TORTS—THE "FIREMAN'S RULE"—INJURED FIREMEN MAY RECOVER DAMAGES FOR HARM CAUSED BY WILLFUL AND WANTON MISCONDUCT—*Mahoney v. Carus Chemical Co., Inc.*, 102 N.J. 564, 510 A.2d 4 (1986).

There is substantial agreement among the states that liability will not attach to a landowner or occupier for negligence in the creation of a fire which causes injury to a firefighter.[1] In New Jersey, this doctrine is known as the "fireman's rule."[2] In a majority of states, the fireman's rule is premised on the notion that firemen are licensees[3] or invitees[4] when they enter upon property for job-related purposes. Some states, such as New Jersey, however, have categorized firemen as occupying a unique status,[5] in an attempt to limit the property-based distinctions associated with the fireman's rule.[6] Thus, the adoption and development of

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[1] Krauth v. Geller, 31 N.J. 270, 273, 157 A.2d 129, 130 (1960).

[2] *See, e.g.*, Entwistle v. Draves, 102 N.J. 559, 560, 510 A.2d 1, 2 (1986); Wietecha v. Peoronard, 102 N.J. 591, 593, 510 A.2d 19, 20 (1986); Berko v. Freda, 93 N.J. 81, 82-83, 459 A.2d 663, 663-64 (1983); Trainor v. Santana, 86 N.J. 403, 403-04, 432 A.2d 23, 23 (1981); Alessio v. Fire & Ice, Inc., 197 N.J. Super. 22, 24, 484 A.2d 24, 25 (App. Div. 1984); Ferraro v. Demetrakis, 167 N.J. Super. 429, 433, 400 A.2d 1227, 1229 (App. Div. 1979).

[3] A licensee is a term of art which refers to a person who enters upon property, with the owner's consent, for his own purpose. BLACK'S LAW DICTIONARY 830 (5th ed. 1979). *See, e.g.*, Pennebaker v. San Joaquin Light & Power Co., 158 Cal. 579, 112 P. 459 (1910); Roberts v. Rosenblatt, 146 Conn. 110, 148 A.2d 142 (1959); Romedy v. Johnston, 193 So.2d 487 (Fla. Dist. Ct. App. 1967); Baxley v. Williams Constr. Co., 98 Ga. App. 662, 106 S.E.2d 799 (Ga. Ct. App. 1958); Pincock v. McCoy, 48 Idaho 227, 281 P. 371 (1929); Woodruff v. Bowen, 136 Ind. 431, 34 N.E. 1113 (1893); Aravanis v. Eisenberg, 237 Md. 242, 206 A.2d 148 (1965); Aldworth v. F.W. Woolworth Co., 295 Mass. 344, 3 N.E.2d 1008 (1936); New Omaha Thomson-Houston Elec. Light Co. v. Anderson, 73 Neb. 84, 102 N.W.89 (1905); Davy v. Greenlaw, 101 N.H. 134, 135 A.2d 900 (1957); Drake v. Fenton, 237 Pa. 8, 85 A. 14 (1912); Burroughs Adding Mach. Co. v. Fryar, 132 Tenn. 612, 179 S.W. 127 (1915).

[4] The term invitee refers to one who is invited to enter upon property, for his and the owner's benefit, in connection with activities conducted upon those premises. BLACK'S LAW DICTIONARY 742 (5th ed. 1979). *See, e.g.*, Horcher v. Guerin, 94 Ill. App. 2d 244, 236 N.E.2d 576 (1968); Mistelske v. Kravco Inc., 88 Pa. D. & C. 49 (1953); Strong v. Seattle Stevedore Co., 1 Wash. App. 898, 466 P.2d 545 (1970). *See also* Walsh v. Madison Park Properties, Ltd., 102 N.J. Super. 134, 245 A.2d 512 (1968) (majority opined that firemen engaged in fire inspection were analogous to building inspectors and as such were considered invitees).

