[14] The court relied on *stare decisis* and declined to require landowners to act with due care towards all entrants on their property.[15] Indeed, in recent decisions, the Ohio courts have not strayed beyond the boundaries that *stare decisis* has established.[16]

In *Eckert v. The Refiners Co.*,[17] a fireman was killed while fighting a fire on the premises of defendant's oil company. The court was forced to define the "status of the fireman"[18] and the duty owed to him by the landowner upon whose property the fire arose. Citing cases from nearby states for support,[19] the court held that "a fireman who enters upon the premises, or into a building in case of fire is a licensee."[20] The plaintiff who sued on the fireman's behalf claimed that the oil company owner was negligent both in his maintenance of the premises and in his failure to impose safety standards upon his employees.[21] Despite this argument, the court held that because the fireman was a licensee, the landowner had no duty to avoid ordinary negligence.[22] Under the *Hannan* rule, liability would be imposed upon the landowner only if it could be shown that he was "wanton or wilfull" in his acts or omissions toward the fireman while on the premises or failed to exercise ordinary care after discovering him to be in peril.[23] The fireman in the 1939 case

12. *Id.* at 176, 131 N.E.2d at 505:

> A licensee takes his license subject to its attendant perils and risks, and the licensor owes him no duty except to refrain from wantonly or willfully injuring him and to exercise ordinary care after discovering him to be in peril; he should not be exposed to hidden dangers, pitfalls or obstructions.

13. 18 Ohio St. 2d 125, 247 N.E.2d 732 (1969).

14. *Id.* at 128, 247 N.E.2d at 734.

15. *Id.* at 131, 247 N.E.2d at 734:

> [W]e are urged in this case to eliminate distinctions based upon the status of a visitor upon premises and to adopt a rule of ordinary care under all the circumstances as the measure of the duty of a landowner or landoccupier. This court, however, is convinced that a just measure of judicial restraint requires that this question be deferred to a later day and to another case.

16. *See* Gray v. Ohio Gas & Borg-Warner, No.84AP-399, slip op. (Ohio Ct. App. June 18, 1985).

17. 17 Ohio App. 221 (1923). This case established the precedent for applying the fireman's rule.

18. *Id.* at 222.

19. The decision cites cases from the jurisdictions of Illinois, Indiana and Minnesota.

20. *Eckert*, 17 Ohio App. at 222.

21. *Id.*

22. *Id.* at 222-23.

23. *Id.*

of *James v. Cities Service Oil Co.*[24] was injured as a result of a hidden danger known to the landowner but unrevealed to the fireman. The court of appeals reversed a judgment for the defendant and held that if the jury found that there was a hidden defect, the defendant landowner may be liable if he failed to warn the licensee of the defect.[25]

In *Terlesky v. Miller*,[26] a 1963 case, the plaintiff police officer, who was injured when he fell through an open trap door, sued the building owner for damages. His theory was that the owner should have revealed the danger about which the police officer had little chance of learning. Rejecting the hidden danger theory by finding the plaintiff contributorily negligent for stepping into the dark, the court found for the defendant.[27] The court held that the police officer was "obviously a mere licensee . . . [and had] no invitation express or implied existed."[28]

In the same year the Ohio Supreme Court decided *Scheurer v. Trustee of Open Bible Church.*[29] Here, a policeman answering a breaking and entering call on defendant's property was injured when he fell into an open excavation. The supreme court reaffirmed the majority rule—that policemen are mere licensees—but noted the existence of a hidden danger exception to the general rule.[30]

While the earlier cases found no landowner liability on what seemed to be a strict *stare decisis* basis, the *Scheurer* court presented a policy rationale for the fireman's rule. The court argued that because the time and manner of a fireman's visit is so unpredictable, too great an imposition would be placed on the landowner if he was required to always keep his land in the safest condition.[31]

The most recent fireman's rule case, decided in 1985, *Gray v. Ohio Gas & Borg-Warner*,[32] was brought by a fireman who was injured when liquid propane exploded on defendant's property. Although the gas was stored in violation of a safety ordinance, the property owner was not held to owe a duty toward the fireman to

24. 66 Ohio App. 87, 31 N.E.2d 872 (1939), *aff'd*, 140 Ohio St. 314, 43 N.E.2d 276 (1942).

25. *Id.* at 96-97, 31 N.E.2d at 876.

26. 28 Ohio Op. 2d 85, 193 N.E.2d 289 (1963).

27. *Id.* at 86, 193 N.E.2d at 290.

28. *Id.*

29. 175 Ohio St. 163, 192 N.E.2d 38 (1963).

30. *Id.* at 168, 192 N.E.2d at 41.

31. *Id.* at 170-71, 192 N.E.2d at 43.

32. No. 84 AP-399, slip op. (Ohio Ct. App. June 18, 1985).

refrain from ordinary negligence.[33] The decision cited the *Scheurer* court's policy statements in support of its holding.

This Note has illustrated then, that the fireman's rule, as it is in force today in Ohio, is founded upon the traditional landowner's duty system of law. While leaving the foundation undisturbed, courts have attempted to add further support to the rule by discussing public policy rationales. However, neither the outdated common law nor the new public policy rationales provide sufficient reasons for maintaining the fireman's rule.

B. *Classification of Firemen and Policemen as Licencees is Incongruent in Light of the Traditional Classification System*

1. *Explanation of the Traditional Classification System of Entrants on Property*

In order to argue that firemen and policemen are improperly classified as licensees, this Note must first examine those types of plaintiffs which the courts in Ohio have traditionally treated as licensees. A licensee is "[a] person who goes upon the lands of another by permission and acquiescence, for his own pleasure, convenience, or benefit, and not by invitation."[34] In *Garrard v. McComas*,[35] the court stated, "[a licensee is] [o]ne whose presence upon the land is solely for his own purpose . . . in which the possessor has no interest. . . ."[36]

In contrast, under Ohio law an invitee is defined as one who is "invited to come upon the premises, either expressly or impliedly."[37] The Ohio Supreme Court in *Scheibel v. Lipton*[38] stressed that the distinguishing characteristic of an invitee, as opposed to a licensee, is that he is on the landowner's property for the benefit of the landowner.[39] *Harper v. Maple Heights Construction Co.*[40] presents an example of a licensee as "one who passes through an amusement park not yet open."[41] On the other hand, the court

33. *Id.*

34. Hannan v. Ehrlich, 102 Ohio St. 176, 131 N.E. 504 (1921).

35. 5 Ohio App. 3d 179, 450 N.E.2d 730 (1982).

