FIREHOUSE LAWYER

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FIREMAN'S RULE - A BAR TO RECOVERY?

It appears that the rule in the majority of states in the United States is that a fireman coming on to private property is what lawyers refer to as a "licensee" and is generally owed no duty of care by the owner of land except not to willfully or wantonly cause injury to the fireman. (Obviously, the rule has been in existence for some years, and should probably now be referred to as the "firefighters rule".)

In order to understand this area of the law, we must be aware that there are essentially three varying levels of care or protection afforded to persons who come on to another persons property. In order of protection, an invitee is a person who comes on the property of another person for business or other highly protected reasons, and is owed a duty of ordinary care. A licensee (such as a social guest) is only entitled to an intermediate level of care to avoid gross negligence or willful or wanton misconduct but not the duty of ordinary care to avoid negligence. Finally, a trespasser is seldom owed any duty of care and is only allowed recovery under narrowly described exceptions.

As mentioned above, the majority rule was that firefighters are characterized as licensees and not invitees. In various states, however, exceptions have been carved out of the general rule of nonliability where, for example, injuries to a firefighter have led to damages against the possessor of land where (1) public access has not been maintained in a reasonably safe condition or (2) there was a failure to warn of unusual or hidden dangers, (3) there was a violation of a statutory duty or (4) the possessor of land was actively negligent. See Annot. 86 A.L.R. 2d 1217-20, Sections 8, 9 and 10 (1962).

In Washington, our appellate court adopted the minority rule, characterized the fireman as an invitee, and imposed a duty of reasonable care on the possessor of land. See Strong v. Seattle Stevedore Co., 1 Wn. App. 898, 466 P.2d 545 (1970). The case involved a fire-related death of a Tacoma Fire Department battalion chief, in a pier fire involving creosoted pilings. While our intermediate appellate court held that Washington should adopt the minority rule and hold firemen to be invitees, in the particular case, the court believed that the fireman had superior knowledge of particular hazards involving creosoted pilings, as compared to the property owner, and therefore the particular fireman could not recover damages against the property owner due to his superior knowledge.

We have, however, conducted follow up research on the viability of the Strong decision, holding a firefighter in Washington to be an invitee. Subsequent cases, which have referred to Strong, have in some instances discussed the

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"professional rescuer doctrine."

FIREMAN'S RULE (continued)

In Black Industries Inc. v. Emco Helicopters, Inc. 19 Wn. App. 697, 577 P.2d 610 (1978), an action was brought against a helicopter company whose negligence started a forest fire that eventually caused a helicopter crash during fire fighting from the air. The court in Black Industries affirmed a trial court summary judgment of dismissal against the company that initially caused the forest fire, citing the professional rescuer rule. In Washington the professional rescuer doctrine was adopted in Maltman v. Sauer, 84 Wn.2d 975, 530 P.2d 254 (1975). That doctrine bars recovery for professional rescuers because:

> "Those dangers which are inherent in professional rescue activity, and therefore foreseeable, are willingly submitted to by the professional rescuer when he accepts the position and the remuneration inextricably connected therewith. . . . Stated affirmatively, it is the business of professional rescuers to deal with certain hazards, and such an individual cannot complain of the negligence which created the actual necessity for exposure to those hazards. When the injury is the result of a hazard generally recognized as being within the scope of dangers identified with the particular rescue operation, the doctrine (referring to the "rescue doctrine" which protects rescuers ordinarily) will be unavailable to that plaintiff."
>
> Maltman, supra at 978-79.

In the Black Industries case, the court made it clear that it makes no difference whether the rescue involved an injured victim, or whether it involved property (for example, a structure engaged in a structural fire or wildlands engaged in a forest fire).

