TORTS—A POLICEMAN OR FIREMAN CANNOT RECOVER DAMAGES FOR PERSONAL INJURIES RECEIVED WHEN THE NEGLIGENT ACT THAT CREATED THE NEED FOR THE OFFICER'S PRESENCE IS ALSO THE DIRECT CAUSE OF HIS INJURY.—*Pottebaum v. Hinds* (Iowa 1984).

Two policemen, Pottebaum and Post, brought a dram shop action[1] against the owner of a tavern, Kent Larson, seeking compensation for injuries inflicted by an intoxicated patron in the course of the officers' attempt to restore order at Larson's tavern.[2] Their petition alleged that the defendant tavern owner had served a patron, Thomas E. Hinds, beer and liquor to the point of intoxication and beyond, in contravention of the Iowa Dram Shop Act.[3] In his answer and motion for judgment on the pleadings, the defendant asserted that the fireman's rule precluded the policemen from recovering for their injuries.[4] The trial court overruled defendant Larson's motion on the grounds that Iowa had not adopted the fireman's rule, and, accordingly, had never allowed it as a defense to a dram shop action.[5] On interlocutory appeal[6] the Iowa Supreme Court *held*, reversed.[7] Iowa adopts the fireman's rule, whereby an officer may not recover damages for personal injuries received when the negligent act that created the need for the officer's presence is also the direct cause of his injury.[8] *Pottebaum v. Hinds*, 347 N.W.2d 642 (Iowa 1984).

The *Pottebaum* decision is narrow in its scope and does not function as an absolute bar to a public safety officer's recovering damages for all negligent activities on the part of the person creating the need for his assistance.[9] For example, the fireman's rule does not bar liability for negligent acts performed after the officer has arrived on the scene.[10] Furthermore, a defendant

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1. IOWA CODE § 123.92 (1983).

2. Pottebaum v. Hinds, 347 N.W.2d 642 (Iowa 1984). The case reveals little of the actual events beyond the fact that the plaintiffs were assaulted at defendant Larson's Naked Zoo Tavern by an intoxicated patron, Hinds, on or about July 2, 1982. Pottebaum v. Hinds, No. 88313 (D. Iowa filed Nov. 5, 1982)(motion for judgment on pleadings).

3. *Id.* at 643. The intoxicated patron was sued in a separate division of the plaintiffs' petition and was not involved in this appeal or holding. *Id.*

4. *Id.*

5. *Id.*

6. *See* Defendant-Appellant's Brief and Argument, Pottebaum v. Hinds, 347 N.W.2d 642 (Iowa 1984).

7. Pottebaum v. Hinds, 347 N.W.2d at 648.

8. *Id.* at 643, 646.

9. *Id.* at 646.

10. *Id. See, e.g.*, Lipson v. Superior Court, 31 Cal. 3d 362, _, 644 P.2d 822, 826, 182 Cal. Rptr. 629, 633 (1982)(fireman's rule does not shield independent acts of misconduct unrelated to cause of officer's presence); Griffeths v. Lovelette Transfer Co., 313 N.W.2d 602, 604-05 (Minn. 1981)(firemen and policemen do not assume all risks that may arise once they have

can be held liable for a failure to warn of a known, hidden peril on his premises, and for misrepresenting the nature of a hazard of which he has, or should have, special knowledge.[11]

The narrow version of the fireman's rule adopted by the Iowa Supreme Court, although derived from venerable common law theories of tort liability, was approved by the court chiefly on the basis of public policy considerations.[12] Two rationales have been traditionally invoked in support of the fireman's rule: (1) the varying duties owed by landowner-occupants to the different categories of entrants on the land—trespassers, licensees, and invitees;[13] and (2) the assumption of risk doctrine, which denies recovery to those who voluntarily confront reasonably apparent hazards.[14] Even though the *Pottebaum* court chose not to base its decision on these traditional principles, its holding placed Iowa in agreement with the majority of the jurisdictions that have recently ruled on this issue.[15]

The court briefly discussed the common law antecedents of the fireman's rule. The first theory considered was liability based on the degree of care owed by a landowner-occupant to those persons coming onto his premises.[16] Because of their privilege to enter at any time of perceived crisis,

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arrived on scene); Berko v. Freda, 93 N.J. 81, _, 459 A.2d 663, 668 (1983)(rule not applicable once officers have begun to render aid).

