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The New Minnesota Fireman's Rule—An Application of the Assumption of Risk Doctrine: Armstrong v. Mailand

Three fire fighters died while battling a fire at a liquified petroleum (LP) gas storage facility. The fire started when a deliveryman failed to follow proper procedures in filling an 11,000 gallon LP gas tank. When the fire fighters were unable to shut off the flow of gas from the delivery vehicle, the fire spread to the storage facility. Following standard operating procedure, the fire fighters hosed down the storage tank in order to prevent an explosion. Their efforts were unsuccessful; a valve on the storage tank released improperly, the tank exploded, and three fire fighters were killed. The fire fighters' representatives subsequently brought a wrongful death action against the owner of the facility and the companies responsible for its design, construction, installation, and maintenance.1 Despite evidence of negligence, fire code violations, and defective products,2 the district court granted summary judgment to all defendants under one form of the widely accepted fireman's rule,3 which has traditionally limited a landowner's liability to injured fire fighters.4 Although it altered the substance of that rule, the

1. The defendants included not only the owner of the facility but also the company that ordered and installed the tank and the company that was refilling the tank when the fire was ignited. See Armstrong v. Mailand, 284 N.W.2d 343, 343, 346 (Minn. 1979).

2. Although the court did not discuss in detail the evidence supporting these theories of liability, it indicated that there was evidence of failure to install the appropriate relief valve in the tank, failure to discover the improper valve, violation of the fire code by housing the tank and the vaporizing unit in the same structure, defects in the delivery truck, and improper procedures used in refilling the storage tank. Id. at 346.


4. For a discussion of the traditional fireman's rule, see text accompany-
Minnesota Supreme Court affirmed, holding that landowners owe fire fighters a duty of reasonable care, but that fire fighters primarily assume all those risks that are reasonably apparent to them as fire fighters.\(^5\) In so holding, the court concluded that the landowner's duty does not depend on whether fire fighters are classified as licensees, invitees, or sui generis. The court simply indicated that fire fighters are owed the same duty of care that is owed to all land entrants, except to the extent that they assume risks in a primary sense.\(^6\) *Armstrong v. Mailand*, 284 N.W.2d 343 (Minn. 1979).

Courts have traditionally held that the duties owed to fire

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\(^{5}\) Armstrong v. Mailand, 284 N.W.2d 343, 350 (Minn. 1979). Primary assumption of risk is not an affirmative defense; rather, it is tantamount to a finding of no duty. It relates to the threshold question of whether the defendant was negligent. *See, e.g.*, Bull S.S. Lines v. Fisher, 196 Md. 519, 524, 77 A.2d 142, 145 (1950); Armstrong v. Mailand, 284 N.W.2d 343, 349 (Minn. 1979); Springrose v. Willmore, 292 Minn. 23, 24, 192 N.W.2d 826, 827 (1971). It arises in a voluntary relationship between two parties in which the duties owed by one party are limited with respect to risks that are incidental to the relationship. *See* Olson v. Hansen, 299 Minn. 39, 44, 216 N.W.2d 124, 127 (1974).


Thus, only primary assumption of risk remains a part of the substantive law in Minnesota. It is distinguished from contributory negligence principally by the importance that the subjective awareness of the plaintiff plays in its application. As stated above, primary assumption of risk requires actual knowledge of the danger. Contributory negligence, on the other hand, requires only a deviation from the objective standard of the reasonable person. *See* Peterson v. Minnesota Power & Light Co., 206 Minn. 268, 270-71, 288 N.W. 588, 589 (1939). Unlike contributory negligence, primary assumption of risk does not require that the plaintiff's conduct deviate from the standards observed by the reasonable person. It can be reasonable for a person to assume a risk, but the reasonable person will never be found contributorily negligent. He may, however, be held to have relieved others of their duties to him through his assumption of the risks they have created. *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 68, at 440-41 (4th ed. 1971).

\(^{6}\) 284 N.W.2d at 349-50. *See* note 5 *supra.*
fighters, like those owed to other land entrants, depended on how the entrants were classified. Entrants were classified as invitees, licensees, or trespassers: invitees if they entered the property for the owner's economic benefit pursuant to either the owner's specific invitation or a general invitation to the public; licensees if they entered with the owner's permission but not for the owner's economic benefit; trespassers if they entered without either permission or invitation. Under the traditional rule, the landowner was obligated to maintain his premises in a reasonably safe condition for invitees, but not for licensees or trespassers.

