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LIABILITY OF A POSSESSOR OF PREMISES TO PUBLIC OFFICIALS FOR PHYSICAL HARM CAUSED BY A CONDITION OF THE PREMISES—A RULE FOR VIRGINIA

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I. INTRODUCTION

Although Virginia has established rules of liability for possessors¹ of premises to trespassers, licensees, and invitees,² the Supreme Court of Virginia has not addressed the possessor's liability for conditions on the premises causing physical harm to public officials who are lawfully upon the premises by virtue of a privilege and without the possessor's express permission or invitation.³ These officials include those who are authorized, but not required, by statutes or ordinances to be upon the premises, whether or not their employment requires it, e.g., firemen and policemen. Such officials are likely to be upon the premises at unexpected times and

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1. The term "possessor" herein means the individual in control of the premises. Page states: "'Possession' is . . . a question of fact involving occupation and intent to control the particular area where the injury occurred." J. PAGE, *THE LAW OF PREMISES LIABILITY* § 1.4, at 3 (1976). See also *Strong v. Seattle Stevedore Co.*, 1 Wash. App. 898, —, 466 P.2d 545, 547-48 (1970) (quoting *RESTATEMENT (SECOND) OF TORTS* § 328E (1965)). The term "premises" encompasses the land and the appurtenances thereon.

2. See, e.g., *Roll 'R' Way Rinks, Inc. v. Smith*, 218 Va. 321, 237 S.E.2d 157 (1977) (duty owed to invitee); *Appalachian Power Co. v. LaForce*, 214 Va. 438, 201 S.E.2d 768 (1974) (duty owed to trespasser or bare licensee); *Busch v. Gaglio*, 207 Va. 343, 150 S.E.2d 110 (1966) (duty owed to licensee (social guest)).

3. Those public officials who are lawfully upon the premises by legal privilege, e.g., firemen and policemen, are hereinafter referred to as "public officials."

under unanticipated circumstances. Not included in this article are those public employees who are required by statutes or ordinances to be upon the premises at particular times, e.g., building inspectors or health department inspectors, and who are usually upon the premises at anticipated times and during "normal business hours."

The issue of liability to a fireman arose in *Pearson v. Canada Contracting Co.*,⁴ a case of first impression in Virginia. This article discusses the facts of *Pearson* and the rule of liability addressed therein, including an exception for premises undergoing construction or demolition. Relevant law of Virginia and other jurisdictions is explored.

This article does not address the possessor's liability when he has violated a statute or ordinance or his liability to a casual passerby of premises undergoing demolition or construction. Furthermore, the doctrines of assumption of the risk and contributory negligence⁵ are not discussed because these defenses are not affected by the basic rule of possessor liability to certain public officials which is addressed in this article.

II. BACKGROUND

A. *The Facts of Pearson*

The plaintiff, Cecil W. Pearson, was a fireman employed by the Richmond Bureau of Fire at the time of the injury giving rise to this case. The injury occurred on June 25, 1979, in an industrial building on Brown's Island in Richmond. The building was one of several being demolished, and fires had occurred previously in the other buildings undergoing demolition. There were three defendants in the action: Ethyl Corporation, the owner of the premises; Canada Contracting Company, the general contractor for the demolition project; and C. S. Lewis, a subcontractor removing and salvaging metal on the premises.⁶

The Richmond Bureau of Fire had extinguished fires previously

4. LE-608 (Cir. Ct., City of Richmond, Div. I filed Apr. 15, 1981).

5. See, e.g., *Amusement Slides Corp. v. Lehmann*, 217 Va. 815, 232 S.E.2d 803 (1977) (assumption of risk); *Smith v. Virginia Elec. & Power Co.*, 204 Va. 128, 129 S.E.2d 655 (1963) (contributory negligence).

6. *Pearson v. Canada Contracting Co.*, LE-608 (Cir. Ct., City of Richmond, Div. I filed Apr. 15, 1981). Ethyl Corporation subsequently was dismissed from the action pursuant to a settlement and covenant not to sue. *Id.*

at the site. In fact, Pearson had participated in fighting a fire in another part of the premises on May 14, 1979, approximately five weeks prior to his injury. He also had knowledge that the building in which he was injured was undergoing demolition at the time of his injury.⁷

The room in which Pearson was injured contained a "broke hole" which had been surrounded by a guard rail.⁸ On the date of the injury, although a number of hours earlier, Lewis had removed a portion of the roof over the room where the injury occurred. Some of the resulting rubble partially or completely covered the broke hole. This part of the premises was "not held open to the public."⁹

The June 25 fire occurred at night. In the process of entering the premises to extinguish the fire, Pearson "fell through the broke hole to the basement of the building,"¹⁰ a distance of five feet. He sustained injuries to his back and spinal cord as a result of the fall.¹¹

Due to the alleged negligence on the part of the defendants resulting in his injuries, Pearson sued the defendants jointly and severally for \$2,000,000 in damages. These damages included "medical expenses, lost time for work, for past, present and future rehabilitation; pain and suffering caused by the defendant."¹²

B. *Virginia Precedent—Liability to Firemen*

In *Chesapeake & Ohio Railway v. Crouch*,¹³ the Supreme Court of Virginia addressed a possessor's liability to firemen in the context of injuries resulting from a fire which the possessor negligently caused.¹⁴ The defendant railroad was allegedly negligent in causing a fire on its right-of-way, and the fire spread to adjacent prop-

7. *Id.*

8. The broke hole had been present when the plant was operating so as to allow trash from the manufacturing process to fall into the basement. The stipulation of facts, for purposes of defendant's motion for summary judgment only, did not indicate whether the guard rail had been removed at the time of the incident. However, the plaintiff's amended motion for judgment alleged that it had been removed. *Id.*

9. *Id.*

10. *Id.*

11. *Id.* Although Pearson alleged the distance of the fall to be twenty feet, the stipulation of facts indicated it to be five feet. *Id.*

12. *Id.*

13. 208 Va. 602, 159 S.E.2d 650, cert. denied, 393 U.S. 845 (1968).

14. *Id.*

erty.¹⁵ The plaintiff's decedent, who had experience in fighting fires, had volunteered to help the forest warden fight the spreading fire. Furthermore, he knew he would be paid to do so, although the pay was minimal.¹⁶

The fire spread to a wooded area where winds enkindled the fire as the fireman attempted to extinguish it. A fireman was burned severely and died about six weeks later.¹⁷ The decedent's administratrix brought a wrongful death action against the defendant railroad. The trial court entered final judgment on the jury's verdict for the plaintiff, and the defendant appealed.¹⁸

Since *Crouch* was a case of first impression, the court considered the general rule regarding the liability of a possessor whose negligence causes a fire resulting in injuries to a fireman attempting to extinguish it.¹⁹ The court noted that it was almost universally the rule that no liability to firemen is imposed upon those who negligently cause fires.²⁰ Furthermore, the situations in which liability had been imposed had involved risks which were not inherent in the undertaking.²¹ The court stated that such risks include "undue risks of injury, such as hidden, unknown, and increased dangers, the hazard of which a fireman does not ordinarily assume."²²

The court found that the hazards which resulted in the decedent's injuries were inherent in fighting fires and thus applied the general rule of nonliability on the part of the defendant railroad.²³

15. 208 Va. at 602, 159 S.E.2d at 651.