11. Pottebaum v. Hinds, 347 N.W.2d at 646. *See, e.g.*, Lipson v. Superior Court, 31 Cal. 3d at _, 644 P.2d at 832-33, 182 Cal. Rptr. at 639-40 (independent act of misconduct includes failure to warn of known, hidden dangers); Buren v. Midwest Indus., Inc., 380 S.W.2d 96, 97 (Ky. 1964)(liability found for failure to warn of unusual or hidden hazards).

12. Pottebaum v. Hinds, 347 N.W.2d at 645 (citing with approval Berko v. Freda, 93 N.J. at _, 459 A.2d at 667-68).

13. *Id. See infra* note 16 and accompanying text.

14. *Id. See infra* note 25 and accompanying text.

15. The *Pottebaum* court cited a variety of recent decisions to illustrate the trend. *See, e.g.*, Walters v. Sloan, 20 Cal. 3d 199, 571 P.2d 609, 142 Cal. Rptr. 152 (1977) (fireman's rule extended to policemen); Giorgi v. Pacific Gas & Elec. Co., 226 Cal. App. 2d 355, 72 Cal. Rptr. 119 (1968)(firemen); Hannah v. Jensen, 298 N.W.2d 52 (Minn. 1980)(firemen's rule extended to policemen); Krauth v. Geller, 31 N.J. 270, 157 A.2d 129 (1960)(firemen).

16. Pottebaum v. Hinds, 347 N.W.2d at 644. Under that theory, the entrant's status as trespasser, licensee, or invitee was as important as the conduct of the owner-occupant in determining liability. Note, *Assumption of the Risk and the Fireman's Rule*, 7 WM. MITCHELL L. REV. 749 n.6 and accompanying text at 751-52 (1982)[hereinafter cited as Note, *Assumption of the Risk*]. Policemen and firemen stood on a better footing than trespassers, who were owed no duty beyond not inflicting intentional harm upon them, but most courts were unwilling to extend to them the most-favored status of invitees, who may proceed on the assumption that reasonable care has been exercised on their behalf in making the premises safe. *Id.*

Because of the infrequency and unpredictability of their visits, and the general lack of consent and invitation to them, policemen and firemen are generally classified as licensees. 2 F. HARPER & F. JAMES, THE LAW OF TORTS § 27.14 (1956). "The occupier must, of course, refrain from intentionally or wantonly injuring such officers, and probably from any active negligence towards them. . . . Moreover, the occupier has been held liable for failure to use care to warn an officer of concealed perils known to the occupier." *Id.* at 1504-05.

most courts classified the public safety officer as a mere licensee.[17] As such, the sole obligation of the person who had called the officer or created the need for his assistance was "to refrain from injuring him by willful or wanton injury, except in certain cases where there may be the duty to warn of hidden danger . . . unknown or unobservable by the fireman in the exercise of ordinary care."[18] The *Pottebaum* court recognized that other courts have retreated from this line of analysis.[19] As signaled in *Rowland v. Christian*,[20] the courts began to reason that a negligent party's duty of care should exist independent of the status of the injured party.[21] Furthermore, such logic would limit the rule's application to landowner-occupants, leaving all other negligent individuals open to liability for conduct that led to the injury of policemen and firemen.[22]

Following *Rowland v. Christian*, the doctrine of assumption of risk increasingly was cited as the reason for extending immunity under the shield of the fireman's rule.[23] The application of this doctrine to the situation of the public safety officer injured while combatting a negligently created emergency was well-stated in *Hannah v. Jensen*:[24] "[t]he risk of injury . . . is an inherent part of police work, just as the danger of explosion is an inherent part of firefighting. In performing his official duties, [the injured officer herein] manifested his consent to assume the risks he could reasonably anticipate would accompany those duties."[25] Thus, the courts have perceived the public safety officer as a member of a class of individuals who, by virtue of their calling, have a duty to confront, regardless of personal consequences, a broad range of risks.[26]

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17. Pottebaum v. Hinds, 347 N.W.2d at 644-45 (citing, e.g., Abney v. London Iron & Metal Co., 245 Ga. 759, 267 S.E.2d 214 (1980); Lave v. Neuman, 211 Neb. 97, 317 N.W.2d 779 (1982)).

