Assumption of the Risk and the Fireman's Rule
ASSUMPTION OF THE RISK AND THE FIREMAN’S RULE

The Minnesota Supreme Court recently has redefined the law regarding the right of firemen and policemen to recover from tortfeasors for injuries sustained in the course of their duties. This Note discusses the evolution of the "fireman's rule" and provides a critical analysis of recent modifications to the rule.

I. INTRODUCTION ................................................................. 749
II. THE HISTORY OF THE FIREMAN'S RULE ............................. 749
III. RECENT MINNESOTA CASES ............................................ 757
IV. THE MODERN FIREMAN'S RULE ....................................... 762
   A. Development of Assumption of the Risk ............................ 765
   B. Assumption of the Risk and the Fireman’s Rule ............... 768
   C. Assumption of the Risk and Strict Liability .................. 774
V. CONCLUSION ................................................................. 778

I. INTRODUCTION

In recent years, the Minnesota Supreme Court has modified the law regarding recovery by injured firemen and policemen.1 In three cases, Armstrong v. Mailand,2 Hannah v. Jensen,3 and Griffiths v. Lovelette Transfer Co.,4 the court replaced the old "fireman's rule," based upon the law of landowners' and occupiers' liability, with a modern rule, based upon primary assumption of the risk.

This Note will examine the history of the fireman's rule and the evolution of the doctrine of assumption of the risk into two separate theories, primary and secondary assumption of the risk. The decision of the Minnesota court to retain the fireman's rule in the form of primary assumption of the risk will be discussed both in terms of its application to cases involving firemen and policemen, and its potential impact on general tort law. In addition, the use of primary assumption of the risk to bar recovery on the basis of strict liability, an issue not fully discussed by the Minnesota court in either Armstrong or Hannah, will be examined.

II. THE HISTORY OF THE FIREMAN’S RULE

Historically, firemen injured while fighting fires have been restricted in their right to recover from the negligent owner of the land upon which

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1. The Minnesota Legislature recently enacted a law prohibiting the use of the fireman’s rule to deny recovery to "peace officers" as defined by Minnesota Statutes section 626.84(1). Act of Mar. 22, 1982, ch. 601, § 3, 1982 Minn. Laws __. This law likely will be challenged by firemen on equal protection grounds. See note 239 infra.
2. 284 N.W.2d 343 (Minn. 1979).
3. 298 N.W.2d 52 (Minn. 1980).
4. 313 N.W.2d 602 (Minn. 1981).
the fire occurred. The law limiting the firemen's cause of action against landowners, commonly called the fireman's rule, was based upon the

5. Gibson v. Leonard, 143 Ill. 182, 32 N.E. 182 (1892) was the first case to restrict the right of a fireman to recover from a negligent owner of land. In that case, the Illinois Supreme Court held that a fireman who entered premises in the performance of his duty was a mere licensee to whom the landowner owed no duty other than to refrain from willful or wanton conduct. See id. at 196, 32 N.E. at 186.

In granting firemen the status of licensees, the court cited as its only authority a paragraph in Cooley on Torts wherein the rights of firemen were set out. That paragraph states:

A third class of licenses comprehends those cases in which the law gives permission to enter a man's premises. This permission has no necessary connection with the owner's interest, and is always given on public grounds. An instance is where fire breaks out in a city. Here the public authorities, and even private individuals, may enter upon adjacent premises as they may find it necessary or convenient in their efforts to extinguish or to arrest the spread of the flames. The law of overruling necessity licenses this, and will not suffer the owner of a lot to stand at its borders and exclude those who would use his premises as vantage ground in staying the conflagration. Id. at 189-90, 32 N.E.2d at 183 (quoting T. COOLEY, TORTS 313 (1st ed. 1880)).

It has been noted that Judge Cooley made no distinction between a licensee and a business invitee, but labeled all who had permission to enter upon land as licensees. See Comment, Are Firemen and Policemen Licensees or Invitees?, 35 MICH. L. REV. 1157, 1159 (1937). The paragraph cited above is therefore improper authority for a holding that designates firemen as mere licensees rather than as business invitees. See id. Judge Cooley merely states that firemen enter land with permission without determining their status as entrants. See id. Nevertheless, courts in many jurisdictions followed the Gibson holding based upon this dubious authority that relegated firemen to the status of licensees. See id. at 1158 n.3.

The Minnesota Supreme Court first adopted the Gibson view in Hamilton v. Minneapolis Desk Mfg. Co., 78 Minn. 3, 80 N.W. 693 (1899). The Gibson court recognized the harshness of the common-law rule, but held against the plaintiff fireman, stating, "it appears to be settled that the owner or occupant of a building owes[s] no duty to keep it in a reasonably safe condition for members of a public fire department who might, in the exercise of their duties, have occasion to enter the building." Id. at 5, 80 N.W. at 694. In the view of the Hamilton court, "[h]owever meritorious a case [the plaintiff] may seemingly have, any expansion of the fireman's right of recovery would have to come from the legislature." Id. at 6, 80 N.W. at 694. Neither the courts nor the legislature challenged or limited the Hamilton holding for the next 42 years, but in 1942, the Minnesota court was again faced with the issue. In Mulcrone v. Wagner, 212 Minn. 478, 4 N.W.2d 97 (1942), the court refused to allow a fireman who was injured while performing a routine fire inspection to recover from the owner of the building. The Mulcrone court stated:

The cases seem to draw a clear line of distinction between ordinary and business invitees and policemen and firemen by the great weight of authority, the general rule is that, absent statute or ordinance, one who comes upon premises in the discharge of his duty, but without an express or implied invitation to enter, is a licensee to whom the owner or occupant owes no duty except to refrain from injuring him willfully or wantonly and to exercise ordinary care to avoid imperiling him by any active conduct. Id. at 482, 4 N.W.2d at 99. The court reiterated the view of the Hamilton court that any change in the duty owed to firemen by negligent landowners should be accomplished by legislative action. See id. at 482-83, 4 N.W.2d at 99. Because the legislature had failed to respond to the challenge of the Hamilton court to elevate the status of firemen, the supreme court was reluctant to expand the firemen's right of recovery. See id.
FIREMAN'S RULE

traditional system of classifying entrants upon land as trespassers, licensees, or invitees. Under that system, the duty of the landowner depended upon the legal status of the entrant; the least duty being owed to trespassers and the greatest to invitees. Although firemen have been

6. See Comment, supra note 5. The method of determining the liability of landowners and occupiers was unique in that it was based upon the status of the person entering upon the land, as well as the conduct of the owner. See J. Dooley, Modern Tort Law § 19.01 (1977); W. Prosser, Handbook of the Law of Torts § 58, at 357 (4th ed. 1971). The Restatement defines the three categories of persons entering upon land as:

§ 329. Trespasser Defined.
A trespasser is a person who enters or remains upon land in the possession of another without a privilege to do so created by the possessor's consent or otherwise.

§ 330. Licensee Defined.
A licensee is a person who is privileged to enter or remain on land only by virtue of the possessor's consent.

§ 332. Invitee Defined.
(1) An invitee is either a public invitee or a business visitor.
(2) 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.
(3) 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 §§ 329, 330, 332 (1965). Comment a of section 332 states:

"Invitee" is a word of art, with a special meaning in the law. This meaning is more limited than that of "invitation" in the popular sense, and not all of those who are invited to enter upon land are invitees. A social guest may be cordially invited, and strongly urged to come, but he is not an invitee. . . . Invitees are limited to those persons who enter or remain on land upon an invitation which carried with it an implied representation, assurance, or understanding that reasonable care has been used to prepare the premises, and make them safe for their reception.

Id. § 332, Comment a.

For further discussion of the status of the business invitee, see Prosser, Business Visitors and Invitees, 26 Minn. L. Rev. 573 (1942).

7. See W. Prosser, supra note 6, § 58, at 357. Because trespassers entered land without the owner's permission, they were owed no duty by the landowner except the avoidance of intentional injury. See id.; J. Dooley, supra note 6, § 19.03, at 379. Limited exceptions were made to this general rule of nonliability, and some courts required the landowner to exercise reasonable care in the case of frequent trespassers, known trespassers, or in situations in which the landowner engaged in dangerous activities. See W. Prosser, supra note 6, § 58, at 360-64.

Licensees entered land for their own purposes but with the permission of the owner or occupier. The landowner generally owed the licensee no duty to keep his land in safe condition, to discover dangerous conditions, or to warn the licensee of open and obvious dangers. See J. Dooley, supra note 6, § 19.04, at 381. An owner had a duty to warn a licensee of hidden dangers of which the owner had knowledge. Id. In addition, a landowner was liable for injuries caused to a licensee by the landowner's active negligence if he should have expected that the licensee would not discover the danger or did not know of the owner's activities and of the risk involved. Id.; RESTATEMENT (SECOND) OF TORTS §§ 341-342 (1965).