36. *Id.* at 181, 450 N.E.2d at 732 (quoting RESTATEMENT (SECOND) OF TORTS 175, § 330 comment *h*).

37. Englehardt v. Phillips, 136 Ohio St. 73, 23 N.E.2d 829 (1939).

38. 156 Ohio St. 308, 102 N.E.2d 453 (1951).

39. *Id.* at 329, 102 N.E.2d at 463; *accord*, Durst v. Van Gundy, 8 Ohio App. 3d 72, 455 N.E.2d 1319 (1982).

40. 6 Abs. 73 (1927) (Ohio Law Abstract, no official reporter).

41. *Id.*

in *Bowins v. Euclid General Hospital Association*[42] classified a hospital visitor as an invitee because he has an implied invitation to visit and his presence contributed to the patient's well-being.[43]

The duty owed by a landowner to an invitee is greater than that owed to a licensee. A landowner owes the invitee a duty of reasonable care.[44] If he expressly or impliedly invites one to enter his property, the landowner is liable for any injury resulting from an unreasonably unsafe condition on the premises.[45] Therefore, if firemen and policemen were classified as invitees, landowners would be liable to them for ordinary negligence in the maintenance of their properties. This would not include liability for negligently causing a fire, as one cannot achieve that level of duty on a licensee/invitee theory alone.

2. *A Fireman is More Like an Invitee Then a Licensee*

A strong argument can be made for classifying firemen as invitees and not as licensees. The primary distinction between the two classes is the difference in who enjoys the benefit of the visit. As previously stated, a licensee benefits from his entrance on the premises.[46] An invitee's visit benefits the landowner.[47] Firemen come to the property of a landowner not for their own welfare but to save the life and property of the owner. Arguably, there is either an express or implied invitation for the fireman to come to extinguish the fire. An express invitation exists when the property owner calls the fire department and asks them to come to save his land. The implied invitation may be said to exist by virtue of a common understanding that one whose property, and perhaps life, is endangered, welcomes the help of the fireman who represents safety and a chance to preserve his possessions.

How dissimilar are the fireman who enters to put out a fire and an amusement park patron who visits after business hours? The first comes for the benefit of another, while the second visits for his own pleasure. On the other hand, the fireman shares a close kinship with the hospital visitor whose visit is expected and whose presence contributes to the occupant's well-being.

---

42. 20 Ohio App. 3d 29, 484 N.E.2d 203 (1984).

43. *Id.* An invitee may share the benefit of his visit with the landowner as does, for example, a salesman.

44. *Schiebel*, 156 Ohio St. at 315, 102 N.E.2d at 458.

45. *Id.*

46. *See supra* note 35 and accompanying text.

47. *See supra* note 40 and accompanying text.

The oft-cited Illinois Supreme Court case, *Dini v. Naiditch*,[48] attacks the fireman's licensee status. The court found inconsistent the ideas that a fireman cannot be an invitee because he has no invitation, yet can be a licensee even though he is on the landowner's property without permission.[49]

In refusing to grant firemen invitee status, the Ohio courts have expressed concern that a landowner is unable to protect himself from liability because he never knows when a fireman will visit his property and, therefore, does not have "a reasonable opportunity to make the premises safe or to warn them of any dangerous condition."[50] This problem can be alleviated by creating distinctions and classifications in the law. For example, the law could divide the landowners into two categories based upon the directness of their relationship to the fireman.

One category would be comprised of the landowner over whose property the fireman must cross in order to extinguish a fire on an adjacent piece of land. In relation to this landowner, the fireman is a licensee. He enters without invitation, expressed or implied, but his presence is permitted by the landowner. He confers no direct benefit upon the landowner.

The second category consists of the landowner upon whose property a fire ignites. His call for help can be viewed as an express invitation to enter the land. In the absence of a call, an invitation is implied based upon a common understanding that one whose property is on fire would welcome the aid of a fireman. As the landowner derives a direct benefit from the fireman's presence, the fireman responding to his need for help is an invitee. Also, as the property owner now expects the fireman, he will be able to fulfill his duty to warn of any hidden danger or defect on the premises. These distinctions are both fair to the fireman and consistent with the traditional landowner's duty classification system.

C. *Firemen are Classified as Invitees in the Surrounding States*

Three jurisdictions which surround Ohio, specifically New York,[51] Illinois[52] and Massachusetts,[53] refuse to classify firemen

48. 20 Ill. 2d 406, 170 N.E.2d 881 (1960).

49. *Id.* at 415-16, 170 N.E.2d at 885.

50. Scheurer v. Trustees of Open Bible Church, 175 Ohio St. 163, 171, 192 N.E.2d 38, 43 (1963).

51. Meiers v. Fred Koch Brewery, 229 N.Y. 10, 127 N.E. 491(1920).

52. *Dini*, 20 Ill. 2d at 406, 170 N.E.2d at 881.

53. Mounsey v. Ellard, 363 Mass. 693, 297 N.E. 2d 43 (1973).

and policemen as licensees. Each jurisdiction has declined to treat firemen as licensees because of the public benefit which they confer.[54] The law of each of these jurisdictions proves to be both more logical in applying the definitions of licensee and invitee and more fair in the protection which it affords firemen.