16. *Id.* at 603, 605-06, 159 S.E.2d at 651, 653.

17. *Id.* at 603-04, 159 S.E.2d at 651.

18. *Id.* at 602-03, 159 S.E.2d at 651.

19. *Id.* at 606-09, 159 S.E.2d at 653-55. After considering a statute empowering the warden to summon "able-bodied male persons between eighteen and fifty years of age . . . to assist in extinguishing any forest fire," *id.* at 605, 159 S.E.2d at 652 (quoting VA. CODE ANN. § 10-59), the court declined to apply the statute to this case because it found that the decedent fireman had voluntarily fought the fire free of statutory compulsion and that he had served in the capacity of a paid fireman. 208 Va. at 605-06, 159 S.E.2d at 653.

20. 208 Va. at 606, 159 S.E.2d at 653. *See also* Mueller, *Liability to the Public Servant—A Divided Approach to Duty*, 68 ILL. B.J. 333, 335-36 (1980); Note, *Landowner's Negligence Liability to Persons Entering as a Matter of Right or Under a Privilege of Private Necessity*, 19 VAND. L. REV. 407, 419 & n.56 (1966) (quoting *Krauth v. Geller*, 31 N.J. 270, 274, 157 A.2d 129, 131 (1960)) [hereinafter cited as *Negligence Liability*].

21. 208 Va. at 607, 159 S.E.2d at 653-54 (citing *Krauth v. Geller*, 31 N.J. 270, —, 157 A.2d 129, 131, and quoting *Jackson v. Ververay Corp.*, 82 N.J. Super. 469, —, 198 A.2d 115, 121 (1964)).

22. 208 Va. at 607, 159 S.E.2d at 653 (noting that fault was usually premised on "creating undue risks of injury, that is, risks beyond those inevitably involved in firefighting").

23. *Id.* at 609, 159 S.E.2d at 655 (reversing the trial court's judgment, setting aside the verdict for the plaintiff, and entering final judgment for the defendant).

The court then held that "as a matter of law, . . . the deceased assumed the risk . . . [of fighting the fire]."²⁴

In making its decision, the Virginia Supreme Court discussed various rationales underlying the general rule of nonliability. Some courts find that the possessor owes no duty to a fireman to avoid negligently causing a fire since "it is [the fireman's business] to deal with the hazards of fire, whether or not negligently set, any such negligence being immaterial."²⁵

The second rationale posited and ultimately adopted by the court was assumption of the risks inherent in fighting fires.²⁶ The court gave the following explanation for this doctrine:

The assumption of risk doctrine employed in fire cases does not depend upon the existence of a spirit of venturesomeness in the face of known danger, as is true in automobile negligence cases, but rather upon the relationship between the fireman and the public, from which arises his obligation to accept the usual risks of injury in undertaking to suppress fires without regard to whether or not they are caused by negligence.²⁷

The court premised its holding of nonliability on assumption of the risk, expressing the view that the imposition of liability for negligently causing fires or for injuries resulting from the inherent risks of fighting such fires would be an undue burden to put on the possessor who is powerless to prohibit the fireman's involvement or to control his acts.²⁸

In addition to establishing a rule of nonliability for negligent causation of fires in which a fire fighter is injured by inherent risks, the Virginia Supreme Court also declared that firemen constitute a category of *sui generis* plaintiffs. The court made this declaration in a summary fashion without discussing what a possessor's duty or liability should be to a *sui generis* individual.²⁹

24. *Id.*

25. *Id.* at 607, 159 S.E.2d at 654 (noting this to be the reasoning in *Krauth v. Geller*, 31 N.J. 270, 157 A.2d 129 (1960)).

26. 208 Va. at 607-09, 159 S.E.2d at 654-55.

27. *Id.* at 608, 159 S.E.2d at 654.

28. *Id.* at 608-09, 159 S.E.2d at 655 (quoting *Wax v. Co-operative Refinery Ass'n*, 154 Neb. 805, —, 49 N.W.2d 707, 710 (1951), which quoted *Suttie v. Sun Oil & Co.*, 15 Pa. D. & C. 3 (1930)).

29. 208 Va. at 608, 159 S.E.2d at 654-55 (basing this classification on "the public nature of his rights and duties"). The court did not expressly label firemen *sui generis*, but did so impliedly. *Id.*

The supreme court has not subsequently addressed the liability of the possessor to individuals falling within this *sui generis* category. Nor has it addressed whether the general rule of nonliability and the *sui generis* classification apply to policemen. Because the policy considerations involved appear to be virtually identical in the case of policemen, the same general rule of nonliability should apply.³⁰

III. THE LAWS OF OTHER JURISDICTIONS REGARDING A POSSESSOR'S LIABILITY TO PUBLIC OFFICIALS

A. *General Philosophical and Policy Considerations*

Various reasons have been given for limiting the liability of possessors to firemen and policemen. It has been argued that these employees receive adequate compensation, including workmen's compensation and disability pension benefits.³¹ However, the question has been raised regarding the adequacy of a fireman's compensation in light of the increased risk of injury.³² The same question is equally applicable to the policeman.

The doctrine of assumption of the risk has been posited as a further reason for denying liability. As applied to public officials, this doctrine is not based on the ordinary ground of the plaintiff's venturesomeness in confronting a known danger. It instead is based on the public official's relationship with the public, which results in "his obligation to accept the usual risks of injury in undertaking to suppress fires. . . ."³³ Furthermore, the assumption tends to be limited to those risks which are inherent in the situa-

30. See *infra* text accompanying notes 122-35.

31. Comment, *The New Minnesota Fireman's Rule—An Application of the Assumption of Risk Doctrine: Armstrong v. Mailand*, 64 MINN. L. REV. 878, 887 (1980) (citing *Walters v. Sloan*, 20 Cal. 3d 199, 205-07, 571 P.2d 609, 612-14, 142 Cal. Rptr. 152, 155-57 (1977) and MINN. STAT. §§ 69.41, .45 (1978), 176.011 to .82 (1978 & Supp. 1979), 424.19 to .20 (1978)) [hereinafter cited as *New Minnesota Rule*].

32. *New Minnesota Rule*, *supra* note 31, at 887-88.