[5] *Krauth*, 31 N.J. at 272-73, 157 A.2d at 130. Firemen have been labeled *sui generis*, meaning "[o]f its own kind or class." BLACK'S LAW DICTIONARY 1286 (5th ed. 1979).

[6] *Krauth*, 31 N.J. at 273, 157 A.2d at 130. New Jersey courts have reasoned that a firefighter's status is unique in that he cannot be denied access to private property. *Id.* at 272, 157 A.2d at 130. Based upon this fact, the courts have opined that

the rule in New Jersey has been based solely upon public policy and a balancing of equities.[7] In *Mahoney v. Carus Chemical Co., Inc.*,[8] the New Jersey Supreme Court acknowledged such policy considerations when it held that wanton and willful misconduct is an exception to the immunity offered by the fireman's rule.[9]

Carus Chemical Company, Inc. (Carus) was the exclusive producer of potassium permanganate in the United States.[10] Carus manufactured this substance under the brand name "Cairox."[11] Originally, Cairox was packaged in metal containers, as opposed to fiber-paper drums, because Carus believed this packaging would reduce the risk of fire.[12] In December 1975, however, Carus began packaging Cairox in fiber-paper drums.[13] By 1978, several fires, traceable to Cairox, confirmed that such packaging created a significant risk of spontaneous ignition.[14] Thus, after a fire occurred at the Bethlehem Steel Co. in April 1978, Carus made a conscious decision to stop packaging Cairox in fiber-paper drums.[15] This formal decision was exemplified by an internal marketing memorandum and a subsequent notice to customers.[16]

On June 13, 1978, Carus shipped Inversand Company (Inversand) eighty-six metal drums and one hundred, discontinued fiber-paper drums of Cairox.[17] Approximately one hour after the shipment arrived, an employee noticed smoke coming from one of the fiber-paper containers of Cairox.[18] The ensuing fire ulti-

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a fireman is not a trespasser, licensee, or invitee because his public right to enter upon property is not dependent upon a landowner's consent or invitation. *Id.*

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

8 Mahoney v. Carus Chem. Co., Inc., 102 N.J. 564, 510 A.2d 4 (1986).

9 *Id.* at 579, 510 A.2d at 12.

10 *Id.* at 568, 510 A.2d at 6. Potassium permanganate, $KNn0_4$, is an inorganic oxidizer which speeds the burning of combustible materials and tends to react violently when used in combination with flammable materials. *Id.* at 568-69, 510 A.2d at 6.

11 *Id.* at 568, 510 A.2d at 5.

12 *Id.* at 569, 510 A.2d at 6.

13 *Id.* The plaintiff, Thomas Mahoney, alleged at trial that the decision to use fiber-paper drums, instead of metal containers, was motivated by the company's economic interest in saving $35,000 per year. *Id.*

14 *Id.* at 568-70, 510 A.2d at 5-7.

15 *Id.* at 571, 510 A.2d at 7.

16 *Id.* The internal memorandum was dated April 17, 1978, one week after the Bethlehem Steel Co. fire. *Id.*

17 *Id.* The plaintiff alleged at trial that the hybrid shipment of metal and fiber-paper containers was done to exhaust the supply of fiber-paper drums before changing solely to metal containers. *Id.* at 568, 510 A.2d at 5.

18 *Id.* at 571, 510 A.2d at 8. The shipment arrived at the Inversand warehouse on June 19, 1978. *Id.*

mately required the attendance of seven volunteer fire companies.[19]

Thomas P. Mahoney was among the volunteer firefighters called to the Inversand fire.[20] In the course of fighting the fire, a wall collapsed on Mahoney, causing him serious permanent injuries.[21] Mahoney instituted suit against Carus, Inversand, and Inversand's parent company, Hungerford & Terry, Inc.[22] In the action against Carus, Mahoney asserted a claim based on alleged willful and wanton misconduct.[23]