A higher duty of care was owed to the invitee who entered upon the land. The pos-
granted the status of invitees in a few cases,8 the majority of courts have held them to be licensees.9 Accordingly, landowners had no duty to avoid negligently starting fires or to keep their premises free from defects unrelated to the fire.10 Applying a rigid system of classification to the determination of a landowner’s duty to firemen proved to be awkward and unsatisfactory.11 Licensees were deemed to be owed a lesser duty because they entered for their own purposes although with the consent of the owner.12 Invitees were granted a higher status because the landowner derived a benefit from their presence.13 Firemen did not fit squarely into either the licensee or the invitee category because their entrance was based upon legal authority rather than upon consent or business invitation,14 and because


11. See Shypulski v. Waldorf Paper Prods. Co., 232 Minn. 394, 397, 45 N.W.2d 549, 551 (1951); J. Dooley, supra note 6, § 19.07, at 387; W. Prosser, supra note 6, § 61, at 397 (“there has always been an aspect of absurdity about [decisions categorizing firemen as licensees]”); Comment, An Examination of the California Fireman’s Rule, supra note 10.

12. See note 7 supra and accompanying text.

13. Id.

they entered the premises not for their own purposes but for the benefit of the landowner and the public in general.\textsuperscript{15} Despite the difficulty of placing firemen into a particular category, the courts continued for many years to treat firemen as licensees.\textsuperscript{16} This was primarily due to the fear that placing a duty on landowners to keep their premises reasonably safe from the infrequent and unpredictable entrances of firemen would prove too burdensome.\textsuperscript{17} An additional and much less valid reason was given:

15. See Shypulski v. Waldorf Paper Prods. Co., 232 Minn. at 396, 45 N.W.2d at 551; 2 F. HARPER & F. JAMES, supra. This rationale for refusing to grant invitee status to firemen has been criticized, since landowners presumably would not refuse entrance to a fireman. See Comment, supra note 5, at 1161. One writer has noted that "if invitation is called for, it is at least clearly present when [a fireman] comes in response to a desperate call for help." W. PROSSER, supra note 6, § 61, at 397.

Additional criticism has been leveled at courts' inconsistent application of the concept of right of law to justify their refusal to grant firemen invitee status. "[I]t is incongruous to say that a fireman on the [landowner's] premises to fight a fire cannot be an invitee because there is no invitation, but that he is a licensee even though in reality the occupier has not granted him permission to enter." Note, supra note 9, at 407-08; see Dini v. Naiditch, 20 Ill. 2d 406, 415-16, 170 N.E.2d 881, 885 (1960).

16. See Shypulski v. Waldorf Paper Prods. Co., 232 Minn. 394, 396-97, 45 N.W.2d 549, 551 (1951), in which the court, discussing the difficulty of placing firemen within the traditional classifications, noted that "[f]iremen are regarded as making their entry primarily for the purpose of performing a duty owed to the public. Although the benefit of their services may accrue to an individual property owner, that fact is incidental." Id. (footnote omitted). The argument that a significant benefit is received by the landowner was advanced to support the elevation of firemen to the invitee classification. Comment, Giorgi v. Pacific Gas & Electric Co.: The "Firemen's Rule" In California, an Anachronism?, supra note 10, at 126; see Dini v. Naiditch, 20 Ill. 2d 406, 416, 170 N.E.2d 881, 885 (1960) ("If benefit to the landowner is the decisive factor, it is difficult to perceive why a fireman is not entitled to that duty of care [owed to an invitee]"); W. PROSSER, supra note 6, § 61, at 397 ("[I]t is of course quite foolish to say that a fireman who comes to extinguish a blaze . . . confers no economic benefit upon the occupier"). One writer extended the benefit rationale even further, saying "[w]hile the benefit to the landowner would, conceded, be the greatest where the fire is on his own property, it does not follow that he derives no benefit from the entry of a fireman for the purpose of fighting a fire next door. Surely he is interested in controlling the fire so that it will not spread to his property." Comment, supra note 5, at 1161.

17. See note 9 supra and accompanying text.

W. PROSSER, supra note 6, § 61, at 397. Prosser has also commented on the widespread use of the unforeseeability rationale as follows: "[i]t is worthy of note that in every one of the cases in which recovery has been denied to [firemen], some such element of unusual
it was thought that landowners might be more reluctant to call firemen promptly if they knew that they could be held liable for injuries.18 These arguments are questionable, however, in light of the element of foreseeability that must be present in a negligence action.19 Only those dangers that firemen could reasonably be expected to encounter would have to be removed from the premises.20 These misplaced concerns caused courts to perpetuate a harsh rule that frequently led to inequitable results for injured firemen.21

Eventually, courts began to recognize that the categories of trespasser, licensee, and invitee were outdated and unworkable.22 The classification system, which had its roots in the English feudal system under which landowners had supreme rights, was an anachronism in modern industrial society.23 Rather than rejecting the outdated classifications altogether, in a few cases courts attempted to expand the duties owed firemen by fitting them into the invitee category.24 In the 1951 case of

and unexpected entry has been present." Prosser, Business Visitors and Invitees, 26 MINN. L. REV. 573, 610 (1942). He expressed considerable doubt about the validity of the firemen's unexpected entry as a basis for the decisions. See W. PROSSER, supra note 6, § 61, at 598; notes 18-19 infra and accompanying text.

18. See Shypulski v. Waldorf Paper Prods. Co., 232 Minn. 394, 397, 45 N.W.2d 549, 551 (1951); J. DOOLEY, supra note 6, § 19.07, at 387. Prosser has stated that "[t]he argument . . . that tort liability might deter landowners from uttering cries of distress is surely preposterous rubbish." W. PROSSER, supra note 6, § 61, at 397; see 2 F. HARPER & F. JAMES, supra note 14, § 27.14, at 1503.

19. See 2 F. HARPER & F. JAMES, supra note 14, § 27.14, at 1502; W. PROSSER, supra note 6, § 61, at 398 ("[The foreseeability of the firemen's entrance] appears to bear upon the issue of negligent conduct itself, as a matter of foreseeable harm and reasonable care, rather than affording an arbitrary basis for denying recovery in all cases.").

20. See 2 F. HARPER & F. JAMES, supra note 14, § 27.14, at 1502; W. PROSSER, supra note 6, § 61, at 398. In Dini v. Naiditch, 20 Ill. 2d 406, 170 N.E.2d 881 (1960), the court found the landowners liable based upon the foreseeability of the firemen's injuries, stating: [F]rom the evidence previously noted that defendant failed to provide firedoors or fire extinguishers, permitted the accumulation of trash and litter in the corridors, and had benzene stored in close proximity to the inadequately constructed wooden stairway where the fire was located, the jury could have found that defendants failed to keep the premises in a reasonably safe condition and that the hazard of fire, and loss of life fighting it, was reasonably foreseeable.

Id. at 417, 170 N.E.2d at 886.


22. See W. PROSSER, supra note 6, § 62, at 398; note 23 infra and accompanying text.


24. See, e.g., Dini v. Naiditch, 20 Ill. 2d 406, 170 N.E.2d 881 (1960); Zuercher v. Northern Jobbing Co., 243 Minn. 166, 66 N.W.2d 892 (1954) (volunteer fireman injured while installing pump purchased by owner from fire department was business invitee); Meiers v. Fred Koch Brewery, 229 N.Y. 10, 127 N.E. 491 (1920) (fireman was not licensee
Shypulski v. Waldorf Paper Products Co.,\textsuperscript{25} the Minnesota Supreme Court finally removed firemen from the classification system altogether and granted them a sui generis status.\textsuperscript{26} At the time, the decision was viewed as progressive,\textsuperscript{27} but in fact it only slightly expanded the duty owed to firemen by landowners.\textsuperscript{28} Landowners still had no general duty to keep their premises safe for members of a public fire department,\textsuperscript{29} although they could be liable for failing to warn firemen of hidden dangers of which the landowners had knowledge and the opportunity to disclose.\textsuperscript{30} The \textit{Shypulski} decision was based upon the court’s recognition of the difficulty of attempting to classify firemen as invitees, licensees, or trespassers.\textsuperscript{31}

In 1968, the California Supreme Court began a trend toward abolishing the common-law classification scheme.\textsuperscript{32} In \textit{Rowland v. Christian},\textsuperscript{33} the court decided that it was no longer appropriate to make an exception in the case of possessors of land to the general requirement of ordinary care.\textsuperscript{34} In \textit{Rowland}, the court noted that “[a]n increasing regard for

\textsuperscript{25}232 Minn. 394, 45 N.W.2d 549 (1951). Plaintiff, a St. Paul fireman, was seriously injured when a poorly constructed wall collapsed as he was fighting a fire in the defendant’s warehouse. \textit{id}. at 395-96, 45 N.W.2d at 550.

\textsuperscript{26}Id. at 397, 45 N.W.2d at 551; see Krauth v. Geller, 31 N.J. 270, 157 A.2d 129 (1960).

\textsuperscript{27}See \textit{53 MINN. L. REV.} 512, 515 (1951).

\textsuperscript{28}See Note, \textit{supra} note 9, at 408 & n.7. The author points out that the duty imposed upon landowners by the \textit{Shypulski} court to warn of “hidden perils” is the same duty owed to licensees under the \textit{Restatement}. See \textit{RESTATEMENT (SECOND) OF TORTS} §§ 341-342 (1965).