33. *Chesapeake & O. Ry. v. Crouch*, 208 Va. 602, 608, 159 S.E.2d 650, 654 (1968) (recovery for wrongful death from inherent risk of fighting fires barred by assumption of inherent risks). See *supra* text accompanying notes 13-28.

This doctrine has been criticized by one author who noted that since assumption of the risk must be made voluntarily and intelligently, there is not a true assumption in the case of the public official because of the lack of voluntariness in undertaking the specific task. If an individual chooses to be a fireman, he must face those risks inherent in extinguishing fires. Otherwise, he must forego employment as a fire fighter. *New Minnesota Rule*, *supra* note 31, at 885-86. But see *supra* text accompanying notes 26-28, 33.

tion, and not undue, unexpected ones.³⁴

In determining liability of the possessor to public officials, courts have frequently attempted to balance the rights and burdens of possessors with those of public officials. The Supreme Court of New Jersey stated in *Krauth v. Geller*:³⁵ "[L]iability is not always coextensive with foreseeability of harm. The question is ultimately one of public policy and the answer must be distilled from the relevant factors involved upon an inquiry into what is fair and just."³⁶ In addressing the duty of an owner to warn of a hidden hazard, known to him, if he is present at the scene, the Supreme Court of Minnesota in *Shypulski v. Waldorf Paper Products Co.*³⁷ balanced the burden on the owner in that situation with the burden on the public official who would suffer the consequences of the possessor's failure to warn. Finding that the burden on the public official outweighed the burden on the possessor, the court imposed a duty to warn on the possessor.³⁸

Although consideration of the relative burdens has influenced courts in determining the liability of possessors to public officials, ultimately courts seem to determine liability on the basis of the public official's classification while on the premises.

B. *Effect of Classification of Entrant*

Traditionally, the common law duties of the possessor of premises to the entrant depended upon the entrant's "legally defined status upon entering the land."³⁹ The possessor's duties included:

34. See, e.g., *Shypulski v. Waldorf Paper Prods., Co.*, 232 Minn. 394, —, 45 N.W.2d 549, 553 (1951), *overruled*, *Armstrong v. Mailand*, 284 N.W.2d 343, 349 (Minn. 1979) (citing *Peterson v. Balach*, 294 Minn. 161, 199 N.W.2d 639 (1972) for abolition of licensee and invitee classifications); *Krauth v. Geller*, 31 N.J. 270, —, 157 A.2d 129, 130-31 (1960); *Spencer v. B.P. John Furniture Corp.*, 255 Or. 359, —, 467 P.2d 429, 432 (1970); *Chesapeake & O. Ry. v. Crouch*, 208 Va. 602, 607, 159 S.E.2d 650, 653-54 (1968); *Mueller*, *supra* note 20, at 337 (quoting *Washington v. Atlantic Richfield Co.*, 66 Ill. 2d 103, 109, 361 N.E.2d 282, 287 (1976)); *Negligence Liability*, *supra* note 20, at 416 n.43, 420.

Regarding the undue risks, "firemen and policemen should not be penalized because of their occupations, neither should all the people [i.e., the public] be expected to bear the burden created by the negligent acts or omissions of a few." *Negligence Liability*, *supra* note 20, at 426.

35. 31 N.J. 270, 157 A.2d 129 (1960). See *infra* text accompanying notes 83-87.

36. *Id.* at —, 157 A.2d at 130.

37. 232 Minn. 394, 45 N.W.2d 549 (1951).

38. *Id.* at —, 45 N.W.2d at 553. See *infra* text accompanying notes 100-06 for discussion of *Shypulski*.

39. Hawkins, *Premises Liability After Repudiation of the Status Categories: Allocation of Judge and Jury Functions*, 1981 UTAH L. REV. 15, 16.

(1) a duty of reasonable care to the business invitee, (2) a duty to warn about "known hidden dangers and . . . [protection] against injury from willful and wanton acts or . . . active negligence"⁴⁰ to the licensee, and (3) a duty to refrain from the infliction of intentional injury to the trespasser.⁴¹

The individual who enters premises by virtue of a legal privilege irrespective of the possessor's consent or invitation has posed problems for courts in establishing the liability of the possessor⁴² for conditions unrelated to the public official's purpose and function on the premises. The traditional categories of entrants are not really appropriate for this entrant because his entrance is (1) lawful, negating trespasser status; (2) premised on a legal privilege, irrespective of consent or invitation, negating licensee or invitee status; and (3) primarily for a public purpose and benefit, thus negating invitee status.⁴³ Courts have dealt with this problem in a variety of ways. Some have granted the public official the common law status of licensee or invitee, others have classified the official as *sui generis*, and still others have imposed upon the possessor a duty of reasonable care under the circumstances.⁴⁴

1. Licensee

Firemen and policemen are classified as licensees in the majority of jurisdictions.⁴⁵ Believing the duty owed to invitees to be too great a burden to place on possessors "since firemen and policemen

40. *Id.*

41. *Id.* at 15-16.

42. W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 61, at 395-96 (4th ed. 1971).

43. See PAGE, *supra* note 1, § 5.1, at 99; Note, *Assumption of the Risk and the Fireman's Rule*, 7 WM. MITCHELL L. REV. 749, 752-53 (1981) [hereinafter cited as *Assumption of Risk*]. See also PROSSER, *supra* note 42, § 61, at 396.

44. See, e.g., *Mounsey v. Ellard*, 363 Mass. 693, 297 N.E.2d 43 (1973) (distinction between licensee and invitee abolished; duty of reasonable care under the circumstances); *Nared v. School Dist.*, 191 Neb. 376, —, 215 N.W.2d 115, 118 (1974) (policeman treated as licensee when injured on part of "premises not held open to the public"); *Beedenbender v. Midtown Properties, Inc.*, 4 A.D.2d 276, 164 N.Y.S.2d 276 (1957) (policeman considered *sui generis*); *Strong v. Seattle Stevedore Co.*, 1 Wash. App. 898, —, 466 P.2d 545, 548-49 (1970) (fireman considered invitee under "economic benefit" test).

45. PAGE, *supra* note 1, § 5.1, at 100, § 5.9, at 107. See, e.g., *Whitten v. Miami-Dade Water & Sewer Auth.*, 357 So. 2d 430, 432 (Fla. Dist. Ct. App.) (policemen and firemen), *cert. denied*, 364 So. 2d 894 (Fla. 1978); *Sherman v. Suburban Trust Co.*, 282 Md. 238, —, 384 A.2d 76, 79-81 (1978) (policeman); *Anderson v. Cinnamon*, 365 Mo. 304, —, 282 S.W.2d 445, 446-47 (1955) (fireman), *overruled on other grounds*, *Wells v. Goforth*, 443 S.W.2d 155 (Mo. 1969) (duty to licensees increased); *Scheurer v. Trustees of Open Bible Church*, 175 Ohio St. 163, —, 192 N.E.2d 38, 41-43 (1963) (policeman). See also *Assumption of Risk*, *supra* note 43, at 752.

may appear at unexpected times and on unexpected parts of the premises,"⁴⁶ these courts have classified the fireman and policeman as licensees.