Under the original fireman's rule, courts classified fire fighters as licensees who, like trespassers, were owed no duty by the owner to keep the premises in a reasonably safe condition. Courts neither recognized nor condemned the anomaly.

12. See, e.g., Dickey v. Hochschild, Kohn & Co., 157 Md. 448, 450-51, 146 A. 282, 283 (1929) (holding that a store proprietor owes an invitee "the duty of exercising ordinary care to see that the place where [items for sale] are displayed and the approaches thereto are in such a condition as not to imperil [the invitee]"); Straight v. B.F. Goodrich Co., 354 Pa. 391, 394, 47 A.2d 605, 607 (1948) (holding that a landowner owes an invitee "the duty either to exercise reasonable care to disclose to [the invitee] dangerous conditions known to [the landowner] and not likely to be discovered by [the invitee] or to make such conditions reasonably safe").
15. See, e.g., Roberts v. Rosenblatt, 146 Conn. 110, 113, 148 A.2d 142, 144 (1959) (because fireman's status was "akin to that of a licensee," owner "owed him no greater duty than that due a licensee"); Baxley v. Williams Constr. Co., 98 Ga. App. 662, 669, 106 S.E.2d 799, 805 (1958) (because fireman is a licensee, owner does not owe him "the high degree of care owed to an invitee"); Mulcrone v. Wagner, 212 Minn. 478, 482, 4 N.W.2d 97, 99 (1942) (fireman "is a licensee to whom the owner or occupant owes no duty except to refrain from..."
of this classification. Unlike other licensees, fire fighters enter premises not for their own benefit, but for the benefit of the public.16 Moreover, the lawfulness of their entry is not contingent upon the landowner's consent.17 Nevertheless, under the traditional approach fire fighters remained licensees.18 This classification relieved owners of liability for two broad types of injury. It made little difference whether the fire fighter was injured as a result of the landowner's negligence in causing the fire, or as a result of hidden dangers on the premises that were entirely unrelated to the fire. In the absence of egregious misconduct, the owner was not liable under the original fireman's rule.19

Courts have attempted to justify the harshness of this denial of liability by emphasizing that the circumstances of fire fighters' visits are peculiar and that undesirable consequences would follow any attempt to abolish the rule. Fire fighters visit infrequently and usually at odd hours. The exigencies of the moment, and not the niceties of social etiquette, determine their modes of ingress and egress. For example, windows,
roofs, and skylights can occasionally provide more serviceable means of access to a burning building than doors and entryways. At least one court has implied that, under such circumstances, it would be unreasonable to require landowners to make their premises reasonably safe for fire fighters' unusual and infrequent visits. Courts have also justified the fireman's rule by suggesting that an expansion of tort liability would deter landowners from promptly summoning the assistance of fire fighters.

A vast majority of courts, influenced by a general trend toward expansion of the duties owed to land entrants and acknowledging the injustice of the fireman's rule, have created exceptions that make the rule adhere more closely to the general principles of negligence law. For example, courts have held that landowners owe firemen a duty not only to refrain from active negligence, but also to warn of hidden perils.

20. See Meiers v. Fred Koch Brewery, 229 N.Y. 10, 15-16, 127 N.E. 491, 492-93 (1920). In Meiers, a fireman on his way to put out a fire in the landowner's barn was injured when he fell into an unguarded coal hole in the driveway. The court, in holding that the landowner owed the fireman the duty of keeping the driveway reasonably safe, emphasized that the fireman had "entered the premises, rightfully, on the way adapted by the owner for that purpose." Id. at 16, 127 N.E. at 493. The court also noted that although the fireman's entry was after dark, the driveway was sometimes used after dark, both by one of the landowner's customers and by the fire department on at least one of the several previous occasions when the barn had been on fire. Id. The Meiers court thus implied that, had the fireman entered by an unusual route, had the route never been used by land entrants after dark, and had the fire department never before used the route, the landowner would have owed the fireman no duty to keep the route reasonably safe. See generally 26 COLUM. L. REV. 116 (1926); 22 MINN. L. REV. 898 (1938).

