March 18, 2009

Fire Safety in Shopping Malls & Premises Liability

John O. Hayward

Available at: http://works.bepress.com/john_hayward/3/
FIRE SAFETY IN SHOPPING MALLS
& PREMISES LIABILITY

By John O. Hayward

There are other real and present dangers in the mall, including fire,
the greatest threat to life in any enclosure in America.
- W.S. Kowinski, The Malling of America

I. INTRODUCTION

Probably no structure reflects American culture more than the shopping mall. The Egyptians built pyramids as tombs for their pharaohs. The Greeks and Romans erected temples to honor their gods and goddesses. Our medieval ancestors constructed cathedrals and mosques. We, on the other hand, put up vast malls to pay homage to our urge to shop. One author describes the great American shopping mall as the present day incarnation of “the souks, bazaars, arcades, bourses, and markets of olden days.”

Malls, like any retailing center, face substantial public liability exposure for a host of risks, including slip and falls, assault, unlawful imprisonment if a customer is incorrectly detained by mall security, and even physical and biological attack. These risks include fire, which is no stranger to shopping malls. In 1977, a quarter of the Westgate Mall in Bethlehem, Pennsylvania burned down and another Pennsylvania shopping center was destroyed by arson on Christmas Eve, 1981. Both were closed at the time. More recently, in November 2006, a fire at the Willow Grove Park mall in Abington, Pennsylvania, outside of Philadelphia, forced the evacuation of more than six thousand people though no injuries were reported. Another fire, in April 2007, at a Milford, New Zealand shopping mall also caused hundreds of people to be evacuated from the smoke-filled structure. In May 2008, a three-alarm blaze destroyed a shopping center in Chelsea, Michigan.

One month earlier, a fire in a strip mall in Anaheim, California ravaged three businesses causing

---

1 M.P.A., Harvard Univ., J.D. & A.B., Boston Univ.; Senior Lecturer, Bentley Univ., Waltham, Massachusetts.
2 Roseanne White Geisel, Public Liability a Major Exposure for Retail Centers, BUSINESS INSURANCE, Mar. 19, 2007, at 14. As regards liability for terrorist attacks, a National Institute of Justice study found that shopping malls have received “too little attention” from security officials as potential sites for terrorist and other attacks. See R.C. Davis, C. Ortiz, C. R. Rowe, J. Broz, G. Rigakos, and P. Collins, An Assessment of the Preparedness of Large Retail Malls to Prevent and Respond to Terrorist Attack (pdf, 50 pages), final report submitted to the National Institute of Justice, December 2006 (NCJ 216641), quoted by Davis et al., Shopping Malls: Are They Prepared to Prevent and Respond to Attack?” NIJ JOURNAL, NO. 259, March 2008 (NCJ 221503). This article is available at http://www.ojp.usdoj.gov/nij/journals/259/shopping-malls.htm (last visited Sept 6, 2008).
4 Tanya Barrientos, Store Fire Forces Mall Evacuation, THE PHILADELPHIA INQUIRER, Nov 26, 2006, at B03.
$180,000 in damages,7 and three months earlier in January, a ten hour fire in the Galleria Baclaran Shopping Mall in Pasay City, outside Manila, The Philippines, resulted in damages estimated at $1.8 million dollars.8 Luckily, none of these conflagrations resulted in loss of life. However, on Christmas Day 2006, a seven-hour fire in the Unitop General Merchandising Store in the Ormoc Mall in Ormoc City, near Manila, claimed the lives of thirty-one people.9

Why do shopping malls present a serious fire risk? According to one commentator:

“Today’s [shopping mall] buildings are scandalously vulnerable because of the use of volatile plastics, which can instantly emit killing chemical fumes and smoke. although large buildings with inadequate protection and evacuation procedures are common, virtually all regional malls have fire alarm and sprinkler systems …”10

“… [malls have] smoke trapping enclosures, … [a] central court with possible updrafts … [and a] mall-wide air-conditioning system. Malls in suburban and rural areas may also be relatively distant from fire companies, which may be too small and poorly equipped to respond to a major fire. There may also be insufficient water pressure to fight a large fire, either because of a remote location or overbuilding in the immediate vicinity.”11

On the other hand, statistical data show that shopping malls do not present a significant risk to life from fire.12 So even though malls with their customary atriums and high ceilings appear not to present a serious fire threat, it is prudent to remember the tragic Hartford circus fire of July 6, 1944, where 168 people lost their lives when a Ringling Bros. and Barnum and Bailey Circus tent caught fire and collapsed in flames.13 Prior to that time, few believed large tents posed a major fire hazard. Also, the lesson of the sinking of the “unsinkable” Titanic during the night of April 14 -15, 191214 shouldn’t be forgotten. It stunned the world and stands as a reminder that the unthinkable can happen.15 So although to date there has been no large-scale loss of life in shopping mall fires,

10 Kowinski, supra at 363.
11 Id. at 364.
14 NY TIMES (NYT), April 16, 1912 at 1.
15 For a highly readable account of the tragic sinking of the Titanic, see WALTER LORD, A NIGHT TO REMEMBER (Bantam Books, NY; 1955). To quote Lord at 21: “But it was still a shock. After all, the Titanic was considered unsinkable. And not just in the travel brochures. The highly technical magazine Shipbuilder described her compartment system in a special edition in 1911, pointing out, ‘The Captain may, by simply moving an electric
the potential for such a disaster should not be lightly dismissed.

This essay will inquire into shopping mall fire safety by reviewing the effectiveness of sprinklers, smoke control, signage and alarms, and evacuation strategies, as well as examining the ability of prescriptive versus performance-based building codes to enhance mall fire safety. The liability of mall owners and retailers as it pertains to fire safety will then be reviewed.

II. FIRE SAFETY AND THE SHOPPING MALL

Shopping malls dot the landscape, both in the US and throughout the world. By one estimate, America is populated by more than 1,175 of these glittering hubs of retailing.16 The first shopping mall in America designed as a fully enclosed, comfort-controlled, two-level mall was Southdale, built in 1956 in Edina, Minnesota, a suburb of Minneapolis.17

A. Overview of Fire Safety Issues

Very often people flock to malls not just to shop but also to be entertained and be part of a social scene.18 Mall owners are acutely aware of this and strive to lure crowds to their facilities with carousels, game arcades, museums, and cinemas.19 This often makes the structure of many malls unlike any other edifice. One author describes mall architecture thusly:

“The problem with shopping malls is that they are complex. They are generally different in style, size and can be very non-standard in their design. They can be single or multiple storey, part of a hotel complex or an airport, can incorporate large atria [a large open space within a building] using modern architecture and new materials. They often include food courts, cinemas, restaurants, bars, as well as offices, with the various parts connected by stairs, escalators and elevators.” 20

Downtown malls built to compete with their suburban counterparts often are multi-storied and present unique problems, both from a fire safety and fire fighting perspective. One commentator - himself a firefighter - describes how multi-storied buildings can fill with smoke before sprinklers can extinguish a fire:

“A problem associated with multi-storied structures is the presence of trash chutes, which terminate at the first floor or basement locations where the trash is unloaded

switch, instantly close the doors throughout and make the vessel practically unsinkable.’ ” Lord’s book served as the basis for the 1958 British film of the same name. Other cinematic treatments of the Titanic sinking are Hollywood’s 1953 melodrama “Titanic” and James Cameron’s similarly titled 1997 blockbuster.