It should be noted, however, that the professional rescuer doctrine of Maltman, and the exceptions to the fireman's rule discussed in Strong recognize that a property owner can still be liable, at least in Washington, for negligence not reasonably foreseeable by the professional rescuer or under the other exceptions discussed above. Thus, neither the majority version of the fireman's rule applicable in most states, or the Strong invitee rule in Washington and other minority states, nor the professional rescuer rule is an absolute bar to recovery. The facts of each case must be examined.

In Sutton v. Shufelberger, 31 Wn. App. 579, 643 P.2d 920 (1982), the case involved a police officer injured while getting off his motorcycle, who sued for damages when a vehicle struck him during a traffic stop involving a different vehicle. Division One of the Court of Appeals held that the fireman's rule has never been found in Washington to apply to police officers. In passing the court discussed the so-called fireman's rule as one negating liability to the fireman, police officer or other official by the one whose negligence or conduct brought the injured official to the scene. The court quoted at length from one of the early, leading cases establishing the fireman's rule of nonliability, i.e. Krauth v. Geller, 31 N.J. 270, 273-74, 157 A.2d 129, 131 (1960). In that case, the court noted that the rule is based upon public policy. The court stated that it is the fireman's business to deal with that very hazard and therefore the fireman cannot complain of negligence in the creation of the very occasion for his engagement. The court said probably most fires are attributable to negligence, and in the final analysis the policy decision is that it would be too burdensome to charge all who carelessly cause or fail to prevent fires with the injuries suffered by the expert retained with public funds to deal with those inevitable, although negligently created occurrences. The Sutton court went on to point out,

FIREMAN'S RULE (continued)

however, that other negligent conduct (other than the original cause of the fire) or willful misconduct may create liability to the injured firefighters or police.

Suppose, therefore, a fire breaks out in an abandoned warehouse due to negligent securing of the property, which allows vagrants to live in the premises and start fires for cooking. While that initial negligence may not be actionable, if the owner also negligently failed to comply with sections of the Uniform Building Code or Uniform Fire Code, leading the premises to be unduly unsafe and allowing floors to collapse or the like, there still could be liability.

The final case in Washington in which the Strong case was cited was Ballou v. Nelson, 67 Wn. App. 67, 834 P.2d 97 (1992). The case again involved police officers who, while responding to a public disturbance complaint, were physically assaulted. Division One of the Court of Appeals, again discussing the professional rescuer doctrine and fireman's rule, made it clear that the fireman's rule per se has never been applied in Washington, citing the Strong case. The court noted that the fireman's rule does not provide immunity to one who commits "independent acts of misconduct" after firefighters have arrived on the premises. Our review of these cases certainly suggests the following summary applies (in Washington at least: (1) probably in Washington, firefighters are subject to not only the Strong rule holding them to be invitees, but also the professional rescuer doctrine, which does not allow recovery by a professional rescuer against the negligent tort-feasor who created the original incident, for that particular negligence; (2) however, there are numerous exceptions to the professional rescuer doctrine, and even to the fireman's rule, if it did apply in Washington. Those exceptions are referred to above. Therefore, at least in Washington, and probably in virtually all states, the injured professional rescuer should look to the particular facts of the case and see whether any exception might apply, before simply assuming that there cannot be any recovery for such injuries or death. The injured firefighter should contact a personal injury attorney, but make sure that attorney is familiar with the professional rescuer doctrine and/or the fireman's rule, as applied in their particular state.

EDITORIAL - THE WASHINGTON "TWO IN, ONE OUT" RULE SHOULD BE CLARIFIED

Since the Occupational Safety and Health Administration adopted a new respirator standard in January 1998, there has been much discussion in the fire service in Washington concerning the effect, if any, in this plan state, which has adopted new safety standards in 1997. In particular, the OSHA "two in, two out" rule, requiring two firefighters on standby outside a structure whenever two firefighters are engaged in an interior attack on the fire inside, appears to be at variance with the Washington rule. In WAC 296-305-05001 (10), at least in the "initial stage" of a structure fire/incident, where only one team (two firefighters) is operating in a hazardous area, at least one additional firefighter shall be assigned to standby outside the hazardous area where the team is operating. In the definitions section, WAC 296-305-01005, "initial stage" is defined as follows: "Shall encompass the control efforts taken by resources which are first to arrive at an incident requiring immediate action to prevent or mitigate the

EDITORIAL (continued)

loss of life or serious injury to citizenry and firefighters."