\textsuperscript{29}See Shypulski v. Waldorf Paper Prods. Co., 232 Minn. 394, 397, 45 N.W.2d 549, 551 (1951); Note, \textit{supra} note 9, at 408 & n.7.

\textsuperscript{30}232 Minn. at 401, 45 N.W.2d at 553.

\textsuperscript{31}See \textit{id}. at 396-97, 45 N.W.2d at 550-51.


\textsuperscript{34}69 Cal. 2d at 117, 443 P.2d at 568, 70 Cal. Rptr. at 104.
human safety has led to a retreat from this position,” and gave examples of the confusing and complex methods that courts had employed in attempting to avoid the harsh rule that landowners owed a limited duty to entrants. The California court chose not to add to that confusion by straining the common-law rule; instead, it simply abolished the land-entrant classification system, and required landowners to use reasonable care in avoiding injury to others. In its opinion, the court stated:

A man's life or limb does not become less worthy of protection by the law nor a loss less worthy of compensation under the law because he has come upon the land of another without permission or with permission but without a business purpose. Reasonable people do not ordinarily vary their conduct depending upon such matters, and to focus upon the status of the injured party as a trespasser, licensee, or invitee in order to determine whether the landowner has a duty of care, is contrary to our modern social mores and humanitarian values. The common law rules obscure rather than illuminate the proper considerations which should govern determination of the question of duty.

Not all jurisdictions have completely abolished the classifications of trespasser, licensee, and invitee. In Minnesota, these classifications continued to limit the duty that landowners owed to entrants as late as 1970. When the Minnesota Supreme Court abolished the distinctions between licensees and invitees in 1972, in Peterson v. Balach, the court declined to expand the duty owed to trespassers, noting that good reasons often exist for limiting the liability of landowners for injury to those who enter onto land uninvited. The court held that as to all other entrants, landowners owed a duty to use reasonable care in maintaining

35. \textit{Id.} at 114, 443 P.2d at 565, 70 Cal. Rptr. at 101.
37. \textit{Id.} at 119, 443 P.2d at 568, 70 Cal. Rptr. at 104.
38. \textit{Id.} at 118, 443 P.2d at 568, 70 Cal. Rptr. at 104.

The Florida Supreme Court has indicated, in two separate decisions, that the licensee/invitee distinction was relevant only when injury was caused by the condition or use of the premises, and that when injury is caused by the active personal negligence of the landowner, ordinary negligence standards would apply, even if the injury occurred on the defendant's property. \textit{See} Maldonado \textit{v.} Jack M. Berry Grove Corp., 351 So. 2d 967 (Fla. 1977); Hix \textit{v.} Billen, 284 So. 2d 209 (Fla. 1973).
40. \textit{See} Holland \textit{v.} Hedenstad, 287 Minn. 244, 177 N.W.2d 784 (1970) (no duty to make premises safe for licensee).
41. 294 Minn. 161, 199 N.W.2d 639 (1972).
42. \textit{See id.} at 165, 199 N.W.2d at 642.
their premises and warning of dangers. The status of the entrant as licensee or invitee no longer was determinative, but was "one element, among many to be considered in determining the landowner's liability under ordinary standards of negligence." The plaintiff's status would go to the issues of foreseeability of the injury and the right of the plaintiff to expect the exercise of reasonable care in his behalf.

III. RECENT MINNESOTA CASES

Although major changes occurred in the area of landowners' and occupiers' liability generally, the question of what duty was owed to firemen who entered upon land remained unanswered until 1979. Faced with that issue in the case of *Armstrong v. Mailand*, the Minnesota Supreme Court combined the reasonable care standard with primary assumption of the risk to create a new fireman's rule in Minnesota. Firemen who enter property to fight a fire are no longer invitees, licensees, or sui generis. Firemen, like other land entrants, are owed a duty of reasonable care unless they assume the risk in the primary sense. They assume, in the primary sense, all the reasonably apparent risks of firefighting. They do not, however, assume risks that are hidden or unanticipated.

In *Armstrong*, three West St. Paul firemen were killed while fighting a fire at a liquefied petroleum gas storage facility. The fire started near a truck that was delivering LP gas to the facility, which was located at an apartment complex. While the firemen were attempting to put out the fire...
WILLIAM MITCHELL LAW REVIEW

fire, it spread to the storage tank.\textsuperscript{53} This caused a BLEVE, a boiling liquid expanding vapor explosion, that resulted in the death of the three firemen.\textsuperscript{54} A wrongful death action was commenced against the owner of the apartment complex, the manufacturer and the installer of the LP gas tank, and the LP gas supplier.\textsuperscript{55} In their complaint, plaintiffs alleged negligence per se,\textsuperscript{56} based on alleged violations of state statutes, city fire ordinances, state fire marshall regulations and industry standards; strict products liability; and strict liability for abnormally dangerous activities.\textsuperscript{57} The trial court, relying on \textit{Shypulski v. Waldorf Paper Products Co.},\textsuperscript{58} granted summary judgment for the defendants and declined to rule upon the questions of strict liability for defective products and ultrahazardous instrumentalities.\textsuperscript{59} The supreme court affirmed the ruling of the trial court.\textsuperscript{60}

The facts of the case indicate that the fire and the resulting explosion were caused by the combined negligence of the defendants.\textsuperscript{61} The tank that exploded was an eleven-thousand-gallon storage tank that had been installed two years earlier at the Mailand apartment complex as a replacement for several smaller tanks.\textsuperscript{62} The tank required some modifications before it could be used at the apartment complex.\textsuperscript{63} The seller of the tank agreed to make the necessary changes for the installer.\textsuperscript{64} These modifications necessitated the installation of a different relief valve,\textsuperscript{65} but the seller failed to provide a new valve or to advise the installer to do so.\textsuperscript{66} The installer relied upon the seller's assurances and made no independent inspection of either the tank or the valve.\textsuperscript{67} When the tank was installed, it was housed in a wooden structure with a vaporizing unit

\textsuperscript{53.} \textit{Id.} at 347. When the firemen arrived, the fire was burning only near the delivery truck. One of the firemen attempted to shut off the flow of gas from the truck, but was unable to get near the truck. \textit{Id.} The fire burned through the line that carried the gas from the truck to the storage tank. Gas escaped, causing the fire to spread from the truck to the tank. \textit{Id.}

\textsuperscript{54.} \textit{Id.} Despite efforts by the firefighters to cool the LP gas tank down with water, the pressure in the tank continued to rise, causing an explosion, the force of which "was compared to the thrust of a Saturn rocket." \textit{Id.}

\textsuperscript{55.} \textit{Id.}

\textsuperscript{56.} \textit{Id.;} Appellant's Brief and Appendix at 45.

\textsuperscript{57.} See note 56 \textit{supra}.

\textsuperscript{58.} 232 Minn. 394, 45 N.W.2d 549 (1951); see notes 25-31 \textit{supra} and accompanying text.

\textsuperscript{59.} 284 N.W.2d at 347.

\textsuperscript{60.} \textit{Id.} at 346.

\textsuperscript{61.} \textit{Id.}

\textsuperscript{62.} \textit{Id.}

\textsuperscript{63.} \textit{Id.}

\textsuperscript{64.} \textit{Id.}

\textsuperscript{65.} \textit{Id.}

\textsuperscript{66.} \textit{Id.}

\textsuperscript{67.} \textit{Id.}
that used an open flame. No fire wall separated the tank from the unit as required by the fire code. On the night the explosion occurred, the driver of the gas delivery truck failed to connect a hose that was used to equalize the pressure between the truck and the storage tank. In addition, the driver sat inside the cab of the truck while the gas was being delivered rather than monitoring the flow of gas from outside the truck as company rules required. The meter on the truck that measured the flow of gas was improperly installed, and had a broken relief line that allowed gas to escape and accumulate near the meter and on the ground underneath it.

Despite evidence of negligence on the part of the defendants, the supreme court found that the risk of an LP gas explosion was among the risks of firefighting that the firemen assumed in the primary sense. The firemen were aware of the possibility that a BLEVE could occur whenever a fire occurred near an LP gas tank. There was evidence that they had received special training in fighting LP gas tank fires in response to the installation of the tank at the Mailand apartment complex. The court concluded that merely because the fire that caused the explosion might have been the result of hidden defects did not mean that the risk of the BLEVE itself was an unanticipated risk.

The fireman's rule, as redefined in terms of primary assumption of the risk in Armstrong, was expanded in Hannah v. Jensen. In Hannah, the court applied the fireman's rule to prevent an on-duty policeman from recovering from a bar owner under the Minnesota Liquor Liability (Dram Shop) Act. The policeman was called to the bar to subdue an

68. Id.
69. Id.
70. Id.
71. Id.
72. Id.
73. Id. at 352.
74. Id. at 347, 352-53.
75. Id.
76. Id. at 347.
77. See notes 107-12 infra and accompanying text.
78. 298 N.W.2d 52 (Minn. 1980).
79. Id. at 55. The current version of section 340.95 of the Minnesota Liquor Liability (Dram Shop) Act, which is substantially identical to the 1976 version, states:

Every husband, wife, child, parent, guardian, employer, or other person who is injured in person or in property, or means of support, by any intoxicated person, or by the intoxication of any person, has a right of action, in his own name, against any person who, by illegally selling or bartering intoxicating liquors, caused the intoxication of such person, for all damages, sustained; and all damages recovered by a minor under this section shall be paid either to such minor or to his parent, guardian, or next friend, as the court directs; and all suits for damages under this section shall be by civil action in any court of this state having jurisdiction thereof.