16 Underhill, supra at 13.
17 Kowinski, supra at 116-117. The author chronicles the development of the nation’s first mall in Chapter 12, “The Invention of the Mall: Eureka in Edina, Minnesota,” at 115-124.
18 Underhill, supra at 9.
into metal trash containers or a compactor system. These areas are trouble spots for firefighters because fires often occur within the systems. A smoldering fire can fill large areas with smoke and set off smoke alarm systems before enough heat is given off to activate a sprinkler head and extinguish the fire.” 21

Malls are designed to accommodate many stores, which in itself can contribute to spreading a fire. As the author explains:

“Walls between the mall stores are often partition walls, a flexibility that permits increasing or decreasing the size of the stores. The fire resistance of these walls could be questionable, allowing a fire to spread and encompass other stores. Suspended ceilings may be installed, or the underside of the roof may be painted and left exposed. If a suspended ceiling is present, partition walls often end at the underside of the suspended ceiling. This feature allows fire to move above the suspended ceiling to extend to other stores.” 22

In addition, the front of many mall stores are often exposed during business hours. After hours, security is maintained by open-web metal gates which permit security guards to see inside the store. This allows fire to extend from one store to another. 23

Shopping mall architecture is unconventional and commercial uses within malls vary widely. As one observer states:

“They [malls] are complex in the multiplicity of commercial users, leasers and owners, including large fashion shops, supermarkets, DIY [do-it-yourself] stores, hotel chains and book shops, some with their own multi-level open or atria designs. They are often also complex in use, in that some are open 24 hours, while others secure their entrances overnight.” 24

Adding to the fire safety concerns of shopping malls is that protective measures and evacuation procedures in adjoining offices or hotels may be different than those required in the main mall. 25

How fires develop also affects mall fire safety. Fire development is very complex, a mixture of heat convection, radiation and conduction, influenced by where it is initiated, the surrounding environment of materials used, the prevalence of air conditioning, as well as the overall space in which to spread. 26 Lastly, shopping mall fire safety is the shared and collective responsibility of the mall owner and tenants, who often have varied approaches to training staff and dealing with fire protection. 27 Thus shopping malls present unique fire safety challenges.

Furthermore, how fire spreads in a mall is similar to how it spreads in other buildings. This

22 Id. at 30.
23 Id.
24 Farquhar, supra at 18.
25 Id.
26 Id.
27 Id.
phenomenon (known as “fire spread”) is recorded in the U.S. under the following categories:

- confined to object of origin
- confined to part of room or area of fire origin
- confined to room of fire origin
- confined to fire-rated compartment of fire origin
- confined to floor of fire origin
- confined to structure of origin
- extended beyond structure of fire origin

Statistics reveal that more fires occur in the daytime than at night, but daytime fires are more likely to be confined to the object of origin, while nighttime fires have a greater chance of becoming large. In addition, more fires occur during normal operating hours due to the greater demand on electricity, heating, cooking and the use of appliances. Nevertheless, the majority of these fires are detected by the occupants and extinguished before they can extend beyond the area of fire origin. These are small fires that may not require fire apparatus to extinguish. Therefore, the building occupants have the best chance to control these situations. However, it has been argued that this may not happen in shopping malls, where store employees are often paid minimum wages and are seldom trained in fire safety procedures. Many employees are unfamiliar with the store, to say nothing of the mall itself. The same can also be said for security staff, whose emphasis during training is security, not fire safety and prevention.

One commentator has written that

“The use of fire drills is looked upon as an annoyance and disruption of business. Because profit is the primary purpose of the malls, understaffing occurs and response to fire alarms may become a secondary consideration after security problems are handled. With little training and no practical application, a fire usually brings chaos and panic.”

Because shopping malls present such complex fire safety issues, many specialists recommend mall owners undertake a full fire protection risk assessment and engineering review as part of an overall building design approach. This a review would address concerns about occupant density, high fire load and inadequate fire safety provisions, such as passive building

29 Id. at 4.
30 Bennetts et al., supra at 9.
31 Id.
32 Id.
33 Smith, supra at 29.
34 Id.
35 Id.
36 Id.
37 Farquhar, supra at 18.
design, active fire protection, and fire safety management. It would include a site survey to determine the geometry of the mall and the shops concerned, fire safety provisions, including means of escape, fire services installations, and transient occupant loading. Finally, it would contain a fire risk analysis of the shops concerned to study the potential hazards of the building and its contents, life safety, and the activities being carried out in the mall.

It is instructive at this point to examine major fire safety technologies and procedures that can be deployed to maximize shopping mall fire safety.

B. Sprinklers

Although the public may perceive sprinklers as primarily intended to protect property, they also have an essential role to play in preserving human life. Indeed, the safety of building occupants depends on the proper functioning of the sprinkler system. Sprinkler systems can be ranked according to their efficacy and reliability, which taken together is expressed as sprinkler effectiveness. As one fire safety report explains:

“These terms [efficacy and reliability] can each be represented numerically by a number between 0 and 1. Sprinkler efficacy can be defined as the ability of the sprinkler system to function in accordance with AS 2118 [the Australian national building code] assuming that the system has activated. Sprinkler reliability, on the other hand, is concerned with whether the system will activate (deliver water) and takes into account such matters as isolation of the system and failure of the water supply. Sprinkler effectiveness is defined as

\[ \text{Effectiveness} = \text{Efficacy} \times \text{Reliability} \]”

As the document makes clear, the efficacy of a sprinkler system in controlling a fire is a function of:

- the type and arrangement of fuel;
- the geometry of the room and the arrangement and type of sprinkler heads;
- whether the area in which the fire occurs is fully sprinklered in accordance with AS 2118 or whether only parts of the building are sprinklered.

---

39 Id.
40 Id.
42 Bennetts et al., supra at 36.
44 Bennetts et al., supra at 36.
45 “1” is the highest level of performance.
46 Id.
47 Id.
While it is important to quantify sprinkler effectiveness in laboratory tests, a more crucial question is how well the sprinkler system performs under actual conditions. According to another fire safety study, which draws heavily on U.S. fire statistics, sprinkler performance is recorded in one of the following categories:

- equipment operated;
- equipment should have operated but did not;
- equipment was present but the fire was too small to require operation of the sprinkler system; or
- no equipment was present in the room or space where the fire originated.\(^{48}\)

As to the effectiveness of sprinklers in containing fires, the study, again citing U.S. statistics, notes that

“The statistics show that sprinklers are very effective in containing the fire, as would be expected. With sprinklers present, whether they operated or not, 60% of fires were confined to the object of origin whereas without sprinklers, the figure is 44%. With sprinklers present, 94% of fires do not spread beyond the room of fire origin, while without sprinklers the figure is 78%. Another way of expressing these figures is to note that with sprinklers present, 22% of fires caused damage beyond the room of fire origin, but with sprinklers present this is reduced to 6% - a four fold reduction.”\(^{49}\)