Basing its decision on the fireman's rule, the superior court granted defendant's motion for summary judgment.[24] The appellate division affirmed the trial court's holding.[25] Focusing primarily on the plaintiff's claim against Carus, the New Jersey Supreme Court reversed the lower courts' opinion.[26] The court held that while the fireman's rule prevents recovery for negligence, it does not preclude an action by an injured firefighter against a defendant whose reckless or willful misconduct created the fire hazard.[27] In addition, the court held that the fireman's rule barred any claims based on principles of strict liability.[28] The court remanded the matter to the trial court for a determination of other issues which might exculpate the defendants.[29]

Prior to *Mahoney*, the seminal New Jersey decision regarding the fireman's rule was *Krauth v. Geller*.[30] In *Krauth*, a fireman

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19 *Id.*

20 *Id.* at 567, 510 A.2d at 5. Mahoney knew he was confronting a chemical fire and was aware of the dangers associated with entering a building engulfed in that type of fire. *Id.*

21 *Id.* at 567, 571, 510 A.2d at 5, 8. Mahoney sustained massive burns, multiple contusions, and a fractured right arm and pelvis. *Id.* at 567, 510 A.2d at 5.

22 *Id.* Barbara Mahoney, Thomas Mahoney's wife, was also a party to the suit. *Id.* at 567 n.1, 510 A.2d at 5 n.1. The court, however, in order to simplify its analysis, did not refer to Mrs. Mahoney in its opinion. *Id.*

23 *Id.* at 580, 510 A.2d at 12. Mahoney's complaint additionally was premised on products liability. *Id.*

24 *See id.* at 567, 510 A.2d at 5.

25 *Id.* Both lower courts' decisions are unreported.

26 *Id.* at 583, 510 A.2d at 14.

27 *Id.* at 576, 579, 510 A.2d at 10, 12.

28 *Id.* at 581-82, 510 A.2d at 13.

29 *Id.* at 583, 510 A.2d at 14. The court noted that there were triable issues as to whether Inversand's liability was excused by the fireman's rule. *Id.* Such liability, the court averred, may be due to failure to warn of structural defects in its warehouse. *Id.*

30 31 N.J. 270, 157 A.2d 129 (1960). While *Krauth* has been relied on by later decisions as the basis for the fireman's rule, the *Krauth* majority cited to Villano v. Pure Oil Co., 62 N.J.L. 37 (Sup. Ct. 1938), as relevant to their decision. *Krauth*, 31 N.J. at 273, 157 A.2d at 130. In *Villano*, a firefighter was injured at a fire when an oil

brought suit against a landowner for injuries sustained when he was called to extinguish an overheated oil-burning stove.[31] The trial court entered judgment in favor of the fireman.[32] The appellate division, however, reversed the lower court's decision.[33] In affirming the appellate division's ruling, the New Jersey Supreme Court held that a landowner, who carelessly starts a fire, is not liable to a paid fireman even if the risk of injury was foreseeable.[34]

The *Krauth* court noted that the underlying justification for this rule emanates from an "assumption of risk" analysis, in that the landowner is not deemed to have breached a duty of care owed to the firefighter by negligently causing a fire.[35] The court asserted that fairness barred an action by a fireman against an individual for creating a hazardous situation which the fireman was trained and paid to abate.[36] Additionally, the majority stated

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storage tank exploded. *Villano*, 62 N.J.L. at 38. The firefighter brought suit against the landowner for dangerous use of property. *Id.* Based on the premise that a fireman assumed the risks incident to his profession and therefore could not recover damages, the *Villano* majority granted the defendant's motion for non-suit. *Id.*

31 Krauth v. Geller, 54 N.J. Super. 442, 448-49, 149 A.2d 271, 274-75 (App. Div. 1959). The oil-burning stove, referred to in *Krauth*, is more commonly known in the building industry as a "salamander." *Id.* at 448, 271 A.2d at 274. The device is a heating apparatus used during construction to dry a building's interior, plaster walls. *Id.*