One of the notes appended to the new OSHA rule suggests that the new "two in, two out" rule was not intended to prevent rescues of persons inside structures engaged in fires. Some commentators in Washington have thus far expressed their belief that there is no need to amend the relatively new "vertical standards" since the "two in, one out" rule only applies during the initial stage. WAC 296-305-05001(11) further states that: "Once additional crews are on the scene and assigned, the incident shall no longer be considered in the initial stage."

Although this interpretation does seem to limit the circumstances under which two firefighters would be inside a structure engaged in a fire with only one standby firefighter, it appears to this writer that the exception must be rigidly followed and carefully applied, or unnecessary deaths and injuries may be the result. In small departments, for example, absent mutual aid, three firefighters may be all the resources they can bring to bear within a reasonable time at a particular fire. Therefore, the initial stage of the fire might be quite lengthy, might involve flashover, or indeed the entire incident. Second, there are still judgment calls to be made at the scene upon arrival of the first units responding. How are the firefighters or their command officer to know for certain that there are no persons inside the building? Should they assume until proven otherwise that there may be a threat of loss of life or serious injury, until they engage in reconnaissance to ascertain that no one is inside the building? Or does the incident require immediate action as defined in the WAC only when they know someone is inside? If the standby firefighter outside is necessary to operate the pump or otherwise, how can he/she be effective as a one person intervention team in the event that the firefighters inside run into difficulties?

We can think of several more questions that point out the ambiguity or need for clarification in the Washington vertical standards. We submit that, at the very least, the Washington State Department of Labor and Industries should issue a memorandum, regional directive or some other interpretation, in light of the OSHA "two in, two out" rule, which clarifies the application of Washington's two in, one out rule during the initial stage. Otherwise, given the ambiguities, there is too much risk of varying interpretations and judgment calls made "on the street" which will not serve to enhance firefighter safety. The department could inform the fire service community as to whether the definition of initial stage will be narrowly or liberally construed. This is my opinion. It may not be shared by all of the varying interests and viewpoints in the State of Washington. It must be kept in mind, however, that the author is an attorney and we can be very conservative about unnecessary exposures to liability of our municipal clients. Further, we believe that it is "better to be safe than sorry", as prevention of liability, i.e. risk management, also means prevention of injuries and loss of life.

RECORDS RETENTION SCHEDULES

Pursuant to RCW 40.14 the state has established guidelines for retention of public records, including those of local government agencies. Recently, the Secretary of State, Archives and Records Management Division, in conjunction with a State Records Committee, released the first edition of the *Local Government General Records Retention Schedules and Records Management Manual*. This new manual applies to fire protection districts and other local government agencies; it supersedes a previous manual published for city and towns. We have room here for only a few highlights. The complete manual is downloadable

RECORDS RETENTION SCHEDULES (continued)

from the web site of the Municipal Research Services Center at www.mrsc.org/recordsmanual.

We know that many fire districts and other special purpose districts, as well as cities and towns, use audio tapes at least as a back up for the secretary's notes used to prepare the official minutes of meetings. Please be advised that the manual adopts a retention period of six years for such audio tapes. Even if the purpose of the tape recording is simply to assist the clerk or secretary preparing the minutes, this new guideline applies. Many districts may want to reconsider whether to use audio tapes, even for backup due to the expense and storage issues.

