IN THE SUPREME COURT OF FLORIDA

CASE NO: 69,687

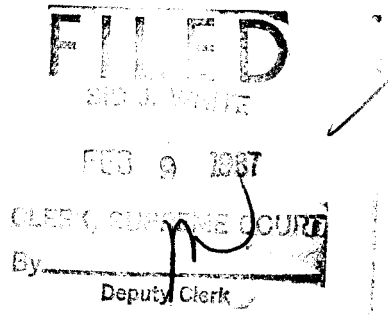
SUZANNE TAYLOR SANDERSON, etc,

Petitioner,

vs.

FREEDOM SAVINGS & LOAN ASSOCIATION, et al.,

Respondents.



AMICUS CURIAE BRIEF OF THE
FLORIDA POLICE BENEVOLENT ASSOCIATION, INC.

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I. STATEMENT OF CASE AND FACTS

The FLORIDA POLICE BENEVOLENT ASSOCIATION, INC., is an independent statewide organization comprised of over 18,000 law enforcement and correctional officers, designed to protect the welfare and lives of police officers and to assist in the enhancement of law enforcement generally throughout the state. The FLORIDA POLICE BENEVOLENT ASSOCIATION, INC., files its brief as amicus curiae in support of the Petitioner's position urging this Court to find the so-called fireman's rule inapplicable to bar the Plaintiff's claims in this case. The FLORIDA POLICE BENEVOLENT ASSOCIATION accepts the Petitioner's Statement of the Case and Facts.

11. ISSUE ON APPEAL

WHETHER THE TRIAL COURT ERRED IN DISMISSING THE PLAINTIFF'S COMPLAINT AGAINST THE BANK AND SPARR UNDER THE FIREMAN'S RULE

111. SUMMARY OF THE ARGUMENT

A conflict has arisen between those cases applying the traditional fireman's rule, which is a limited premises liability doctrine, and several recent District Court decisions, which have greatly expanded the doctrine by utilizing an assumption of the risk rationale, disfavored in all other aspects of Florida law. The traditional fireman's rule has the limited application of categorizing firemen and policemen injured due to latent defects on a premises as licensees in an action against the landowner or occupier. The historical justification for this rule has been

that in certain limited situations firemen and policemen may enter portions of a landowner's premises, which are not open to the public and at unforeseeable times under circumstances of emergency, where there is no time to warn of latent dangers. Several recent cases, however, have abandoned the historical justification for the rule, instead holding that since firemen and policemen take on an inherently dangerous profession, they must assume the risk of injuries from that profession.

The assumption of the risk rationale adopted by these recent cases is unjustified from both a legal and policy standpoint in that it singles out police officers and firemen by applying a rule which is totally disfavored in all other aspects of the law. There is no logical justification to hold that police officers assume the risk of being injured due to a landowner's negligence, but that other municipal employees, such as building inspectors, mailmen, garbage collectors, meter readers or public health inspectors coming on the premises for the performance of their official duty do not likewise assume the risk of such injury.

The expansion of the fireman's rule by the departure from its historical justification is also contrary to the established public policy of this state in that it places the ultimate burden for compensating the negligently injured public safety officer upon the taxpayers, who employ him, rather than upon the negligent tortfeasor, who injured him. The expansion of this rule also violates the acknowledged public policy of this state

to shift the losses resulting when a wrongful death or injury occurs from the plaintiff or his survivors to the wrongdoer who caused the injuries.

Since this Court has not previously directly considered the scope and applicability of the fireman's rule, this case presents this Court with the opportunity to resolve these conflicting approaches and to fashion a rational and logical rule that is consistent with the public policies of the state. There is clearly no justification for subjecting police officers to the harsh inequities created by the assumption of the risk doctrine, nor is there any legal or policy reason for applying the fireman's rule to situations which do not involve defects on the defendant's premises, such as where the active negligence of the landowner causes the injury as in the present case.

If there is any justification for distinguishing between the duty of care owed by a landowner to police and other members of the public, it lies in those limited circumstances where the landowner cannot reasonably foresee the police officer's presence upon his premises and where there is no time to warn of any latent defects therein. Under all other circumstances, police officers and firemen would be entitled to the status of invitees and the corresponding full duty of reasonable care under the circumstances. In those limited circumstances where their presence is unforeseeable, they would be owed the same duty of care owed to licensees.