The common law of the state of Illinois has altered the fireman's rule to provide greater protection for firemen and policemen. In *Dini v. Naiditch*,[55] the Illinois Supreme Court rejected the traditional common law rule treating firemen as licensees.[56] Finding the classification system to be outdated, the court held that a reasonable duty of care was owed in light of the benefit which the fireman offers to property owners.[57] *Dini* involved a suit brought on behalf of two firemen, one severely injured and the other killed, in a hotel fire.[58] The defendants, the building owner and occupant, violated safety ordinances and building inspection codes.[59] The court held that the safety ordinance was intended for the benefit of firemen in addition to the general public.[60] Violation of these codes was negligence per se, and because the firemen were invitees, ordinary negligence was actionable.[61]

The Illinois cases following *Dini* define the limits of the landowner's duty to the fireman. In *Horcher v. Guerin*,[62] a fireman was injured while fighting a fire in a building which should have been demolished because of its dangerous condition.[63] According to the *Horcher* court, *Dini* left ambiguity in the law as to the nature of negligence for which a landowner is liable to the fireman.[64] The court interpreted *Dini* as holding that a landowner cannot be held liable for negligently causing a fire.[65] However, a landowner does have a "duty not to expose [a fireman] to an unreasonable risk of harm — that is, a duty to remove hidden, unusual or not to be

54. *Dini*, 20 Ill. 2d at 415-16, 170 N.E.2d. at 886; *Mounsey*, 363 Mass. at 702, 297 N.E.2d at 48; *Meiers*, 229 N.Y. at 15, 127 N.E. at 492.

55. 20 Ill. 2d 406, 170 N.E.2d 881 (1961).

56. *Id.* at 416, 170 N.E.2d at 885.

57. *Id.* at 416-17, 170 N.E.2d at 886.

58. *Id.* at 409, 170 N.E.2d at 882.

59. *Id.* at 410, 170 N.E.2d at 883.

60. *Id.* at 419, 170 N.E.2d at 887.

61. *Id.* at 415-16, 170 N.E.2d at 885 (Although the court did not explicitly confer invitee status on the fireman, its explicit rejection of licensee status and adoption of an obligation of reasonable care on behalf of the property owner implies the adoption of invitee status.)

62. 94 Ill. App. 2d 244, 236 N.E.2d 576 (1968).

63. *Id.* at 245, 236 N.E.2d at 577.

64. *Id.* at 246, 236 N.E.2d at 578.

65. *Id.* at 247-48, 236 N.E.2d at 578-579.

expected dangers from the premises or to give adequate warning thereof."[66]

In *Erickson v. Toledo, Peoria & Western R.R.*,[67] the court affirmed a dismissal of plaintiff fireman's complaint because the injury was due to his exposure to the fire.[68] Similarly, in *Facil v. OSE Foods, Inc.*,[69] the defendant landowner was held not liable to a policeman for the injuries he received when criminals attacked him in a badly lit area of the owner's property.[70] The "risk of ambush" was held to be a risk "inherent" to the policeman's work and was therefore not an unreasonable act of negligence by the defendant.[71]

The common law of New York also has deviated from the traditional fireman's rule. *Dini*[72] cited *Meiers v. Fred Koch Brewery*[73] as persuasive precedent for its rejection of the traditional fireman's rule. In *Meiers*, the plaintiff fire chief was injured when he fell into a coal hole while fighting a fire on defendant's property.[74] In refusing to prolong the fireman's licensee status, the court explained that while a licensee enters by virtue of consent and acceptance, the fireman and policeman do not enter by such permission.[75] Should a landowner refuse to consent, the fireman or policeman is authorized by the state to enter the property. He is "engaged in the business of the public," and he confers a benefit upon the landowner.[76]

In the New York cases which follow *Meiers*, the courts recognized that firemen and policemen fall between the categories of licensee and invitee. In *Beedenbender v. Midtown Properties*,[77] the court held that while a fireman is neither an invitee nor a licensee,

66. *Id.* at 248, 236 N.E.2d at 579.

67. 21 Ill. App. 3d 546, 315 N.E.2d 912 (1974).

68. *Id.* at 549, 315 N.E.2d at 914. *See also* Washington v. Atlantic Richfield Co., 66 Ill. 2d 103, 108, 361 N.E.2d 282, 285 (1976) (the function of a fireman is to deal with fires, and he assumes the risks normally associated with that function when he enters upon that employment).

69. 60 Ill. 2d 552, 328 N.E.2d 538 (1975).

70. *Id.* at 554, 328 N.E.2d at 534. *See also* Murphy v. Ambassador East, 54 Ill. App. 3d 980, 370 N.E.2d 124 (1977) (citing *Facil* for the proposition that if the risk of harm was of the type a property owner could reasonably expect those on the property to be aware of, injuries resulting therefrom do not create liability).

71. *Id.* at 558, 328 N.E. 2d at 541.

72. 20 Ill. 2d 406, 414, 170 N.E.2d 881, 885 (1960).

73. 229 N.Y. 10, 127 N.E. 491 (1920).

74. *Id.* at 10, 127 N.E. at 491.

75. *Id.* at 14-15, 127 N.E. at 492.

76. *Id.* at 15, 127 N.E. at 492.

77. 4 A.D.2d 276, 164 N.Y.S.2d 276 (1957).

he is owed a duty of reasonable care.[78] In essence, while the label has changed, the duty owed to the fireman is the same as that owed to an invitee.

A recent New York Court of Claims case clarifies the limit of this duty. In *Santangelo v. State*,[79] an escaped mental patient stabbed two police officers who were attempting to confine him. When the police officers sued the state for negligently allowing him to escape, the court held that police officers cannot recover for injuries "caused by another's negligence which creates the very occasion for their engagement."[80] This statement defines the fireman's rule as it exists in New York today.

The New York court cited public policy to substantiate its holding. The court suggested that policemen are already sufficiently compensated for the risks they are required to take and that the public should not have a duty to provide policemen with a risk-free environment.[81]

The fireman's rule in Massachusetts has undergone a more dramatic evolution. In the early cases, both firemen and policemen were licensees with the traditional duty of care owed to them.[82] However, in later cases the Massachusetts courts reclassified the status of firemen and policemen. For example, in *Learoyd v. Godfrey*,[83] the supreme court held a landowner liable to a police officer who suffered injuries when he fell into a hole on defendant's property while answering a call for help. Similarly in *Mounsey v. Ellard*,[84] the court allowed a policeman to recover for injuries suffered when he slipped on ice on defendant's premises while delivering a summons. The court held that the policeman was "an implied invitee to whom the defendants owed a duty of reasonable care to keep

78. *Id.* at 281, 164 N.Y.S.2d at 280-81; *see also* McGee v. Adams Paper & Twine Co., 26 A.D.2d 186, 191-92, 271 N.Y.S.2d 698, 707 (1966).