One report expressed concern that recent trends in retail stores involving high shelving and greater use of plastic material could cause a fire in a mall to spread more rapidly and shield the fire from water.\(^{50}\) High shelving is often prevalent in toy stores, shoe storage areas, and some major stores, including variety stores and supermarkets.\(^{51}\) Moreover, the document continues, the spacing between shelves can be substantially less than the sprinkler head spacing and the heads may be positioned well away from the location of the fire.\(^{52}\) This is of special concern in clothing or fabric stores which comprise about one-third of all stores in shopping malls.\(^{53}\)

Once a shopping mall installs a sprinkler system, it is imperative to maintain and test it regularly, otherwise its safety might be compromised. As one fire safety engineer cautions:

“You can put all the systems in you want - stair pressurization and smoke exhaust, passive systems with compartmentalization - but if these systems are not maintained, are not tested and regularly checked, then all the dollars you spent on them, including the sprinkler system (emphasis added), is money down the drain.”\(^{54}\)

\(^{48}\) Beever et al., supra at 4.
\(^{49}\) Id.
\(^{50}\) Bennetts et al., supra at 36.
\(^{51}\) Id. at 36-37.
\(^{52}\) Id. at 37.
\(^{53}\) Id.
\(^{54}\) James P. Buckley, PE, quoted in Tim Baker & Scott Arnold, Fire & Smoke, HPAC ENGINEERING (July 2000), at 31.
So it is imperative for fire safety that shopping mall management implement a program to maintain and test their sprinkler systems on a regular basis.

Another area of concern in a shopping mall is that as tenants come and go, sprinkler systems may be impaired by renovations, modifications, or expansions. The reliability of these systems depends very much on how they are managed during these changes. Sound management practices should include:

- using primarily one company for sprinkler isolations (shutting down the sprinkler system in certain areas within the mall);
- re-activating the system at the completion of each day’s work;
- implementing an approval system that requires written permission from management before sprinkler isolation can take place and a statement as to how long the isolation will continue (should be less than one day);
- requiring that the contractor sign-off after the work is completed; and
- assessing penalties for contractors who fail to comply with the above requirements.

Because of the height of many mall atria, sprinklers may not be effective. Therefore, other fire protection strategies should be employed, including specific sprinklering of concession kiosks within the mall or spacing them in a manner that minimizes the spread of fire.

C. Smoke Control

Although sprinkler systems are critical, some fire safety experts argue they are not a “cure-all.” In any fire in an enclosed area, such as a mall, smoke represents a major threat to human life, since “smoke-related injuries and deaths outnumber fire-related injuries and deaths four to one ...”

One fire safety study succinctly describes the hazards of smoke. To quote:

“Smoke is generated by combustion and contains, in addition to toxic gases, small particles of matter suspended in air. It is these particles that indicate the presence of potentially toxic gases and assist in the containment of heat within a layer of smoke. High temperatures in a hot layer of smoke also present a threat to the occupants.

---

55 Bennetts et al., supra at 38.
56 Id.
57 The Bennetts Report determined sprinklers would be ineffective at heights greater than 10 meters (32.8 ft). Id at 39.
58 Id.
59 Buckley, supra at 30.
60 Id. at 34, quoting from Vickie J. Lovell, a fire safety building code consultant. The lethal nature of smoke was sadly demonstrated in a fire in Gothenburg, Sweden, in October 1998, where exposure to smoke was responsible for the deaths of sixty-three teenagers. See Lars Benthorn & Håkan Frantzich, Managing Evacuating People From Facilities During a Fire Emergency, FACILITIES, Vol. 17, #9/10 at 325 (1999).
In the event of a fire, because it is hotter than air, smoke will rise and move through a building including enclosures used by the occupants, thereby putting them at risk. Smoke management, when understood in the broadest sense, is concerned with managing smoke within the building such that the likelihood of exposure of the occupants to debilitating smoke is minimized.\(^\text{61}\)

Too often the fire scenario at stores reads as follows:

“There was light smoking showing. All of a sudden, huge volumes of black smoke developed, and visibility was zero.”\(^\text{62}\)

Sometimes zero visibility is the result of sprinklers driving the smoke down to the floor.\(^\text{63}\)

The National Fire Protection Association (NFPA), a Boston-based organization charged with creating and maintaining minimum fire safety standards, publishes guidelines for controlling smoke in shopping malls, but they are only recommendations not mandatory requirements.\(^\text{64}\) Some fire safety experts maintain these guidelines are adequate because “every smoke-control system is different.”\(^\text{65}\) Nevertheless, the performance objectives of the system must be understood beforehand and designed to achieve those goals. As one fire safety engineer stated:

“You have to look at what are the performance objectives of that smoke-control system. What is the life-safety dependency on that smoke-management system? Is it there for helping to clear out smoke after the fire department arrives so that they can do their mop-up operations? Or is it there to provide a tenable means of egress for the building population during fire emergency?”\(^\text{66}\)

Other fire safety experts fault various building codes for not taking a consistent approach to smoke control, an example being the International Code Council (ICC) vote in 2000 against requiring closed elevator lobbies, thereby permitting smoke to travel from floor to floor in a building or shopping mall.\(^\text{67}\)

Many malls, especially those involving urban revitalization where large department stores or abandoned mills are converted to shopping complexes, require extensive parking facilities where smoke control and ventilation are vital for occupant safety.\(^\text{68}\) Recent technological developments have made it possible to keep smoke completely away from occupant escape routes in multi-storied underground parking facilities without the need for smoke curtains or physical

---

\(^{61}\) Bennett et al., supra at 73. Through the use of the term “debilitating,” the authors make the point that not all exposures to smoke lead to serious injury or death.

\(^{62}\) Brannigan, supra at 93.

\(^{63}\) Id.


\(^{65}\) Gregory E. Harrington, PE, quoted in Tim Baker & Scott Arnold, Fire & Smoke, supra at 34.

\(^{66}\) Id.

\(^{67}\) John H. Klote, DSc, PE, Id. For a study of a smoke control system at a large shopping store, see Masayuki Hirota, Hideni Mizouchi and Shuji Kakegawa, A Demonstrational Test of Pressurization Smoke Control System at a Large-Scale Shopping Store, FIRE SCIENCE AND TECHNOLOGY, Vol. 25, No. 3, at 213-237 (2006).