IV. ARGUMENT

THE TRIAL COURT ERRED IN DISMISSING THE PLAINTIFF'S COMPLAINT AGAINST THE BANK AND SPARR UNDER THE FIREMAN'S RULE

The conflict between the Fifth District's decision in Whitlock v. Elich, 409 So. 2d 110 (Fla. 5th DCA 1982) and the lower court's opinion in the present case epitomizes the clash between the traditional fireman's rule, which is a limited premises liability doctrine and a recent unwarranted expansion of the rule by several District Court opinions relying upon the largely discredited assumption of the risk doctrine. In resolving this conflict, this Court will have the opportunity to address for the first time, the scope and applicability of the so-called fireman's rule in the State of Florida. In deciding this particular case, the FLORIDA POLICE BENEVOLENT ASSOCIATION, INC., urges this Court to follow the lead of those states which have abolished the rule in its entirety, or at the very least to restrict its application to those limited situations envisioned by its traditional historical justifications.

The fireman's rule originated nearly a century ago as a means of defining the status of firemen and policemen on a premises for the purpose of determining the duty of care owed to them by the landowner in premises liability actions. E.g. Hall v. Holton, 330 So. 2d 81 (Fla. 2d DCA 1976) cert. den. 348 So. 2d 948 (Fla. 1977). The doctrine made its first appearance in Florida jurisprudence as dicta in the case of Fred Howland, Inc.

v. Morris, 196 So. 472 (Fla. 1940). In Morris, the plaintiff was a building inspector, who was injured when he fell through a floor of a building he was inspecting as part of his official duties. Although this Court ironically held that the building inspector was a "business invitee", it referred in dicta to decisions in other states classifying firemen and policemen as licensees.

The historical justification behind the Rule has been traditionally expressed as:

> Firemen, in the performance of their duties in attempting to extinguish fires and preserve property, enter upon the premises of others by permission of law and not at the invitation of the owner. . . Since the occurrence of fires is unpredictable, it would be wholly impractical and unreasonable to require the owner or occupant of premises to exercise at all times the high degree of care owed to an invitee in order to guard against the remote possibility that a fire may occur and a fireman, while fighting the fire, may become exposed to a dangerous condition created by the negligent manner in which the owner has maintained his premises. The emergency situation generally created by the outbreak of a fire does not permit time for conferences between the owner and members of the fire department in order that defective conditions of the building might be pointed out and dangers thereby avoided by those having the responsibility for containing and extinguishing the blazes.

Romedy v. Johnston, 193 So. 2d 487 (Fla. 1st DCA 1967).

Until several recent cases, the fireman's rule had been traditionally defined in Florida as providing:

> Once upon the premises, the firemen or policeman has the legal status of a licensee and the sole duty owed him by the owner or occupant of the premises is to refrain from wanton negligence or wilful conduct and to warn him of any defect or condition known to the owner or occupant to be dangerous, if such danger is not open to ordinary observations by the licensee.

Whitten v. Miami-Dade Water and Sewer Authority, 357 So. 2d 430, 432 (Fla. 3d DCA 1978) cert. den. 364 So. 2d 894 (Fla. 1979). Under the traditional definition of the fireman's rule, the landowner is still required to exercise reasonable care in carrying on his activities and to give warning of those dangers of which he has knowledge, as is the case with other licensees. Berglin v. Adams Chevrolet, 458 So. 2d 866 (Fla. 4th DCA 1984). Also see Prosser, Law of Torts (1971 Ed.) 561, Restatement (Second) of Torts 5345, Comment d.

Several recent cases in Florida have extended the reach of this doctrine well beyond its early premises liability application so as to greatly restrict recovery by firemen and policemen for their injuries. Ironically, this expansion in the scope of the fireman's rule has come at the same time as a nationwide trend in premises liability cases in general, in which recovery has been expanded by reducing the importance of the various common law classifications of the plaintiff's status on the subject premises, in favor of requiring the landowner to exercise the same duty of reasonable care to all lawfully on his premises.[1] Paradoxically, rather than accord firemen and police officers the same expanded rights of recovery applicable to other

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'Am. Liability of Owner or Occupant of Premises to Police Officers Coming Thereon in Discharge of Officer's Duty, 30 ALR 4th 81. Also see Rowland v. Christian, 69 Cal. 2d 108, 70 Cal. Rptr. 97, 443 P. 2d 561 (Cal. 1968), Pickard v. City of Honolulu, 51 Haw. 134, 452 P. 2d 445 (Haw. 1969), Kermarec v. Compagne Generale Transatlantique, 358 U.S. 625, 79 s. Ct. 406 (1959).

members of the public generally, these recent cases have instead restricted recovery by drastically changing the rationale behind the fireman's rule.