In *Krauth*, the West Orange Fire Department was summoned on two consecutive days to the defendant's partially constructed home by neighbors to extinguish an overheated stove. *Id.* at 446, 449, 149 A.2d at 273, 275. Subsequently, a fire department official reprimanded the defendant for leaving the stove unattended while it was burning. *Id.* at 449, 149 A.2d at 275. Three days later, however, the fire company again responded to a call from the defendant's neighbors regarding a fire at his home. *Id.* at 448, 149 A.2d at 274. This time, the firemen discovered that the house was filled with smoke because the stove had been burning unsupervised in the basement. *Id.* at 448-49, 149 A.2d at 274. The firemen proceeded to check the house for fire. *Id.* at 449, 149 A.2d at 274. Krauth sustained injuries when his vision was obstructed by smoke and he fell from a second floor balcony. *Id.*, 149 A.2d at 274-75. Krauth brought suit based on negligence and nuisance. *Id.* at 447, 149 A.2d at 273.

32 *Krauth*, 31 N.J. at 272, 157 A.2d at 130.

33 *Krauth*, 54 N.J. Super. at 459, 149 A.2d at 280. The appellate division reversed because they found that the lower court's charge to the jury regarding nuisance, as an alternate theory of liability, was without basis and prejudicial to the defendant. *Id.* at 451, 149 A.2d at 276.

34 *Krauth*, 31 N.J. at 278, 157 A.2d at 133.

35 *Id.* at 273, 157 A.2d at 130-31. Assumption of risk is a doctrine which provides "that a person may not recover for an injury received when he voluntarily exposes himself to a known and appreciated danger." BLACK'S LAW DICTIONARY 113 (5th ed. 1979).

36 *Krauth*, 31 N.J. at 273-74, 157 A.2d at 131.

that because of the overwhelming number of fires caused by careless behavior it would be infeasible to hold liable all those who accidentally start fires.[37] The court noted, however, that several other states impose liability on individuals for creating ultrahazardous conditions "beyond those inevitably involved in fire fighting."[38]

In *Krauth*, the court declined to adjudicate the issue of whether reckless or wanton behavior might be an exception to the immunity created by the fireman's rule.[39] The majority stated that although the plaintiff's complaint alleged wanton misconduct, the plaintiff failed to establish such at trial.[40] Significantly, the *Krauth* court noted that it was debatable whether culpability was relevant to the issue of liability.[41]

Four years later, *Jackson v. Velveray Corp.*,[42] provided the appellate division an opportunity to expound upon the "undue

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[37] *Id.* at 274, 157 A.2d at 131. Based on the same reasoning, the Supreme Court of New Jersey extended the fireman's rule to police officers in Berko v. Freda, 93 N.J. 81, 459 A.2d 663 (1983). For a thorough discussion of Berko v. Freda see Note, *Fireman's Rule Applicable to Police Officers*, 14 SETON HALL 759 (1984).

[38] *Krauth*, 31 N.J. at 274, 157 A.2d at 131. *See, e.g.*, Bandosz v. Daigger & Co., 225 Ill. App. 494 (1930); Maloney v. Hearst Hotels Corp., 274 N.Y. 106, 8 N.E.2d 296 (1937); Drake v. Fenton, 237 Pa. 8, 85 A. 14 (1912).

[39] *Krauth*, 31 N.J. at 277, 157 A.2d at 132. *See infra* note 41 and accompanying text.

[40] *Krauth*, 31 N.J. at 277, 157 A.2d at 132. The court noted that the plaintiff's suit was instituted only with regard to the third instance in which the fire department had to respond to the defendant's home, even though the circumstances of all three episodes were identical. *Id.*, 157 A.2d at 133. The court asserted that while the defendant's behavior may have been careless and exasperating, it was not wanton and willful misconduct. *Id.* Moreover, the court stated that although harm to a fireman is foreseeable, in the case at issue there was no evidence to suggest that there was a "high degree of probability that harm would befall a fireman." *Id.* at 277-78, at 157 A.2d at 133. The majority observed that wanton and willful misconduct was a conscious and intentional act or omission which is likely to result in harm. *Id.* at 277, 157 A.2d at 132-33. Thus, the court ordered that judgment be entered in favor of the plaintiff. *Id.* at 278, 157 A.2d at 133.