The Restatement (Second) of Torts treats the public official as a licensee with corresponding liability imposed on the possessor. However, the public official is considered an invitee if his injury results from a condition on the premises open to the public.⁴⁷ The general rule of liability is:

A possessor of land is subject to liability for physical harm caused to licensees by a condition on the land if, but *only if*,

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

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

(c) the licensees do not know or have reason to know of the condition and the risk involved.⁴⁸

According to the Washington Court of Appeals in *Strong v. Seattle Stevedore Co.*,⁴⁹ the possessor's only duty to the licensee is to refrain from inflicting willful or wanton injury. However, the court acknowledged that

[l]iability has been imposed (1) where means of public access have not been maintained in a reasonably safe condition, (2) where there has been a failure to warn of unusual or hidden hazards, (3) where there is a breach or violation of a statutory duty, and (4) where there is active negligence.⁵⁰

46. PAGE, *supra* note 1, § 5.1, at 100 (noting criticism directed at this rationale). See also *Negligence Liability*, *supra* note 20, at 408.

47. RESTATEMENT (SECOND) OF TORTS § 345 (1965). Subsection (1) provides:

Except as stated in Subsection (2) [public employee considered invitee if injury occurs "because of a condition of a part of the land held open to the public," *Id.* § 345(2)], the liability of a possessor of land to one who enters the land only in the exercise of a privilege, for . . . a public . . . purpose, and irrespective of the possessor's consent, is the same as the liability to a licensee.

Id. § 345(1).

48. *Id.* § 342 (emphasis added).

49. 1 Wash. App. 898, 466 P.2d 545 (1970) (classifying fireman as invitee under facts, but denying recovery because of decedent fireman's superior knowledge of specific hazard).

50. *Id.* at —, 466 P.2d at 548 (dictum) (citations omitted). See also PAGE, *supra* note 1, § 5.2, at 100, § 5.9, at 107.

The liability of the possessor to the licensee-public official is very restricted unless one of the aforementioned exceptions applies to the facts of the case. Even the duty to warn is limited by the possessor's knowledge of the concealed danger and the opportunity to so warn.⁵¹

2. Invitee

A few jurisdictions consider public officials to be invitees under all circumstances or while in those areas of the premises open to the public.⁵² Other jurisdictions classify the public official as an invitee on the basis of his function at the time of the injury and the intended beneficiary of this function, i.e., the possessor instead of the public.⁵³ Thus, the possessor owes this invitee-public official the duty of reasonable care.⁵⁴ Such reasonable care encompasses keeping the premises in a safe condition to avoid exposing the entrant to unnecessary hazards and warning the entrant of hidden dangers of which the possessor has notice. The basis for this duty of reasonable care is that the entrant "has a right to assume that the premises, aside from obvious dangers, [are] . . . reasonably safe for the purpose for which he [is] . . . upon them, and that proper precaution [has] . . . been taken to make them so."⁵⁵

3. Abandonment of Categories of Entrants

A few jurisdictions have abandoned common law categories as a means for determining the liability of possessors to any entrant, including firemen and policemen.⁵⁶ In *Mounsey v. Ellard*,⁵⁷ the Su-

51. See, e.g., *Shypulski v. Waldorf Paper Prods. Co.*, 232 Minn. 394, —, 45 N.W.2d 549, 552-53 (1951); *Krauth v. Geller*, 31 N.J. 270, —, 157 A.2d 129, 131-32 (1960); *Beedenbender v. Midtown Properties, Inc.*, 4 A.D.2d 276, —, 164 N.Y.S.2d 276, 281 (1957); *Schwab v. Rubel Corp.*, 286 N.Y. 525, —, 37 N.E.2d 234, 236 (1941); PAGE, *supra* note 1, § 5.2, at 100, § 5.9, at 107; *Negligence Liability*, *supra* note 20, at 411.

52. PAGE, *supra* note 1, § 5.1, at 100-01. See also *Taylor v. Palmetto Theater Co.*, 204 S.C. 1, —, 28 S.E.2d 538, 541 (1943); RESTATEMENT (SECOND) OF TORTS § 345(2) (1965).

53. See, e.g., *Cameron v. Abatiell*, 127 Vt. 111, —, 241 A.2d 310, 313-15 (1968) (policeman as invitee under facts of case); *Strong v. Seattle Stevedore Co.*, 1 Wash. App. 898, —, 466 P.2d 545, 548-49 (1970) (fireman as invitee under "economic benefit" test); PROSSER, *supra* note 42, § 61, at 396.

54. *Strong*, 1 Wash. App. at —, 466 P.2d at 548.

55. *Morgan v. Renehan-Akers Co.*, 126 Vt. 494, —, 236 A.2d 645, 647 (1967), *cited with approval in Cameron v. Abatiell*, 127 Vt. 111, —, 241 A.2d 310, 315 (1968).

56. See, e.g., *Mounsey v. Ellard*, 363 Mass. 693, —, 297 N.E.2d 43, 51-53 (1973) (noting effect of abolition of licensee-invitee classifications and treating policeman accordingly); *Armstrong v. Mailand*, 284 N.W.2d 343, 349 (Minn. 1979) (prior abolition of licensee-invitee classification encompassed sui generis classification of fireman).

preme Judicial Court of Massachusetts discussed the historical underpinnings of the traditional approach of imposing liability on the possessor based on the classification of the entrant into the common law category of licensee or invitee, and rejected its appropriateness in an urban society. The court then stated that as regards any entrant lawfully upon the premises, the possessor must "act as a reasonable man in maintaining his property in a reasonably safe condition in view of all the circumstances, including the likelihood of injury to others, the seriousness of the injury, and the burden of avoiding the risk."⁵⁸ In *Mounsey*, a policeman was injured while on official business and sued the possessors. The trial court ordered a directed verdict for the defendants. The supreme judicial court reversed the trial court's ruling and ordered a new trial for the jury's determination according to the new standard.⁵⁹

Although firemen had been declared to be sui generis in *Shypulski v. Waldorf Paper Products Co.*,⁶⁰ the Supreme Court of Minnesota extended its abandonment of the traditional classification approach to include those falling within the former sui generis category in *Armstrong v. Mailand*.⁶¹ Using this modern approach, the court defined the duty owed to firemen in Minnesota as follows:

[L]andowners owe firemen a duty of reasonable care, except to the extent firemen primarily assume the risk when entering upon the land. Firemen assume, in a primary sense, all risks reasonably apparent to them that are part of firefighting. However, they do not assume, in a primary sense, risks that are hidden from or unanticipated by the firemen.⁶²

The *Armstrong* court applied primary assumption of the risk to bar recovery by plaintiffs in a wrongful death action brought after

57. 363 Mass. 693, 297 N.E.2d 43 (1973).