This trend started with two cases which extended the doctrine's application to policemen and firemen injured outside of the defendant's premises, albiet by defects occurring in the premises themselves. See e.g. Whitten v. Miami-Dade Water & Sewer Authority, 357 So. 2d 430 (Fla. 3d DCA 1978) cert. den. 364 So. 2d 894 (Fla. 1979), Wilson v. Florida Processing Company, 368 So. 2d 609 (Fla. 3d DCA 1979). Ironically, these cases evidenced a gradual abandonment of the premises liability rationale in favor of the adoption of an implied assumption of the risk justification, despite the fact that their end results could have easily and logically been justified by reliance upon the original premise liability rationale of the doctrine.

The departure from the traditional premises liability origins of the fireman's rule was even more dramatic in the Third District's subsequent decision in Rishel v. Eastern Airlines, Inc., 466 So. 2d 1136 (Fla. 3d DCA 1985), which applied the doctrine for the first time in Florida in a case where the basis of the Plaintiff's claim was not due in any manner to a physical pre-existing defect in the premises. Officer Rishel had been injured when attacked by an intoxicated passenger, who she was removing from an Eastern Airlines jet at the request of the

airline. Her complaint was based upon the allegation that the Eastern gate agent had negligently failed to warn her of the violent propensities of the intoxicated passenger.

Not only is Rishel totally distinguishable from the present case as pointed out in the Petitioner's brief, but it also ignores the well established principle of traditional premises liability law which provides that where liability is predicated upon the active negligence or ongoing activity of the landowner, rather than upon a pre-existing physical defect or condition in the premises itself, the Plaintiff's status upon the land is totally irrelevant. E.g. Maldonado v. Jack M. Berry Grove Corp., 351 So. 2d 967 (Fla. 1977), Hix v. Billen, 284 So. 2d 209 (Fla. 1973), Gerlach v. Trepanier, 440 So. 2d 73 (Fla. 5th DCA 1983), Walt Disney World Co. v. Beattie, 428 So. 2d 693 (Fla. 5th DCA) pet. for rev. den. 440 So. 2d 354 (Fla. 1983), Kilgus v. Kilgus, 1986 FLW 5th DCA 2204 (October 16, 1986).

This distinction was clearly recognized in the earlier Whitlock case in which the Fifth District had held that the fireman's rule did not bar a claim by a police officer who was injured during the course of an investigation on a homeowner's premises by a window falling on his hand, where the cause of the falling window was the homeowner's removal of a flashlight placed by the officer to prop open the window, rather than due to a defect in the premises itself. In refusing to apply the fireman's rule to this situation, the Fifth District correctly relied upon the Maldonado and Hix line of decisions to observe

that the officer's status upon the premises was totally irrelevant, since the injury was caused by the landowner's active negligence, rather than due to a defect in the premises.

Unfortunately, however, the Fifth District subsequently chose to ignore this same distinction and to instead extend the "assumption of the risk" rationale to its most illogical extension yet in Florida in Preferred Risk Mutual Insurance Company v. Saboda, 489 So. 2d 768 (Fla. 5th DCA 1986). In Saboda, it was held that the survivors of a SWAT team member shot and killed by a deranged homeowner, who had gone berserk as a result of a drug overdose, were barred from recovery by the fireman's rule, even though the injury had nothing whatsoever to do with a defect in the premises and was caused by the homeowner's affirmative actions in shooting the officer.

This trend to expand the application of the fireman's rule by changing the historical rationale behind it is disturbing from both a legal and policy standpoint. The singling out of police officers and firemen by applying the new assumption of risk based rule, which is totally disfavored in all other aspects of the law, is totally without logic or justification.