18. Lave v. Neuman, 211 Neb. at 99-100, 317 N.W.2d at 781 (quoting Wax v. Co-Operative Refinery Ass'n, 154 Neb. 805, 807, 49 N.W.2d 707, 709 (1951)).

19. Pottebaum v. Hinds, 347 N.W.2d at 645 (citing Rosenau v. City of Estherville, 199 N.W.2d 125, 126 (Iowa 1972)).

20. 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968).

21. Comment, *An Examination of the California Fireman's Rule*, 6 PAC. L.J. 660, 664 (1975).

22. Pottebaum v. Hinds 347 N.W.2d at 645.

23. Note, *Assumption of the Risk*, *supra* note 16, at 762-65 (*Rowland's* "reasonable care under the circumstances" merged with doctrine of assumed risk to bar recovery by firemen for all reasonably apparent risks of firefighting).

24. 298 N.W.2d 52 (Minn. 1980).

25. *Id.* at 54. "The [assumption of risk] which is normally involved with the fireman's rule is the plaintiff assuming a risk by voluntarily encountering a known, existing danger created by the defendant's negligence. This willingness to take a chance is said to be 'implied' or tacitly manifested." Note, *Hubbard v. Boelt: The Fireman's Rule Extended*, 9 PEPPERDINE L. REV. 197, 205 (1981) [hereinafter cited as Note, *Hubbard v. Boelt*]. *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 68, at 450-51 (4th ed. 1971).

26. Indeed, at least one court has concluded that any *degree* of negligence, including wanton and willful misconduct, "is immaterial so long as defendant's act created a condition or

In barring police and firemen recovery for negligently inflicted on-the-job injury, the *Pottebaum* court did not denigrate the personal interests being sacrificed by the adoption of the fireman's rule, but concluded that they were outweighed by the societal values which the rule would foster.[27] These values may be summarized as follows: (1) that citizens should be encouraged, not dissuaded, from calling on those individuals best trained to handle emergency situations, negligently created or otherwise;[28] (2) that it would not be fair to impose liability on persons who have no right to exclude public safety officers or to otherwise limit their actions in an emergency, noting that in some instances a citizen has an affirmative duty to summon said officers;[29] and, (3) that, rather than relying on the individual tortfeasor's insurance or other resources, the public safety officer's damages are more equitably spread by passing them on to the public through workers' compensation and other benefits provided by the governmental bodies that employ them.[30]

The *Pottebaum* court illustrated the scope of its version of the fireman's rule by describing its application in cases from a variety of jurisdictions, most notably California, New Jersey, and Minnesota.[31] As a guiding principle, the court stated that one must ask whether "the negligently created risk which resulted in the fireman's or policeman's injury was the very reason for his presence on the scene in his official capacity. If the answer is yes, then recovery is barred; if no, recovery may be had."[32]

In *Berko v. Freda*,[33] a car owner negligently left the keys in his car's

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hazard with which policemen are employed to cope." Entwistle v. Draves, 194 N.J. Super. 571, _, 447 A.2d 435, 437 (1984).

27. Pottebaum v. Hinds, 347 N.W.2d at 645-46.

28. *Id.* at 645-46. *See* Hannah v. Jensen, 298 N.W.2d at 55. In *Hannah*, a dram shop action, a bar patron went on a drinking spree which culminated in a scuffle that injured a police officer who had been summoned to end the intoxicated patron's altercation with bar employees. *Id.* at 53-54.

29. Pottebaum v. Hinds, 347 N.W.2d at 645. *See* Buren v. Midwest Indus., Inc., 380 S.W. 2d at 99 (involving various violations of fire safety ordinances creating dangerous fire control situation).

30. Pottebaum v. Hinds, 347 N.W. 2d at 645-46. *See* Berko v. Freda, 93 N.J. at _, 459 A.2d at 666; Walters v. Sloan, 20 Cal. 3d at _, 571 P.2d at 612-13, 142 Cal. Rptr. at 155-56.

Because the officer is provided with a salary, workers' compensation, and other tax-supported benefits specifically for the purpose of dealing with the hazards created by negligent citizens, the courts have analyzed the public safety officer's compensation scheme as a form of "self-insurance" on the part of the public. Comment, *The Fireman's Rule: Defining its Scope Using the Cost-Spreading Rationale*, 71 CAL. L. REV. 218, 236 (1983) [hereinafter cited as Comment, *The Fireman's Rule*]. A defendant taxpayer, without the benefit of the fireman's rule, could be subjected to double payments, as he has already contributed through taxation his "share" of the cost of the on-the-job injuries. *Id.*

31. Pottebaum v. Hinds, 347 N.W.2d at 646-47.

32. *Id.* at 646.

