

EXTINGUISHING THE COMMON LAW
FIREMAN'S RULE:
FLOWERS V. ROCK CREEK TERRACE,
308 Md. 432, 520 A.2d 361 (1987)

The fireman's rule prohibits firefighters and police officers from initiating tort claims against persons whose negligent conduct causes fires or other perils that injure the officers.¹ Traditionally, state courts have based the fireman's rule on the common law theories of landowner liability² and assumption of the risk.³ In *Flowers v. Rock Creek Terrace*,⁴ the Court of Appeals of Maryland rejected the landowner liability rationale and held that public policy best supported imposition of the fireman's rule.⁵

In *Flowers*, a volunteer firefighter, while fighting a fire, fell down an open elevator shaft and sustained permanent injuries.⁶ The firefighter sued the owners of Rock Creek Terrace, the security company, and the manufacturer of the elevator for failure to maintain the apartment building in a safe condition.⁷ The defendants demurred to the plaintiff's charges, believing that the fireman's rule barred the cause of ac-

1. See, e.g., *Walters v. Sloan*, 20 Cal.3d 199, 571 P.2d 609, 142 Cal. Rptr. 152 (1977). See generally Annotation, *Liability of Owner or Occupant of Premises to Fireman Coming Thereon in Discharge of His Duty*, 11 A.L.R.4th 598 (1982).

2. See, e.g., *Todd v. Armour and Co.*, 44 Ga. App. 609, 162 S.E. 394 (1931) ("the uniform and universal holding of all the courts" is that the fireman is a licensee to whom the landowner owes no duty). *Id.* at 609, 162 S.E. at 394.

3. See, e.g., *Buckeye Cotton Oil Co. v. Campagna*, 146 Tenn. 389, 242 S.W. 646 (1922) (dismissing wrongful death action because the fireman assumed the risk that "the burning shed would fall on him").

4. 308 Md. 432, 520 A.2d 361 (1987).

5. *Id.* at 447, 520 A.2d at 368.

6. *Id.* at 434, 520 A.2d at 363.

7. *Flowers* filed a sixteen-count declaration against the defendants, alleging that defendant building owners and security company knew of "prior suspicious fires" and failed to take precautions against future fires. He also claimed Rock Creek failed to adopt reasonable safety measures. Finally, *Flowers* alleged that the elevator was not fireproof and that defendants failed to warn *Flowers* of the open elevator shaft. *Id.*

tion.⁸ The circuit court⁹ sustained the demurrers because the firefighter had incurred injuries during the course of duty.¹⁰ On appeal, the Special Court of Appeals affirmed.¹¹ On writ of certiorari¹² the Court of Appeals of Maryland abolished the traditional landowner liability theory and held that public policy mandates that firefighters are foreclosed from recovering damages against negligent parties who create the need for the firefighters' services.¹³

Historically, courts have held that a landowner's duty to one entering his premises depended on the entrant's status as trespasser, licensee, or invitee.¹⁴ The landowner owes the invitee a duty of reasonable

8. The defendants claimed that the firefighter sustained his injuries during the performance of his duties, arguing that falling down the smoke-filled elevator shaft was a risk of firefighting. *Id.*

9. Initially, plaintiff filed suit in the Circuit Court for Prince George's County. Plaintiff then appealed the judgment to Maryland's Court of Special Appeals. 308 Md. at 436, 520 A.2d at 364. The Court of Appeals of Maryland is the state's highest court.

10. Because Flowers sustained injuries in a common area, he alleged that defendants owed him a duty of reasonable care. Under RESTATEMENT (SECOND) OF TORTS § 345 (1965) a landowner or occupier must exercise reasonable care for public officers entering property held open to the public. The Maryland Court of Appeals rejected Flowers' reliance on the *Restatement* on the basis that § 345, comment c expressly precludes firefighters and police officers from the duty of care rule. The court found that the *Restatement* places firefighters and police officers in the licensee category. 308 Md. at 434, 520 A.2d at 363. See RESTATEMENT (SECOND) OF TORTS § 345, comment c (1965).

11. 308 Md. at 434, 520 A.2d at 364.

12. The writ of certiorari presented the question whether landowner liability principles or the public policy rationale provides the better justification for the fireman's rule. *Id.* at 434, 520 A.2d at 364.

13. *Id.* at 447, 520 A.2d at 368.

14. See generally Note, *Landowner's Negligence Liability to Persons Entering as a Matter of Right Under a Privilege of Private Necessity*, 19 VAND. L. REV. 407 (1966).

"A trespasser is a person who enters or remains upon land in the possession of another without a privilege to do so by the possessor's consent or otherwise." RESTATEMENT (SECOND) OF TORTS § 329 (1965); see also W. PROSSER & W. KEETON, TORTS 393-412 (1984). "A licensee is a person who is privileged to enter or remain on land only by virtue of the possessor's consent." RESTATEMENT (SECOND) OF TORTS § 330 (1965). See also W. PROSSER & W. KEETON, *supra*, at 412-19. The *Restatement* provides:

An invitee is either a public invitee or a business visitor. A public invitee is a person who is invited to enter or remain on land as a member of the public for a purpose for which the land is held open to the public. A business visitor is a person who is invited to enter or remain on land for a purpose directly or indirectly connected with business dealings with the possessor of the land.