Commentators have observed, however, that imposition of the duty of reasonable care inherent in the concept of negligence would not be unfair to landowners, insofar as they would be required only to guard against those unreasonable dangers that were foreseeable. See 2 F. HARPER & F. JAMES, supra note 17, § 27.14, at 1501-02; W. PROSSER, supra note 5, § 61, at 397-98.

21. See Shypulski v. Waldorf Paper Prods. Co., 232 Minn. 394, 397-98, 45 N.W.2d 549, 551 (1951) (lines jumbled in state reporter); Suttie v. Sun Oil Co., 15 Pa. D. & C. 3, 5-6 (Philadelphia County Ct. 1931). But see 2 F. HARPER & F. JAMES, supra note 17, § 27.14, at 1503 (landowner would not be deterred "when the threat to his life or his property was imminent enough for him to . . . turn in an alarm"); W. PROSSER, supra note 5, § 61, at 397 (this justification is "preposterous rubbish").

22. See generally W. PROSSER, supra note 5, § 62, at 398-99.


fulfill the requirements of local fire safety ordinances,26 and to maintain in a reasonably safe condition those parts of the premises held open for the use of invitees.27

Despite this general expansion of liability for injuries suffered as a result of a violation of a statute and defects in the premises that are unrelated to the fire, almost all courts have refused to grant fire fighters a cause of action for injuries proximately caused by the negligently ignited fire itself.28 A possible rationale for this modified fireman's rule is public policy. At least one court has argued, with little consistency, that both that fire fighters are already liberally compensated for their injuries and that fire fighters should not complain of negligence in the creation of a fire whose existence necessitated their presence.29 Another possible rationale for such a modified fireman's rule is the doctrine of assumption of risk, which arguably mandates that owners and occupants do not owe fire fighters a duty of reasonable care with respect to those risks that they have primarily assumed.30


27. See, e.g., Meiers v. Fred Koch Brewery, 229 N.Y. 10, 15-16, 127 N.E. 491, 492-93 (1920) (landowner owed duty of reasonable care to fireman injured on driveway used by invitees); Beedenbender v. Midtown Properties, Inc., 4 A.D.2d 276, 281, 164 N.Y.S.2d 276, 280-81 (1957) (landowner owes to firemen a duty "to use reasonable care to keep in safe condition those parts of the premises which are utilized as the ordinary means of access for all persons entering thereon") (dictum). See also Comment, Liability of Property Owners Towards Policemen and Firemen, 25 ALB. L. REV. 105, 105-07 (1961); Note, Landowner's Negligence Liability to Persons Entering as a Matter of Right or Under a Privilege of Private Necessity, 19 VAND. L. REV. 407, 409-17 (1966); 34 HARV. L. REV. 87-88 (1920); 30 YALE L.J. 93 (1920).


Minnesota adopted the original fireman's rule in 1899 and followed it until 1951 when, in *Shypulski v. Waldorf Paper Products Co.*, the Minnesota Supreme Court acknowledged the anomaly of classifying fire fighters as licensees, reclassified them as sui generis, and created an exception to the original rule. The court held that a landowner has a duty to warn fire fighters of hidden dangers of which the landowner is aware, if the landowner has an opportunity to do so. The status of this modified rule was threatened in 1972, when the court held in *Peterson v. Balach* that the classification of land entrants as licensees or invitees was no longer determinative of the landowner's duty. Since under *Shypulski* the duties owed to fire fighters were more extensive than those owed to licensees but less extensive than those owed to invitees, it was unclear whether the sui generis classification remained valid or whether the *Peterson* decision had, by implication, abolished it and imposed upon landowners a duty of reasonable care.

In *Armstrong*, the Minnesota Supreme Court resolved this uncertainty by holding that *Peterson* had abolished the sui generis classification and that fire fighters are owed a duty of reasonable care. Fire fighters, like any land entrants, however, may relieve landowners of this duty by primarily assuming the risk of injury. Under *Armstrong*, a fire fighter is held to primarily assume all those risks that are reasonably apparent to him as a fire fighter, but not those that are either hidden or unanticipated.

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31. *See* Hamilton v. Minneapolis Desk Mfg. Co., 78 Minn. 3, 5, 80 N.W. 693, 694 (1899). Plaintiff fire fighter fell through an unguarded elevator shaft while fighting a fire on defendant’s property. The court offered no rationale for reversing an order that had overruled defendant’s demurrer. It simply described as settled law the proposition that the owner of a building owes “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.”