MINN. STAT. § 340.95 (1980).
intoxicated patron. While the policeman was escorting the patron outside, a fight broke out in which the policeman was injured. The trial court, applying Armstrong, held that although the Dram Shop Act imposed strict liability upon bar owners to members of the public for injuries caused by intoxicated persons to whom liquor had been sold illegally, policemen assumed, in the primary sense, the risks of such injury. The supreme court upheld the lower court's ruling, stating that the policeman could not recover under the Act because "[t]he risk of injury from [an intoxicated] person is an inherent part of police work, just as the danger of explosion is an inherent part of firefighting."

The court noted that had the Dram Shop Act imposed absolute liability rather than strict liability, the fireman's rule would not have been applied. The public policy reflected by a statute creating absolute liability would be so strong that the plaintiff's conduct would not be considered. The Hannah court found that the Dram Shop Act imposed only strict liability, and thus did not reflect a strong public policy in favor of absolute recovery. In addition, the court found a strong countervailing public policy consideration in the possibility that the imposition of liability would prevent bar owners from calling the police. The court felt that to impose liability under the circumstances would encourage the use of self-help measures and thereby create an additional risk to the public.

The Hannah decision was accompanied by a strong dissenting opinion. The dissent began by stating that the fireman's rule was "not a favorite principle of the law," and that its application should be strictly limited. In addition, the Minnesota court had previously interpreted the Dram Shop Act as warranting liberal application. Therefore, the court should not have applied the fireman's rule as a bar to an action brought by a policeman under the Dram Shop Act. The dissent was not persuaded by the majority's prediction that allowing recovery by policemen would inhibit bar owners from calling police in case of a disturbance. It stated: "In that dram shop insurance will most likely cover

80. 298 N.W.2d at 54.
81. Id.
82. Id.
83. Id.
84. Id.
85. Id.
86. Id.
87. Id. at 55.
88. Id.
89. Id. (Scott, J., dissenting).
90. Id.
91. Id.
92. Id. at 55, 56.
93. Id. at 56.
any damages sustained by a police officer, I find it difficult to believe that bar owners would compromise the physical well-being of their patrons and their establishments by failing to summon appropriate law enforcement authorities.94

In the most recent fireman's rule decision, Griffiths v. Lovelette Transfer Co.,95 the Minnesota Supreme Court clarified the rule and made it somewhat less restrictive. In Griffiths, a police officer who was directing traffic at the scene of an automobile accident was injured when a third car went off the road and caught a loose guide wire on its bumper, causing the power pole attached to the wire to whip around and knock the officer to the ground.96 The trial court concluded that officer Griffiths' claim was not barred by the fireman's rule because the risk of injury was not reasonably apparent to the officer.97 Three questions were certified to the supreme court. (1) Does the fireman's rule apply to police officers investigating an automobile accident? (2) Must the particular risk of injury be reasonably apparent to the police officer or must only a general risk be apparent? (3) Is the determination of whether the risk was reasonably apparent to be made by the court or the jury?98

In response to the first question, the supreme court cited the Hannah decision as authority for applying the fireman's rule to police officers who are investigating an accident as part of their police duties.99 As to the second question, the court held that firemen and policemen do not generally assume all risks that may occur while they are on duty, but that each situation encountered "may involve some risks which are anticipated and assumed and some which are unanticipated and therefore unassumed."100 The court stated that in each case the facts "must be examined to determine if the particular risk was either hidden from or unanticipated by the fireman or policeman and therefore not reasonably apparent to the officer."101 It upheld the trial court's finding that officer Griffiths could not anticipate and did not assume the risk of injury from the downed utility pole.102

Finally, the court held that the question of whether a particular risk is

94. Id.
95. 313 N.W.2d 602 (Minn. 1981).
96. Id. at 604.
97. Id.
98. Id. The trial court certified these questions as important and doubtful under Rule 103.03(i) of the Minnesota Rules of Civil Appellate Procedure.
99. 313 N.W.2d at 604. The legislature recently enacted a law that prohibits application of the fireman's rule to bar recovery in actions by policemen. See note 1 supra.
100. Id. at 605. For further discussion of splitting risks, see notes 165-80 infra and accompanying text.
101. 313 N.W.2d at 605. The court cautioned that this holding did not mean that the facts creating the risk must be known if the risk itself was apparent, an argument rejected in Armstrong. See id. at 605 n.2.
102. Id.
reasonably apparent to the plaintiff may be submitted to the jury in cases in which the court does not decide the question as a matter of law. In essence, the court said that, as in any motion for summary judgment, if no material issue of fact is presented the trial court may decide the issue as a matter of law and summary judgment may be granted, but if there is a factual dispute the question should be submitted to the jury in a special verdict.

In addition to answering the certified questions, the Griffiths court attempted to clarify the definition of primary assumption of the risk as it appeared in Armstrong v. Mailand. Noting that both pre- and post-Armstrong cases have confused primary and secondary assumption of the risk, the court stated that:

The basic premise underlying our decision in Armstrong is that the defendant owes a duty to the plaintiff and others. However, where the plaintiff is a policeman or a fireman the defendant may be relieved of that duty by reason of the nature of the work performed by policemen and firemen.

IV. THE MODERN FIREMAN'S RULE

The Armstrong decision discarded the outdated system of determining landowners' liability for firemen's injuries and replaced it with modern tort terminology. The old rule, based upon the fireman's status as a licensee or as sui generis, became the new fireman's rule, based upon the standard of reasonable care and assumption of the risk. When the theories underlying the old and new rules are examined more closely, however, this transformation proves to be less progressive than it may first appear.

Under the old classification system, a landowner's liability was determined by the degree of duty owed to the entrant according to the entrant's status as either a trespasser, licensee, or invitee. Similarly, the question of whether a plaintiff has primarily assumed the risk is actually a question of whether the defendant had any duty to protect the plaintiff

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103. Id. In so holding, the court rejected the defendant's argument that the issue presented was whether a duty existed and that the question of duty is always to be decided by the court. Id. It stated that a duty exists on the part of the defendant toward the plaintiff but that the defendant may be relieved of that duty because of the plaintiff's position as a police officer. This in turn raises the question of whether the risk was reasonably apparent to the officer and whether this question may be submitted to the jury if it cannot be decided as a matter of law by the court. Id.

104. Id.

105. Id.; see note 110 infra.

106. 313 N.W.2d at 605.

107. 284 N.W.2d at 353.

108. See id. at 348-49.
from injury.109 The Armstrong court noted the relationship between the classification of land entrants and primary assumption of the risk, stating: "the classification of a fireman as a 'licensee,' 'invitee,' or 'sui generis' is just another means of determining the extent to which a fireman primarily assumes the risk and thereby relieves the landowner of his duty to keep the premises in a safe condition."110 Just as the classification of firemen as licensees, or later as sui generis, substantially limited their right of recovery from negligent landowners, the doctrine of primary assumption of the risk acts as a bar to recovery by firemen from landowners except with respect to risks that are hidden or unanticipated.111

Despite the apparent similarity, in both the underlying legal theory and the result, between the old fireman's rule, based upon entrant classifications, and the new rule, based upon assumption of the risk, the Armstrong court viewed the change in focus to primary assumption of the risk as producing three important results:

First, it results in consistency with the policy set forth in Peterson v. Balach . . . of eliminating classifications of land entrants. Secondly, the change in focus facilitates application of the fireman's rule to defendants other than owners and possessors of land. A third aspect to the change in focus is a change in the substantive law. Presently, under Shypulski, a landowner is not liable to the fireman unless the landowner

109. See Griffiths v. Lovelette Transfer Co., 313 N.W.2d 602, 605 (Minn. 1981); notes 6-7 supra and accompanying text.

110. 284 N.W.2d at 348-49 (quoting Springrose v. Willmore, 292 Minn. 23, 192 N.W.2d 826 (1971)); see notes 119-43 infra and accompanying text. In Springrose, the court distinguished between primary and secondary assumption of the risk. See Springrose v. Willmore, 292 Minn. 23, 24, 192 N.W.2d 826, 827 (1971). Primary assumption of the risk was defined as "relating to the initial issue of whether a defendant was negligent at all—that is, whether the defendant had any duty to protect the plaintiff from a risk of harm. It is not therefore, an affirmative defense." Id. Secondary assumption of the risk, on the other hand, is an affirmative defense to be pled by the defendant. Id. A plaintiff assumes the risk in the secondary sense when he voluntarily encounters a known danger created by the defendant without relieving the defendant of his duty of care. See Armstrong v. Maidland, 284 N.W.2d 343, 349 (Minn. 1979). Primary assumption of the risk is still a complete bar to a plaintiff's right of recovery. Secondary assumption of the risk was merged with contributory negligence in Springrose; therefore, the plaintiff's negligence was apportioned with that of the defendant under the comparative negligence statute. See Springrose v. Willmore, 292 Minn. at 24-25, 192 N.W.2d at 827. Merging secondary assumption of the risk with contributory negligence meant that the plaintiff not only must voluntarily encounter the danger, but the assumption of the risk must be unreasonable in all circumstances. See Springrose v. Willmore, 292 Minn. at 24, 192 N.W.2d at 827. For a discussion of the historical relationship between contributory negligence and secondary assumption of the risk, see Steenson, The Anatomy of Products Liability: Principles of Tort Loss Allocation, 6 WM. MITCHELL L. REV. 243, 246-51 (1980). Professor Steenson concludes that "in post-Springrose negligence cases, the defenses of secondary assumption of the risk, misuse, and contributory negligence can be distilled to a single issue: did the plaintiff exercise reasonable care for his own safety?" Id. at 251.