RESTATEMENT (SECOND) OF TORTS § 332 (1965).

care.¹⁵ Because trespassers and licensees enter the land without the owner's consent, they are not entitled to receive due care.¹⁶

In *Gibson v. Leonard*¹⁷ the Illinois Supreme Court first used the landowner liability rationale in a fireman's rule case. The *Gibson* court held that the firefighter was a mere licensee to whom the landowner owed no duty other than to refrain from willful or wanton misconduct.¹⁸ Numerous jurisdictions subsequently adopted the fireman's rule, holding that, absent invitation or statute, a firefighter who entered the premises in the course of duty was a licensee.¹⁹

By classifying the firefighter as an invitee, some courts require landowners and occupiers to maintain the premises in a reasonably safe

15. See W. PROSSER & W. KEETON, *supra* note 14, at 425. Invitees receive a higher duty of care. The landowner has a duty to protect an invitee from known or foreseeable dangers. The owner also must use reasonable care to discover hidden dangers. *Id. See, e.g.,* Lingerfelt v. Winn-Dixie Texas, Inc., 645 P.2d 485 (Okla. 1982) (store customer is an invitee). *Sinn v. Farmer's Deposit Savs. Bank*, 300 Pa. 85, 150 A. 163 (1930) (bank's customer is an invitee who is entitled to a duty of due care).

16. See W. PROSSER & W. KEETON, *supra* note 14, at 393. Because trespassers enter the land without the owner's permission, the landowner owes them no duty except to abstain from intentionally injuring the trespassers. *Id.* at 399.

Licensees enter the land without the owner's permission. The owner owes licensees no duty to keep land in a safe condition. *Id.* The landowner has a duty to warn licensees of hidden dangers of which the owner has knowledge. *Id.* at 417-18. The landowner is also liable to the licensee for injuries caused by the landowner's active negligence. *Id.* at 418.

17. 143 Ill. 182, 32 N.E. 182 (1892). *Dini v. Naiditch*, 20 Ill. 2d 406, 170 N.E.2d 881 (1960) overruled *Gibson*.

18. 143 Ill. at 190-91, 32 N.E. at 184. The court used *Cooley* as its sole authority. *Cooley* did not distinguish between a licensee and a business invitee. He instead classified all entrants who had permission to come on to the land as licensees. See T. COOLEY, *TORTS* 313 (1880). Commentators maintain that *Cooley* suggests no more than firefighters enter land without permission. Thus, he does not determine the firefighters' status. *Cooley's* omission has led some critics to conclude that the *Gibson* court's rule and cases following it have based the fireman's rule on a misinterpretation of *Cooley*. See Comment, *Are Firemen and Policemen Licensees or Invitees?*, 35 MICH. L. REV. 1157, 1158 (1937); Note, *Assumption of the Risk and the Fireman's Rule*, 7 WM. MITCHELL L. REV. 749 (1981).

19. See *Pennebaker v. San Joaquin Power Co.*, 158 Cal. 579, 112 P. 459 (1910) (fireman entering a building under legal necessity is a licensee); *Roberts v. Rosenblatt*, 146 Conn. 110, 148 A.2d 142 (1959) (a fireman entering the premises in performance of his duties is a licensee); *Woodruff v. Bowen*, 136 Ind. 431, 34 N.E. 1113 (1893) (absent statute or ordinance, a fireman is a licensee); *Steinwedel v. Hilbert*, 149 Md. 121, 131 A. 44 (1925) (under the great weight of authority, fireman entering a premises to extinguish a fire is a licensee). *But see* *Houston B. & T.R. Co. v. O'Leary*, 136 S.W. 601 (Tex. Civ. App. 1911) (firefighter is licensee but landowner has a duty to maintain premises in a safe condition).

condition for the firefighter.²⁰ In *Dini v. Naiditch*,²¹ for example, a fireman's family brought a wrongful death action against the landowner for negligently maintaining his property in violation of fire ordinances.²² The Illinois Supreme Court overruled *Gibson* and allowed the cause of action against the negligent landowner by classifying the firefighter as an invitee.²³ The court reasoned that the firefighter had a right to perform his duty on the premises where he "might reasonably be expected to be."²⁴ Thus, the court held that the landowner owed the firefighter a duty of reasonable care.²⁵

In *Krauth v. Geller*,²⁶ the New Jersey Supreme Court held that a firefighter does not fit into either the licensee or invitee category.²⁷ Instead, the court placed the firefighter in the *sui generis*²⁸ category, which applies to those who enter a premises under legal authority rather than by invitation or consent.²⁹ The court concluded that classi-

20. See, e.g., *Mistelske v. Kravco, Inc.*, 88 Pa. D. & C. 49 (1953) (fireman is an implied invitee); *Strong v. Seattle Stevedore Co.*, 1 Wash. App. 898, 466 P.2d 545 (1970) (fireman was an invitee because he conferred at least a potential economic benefit upon landowner). Cf. *Walsh v. Madison Park Properties, Ltd.*, 102 N.J. Super. 134, 245 A.2d 512 (1968) (firefighter is classified as a business invitee because his presence does not depend on an express invitation but rather on implied invitation to perform his duties on the premises).