79. 129 Misc. 2d 898, 494 N.Y.S.2d 49 (1985).

80. *Id.* at 907, 494 N.Y.S.2d at 54.

81. *Id.* at 907, 494 N.Y.S.2d at 54-55.

82. *See* Carroll v. Hemenway, 315 Mass. 45, 51 N.E.2d 952 (1944) (investigating police officer, injured upon falling into an elevator shaft, treated as a licensee); Aldworth v. F.W. Woolworth Co., 295 Mass. 344, 3 N.E.2d 1008 (1936) (fireman who fell from fire escape while performing duties could not recover in tort for simple negligence); Brennan v. Keene, 237 Mass. 556, 130 N.E. 82 (1921) (policeman who entered building and fell through trap door held to be a licensee); Blackstone v. Chelmsford Foundry Co., 170 Mass. 321, 49 N.E. 635 (1898) (employee fireman treated as licensee when injured due to construction on employer's premises).

83. 138 Mass. 315 (1885).

84. 363 Mass. 693, 297 N.E.2d 43 (1973).

the route of access to their premises in reasonably safe condition."[85] The court found that the fireman's licensee status unfairly favors the landowners and that courts have granted firemen and other public servants invitee status to avoid the inequitable effects of the rule.[86]

To summarize, under the common law of Illinois, New York and Massachusetts, a fireman who enters property to respond to a fire is an invitee and a landowner owes him a duty not to expose him to an unreasonable risk. However, the landowner is not liable for any injury which results from an inherent risk of the occupations of firemen and policemen.

In examining these jurisdictions, we find that the Ohio courts have not reached the same point in their development of the fireman's rule. The decisions of the three jurisdictions reveal that the traditional landowner's duty system can no longer account for these modern occupations. As these states continue to question the duty owed to firemen, so too should the Ohio courts challenge the antiquated basis of Ohio's fireman's rule.

D. *The Classification System of Landowner Liability is Outdated*

As the courts in Illinois, New York, and Massachusetts have begun to classify firemen and policemen as invitees, they seem to have done so more to increase the duty owed to government officials who confer a public benefit than because they feel that a fireman falls completely within the definition of an invitee.[87] The *Mounsey* court went so far as to abandon the entrant classification system and to expressly overrule all prior decisions finding liability on that basis.[88] The court opined, "[w]e can no longer follow this ancient and largely discredited common law distinction which favors the free use of property without due regard to the personal safety of those individuals who have heretofore been classified as licensees."[89]

One can argue that the landowner/entrant classification system does not provide adequately for the issue of landowner's liability to firemen and policemen. The Ohio courts need to update the common law fireman's rule as its foundation has eroded. However, in-

85. *Id.* at 700, 297 N.E.2d at 47.

86. *Id.* at 701, 297 N.E.2d at 48.

87. W. PROSSER, TORTS § 61, at 396 (4th ed. 1971). *See, e.g.*, Mounsey v. Ellard, 363 Mass. 693, 702, 297 N.E.2d 43, 49 (1973).

88. *Mounsey*, 363 Mass. at 707-09, 297 N.E.2d at 51-53.

89. *Id.* at 706-07, 297 N.E.2d at 51.

stead of developing the rule to the point where firemen are awarded invitee status, the courts should advance further to the point of abandoning the entrant's classification system altogether.

The fireman's rule is a legal vehicle for limiting the landowner's liability. The law should undergo a shift in focus to the traditional basis of liability in tort law — the fault concept. In the interests of justice and fairness, the liability of the landowner should depend upon whether or not he is at fault.

In restructuring the liability, the law must account for the various situations which present different degrees of fault on the part of the landowner. One could describe three types of scenarios which imply varying levels of fault and, therefore, liability. The first type of situation would occur when the fireman crosses the landowner's property to extinguish a fire on adjacent land. By analogy, a policeman runs across a person's property in pursuit of a criminal. The landowner here has no relation to the fire or to the crime. He is as an innocent bystander and owes only that general duty of reasonable care to the fireman that he owes to all persons.

A second scenario involves a landowner upon whose property a fire is started through no fault of the landowner's. By analogy, a crime occurs on a landowner's premises, but the owner is not involved in the crime. Because this landowner was not at fault, he becomes a victim himself. He, too, owes only a general duty of care.

A third category is created when it is the landowner's own negligence or intentional act which starts a fire. This class also includes the person whose negligence facilitates a crime and the criminal himself who injures the police officer during his arrest. The fireman or policeman responding to this call for help is owed a higher duty based upon the degree of fault shown. This defendant should be liable for injuries resulting both directly and indirectly from the fire or the crime.

While increasing the duty of care owed to firemen for injury caused by the condition of the property, this analysis goes further to abolish the fireman's rule where a person's negligence or intentional act caused the fire or the crime. Although this analysis deviates greatly from the fireman's rule in Ohio, as well as the surrounding jurisdictions, it finds support in new trends for defining liability in Illinois and California.

Two important decisions abolished the landowner classifications system altogether and adopted new methods for treating the issue of

liability to entrants on property, *Dini v. Naiditch*,[90] discussed earlier, and *Rowland v. Christian*.[91] In *Rowland*, the California Supreme Court abolished the entrant classification system as a determinant of liability.[92] Instead, the court relied upon foreseeability of the risk to define the duty owed by a property owner to his visitor.[93] As a result of *Rowland*, a property owner in California owes a general duty of care to any person upon his property and to maintain his property in a reasonably safe condition.[94] In summary, in defining the duty owed to firemen by landowners, the Ohio courts should abandon the landowners duty system altogether. That system cannot be adequately applied to the relationship between a landowner and an entering fireman. Instead, the Ohio courts should adhere to the traditional tort fault concept; equating the amount of liability with the level of fault.