As noted by this Court in abolishing the doctrine of implied assumption of the risk in Blackburn v. Dorta, 348 So. 2d 287 (Fla. 1977):

> At the outset, we note that assumption of risk is not a favored defense. There is a puissant drift toward abrogating the defense. . .

. . .

> There is little to commend this doctrine of implied-pure or strict assumption of risk, and our research discloses no Florida case in which it has been applied. Certainly, in light of Hoffman v. Jones, supra, there is no reason supported by law or justice in this state to give credence to such a principle of law. (Emphasis added).

In considering the application of the doctrine of assumption of risk to a police officer who was injured during a police training exercise while attempting to "disarm" a fellow officer, the Fourth District Court of Appeals recently held the doctrine applicable on the basis that the training exercise was analagous to participation in a contact sport, however, went on to further observe:

> We caution that our holding is predicated on the specific facts of this case. In particular, we do not suggest that the doctrine of assumption of risk applies to the appellant by virtue of her status as a policewoman. We agree with the appellant that the notion that a person who takes on an inherently dangerous profession must assume the risk of injuries from that profession is a classic example of implied assumption of risk, abolished by Blackburn. (Emphasis added).

Black v. District Board of Trustees of Broward Community College, 491 So. 2d 303 (Fla. 4th DCA 1986).

Following this Court's decision in Blackburn, assumption of the risk has been held to be viable only in cases where there is an express contract not to sue for an injury or loss or where there is an actual consent, such as when one voluntarily participates in a contact sport. See e.g. Blackburn v. Dorta, 348 So. 2d 287 (Fla. 1977), Ashcroft v. Calder Racecourse, Inc.,

492 So. 2d 1309 (Fla. 1986). The basis for the application of the doctrine of assumption of risk in those cases where it is still applicable has been expressed by this Court as:

> Our judicial system must protect those who rely on such a waiver and engage in otherwise prohibited bodily contacts.

Kuehner v. Green, 436 So. 2d 78, 80 (Fla. 1983), Aschcroft v. Calder Racecourse, Inc., 492 So. 2d 1309, 1311 (Fla. 1986). Obviously, this rationale cannot support the application of the fireman's rule, since the element of reasonable reliance is missing.

The abolition of the doctrine of implied assumption of the risk has brought about a re-evaluation of the fireman's rule in other states. For example, in Oregon the Supreme Court held in Christensen v. Murphy, 678 P. 2d 1210 (Ore 1984)[2]:

> When we thus re-examine the "fireman's rule" we find that its major theoretical underpinning is gone. . .
>
> Frequently, the so-called policy reasons are merely redraped arguments drawn from premises liability or implied assumption of the risk, neither of which are available as legal foundations in this state. . .
>
> As a result of statutory abolition of implied assumption of risk, we hold that the "fireman's rule" is abolished in Oregon's rule of law . . .

Christensen, supra, at pages 1217-18.

What logical justification can there be to say that police officers and firemen "assume the risk" of being injured due to negligence on a defendant's premises, while a building inspector,

[2] Also see Dini v. Naiditch, 20 Ill. 2d 406, 170 N.E. 2d 881 (Ill. 1960), Cameron v. Abatiell, 217 Vt. 111, 241 A. 2d 310 (Vt. 1968).

mailman, garbage collector, meter reader, or public health inspector coming on the premises for the performance of his official duty does not likewise assume the risk of such injury? As observed by the Massachusetts Supreme Court in Mounsey v. Ellard, 297 N.E. 2d 43, 47 (Mass. 1973):

> It seems logical to contend that if the trashman and mailman can rely on the appearance of safety of an intended mode of appraach which they necessarily use in the performance of their official duties, that police officers should be afforded the same right.

In criticizing the strained logic some courts have used to justify the illogical distinction made between police officers and other municipal employees, Dean Prosser has pointed out:

> Where it can be found that the public employee comes for a purpose which has some connection with business transacted on the premises by the occupier, he is almost always invariably treated as a invitee. Quite often, however, this has a very artificial look. It is no doubt possible to spell out pecuniary benefit to the occupier in a case of a garbage collector, city water meter reader, or even a postman, but it becomes quite fanciful, to say the least, in the case of sanitary or building inspectors, and especially so as to tax or a customs collector. The courts are reduced to saying the occupier cannot legally do business without such visits.
>
> While this is true, pecuniary benefit on such a basis appears to be quite unrealistic. The visitor is an unsought and often resented condition of doing business at all. The freedom of choice to admit or exclude him, which is so essential to ordinary invitation, is entirely lacking, and he is a burden thrust upon the occupier as the fruit of compulsion.