32. 232 Minn. 394, 45 N.W.2d 549 (1951).
33. *See* note 18 supra.
34. 232 Minn. at 396-97, 401-02, 45 N.W.2d at 550-51, 553.
35. *Id.* at 401-02, 45 N.W.2d at 553.
36. 294 Minn. 161, 199 N.W.2d 639 (1972).
37. *Id.* at 173, 199 N.W.2d at 647.
38. The court reasoned that since the duties that were owed to the sui generis plaintiffs in *Peterson* were more extensive than those owed to licensees and less extensive than those owed to invitees, the abolition of both of the latter categories in *Peterson* also destroyed the sui generis classification. 284 N.W.2d at 349.
39. *Id.* at 350.
40. *Id.* at 350. This results in an expansion of the duty that was imposed in *Shypulski*. The court in *Shypulski* did not impose liability for injuries caused
in an action for negligence per se but also in actions for strict products liability and for strict liability for an abnormally dangerous activity.

The court's use of the assumption of risk doctrine as the foundation of the fireman's rule may be strongly criticized. A prerequisite to any such assumption of risk is an appreciation by the plaintiff of the particular risk involved and the magnitude of that risk. These elements point to the consensual nature of the assumption: to be effective, an assumption of risk must be both voluntary and intelligent. It is questionable whether a fire fighter's decision to combat a blaze can be properly characterized as voluntary. It is a fire fighter's public duty to face risks inherent in fire fighting. If he wishes to keep his job, he must fight fires and, if necessary, risk his life in doing so. In choosing to work as a fire fighter, a reasonable person will know that the job will require him to face unusual risks,
many of them negligently caused. Nevertheless, a person should not have to choose between forgoing employment as a fire fighter and risking severe, uncompensated or undercompensated injury. In describing the fire fighter's conduct as voluntary, the court is requiring him to make this choice.\textsuperscript{44} The court also failed to discuss the possible relevance of the rescue doctrine to fireman's rule cases. The rescue doctrine allows a cause of action to a person injured while making a reasonably prudent attempt to rescue life or property negligently endangered by another.\textsuperscript{45} The theory denies recovery only when the attempted rescue is reckless in view of all relevant aspects of the situation;\textsuperscript{46} thus, the theory recognizes that when life or property is endangered, a reasonable person will take greater risk than would ordinarily be justified.\textsuperscript{47} The rescue doctrine is compatible with the general principles of negligence: a tortfeasor should foresee that others may attempt to protect the interests that he has negligently threatened.\textsuperscript{48} This proposition is especially compelling when applied to fire fighters; their presence at a fire is clearly foreseeable.

Although both the rescue and primary assumption of risk doctrines appear applicable to fire fighters' actions against landowners, the two doctrines generate opposite results: the rescue doctrine would generally allow fire fighters to recover, but the assumption of risk doctrine would not. Consequently, it is impossible to mechanically generate a just rule for the

\textsuperscript{44} For a discussion of the application of these arguments to volunteer fire fighters, see note 69 infra.


\textsuperscript{47} See, e.g., Henjum v. Bok, 261 Minn. 74, 77, 110 N.W.2d 461, 463 (1961); Duff v. Bemidji Motor Serv. Co., 210 Minn. 456, 460, 299 N.W. 196, 198 (1941); Perpich v. Leetonia Mining Co., 118 Minn. 508, 512, 137 N.W. 12, 14 (1912).

Armstrong-type situation. The choice between the two doctrines must rest on considerations of fairness and social policy.⁴⁹

At least one court has argued that the existence of an adequate system of compensation makes imposition of liability on landowners unnecessary.⁵⁰ Fire fighters may, along with other workers, avail themselves of the benefits provided by workers' compensation laws.⁵¹ They may also receive service pensions if disabled by injury or illness arising out of their official duties.⁵² Because these are limited in amount, however, they may not adequately compensate an injured fire fighter. In addition to a pension,⁵³ in Minnesota the dependants of a fire fighter killed in the line of duty are entitled to a $100,000 lump sum payment, which includes $50,000 from the federal government⁵⁴ and $50,000 from the state government.⁵⁵ Because a fire fighter's work subjects him to a risk of harm greater than that confronting the average worker,⁶⁶ and because the fire fighter is de-