21. 20 Ill.2d 406, 170 N.E.2d 881 (1960).

22. The landowner, in violation of an ordinance, did not equip the building with fire doors and fire extinguishers. Further violations included trash in the hallways and inadequately constructed stairways. *Id.* at 417, 170 N.E.2d at 886.

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

24. *Id.* at 415, 170 N.E.2d at 885. The court referred to the licensee label as "an illogical anachronism, originating in a vastly different social order, and pock-marked by judicial refinements." *Id.* Furthermore, the court noted that "[i]t is highly illogical to say that a fireman who enters the premises quite independently of either invitation or consent cannot be an invitee because there has been no invitation, but can be a licensee even though there has been no permission." *Id.*

25. 20 Ill. 2d at 416-17, 170 N.E.2d at 886. *But see* *Washington v. Atlantic Richfield Co.*, 60 Ill. 2d 103, 361 N.E.2d 282 (1976). The Illinois court limited the *Dini* holding to a duty of reasonable care to maintain the premises "so as to prevent injury occurring to a fireman from a cause independent of the fire." *Id.* This narrow holding protected the landowner from liability "for negligently causing the fire." *Id.*

26. 31 N.J. 270, 157 A.2d 129 (1960).

27. *Id.* at 273, 157 A.2d at 130.

28. See *Shypulski v. Waldorf Paper Prods.*, 232 Minn. 394, 45 N.W.2d 549 (1951). *Sui generis* applies to firefighters because they enter the premises under unique circumstances rather than by invitation or consent. *Id.*

29. 31 N.J. at 273, 157 A.2d at 130. The New Jersey Supreme Court described the firefighter's unique situation:

A fireman isn't a trespasser for he enters pursuant to public right. Although it is

fication of firefighters into inappropriate common law categories leads to consequences derived from an artificially imputed status.³⁰

Courts have justified application of the fireman's rule by noting that firefighters often enter a premises at unexpected times or in unusual ways.³¹ Thus, some courts hold that landowners and occupiers cannot prepare for the firefighters' unforeseeable arrival.³² Other jurisdictions maintain that abolishing the fireman's rule would discourage negligent landowners and occupiers from seeking firefighters' help because they would fear tort liability.³³

To mitigate the harsh effects of the fireman's rule, courts permit firefighters' tort claims when the hazards causing their injuries extend beyond the risks reasonably inherent in firefighting.³⁴ Liability may be

frequently said that he is a licensee rather than an invitee, it has been correctly observed that he falls within neither category, for his entry does not depend upon permission or invitation of the owner or occupier, nor may they deny him admittance.

Id.

See C. & O. Ry. v. Crouch, 208 Va. 602, 154 S.E.2d 650 (1967), *cert. denied*, 393 U.S. 845 (1968) (firefighters are *sui generis* but the landowner is not liable to the firefighter for negligently causing the fire). *Beedenbender v. Midtown Properties, Inc.*, 4 A.D.2d 276, 164 N.Y.S.2d 276 (1957); *McGee v. Adams Paper & Twine Co.*, 26 A.D.2d 186, 271 N.Y.S.2d 698, *aff'd*, 20 N.Y.2d 919, 233 N.E.2d 289, 286 N.Y.S.2d 274 (1967); *Buren v. Midwestern Indus., Inc.*, 780 S.W.2d 96 (Ky. 1964) (these cases hold that firefighters are *sui generis* because firefighters enter land for public purposes).

30. 31 N.J. at 273, 157 A.2d at 130.

31. *See Boneau v. Swift & Co.*, 66 S.W.2d 172, 173 (Mo. 1934); *Shypulski v. Waldorf Paper Prods. Co.*, 232 Minn. 394, 397, 45 N.W.2d 549, 551 (1951); Note, *New Minnesota Fireman's Rule*, 64 MINN. L. REV. 878, 881 (1980); W. PROSSER & W. KEETON, *supra* note 14, at 431-32.

32. *Id.* *But see* 5 F. HARPER, F. JAMES & O. GRAY, *THE LAW OF TORTS* § 27.14 (2d ed. 1986) (landowner should be required to exercise a duty of reasonable care to firefighters under the general negligence standard); W. PROSSER & W. KEETON, *supra* note 14, at 432 (instead of imposing the fireman's rule to limit all liability, require landowner to exercise due care "only when it is reasonable to expect him to do so"); Note, *supra* note 14, at 412-13 (courts should permit firefighters to sue landowners for breaching their duties to any class of entrants; allowing firefighters to assert tort claims against landowners for breaching a pre-existing duty "would not impose an additional burden" on the landowner).