[41] *Id.* The court noted:

> We are not concerned with the liability to a fireman of an arsonist or one who deliberately induces a false alarm. Rather we are asked to hold that "wanton" conduct resulting in a fire and consequent alarm will suffice. Wantonness is not too precise a concept. It is something less than intentional hurt, and so viewed is an advanced degree of negligent misconduct. In the context of the policy considerations which underlie the rule of non-liability for negligence with respect to the origination of a fire, it is debatable whether degrees of culpability are at all pertinent.
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> At any rate, we need not decide the question since we can see no basis for a claim of wanton misconduct as the term is ordinarily defined.

Id.

[42] 82 N.J. Super. 469, 198 A.2d 115 (App. Div. 1964).

risk" doctrine mentioned briefly in *Krauth*.[43] In *Jackson*, a fire at the defendant's place of business resulted in injury to several firemen.[44] The plaintiff-firemen alleged that the defendant's carelessness not only accelerated the spread of the fire, but exposed them to risks beyond those generally associated with their jobs.[45] In a unanimous opinion authored by Judge Sullivan, the court asserted that the *Krauth* court had implied that the creation of "undue risk" was an exception to the immunity afforded a negligent plaintiff by the fireman's rule.[46] The court thus stated that an individual could be held liable for negligent acts which created dangers beyond those normally encountered while fighting a fire.[47] Judge Sullivan asserted that the question of whether a risk was "inherent" in firefighting was to be determined by the trier of fact.[48] The court reasoned that while the fireman's rule is cast in terms of the creation of a fire, it also extends to negligence regarding the "spread of the fire".[49] Based on the plaintiffs' failure to establish "undue risk," however, the court remanded the matter for entry of judgment in favor of the defendants.[50]

The next development concerning the fireman's rule oc-

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[43] *See id.* at 475, 198 A.2d at 118.

[44] *Id.* at 471-73, 198 A.2d at 116-17. The plaintiff, William Jackson, was injured when struck by falling debris. *Id.* He later died from injuries sustained in the accident. *Id.*

[45] *Id.* at 473-74, 198 A.2d at 117-118. The conditions which allegedly accelerated the spread of the fire and exposed the firemen to undue risks were as follows: negligence in the operation and maintenance of a sprinkler system; storage of inflammable materials in violation of a city ordinance; failure to promptly notify the fire department; failure to develop an employee fire brigade; cracks in the building structure which permitted the fire to spread to higher floors; and poor housekeeping which facilitated the spread of the fire. *Id.* at 473, 198 A.2d at 117.

[46] *Id.* at 474, 198 A.2d at 118.

[47] *Id.* The court stated "undue risks" included violations of fire codes, storage of hazardous substances, failure to warn of hidden dangers, and other perilous conditions unrelated to the fire. *Id.* at 475, 198 A.2d at 118-19. *See also* Walsh v. Madison Park Properties, Ltd., 102 N.J. Super. 134, 245 A.2d 512 (App. Div. 1968) (fireman did not assume "hidden unknown extrahazardous dangers" which were not reasonably foreseeable).

[48] *Jackson*, 82 N.J. Super. at 482, 198 A.2d at 122.

[49] *Id.* at 475, 198 A.2d at 118. The court observed:

> The general rule as to the nonliability of an owner or occupant to a paid fireman for negligence is often stated in terms of nonliability for negligence in *creating* or *starting* a fire. However, it seems clear that on principle such rule of nonliability extends not only to negligence in creating or starting the fire but also includes negligence related to the spread of the fire. . . . Indeed, the two situations are often indistinguishable.

Id. (citations omitted) (emphasis added).