⁴⁹. The court in Armstrong did not discuss policy considerations. It merely quoted with approval conclusory language of the California Supreme Court that described the fireman's rule as "premised on sound public policy and . . . in accord with—if not compelled by—modern tort liability principles." 284 N.W.2d at 349 (quoting Walters v. Sloan, 20 Cal. 3d 199, 203, 571 P.2d 609, 611, 142 Cal. Rptr. 152, 154 (1977)). The Armstrong court directed most of its attention to showing that abandonment of the rule was not mandated by either the partial abolition of secondary assumption of risk in Springrose v. Willmore, 292 Minn. 23, 24-26, 192 N.W.2d 826, 827-28 (1971), or the rejection of the licensee/invitee distinction in Peterson v. Balach, 294 Minn. 161, 173-74, 199 N.W.2d 639, 647 (1972). See 284 N.W.2d at 348-50.


⁵². The fire fighter's relief associations in Minnesota may pay disability benefits, not to exceed $75 per month, to disabled fire fighters. Minn. Stat. §§ 424.19-20 (1978). The relief associations may also pay retirement pensions to totally disabled fire fighters, Minn. Stat. § 69.41, .45 (1978), and may disburse the funds without regard to the fire fighter's age or length of service, see Minn. Op. Att'y Gen. 688m, at 3 (Aug. 27, 1965). Both Duluth and Minneapolis, for instance, have established a disability pension of one-half of a first-class fire fighter's pay for permanently disabled fire fighters, to be paid without regard to age or length of service. Telephone interview with Donald Gregg, President, Minneapolis Fire Department Relief Association (Jan. 18, 1980); Telephone interview with James Heim, Secretary, Duluth Firemen's Pension Office (Jan. 18, 1980).

⁵³. In Minnesota, the pension to a surviving spouse must not exceed $50 per month and the pension to a child, if the surviving spouse is living, must not exceed $15 per month. Minn. Stat. § 424.24(1) (a), (b) (1978).


nied a cause of action against negligent third parties, an option that courts extend to other workers; these special benefits seem inadequate.

Some courts have argued that abolition of the fireman's rule would lead to an increase in litigation—an increase substantial enough to impede the administration of justice. This argument, however, ignores one of the most fundamental principles of both constitutional and common law: judicial convenience does not warrant a refusal to protect personal rights. Even if convenience could justify such a refusal, it is doubtful that abrogation of the fireman's rule would lead to a dramatic increase in litigation. Many injuries would be minor, and thus would be fully covered by workers' compensation benefits. Furthermore, Minnesota law already requires prompt official investigation of the causes of fires, and the results of such investigations would increase pressures to settle. Finally, the employer's statutory right of subrogation would deter firemen from bringing claims less substantial than the awards available under the worker's compensation laws, since they would not stand to benefit financially even if their actions were successful.

While rejection of the fireman's rule would remove the

57. In California, other workers may recover from negligent third parties. See Walters v. Sloan, 20 Cal. 3d 199, 213-14, 215, 571 P.2d 609, 617-18, 619, 142 Cal. Rptr. 152, 160-61, 162 (1977) (Tobriner, Acting C.J., dissenting). The same option is apparently available in Minnesota. No statutes or cases were found denying other classes of injured employees a cause of action against negligent third parties not engaged in the furtherance of a common enterprise with the injured party's employer.


59. See, e.g., Dillon v. Legg, 68 Cal. 2d 728, 736-37, 441 P.2d 912, 918, 69 Cal. Rptr. 72, 78 (1968) (“[T]he interests of meritorious plaintiffs should prevail over alleged administrative difficulties.”); Simon v. City of New York, 53 Misc. 2d 622, 626, 279 N.Y.S.2d 223, 228 (Civ. Ct. N.Y. 1967) (“This court cannot concern itself with the contention that this decision may encourage a multiplicity of lawsuits since its function is to do justice under the law.”).


61. See note 51 supra.

62. The fire chief of each city in Minnesota is required to investigate both the cause of every fire that results in more than $100 damage and to report the results of each investigation to the state fire marshal. Minn. Stat. § 299F.04 (1978).