33. 93 N.J. 81, 459 A.2d 663 (1983).

ignition, resulting in the theft of the vehicle.[34] A police officer who was injured in the apprehension of the thief was permitted to sue the thief, but not the car owner.[35] The owner's negligent conduct was the same act that created the subsequent risk and attendant injury.

The Iowa court cited *Walters v. Sloan*[36] as another example of the rule's operation.[37] A police officer, Walters, responded to a call to quell a disturbance at a private party and was assaulted by an intoxicated minor.[38] Again, the injury arose as the direct result of the negligent parental consent to underage drinking that occasioned the officer's presence.[39] Therefore, the officer had no cause of action against the parents.[40] California courts, as in *Walters*, have tried to illuminate the application of the fireman's rule by asking whether or not the injury-producing conduct was independent of the conduct which necessitated the officer's presence originally.[41]

As stated previously, immunity under the fireman's rule may be denied in cases involving reckless or intentional misconduct,[42] and in cases involving acts of knowing misrepresentation on the part of the person creating the original need for the officer.[43] In *Lipson v. Superior Court*,[44] firefighters at a chemical plant boilover were told by the owner, during the course of the fire, that no toxic chemicals were stored in a certain building.[45] The building did, in fact, contain such chemicals and a fireman who came into contact with them was injured.[46] The owner's misstatement, distinct from the boilover that led to the call for assistance, was actionable.[47] Such misrepresentations could also be characterized as simply another variety of negligent misconduct committed subsequent to an officer's arrival, which would also be actionable.[48]

Having adopted the fireman's rule, defined its scope, and illustrated its application, the *Pottebaum* court addressed the plaintiffs' contention that a common law doctrine from outside its jurisdiction should not be used to

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34. *Id.* at _, 459 A.2d at 664.
35. *Id.* at _, 459 A.2d at 667, 668.
36. 20 Cal. 3d 199, 571 P.2d 609, 142 Cal. Rptr. 152 (1977).
37. Pottebaum v. Hinds, 347 N.W.2d at 646.
38. Walters v. Sloan, 20 Cal. 3d at _, 571 P.2d at 610, 142 Cal. Rptr. at 153.
39. *Id.*
40. *Id.* at _, 571 P.2d at 613-14, 142 Cal. Rptr. at 157.
41. *See, e.g.*, Lipson v. Superior Court, 31 Cal. 3d at _, 644 P.2d at 829, 182 Cal. Rptr. at 636; Hubbard v. Boelt, 28 Cal. 3d 480, _, 620 P.2d 156, 159, 169 Cal. Rptr. 706, 709 (1980). *See also* Note, *Hubbard v. Boelt*, *supra* note 25, at 216-20 (favoring the independent conduct test).
42. Pottebaum v. Hinds, 347 N.W.2d at 646.
43. *Id.*
44. 31 Cal. 3d 362, 644 P.2d 822, 182 Cal. Rptr. 629 (1982).
45. *Id.* at _, 644 P.2d at 824, 182 Cal. Rptr. at 634.
46. *Id.* at _, 644 P.2d at 824, 182 Cal. Rptr. at 634.
47. *Id.* at _, 644 P.2d at 832-33, 182 Cal. Rptr. at 639-40.
48. *Id. See* Buren v. Midwest Indus., Inc., 380 S.W.2d at 99.

judicially amend what is generally conceded to be a strict liability statute.[49] The court was guided in its consideration of this question by previous Iowa decisions marking exceptions to the strict liability imposed by the Iowa Dram Shop Act,[50] and by a recent Minnesota Supreme Court decision involving a fact pattern and a statute virtually identical to those in the *Pottebaum* decision.[51] The court used the Iowa decisions to illustrate that the defense of assumption of risk, another common law doctrine, had previously been successfully raised as a defense to the strict, but not absolute, liability of the Iowa Dram Shop Act.[52]