[50] *Id.* at 482, 198 A.2d at 122.

curred in *Ferraro v. Demetrakis*.[51] *Ferraro* involved an action to recover damages sustained at a fire caused by a defectively repaired oil burner.[52] The trial court granted summary judgment in favor of the defendants.[53] On appeal, the plaintiffs[54] advanced the argument that the defendants' wanton misconduct fell within an exception to the fireman's rule created by the *Krauth* decision.[55] Additionally, the plaintiffs claimed that the fireman's rule was inapplicable because the plaintiffs were volunteers, not paid firemen.[56] Finally, the plaintiffs alleged that the fireman's rule did not preclude recovery against third party tortfeasors.[57]

In rejecting the argument regarding volunteer firefighters, the court stated that because the rationale for the fireman's rule was equally compelling for paid or volunteer firemen, no line of demarcation was necessary.[58] The court noted that both volunteer and paid firefighters face the same type of dangers and that both are covered by the workmen's compensation statute.[59] In

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51 167 N.J. Super. 429, 400 A.2d 1227 (App. Div. 1979).

52 *Id.* at 430, 400 A.2d at 1228. The plaintiffs, an injured fireman and his wife, and the administrators of the estates of two deceased firemen, sued the defendants for negligent repair of a defective oil burner, or alternatively, failure to rectify a known defective condition. *Id.* at 430-431, 400 A.2d at 1228.

53 *Id.* at 430, 400 A.2d at 1228. The defendants were a partnership trading as Jineri Company, which owned the apartment building; Vito Albanese, Sr., Incorporated and Vito Albanese the lessee of the apartment building; and Combustion Sales Corporation of New Jersey and M. G. Romano Plumbing & Heating Incorporated, the companies that allegedly were negligent in repairing the oil burner. *Id.* at 430-31, 400 A.2d at 1228.

54 The plaintiffs in this action include an injured fireman, the injured fireman's wife, and the wives of two firemen who died at the fire. *Id.* at 430-31, 400 A.2d at 1228.

55 *Id.* at 432, 400 A.2d at 1229.

56 *Id.* at 433, 400 A.2d at 1229.

57 *Id.*, 400 A.2d at 1229-30. In *Ferraro*, the plaintiffs also asserted that the "undue risk" doctrine applied. *Id.* at 432, 400 A.2d at 1229. The court held, however, that injuries attributable to smoke inhalation were a danger normally associated with firefighting. *Id.* Additionally, the plaintiffs argued that the fireman's rule denied firemen equal protection under the law. *Id.* at 431, 400 A.2d at 1228. The court dismissed this issue because the plaintiffs failed to assert it at trial. *Id.* at 431-32, 400 A.2d at 1228-29.

58 *Id.* at 433, 400 A.2d at 1229.

59 *Id.*

> [The] plaintiff . . . argues that, because her husband was a volunteer fireman, the *Krauth* rule does not bar recovery for his death. It is true that the rule is usually stated in terms of a "paid" fireman. No case discusses why the rule should be so limited. We see no reason to make liability turn upon whether the fireman is full-time or only a volunteer. The policy behind the rule is to acknowledge the nature of a fireman's duties as determining the scope of risks which he must be deemed to have assumed. A trained fireman faces the same dangers and must be

addressing the rule's applicability to third party tortfeasors, the court held that although the rule had been expressed in terms of landowners and occupiers, it applied with equal force to other negligent parties.[60] The majority disagreed with the plaintiffs' assertion that *Krauth* had limited the fireman's rule to negligent conduct.[61] Instead, the *Ferraro* court stated that *Krauth* not only refused to decide that issue, but implicitly disapproved of such an exception.[62]

In 1986, *Mahoney v. Carus Chemical Co., Inc.*, presented the New Jersey Supreme Court with an opportunity to reevaluate the standard for determining the scope of the fireman's rule.[63] The court averred that, while the immunity afforded to an actor whose careless behavior causes a fire hazard is appropriate, the basis for non-liability erodes when the defendant's conduct is more culpable than mere negligence.[64] The majority, therefore, held that just as the fireman's rule did not bar suits for intentional misconduct, it would not preclude actions for willful and wanton misconduct.[65]

Justice Stein, writing for the majority, began his analysis by

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> deemed to assume the same risks whether he is a volunteer or salaried. Moreover, volunteer firemen are expressly covered by the workers' compensation law. Recall that the availability of workers' compensation was mentioned in *Krauth* as a basis for precluding civil liability.