33. *See, e.g., Steelman v. Lind*, 97 Nev. 425, 634 P.2d 666, 667 (1981) (if there is no fireman's rule, then citizens would be reluctant to seek firefighters' assistance for fear of a subsequent tort claim). *But see* W. PROSSER & W. KEETON, *supra* note 14, at 432 (refutes the *Steeleman* rationale "as preposterous rubbish"); *Christensen v. Murphy*, 296 Or. 610, 620, 678 P.2d 1210, 1217 (1984) (agrees with Prosser's assessment of the fireman's rule and instead applies the ordinary negligence standard to determine liability to firefighters).

34. *See, e.g., Meirs v. Fred Koch Brewery*, 229 N.Y. 10, 127 N.E. 491, 492-93, 167

imposed if the landowner or occupier engages in willful or wanton misconduct,³⁵ the landowner or occupier fails to warn of hidden dangers,³⁶ or the peril results from a statutory violation.³⁷

In *Armstrong v. Mailand*³⁸ the Minnesota Supreme Court rejected common law liability classifications and based the fireman's rule on the assumption of the risk doctrine. The court held that the landowner or occupier owes the firefighter a duty of reasonable care³⁹ unless the

N.Y.S. 740 (1920) (firefighters injured during the course of duty when he fell into a coal hole in an unlit driveway can recover damages from landowner). *Anderson v. Cinnamon*, 365 Mo. 304, 282 S.W.2d 445, 447 (1955) (landowner's negligence is no basis for firefighters' recovery).

35. See *Whitten v. Minnesota-Jade Water and Sewer Auth.*, 357 So.2d 430, cert. denied, 364 So.2d 894 (1977); *Lipson v. Superior Court*, 31 Cal. 3d 362, 644 P.2d 822, 182 Cal. Rptr. 629 (1982) (fireman has cause of action due to landowner's intentional misrepresentation that the boiler did not contain toxic materials); *Bandosz v. Daigger and Co.*, 255 Ill. App. 494 (1930) (fireman's widow may recover damages against landowner who intentionally caused the explosion that killed the firefighter); *Houston B. & T.R. Co. v. O'Leary*, 136 S.W. 601 (Tex. Civ. App. 1911) (owner liable to fireman for knowing that the railroad car contained explosives).

36. *Shypulski v. Waldorf Paper Prod. Co.*, 232 Minn. 394, 45 N.W.2d 549 (1951); *Lave v. Newman*, 211 Neb. 97, 317 N.W.2d 779 (1982) (landowner must warn firefighters of hidden dangers where landowner has knowledge of the danger and an opportunity to give warning); *Schwab v. Rubel Corp.*, 286 N.Y. 525, 37 N.E.2d 234 (1941) (duty to warn fireman of open shafts); *James v. Cities Service Oil Co.*, 140 Ohio St. 314, 23 Ohio Op. 571, 43 N.E.2d 276 (1942) (owner should have warned firefighter of empty gasoline tank containing explosive vapors located near the fire); *Clark v. Corby*, 75 Wis. 2d 292, 249 N.W.2d 567 (1977) (duty to warn firefighter of hidden dangers).

37. See *Maloney v. Hearst Hotels Corp.*, 274 N.Y. 106, 8 N.E.2d 296 (1937) (storage of paints and chemicals in violation of fire ordinance; landowner liable to fireman); *Carroll v. Pellico Bros., Inc.*, 44 Misc. 2d 832, 255 N.Y.S.2d 771 (1964) (violation of ordinance makes landowner liable to firefighter). But see *Luetje v. Corsini*, 126 Ill. App. 3d 74, 466 N.E.2d 1304 (1984) (no liability to firefighter for violation of building and fire codes).

38. 284 N.W.2d 343 (Minn. 1979). The court had previously abolished landowner classifications in *Peterson v. Balach*, 294 Minn. 161, 199 N.W.2d 639 (1972) (entrant's status as an invitee or licensee is no longer the sole factor in determining landowner's liability). See *Rowland v. Christian*, 69 Cal. 2d 108, 119, 443 P.2d 561, 568, 70 Cal. Rptr. 97, 104 (1968) (abolished traditional liability classifications and focused on landowner's duty to exercise reasonable care to all entrants).

39. 284 N.W.2d at 350. The court required of landowners the same duty of care to firefighters as they would to all entrants. *Id.* Applying the same duty to firefighters and other entrants makes the abolition of landowner liability classifications more consistent. *Id.* The Court also mentioned that the reasonable care standard coupled with assumption of the risk enables the court to apply the fireman's rule to nonlandowners and nonoccupiers. *Id.*

firefighter primarily assumes the risk of harm.⁴⁰ The court further noted that the assumed risk must be reasonably apparent to the firefighter as part of his occupation.⁴¹

Although classifying firefighters as *sui generis*, the New Jersey Supreme Court based the fireman's rule on both assumption of the risk and public policy in *Krauth v. Geller*.⁴² The court observed that the public pays the firefighter to confront certain hazards.⁴³ Thus, the firefighter cannot complain of the negligence creating the peril that requires him to perform his duties.⁴⁴ Next, the court asserted that, on the basis of public policy, the negligent individual should not have to pay for the firefighter's injuries because the public already compensates the firefighter for assuming the risks inherent in his occupation.⁴⁵

The *Krauth* court's analysis has received approval in other jurisdictions.⁴⁶ In *Aravanis v. Eisenberg*,⁴⁷ the Court of Appeals of Maryland

40. *Id.* Primary assumption of the risk is the injured party's express or implied consent to relieve the defendant of any duty to exercise care. *Id.* at 351.