58. *Id.* at —, 297 N.E.2d at 52 (quoting *Smith v. Arbaugh's Restaurant*, 469 F.2d 97, 100 (D.C. Cir. 1972)).

59. 363 Mass. at —, 297 N.E.2d at 44, 53-54.

60. 232 Minn. 394, —, 45 N.W.2d 549, 550 (1951). See *infra* text accompanying notes 100-06.

61. 284 N.W.2d 343, 349 (Minn. 1979) (noting duty to sui generis entrant to have been "somewhere between licensee and invitee").

62. *Id.* at 350. The court distinguished primary and secondary assumption of the risk, with primary assumption being the absence of any duty of care owed by the possessor and thus not an affirmative defense. *Id.* at 348. This article does not utilize this distinction. Rather, assumption of the risk is utilized in its traditional sense and as modified by the Virginia Supreme Court. See *supra* text accompanying notes 26-28.

firemen died fighting a fire involving liquified petroleum. The specific hazard causing death was a boiling liquid expanding vapor explosion, a hazard of which the decedents were aware.⁶³

The Court of Appeals of New York addressed the elements of unusual risk and duty to warn, without giving firemen any specific status in *Schwab v. Rubel Corp.*⁶⁴ In *Schwab*, a fire broke out in a building which had housed an ice factory and from which the machinery, equipment, and scrap metal were being removed. The first floor, where the fire started, had holes which were used to drop disassembled equipment to the ground floor. The plaintiff fireman was injured when he fell through one of the openings where a piece of equipment had been located. The facts were conflicting regarding whether the opening was unguarded and whether the fireman was given a warning concerning the hazard. The court reversed the trial court's judgment for the defendants and ordered a new trial for the jury to consider whether an unusual danger was present, whether the defendant or his agent had knowledge of this danger, and if so, whether the defendant or his agents gave a warning.⁶⁵ Apparently the plaintiff had had no prior experience with the premises to provide him with knowledge of the potential hazards.

4. The Sui Generis Category

Since firemen and policemen do not fit the criteria for the traditional common law categories of entrants,⁶⁶ some courts have declared them to fall within a category that is sui generis.⁶⁷ Despite the uniqueness connoted by the term "sui generis," Page, an authority on premises liability, has noted that in reality the duty owed by the possessor to individuals falling within the sui generis category does not exceed the duty owed to licensees.⁶⁸

63. *Id.* at 345-47, 353. See also *Griffiths v. Lovelette Transfer Co.*, 313 N.W.2d 602 (Minn. 1981) (primary assumption or risk applied to policeman).

64. 286 N.Y. 525, 37 N.E.2d 234 (1941).

65. *Id.* at —, 37 N.E.2d at 235-36.

66. See *supra* text accompanying notes 42-44.

67. See, e.g., *Shypulski v. Waldorf Paper Prods. Co.*, 232 Minn. 394, —, 45 N.W.2d 549, 550 (1951) (firemen); *Beedenbender v. Midtown Properties, Inc.*, 4 A.D.2d 276, —, 164 N.Y.S.2d 276, 280 (1957) (policeman); *Chesapeake & O. Ry. v. Crouch*, 208 Va. 602, 608, 159 S.E.2d 650, 655 (1968) (firemen); PAGE, *supra* note 1, § 5.2, at 101.

68. PAGE, *supra* note 1, § 5.2, at 101. See also *Armstrong v. Mailand*, 284 N.W.2d 343, 349 (Minn. 1979) (noting duty of care owed to sui generis under *Shypulski* to be "somewhere between licensee and invitee").

In *Meiers v. Fred Koch Brewery*,⁶⁹ the New York Court of Appeals impliedly classified the plaintiff fireman as *sui generis* by acknowledging that his presence was rightful and by rejecting the classifications of trespasser, licensee, and invitee. The court then addressed the duty owed to this group in relation to the condition of the route of access to the premises.⁷⁰

In *Meiers*, the fireman was injured when he fell into an unguarded hole in the driveway giving access to a stable which was on fire. The driveway was dark at the time, but the defendant contended that the fire had caused the failure of the electric lights which would have illuminated the driveway. The trial court dismissed the action by a directed verdict, but the appellate division reversed.⁷¹

The court of appeals affirmed the reversal and entered a judgment for the plaintiff. It held that recovery was appropriate for the nonlicensee, rightfully entering the business premises, who is injured by the landowner's negligent failure "to keep that way [means of access] in a reasonably safe condition for those using it as it was intended to be used."⁷²

In *Beedenbender v. Midtown Properties, Inc.*,⁷³ the Appellate Division of the New York Supreme Court expressly classified firemen and policemen as "*sui generis*, privileged to enter the land for a public purpose irrespective of consent."⁷⁴ In *Beedenbender*, the night watchman of a restaurant summoned a policeman because of a prowler. During the investigation of the back of the premises, the policeman climbed a fence separating the restaurant property from the adjacent property. There was a narrow sidewalk along with an eighteen-inch ledge on the other side and then a drop of approximately eighteen to twenty feet. The policeman lost his balance, fell, and was injured. Although the night watchman was present, he did not warn the policeman of the drop. The policeman subsequently brought a negligence action against the owners of both properties.⁷⁵

69. 229 N.Y. 10, 127 N.E. 491 (1920).

70. *Id.* at —, 127 N.E. at 491-93.

71. *Id.* at —, 127 N.E. at 491, 493.

72. *Id.* at —, 127 N.E. at 493. The court was influenced by the fact that there had been previous fires in the barn, thus putting the owner on notice of the possibility of the fireman's presence on the premises after business hours. *Id.*

73. 4 A.D.2d 276, 164 N.Y.S.2d 276 (1957).

74. *Id.* at —, 164 N.Y.S.2d at 280.

75. *Id.* at —, 164 N.Y.S.2d at 277-78.