Prosser, Law on Torts (1971 Ed.) §61. Thus, under the fireman's rule, the injured public safety officer must illogically bear a loss, which other public employees are not required to bear.

The acceptance of an assumption of the risk basis to support the doctrine also opens the way for even further unwarranted extensions of the doctrine. For example, if the basis of the theory behind the rule lies in a police officer's assumption of the risk of hazards associated with his duties, what rationale is there to limit the application of the doctrine to cases against property owners who call police and firemen to their premises? Will a police officer be barred from recovery where he is shot by a bank robber, killed by a drug dealer or run over while trying to apprehend a fugitive?

California, which has been in the forefront of those states relying upon the assumption of the risk rationale to support the fireman's rule has virtually reached these extremes. In Hubbard v. Boelt, 620 P. 2d 156, **169** Cal. Rptr. **706 (1980)** it was held that a police officer who was injured during a car chase reaching speeds of 100 MPH was barred from recovery when he crashed as a result of the fugitive's reckless misconduct in trying to avoid arrest. Applying the "assmption of the risk" doctrine to its logical extremes, the Court held that the fireman's rule applied where the defendant was guilty of reckless misconduct, rather than mere negligence, even though the Defendant was violating various criminal statutes by fleeing from the police at the time of the plaintiff's injuries.

Not surprisingly, Hubbard was only a springboard for an even more outrageous application of the fireman's rule in Lenthall **v.** Maxwell, **188** Cal. Rptr. **260,** 138 Cal. App. 3rd 706 (Cal. 2d Dist.

1982) in which a police officer was barred from recovery for an intentional shooting at the hands of a landowner, while attempting to subdue a violent family disturbance at the defendant's home. The Court concluded that:

> . . . a police officer called to subdue a violent offense involving firearms should reasonably anticipate that one of the persons whom he was called on to subdue might resist him by use of the firearms involved. (Emphasis added).

Lenthall, supra at page 719.

By virtue of its reliance upon an assumption of the risk rationale to support the fireman's rule, California now has extended the rule to apply to cases where the defendant is not a landowner, the injuries have nothing whatsoever to do with defects on the defendant's property or the Defendant's status as a property owner and are purely the result of the defendant's reckless misconduct and even intentional actions, while engaging in criminal activity. What policy reasons can possibly justify such results?

As observed by California Supreme Court Justice Tobriner in his dissent in Hubbard:

> . . . The majority [has] transformed the fireman's rule from a restrained doctrine that simply protects the average homeowner or citizen from potentially severe liability for mere acts of negligence in creating a situation to which firemen and policemen are employed to respond, into a sweeping, across the board rule that forbids firemen and policemen from recovering any damages from persons who, with knowledge of a safety officer's presence on the scene, intentionally engage in wilfull and wanton misconduct which results in serious injury to the officer. With all respect, I am astonished that the majority finds such a result mandated by considerations of sound public policy. . .

. . .

> Although the majority's rejection of the police officer's claim for damages on the present facts is both legally indefensible and totally inequitable in itself, perhaps the most disturbing aspect of the majority opinion lies in its overly broad rendition of the policies austensibly underlying the firemen's rule. The majority states in this regard that the fireman's rule "is based upon (1) the traditional principle that "one who has knowingly and voluntarily confronted a hazard cannot recover for injuries sustained thereby," . . . and (2) a public policy to preclude tort recovery by firemen or policemen who are presumably adequately compensated with special salary, retirement and disability benefits for undertaking their hazardous work [citations omitted]. Consistent application of these two "policies", however, would convert the fireman's rule into a broad doctrine that would bar both policemen or firemen from recovering from third parties for virtually all injuries inflicting upon them in the course of their employment
>
> . . .
>
> . . . the majority's policy formulation in this case has fundamentally altered the limited nature of the traditional fireman's rule, converting the rule into a broad doctrine prohibiting firemen and police officers - but no other employees from recovery for injuries which they suffer at the hands of third persons in the course of their employment. This reasoning is not only inconsistent with the traditional limits of the fireman's rule, but in addition squarely conflicts with the principles of Labor Code §3852, which provides "the claim of an employee for [workers] compensation does not affect his claim or right of action for all damages proximately resulting from such injury or death against any person other than the employer. [citations omitted].