41. *Id.* at 351-52. Defendant summoned firefighters to extinguish a fire near a gasoline storage tank. The fire spread and the tank exploded. The firefighters were killed in the line of duty. The court barred the firefighters' families wrongful death action on the ground that the firefighters knew of the possibility of an explosion and had primarily assumed the risk. *Id.* at 347. *See generally* Note, *supra* note 18. *See also* Note, *supra* note 31, at 885 (critical analysis of fireman's rule based on assumption of the risk; author contends that firefighter must either confront life-threatening risks or lose his job; fireman's assumption of the risk, therefore, is not voluntary). *But see* *Bartels v. Continental Oil Co.*, 384 S.W.2d 667 (Mo. 1964) (firefighter's family entitled to wrongful death action due to gasoline storage tank explosion; defendant neglected to warn firefighters of the hidden danger in the tank's faulty pressure valves). *Cf.* *McGee v. Adams Paper and Twine Co.*, 26 A.D.2d 186, 271 N.Y.S.2d 698 (1966), *aff'd*, 20 N.Y.2d 921, 233 N.E.2d 289, 286 N.Y.S.2d 274 (1967) (firefighters assume risks usually inherent in their work such as risks of contact with flames and smoke and collapse of ceilings, walls, buildings and floors).

42. 31 N.J. 270, 157 A.2d 129 (1960).

43. *Id.* at 272, 157 A.2d at 131.

44. The court compared the firefighter to a contractor. Both are experts hired to "remedy dangerous situations." Thus, they cannot complain of the negligence which requires their expertise. *Id.*

45. *Id.*

46. *See, e.g.*, *Grable v. Varela*, 115 Ariz. 222, 564 P.2d 911 (1977) (firefighter cannot recover damages against negligent party since the firefighter's occupation requires him to confront certain risks); *Romedy v. Johnson*, 193 So. 2d 487 (1967) (firefighter, by virtue of his voluntary employment, assumes risks of injury due to exposure to fire, smoke, and collapsing structures); *Washington v. Atlantic Richfield Co.*, 66 Ill. 2d 103, 361 N.E.2d 282 (1967) (landowner is not liable to firefighter for negligently creating the hazard since it is the fireman's job to fight fires).

47. 237 Md. 242, 206 A.2d 148 (1965).

considered the *Krauth* decision.⁴⁸ Although the court upheld the landowner liability rationale,⁴⁹ it noted that a firefighter cannot recover for hazards inherent in firefighting regardless of his common law status.⁵⁰

In *Walters v. Sloan*⁵¹ the California Supreme Court held that the fireman's rule bars a police officer's tort claims.⁵² The court adopted the *Krauth* court's view that an officer cannot recover for injuries when he voluntarily confronts risks in the line of duty.⁵³ Second, the court developed a public policy rationale based on cost spreading.⁵⁴ The court recognized that public officers receive tax-funded salaries and workers' compensation benefits.⁵⁵ Thus, public officers receive adequate compensation for injuries resulting from the negligent acts of

48. *Id.* at 250-51, 206 A.2d at 153. In considering *Krauth*, the court recognized that the firefighter, if injured "by the flames of the conflagration," cannot recover damages. *Id.* at 250-51, 206 A.2d at 153. The firefighter cannot sue a negligent landowner due to the nature of his occupation and the compensation he receives for encountering the risk. *Id.* at 252, 206 A.2d at 153.

49. *Id.* at 253, 206 A.2d at 153. The firefighter claimed that the landowner's negligent storage of acetone, rather than the fire itself, caused his injuries. *Id.* at 253-54, 206 A.2d at 154. The firefighter argued that his status changed from licensee to invitee because the injury occurred after he had already confronted the risk. *Id.* at 253-54, 206 A.2d at 155. Although conceding that a change of status does occur in some situations, the court declined to recognize whether a chronological change in status occurred in *Aravanis*. *Id.*

50. *Id.* at 254, 206 A.2d at 155.

51. 20 Cal.3d 199, 571 P.2d 609, 142 Cal. Rptr. 152 (1977).

52. *Id.* at 200, 571 P.2d at 610-11, 142 Cal. Rptr. at 154. In *Walters*, the defendants' minor daughter had a party at their home and served alcoholic beverages to her minor friends. The police officer sustained injuries while attempting to arrest an intoxicated minor. *Id.* at 200, 571 P.2d at 610, 142 Cal. Rptr. at 153.