111. 284 N.W.2d at 348.
knows of the hidden danger and negligently fails to warn the fireman of that danger. By concluding that the sui generis classification is abolished . . . and that landowners owe firemen a duty of reasonable care with respect to risks that are hidden or unanticipated by the firemen, it is obvious that the Shypulski requirement of knowledge of the danger by the landowner and of opportunity to warn would be eliminated . . . . Of course, a jury may still consider the landowner's knowledge and opportunity, or lack thereof, in determining negligence, but lack of knowledge and opportunity no longer bars recovery as a matter of law. 112

The Armstrong court acknowledged that the abolition of the fireman's status as sui generis left open the possibility of completely eliminating the fireman's rule. 113 As support for retaining the rule, it cited the 1977 California case, Walters v. Sloan, 114 and quoted the portion of the decision in which that court noted:

In recent years, the rule has been repeatedly attacked as being "behind the times," based on out-dated concepts of tort liability. However, the courts in this and other jurisdictions have answered the attacks, pointing out the rule is premised on sound public policy and is in accord with—if not compelled by—modern tort liability principles. . . .

While modernizing has brought the law of landowner liability into accord with current concepts of tort liability by eliminating formalistic categories—invitees, licensees, trespassers—the fireman's rule is not based on such categorizations. Under the old rule, all persons within its scope were denied recovery when injured when voluntarily confronting a known peril with full realization of the risk. The changes wrought by Rowland do not relate to the fireman's rule.

Rather, the fireman's rule is based on a principle as fundamental to our law today as it was centuries ago. The principle is not unique to landowner cases but is applicable to our entire system of justice—one who has knowingly and voluntarily confronted a hazard cannot recover for injuries sustained thereby. 115

To determine whether this rationale and the Minnesota court's decision to retain the fireman's rule in the form of primary assumption of the risk is sound, it is necessary first to discuss the doctrine of primary assumption of the risk itself, in light of its origins, its development, its later separation from the defense of secondary assumption of the risk, and its current status. In addition, because the actions in both Armstrong 116 and

112. Id.
113. See id. at 349.
115. Id. at 203, 571 P.2d at 611, 142 Cal. Rptr. at 154 (citations omitted), quoted in Armstrong v. Mailand, 284 N.W.2d 343, 349 (1979).
116. 284 N.W.2d at 347 (strict products liability and abnormally dangerous instrumentalities).
were based in whole or in part on strict liability, the application of primary assumption of the risk to strict liability, an area that is still unsettled, will be examined.

A. Development of Assumption of the Risk

Assumption of the risk is a term that at one time encompassed two distinct theories. The doctrine itself developed from the common-law master-servant cases in the mid-1800's. A master had a duty to provide only a reasonably safe workplace, and had no duty to guard against other inherent risks of employment. These latter inherent risks were held to have been assumed by experienced workmen. A servant could prevail against the master only if he could prove that the master had breached his duty to maintain a reasonably safe workplace. Even if the servant met this burden, the master could still assert an affirmative defense by proving that the servant had voluntarily exposed himself to the risks caused by the master's negligence.

In these early cases, the two separate theories were given one label, assumption of the risk. The first theory, under which the defendant owed no duty, became known as primary assumption of the risk. Primary assumption of the risk is not an affirmative defense. It arises when: (1) a voluntary relationship exists between the parties; (2) the plaintiff assumes the risks incidental to the relationship; (3) the defendant is thereby relieved of a duty to the plaintiff; and (4) the reasonableness of the plaintiff's conduct is irrelevant. The plaintiff has the burden of proving that the risk was not assumed under the relationship. Primary assumption of the risk does not turn on the reasonableness of the plaintiff's conduct, but depends upon whether the defendant's conduct is within the scope of the risk that the plaintiff assumed.

117. 298 N.W.2d at 54 (statutory imposition of strict liability).
118. See Steenson, supra note 110, at 258 n.82.
120. See id.; V. SCHWARTZ, COMPARATIVE NEGLIGENCE § 9.1, at 155 (1974); Note, Contributory Negligence and Assumption of Risk—The Case for Their Merger, 56 MINN. L. REV. 47, 48, 50 (1971). In Canbell v. Railway Transfer Co., 95 Minn. 375, 104 N.W. 547, (1905), the court held that assumption of the risk applied only when the defendant was the employer of the injured party. Id. at 381, 104 N.W. at 554.
122. Id.
123. Id.
124. Id.
125. Id.
126. See Note, supra note 120, at 49.
127. See id.
128. See id.
129. See id. at 50.
The second theory was known as secondary assumption of the risk.130 Secondary assumption of the risk was an affirmative defense, which the defendant had the burden of pleading and proving.131 Under this theory, the defendant may have had a duty to the plaintiff, but by voluntarily encountering the risk created by the defendant’s breach of duty, the plaintiff relieves the defendant of liability and assumes the risk.132 The plaintiff may have acted reasonably or unreasonably and still have assumed the risk.133

Much confusion resulted from giving one label—assumption of the risk—to two distinct theories, one focusing upon the defendant’s duty to the plaintiff and the other upon the plaintiff’s conduct in encountering the risk.134 This confusion was compounded by the similarity between secondary assumption of the risk and the separate defense of contributory negligence.135 Both secondary assumption of the risk and contributory negligence focused on the plaintiff’s conduct,136 but they were viewed as separate defenses because “secondary assumption of the risk rested upon plaintiff’s voluntary consent to take his chances, while contributory negligence rested upon plaintiff’s failure to exercise the care of a reasonable man for his own protection.”137 When the plaintiff’s voluntary assumption of the risk was unreasonable, however, the two defenses overlapped, and the distinction between them became meaningless.138

The New Jersey Supreme Court chose to avoid this confusion by combining secondary assumption of the risk with contributory negligence,
treating both under the standard of reasonableness. It stated:

[W]e think it is clear that assumption of the risk in its secondary sense is a mere phase of contributory negligence, the total issue being whether a reasonably prudent man in the exercise of due care (a) would have incurred the known risk and (b) if he would, whether such a person in light of all of the circumstances including the appreciated risk would have conducted himself in the manner in which plaintiff acted.

The theory of primary assumption of the risk was retained and was phrased in terms of the defendant’s negligence. If the defendant owed no duty there was no negligence. The plaintiff assumed only those risks against which the defendant owed no duty to protect the plaintiff. The plaintiff could therefore recover for those risks as to which defendant had a duty that was negligently breached, unless the defendant proved that the plaintiff was contributorily negligent.

In Minnesota, primary and secondary assumption of the risk and contributory negligence remained separate theories for many years. If successfully pleaded, they acted as a complete bar to a plaintiff’s recovery. In 1969, the Minnesota Legislature enacted a comparative negligence statute, under which contributory negligence was not a bar to recovery unless the plaintiff’s negligence was equal to or greater than the defendant’s. The statute did not refer to assumption of the risk, leaving open the question of whether assumption of the risk remained a complete defense. In 1971, the Minnesota Supreme Court followed the
lead of the New Jersey court and merged secondary assumption of the risk with contributory negligence under the comparative negligence statute. This merger meant that a plaintiff's voluntary and unreasonable confrontation of a risk would be compared with the negligence of the defendant to determine fault. In 1978, the Minnesota Legislature rewrote the comparative negligence statute in terms of comparative fault. The statute defines fault as:

> [A]cts or omissions that are in any measure negligent or reckless toward the person or property of the actor or others, or that subject a person to strict tort liability. The term also includes breach of warranty, unreasonable assumption of risk not constituting an express consent, misuse of a product and unreasonable failure to avoid an injury or to mitigate damages. Legal requirements of causal relation apply both to fault as the basis for liability and to contributory fault.

Primary assumption of the risk was not merged and therefore remains a separate theory. If the defendant is relieved of a duty to the plaintiff, primary assumption of the risk remains a complete bar to recovery.

**B. Assumption of the Risk and the Fireman's Rule**

Although primary assumption of the risk remains a complete bar to recovery, it has rarely been applied except in cases involving licensees entering upon land or patrons of sporting events that are considered inherently dangerous. The Minnesota court nevertheless found that a fireman's rule based upon primary assumption of the risk was "in accord with—if not compelled by—modern tort principles.