63. See Comment, supra note 56, at 675.

64. See id. In Minnesota, the injured worker's employer is allowed to deduct from the compensation payable by him the amount obtained by the worker in an action against the negligent landowner. Minn. Stat. § 176.061(3)-(6) (1978 & Supp. 1979). See, e.g., Lambertson v. Cincinnati Corp., 257 N.W.2d 679, 684-89 (Minn. 1977); Courtney v. Babel, 293 Minn. 328, 331-34, 198 N.W.2d 566,
heavy burden imposed on fire fighters and increase somewhat the burden on landowners whose negligence proximately causes injury to fire fighters, it is doubtful that abolition of the rule would impose any significant burden on nonnegligent landowners. Although all landowners with liability insurance would bear some additional expense if abandonment of the rule led to increased premiums, at least one court has concluded that the additional expense would not necessarily be substantial.65

Furthermore, it is not clear that the community benefits from the continued existence of the fireman's rule. The rule forces the community to bear the expense of compensating the injured fire fighter out of the public fund.66 The burden on the state treasury would not be eliminated in the absence of the rule, since injured fire fighters would not have a financial incentive to sue unless public benefits were inadequate. The burden on the treasury would surely be reduced, however, because the fire fighter's employer would possess an independent cause of action for indemnification against the negligent party.67 Furthermore, if the rule were abandoned, the state would acquire a right of subrogation allowing it to share in the civil damage awards won by the injured fire fighter and to pursue such actions itself should the fire fighter decline to do so.68

In sum, the fireman's rule severely burdens fire fighters without substantially benefiting either the landowner or the community. It is also doctrinally suspect, both as an unjustified exception to the rescue doctrine and as an imposition of assumption of risk upon actors whose conduct is arguably nonvoluntary.69

Even if the court is justified in employing primary assump-


Neither of these cases argues the issue at any length. Both assume that damages to negligently injured fire fighters would be a very small fraction of the total insured damages. This assumption is not disputed, directly or indirectly, in any opinions supporting the perpetuation of the fireman's rule.
66. See notes 50-55 supra and accompanying text.
67. MINN. STAT. § 176.061(3) (Supp. 1979).
68. See id.
69. It is difficult to tell how the Minnesota Supreme Court would classify volunteer firemen. The nonprofessional nature of volunteer firemen does not seem relevant to the application of assumption of risk. Application of the rescue doctrine, however, would be more appropriately applied to volunteer fire fighters since the policy underlying that doctrine—encouraging people to be
tion of risk as the foundation of the Minnesota fireman’s rule, it incorrectly applied that doctrine to the facts of Armstrong. A fire in an LP gas storage facility threatens an explosion even in the absence of product defects, but the presence of defects in the products or installation can increase the likelihood of an explosion.\textsuperscript{70} The court did not consider whether the fire fighters would have adopted a different means of fighting the blaze had they known of the improper operation of the relief valve. The evidence on this issue was too inconclusive for assumption of risk to be found as a matter of law.\textsuperscript{71}

The arguments militating against the court’s use of assumption of risk principles in the negligence action\textsuperscript{72} apply with equal force to its use of those principles in the strict liability actions for product defects and maintenance of a dangerous instrumentality. The court discussed none of these arguments, although it observed that “certain types of the plaintiff’s conduct may provide a complete or partial bar to recovery in an action predicated upon strict liability.”\textsuperscript{73} In support of this contention, the court cited only cases in which the plaintiff was contributorily negligent, that is, cases in which the plaintiff secondarily assumed the risk.\textsuperscript{74} The court too hastily concluded that because some types of plaintiff conduct prevent recovery, primary assumption of risk also prevents recovery.\textsuperscript{75}

good samaritans—would ostensibly be better served through its application to volunteers than to professionals who are already obliged to fight fires.


\textsuperscript{70} \textit{See} 284 N.W.2d at 353.

\textsuperscript{71} The plaintiff’s assumption of risk is a question for the jury unless the evidence is conclusive. \textit{See} Hansen v. City of Minneapolis, 261 Minn. 568, 571, 113 N.W.2d 508, 510-11 (1962); Geis v. Hodgman, 255 Minn. 1, 6, 95 N.W.2d 311, 315 (1959).

\textsuperscript{72} \textit{See} text accompanying notes 58-64 \textit{supra}.

\textsuperscript{73} 284 N.W.2d at 351.