The appellate division elaborated on the dual duties of landowners to policemen and firemen, the first of which concerned the condition of the access route to the premises.⁷⁶

[I]f the owner knows of the presence on the premises of officially privileged persons, such as firemen or policemen, is cognizant of a dangerous condition thereon, and has reason to believe that they are unaware of the danger, he has a duty to warn them of the condition and the risk involved. . . . The owner owes no duty to those privileged to enter irrespective of consent to safeguard those parts of his property not ordinarily utilized for passage through the premises, or to discover potential dangers therein, for the entry thereon by such persons under unusual conditions at any hour of the day or night is not reasonably foreseeable.⁷⁷

The court found that the defendants had no duty regarding the fence because it was not a usual means of access. It further held that the existence of any duty to warn was a question of fact and thus did not exist as a matter of law. To determine that such a duty existed, the jury would have to find that the "drop" was an unusual hazard and that the night watchman, serving in an agency role, had knowledge of the danger, as well as grounds to think that the policeman would not otherwise discover it. Because of errors in the trial excluding evidence relevant to these questions, a new trial was ordered, and a judgment against the restaurant owner was reversed.⁷⁸

The appellate division reaffirmed the *sui generis* classification and the *Beedenbender* duties in extending them to lessees and occupants in *McGee v. Adams Paper & Twine Co.*⁷⁹ *McGee* was a wrongful death action brought after the deaths of firemen and fire underwriter patrolmen when a six-story building, the upper four floors of which were used mainly for storing commercial paper, collapsed in a fire.⁸⁰ Although the plaintiffs alleged that the fifth floor was overloaded, even before the paper became soaked from the fire fighting efforts, the court found that the only duty owed by the defendants would be a duty to warn. However, because the court

76. *Id.* at ___, 164 N.Y.S.2d at 281.

77. *Id.* (citations omitted).

78. *Id.*

79. 26 A.D.2d 186, ___, 271 N.Y.S.2d 698, 707 (1966), *aff'd mem.*, 20 N.Y.2d 921, 233 N.E.2d 289, 286 N.Y.S.2d 274 (1967).

80. 26 A.D.2d at ___, 271 N.Y.S.2d at 704.

considered building collapse to be a risk generally inherent in fire fighting, it held that no duty was owed by the defendants.⁸¹ Thus, the court reversed and vacated a judgment for the plaintiffs.⁸²

New Jersey also has classified firemen as *sui generis* and defined the duties of possessors accordingly. In *Krauth v. Geller*,⁸³ a fireman was injured at a house under construction which contained an overheated salamander used to dry the walls. At the time of the injury there was not yet a railing around the balcony or stairwell. However, the fireman was aware of the stage of construction because he had answered an alarm to the house four days prior to the accident and admitted at trial that he had this knowledge. Despite this knowledge, the fireman accidentally fell from the balcony, which, because of smoke layers, had the appearance of stairs.⁸⁴ In affirming the reversal of a judgment for the fireman, the Supreme Court of New Jersey found that the landowner-builder was not liable for either the condition of the premises under the circumstances of construction or for a failure to warn since the defendant was not present.⁸⁵

In exploring the issue of when a landowner or occupier should be liable to a fireman, the court in *Krauth* stated that liability must be determined by public policy considerations premised on fairness and justice under the circumstances.⁸⁶ Although not applicable to the *Krauth* facts, the court noted that conditions under which liability may be imposed for undue risks not inherent in firefighting would include: statutory violations causing the risk, e.g., unguarded elevator shafts; failure to warn of hidden dangers when the opportunity to warn was present; and lack of due care regarding the condition of routes of access to the premises by anticipated users.⁸⁷

81. *Id.* at ___, 271 N.Y.S.2d at 707-08.

82. *Id.* at ___, 271 N.Y.S.2d at 698-99, 713. Although New York has abolished classifications of entrants on premises, the courts have not addressed whether the *Beedenbender* duties are still applicable to firemen and policemen in light of this new standard. *Fiederlein v. Hochberg Bros.*, 83 A.D.2d 472, ___, 445 N.Y.S.2d 183, 186-87 (1981) (duty of reasonable care applied to telephone repairman) (citing *Basso v. Miller*, 40 N.Y.2d 233, 352 N.E.2d 868, 386 N.Y.S.2d 564 (1976) and *Scurti v. City of New York*, 40 N.Y.2d 433, 354 N.E.2d 794, 387 N.Y.S.2d 55 (1976) for the abolition of classifications).

83. 31 N.J. 270, ___, 157 A.2d 129, 130 (1960).

84. *Id.* at ___, 157 A.2d at 131-32.

85. *Id.* at ___, 157 A.2d at 130-33.

86. *Id.* at ___, 157 A.2d at 130.

87. *Id.* at ___, 157 A.2d at 131.

In *Jackson v. Volveray Corp.*,⁸⁸ the Superior Court of New Jersey defined the noninherent risks noted in *Krauth*⁸⁹ as follows: "Undue risk beyond these inherent hazards . . . includes hidden perils, such as an open elevator shaft, storage of dangerous substances, and other conditions independent of the fire itself."⁹⁰ The court further stated:

The law . . . [the undue risk doctrine] is not concerned with how the fire began or spread before the firemen arrived, but rather whether, after they arrived and undertook to fight the fire, they were subjected to risks not inevitable or inherent in fighting the fire of that kind and extent.⁹¹

The Supreme Court of Oregon impliedly classified firemen as *sui generis* in *Spencer v. B.P. John Furniture Corp.*,⁹² a wrongful death action brought by the administratrix of the estate of a fireman who had died fighting a fire allegedly caused by the defendant's negligence in permitting dust to accumulate. The accumulation of dust exploded when the fire hit it, and the fireman was killed. The supreme court affirmed the trial court's ruling sustaining the defendant's demurrer, but granted the plaintiff leave to file another amended complaint subject to the trial court's permission.⁹³

In *Spencer*, the supreme court explained the basis for its ruling as follows:

[A] fireman does not assume all risks encountered in fighting fires. He should have a right to expect that the owner or possessor of a premises will not imprudently permit an unusual, serious *hidden* danger of a totally unexpected kind and, therefore, we hold that he does not assume such risks A measure of protection resulting from training and experience can be taken against apparent, known, or to-be-anticipated risks. However, a fireman is completely vulnerable to such a hidden danger . . . , and we see nothing in the lack-of-duty concept of assumption of risk or in public policy which precludes him from having a cause of action in such circumstances.⁹⁴

88. 82 N.J. Super. 469, 198 A.2d 115 (1964).

89. See *supra* text accompanying note 87.

90. 82 N.J. Super. at —, 198 A.2d at 118-19.

91. *Id.* at —, 198 A.2d at 121.

92. 255 Or. 359, —, 467 P.2d 429, 430 (1970).

93. *Id.* at —, 467 P.2d at 430, 433.

94. *Id.* at —, 467 P.2d at 432 (citations omitted).