\(^{68}\) Article (anonymous), Shopping in Safety, FIRE SAFETY ENGINEERING, Vol. 14, #2, at 39 (Mar. 2007). This article features the installation of many recent mall fire safety improvements, including the latest smoke control technology, in a large, newly-built shopping center in Carlow, Ireland, that has four levels of underground parking.
barriers.69 (A “smoke curtain” is any barrier deployed in the event of a fire to contain and/or channel away smoke, heat and superheated gases.70)

Contemporary technological innovations in smoke sensing devices are now available that provide greater shopping mall fire safety.71 For example, multi-sensor detectors incorporating certain algorithms for heat and smoke can detect smoke and at the same time reduce the incidence of false alarms. Some devices also use CO (carbon monoxide) and smoke sensing, the CO providing a non-particulate based means of detecting a fire.72

Shopping malls with large atria and very high roofs present a special problem because it is difficult for a smoke-sensing device to detect smoke before it dissipates into the air. One solution is use of long path beam smoke detectors that can monitor smoke across large areas of empty space. Other means include installation of optical beam sensors that are effective in detecting smoldering fires, or aspirating detectors that draw air into highly sensitive smoke detection chambers instead of waiting for the smoke to reach the sensor.73 Lastly, malls can be equipped with infra-red detectors that can sense flame and extinguish a fire on the mall floor by setting off long throw sprinkler systems mounted on the roof.74

Lastly, so-called “smart” detectors can actually monitor themselves. One fire safety expert describes them as follows:

“Smart smoke detection and alarm systems are also available which can automatically adjust the sensitivity of the detectors to meet ambient or changing environment conditions as well as self-check their own sensitivity capability. When one detector goes into alarm, detectors in surrounding locations can be made more sensitive for earlier confirmation of the fire. Smart smoke detectors can also change their sensitivity according to the time of day. The intelligence for self-adjustment can either be built into the sensor head or some intelligence retained within the [fire] panel software.” 75

Clearly these devices offer great opportunities to enhance fire safety and protect shoppers from mall fires.

D. Signage & Alarms

In the event of a fire in a shopping mall, the occupants should look for the nearest EXIT
sign and make their way out of the building in an orderly manner. However, this is not always the case. At a fire in a Pennsylvania mall, shoppers wanting to get to a big sale at a store at one end of the mall ignored a raging fire at the other end.\footnote{76}{Brannigan, supra at 92.}

Exit signs should be clear and unambiguous, and in the event of a power and light failure, emergency battery back-up systems are a necessity.\footnote{77}{Farquhar, supra at 19.} Permanent signs that glow in the dark and indicate self-luminous exit paths should also be provided.\footnote{78}{Id.} A new technology for assisting people to exit buildings is the use of special directional sound that can lead a person to an exit if the building is dark or filled with dense smoke.\footnote{79}{Id.} This is often the case in shopping mall fires.

Signs must also be easily recognizable and understood so that mall shoppers can take appropriate action in the event of a fire.\footnote{80}{Lars Benthorn & Håkan Frantzich, supra at 329.} In one study, subjects were presented with six different signs and asked if they recognized and understood the meaning of each sign.\footnote{81}{Id.} Everyone understood the NO SMOKING sign and EMERGENCY EXIT with a man running sign but only 53\% understood the sign for fire hose.\footnote{82}{Id.} The authors caution that only half the population understands such signs.\footnote{83}{Id.} From a mall fire safety perspective, this finding should be cause for concern.

Once smoke sensing devices detect a fire, an alarm should sound.\footnote{84}{Id.} A ring signal should be the first alarm but it might not be sufficient to get the attention of shoppers. The signal should be followed by a voice message telling shoppers to leave the mall through the normal exits or emergency exits.\footnote{85}{Id.} Many fire alarm panel systems now come equipped with smart built-in voice alarm messages that provide shoppers with messages that depend on location and even furnish local individual messages.\footnote{86}{Farquhar, supra at 20.}

\begin{thebibliography}{9}
\footnote{76}{Brannigan, supra at 92.}
\footnote{77}{Farquhar, supra at 19.}
\footnote{78}{Id.}
\footnote{79}{Id.}
\footnote{80}{Lars Benthorn & Håkan Frantzich, supra at 329.}
\footnote{81}{Id. The authors themselves conducted the study. See “Fire Alarm in a Public Building: How Do People Evaluate Information and Choose an Evacuation Exit?” Report 3082, Department of Fire Safety Engineering, Lund Univ., Sweden (1996).}
\footnote{82}{Id.}
\footnote{83}{Id.}
\footnote{85}{Id. The authors point out that studies of people evacuating buildings during a fire indicate they prefer to enter and leave the building by the same entrance even if an emergency exit is closer.}
\footnote{86}{Farquhar, supra at 20.}
\end{thebibliography}
E. Evacuation Strategies

Once smoke detectors alert mall management to the fire and sprinklers begin operating and alarms sound, everyone, including shoppers and store and mall personnel must evacuate the premises as quickly and orderly as possible. Any delay in evacuation or inability to exit the mall could result in fatalities. As one commentator admonishes:

“Ensuring that the public can make a rapid exit from a shopping mall, should a fire result, is a prime consideration. Evacuation is generally satisfied through use of multiple exits, either through the rear of individual shops or through the main entrance and exit routes. The key requirements, however, that such large numbers of people sometimes present within a shopping mall, are to prevent panic and to aim to evacuate first those closest to the fire.”

Everyone must be able to reach a place of safety outside the mall or in a fire-protected corridor. Exits must be adequate in number, safe and readily accessible. Requirements for evacuation safety should include:

- sufficient number of exit routes with adequate capacity that are suitably located to enable persons to escape to a place of safety in case of fire;
- the routes should be sufficiently protected from the effects of the fire;
- the routes should be adequately lit;
- the exits should be adequately signed;
- appropriate means should be available to limit smoke from entering the escape routes, or
- suitable measures taken to restrict the fire and remove smoke from the building.

Distances to the nearest mall exit are usually regulated by national fire codes, which often vary from country to country. They are divided into two distinct categories - direct distances and travel distances. Direct distances are measured from any point in the mall to the nearest story exit, while travel distances consider the total building design, including features such as partitions and

---

89 Farquhar, supra at 19. For a discussion of the dangers of panic during a fire, see J.D. Sime, “The Concept of Panic,” in FIRES AND HUMAN BEHAVIOUR, D. Cantor (Ed.), (J. Wiley & Sons, Chichester, UK; 1980) at 63-81, cited in Lars Benthorn & Håkan Frantzich, supra at 325-326.
90 Gibson, supra at 160.
91 Lars Benthorn & Håkan Frantzich, supra at 328. Maximum capacity (i.e., occupancy load) also determines these criteria. See “Example of Calculating Occupancy from Floor Plans,” available at http://www.cornwall.gov.uk/index.cfm?articleid=2460 (last visited Sept 6, 2008).
92 Adapted from Department of the Environment [UK], The Building Regulations, Approved Document B Fire Safety [HMSO], cited in Gibson, supra at 158.
office layouts.\textsuperscript{93} One commentator compares U.S. and European building codes in terms of providing safe fire exits from shopping malls.\textsuperscript{94} First, he observes that

\begin{quote}
“Although fire safety approaches have varied when comparing American standards with European standards, both have been challenged by this new development of super retail structures better known as retail malls in North America or shopping centres in Europe.” \textsuperscript{95}
\end{quote}

After an analysis of each code’s requirements for the number, width, and fire protection capabilities of mall stairway enclosures, he concludes:

\begin{quote}
“It is apparent that the Life Safety Code\textsuperscript{®} requires wider stairs with narrower entrances while the NBE-CPI-96 requires narrower stairs but wider entrances. Under the European approach, a bottleneck is expected to exist within the stairway enclosure, which is assumed to be safe from the elements of fire. Under the American approach, a bottleneck is expected at the entryway or transition point from the space to the stairway.” \textsuperscript{96}
\end{quote}

He does not favor one approach over another, but rather believes that in the future they will not be so drastically different due to the increased use of computer models that serve as analytical tools in conducting fire hazard analysis.\textsuperscript{97} No matter what code is used, shopping mall evacuation is so important for fire safety that in 2004 a Maryland circuit court ruled that the Americans with Disabilities Act (ADA)\textsuperscript{98} requires places of public accommodation, including malls, to consider the needs of people with disabilities when developing emergency evacuation plans.\textsuperscript{99}

Obviously prompt and orderly evacuation during a fire emergency is absolutely essential to shopping mall fire safety.