Additionally, the Minnesota Supreme Court had construed "or other persons," language identical to that cited by Officers Pottebaum and Post in support of their position, to exclude public safety officers from the classification of persons protected by the dram shop statute.[53] The Iowa court adopted this interpretation as its own,[54] but emphasized that the ruling was a narrow one, not a blanket pronouncement that public safety officers can never state a cause of action under the Iowa Dram Shop Act.[55] When officers are acting to protect the public from the opprobrious behavior of intoxicated patrons, injuries sustained thereby will lie outside the scope of the statute.[56] When officers are on the premises for reasons unrelated to public intoxication, an assault by a drunken patron could serve as the basis for a dram shop action by the officers and not offend the public policy considerations underlying the Iowa version of the fireman's rule.[57]

The rule adopted by the *Pottebaum* court, although widely accepted,

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49. Pottebaum v. Hinds, 347 N.W.2d at 647 (interpreting IOWA CODE § 123.92 (1983)). The Iowa Dram Shop Act reads, in part:

> Every husband, wife, child, parent, guardian, employer *or other person* who shall be injured in person or property or means of support by an intoxicated person or resulting from the intoxication of any such person, *shall have a right of action*, severally or jointly, against any licensees or permittees, who shall sell or give any beer or intoxicating liquor to any such person while he or she is intoxicated, or serve any such person to a point where such person is intoxicated, for all damages sustained.

IOWA CODE § 123.92 (1983)(emphasis added).

50. Rippel v. J.H.M. of Waterloo, Inc., 328 N.W.2d 499 (Iowa 1983)(asserting assumption of risk as a defense to present dram shop statute); Berge v. Harris, 170 N.W.2d 621 (Iowa 1969)(dram shop action under previous statute where assumption of risk was successfully asserted as a defense).

51. Hannah v. Jensen, 298 N.W.2d 52 (Minn. 1981).

52. Pottebaum v. Hinds, 347 N.W.2d at 647 (explaining exceptions to IOWA CODE § 123.92 (1983)).

53. Hannah v. Jensen, 298 N.W.2d at 55.

54. Pottebaum v. Hinds, 347 N.W.2d at 647.

55. *Id.*

56. *Id.*

57. *Id.* at 647-48. *But see* Hannah v. Jensen, 298 N.W.2d at 55 (Scott, J., dissenting): "the Dram Shop Act must be liberally construed 'to suppress the mischief and advance the remedy.' . . . Thus, in the absence of clear legislative guidance to the contrary, I believe a proper construction of the statute allows a police officer to proceed under the Dram Shop Act." *Id.*

has received its share of criticism, criticism that was not dealt with at length in the *Pottebaum* decision.[58] A brief review of some of the problems associated with making the fireman's rule a rule of law may be of assistance in predicting how Iowa courts will apply the rule adopted in this case.

First, although the rule would seem to be one of mechanical application, the fact is that there is not a glaringly bright line dividing conduct that calls an officer to the scene of an emergency from conduct that may or may not be characterized as evolving out of the original incident.[59] Consider the facts and holding of *Hubbard v. Boelt*.[60] A police officer responded to a speeding violation in the customary manner, signaling the speeder to pull over and be ticketed.[61] The defendant did not submit, but rather took flight in a wild chase that resulted in a crash injuring the plaintiff officer.[62] The trial court held that the policeman's negligence suit against the motorist was barred by the fireman's rule.[63] Although the California Supreme Court affirmed,[64] extending the fireman's rule to shield even reckless conduct,[65] the plaintiff raised a troubling contention. Using the language of the dependent/independent conduct test, the plaintiff argued that the defendant's flight was independent of the act which originally brought the officer on the scene, a mere speeding violation.[66] It was a contention of some weight, given the circumstances, and would have rendered the negligent motorist liable.[67] Perhaps there is an inherent weakness in attempting to apply the fireman's rule to

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58. The court noted in passing some examples of dissent. Pottebaum v. Hinds, 347 N.W.2d at 645. *See, e.g.*, W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 61 (4th ed. 1971); Case Comment, *The New Minnesota Fireman's Rule—An Application of the Assumption of Risk Doctrine: Armstrong v. Mailand*, 64 MINN. L. REV. 878 (1980) [hereinafter cited as Case Comment, *The New Minnesota Fireman's Rule*]; Berko v. Freda, 93 N.J. 81, _, 459 A.2d 663, 668 (1983)(Handler, J., dissenting).