In addition to the lack of legal and logical justification and the inherent unfairness in singling out police officers and firemen, the expansion of the fireman's rule is also contrary to established public policy of this state as well. Since injured public safety officers are generally entitled to workers'

compensation benefits for their injuries, the continued application of the fireman's rule places the ultimate burden for compensating the safety officer or fireman upon the taxpayers, who employ him, rather than upon the negligent tortfeasor, who injured him. Because the workers' compensation carrier is entitled to reimbursement for the benefits which it has paid where there is a third-party recovery from a negligent tortfeasor, the abolition or restriction of the fireman's rule would serve to shift the loss from the public at large to the party creating it. See Florida Statutes **8440.39.**

It is also the acknowledged public policy of this state to shift the losses resulting when a wrongful death or injury occurs from the plaintiff or the decedent's survivors to the wrongdoer who caused the injuries. See Florida Statutes **8768.17.** Accordingly, the law of this state has long recognized the principle that citizens, who are injured by the negligence of another, are entitled to full and reasonable compensation for these injuries. Champion v. Gray, **478** So. 2d **17** (Fla. **1985),** Hanna v. Martin, **49** So. 2d **585** (Fla. **1950).** Since the expansion of the fireman's rule operates to deny the recovery of such compensation, it is clearly iniminical to this central tenant of Florida's tort system.

Even the traditional more limited application of the fireman's rule has been appropriately criticized by many authorities and courts. For example, as pointed out by Dean Prosser in his landmark treatise, Law of Torts (Ed. **1971) 861:**

> There has always been something of an aspect of an absurdity about these decisions. It is, of course, foolish to say that a fireman who comes to extinguish a blaze or a policeman who enters to prevent a burglary confers no pecuniary benefit upon the occupier; and if invitation is called for, it is at least clearly present when he comes in response to a desperate call for help. The argument, occasionally offered, that tort liability might deter landowners from uttering such cries of distress, is surely preposterous rubbish. It is quite true, it has been pointed out, that injuries to firemen and policemen are covered by compensation and pension funds; but this is no less true of the other public employees mentioned above, or even of many private employees who are held to be invitees. (Emphasis added).

In abolishing the fireman's rule, the Illinois Supreme Court further observed:

> In reviewing the law on this issue, we note further that this legal fiction that firemen are licensees to whom no duty of reasonable care is owed is without any logical foundation. [citations omitted] It 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. The lack of logic is even more patent when we realize that the courts have not applied the term "licensee" to other types of public employees required to come on to another's premises in the performance of their duties, and to whom the duty of reasonable care is owed. If the benefit to the landowner is the decisive factor, it is difficult to perceive why a firemen is not entitled to that duty of care, or how the landowner derives a greater benefit from the visit of other public officials, such as postmen, water meter readers and revenue inspectors, than from the firemen who comes to prevent the destruction of his property. (Emphasis added).

Dini v. Naiditch, 20 Ill. 2d 406, 170 N.E. 2d 881 (Ill. 1960).

Rather than take the approach followed by the Oregon Supreme Court in abolishing the doctrine totally, many states have attempted to ameliorate its harsh results and illogical effects by creating a variety of exceptions to the rule or by utilizing

"flexible" reasoning or artful classifications to bring about equitable results in the individual case, while leaving the unjust rule still in place. As noted by the Massachusetts Supreme Court in Mounsey v. Ellard, 293 N.E. 2d 43, 49 (Mass. 1973):

> Instead of challenging the efficacy of a classification that establishes immunities from liability which no longer comport with modern accepted values and common experience, many courts have carved out special exceptions to the licensee rule or made procrustean efforts to fit the circumstances of contemporary life into this archaic and rigid classification system.

One such example is the creation of an "exception" to the rule where the police officer is injured by a so-called "independent" act of negligence or misconduct, which is not the cause of the policeman's presence at the scene of the injury or which occurs subsequent to his arrival at the scene. In fact, the Fifth District Court of Appeals attempted to utilize this same justification in distinguishing its Saboda opinion from its prior holding in Whitlock.