II. EQUAL PROTECTION AND THE FIREMAN'S RULE

There is another strong argument for eliminating the Ohio courts' reliance on the entrant classification system or, in the alternative, for promoting the fireman's status by modifying the fireman's rule. Under the current rule, firemen and policemen are denied equal protection in that there is a lower duty owed to them as visitors upon land than is owed to other similarly situated visitors. This Note will first examine the equal protection clause of the Ohio Constitution as it has been interpreted in Ohio case law. Second, it will argue that firemen and policemen have been denied equal protection in light of the higher status awarded, first to other state employees and second, to other rescuers.

A. *Equal Protection Under the Ohio Constitution*

The Equal Protection clause of the Ohio Constitution provides, "[a]ll power is inherent in the people . . . [g]overnment is instituted for their equal protection and benefit, and they have the right to alter, reform, or abolish the same, whenever they may deem it necessary. . . ."[95]

90. 20 Ill. 2d 406, 170 N.E.2d 881 (1960).

91. 69 Cal. App. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968).

92. *Id.* at 119, 443 P.2d at 568, 70 Cal. Rptr. at 104. *See also Examination, supra* note 1, at 664; Note, *The "Fireman's Rule": Open Season on Firemen and Policemen*, 14 U. WEST L.A. L. REV. 89, 90 (1982) [hereinafter *Open Season*].

93. *Rowland*, 69 Cal. 2d at 119, 443 P.2d at 568, 70 Cal. Rptr. at 104.

94. *Id. See also Examination, supra* note 1.

95. OHIO CONST. art. I, § 2.

This doctrine has been interpreted to require that "class legislation apply alike to all persons within a class, and that reasonable grounds exist for making a distinction between those within and those without a designated class."[96]

In *City of Xenia v. Schmidt*,[97] a city ordinance prohibited any obstruction of a public street or other public property.[98] The ordinance exempted already existing permanent obstructions.[99] When the constitutionality of the ordinance was challenged, the Ohio Supreme Court examined the classifications created by the ordinance.[100] The court found four classifications: "temporary" obstructions, "future" obstructions, "permanent" obstructions, and "obstructions already abutting on any street."[101] In analyzing the equal protection challenge, the court began by defining the classes created and then compared and contrasted them to determine whether the differential treatment was justified. The *Xenia* court explained:

> In definition we have two propositions involved: first, the genius of the thing defined, and, second, the differential or the thing by which the particular thing defined is distinguished from other things of its class or group. . . .[102]
>
> The test . . . is this: Is there a real and substantial distinction in the classification attempted, or is it merely artificial, arbitrary or fictitious made for the purpose of avoiding constitutional requirements?[103]

In applying this test to the facts of *Xenia*, the court held the ordinance valid on the grounds that "[t]he classification into things temporary and permanent is of such long standing and so general in its application to all kinds of conditions and structures that to ask the question is to affirmatively answer it."[104] The court concluded that because there is a recognized difference between the temporary and the permanent, the differential treatment of temporary and permanent obstructions was justified.

---

96. State v. Buckley, 16 Ohio St. 2d 128, 134, 243 N.E.2d 66, 71 (1968); Porter v. Oberlin, 1 Ohio St. 2d 143, 151-52, 205 N.E.2d 363, 369 (1965); City of Xenia v. Schmidt, 191 Ohio St. 437, 451-52, 130 N.E. 24, 28 (1920).

97. 101 Ohio St. 437, 130 N.E. 24 (1920).

98. *Id.* at 439, 130 N.E. at 24.

99. *Id.* at 447, 130 N.E. at 27.

100. *Id.* at 446-47, 130 N.E. at 27.

101. *Id.* at 447, 130 N.E. at 27.

102. *Id.* at 448, 130 N.E. at 27.

103. *Id.* at 451-52, 130 N.E. at 28.

104. *Id.* at 452, 130 N.E. at 28.

In another case, *Senior v. Ratterman,*[105] the court addressed the equal protection issue as it relates to occupations, an area closer to the subject of this Note. The issue was whether wholesalers of intoxicating liquor should be subjected to the same tax as the manufacturers.[106] The court further clarified the requirements of equal protection by holding that the law treat similarly situated persons uniformly.[107] The court held that there is a "real, tangible difference"[108] between wholesalers and manufacturers that accounts for the wholesalers' exemption. In summary, the equal protection clause of the Ohio Constitution has been interpreted by the Ohio courts as requiring equal treatment of equally situated persons. Further, if two groups are treated differently, the courts will examine their characteristics to determine whether there are sufficient differences to justify their differential treatment.

B. *Firemen are Denied Equal Protection of the Law by Their Licensee Status*[109]

1. *Other Public Employees are Invitees*

Traditionally, city and state employees, excluding firemen and policemen, have been classified as invitees.[110] Recognizing that there is scant Ohio case law classifying any type of public servant, this Note will examine the case law of the surrounding jurisdictions, Illinois, New York, and Massachusetts, for an indication of the status of public employees.

In Illinois, public servants, such as postmen and revenue inspectors, are categorized as invitees.[111] For example, the plaintiff in *Roewe v. Lombardo,*[112] a postman, sued a store owner for damages for the injuries which he incurred when he was hit by the owner's car in the parking lot immediately after delivering mail to the defendant's store. The Illinois Supreme Court permitted his recovery.[113] Thus, this case illustrates that city employees in Illinois are

105. 44 Ohio St. 661, 11 N.E. 321 (1887).

106. *Id.* at 670, 11 N.E. at 323.

107. *Id.* at 678, 11 N.E. at 327.

108. *Id.*

109. For an argument that the fireman's rule denies firemen equal protection because of the differential treatment between firemen and other public employees see *Examination, supra* note 1.