53. *Id.* at 203-04, 571 P.2d at 612, 142 Cal. Rptr. at 155. The court recognized this premise as fundamental to tort theories such as assumption of the risk, duty to warn of a known danger, and strict liability. The court rejected landowner's liability concepts as the rationale for the fireman's rule. *Id.*

See also *Rowland v. Christian*, 69 Cal.2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968) (California Supreme Court abolishes landowner liability categories).

54. 20 Cal.3d 202-03, 571 P.2d at 612-13, 142 Cal. Rptr. at 155. See Comment, *The Fireman's Rule: Defining Its Scope Using the Cost-Spreading Rationale*, 71 CAL. L. REV. 218 (1983) (indepth analysis of the *Walters* decision). See also *Berko v. Freda*, 93 N.J. 81, 459 A.2d 663 (1983) (New Jersey Supreme Court extends fireman's rule to police officers).

55. 20 Cal.3d at 205, 571 P.2d at 612-13, 142 Cal. Rptr. at 155-56. See also *Steelman v. Lind*, 97 Nev. 425, 634 P.2d 666 (1981) (public safety officers assume all risks inherent in employment by accepting salaries and work benefits and therefore cannot recover against negligent parties).

others.⁵⁶ Because of this coverage, the court maintained that allowing an officer additional tort recovery would amount to an award of double damages.⁵⁷

The Iowa Supreme Court in *Pottebaum v. Hinds*⁵⁸ held that a police officer cannot recover damages for injuries resulting from the negligent act that necessitated his presence.⁵⁹ The *Pottebaum* court rejected the landowner liability theory⁶⁰ and adopted the public policy rationale.⁶¹

56. 20 Cal.3d at 205-06, 571 P.2d at 613, 142 Cal. Rptr. at 156. See also Comment, *supra* note 54, at 219 (cost-spreading best supports the fireman's rule on the basis that the public has "become a self-insurer of its own wrongs").

57. 20 Cal.3d at 205-06, 571 P.2d at 613, 142 Cal. Rptr. at 156. According to the court, abolishing the fireman's rule would also dilute the effectiveness of the public officers' compensatory scheme and burden the courts with excessive litigation. *Id.*

In his dissent, Justice Tobriner advocated abolishing the fireman's rule. He refuted the policy consideration on the following grounds: (1) It is unfair to treat firefighters and police officers as second class citizens by refusing their causes of action. Other employees can recover damages from third parties in addition to workman's compensation. *Id.* at 208-09, 571 P.2d at 615, 142 Cal. Rptr. at 158. (2) The fireman's rule is a departure from basic negligence in that it rests on the "fortuity that the fire was negligently caused." *Id.* at 208, 571 P.2d 618, 142 Cal. Rptr. at 161. (3) Although officers receive compensation, they still encounter an added risk ordinarily not faced absent a tortfeasor's negligence. *Id.* at 215, 571 P.2d at 618, 142 Cal. Rptr. at 161.

See also *Berko*, 93 N.J. at 94-95, 459 A.2d at 670 (the dissent to the majority's extension of the fireman's rule reiterated the *Walters* dissent). The *Berko* dissent further noted that "[t]o exclude police officers from the scope of potential liability will reduce the deterrent effect of the civil law against such irresponsible conduct." *Id.* at 102, 459 A.2d at 674. The public-policy-based fireman's rule is also problematic on the ground that the rule protects the tortfeasor rather than the police officer "who must thwart the crime." *Id.* See generally Comment, *Berko v. Freda: The Fireman's Rule Burns Police Officers*, 37 RUTGERS L. REV. 195 (1984) (supporting the dissent); Note, *Torts - Negligence - Fireman's Rule Applicable to Police Officers*, 14 SETON HALL L. REV. 759 (1984) (supporting the *Berko* majority view on extending fireman's rule to cover police officers).

58. 347 N.W.2d 642 (Iowa 1984).

59. *Id.* at 646. *Pottebaum*, a police officer, sued *Hinds*, a tavern owner, for injuries sustained when the officer attempted to quiet a disturbance at *Hinds*' tavern. *Id.* at 643.

60. *Id.* at 645. The court rejected premises liability on the grounds that a duty of care exists despite one's status and that the rule applies only to landowners and occupiers. Thus, third parties could not seek the rule's protection. *Id.*

61. *Id.* at 644-45. Although the court conceded that the fireman's rule has evoked criticism from scholars and judges, "the modern trend is not away from the rule but toward it." *Id.* at 644. The court cited recent decisions supporting its holding. *Id.* See, e.g., *Walters v. Sloan*, 20 Cal.3d 199, 571 P.2d 609, 142 Cal. Rptr. 152, (1977) (based fireman's rule on public policy and assumption of the risk); *Krauth v. Geller*, 31 N.J. 270, 157 A.2d 129 (1960) (based fireman's rule on public policy and assumption of the risk); *Berko v. Freda*, 93 N.J. 81, 459 A.2d 663 (1983) (upheld the fireman's rule and barred police officer's tort claim).