A good illustration of this rule is found in Lipson v. Superior Court of Orange County, 644 P 2d 822 (Cal. 1982), in which the California Supreme Court attempted to circumvent the absurd result which would have otherwise been mandated by its prior Hubbard decision. Fireman Lipson was injured during the course of fighting a chemical fire on the defendant's premises. It was alleged that the landowner negligently or intentionally

mis-informed the firefighters that chemicals involved in the boilover were not toxic, when in fact they were, resulting in severe injuries in the ensuing explosion.

In holding that the fireman's rule did not apply, the Court concluded that the landowner's negligence in failing to inform the firemen of the toxic nature of the chemicals constitued a separate independent act of misconduct. Although the court attempted to distinguish its prior decision in Hubbard, it is hard to understand how the conduct of the defendant in subsequently attempting to avoid arrest by officer Hubbard by leading him on a high speed chase at speeds of 100 miles per hour did not constitute a similar subsequent "independent" act. Perhaps the most interesting aspect of the Lipson decision, however, is that it was authoried by Chief Justice Bird, who was one of the dissenting justices in the prior Hubbard case.

Other decisions have held the fireman's rule inapplicable where the plaintiff can show the defendant violated a statute or ordinance or where the landowner failed to advise the plaintiff of "hidden dangers" or "unusual hazards". See e.g. Dinni v. Naiditch, 170 N.E.2d 881 (Ill. 1960), Ryan v. Thomson, 38 N.Y. Sup. Ct. 133 (1874), Racine v. Morris, 121 NYS 146 aff'd 201 NY 240, 94 NE 864 (1910), Shypulski v. Waldorf Paper Products, Co., 232 Minn. 394, 45 N.W. 2d 549 (Minn. 1951).

Still other decisions have utilized a variety of different artful dodges to avoid the application of the rule. One such example is seen in Walsh v. Madison Park Properties, Ltd, 102

N.J. Super 13, 240 A. 2d 12 (1968), in which it was held that firemen injured by the collapse of the defendant landowner's defective fire escapes in the course of a visual inspection were not barred from recovery, because the nature of the work they were performing at the time was more akin to that of a building inspector, rather than that of a fireman.

Although artful classifications and flexible reasoning may provide for "justice" in individual situations, they help create "bad law" in future cases and do little to advance the reasonable expectations of society in being governed by a coherent, logical and predictable system of law. By taking the easy way out, such an approach deprives the law of both clarity and any reasonable predicatability and instead relies upon the individual whim of the court involved. The lack of ability to reasonably predict the outcome of cases results in a loss of confidence in the judicial system in much the same way as an inequitable and unjust rule of law.

What is necessary, is a rational, fair, just and logical rule that is consistent with the public policies of this state. There is clearly no justification for subjecting police officers and firemen to the harsh inequities created by the assumption of risk doctrine, which has been totally rejected in almost all other aspects of our law. It is equally apparent that there can be no legal or policy reason whatsoever for applying the

fireman's rule to situations which do not involve defects on the Defendant's premises, such as where the active negligence of the landowner causes the injury as in the present case.

If there is any justification whatsoever for distinguishing between the duty of care owed by a landowner to police or firemen on one hand and other members of the public on the other, it lies in those limited situations where:

> Firemen and policemen . . . enter at unforeseeable times, upon unusual parts of the premises, and under circumstances of emergency, where care in looking after the premises and in preparation for the visit, cannot reasonably be looked for. A man who climbs in through a basement window in search of a fire or a thief cannot expect any assurance that he will not find a bulldog in the cellar.

Prosser, Law of Torts (Ed. 1971) §61. Also see Restatement (Second) of Torts 5345, Comment C.

These limited situations, however, can easily be resolved by the approach which has been followed by a number of states, requiring the landowner to take precautions on its premises to protect police and firemen where it is reasonable to expect them to enter. See e.g. Meiers v. Fred Koch Brewery, 229 N.Y. 10, 127 N.E. 491 (1920), Mounsey v. Ellard, 363 Mass. 693, 297 N.E. 2d 43 (1973). Also see cases cited in Prosser, Law on Torts (Ed. 1971) §61, n. 92.

Under this rule, police officers and firemen are entitled to the status of invitees and the corresponding full duty of reasonable care under the same circumstances as other members of the public, such as when they come to a part of the premises at a time that it is held open to the public or where they come on the