\textit{F. Prescriptive vs. Performance-Based Building Codes for Fire Safety}

\textsuperscript{93} Gibson, \textit{supra} at 159-160.

\textsuperscript{94} Antonio C. Caro, P.E., \textit{Shopping Centre Life Safety}, INTERNATIONAL FIRE PROTECTION, at 29, available at \url{http://technotribe.net/pdfs/Fire_Protection_for_Shopping_Centres_(Caro).pdf}, (last visited Sept 6, 2008). The codes were NFPA (National Fire Protection Association) 101\textsuperscript{®} (200) (also known as the Life Safety Code\textsuperscript{®}) which is utilized by nearly all the U.S. model building codes for requirements of life safety and fire protection and the Spanish fire safety code NBE-CPI-96 (\textit{Norma Básica de la Edificación - Condiciones de Protección Contra Incendios en los Edificios}), which is primarily based on European standards established by the European Committee for Standardization.

\textsuperscript{95} Id.

\textsuperscript{96} Id. at 33.

\textsuperscript{97} Id.

\textsuperscript{98} 42 U.S.C. §1201 et seq.

\textsuperscript{99} Savage et al., v. City Place Limited Partnership, et al., Civil No. 240306 (Debelius, J.) available at \url{http://www.depweb.state.pa.us/ofcchiefcounsel/cwp/view.asp?a=3&q=525052}, (last visited Sept 6, 2006). The facts in this case are that plaintiff Katherine Savage, who uses a wheelchair, was trapped on the second floor of Marshall’s Department store in City Place Mall in Silver Spring, MD, when a fire alarm was activated. She was evacuated into the Mall along with the other customers, but because the elevators were inoperable due to the fire alarm emergency, she was unable to escape the Mall until after the emergency had passed.
Any discussion of mall evacuation strategies involves the issue of prescriptive versus performance-based building codes for fire safety, a topic that in the last decade or so has generated a fair amount of controversy. Supporters of performance-based codes argue that they permit more flexibility in design while maintaining a high level of safety. Opponents disagree, making the case that performance-based codes are vague, non-quantifiable and have the potential to compromise fire safety.

Simply put, prescriptive codes “typically prescribe specific design criteria, such as the number of exits or the number of feet to an exit. These are numeric criteria that can easily be measured.” On the other hand, performance-based codes “allow for the use of any design that demonstrates compliance with the safety goals of the code.” Performance-based codes, which can be found in provisions of many codes and standards, have been allowed for some time but are now specifically recognized in code texts. While prescriptive code requirements are numeric and allow no deviation, performance-based codes inquire into the main purposes of the numerical prescriptive requirements to determine the intent of the code. Compliance with prescriptive codes is straightforward - it involves measurement of whatever must be in compliance. However, with performance-based codes, compliance is not quantified and rests in the eye of the beholder.

For example, two provisions from the first draft of the 1998 International Building Code (IBC) provide that

- Appliances and services shall be installed so that they will not become a source of ignition;
- Wall, floor, and ceiling assemblies shall limit the spread of fire.

Under such a code, what constitutes compliance? How is anyone to decide that an appliance won’t become a source of ignition? Under a prescriptive code, certain appliances would be prohibited or a test for ignition would be included. If the appliance passed the test, it complied. If it didn’t, it failed. Similarly, what determines if a wall or floor limits the spread of fire? Again, a prescriptive code would prohibit certain materials or include a pass/fail test. But under a performance-based code, the designer is without guidance, and, more importantly, the safety of the building occupants is at the mercy of the code enforcement officer. Indeed mall fires resulting in

---

101 Begley, supra.
102 Babrauska, supra.
103 Begley, supra.
104 Id.
106 Id.
107 Begley, supra.
108 Babrauska, supra.
109 Id. at 1-2.
loss of life are more prevalent in jurisdictions dominated by performance-based codes.\textsuperscript{110}

One way out is to provide guidance in the code by way of a range of acceptable design solutions.\textsuperscript{111} This provides maximum flexibility and design freedom. While there is no obligation to adopt any particular solution, if a suggested solution is adopted, that is evidence tending to show compliance with the code.\textsuperscript{112} However, if no solutions in the code are followed, that is evidence tending to show non-compliance. The burden then shifts to the designer to show that the chosen solution complies with the code.\textsuperscript{113} This appears to be a compromise between prescriptive and performance-based codes.

Given the inherent vagueness and lack of quantification of performance-based codes, one critic nevertheless presents their advantages:

- resources can be allocated to meeting real needs, instead of satisfying code provisions which may be ineffectual or unnecessarily duplicative;
- a rational design may be made in projects which are sufficiently unconventional that they are not amenable to analysis under prescriptive codes;
- an owner desiring to increase the level of safety over the legal minimum has a rational tool for doing so.\textsuperscript{114}

This same critic is deeply concerned that performance-based codes will be used for large, expensive projects that are precisely the ones where the greatest number of people will be at risk.\textsuperscript{115} He argues that such codes present the following problems:\textsuperscript{116}

- the level of safety is not quantified (e.g., risk computations are not made);
- quantitative performance evaluation formulas are not offered to determine if any particular fire safety subsystem is adequate;
- redundancy\textsuperscript{117} is considered as something to expunge, not as a valuable aid to safety;


\textsuperscript{111} Approved Document B [1992 Ed], Department of the Environment Building Regulations [UK], cited in Gibson, supra at 157.

\textsuperscript{112} Id.

\textsuperscript{113} Id.

\textsuperscript{114} Babauska, supra at 1.

\textsuperscript{115} Id. at 2.

\textsuperscript{116} Id.