In distinguishing primary from secondary assumption of the risk in the context of the fireman's rule, the court quoted the New Jersey Supreme Court:

> The rationale of the prevailing rule is sometimes stated in terms of "assumption of risk," used doubtless in the so-called "primary" sense of the term and meaning that the defendant did not breach a duty owed, rather than that the fireman was guilty of contributory fault in re-

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148. Springrose v. Willmore, 292 Minn. 23, 192 N.W.2d 826 (1971); see note 110 supra and accompanying text.
151. MINN. STAT. § 604.01(la) (1980).
153. See id.; Steenson, supra note 110, at 246-51; Note, supra note 120, at 49.
155. See id.; Steenson, supra note 110, at 246-51; Note, supra note 102, at 49.
spending to his public duty. 157

The court's application of primary assumption of the risk to firemen and policemen raises several questions. First, the court seems to assume that a fireman's assumption of the risk is voluntary, since nowhere does it discuss that aspect of primary assumption of the risk. 158 The voluntariness of a fireman's or a policeman's conduct is questionable in light of the nature of their employment. Firemen and policemen have a legal and moral duty to the community to protect lives and property from harm. 159 While it is true that they initially accept employment voluntarily, firemen and policemen are not allowed to pick and choose among the dangers that they are willing to face. The obligation to fight fires and to respond to police calls without regard to personal safety benefits society by assuring that reliable, professionally-trained public servants are available.

One court, in determining that a highway patrolman had not assumed the risk of injury incurred while clearing a highway of obstructions, noted:

The evidence justifies the conclusion that the plaintiff did not voluntarily accept the risk in question. He was under an obligation to clear the highway of obstructions. His choice, being dictated by a legal and moral duty, was not voluntary within the requirements of the doctrine. 160

This holding is consistent with the principle, known as the rescue doctrine, that "those who dash in to save their own property, or the lives or property of others, from a peril created by the defendant's negligence, do not assume the risk where the alternative is to allow the threatened harm to occur." 161 The rescue doctrine appears to be based upon two grounds: one, that the plaintiff may have no reasonable alternative to assuming the risk, 162 and two, that the ordinary person will assume a greater risk to rescue persons or property, and that one who creates the need for rescue.

157. Id. at 348 (quoting Krauth v. Geller, 31 N.J. 270, 273, 157 A.2d 129, 130 (1960)).
158. Assumption of the risk must be voluntary. See Bakhos v. Driver, 275 N.W.2d 594 (Minn. 1979); Seidl v. Trollhaugen, 305 Minn. 906, 232 N.W.2d 236 (1975); Donald v. Moses, 254 Minn. 186, 94 N.W.2d 253 (1959); Note, supra note 120, at 48-49.
160. Id. at 545, 6 Cal. Rptr. at 70.
161. W. Prosser, supra note 6, § 68, at 451; see Schroeder v. Jesco, 296 Minn. 447, 209 N.W.2d 414 (1973) (defendant must leave plaintiff reasonable alternative); Parness v. Economics Laboratory, Inc., 284 Minn. 381, 170 N.W.2d 554 (1969) (must be safe alternate course of conduct); Stephenson v. F.W. Woolworth Co., 277 Minn. 190, 152 N.W.2d 138 (1967); Cogswell v. U.S.S. Yorktown Post 178, V.F.W., 274 Minn. 154, 143 N.W.2d 45 (1966) (no assumption of risk where plaintiff has no choice but hazardous route).
162. See W. Prosser, supra note 6, § 68, at 451; cases cited at note 161 supra. The Restatement sets out the following standards for voluntary assumption of the risk:
   (1) A plaintiff does not assume a risk of harm unless he voluntarily accepts the risk.
   (2) The plaintiff's acceptance of a risk is not voluntary if the defendant's
should foresee that another may be injured while responding to that need.\textsuperscript{163} In either case, the doctrine of assumption of the risk should not bar the plaintiff from recovery.\textsuperscript{164}

A second question that was raised by the \textit{Armstrong} decision and was answered in \textit{Griffiths} is whether policemen or firemen assume all risks encountered in the course of their duties. In \textit{Armstrong}, the court found that because the firemen had received training in fighting LP gas fires, they knowingly assumed the risk that the tank on the Mailand property would explode.\textsuperscript{165} In the court's view, the fact that the tank had hidden defects that increased the likelihood of a BLEVE did not make the risk an unanticipated one.\textsuperscript{166}

In two prior decisions not involving police officers or firemen, \textit{Wege}scheider v. Plastics, Inc.\textsuperscript{167} and \textit{Bigham v. J.C. Penney Co.},\textsuperscript{168} the Minnesota court was willing to separate the risks involved and to find that while the plaintiffs may have assumed one risk, they were not barred from recovery for a hidden or unknown risk, even if both the assumed and the unassumed risks contributed to their injuries. In \textit{Bigham}, a Northern States Power Company lineman was injured when a "flashover" occurred while he was repairing an NSP substation.\textsuperscript{169} His injuries were aggravated when the work clothes he was wearing ignited and produced a "melt and cling" effect.\textsuperscript{170} The court held that the plaintiff had assumed the risk of

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\textbf{tortious conduct has left him no reasonable alternative course of conduct in order to}

(a) avert harm to himself or another, or

(b) exercise or protect a right or privilege of which the defendant has no right to deprive him.

\textbf{Restatement (Second) of Torts § 496E (1965).}


The \textit{Restatement} gives the following illustrations of the rescue doctrine:

2. A Railroad negligently sets a fire on its right of way, which burns toward B's house. In order to save the house B attempts to extinguish the fire, although he knows that there is a risk that he may be burned in doing so. B does not assume the risk.

3. A Railroad is negligent in failing to give warning of the approach of its train to a crossing, and thereby endangers B, a blind man who is about to cross. C, a bystander, in a reasonable effort to save B, rushes onto the track to push B out of danger. Although C acts as carefully as possible, he is struck and injured by the train. C does not assume the risk.

\textbf{Restatement (Second) of Torts § 496E, Comment c, at 577-78 (1965).}

164. See W. Prosser, supra note 6, § 68, at 451.

165. 284 N.W.2d at 352-53.

166. \textit{Id.} at 353.

167. 289 N.W.2d 167 (Minn. 1980).

168. 268 N.W.2d 892 (Minn. 1978).

169. \textit{Id.} at 894.

170. \textit{Id.} at 895.
the "flashover" because he could anticipate encountering that risk during the course of his employment. The court, however, found that he had not assumed the risk of the clothes' flammability, of which he had not been warned and had no knowledge.\textsuperscript{171} Because the plaintiff had assumed his employment risks, NSP was not liable to him for his injuries,\textsuperscript{172} but since he was found not to assume the risk of injury from the melting of the work clothes, he was allowed to recover from the clothes' manufacturer.\textsuperscript{173}

In \textit{Wegscheider}, the plaintiff, a truck driver, was injured while hoisting equipment to the top of a tanker truck.\textsuperscript{174} The driver lost his balance and fell from the truck when the rope he was using to lift the equipment was severed by jagged material on the side of the tanker.\textsuperscript{175} He sued on grounds of strict liability and negligence.\textsuperscript{176} The court held that although the plaintiff was aware of a general risk of injury from a fall from a tanker-trailer, he did not assume the risk of a hidden defect on the particular trailer on which he was injured.\textsuperscript{177}

The question of whether the court would allow risk-splitting in fireman's rule cases was answered in \textit{Griffiths}.\textsuperscript{178} Citing \textit{Bigham} and \textit{Wegscheider}, the court stated:

\begin{quote}
[F]iremen and policemen do not, by accepting dangerous employment, generally assume all risk that may occur. Rather, each situation encountered may involve risks which are anticipated and assumed and some which are unanticipated and therefore unassumed.\textsuperscript{179}
\end{quote}

In \textit{Griffiths}, the court found that the risk of being knocked down by a utility pole that flew into the air when the guide wire caught on the bumper of a car was not one assumed by the police officer.\textsuperscript{180} Presumably the officer did assume other potential risks while investigating the accident scene.