Please note also that with respect to hearings, for example budget hearings and benefit charge hearings required by statute, more is legally required. Since judicial review of such hearings would require a verbatim record, and a complete record of all paperwork with respect to the issue, a district may still want to use audio taping in order to facilitate the creation of a verbatim record. Otherwise, probably a court reporter would have to be used. We have downloaded just a few portions of the manual and included them as an appendix to the Firehouse Lawyer this month. We chose the General Records Retention Schedules applicable to governing bodies and those applicable to fire protection/fire and emergency medical operations. Please note those type of records that must be kept permanently. Any questions on the subject of records retention and open public records should be directed to your legal counsel.

Q AND A COLUMN

Sorry! The Website Manager—Jay Gunsauls—has informed us that the Q and A column will have to be discontinued. He claims that the name is too boring and legalistic. To gain his grudging, reluctant permission to continue the column, we have promised to hold a contest, where readers submit their preferences (suggestions) for renaming the column. So send in your ideas by email, fax or mail. The winner will be announced in the Firehouse Lawyer at the end of April; he/she will also receive one free hour of legal consultation on an issue of the winner's choice.

The purpose of this feature is to allow readers to submit short questions which lend themselves to general answers, on various legal issues. Questions may be submitted by e-mail or by regular mail from those readers who are not getting *The Firehouse Lawyer* online. More detailed questions would require a formal legal opinion and are beyond the scope of the Q&A column. By giving answers in the Q&A column, the Firehouse Lawyer does not purport to give legal advice and disclaims any attorney/client relationship with the reader submitting the question. Readers are cautioned that detailed legal opinions require a greater explanation of the facts, possible legal research and a more thorough discussion of the issue. Readers are therefore urged to contact their legal counsel for legal opinions.

One more change. **Please** provide not only your name but your location (city or fire department name) so we can be sure the "questioners" are members of the fire service. Without some verification process, I might unwittingly be providing ideas to adversaries of the fire service, or even (heaven forbid!) plaintiff's lawyers planning to sue a fire department.

Q Is there such a form of governance that would allow several fire districts and a city to share in some major function, i.e. communications, and to have some separate level of taxing revenue? HAZMAT operations also come to mind here. In California, I believe the function is called "Joint Powers". Can we form a County Fire Authority for the entire county or a portion thereof?

Q AND A COLUMN (continued)

…..Jay Gunsauls, Fire Chief, Bellingham, Washington.

A The Interlocal Cooperation Act, chapter 39.34 of the Revised Code of Washington, authorizes municipal

corporations in this state to exercise joint powers, but it does not grant any additional taxing authority. It is common, for example, for fire districts and cities to exercise functions jointly. In Pierce County, Firecomm is a dispatching agency for at least a dozen fire districts and cities; Firecomm is a joint undertaking administered by Pierce County Fire District 2 in Lakewood. It is financed, however, by each member of the Users Group making an annual contribution based on a formula, plus capital contributions when they join. Some money may be obtained through E911 funds, but the users group obtains their funds through the usual statutes giving them regular tax levy authority, EMS levy tax authority, and benefit charge powers. RCW 39.34 supplements the municipal powers otherwise granted to local governments but does **not** grant supplemental taxing authority. The question in your last sentence above is different. With regard to emergency medical services and ambulance service particularly, there are some often overlooked statutes authorizing counties to establish EMS and collect reasonable fees, or to establish a system of ambulance service in part of, or all of, a county. See RCW 36.01.095 and 36.01.100. Also, RCW 36.32.470 authorizes counties to provide financial assistance to other municipal corporations for fire protection, EMS and "medical" services. It is not clear what you meant by County Fire Authority, but I conclude by noting that the various statutes create myriad possibilities for delivering services through differing combinations of local government entities.

Q Is a chief officer more or less liable with written SOG's (or SOP's), which may be scrutinized by lawyers than he or she would be if there were no written documents? …John Matz,_____ _____.

