OHIO SUPREME COURT HOLDS THAT POLICEMEN WHO ENTER PRIVATE PROPERTY UNDER AUTHORITY OF LAW ARE LICENSEES

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

Plaintiff policeman sued for personal injuries sustained when he fell into an unguarded, open excavation on defendants' premises while investigating at night a radio call that "kids" were breaking into defendants' church building.[1] Jury trial was waived, and a three-judge court found for plaintiff, awarding damages of $7,500. The court of appeals affirmed the decision. The Supreme Court of Ohio, with two justices dissenting, reversed, holding that the duty of care owed a policeman in the performance of his duties is that owed a licensee.[2]

Although the instant case is one of first impression in Ohio,[3] the majority opinion follows the law of most American jurisdictions.[4] The rule goes back to the feudal concept that landowners, being the backbone of society, were sovereign within their own boundaries and owed only a bare minimum of duty to outsiders.[5]

Society has changed greatly since the feudal era—from the loosely knit social structure caused by each manor having its own self-sustained economy to the closely knit, interdependent society of an industrial economy; from a society where self-help was the rule to one where self-help is the exception and reliance upon the state is the rule. Unfortunately, the law has not changed. The majority of courts do not afford policemen the standard of reasonable care due invitees. Rather they are treated as licensees. The licensor owes them the duty to refrain from wantonly or wilfully injuring them, to exercise ordinary care after discovering them in a position of peril, and to refrain from exposing them to hidden dangers.[6] The rationale is that they may enter the premises at unpredictable times and locations and that it would place an undue burden upon the owner of the premises to afford policemen the duty of ordinary care.[7] However, the growing interdependence of our present society

[1] The excavation was near the end of a driveway which led to the side door of the church. A light above the door usually illuminated this area, but on the night of the accident the light was not lit. The plaintiff was to enter the side door while his partner entered the front door. There was no finding of negligence on plaintiff's part.

[2] Scheurer v. Trustees of the Open Bible Church, 175 Ohio St. 163, 192 N.E.2d 38 (1963).

[3] *Id.* at 166, 192 N.E.2d at 40.

[4] Prosser, Torts § 78, at 461 (2d ed. 1955); 2 Harper & James, Torts § 27.14, at 1501 (1956). See also Eckert v. Refiners Oil Co., 17 Ohio App. 221 (1923) for general law as to firemen. *Contra*, Dini v. Naiditch, 20 Ill. 2d 406, 170 N.E.2d 881 (1960).

[5] Dini v. Naiditch, *supra* note 4; see 2 Harper & James, *op. cit. supra* note 4, § 27.1.

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

[7] Prosser, *op. cit. supra* note 4, § 78; 2 Harper & James, *op. cit. supra* note 4, § 27.14.

requires a reappraisal of the duty owed a policeman who enters private property under authority of law.

The Supreme Court of Ohio had the opportunity for reappraisal, but relied instead upon an historical approach to the problem. The majority did concede two major issues however: (1) that the reasoning behind the law does not have as much force today as it did in earlier cases, and (2) that policemen should not be required to bear the burden of the loss incurred as a result of their injuries.[8] The majority of the court treated the second issue as a policy question decided by the Ohio legislature through the Workmen's Compensation Act. The majority's opinion was that this legislation provided that the burden of loss was to be spread throughout society and was not to be placed upon the landowner.[9] This view takes no cognizance of the possible culpability of the landowner nor of the distribution of loss according to fault. In fact, the majority's argument is contra to prior Supreme Court of Ohio decisions which granted relief to plaintiffs who had recovered previously under Workmen's Compensation.[10] The use of this inapposite argument as one of the two surviving and presently forceful policy reasons for not imposing liability upon the landowner indicates the injustice of this decision.

Further, the court did not answer squarely the question of whether or not there was an implied invitation for the plaintiff to use the driveway to enter the defendants' property. The "ultimate fact" question of express or implied invitation is to be decided by the jury in Ohio.[11] In the instant case, the three-judge court found that there were facts which in the law constituted an implied invitation. The supreme court either ignored the question of the implied invitation, or reversed the trial court's finding as against the law. If the latter is true, the court should have been explicit in its finding.

Judge Gibson in a dissenting opinion examined the doctrinal basis of the law, then criticized the distinction between classifying garbage collectors as business guests and policemen as "mere" licensees, arguing that the social justification for such a distinction has long since disappeared. Judge Gibson concluded that the distinction should be eliminated.[12] However, this approach would hold property owners liable for injuries occurring at any point upon

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[8] Scheurer v. Trustees of the Open Bible Church, *supra* note 2, at 168-69, 192 N.E.2d at 42.

[9] *Id.* at 169, 192 N.E.2d at 42.

[10] *Id.* at 177, 192 N.E.2d at 46-47 (Gibson, J., dissenting); George v. City of Youngstown, 139 Ohio St. 591, 41 N.E.2d 567 (1942); Trumbull Cliffs Furnace Co. v. Shachovsky, 111 Ohio St. 791, 146 N.E. 306 (1924).

[11] Pennsylvania R.R. v. Vitti, 111 Ohio St. 670, 146 N.E. 94 (1924) (Involving a policeman). The implied invitation is present when a person "has a right to understand from the appearance of the premises that the intended mode of approach to the tenement in question was over the open space . . . ." Learoyd v. Godfrey, 138 Mass. 315, 323-24 (1885) (Also involving a policeman).

[12] Scheurer v. Trustees of the Open Bible Church, *supra* note 2, at 175-78, 192 N.E.2d at 45-47 (Gibson, J., dissenting). Judge Gibson's conclusion is based upon a social analysis similar to this writer's.

their premises. It would appear that a more reasonable approach to the problem could be effected without unduly burdening property owners.

Since most jurisdictions refuse to grant relief in cases of this nature because it is uncertain when and where a policeman will enter private property—the foreseeability argument of the Ohio Supreme Court, the best solution would appear to be a recognition that policemen and firemen who enter private property under authority of law are neither invitees nor licensees, but rather a class *sui generis*.[13] The owner of private property should be held to the exercise of reasonable care in the maintenance of all areas of his property to which there is normal access by guests or invitees, a duty of care now imposed in favor of meter readers and garbage collectors. The suggested rule would not place too great a burden upon the property owner, but it would prevent his unreasonable acts or omissions from causing undue hardship to persons who are injured while performing public duties. Since the performance of the public duty is as beneficial to the property owner as it is to the community, the owner of private property should be held to the duty of ordinary care toward public servants, such as policemen, who enter the premises by normal means of ingress. In the instant case, plaintiff would have recovered if the supreme court had adopted the suggested test.[14] Since the Supreme Court of Ohio will not remedy a patently unjust rule of law, the Ohio Legislature should.

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[13] Shypulski v. Waldorf Paper Products Co., 232 Minn. 394, 45 N.W.2d 549 (1951); see Meiers v. Fred Koch Brewery, 229 N.Y. 10, 127 N.E. 491 (1920); 2 Harper & James, *op. cit. supra* note 4, § 27.14; Prosser, *op. cit. supra* note 4, § 78, at 460.

[14] A similar result would have been reached if the court had rejected any distinction between licensees and invitees, using instead the foreseeability test of Palsgraf v. Long Island R.R., 248 N.Y. 339, 162 N.E. 99 (1928), to determine whether these defendants should have foreseen this plaintiff's falling into the unguarded, open excavation.