According to the court, the existence of "undue risks" is, in part, a function of the use to which the premises are placed.⁹⁵

In *Buren v. Midwest Industries*,⁹⁶ the Kentucky Court of Appeals affirmed the denial of recovery in an action brought for the death of a fireman killed while fighting a fire which was alleged to have spread more rapidly because of various violations of fire safety statutes, e.g., requirements of fire walls. After classifying the fireman as *sui generis*, the court applied the principle of assumption of those risks inherent in fire fighting. The court based its application of this principle to deny recovery upon the fireman's training in evaluating dangers and upon the lack of possessor control once the fireman enters the scene.⁹⁷ Nonetheless, the court agreed with the principle that "a fireman is entitled to assume compliance with respect to unguarded elevator shafts, open stairwells, exposed wires, and similar hazards to a reasonably safe access to and use of the premises in the manner in which they are ordinarily expected to be used"⁹⁸ The court, however, found that the safety violations which allowed the fire to spread more rapidly did not fit within those hazards inherent in fire fighting.⁹⁹

In *Shypulski v. Waldorf Paper Products Co.*,¹⁰⁰ the Supreme Court of Minnesota, after classifying a fireman as *sui generis*, held that when a possessor knows of the existence of a hidden peril and has the opportunity to warn a fireman of it, he has a duty to do so.¹⁰¹ The court stated, however, that "firemen must accept the premises as they find them"¹⁰² The rationale for this view was two-fold: (1) it would be an undue burden to require a landowner to exercise reasonable care regarding the condition of the entire premises, including those areas not routinely used, and (2) if such a requirement were imposed, a landowner might delay calling the fire department and attempt to extinguish the fire himself. If his efforts were unsuccessful, reasoned the court, the danger to the

95. *Id.* at —, 467 P.2d at 432.

96. 380 S.W.2d 96 (Ky. 1964).

97. *Id.* at 99 ("having bound . . . [the possessor's] hands [by denying control over fireman], the law cannot justly inflict upon him the consequences of what he might otherwise have been able to prevent").

98. *Id.* at 98.

99. *Id.* at 98-99.

100. 232 Minn. 394, 45 N.W.2d 549 (1951). See *supra* notes 61-63 and accompanying text for discussion of *Armstrong v. Mailand*, 284 N.W.2d 343 (Minn. 1979), which overruled *Shypulski*.

101. 232 Minn. at —, 45 N.W.2d at 549-50, 552-53.

102. *Id.* at —, 45 N.W.2d at 551.

public would be even greater.¹⁰³

The *Shypulski* court affirmed the overruling of a demurrer in a negligence action based on injuries sustained by a fireman when an inadequately constructed wall collapsed from the lateral pressure exerted during the fire fighting. Employees of the defendant were present at the time and failed to warn the fireman.¹⁰⁴ The court expressed the view that although assumption of risks inherent in fire fighting was appropriate, firemen "should [not] be required to assume the extraordinary risk of hidden perils of which they might easily be warned."¹⁰⁵ The court balanced the burden on the landowner in giving warning while present against the costs of failure to warn.¹⁰⁶

Those courts classifying firemen and policemen as sui generis have defined liability to a public official on the premises by virtue of legal privilege on the basis of risks which the fireman reasonably should have anticipated because of his training, experience, and knowledge of the use of or changes occurring on the premises. Where a duty to warn was found to exist, the defendant or his agent was present at the fire.

IV. A RULE FOR VIRGINIA

In developing a rule for Virginia for a possessor's liability to public officials, several cases are particularly instructive. The Supreme Court of Virginia addressed the duty of a possessor of land to a social guest licensee in *Busch v. Gaglio*.¹⁰⁷ In *Busch*, a visitor was injured by a metal stake protruding above the ground near the driveway and sidewalk of the host's house.¹⁰⁸ In determining the appropriate rule of liability, the court quoted section 342 of *The Restatement (Second) of Torts*.¹⁰⁹ The court's holding for the

103. *Id.*

104. *Id.* at —, 45 N.W.2d at 550, 554.

105. *Id.* at —, 45 N.W.2d at 553.

106. *Id.*

107. 207 Va. 343, 150 S.E.2d 110 (1966).

108. *Id.* at 344-46, 150 S.E.2d at 111. The defendant owner was found to control the premises although his mother and sisters actually lived there. He had driven the stake into the ground so that cars could not be parked in the yard. The plaintiff was a friend of the mother and sisters and arrived after dark on the evening that she was injured. The stake was in an unlighted area. *Id.* at 344-45, 150 S.E.2d at 111.

109. *Id.* at 347, 150 S.E.2d at 113 (quoting RESTATEMENT (SECOND) OF TORTS § 342 (1965)). See *supra* text accompanying note 48.

plaintiff¹¹⁰ closely tracked the language of this section:

[T]he defendant was liable to the plaintiff for injuries caused her by the condition on his land if he knew or had reason to know of the condition, should have realized that it involved an unreasonable risk of harm to her, should have expected that she would not discover or realize the danger, and failed to exercise reasonable care to make the condition safe or to warn her of the condition; *provided, however*, that she did not know or have reason to know of the condition and the risk involved.¹¹¹

In *Indian Acres v. Denion*,¹¹² the Virginia Supreme Court addressed the duty of an owner to a business invitee in the context of premises undergoing construction where excess construction materials were readily accessible to a lawful entrant on the premises.¹¹³ Although injuries to the entrant were produced by the action of a third party and were not foreseeable by the defendant, the court also indicated that its refusal to impose liability upon the owner was based upon the principle that "the developer was not required to eliminate all excess construction materials from the site, while construction was still in progress."¹¹⁴

Material factual differences distinguish the holdings in *Pearson* and *Indian Acres*. For example, in *Pearson* it was alleged that hazardous or defective conditions existed on the premises, whereas in *Indian Acres* there were no such allegations. The premises in-

110. 207 Va. at 348-49, 150 S.E.2d at 114. The court reversed the trial court which had set aside the jury verdict for the plaintiff, reinstated the verdict, and entered final judgment for the plaintiff. *Id.* at 345, 349-50, 150 S.E.2d at 111, 115.

111. *Id.* at 348-49, 150 S.E.2d at 114 (emphasis added).

112. 215 Va. 847, 213 S.E.2d 797 (1975).

113. *Id.* (assuming without deciding that plaintiff was invitee).

In *Indian Acres* an observation tower was being made from an old silo on a camping community which was being developed. As the tower conversion was almost finished, lawful entrants had ready access to it. There was construction debris in the area surrounding the tower. The adolescent son of one of the users of the camp site climbed the tower and dropped a piece of concrete, between the size of a softball and a volleyball, from the top. The concrete struck the adolescent plaintiff in the face. Suit was brought for negligence. 215 Va. at 847-49, 213 S.E.2d at 798.

No methods to control the use of the tower had been employed by the defendant. However, the defendant had no notice that objects had been thrown previously from the tower. *Id.* at 848-49, 213 S.E.2d at 798. The court agreed with the defendant that the adolescent's action in dropping the concrete was "not foreseeable, by a reasonable person exercising ordinary care for the safety of others. . . ." *Id.* at 849, 213 S.E.2d at 799. The court thus determined that there was no primary negligence and found no liability on the part of the owner defendant. *Id.* at 851, 213 S.E.2d at 800.