Id. (citations omitted).

60 *Id.* at 433-34, 400 A.2d at 1229-30. The court noted that although the fireman's rule had traditionally been interpreted as defining an owner or occupier's liability, no New Jersey court had addressed the issue of recovery against a third party. *Id.* at 433, 400 A.2d at 1230. The court observed, however, that other jurisdictions faced with this question had not limited the rule to landowners. *Id.* at 433-34, 400 A.2d at 1230. Thus, the court asserted that if a landowner cannot be held accountable to an injured fireman, a person with less control over the property, and therefore less opportunity to discover latent defects, could not be charged with a higher standard of care. *Id.* at 434, 400 A.2d at 1230. Ultimately, the court held that a third party who negligently causes a fire, while liable to the landowner, is immune from liability to an injured fireman. *Id.*

61 *Id.* at 432, 400 A.2d at 1229.

62 *Id.* at 432-33, 400 A.2d at 1229.

> Plaintiffs . . . attempt to fit within a[n] . . . exception which they claim was acknowledged by the *Krauth* court: recovery may be had where the negligence rose to the level of wantonness. We disagree that any such exception was recognized in *Krauth*. Indeed, the court expressly declined to decide whether wantonness was an exception, citing the absence of evidence of such conduct in that case. Moreover, it implied that the wantonness exception was not tenable. . . .

Id. (citations omitted).

63 *Mahoney*, 102 N.J. at 566, 510 A.2d at 5.

64 *See id.* at 573-74, 510 A.2d at 9.

65 *Id.* at 579, 510 A.2d at 12.

explaining that the fireman's rule was a product of careful inquiry into the interaction between an individual's conduct in creating a fire hazard, and the fireman's right to recover damages based upon that conduct.[66] The court emphasized that this examination, while useful, was of limited value in that it was undertaken only with regard to negligent conduct.[67] The majority stated that *Krauth* made no specific determination as to whether the immunity afforded by the fireman's rule should be extended to actions where the degree of fault was greater than that associated with ordinary carelessness.[68] Additionally, the court asserted that although the appellate court in *Ferraro* had held that wanton misconduct was not an exception to the fireman's rule, other jurisdictions are divided over the issue.[69]

The majority reasoned further that, although *Krauth* held that culpability might be irrelevant,[70] New Jersey had long established a distinction between negligence and wanton misconduct.[71] The *Mahoney* court recognized that wanton and willful misconduct has been defined as an intentional act performed with knowledge of a high degree of probability of harm, with "reckless indifference to the consequences."[72] This distinction, the court noted, had been recognized by the legislature.[73] The court stated that culpability beyond ordinary negligence has generally been an exception to grants of statutory immunity.[74] The court held that while negligence and wanton conduct are wholly

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66 *Id.* at 571, 510 A.2d at 8. As an alternative theory of liability, the plaintiff alleged a cause of action based upon products liability. *Id.* at 580-81, 510 A.2d at 12-13. The plaintiff claimed "that the risk-spreading rationale of products-liability law justifie[d] the imposition of liability on manufacturers and distributors of defective products, who are best able to absorb and redistribute the cost of injuries." *Id.* at 580, 510 A.2d at 12. In rejecting this notion, the court held that the doctrine of strict liability was consistent with, and not an exception to, the fireman's rule. *Id.* at 581-82, 510 A.2d at 13.

67 *Id.* at 571-72, 510 A.2d at 8.

68 *Id.* at 572, 510 A.2d at 8.

69 *Id.* at 575, 510 A.2d at 10. *Compare* Rishel v. Eastern Airlines, Inc., 466 So.2d 1136, 1138 (Fla. Dist. Ct. App. 1985) *and* Marquart v. Toledo, Peoria & Western R.R. Co., 30 Ill. App. 3d 431, 433, 333 N.E.2d 558, 560 (1975) *with* Hubbard v. Boelt, 28 Cal.3d 480, 485, 169 Cal. Rptr. 706, 709, 620 P.2d 156, 159 (1980).