The court stated that the fireman's rule protects the public⁶² by encouraging citizens to rely on firefighters and police officers without fear of private liability.⁶³ The court also noted that a citizen has a duty to summon an officer during an emergency.⁶⁴ Thus, in seeking the officer's help, the citizen should not risk liability to the officer who is trained and employed to confront certain hazards.⁶⁵ Furthermore, the court determined that the fireman's rule assured fairness because workers' compensation and other benefits evenly spread the costs of injuries among all taxpayers.⁶⁶

Public policy became the Kansas Supreme Court's sole rationale for adopting the fireman's rule in *Calvert v. Garvey Elevators, Inc.*⁶⁷ The court held that public policy precludes the injured firefighter from recovering damages against a negligent party who caused the hazard that initially required the officer's presence.⁶⁸ The court rejected the landowner liability⁶⁹ and assumption of the risk rationales⁷⁰ as inapplicable

62. See generally Comment, *Torts - A Policeman or Fireman Cannot Recover for Personal Injuries Received When the Negligent Act that Created the Need for the Officer's Presence Is Also the Direct Cause of His Injury* — *Pottebaum v. Hinds*, 334 DRAKE L. REV. 1109, 1118 (1984) (approving the public policy basis for the fireman's rule under *Pottebaum's* facts, but also recognizing that the rule is not the perfect solution for a case-by-case administration of justice).

63. See *Berko*, 93 N.J. at 88-89, 459 A.2d at 667 (offends public policy to hold a citizen liable because he creates the hazard requiring the officer's aid).

64. 347 N.W.2d at 645. The court stated: "A citizen does not have the right to exclude public safety officers from emergency situations or to control their actions once they have been alerted to an emergency and arrive on the scene." *Id.*

65. *Id.* The court maintained that under certain circumstances a citizen has a legal duty to seek the public officer's help. The court noted the inconsistency and unfairness of holding the citizen liable for the officer's tort claims because the citizen may simply be discharging his duty to summon aid. *Id.*

66. *Id.* at 645-46. According to the court, the public bears the risks of tort liability to officers through liability insurance and compensation. Thus, "these risks are more effectively and fairly spread . . . through government entities that employ firefighters and police officers." *Id.*

See *Walters v. Sloan*, 20 Cal.3d 199, 571 P.2d 602, 142 Cal. Rptr. 152; *Berko v. Freda*, 93 N.J. 81, 459 A.2d 663 (1983) (cases using the cost-spreading rationale in basing the fireman's rule on public policy).

67. 236 Kan. 570, 694 P.2d 433 (1985).

68. *Id.* at 571, 694 P.2d at 438 (firefighter cannot recover against chemical company and grain elevator for injuries resulting from firefighter's inhalation of poisonous gases during his performance in the line of duty).

69. *Id.* at 573-74, 694 P.2d 436-37. The court held that the district court erred in classifying the firefighter as a licensee at the time of the accident, since licensee cannot recover damages for a landowner's failure to warn of hidden defects on premises or for a misrepresentation of the hazard. *Id.* at 577, 694 P.2d at 439.

to the firefighters' situation. The court next asserted that the firefighter receives publicly funded compensation for encountering dangerous risks.⁷¹ Thus, the court reasoned that public policy bars the firefighter's recovery for injuries attributed to the hazard that requires him to act in his official capacity.⁷²

In *Flowers v. Rock Creek Terrace*,⁷³ the Court of Appeals of Maryland resolved the issue of whether to base the fireman's rule on traditional landowner liability law or on modern public policy considerations.⁷⁴ The court held that public policy provided the best rationale for the rule.⁷⁵ Thus, the Maryland public-policy-based fireman's rule bars the firefighter's tort claims for injuries sustained due to the negligently created hazard that necessitated his presence.⁷⁶

After acknowledging that landowner liability has formed the basis for Maryland's fireman's rule,⁷⁷ the court noted that this common law rationale contained deficiencies⁷⁸ in two areas. The court first recognized that the premises-liability rationale applies only to landowners and occupiers.⁷⁹ Thus, the fireman's rule, as based on premises liability, does not protect negligent nonowners or nonoccupiers from the firefighter's tort claims.⁸⁰ For instance, if the court applied the common law rationale, then two of the *Flowers* defendants, who did not own or occupy the building, could not invoke the rule for tort

70. *Id.* at 574-75, 694 P.2d at 437-38. In *Calvert*, the court refused to extend the master-servant concept to include the land-occupying taxpayer as the fireman's employer. See *Jackson v. Kansas City*, 236 Kan. 278, 680 P.2d 877 (1984) (Kansas Supreme Court limited the application of assumption of risk to master-servant relationships).

71. 236 Kan. at 576, 694 P.2d at 438.

72. *Id.* But cf. *Christenson v. Murphy*, 296 Or. 610, 678 P.2d 1210 (1984) (rejected public policy and abolished the fireman's rule on the ground that policy considerations are "merely redraped arguments drawn from premises liability or assumption of the risk"); *Kreski v. Modern Wholesale Elec. Supply Co.*, 151 Mich. App. 376, 390 N.W.2d 244 (1986) (public policy is an unsound basis for fireman's rule).