114. *Id.* at 850, 213 S.E.2d at 799.

volved in *Pearson* were restricted, unlike those in *Indian Acres*. However, in both *Pearson* and *Indian Acres*, the premises were undergoing structural changes at the time of the injuries. There is certainly the suggestion in *Indian Acres* that the fact of structural changes impacts upon the issue of the possessor's liability.¹¹⁵ Structural changes also were involved in *Krauth v. Geller*,¹¹⁶ the New Jersey case involving premises undergoing construction. Nonliability of the possessor in that case was based in part upon the circumstances of construction.¹¹⁷

A variety of factors influence the determination of the appropriate rule of liability for a possessor to public officials. In addition to the entrant's classification and public policy considerations, other important factors include the foreseeability of the entrant's presence, the entrant's knowledge or reason to know of hazards on the premises, and the opportunity of the possessor or his agent to warn the entrant of hazards on the premises. In *Meiers v. Fred Koch Brewery*,¹¹⁸ the possessor was on notice that firemen might be on the premises after business hours because of previous fires. The court's imposition of liability was based in part on this notice.¹¹⁹ And in *Krauth*, the possessor's nonliability was based in part on the fireman's knowledge that the premises were under construction.¹²⁰

Both of these elements were present in *Pearson*. The possessor(s) were on notice of the premises condition and the likelihood that firemen would be upon the premises. However, the plaintiff fireman knew that the premises were being demolished because of his previous visits there.¹²¹

The rule suggested herein for the liability of possessors to public officials is based on case precedent and a balancing of the rights

115. *Id.* at 847, 213 S.E.2d at 797.

116. 31 N.J. 270, 157 A.2d 129 (1968). See *supra* text accompanying notes 66-106.

117. *Id.* at —, 157 A.2d at 131-32. The other predicates of liability were the fireman's knowledge of the construction and the possessor's absence from the premises. *Id.* See *supra* text accompanying notes 83-87.

118. 229 N.Y. 10, 127 N.E. 491 (1920). See *supra* text accompanying notes 69-72.

119. *Id.* at —, 127 N.E. at 493.

120. 31 N.J. at —, 157 A.2d at 132.

121. *Pearson v. Canada Contracting Co.*, LE-608 (Cir. Ct., City of Richmond, Div. I filed Apr. 15, 1981). Since *Pearson* has not been tried, no determination has been made about whether the contractor or subcontractor or both were actually in possession of the premises at the time of the injury. See *supra* note 6. There was no allegation that either the defendants or their agents were present when the injury occurred.

and burdens of possessors and public officials. The Virginia Supreme Court has recognized the liability of a possessor toward a licensee, premised on *The Restatement (Second) of Torts*.¹²² *The Restatement* states the liability toward the public official to be that of a licensee, unless the part of the premises in question is open to the public.¹²³ Furthermore, the supreme court has also indicated that a possessor is not liable to an invitee, to whom the highest duty is owed, for the accumulation of excess construction materials during the process of construction.¹²⁴

While the possessor does owe a duty to an entrant lawfully upon his premises, this duty is circumscribed when the entrant is a public official in the *sui generis* category. Although this limitation is based in part upon the assumption of risks inherent in the occupation, it is unjust and contrary to public policy to make the fireman or policeman assume the risk of hazards which are hidden and not to be anticipated by his training and experience when the possessor has knowledge of the risk and a reasonable opportunity to warn. Thus, the possessor should be liable to the public official where these three elements exist: 1) noninherent or undue risks, 2) possessor knowledge of such risks, and 3) possessor opportunity to warn of these risks. However, if the premises are undergoing demolition or construction, and such activity is known by the entrant, or should be known to him in the exercise of reasonable care, it is an unreasonable and unrealistic burden on the possessor to expect him to keep those premises in a safe condition at all times.

Based on these considerations and Virginia precedent, the possessor should be subject to the following liability:

A possessor of premises is subject to liability for bodily harm caused by a natural or artificial condition thereon to others who are privileged to enter upon the premises for a public purpose without the consent of the possessor, if the possessor

(a) knows that they are upon the premises or are likely to enter upon it in the exercise of their privilege, and

(b) knows of the condition and should realize that it involves unreasonable risk to them, and

(c) should have expected that they would not discover or realize the risk, and

122. See *supra* text accompanying notes 107-11.

123. See *supra* notes 47-48 and accompanying text.

124. See *supra* notes 112-14 and accompanying text.

- (d) fails to exercise reasonable care to
 - (i) make the condition reasonably safe or
 - (ii) warn them of the condition and risk involved.

However, if the bodily harm results from conditions on the premises involving construction or demolition activities, and if persons privileged to enter upon the premises for a public purpose know, or in the exercise of reasonable care should know, that such activities are being conducted thereon, then the possessor is not liable, unless the possessor

- (i) has actual notice of the premises condition which caused the bodily injury, and
- (ii) has actual knowledge of the presence on the premises of persons so privileged, and
- (iii) having obtained such notice and knowledge, fails to use reasonable care to warn the persons so privileged.¹²⁵

V. CONCLUSION

*Pearson v. Canada Contracting Co.*¹²⁶ presented a unique factual situation in the field of premises liability in Virginia. It required the development of a rule of liability of possessors to public officials who enter premises by legal privilege, irrespective of the possessor's consent or invitation. Because premises undergoing construction or demolition present special circumstances and often provide external notice to the entrant, an exception to the general rule of liability was established. The rule and the exception result in a balance between the appropriate rights and burdens of possessors of premises and those public officials entering for a public duty pursuant to a legal privilege.

125. This rule is expressly applicable only to the liability of the possessor of premises to public officials who enter thereon lawfully and in the performance of a public duty, without the express invitation or consent of the possessor. Neither assumption of the risk nor contributory negligence is affected by this rule.

This rule is *not* expressly applicable to building inspectors who are on the premises during construction or demolition activities carrying out a public duty to inspect the property. Their visits are usually not unexpected and occur during "normal business hours." These individuals are often classified as invitees with corresponding duties owed. *See, e.g., Atkins v. Urban Redev. Auth.*, 263 Pa. Super. 37, —, 396 A.2d 1364, 1369-70 (1979) (impliedly invitee; recovery barred by contributory negligence), *aff'd in part, appeal dismissed in part on other grounds*, 489 Pa. 356, 414 A.2d 100 (1980); PROSSER, *supra* note 42, § 61, at 396. Nor does this rule affect the possessor's liability to members of the general public who are injured near a construction or demolition site because the possessor has failed to comply with governmental ordinances or otherwise to exercise reasonable care.

126. LE-608 (Cir. Ct., City of Richmond, Div. I filed Apr. 15, 1981).