59. Comment, *The Fireman's Rule*, *supra* note 30 at 230-35 (debating the inadequacy of the dependent/independent conduct test as a basis for identifying the types of misconduct the fireman's rule shields).

60. 28 Cal. 3d 480, 620 P.2d 156, 169 Cal. Rptr. 706 (1980).

61. *Id.* at _, 620 P.2d at 157, 169 Cal. Rptr. at 707.

62. *Id.* at _, 620 P.2d at 157-58, 169 Cal. Rptr. at 707-08.

63. *Id.* at _, 620 P.2d at 158, 169 Cal. Rptr. at 708.

64. *Id.* at _, 620 P.2d at 159, 169 Cal. Rptr. at 709.

65. *Id.* at _, 620 P.2d at 159, 169 Cal. Rptr. at 709.

66. *Id.* at _, 620 P.2d at 159, 169 Cal. Rptr. at 709. As an illustration of the malleability of the dependent/independent conduct test, see Trainor v. Santana, 86 N.J. 403, 432 A.2d 23 (1981). A defendant stopped for speeding attempted to escape with an officer's arm caught in the door. Id. at _, 432 A.2d at 23-24. The motorist's misconduct was held to be independent of the act leading to a citation. *Id.* at _, 432 A.2d at 25. Yet it could be argued, using the assumption of risk doctrine underlying the rule, that the risk to an officer issuing a ticket is no more remote than that to an officer chasing a speeder. In both cases occasional physical injury is an expected on-the-job hazard.

67. "Even accepting the majority's rationale for extending the fireman's rule to willful and wanton misconduct . . . there seems to have been an independent act of misconduct in the *Hubbard* case, and, therefore, the fireman's rule should not have been applied." Note, *Hubbard v. Boelt*, *supra* note 25, at 216. *See id.* at 216-20, for a fuller discussion of this argument.

off-the-premises situations. Yet, rather than renounce the fireman's rule under the given circumstances, the California Supreme Court upheld it, looking beyond the language of its customary test and relying on the underlying rationales of assumption of risk and public policy considerations.[68] Hazardous encounters are part of a policeman's stock-in-trade, for which he is well-compensated.[69] It is relatively simple to characterize such encounters, then, as part of *any* incident involving policemen and firemen acting in the line of duty.[70] Therein lies the problem, for such reasoning blurs the distinctions drawn by the language of decisions like *Pottebaum*.[71] This might cause the results of future cases applying the fireman's rule to appear arbitrary, with similar facts not always pointing to one end.[72]

The other criticisms raised by those who disfavor the fireman's rule center, in the *Pottebaum* case, on its public policy underpinnings.[73] The first such argument is that there is no limitation on a negligent defendant's liability to other members of the public, including other public employees, for his torts.[74] If, as the *Pottebaum* court seems to believe, "fairness" is an important element of public policy,[75] it can be argued that it is not fair to limit policemen and firemen to the generally-recognized inadequate amounts provided by workers' compensation and other fringe benefits in cases of catastrophic injury.[76]

A second line of criticism attacks the validity of the "spreading the cost" prong of the public policy argument.[77] Supporters of the fireman's rule argue that the benefits of the tax-supported public safety scheme are enjoyed by all; therefore, the burdens, including the costs of compensating injured public safety officers, should be borne by all.[78] Critics note, however, that the relevant taxes are imposed on the basis of assessed property values,

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68. Hubbard v. Boelt, 28 Cal. 3d at 480, 620 P.2d at 158, 169 Cal. Rptr. at 708.

69. *Id.*

70. *Id.*

71. Pottebaum v. Hinds, 347 N.W.2d at 646.

72. Berko v. Freda, 93 N.J. at _, 459 A.2d at 672 n.3 (Handler, J., dissenting)(pointing out the hairsplitting entailed in distinguishing dependent from independent causes of misconduct arising during the officer's performance of his duties).

73. *See infra* notes 73-84 and accompanying text.

74. Comment, *An Examination of the California Fireman's Rule*, 6 PAC. L.J. at 671. *See* J. DOOLEY, MODERN TORT LAW § 19.07, at 457 (1982)(discussing tort actions by other public employees).