73. 308 Md. 432, 520 A.2d 361 (1987).

74. *Id.* at 439, 520 A.2d at 364.

75. *Id.* at 447-48, 520 A.2d at 368.

76. *Id.* at 447, 520 A.2d at 368.

77. *Id.* at 438-40, 520 A.2d at 364-65. See *supra* note 19-20 for a discussion of premises liability. Maryland classified firemen as licensees to whom the landowner owes no duty of care in *Steinwedel v. Hilbert*, 149 Md. 121, 131 A. 44 (1925).

78. 308 Md. at 443-44, 520 A.2d at 366-67.

79. *Id.* at 443, 520 A.2d at 366.

80. *Id.* at 443-44, 520 A.2d at 366.

immunity.⁸¹

The court also demonstrated the inequity of landowner liability classifications.⁸² Some public officers receive a duty of reasonable care because they are invitees on the premises.⁸³ Firefighters, as public officers entering the premises under the same authority, however, do not receive reasonable care from the landowner due to their classification as licensees.⁸⁴ Thus, the court abolished the landowner liability rationale.

To adopt a new rationale, the court turned to the law in other jurisdictions.⁸⁵ The court examined the assumption of the risk and public policy theories.⁸⁶ Relying heavily on *Walters* and *Krauth*, the court agreed that firefighters must confront certain risks on the public's behalf.⁸⁷ The court held, therefore, that an officer cannot recover damages for injuries caused by the negligently created hazard during the course of his duty.⁸⁸

Flowers represents a new development of the fireman's rule.⁸⁹ The court of appeals boldly abolished the landowner-liability-based fireman's rule. The court correctly noted the problems of labeling firefighters as licensees and other officers as invitees under premises liability.⁹⁰ The court erred, however, in failing to examine the weaknesses of the public policy rationale as well as the problems of the fireman's rule itself.⁹¹

81. *Id.* Only one defendant was a building owner. The other defendants, an elevator manufacturer and security system company, were not premises owners or occupiers. *Id.*

82. *Id.* at 444, 520 A.2d at 366-67.

83. *Id.* The court cited postal officers and building inspectors as examples of public officers in the invitee category. *Id.* at 444, 520 A.2d at 366.

84. *Id.* at 444, 520 A.2d at 367. According to the court, premises liability law does not provide a basis for classifying some public officers as invitees and others as licensees. *Id.*

85. *Id.* See, e.g., *Krauth v. Geller*, 31 N.J. 270, 157 A.2d 129 (1960); *Pottebaum v. Hinds*, 347 N.W.2d 642 (Iowa 1984).

86. 308 Md. at 444-45, 520 A.2d at 367.

87. *Id.* at 438, 520 A.2d at 368.

88. *Id.*

89. See *supra* notes 19-75 and accompanying text.

90. 308 Md. at 443-44, 520 A.2d at 366. See *supra* notes 78-84 and accompanying text.

91. See Tobriner's dissent in *Walters v. Sloan*, 20 Cal.3d 199, 571 P.2d 609, 142 Cal. Rptr. 152 (1977).

The court failed to consider the soundness of the public policy rationale. The public-policy-based fireman's rule is an exception to basic tort recovery.⁹² Generally, injured parties are permitted tort recovery for the defendant's negligent acts.⁹³ The court ignored this basic principle and barred an injured firefighter's tort claim against the negligent defendants.⁹⁴ Thus, *Flowers'* public policy rationale contravenes traditional tort law.⁹⁵

The public policy rationale could also harm the public at large. Without the threat of tort liability to firefighters, landowners are less likely to correct hazardous conditions that may cause injury not only to firefighters, but to the public as well.⁹⁶ Thus, more citizens could act carelessly to create more fires.⁹⁷

The obvious losers of the *Flowers* decision are firefighters and the public. The court simply exchanges one faulty rationale for another. The public-policy-based fireman's rule is as problematic as the common law fireman's rule. The court should have abolished the fireman's rule and applied the general negligence standard of reasonable care.⁹⁸

By refusing to abolish the fireman's rule, the Court of Appeals of Maryland upheld the majority view that the rule prevents a firefighter's tort claim against negligent parties. The court's public policy rationale indicates a departure from the traditional fireman's rule based on landowner liability law.

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92. *Pottebaum v. Hinds*, 347 N.W.2d 642, 645-46 (Iowa 1984) (fireman's rule is a departure from basic negligence).

93. *See Walters*, 20 Cal.3d at 207, 571 P.2d at 618, 142 Cal. Rptr. at 161.

94. *Id.*

95. *See* dissent in *Berko v. Freda*, 93 N.J. 81, 459 A.2d 663 (1983).

96. *See, e.g., Walters*, 20 Cal. 3d at 202-04, 571 P.2d at 614, 142 Cal. Rptr. at 158.

97. *Id.*

98. *See Christenson v. Murphy*, 296 Or. 610, 678 P.2d 1210 (1984).