\textsuperscript{117} Redundancy” in the language of engineering means “duplication of critical components of a system with the intention of increasing reliability of the system, usually in the case of a backup or fail safe.” See http://en.wikipedia.org/wiki/Redundancy_(engineering) (last visited Sept 6, 2008). For example, a jetliner with four independent braking systems can land and safely stop even if three systems are inoperable.
• an assumption is built in that fire dynamics are fully known;
• designs start with, and are largely based on, fire scenarios which
  the designer is free to define or select;\(^{118}\)

The role of redundancy in fire safety is especially significant and the author finds its
removal in performance-based building codes most disturbing. As he observes:

“Traditionally, prescriptive building codes have achieved a sizeable fraction of
their safety level by redundancy. Commonly, they mandate fire endurance AND
restrict fuel load in various ways AND require fire sprinklers AND a whole host
of other arrangements. It can certainly be argued that any one of these measures
should obviate the need for the others. Unfortunately, not only has this been argued,
but authorities have often been persuaded by such an argument. Perhaps it is best
to point out here that **there have been very few major fire disasters which did
not involve a series of failures.** Under traditional fire protection philosophies, if
any one safety system fails, normally what results is a nuisance fire, not a disaster.
Catastrophes tend to take place only when a string of failures occur in a row. But
redundancies cost money.” \(^{119}\) [**Emphasis in original**]

The writer’s safety message is clear - as more levels of safety are removed, the potential for
disaster increases. This bodes ill for many types of construction (high rise office buildings come
immediately to mind). It should be of special concern for shopping malls where thousands of
people gather daily to shop or socialize.

Nevertheless, performance-based building codes can enhance fire safety by quantifying the
level of safety, making certain elected officials, not building designers, determine the appropriate
safety level, and incorporating redundancy into performance-based requirements.\(^{120}\) Even though
they are being used less frequently, prescriptive codes have a longer and more reliable safety
record.

Now that the effectiveness of selected fire safety technologies has been examined, it is
appropriate to examine the liability of mall owners and tenants for mall fire safety.

**III. PREMISES LIABILITY FOR MALL FIRE SAFETY**

**A. Introduction**

Mall owners and tenants come under the same legal umbrella as other business
establishments as regards liability for loss or injuries resulting from fire.\(^{121}\) Unless a statute

\(^{118}\) Fire safety engineering starts with positing some type of fire and then designing systems to control or suppress it.
Babrauska, *supra* at 5.

\(^{119}\) *Id.* at 3.

\(^{120}\) *Id.* at 6.

\(^{121}\) Of course, mall owners and tenants must also be concerned about protecting their customers from criminal assault
as well as providing them reasonably safe and well-maintained premises. See “Liability of owner or operator of
shopping center, or business housed therein, for injury to patron on premises from criminal attack by third party,”
provides a different standard of liability, legal responsibility for loss or injuries resulting from fire usually is based on negligence or some wrongful act or omission. This liability can be related to starting a fire or failing to provide efforts to extinguish it and can be modified by contributory negligence or proximate cause.

**B. Liability for Fire and Res Ipsa Loquitur**

Courts are split on whether res ipsa loquitur (RIL) is applicable to fires. Generally, just because an injury occurs does not create a presumption of negligence. However, under RIL, facts or circumstances accompanying an injury can raise a presumption or permit an inference of negligence on the defendant’s part. In most jurisdictions, three elements are necessary for RIL to apply: 1) the defendant must be in exclusive control of whatever caused the injury or damage; 2) the accident must be such that it would not have occurred unless someone was negligent; 3) the plaintiff must be free of contributory negligence, i.e., not have contributed to the accident in any way. Lastly, some jurisdictions use a fourth element - the evidence must be more easily accessible to the defendant than to the plaintiff.

The court refused to apply RIL in *Gicking v. Kimberlin*, where a fire spread from one shop to another in a shopping center. The court held that the cause of the accident was merely speculative because it was equally probable that the accident was caused by some fault for which the shop where the fire originated was not responsible. However, in *Granata v. Schaefer’s Bake Shop, Inc.*, the court, while not resting its decision for the plaintiff on the application of RIL, nevertheless indicated without elaboration that it was applicable to the facts in the case, which involved a fire caused in a store adjoining the plaintiff’s typewriter company by the unattended
operation of a "fry-o-lator" that had caught fire on a previous occasion.

C. Liability for Fire and Sufficiency of Evidence

Often the legal issue in store fire cases where the fire spreads to adjoining establishments is not RIL but the sufficiency of the evidence. For example, in Remy v. Michael D’s Carpet Outlets, a fire spread to several businesses from a carpet outlet business. The court held there was evidence from which a jury could have concluded that employees of the carpet outlet business had stored foam padding too close to the ceiling light bulbs in spite of their knowledge of the flammable quality of the foam padding, and that this had caused the foam padding to ignite, and that even if the fire had been caused by electrical failure, it was clear to the court that the foam padding acted as an accelerant and caused the rapid spread of the fire into the all-consuming conflagration which destroyed several businesses. In Pacific Indem. Co. v. Thompson-Yaeger, Inc., a fire spread from a hardware store to other stores in a strip-type shopping center. The court affirmed the judgment of the trial court, holding that there was sufficient evidence to find the hardware store liable, where it was alleged that its employees had placed waste paper and cardboard boxes close to a furnace. This caused the materials to ignite and contribute to the fire. Another case involving improper storage of combustible material too close to an ignition source is Hazewinkel v. Thomas. There the owner and manager of a grocery store piled up paper waste and litter near an open furnace in his basement. A fire started and spread to an adjoining footwear store. The court held there was sufficient evidence to hold him liable for damages from the fire. However, there was insufficient evidence and no definite cause of the fire could be established in Jerome Thriftway Drug, Inc., v. Winslow, where a fire spread from a department store to a drug store. The court took the position that there was no justification for the conclusion that negligence was the most likely explanation for the fire because there was testimony that the fire damage was so extensive that its point of origin could have been burned up and lost.

D. Landlord Has No Duty at Common Law To Provide Fire Safety Equipment

Mall owners, like other landlords, have no duty at common law to provide fire-fighting or safety equipment. Thus in Neuber v. Royal Realty Co., an action by a tenant employee against

---

134 On occasion the cause of mall fires can become quite contentious. In Jobes v. Evangelista, 369 N.J. Super. 384, 849 A.2d 186, 2004 N.J. Super LEXIS 188, the court affirmed damage awards to anchor store employees for defamation, malicious prosecution, and false-light invasion of privacy when the local fire chief accused them of not timely reporting the mall fire to the authorities.


139 Bidlake v. Youell, Inc., 51 Wash. 2d 59, 315 P.2d 644 (1957); Stewart v. Raleigh County Bank, 121 W. Va. 181, 2
the landlord for injuries sustained in a fire on demised premises resulting from a tenant’s negligent use of flammable materials, the court held that evidence that the landlord failed to enclose an open stairway between floors with fire-resistant materials proximately contributed to employee injuries was insufficient to take the case to the jury. In Olin v. Honstead, the court ruled that the landlord was under no common law duty to equip a building, which wasn’t shown to be more than one story high, with fire escapes, in the absence of a contract, statute, or ordinance requiring it. And in Dodd v. Nazarowski, the court decided that simply because under a given set of circumstances a tenant may attempt to escape from a burning building through a window does not of itself place a duty on the landlord to maintain it as means of escape.