A This presents a true dilemma that I have been struggling with for many years myself. Having given it much consideration over the years, I have concluded that written policy is better than the alternative you suggest. But first let me address the personal liability issue your question implies you are concerned about. In Washington, and in most states, municipal corporations indemnify and insure their officers and employees against risk of liability for their actions taken in the ordinary course of their employment (and the same goes for volunteers). The protection is there even if the employee is negligent; if the conduct is grossly negligent, willful and wanton or intentional then the protection may well **not** be available. And the entity's insurance carrier may deny coverage too, but these instances are rare. So let us say that your personal liability exposure (whereunder your personal assets could be reached in execution of a court judgment) is ordinarily more theoretical than real. Your question is still a good one, phrased this way: "Is a city or fire district more or less liable with written SOP's?" In a civil tort case, liability is usually predicated upon a duty, breach of duty, proximate cause and damages. Existence of a policy could be used to show a duty, but probably there will be an independent source of that duty anyway such as state safety laws or regulations, NFPA standards or other recognized standards, a contract or agreement, etc. If a municipal corporation has adopted a policy by practice, or orally, it is just as much a policy as if it were written. It is just harder

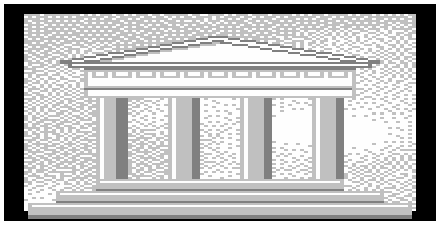
Q AND A COLUMN (continued)

to prove. Now let's look at the reasons to have written policies. Let's take safety as an example. First, it shows the city or district considers the issue of sufficient importance to establish a policy. Second, it shows an intent to comply with the law, which requires local policy. (In many areas of city

and district governance, policies are **required** by state and/or federal law so having them in writing proves compliance.) Third, and perhaps foremost, having policies in writing gives employees and volunteers the information and guidance they need to perform competently. In summary (and this is a lawyer saying this) I concluded that we cannot let the fear that some lawyer is "looking over our shoulder" shape all of our conduct. If we write solid policy guidance, have it reviewed by our counsel for legal sufficiency, and then follow it to the best of our ability, we are far better off than we would be with oral policies. Not having written policy increases the possibility that unforeseen problems and injuries can lead to liability. If you have a sexual harassment complaint, do you think you will be better off with or without a detailed policy showing management takes these seriously, investigates them promptly and thoroughly, trains to prevent them, and disciplines violators? I think the answer is clear—start writing!

Q To what degree does the design of a fire station have to comply with the Americans With Disabilities Act? Does the rest room of a fire station have to accommodate disabled persons if the rest rooms are only used by the firefighters and not by the public? …Bill Gabbert, Valparaiso, Indiana.

A I edited your question, but the rest of it essentially asked me to assume that the firefighters themselves were not disabled, so as to need such rest room facilities. Your question points up the necessity for distinguishing between the public facilities sections of the ADA and those sections of the Act prohibiting employment discrimination against disabled persons. As employers we must not mix up these very different requirements of the ADA. The portions of your question I edited out implied that you have no disabled firefighters, as they must pass fitness tests regularly. Therefore, I believe your question is aimed at the public facilities provisions of the ADA. In my opinion, the short answer to your question is that there is no legal requirement that the rest rooms be made available to the public at all; if they truly are only used by firefighters then the public accommodations provisions of the ADA do not apply. I assume this fire station is not used for public meetings, for example, of the governing body of the fire department. There is also a section of the regulations exempting existing facilities (as of the date of the Act's passage); see 29 C.F.R. 35.150.



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Lawyer and many fire-service features.

NOTA BENE:

In 1997 I developed a fire department safety checklist and a set of forms for safety officers. Designed to help fire departments comply with the new WAC 296-305 safety standards, these materials are available to fire departments throughout the state, subject to payment of $50.00 to defray reasonable copying and mailing costs.

In June, 1997, a model Safety Resolution and complete set of operating instructions (SOPs) were completed, to comply with the "vertical standards". Cost $100.

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