The court distinguished the facts in \textit{Griffiths} from the situation in \textit{Armstrong}, in which the facts underlying the risk of the BLEVE were hidden but the risk of the explosion itself was known to the firemen.\textsuperscript{181} In \textit{Griffiths}, the facts that gave rise to the risk were known because the wire and

\begin{footnotes}
\item[171.] \textit{Id.} at 895-96.
\item[172.] \textit{Id.} at 898-99. The court found that assumption of the risk acted as a complete bar to recovery because the cause of action arose prior to \textit{Springrose}. \textit{See id.} at 899. This is confusing because \textit{Springrose} changed the result only as to secondary assumption of the risk, and the facts of \textit{Bigham} seem to indicate that the lineman primarily assumed the risks of his employment.
\item[173.] \textit{See id.} at 896-99; note 110 supra.
\item[174.] \textit{See} 289 N.W.2d at 169.
\item[175.] \textit{See id.}
\item[176.] \textit{See id.}
\item[177.] \textit{See id.} at 170.
\item[178.] \textit{See} 313 N.W.2d 602 (Minn. 1981).
\item[179.] \textit{Id.} at 605.
\item[180.] \textit{Id.}
\item[181.] \textit{Id.}
\end{footnotes}
the attached pole were in plain view, but the risk itself was not foreseeable. The court apparently rejected the defendant’s argument that a risk must be hidden to be unanticipated. The court pointed to the language of *Armstrong* that states that firemen do not assume risks that are hidden or unanticipated, thereby emphasizing its intent to create two exceptions to the fireman’s rule, not one.182

A third and more general question raised by the fireman’s rule decisions is whether the rule is supported by public policy.183 Although the Minnesota court has not discussed specifically the various considerations that might support the rule, other writers have set forth certain policies that have influenced courts to adopt the rule. These considerations include the burden on landowners, the need to spread the risk of loss to the public, and the possible increase in litigation.184

The first consideration—the burden that imposition of liability would place on landowners—ignores the basic tort principle that negligent persons are liable to whom injury is foreseeable.185 Any burden of liability should fall upon only those landowners who were in fact negligent in causing a fire.186 The fireman’s rule, by allowing negligent persons to escape liability, does not encourage the public to use care in maintaining property and to avoid carelessly starting fires.187 The rule has been criticized on the ground that “[a]ny rule of law that fails to promote vigilance but instead exempts persons responsible should be questioned.”188

The second consideration—the need to spread the loss from fire to the public by compensating injured firemen out of public funds—can be criticized on grounds similar to those discussed above. The weaknesses in the loss-spreading rationale have been stated as follows:

First, the doctrine forces the public to underwrite tortfeasors. This contravenes basic principles of negligence which place the loss with the cause. Secondly, the argument ignores the role of insurance. It is the business of insurance to accept risks in return for payment. Placing the risk of injury to firemen with the fire insurer would obviously have the effect of passing on the additional costs to those insured. The ultimate effect of such allocation of risk is spreading it, but spreading it among

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182. *Id.* at 604-05.
183. *See Comment, supra* note 163, at 887. The California Supreme Court stated in *Rowland v. Christian*, 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968), that exceptions should not be made to the general rule that persons must use reasonable care to avoid injury to others unless “clearly supported by public policy.” *Id.* at 112, 443 P.2d at 564, 70 Cal. Rptr. at 100.
184. *See Comment, supra* note 163, at 886.
186. *See Comment, supra* note 163, at 888-89.
188. *Id.*
those who are deserved of the burden. 189

The policy of denying recovery to firemen because of the availability of public funds for compensation seems particularly unfair when firemen and policemen are compared with other employees. 190 In all cases, the funds may be inadequate to compensate fully for injuries. Although their job risks may be considerably greater than those of the average worker, firemen and policemen are unable to bring an action against negligent third parties for uncompensated damages. 191

The third consideration—the fear that allowing injured firemen and policemen to bring an action against any person whose negligence causes the injury would result in a flood of litigation—is also invalid. It violates the basic principle of our legal system that no one should be denied the opportunity to protect personal rights simply to avoid problems of judicial administration. 192 It has also been noted that the predicted increase in litigation would probably not materialize because minor injuries would be covered by workers’ compensation; thus, actions would be brought only for damages above the amount not compensated by public funds. 193

The retention of the fireman’s rule is not only unsupported by public policy, but contravenes it by denying a right of recovery to injured firemen and policemen, who perform a considerable public service. Negligent persons, whose actions could endanger not only policemen and firemen but the entire community, are exonerated. The Minnesota Supreme Court in Armstrong, Hannah, and Griffiths failed to provide any reasons for retaining the fireman’s rule.

189. Id. at 133; see Court v. Grzelinski, 72 Ill. 2d 141, 150, 379 N.E.2d 281, 284-85 (1978); Comment, An Examination of the California Fireman’s Rule, supra note 10, at 671-72; Comment, supra note 163, at 889.

The Rowland court dismissed the argument that the imposition of liability on landowners would decrease the availability of insurance and increase its cost, pointing to the lack of evidence in support of that prediction. See Rowland v. Christian, 69 Cal. 2d 108, 118, 443 P.2d 561, 567, 70 Cal. Rptr. 97, 103-04 (1968).

190. See Comment, supra note 163, at 887-88.

191. Id.

192. See Court v. Grzelinski, 72 Ill. 2d 141, 379 N.E.2d 281 (1978), in which the California court’s use of this justification was criticized as follows:

California would also preclude recovery by firemen because of the potential problems and lengthy trials that might arise with the need for a judicial determination on the cause of a fire. We find this policy consideration unpersuasive for two reasons. First, Illinois law requires that every fire, by which property has been destroyed or damaged, be investigated as to its cause, origin and circumstances. . . . More importantly, courts may not compromise their basic responsibility to decide the merits of each case merely because it would be administratively convenient to sweep away a class of plaintiffs whose claims may be difficult to adjudicate.

Id. at 150, 379 N.E.2d at 285; see Comment, supra note 163, at 888 & n.59.

193. See Comment, supra note 163, at 888.

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C. Assumption of the Risk and Strict Liability

Any discussion of policy considerations applies with equal or greater strength to the use of the fireman’s rule as a complete bar to recovery against persons other than landowners who are strictly liable for injuries incurred by firemen or policemen.194 Although the use of common-law defenses in actions based upon strict liability has been the subject of much discussion,195 it is clear that in Minnesota the plaintiff’s fault may be compared with that of the defendant in a strict liability action.196 The definition of fault under the comparative fault statute now expressly includes acts that subject a person to strict tort liability and the defenses of unreasonable assumption of the risk, “misuse of a product and unreasonable failure to avoid an injury.”197

The doctrine of primary assumption of the risk, which acts as a complete bar to recovery, has never been applied to a strict liability action in Minnesota, although an analogous theory exists in strict liability cases.198 Courts have allowed a plaintiff’s conduct in “deliberately encountering a known and obvious risk”199 to bar recovery for injuries from a defective product.200 This theory, known as the latent-patent rule or the Campo doctrine,201 has been severely criticized as contrary to underlying social and economic policies of products liability law because it allows the manufacturer of a defective product to avoid liability completely.202 Like primary assumption of the risk, the latent-patent rule is not an affirmative defense.203 The plaintiff must prove that the dangerousness of the product was not obvious.204 Like primary assumption of the risk, the latent-patent doctrine acts as a complete bar to recovery despite the existence of a comparative negligence statute.205

Despite the controversy over the use of the latent-patent doctrine in strict liability actions, the Minnesota court found that the similar doctrine of primary assumption of the risk may be used to bar recovery on

196. See Busch v. Busch Constr., Inc., 262 N.W.2d 377 (Minn. 1977); Magnuson v. Rupp Mfg., Inc., 285 Minn. 32, 171 N.W.2d 201 (1969); Steenson, supra note 110, at 257-60.
197. MINN. STAT. § 604.01(1a) (1980).
199. Park v. Allis-Chalmers Corp., 289 N.W.2d 456, 460 (Minn. 1980).
201. See Campo v. Scofield, 301 N.Y. 468, 95 N.E.2d 802 (1950); Comment, supra note 198, at 243.
203. See id. at 253.
204. See id. at 253-54.
205. See id. at 254.
the strict liability claims in both Armstrong and Hannah. In Armstrong, assumption of the risk was held to bar the plaintiffs from recovering, not only against the owner of the property on which the fire occurred, but against the manufacturer and the installer of the defective gas tank and the gas supplier. In Hannah, the action of the plaintiff, a policeman, was barred by assumption of the risk even though the statute under which the action was brought imposed strict liability on the defendant. In neither case did the court discuss the significance of the application of a total defense to strict liability actions, nor did the court offer sufficient justification or explanation for the extension. The court simply stated that the policies underlying strict liability were not so strong that a plaintiff could not "implicitly or expressly, manifest his consent to relieve the defendant of his duty." In Hannah, the court noted that had the Dram Shop Act imposed absolute liability, the fireman's rule would not have applied.