E. Fire Regulations as Exercise of the Police Power

No doubt in response to the common law rule that landlords are under no obligation to furnish their premises with fire-fighting or safety equipment, legislatures passed ordinances and regulations requiring installation of such apparatus. Mall owners and operators must comply with these requirements, which are intended to lessen the danger and spread of fire, as recognized in Morelli v Fire Code Bd. of Appeals of East Whiteland Twp., where the court held that a shopping center owner could be required to install a sprinkler system in the basement of his building, even though the building was built 16 years before the enactment of the code regulations, finding that the regulations could be retroactively applied to his property. Other cases have upheld the validity of retrofitting older buildings with sprinkler systems. For example, in Third & Catalina Assocs. v City of Phoenix, the court held that a city ordinance requiring the retrofitting of the plaintiff’s building with sprinklers was not unconstitutional as a taking without due process of law or just compensation, and the fact that the ordinance required the retrofitting of commercial high rise but not residential high rise buildings with sprinklers was not unconstitutional as violating Equal Protection rights. However, such regulations cannot be used to put an undue burden on businesses the community may regard as undesirable.

Courts have also ruled that fire-safety regulations are a proper exercise of the police power unless oppressive or unreasonable. In addition, state legislatures may authorize cities and towns


141 60 Idaho 211, 91 P.2d 380 (1939).


146 Myrick v Board of Pierce County Commissioners, 102 Wash 2d 698, 677 P.2d 140 (1984), mod.,102 Wash. 2d 698, 687 P.2d 1152 (even though no fire had occurred in massage parlors for ten years, regulation requiring only massage parlors to have sprinkler systems for purpose of fire prevention ruled unconstitutional because insufficient justification given for allowing other businesses to be unaffected by the requirement).

to pass fire safety ordinances that have the effect of state law.\textsuperscript{148}

In addition, the federal government has legislated in the field of fire protection with passage in 1974 of the Federal Fire Prevention and Control Act.\textsuperscript{149} It provides fire prevention and control guidelines for places of public accommodation.\textsuperscript{150}

\textbf{F. Status of Mall Shoppers}

In \textit{Walsh v. C & K Market, Inc.},\textsuperscript{151} the court held that visitors to a shopping mall are business invitees even if they do not make a purchase, the mere possibility of a future purchase being sufficient. If they enter upon mall premises intending to use the facilities of one or more of the stores, they are invitees as to the owner of the mall, even though the owner is the lessor of the stores, because the owner of the shopping center extends an invitation to the public to visit the mall, the success of which depends on the ability of the owner and store operators to attract substantial business.\textsuperscript{152} In \textit{Walsh}, the plaintiff sought damages for injuries she suffered when the automatic door at defendant’s grocery store malfunctioned and hit her as she was entering. She appealed from a judgment that the trial court entered after granting defendant’s motion for a directed verdict at the close of her case. The trial court held she was a licensee at the time of her injury, rather than an invitee. The Oregon Court of Appeals reversed. It first presented the rules by which they determine whether a visitor is a licensee, invitee, or trespasser:

“Oregon adheres to the traditional rules governing the liability of an owner or possessor of land, under which the duties that the occupier owes to a person who comes on the land depend on whether the person is an invitee, licensee, or trespasser. The occupier owes the greatest duties to an invitee, including both a duty to warn of latent dangers and an affirmative duty to protect the invitee against the dangers in the condition of the premises about which the occupier knows or should reasonably have known.”\textsuperscript{153} [citations omitted]

The court then sets out the tests to determine the status of anyone on the landlord’s premises:

“Oregon has adopted two tests for determining whether a person is an invitee.
Under the first, the “economic advantage” test, anyone who comes on the


\textsuperscript{149} 15 USCA §§2201 et seq.

\textsuperscript{150} Id. at §2225.

\textsuperscript{151} 171 Or. App. 536, 16 P.3d 1179 (2000).


\textsuperscript{153} Id. at 539, 1181.
premises for business that concerns the occupier, with the occupier’s express or implied invitation, is an invitee. ... Under the second, the “invitation” test, a person is an invitee when the occupier, expressly or impliedly, leads the person to believe that it intended visitors to use the premises for the purpose that the person is pursuing and that the use was in accordance with the intention or design for which the premises were adapted or prepared.” 154 [Citations omitted]

The justices then applied the rules to the case before them, stating that the issue was whether plaintiff was an invitee when she went into defendant’s store, even though she did not intend to purchase anything. They concluded that

“... the jury could find that the plaintiff was both a public invitee under the ... invitation test and that she was a business visitor, and thus an invitee under the economic advantage test. Indeed the tests tend to merge in this situation, because a broad invitation may well be economically advantageous to defendant’s business.” 155

They then observed that

“... foot traffic of any sort is potentially beneficial to the business of a store operator. As a result of that potential advantage, a store is held to have extended a broad invitation to the public at large, making all who enter public invitees. The expectation is that future economic advantage will accrue from all who accept the invitation.” 156

It is worth noting that some jurisdictions have abandoned the “licensee, invitee, trespasser” distinction in favor of a “reasonable care under the circumstances” test. 157

G. Liability of Mall Owners to Tenants for Fire

Under general principles of negligence, mall owners as lessors are required only to use reasonable care in inspection and maintenance of leased property. 158

Though there are cases to the contrary, the general rule is that in the absence of a statute or municipal regulation, or agreement between the parties, or unless the fire was the result of the landlord’s negligence or his agent’s in not repairing a defect in the leased premises which was his duty to repair, a landlord is not liable for the destruction or damage to his tenant's goods by fire. 159

154 Id. See generally RESTATEMENT (SECOND) OF TORTS §332 (1974).
155 Walsh, supra, at 540, 1182.
156 Id. at 543, 1183.
158 Bradley v. Wachovia Bank & Trust Co., N.A., 90 N.C. App. 581, 369 S.E.2d 86 (1988). A lessor can be liable to business patrons of their lessees as a result of a defective condition of the premises where the lessors, although aware of the defective condition, concealed or failed to disclose such condition, or where he maintained a nuisance in the premises which was likely to cause injuries to others, or where he had certain control of the leased premises, or where he was negligent in making repairs or improvements of the premises. See generally 17 A.L.R. 3d 422 (1968), “Landlord's liability to tenant's business patron injured as a result of defective condition of premises.”
159 Home Insurance Co. of Illinois et al v. National Tea Co. et al, 577 So.2d 65, 1990 La. App. LEXIS 2965; see
Exculpatory clauses in leases providing that landlords shall not be liable to tenants for fire damage to their property are usually enforced, unless the fire damage results from the landlord's active negligence. In *Home Insurance Co. of Illinois v National Tea Co.*, a fire destroyed a store in a shopping mall. The smoke from the fire and the water resulting from the fire-fighting efforts caused damage to a substantial portion of other stores in the center. The store owners (shopping center tenants) sued various individuals, including the store owner who caused the fire, the mall owners, the manufacturer and seller of the equipment that caused the fire, and the fire department. The trial court found that the fire was the result of an electrical arc caused by a short circuit in the control wiring in the store's deli oven. The trial judge concluded that the store where the fire originated was solely responsible for the damage and entered judgment accordingly. The decision was affirmed on appeal as not manifestly erroneous, the appellate court ruling, *inter alia*, that the mall owner is answerable for damage to the building only when it is caused by his neglect to repair it, or when it is the result of a defect in the original construction. The tenants also argued that the mall owners should have installed sprinkler systems and fire stops even though such devices were not required by local or state building codes at the time the mall was built. The trial judge rejected this argument, determining that the mall owners complied with all applicable building codes, and therefore were not negligent.