\textsuperscript{74} \textit{Id.} Two cases were cited. Busch v. Busch Constr., Inc., 262 N.W.2d 377 (Minn. 1977) (driver of defectively manufactured vehicle was found to be 15% negligent in causing accident); Magnuson v. Rupp Mfg., Inc., 285 Minn. 32, 171 N.W.2d 201 (1959) (plaintiff injured while driving snowmobile he knew to be defectively manufactured).

\textsuperscript{75} There has been much discussion and much disagreement involving this complex and controversial issue. Professor Prosser stated, without disapproval, that assumption of risk would probably be employed in cases involving the strict liability of product suppliers. Prosser, \textit{The Assault upon the Citadel (Strict Liability to the Consumer)}, 69 YALE L.J. 1099, 1148 (1960). Professor
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Even if the assumption of risk doctrine is relevant to a strict liability action, it is not clear that the elements necessary for such an assumption of risk were present in the facts of Armstrong. The firemen were aware that certain risks attended their task. This awareness, although perhaps sufficient to make assumption of risk initially plausible in the negligence and dangerous instrumentality actions, could not function similarly in the products liability action. Knowledge of the dangers associated with an LP fire cannot be equated with knowledge of the hidden defects in the LP gas facility itself, and knowledge of the defects is necessary in products liability cases for assumption of risk to be found.

The application of the assumption of risk theory to the facts in Armstrong may indicate a shift in the court's interpretation of that doctrine as it is applied to all plaintiffs, not simply fire fighters. By holding that the fire fighters in Armstrong assumed the risks inherent in the fire, including the installation of the improper valve on the fuel truck, the court may be asserting that a plaintiff can assume a risk without appreciating either the magnitude of that risk or the probability that it will result in harm. Such a change in theory could impose assumption of risk on plaintiffs whose actions were neither voluntary nor intelligent. The absence of any affirmative indication in the

Keeton, however, argued that the doctrine should not be applied in strict products liability actions. He analogized the situation in these cases to that in workers' compensation cases and argued that when liability ceases to be grounded upon the creation of unreasonable risk, assumption is no longer a good answer to plaintiff's claim. In his view, assumption of risk (a doctrine that denies recovery to one who has coauthored his own harm) is conceptually inseparable from a jurisprudence that views fault as the principal justification for shifting loss in tort. In rejecting fault for the principle that loss and risk of loss should be apportioned where it can be most easily borne and distributed, strict liability must necessarily reject assumption of risk. Keeton, Assumption of Risk in Products Liability Cases, 22 LA. L. REV. 122, 149-66 (1961). More recently, Professor Twerski argues that allowing assumption of risk in strict products liability cases would reduce the manufacturer's incentive to produce a safe product. Twerski, Old Wine in a New Flask—Restructuring Assumption of Risk in the Products Liability Era, 60 IOWA L. REV. 1, 49-51 (1974). He nevertheless recommends a pragmatic, expedient use of assumption of risk in the products area and would determine in each case, with each product, whether the manufacturer should protect the plaintiff who decides to use a product knowing that it is defective.

76. The fire fighters knew that an explosion was possible. They did not know of the defective relief valve that greatly increased the probability of an explosion. See notes 70-71 supra and accompanying text.

opinion that the court was overruling previous assumption of risk cases, however, suggests that the court did not intend to alter significantly the doctrine of assumption of risk. Nevertheless, until the court clarifies its position, the scope of the doctrine of assumption of risk in Minnesota will remain uncertain.

The Minnesota Supreme Court's inadequate discussion of policy considerations in *Armstrong* makes it difficult to understand the status and foundation of both the modified Minnesota fireman's rule and the assumption of risk doctrine in general. The court failed to adequately justify its application of assumption of risk principles. The court did not discuss the considerations of fairness and social policy which suggest that perpetuation of the fireman's rule will burden both fire fighters and the community without substantially benefiting nonnegligent landowners. Fire fighters perform an essential public service, yet neither their salaries nor the other benefits currently available to them in Minnesota provide full compensation for catastrophic injuries. Considerations of fairness and social policy strongly support the abandonment of the fireman's rule, through either a finding that a fire fighter's decision to fight a fire is not voluntary in the relevant sense of the word, or a finding that the rescue doctrine should apply.