75. Pottebaum v. Hinds, 347 N.W.2d at 645.

76. "Despite the availability of workers' compensation, [other public employees'] tort actions are permitted because workers' compensation standing alone is rarely adequate redress." Berko v. Freda, 93 N.J. at _, 459 A.2d at 670 (Handler, J., dissenting).

77. *See, e.g.*, Christensen v. Murphy, 296 Or. 610, 678 P.2d 1210 (1984); Note, *Assumption of the Risk*, *supra* note 16, at 772-73.

78. Scheurer v. Trustees of Open Bible Church, 175 Ohio St. 163, _, 192 N.E.2d 38, 43 (1963).

not on the basis of risks inherent in the premises.[79] Thus, a person maintaining a firetrap at low cost does not pay a fair share of the burden imposed on the public fund to protect those premises.[80]

A final argument raised against the public policy considerations represented by the fireman's rule is that the "parade of horribles" offered in *Giorgi v. Pacific Gas & Electric Co.*[81] vastly overstates the consequences of not having such a rule. According to the *Giorgi* court, the absence of the rule would "open the floodgates" of litigation.[82] The critics counter, first, that no outrageous expansion of liability could occur so long as courts continue to use the standard they apply to protect persons outside the category of public safety officer from negligent conduct; that is, the "reasonable foreseeability of risk under the circumstances."[83] Second, at least for firemen, although injuries are common, they are usually minor and adequately covered by workers' compensation and other benefits.[84] Even when the injuries are major, problems in proving foreseeability and causation are formidable and would encourage out-of-court settlements, or suits that would not materialize at all.[85]

A final matter to give pause to those seeking to utilize the rule adopted in *Pottebaum* concerns the fate of two cases originally cited by the Iowa Supreme Court in support of its decision:[86] *Cullivan v. Leston*[87] and *Spencer v. B.P. John Furniture Co.*[88] Both were overruled in *Christensen v. Mur-*

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79. Comment, *An Examination of the California Fireman's Rule*, 6 PAC. L.J. at 670.

80. *Id.* Also, " '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.' " Note, *Assumption of the Risk, supra* note 16, at 772 (quoting Comment, *Giorgi v. Pacific Gas & Elec. Co.: The "Fireman's Rule" in California, an Anachronism?*, 4 U.S.F.L. REV. 125, 133 (1969)).

81. 226 Cal. App. 2d 355, _, 72 Cal. Rptr. 119, 122 (1968)(ambulance drivers injured on the way to a crash suing the motorists causing the need for their assistance, nurses suing patients who negligently expose them to disease, etc.).

82. *Id.* at _, 72 Cal. App. Rptr. 119, 122 (1968).

83. *See* Comment, *An Examination of the California Fireman's Rule*, 6 PAC. L.J. at 664.

84. Case Comment, *The New Minnesota Fireman's Rule, supra* note 58, at 888. *See also* Note, *Assumption of the Risk, supra* note 16, at 773 (criticizing mere judicial economy as sufficient basis for removing personal rights).

85. *Id.*

86. Pottebaum v. Hinds, No. 86/83-551, slip op. (Iowa April 11, 1984).

87. 43 Or. App. 361, 602 P.2d 1121 (1979). In *Cullivan*, an on-duty police officer was injured in the attempt to break up a fight between bar patrons. *Id.* at _, 602 P.2d at 1122. In barring the officer's suit against the tavern owner, the Oregon court relied on the principles underlying the fireman's rule established in *Spencer v. B.P. John Furniture Co.* (*see infra* note 87). *Id.* The officer knew of and consented to the risks inherent in carrying out his official duties. *Id.* In dicta the Oregon court also hinted that the unfairness of imposing liability on one obligated to call police to restore order also played a part in its decision. *Id.* at _, 602 P.2d at 1123.