However, as regards common areas, mall owners as landlords do owe a duty to their tenants to protect them from unreasonable risks of harm, including fire, resulting from foreseeable activities taking place within these areas. They must also use reasonable diligence to put and keep in safe condition portions of their buildings used in common, including water pipes and sprinkler systems, and common passageways.

---


162 Supra.

163 While it arguably foreseeable that a defect in an oven could cause a fire, it is less likely that paraffin-filled hair curlers left unattended on a stove could ignite a conflagration that would substantially destroy an apartment complex. Yet this is precisely what happened in *Gardner v. Q.H.S., Inc.*, 448 F.2d 238 (4th Cir [Va]), 1971 U.S. App. LEXIS 8277, a products liability action against the manufacturer of the hair curlers where the appellate court reversed the lower court’s decision that they were not “inherently dangerous” and ordered a new trial.

164 Id. at 76.


167 Leary v Lawrence Sales Corp, 442 Pa 389, 275 A.2d 32 (1971). It has also been held that a mall owner is not vicariously liable under theories of joint venture or agency where consumers purchase contaminated food from his tenant’s restaurant which causes illness. See *Clapp v. JMK/Skewer, Inc.*, 137 Ill. App. 3d 469, 92 Ill. Dec. 186, 484 N.E.2d 918 (3rd Dist. 1985).
H. Liability of Tenants to Mall Owners for Fire

As a general rule, a person who chooses to take possession and control of property is fairly charged with the responsibility of maintaining it and should expect to be held responsible for any defects.\textsuperscript{168} Factors to be considered in determining control of premises, for purposes of premises liability, include: 1) management of daily operations; 2) right to admit or exclude company; 3) responsibility for maintenance and repair; 4) liability for bills, taxes, and wages; and 5) responsibilities of parties under lease.\textsuperscript{169}

One of the most common situations where tenants are liable to their landlord involve fires on the tenants’ premises,\textsuperscript{170} even though many commercial leases exonerate the tenant from liability.\textsuperscript{171} Often the courts refuse to enforce these exculpatory clauses, especially where there has been active negligence\textsuperscript{172} or willful and wanton acts\textsuperscript{173} on the part of the tenant that caused the fire. Although this writer couldn’t find such a case involving a mall tenant, numerous cases involving tenants of commercial property amply illustrate this legal principle. For example, where the landlord charged the tenant with negligence in failing to comply with fire prevention ordinances relating to cutting of weeds, removal of wood shavings, fire-fighting equipment, and no-smoking signs, the court in \textit{Stone Mountain Industries, Inc. v Bennett}\textsuperscript{174} held that the lease provision whereby the tenant agreed to return the premises at the expiration of the lease in as good condition and repair as when first received, damage by "fire . . . or other casualty" excepted, referred to a fire deemed to be a casualty, that is, an accident or other event not to be foreseen or guarded against, and not one caused by the tenant's negligence.

In \textit{Galante v Hathaway Bakeries, Inc.},\textsuperscript{175} the lease provided that the tenant should make all necessary repairs to the interior of the leased premises "damage by fire and unavoidable casualty excepted," but did not require the landlord to maintain fire insurance on the premises, nor require the tenant to pay the amount of any premium increase caused by a particular use of the premises. Applying the principle that a contract will not be construed to exempt a party from liability for his negligent acts unless such intention is expressed in unequivocal terms, the court held that the provision did not state a legally sufficient defense to an action by the landlord to recover the cost of repairs precipitated by fire alleged to have been caused by the tenant's negligence.

Similarly, in an action by a landlord against his tenant for damages caused by destruction of leased premises by fire that originated in combustible materials being stacked next to the building all the way to the eves and that progressed up to the exterior wall to a combustible roof, the court in \textit{Britton v. Wooten}\textsuperscript{176} held that summary judgment was erroneously granted the tenant.


\textsuperscript{170} 15 A.L.R.3d 786 (1967).

\textsuperscript{171} \textit{Id}.

\textsuperscript{172} Sears, Roebuck & Co. v. Poling, 248 Iowa 582, 81 N.W.2d 462 (1957).


\textsuperscript{174} 112 Ga. App. 466, 145 S.E.2d 591 (1965).

\textsuperscript{175} 6 App. Div. 2d 142, 176 N.Y.S.2d 87 (1958).

\textsuperscript{176} 817 S.W.2d 443 (Ky. 1991).
on the basis that the lease provision requiring that, if leased premises were destroyed by fire, the lease would be cancelled, contracted away the landlord’s right to sue the tenant for destruction of premises by fire. The court reasoned that the lease provision did not exculpate the tenant from liability for damages caused by his own negligence, but only relieved him from further contractual obligations. The court viewed the record as suggesting that permitting trash and refuse to accumulate and pile up next to the building was in violation of the local safety code, which would be a basis for liability if it were found to be a substantial factor in causing the fire. Even if there was no safety code, the court noted, such conduct might well be viewed as actionable negligence being the proximate cause, or substantial factor, in destruction of the building, regardless of how the fire started. The court rejected the argument that the source of the spark that ignited the fire was a superseding cause, concluding that no matter how the spark was ignited, whether negligently, intentionally, criminally, or truly accidentally, it did not override the tenant’s negligence.

Lastly, in *Acquisto v. Joel R. Hahn Enterprises, Inc.*, where parties to the lease failed to agree that one or both of them would carry fire insurance, the court held that the clause in the lease exempting the tenant from liability for "loss by fire or inevitable accident, damage by the elements" meant that only fire caused by unavoidable consequences or acts of God was to be exempt, but not fire caused by negligence. It concluded the lease was not ambiguous, and that the tenant was liable for negligently causing a fire on the leased premises.

### IV. CONCLUSION

This essay has briefly surveyed shopping mall fire safety by reviewing the effectiveness of sprinklers, smoke control, signage and alarms, and evacuation strategies, as well as examining the ability of prescriptive versus performance-based building codes to enhance mall fire safety. Then premises liability of mall owners and tenants as it pertains to fire safety was considered.

Fortunately, incidents of death and injury resulting from fires within modern shopping mall are small. Given that most U.S. building codes are prescriptive, this writer could find no case in the U.S. where a mall owner or tenant was held responsible for death or injury in a mall fire. In terms of fire safety, shopping malls are as safe as other public places and safer than one’s home. As one commentator observed:

> “public places such as hotels, offices or shopping malls are at least as safe in the United States as elsewhere. It is the fire problem in the home that most distinguishes our fire experience from that of other industrialized nations.”

Nevertheless, given the design of modern shopping centers and the thousands of shoppers

---

177 95 NM 193, 619 P.2d 1237 (1980).
176 Farquhar, *supra* at 20.
179 Begley, *supra*.
who routinely patronize malls, it behooves architects and designers, facility owners and managers to make use of the most up-to-date state of the art fire safety technology and equipment to protect their customers from the risks of fire.