110. Scheurer v. Trustees of Open Bible Church, 175 Ohio St. 163, 176-77, 192 N.E.2d 38, 46 (1963) (Gibson, J. dissenting).

111. *Dini,* 20 Ill. 2d 406, 416, 170 N.E.2d 881, 885 (1960).

112. 76 Ill. App. 2d 164, 221 N.E.2d 521 (1966).

113. *Id.* at 176, 221 N.E.2d at 527.

afforded a higher status than are firemen and policemen in Ohio. As was stated earlier, this status has been extended to include firemen and policemen in Illinois as well.[114] Therefore, the courts in that jurisdiction have treated all public servants equally.

New York also grants invitee status to public employees.[115] In *Dillon v. Socony Mobil Oil Co.*,[116] a county meter reader slipped and fell on an oil spot, injuring himself on sharp edges of the floor. Although the court reversed the plaintiff's favorable verdict on other grounds, it specifically referred to the meter reader as a business invitee.[117] Similarly, in *Glassbrook v. Manhi Realty Corp.*,[118] a United States census taker slipped and fell on a worn carpet in an apartment building stairway. The New York court held that since the census taker was "engaged in the business of the public,"[119] he was owed that duty of care in maintenance of a building that is owed an invitee.[120]

Massachusetts is a third example of the classification of public employees as invitees. In *Mounsey v. Ellard*,[121] an apartment building owner was held liable to a postman for ordinary negligence which resulted in his injury while on the property. The court which decided *Mounsey* relied in part upon a type of equal protection argument to find a general duty of reasonable care owed to all visitors on the property.[122] The court argued that since both a policeman and a mailman enter upon land to perform their official duties, it is logical that they be afforded the same degree of care.[123] In *Dini v. Naiditch*, a similar "logical" argument is posed suggesting that since a firemen who saves property confers a greater benefit upon the landowner than other public employees, the court finds illogical the fact that he is not afforded the same duty of care.[124]

While case support is lacking in Ohio to show the status of public employees, Judge Gibson, in his dissenting opinion in *Scheurer v. Trustees of Open Bible Church*,[125] seems to suggest that the status of

114. *Dini*, 20 Ill. 2d at 416, 170 N.E.2d at 885.

115. Dillon v. Socony Mobil Oil Co., 9 A.D.2d 835, 192 N.Y.S.2d 818 (1959); Glassbrook v. Manhi Realty Corp., 279 A.D. 711, 108 N.Y.S.2d 652 (1951).

116. 9 A.D.2d 838, 192 N.Y.S.2d 818 (1959).

117. *Id.* at 835, 192 N.Y.S.2d at 819.

118. 279 A.D. 711, 108 N.Y.S.2d 652 (1951).

119. *Id.* at 711, 108 N.Y.S.2d at 652.

120. *Id.*

121. 363 Mass. 693, 700, 297 N.E.2d 43, 50 (1973).

122. *Id.* at 700, 297 N.E.2d at 50.

123. *Id.*

124. 20 Ill. 2d 406, 415, 170 N.E.2d 881, 885 (1960).

125. 175 Ohio St. 163, 176, 192 N.E.2d 38, 46 (1963) (Gibson, J., dissenting).

these public servants in Ohio would be that of an invitee. Judge Gibson argues for raising the status of firemen to match that of other public employees.[126] He objects to the fact that while a landowner does not invite the health or safety inspector, he owes them a greater duty of care than he owes to the fireman who offers the landowner an equal service.[127]

After determining that firemen are licensees and other public employees are treated as invitees, this Note shall now return to the method of analysis presented in *City of Xenia*.[128] First, there are two classes: public employees, on the one hand, and firemen and policemen on the other. Second, there is differential treatment between the two classes. Third, this Note must determine whether distinctions between these two classes are "real and substantial"[129] so as to justify treating one class as invitees and the other as licensees.

This Note has already stated that the two points of distinction between invitees and licensees are the placement of the benefit and the presence of invitation or consent.[130] As the authorities quoted above point out, public employees and firemen do not differ on these two points. Both confer a benefit upon the property owner; the firemen perhaps even more than other public employees. Neither is invited nor permitted by the landowner, but both gain their right to enter by virtue of their duty to serve the state. It is easy to argue, then, that there is no basis for excluding firemen and policemen from the class of public employees to whom a greater duty of care is owed.

This Note shall next determine whether there are any state interests which justify this discrepancy. In applying the fireman's rule to bar recovery, several courts have offered public policies in favor of denying firemen equal treatment.[131] One Ohio court has suggested that the "burden" of compensating firemen "should be shared by all taxpayers who share the benefits of protections provided by policemen and firemen."[132]

126. *Id.* at 176-77, 192 N.E.2d at 46.

127. *Id.*

128. 101 Ohio St. 437, 130 N.E. 24 (1920).

129. *Id.* at 452, 130 N.E.2d at 28.

130. *See supra* notes 39-43 and accompanying text.

131. Scheurer v. Trustees of Open Bible Church, 175 Ohio St. 163, 192 N.E.2d 38 (1963). *See also* Walters v. Sloan, 20 Cal. 3d 199, 571 P.2d 609 (1977) (assumption of risk, other forms of compensation provided); Berko v. Freda, 93 N.J. 81, 459 A.2d 663 (1983) (assumption of risk, other forms of compensation provided).

132. *Scheurer*, 175 Ohio St. at 170, 192 N.E.2d at 42.