By failing to discuss fully the impact of assumption of the risk on strict liability, the court ignored the fact that allowing a defendant completely to avoid liability for injuries, particularly those caused by defective products, contravened the basic policies that strict products liability was designed to enforce. Strict liability is imposed upon manufacturers because of their superior ability to spread the risk of loss and because the law encourages the manufacture of safe products. An anomalous situation is created when the manufacturer can avoid liability. This unfair result has been explained as follows:

When the assumption of risk defense is allowed, the plaintiff is required to bear the entire cost of his injury, while the defendant is exonerated despite marketing a dangerously defective product. The cost of the injuries, therefore, is not spread to the users and consumers of the product and the seller's superior risk-bearing capabilities are not utilized. In addition to being contrary to the policies of strict liability, this result is also unfair to the plaintiff who suffers the injury, especially if his culpability is relatively inconsequential when compared with the injury caused by the defective product. The result of invoking the assumption of risk defense in employment accident cases is even harsher. The plaintiff-employee has little choice but to work with the defective machinery, yet if he becomes aware of the defect he often is barred from recovery. The assumption of risk defense is thus contrary to the

206. 284 N.W.2d 343, 352-53 (Minn. 1979).
207. 298 N.W.2d 52, 54 (Minn. 1980).
208. See 284 N.W.2d at 352-53.
209. See 298 N.W.2d at 54.
210. 284 N.W.2d at 352; see 298 N.W.2d at 54.
211. See 298 N.W.2d at 54.
212. See Note, supra note 195, at 239; Comment, supra note 198. The authors make this point in relation to contributory fault. The result is even more harsh when assumption of the risk acts as a complete bar to recovery.
213. Note, supra note 195, at 239.
spirit of the strict liability theory.\textsuperscript{214} In addition to failing to recognize the strong policy considerations underlying the imposition of strict liability on manufacturers, the \textit{Armstrong} court apparently ignored the requirement that to find that a plaintiff assumed the risk in a particular situation, a voluntary relationship, either express or implied, must exist between the plaintiff and the defendant.\textsuperscript{215} While such a relationship may arguably exist between firemen and the owners of property for whose protection the firemen were employed, it is considerably more difficult to imply a voluntary relationship between firemen and the manufacturer or the installer of a defective product that the firemen happened to encounter. The court made no attempt to find such a relationship, but simply leapt from an application of the doctrine to one defendant to an application to all defendants.\textsuperscript{216}

In a similar case, the Illinois Supreme Court declined to extend the fireman's rule to a manufacturer and an installer of a defective product.\textsuperscript{217} In \textit{Court v. Grzelinski},\textsuperscript{218} the plaintiff, a fireman, was injured while fighting a fire that had erupted in an automobile. An explosion ignited gasoline and caused it to shoot up from the car onto the plaintiff.\textsuperscript{219} The firemen brought an action against the manufacturer of the gas tank and the used car dealer who had installed the tank in the car.\textsuperscript{220} He alleged that the tank was defective and that the dealer had installed it in a defective manner.\textsuperscript{221} In refusing to allow the fireman's rule to bar recovery against the defendants, the court noted that the fireman's rule was based upon certain policy considerations\textsuperscript{222} limiting the liability of landowners.\textsuperscript{223} It stated:

\begin{quote}
Defendants attempt to extend the "fireman's rule" beyond its limited context of landowner/occupier liability. The rule cannot be extended to a free-floating proposition that a fireman cannot recover for injuries resulting from risks inherently involved in fire fighting. To do so would be tantamount to imposing the doctrine of assumption of risk onto the occupation of fire fighting and would be directly contrary to the limited concept of assumption of risk in Illinois. In negligence actions, assumption of risk is confined to those situations involving persons who have a contractual or employment relationship with the defendant. In products liability actions such as this, assumption of risk is a bar to recovery only if the plaintiff is aware of the product defect and voluntarily proceeds in disregard to the known danger. In either case, assump-
\end{quote}

\textsuperscript{214} \textit{Id.} at 242-44.
\textsuperscript{215} See text accompanying note 127 \textit{supra}.
\textsuperscript{216} See 284 N.W.2d at 352-53.
\textsuperscript{217} \textit{Court v. Grzelinski}, 72 Ill. 2d 141, 379 N.E.2d 281 (1978).
\textsuperscript{218} \textit{Id}.
\textsuperscript{219} \textit{Id.} at 145, 379 N.E.2d at 289.
\textsuperscript{220} \textit{Id}.
\textsuperscript{221} \textit{Id}.
\textsuperscript{222} See \textit{id.} at 148, 379 N.E.2d at 283-84; notes 161-93 \textit{supra} and accompanying text.

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tion of risk is an affirmative defense interposed against a plaintiff who voluntarily exposes himself to a specific, known risk, not a preclusion of recovery against a plaintiff whose occupation inherently involves general risks of injury.\footnote{224}

The majority opinion in \textit{Court} was accompanied by a lengthy dissent\footnote{225} in which the fireman’s rule was defined as a limitation on the duty owed to firemen by all persons, not just landowners and occupiers.\footnote{226} It pointed out that the majority opinion, if taken to its extreme, would give the following result:

The majority appears to be willing to apply the fireman’s rule only in the “limited context of landowner/occupier liability.” This implies that the majority would not permit a fireman to recover for injuries he receives in extinguishing a fire in my automobile which I negligently caused by pouring gasoline on the hot manifold if the automobile is parked in my driveway, but that he would be permitted to recover if my automobile is parked in the street. This appears to me not only to be extremely illogical but also to possibly present some constitutional questions.\footnote{227} The result is not illogical, however, if the landowner and occupier classifications are viewed as relevant only to injuries resulting from the negligent use or maintenance of land.\footnote{228} If viewed in such a manner, the fireman’s injuries in \textit{Court}, which resulted from personal, affirmative negligence of the defendants, would not be limited by the classification system whether they occurred on or off the defendant’s property, but instead would be determined by ordinary negligence standards.\footnote{229}

The dissent focused on the question of whether the particular danger was one that firemen would anticipate in performing their firefighting duties.\footnote{230} It concluded that a gasoline explosion could be foreseen when an automobile was on fire.\footnote{231} In addition, the dissent asserted that firemen were not among those persons entitled to protection under the theory of strict liability.\footnote{232} This conclusion was based upon the minority’s view that firemen were not “individuals to whom injury from a defective product may reasonably be foreseen.”\footnote{233}

The dissent’s challenge to the imposition of strict products liability on the basis of foreseeability in \textit{Court} may be valid in view of the facts of the case. In \textit{Court}, the defendants manufactured and installed a defective

\footnotesize{\begin{itemize}
\item[224.] \textit{Id}.
\item[225.] \textit{Id.} at 151, 379 N.E.2d at 285 (Ryan, J., dissenting).
\item[226.] \textit{Id.} at 152, 379 N.E.2d at 286 (Ryan, J., dissenting).
\item[227.] \textit{Id.} at 152-53, 379 N.E.2d at 286 (Ryan, J., dissenting).
\item[228.] \textit{See} Maldondo v. Jack M. Berry Grove Corp., 351 So. 2d 967 (Fla. 1977).
\item[229.] \textit{See} \textit{Court} v. Grzelinski, 72 Ill. 2d 141, 149, 379 N.E.2d 281, 284 (1978).
\item[230.] \textit{See id.} at 155, 379 N.E.2d at 287 (Ryan, J., dissenting).
\item[231.] \textit{See id.} (Ryan, J., dissenting).
\item[232.] \textit{See id.} at 156, 379 N.E.2d at 287-88 (Ryan, J., dissenting).
\item[233.] \textit{Id.} at 157, 379 N.E.2d at 288 (Ryan, J., dissenting).
\end{itemize}
Harm to firemen from a defective automobile may be less foreseeable than harm to the car owner or passengers. The lack of foreseeability in one case, however, does not justify a denial of recovery to firemen in all cases involving defective products. An analogy may be made to bystander cases in which liability for a defective product has been extended beyond purchasers and users to other parties injured by the defect. Bystanders to whom injury was foreseeable have been found to be entitled to greater protection than consumers because the bystanders were unable to control the purchase or to inspect the product.

This rationale can easily be applied to the facts in Armstrong. Although the court in that case did not discuss the question of foreseeability from the perspective of the defendants, it found that, from the plaintiff's point of view, the risk of an explosion of an LP gas tank was readily apparent. From this determination, it seems obvious that the risk of an explosion is reasonably foreseeable because LP gas tanks are often installed on private property, which policemen could be summoned to protect.

In light of the strong public policy favoring recovery in products liability cases, the foreseeability of harm to the plaintiff firemen, and the generally harsh result of allowing a total defense, the court should not have extended the fireman's rule to bar recovery against the manufacturer and installer in Armstrong. The same criticism can be applied to the holding in Hannah v. Jensen, in which a statute reflected public policy favoring the imposition of strict liability.

V. CONCLUSION

In Armstrong v. Mailand, the Minnesota Supreme Court revamped the fireman's rule by explaining it in terms of primary assumption of the risk rather than the outdated law relating to landowners' liability. The rule has since been expanded to include policemen, and has been somewhat more liberally construed to allow for a case-by-case determination of the application of the rule, the separation of assumed and unassumed risk in each situation, and the opportunity for firemen and policemen in certain circumstances to present their cases to a jury. Unfortunately, ad-

234. Id. at 146, 379 N.E.2d at 282.
236. Id. at 586, 451 P.2d at 89, 75 Cal. Rptr. at 657.
237. 284 N.W.2d 343 (Minn. 1980).
238. Id. at 352-53.
239. The legislature has since determined that the rule should not be applied to policemen. See note 1 supra. There does not appear to be any reason to distinguish between policemen and firemen in the application of the rule. It is likely that firemen will either request the legislature to amend the law to include all public employees, thus abrogating the rule completely, or bring an action to challenge the law on equal protection grounds.
equate attention has not been given in these recent cases to the issue of whether the rule should be retained in any form or to the many countervailing policies that support recovery of damages by policemen and firemen for injuries negligently caused by third parties. It is hoped that trial courts will take advantage of the holding in *Griffiths* by allowing plaintiffs in fireman’s rule cases to present their claims to the jury instead of granting summary judgment. In that way the community served by the policemen and firemen can determine whether the injured officers should be allowed to recover for injuries caused by members of the public.