88. 255 Or. 359, 467 P.2d 429 (1970). *Spencer* was a wrongful death action brought against the owner of a furniture store who had negligently caused, by allowing an accumulation of dust, an explosion which took a firefighter's life. *Id.* at _, 467 P.2d at 430. The Oregon

phy,[89] a 1984 decision of the Oregon Supreme Court. The Iowa court deleted the references in question as nonsubstantive changes.[90]

In Oregon, implied assumption of risk, viewed as one of the major theoretical underpinnings of the fireman's rule, was abolished by legislative mandate in 1975.[91] The Oregon court further suggested that the oft-cited public policy considerations supporting the fireman's rule were mostly "redraped arguments drawn from premises liability, or implied assumption of risk."[92] With neither the implied assumption of risk doctrine nor public policy considerations to support it, the fireman's rule was abolished as a rule of law in Oregon.[93] Although the Iowa Supreme Court did not base its own decision on assumption of risk principles, the decision in *Christensen* also derogated some of the policy considerations relied upon by the Iowa Supreme Court as redraped versions of common law principles that the Iowa court had implicitly rejected.[94]

Notwithstanding the foregoing criticisms, Iowa joins the majority of the jurisdictions that have recently considered and adopted the fireman's rule.[95] The policy considerations raised by the *Pottebaum* court are of some weight and, on the facts of this case, persuasive. The court did well to avoid the wars over the "voluntariness" of the public safety officer's assumption of risk. The mechanistic test utilized, however, is not the perfect solution for a case-by-case administration of justice. There is not always a clean break delineating the cause of an injury, as might be suggested by the language of the rule.[96] Furthermore, although the *Pottebaum* decision leaves intact the officer's right to sue the person directly responsible for his injury,[97] and the right to recover for subsequent acts of misconduct and misrepresentation on the part of the party creating the need for their assistance,[98] other courts might feel some uneasiness at removing a personal right from a small class

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Supreme Court ruled that a fireman, by his choice of occupation, assumes the normal risks inherent to fighting all fires, negligently caused or not; however, the Oregon court left open the possibility of recovery for failure to warn of known, hidden perils. *Id.* at _, 467 P.2d at 431-32.

89. 296 Or. 610, 678 P.2d 1210 (1984)(wrongful death action wherein police officer was slain by minor in custody of Northwest Regional Youth Center; minor was negligently released by the night matron and intercepted by said officer).

90. Letter from Iowa Supreme Court Justice Schultz to Editorial Department of West Publishing Co. (April 13, 1984)(requesting deletion of citations to overruled Oregon cases in question).

91. Christensen v. Murphy, 296 Or. at _, 678 P.2d at 1212 n.2.

92. *Id.* at _, 678 P.2d at 1217.

93. *Id.* at _, 678 P.2d at 1218.

94. *Id.* at _, 678 P.2d at 1217. *See* Pottebaum v. Hinds, 347 N.W.2d at 644-46.

95. *See supra* note 15.

96. *See supra* notes 67-72 and accompanying text.

97. Pottebaum v. Hinds, 347 N.W.2d at 646.

98. *Id.*

of valued individuals while leaving it intact with all other members of society.[99]

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99. *See supra* note 75. *See also* Berko v. Freda, 93 N.J. at _, 459 A.2d at 671 (Handler, J., dissenting):

> [E]ven if police officers and firefighters are presumed to be adequately compensated for the risks of their work, the majority does not explain why other governmental employees, who also must be presumed to receive adequate compensation for their work should not be prohibited, as are police officers and firefighters, from recovering from negligent third parties for injuries attributable to the risks normally inherent in their employment.

Id.

Such reasoning might lead to the inference that the fireman's rule might be vulnerable to an Equal Protection challenge. *See* Comment, *An Examination of the California Fireman's Rule*, 6 PAC. L.J. at 676-79. The author suggests that the fireman's rule may not even satisfy the very deferential "rational basis" test; the fireman's rule "partakes of arbitrariness." *Id.* at 679.

Christensen v. Murphy, the case leading to the re-editing of *Pottebaum v. Hinds* (*see supra* notes 85-93 and accompanying text), must be a source of concern to those who would like to proceed to apply the fireman's rule with vigor. A telephone conversation with a partner of a law firm handling dram shop work in the eastern Iowa area suggests that Iowa courts have, indeed, been reluctant to impose the shield of the newly adopted fireman's rule. Telephone interview with Gerry W. Rinden, partner in the Rock Island, Illinois law firm of Klockau, McCarthy, Ellison, Rinden, & Hartsock (Oct. 18, 1984). The attorney, Gerry M. Rinden, reported a general dissatisfaction based primarily on the belief that the underlying purpose of the fireman's rule has been perverted by extending it to policemen beyond the area of premises-liability. *Id.* The dissatisfaction, in some cases, has taken the form of a refusal to grant directed verdicts in favor of defendants ostensibly within the fireman's rule's ambit of protection. *Id.*