Judge Tobriner in his dissent in *Walters v. Sloan*[133] takes issue with the policy arguments proffered in favor of the fireman's rule. Advocates of the rule argue that firemen have assumed the risk of dangers which they have been trained to confront.[134] They also argue that because it is difficult to determine the cause of a fire, and therefore fault, judicial economy requires a total bar to recovery.[135]

Those decisions which have been written in opposition to the fireman's rule discuss the differential treatment of public employees.[136] As one decision pointed out, the fact that firemen receive workers' compensation for their injuries should not bar their suits against property owners as other public employees receive workers' compensation and are left free to sue private negligent parties. Judge Tobriner in his dissent in *Walters v. Sloan*,[137] even goes so far as to compare firemen with nonpublic employees and to demand similar treatment in personal injury suits.[138] In comparing firemen to other occupational risk-takers such as utility repairmen, he points out that while these workers are similarly compensated for the danger of their jobs, they are not barred from suing for their injuries.[139]

Without expressly raising the equal protection issue, Judge Handler in *Berko v. Freda*[140] criticizes the dissimilar treatment of firemen and other public employees. "This asserted distinction merely disguises the fact [that] there are more similarities than differences between police officers and fire fighters and a host of other public employees."[141] Judge Handler argues that while police officers face danger on the job, so do many other public employees.[142] Further, although the level of risk may be higher, there is no proof of greater compensation to balance the scale.[143]

In summary, then, this Note has examined the public policy arguments advanced in favor of the differential treatment of one type of public employee. Perhaps the strongest of these arguments may

133. 20 Cal. 3d 199, 207, 571 P.2d 609, 614, 142 Cal. Rptr. 152, 157 (1977) (Tobriner, J., dissenting).

134. *Id.* at 212, 571 P.2d at 612, 142 Cal. Rptr. at 160.

135. *Id.*

136. *See* Walters v. Sloan, 20 Cal.3d 199, 571 P.2d 609, 142 Cal. Rptr. 152 (1977) (Tobriner, J., dissenting); *Scheurer*, 175 Ohio St. at 163, 192 N.E.2d at 38 (Gibson, J., dissenting).

137. 20 Cal. 3d at 208-13, 571 P.2d at 617-18, 142 Cal. Rptr at 158-60.

138. *Id.* at 213, 571 P.2d at 620, 142 Cal. Rptr. at 160.

139. *Id.* at 213, 571 P.2d at 617, 142 Cal. Rptr. at 160.

140. 93 N.J. 81, 95-96, 459 A.2d 663, 671 (1983) (Handler, J., dissenting).

141. *Id.* at 95, 459 A.2d at 671.

142. *Id.* at 95-96, 459 A.2d at 671.

143. *Id.*

be the assumption of the risk factor, that is firemen and policemen, by the very nature of their occupations, accept the risk of injury as a part of their daily routines.

However, if this is truly the underlying basis of the courts' differing treatment of firemen and policemen, a second equal protection issue is raised. If firemen and policemen are to be distinguished from other public employees because they assume the risk of injury in saving lives and property, how then can we account for their being treated differently than other rescuers who can also be said to assume the risk of injury and to whom a greater duty of care is owed under the rescue doctrine?

The rescue doctrine holds that if a rescuer can show that the defendant was negligent in putting the rescuee in a position of peril, defendant's negligence is said to violate a duty of care to the rescuer.[144] In 1891, the plaintiff in *Pennsylvania Co. v. Langendorf*[145] sued for injuries incurred while rescuing a child who fell in front of a train. The court allowed the rescuer to recover from the negligent railroad company, thus founding the rescue doctrine.[146] In doing so, the court affirmed the public policy of rewarding the "strongest dictates of humanity."[147] The long line of rescue doctrine cases which followed further supports this great regard for the value of human life.

Applying the rescue doctrine requires the court to treat the issue of the contributory negligence of the rescuer. In doing so, account is taken of the need for quick decision, the opportunity for mistake, and the apprehension and uncertainty on the part of the rescuer.[148] The rescuer must first show the presence of all of the elements of negligence: duty of care to the rescuee, proximate causation, violation of that duty and injury to the rescuer.[149] "[T]he violation of the duty of the defendant to the rescuer occurs at the moment when the duty to the person to be rescued is breached setting in motion the forces triggering the rescue attempt."[150]

144. *See* Pittsburg, C.C. & St. L. Ry. v. Lynch, 69 Ohio St. 123, 123, 68 N.E. 703, 703 (1903); Pennsylvania Co. v. Langendorf, 48 Ohio St. 316, 316, 28 N.E. 172, 173 (1891); Reese v. Minor, 2 Ohio App. 3d 440, 440, 442 N.E.2d 782, 783 (1981); Marks v. Wagner, 52 Ohio App. 2d 320, 320, 370 N.E.2d 480, 482 (1977).

145. 48 Ohio St. at 316, 28 N.E. at 172.

146. *Id.*

147. *Id.* at 323, 28 N.E. at 174.

148. *Id.*

149. *See* Reese v. Minor, 2 Ohio App. 3d 440, 441, 442 N.E.2d 782, 784 (1981) (no proximate causation shown); Woodward v. Gray, 46 Ohio App. 177, 182, 188 N.E. 304, 306 (1933) (defendant found not negligent).

150. Marks v. Wagner, 52 Ohio App. 2d 320, 324, 370 N.E.2d 480, 484 (1977).

Professor Bohlen has clarified the theory upon which the doctrine is based. According to him, one who endangers another person in the view of other people must expect that someone may come to that person's rescue.[151] The duty to the rescuer arises from the fact that the defendant is responsible for the rescuer's risking his life to save the person the defendant imperiled.[152]

It is difficult to understand why the courts have not applied this doctrine to firemen and policemen to allow them to recover for their injuries. Surely they are rescuers. Judge Handler in his dissenting opinion in *Berko v. Freda*[153] agrees with this argument. He asserts that since a fireman is a rescuer, and since rescuers are allowed to recover for their injuries, it would be "just and fair" if firemen were allowed to recover as well.[154] "I am at a loss to understand why this judicial philosophy is repudiated in a case such as this, where the rescuer is not simply a good samaritan but a professional, who is not invited to rescue, but is expected to rescue."[155] He suggests that since the rule is based upon the foreseeability that one will rescue an imperiled person, the rule should be extended to firemen whose rescue attempt is almost "certain."[156]

Again, defining the classifications created under an equal protection analysis, we find that a general class of rescuers can recover for their injuries, while a subset of that class, firemen and policemen, cannot. One's initial response to this observation may be that firemen are rescuers by profession while private citizens are not. However, we must look to the theory of recovery under the rule to determine whether this distinction is relevant for equal protection purposes. The purpose of the rescue doctrine, as stated earlier, is to reward and encourage this humanitarian act. The fairness of the rule lies in the fact that the duty of care owed to the rescuee can be transferred to the rescuer because it is foreseeable that a rescue attempt will be made. The fault principle, too, is at work here as the defendant must be shown to have put the rescuee in danger by his negligence.

These policies are applicable irrespective of the professionalism of the rescuer and render this distinction inconsequential. While

151. F. BOHLEN, STUDIES IN THE LAW OF TORTS 569 n.33 (1926).

152. *Id.; See also* Carney v. Buyea, 271 A.D. 338, 344, 65 N.Y.S.2d 902, 908 (1946) (defendant parking his car on an incline created undue risk of injury).

153. 93 N.J. 81, 100, 459 A.2d 663, 673 (1983) (Handler, J., dissenting).

154. *Id.*

155. *Id.*

156. *Id.*

the state wants to encourage rescue attempts and humanitarian acts among private citizens, it also wants to encourage persons to enter the worthy service departments of firemen and policemen. As already shown, the foreseeability factor is present both with private citizen rescuers and professional rescuers, arguably to a greater extent with the latter. Finally, the degree of fault on the defendants' part is not altered by the type of rescuer.

The inequity of the differential treatment among rescuers is illustrated by the following example. Suppose that a fire were to be started in a hotel with many guests. Many of the guests were trapped when a negligently constructed skywalk collapsed during the fire.[157] Firemen, policemen, paramedics, ambulance workers and nurses all sue the hotel owners for the physical and emotional injuries they sustained while attempting to rescue the victims. The court awards damages to all of those rescuers injured excluding the firemen and policemen. While each rescuer knowingly accepted the risks involved, and many were being paid for their time, only the firemen and policemen are barred from recovery because no duty of care was owed to them. This is the result under the Ohio fireman's rule as it stands today.

Again, in examining the law of the surrounding jurisdictions, we find the rescue doctrine common to all of them. In New York,[158] Indiana,[159] Massachusetts[160] and Illinois,[161] "[a] person who is injured while attempting to rescue one put in peril through the negligence of a third party, can recover from that third party."[162]

In his dissent, Judge Handler urges the New Jersey court to follow the theory of the rescue doctrine by transferring the basis upon

157. *See* In re Skywalks, No. CV 81-15200, slip op. (W.D. Mo. 1983). *Skywalks* is a case of similar facts brought in Missouri. When a hotel skywalk collapsed during a fire, rescuers of all types came to the scene. A group of rescuers, made up of nurses and paramedics, sued in a class action suit and recovered for their injuries. Recovery by the firemen and policemen only was barred by the fireman's rule. Later, firemen and policemen brought a separate class action suit.

158. Provenzo v. Sam, 23 N.Y.2d 256, 244 N.E.2d 26, 296 N.Y.S.2d 26 (1968); Rodriguez v. New York State Thruway Authority, 82 A.D.2d 853, 440 N.Y.S.2d 49 (1981).

159. Neal, Admr. v. Home Builders, Inc., 232 Ind. 160, 111 N.E.2d 280 (1953); Lambert v. Parrish, 492 N.E.2d 289 (Ind. App. 1986).

160. For Massachusetts rescue doctrine cases, see Barnes v. Geiger, 15 Mass. App. 365, 446 N.E.2d 78 (1983); Linnehan v. Sampson, 126 Mass. 506 (1879).

161. For Illinois cases on the same subject, *see* Cox v. Stutts, 130 Ill. App. 3d 1018, 474 N.E.2d 1382 (1985); McGinty v. Nissen, 127 Ill. App. 3d 618, 469 N.E.2d 445 (1984); Seibutis v. Smith, 83 Ill. App. 3d 1010, 404 N.E.2d 950 (1980).

162. Talbert v. Talbert, 22 Misc.2d 782, 784, 199 N.Y.S.2d 212, 214 (1960); *see also* Wagner v. International Ry. Co., 232 N.Y. 176, 133 N.E. 437 (1921); Eckert v. Long Island R.R. Co., 43 N.Y. 502, 3 Am. Rep. 721 (1871).

which liability to firemen is determined to the fault concept. "Our most basic jurisprudence affirms a right of redress for those injured as a result of the wrongdoings of others. We have on numerous occasions expressed antipathy towards immunities and defenses that perpetuate the injustice of unredressed wrongs."[163]

V. CONCLUSION

The common law governing the suits of firemen and policemen against tortfeasors for personal injury damages is in need of a complete restructuring. The most traditional fireman's rule bars firemen from recovery for injuries directly resulting from a fire and categorizes them as licensees in their suits against landowners for injury resulting from the negligent maintenance of their property. The Ohio courts have not modernized, or indeed even altered to any extent, this rule since its creation, and the landowner's duty system upon which it is based is outdated.

The determination of whether firemen and policemen can recover for their injuries should depend instead, upon the presence of fault, the basis of all tort law. In short, the property owner should be liable to the firemen for his injuries directly resulting from the fire when the landowner negligently or intentionally caused the fire. The fireman should be owed that same duty of care owed to rescuers and public and private employees — a general duty of care owed to all foreseeably injured.[164]

This restructuring would remedy the inequitable treatment suffered by firemen and policemen, and at the same time, would further two important public policies. Allowing recovery by firemen would serve to deter negligence in causing fires and would encourage persons to enter this important area of public service which asks man every day to put another's safety and welfare before his own.

JULIANNE PALUMBO

163. Berko v. Freda, 93 N.J. 81, 99-100, 459 A.2d 663, 673 (1983) (Handler, J., dissenting).

164. The idea that a person owes a general duty of care to all foreseeably injured due to the person's lack of due care in the management of his or her property is a fundamental concept in the common law. *See, e.g.*, Rowland v. Christian, 69 Cal. 2d 108, 112, 443 P.2d 561, 564, 70 Cal Rptr. 97, 100 (1968) (citing Hearen v. Pender, 11 Q.B.D. 503 (1883)).