70 *Mahoney*, 102 N.J. at 575, 510 A.2d at 10.

71 *Id.* at 574, 510 A.2d at 9. *See, e.g.*, Foldi v. Jeffries, 93 N.J. 533, 549, 461 A.2d 1145, 1153-54 (1983); McLaughlin v. Rova Farms, Inc., 56 N.J. 288, 305-08, 266 A.2d 284, 293-95 (1970).

72 *Mahoney*, 102 N.J. at 574, 510 A.2d at 9 (quoting McLaughlin v. Rova Farms, Inc., 56 N.J. 288, 305, 266 A.2d 284, 293 (1970)). *See also* Berg v. Reaction Motors Div., 37 N.J. 396, 414, 181 A.2d 487, 496 (1962).

73 *Mahoney*, 102 N.J. at 576-77, 510 A.2d at 10-11.

74 *Id.*

different concepts, the distinctions between wanton and intentional behavior, however, are slight.[75]

Justice Stein opined that the *Krauth* decision implied that an injured fireman should not be barred from recovering against an intentional wrongdoer.[76] Moreover, the court acknowledged that such a proposition had been supported by decisions in this jurisdiction,[77] as well as in others.[78] Intentional conduct, the court asserted, denotes an actor that realizes "with substantial certainty that harm is likely to result" from his actions.[79] Justice Stein thus stressed that the justification for the fireman's rule would be undermined if extended to malicious conduct.[80]

In light of the foregoing, the court declined to extend the immunity of the fireman's rule to willful and wanton acts.[81] Justice Stein recognized that the justification for not extending such immunity to intentional behavior was equally compelling when a defendant's actions were performed with reckless indifference to the consequences.[82] The *Mahoney* court acknowledged that it is not burdensome to hold all whose wanton misconduct cause fires

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75 *Id.* at 574, 510 A.2d at 9. The court asserted that the difference between wanton and willful misconduct and intentional misconduct was simply one of degree. *Id.* For an act to be considered intentional the actor "must intend the harm or realize with substantial certainty that harm is likely to result." *Id.* For an act to be wanton and willful, however, the act must be intentional, but not the harm which results. *Id.*

76 *Id.* at 572, 510 A.2d at 8.

77 *Id. See, e.g.*, Berko v. Freda, 93 N.J. 81, 90, 459 A.2d 663, 668 (1983); Ferraro v. Demetrakis, 167 N.J. Super. 429, 433, 400 A.2d 1227, 1229 (App. Div. 1979).

78 *Mahoney*, 102 N.J. at 572, 510 A.2d at 8. *See, e.g.*, Krueger v. City of Anaheim, 130 Cal. App. 3d 166, 181 Cal. Rptr. 631 (1982).

79 *Mahoney*, 102 N.J. at 574, 510 A.2d at 9.

80 *Id.* at 573-74, 510 A.2d at 9. The majority stated:

> [C]onsiderations of fairness support the grant of immunity from suit by firemen . . . to a citizen whose conduct is merely negligent. Hazards negligently created are staples of the duties firemen . . . are expected to perform. Although the citizen immunized is not free from fault, the quality of fault is not so severe that the grant of immunity from liability for injuries sustained by firemen . . . in the ordinary course of their duties offends our common sense of justice. By contrast, the degree of fault of the intentional wrongdoer is substantial. Thus, to accord immunity to one who deliberately and maliciously creates the hazard that injures the firemen . . . stretches the policy underlying the fireman's rule beyond the logical and justifiable limits of its principle.
>
> Many of the same considerations apply when the hazards to which firemen . . . are exposed are caused not intentionally but by willful and wanton misconduct.

Id.

81 *Id.* at 579, 510 A.2d at 12.

82 *Id.* at 574, 510 A.2d at 9. *See supra* note 80 and accompanying text.

liable for the injuries that may ensue, because most fires are not attributable to such behavior.[83] The majority stated that it would be unjust to allow culpable behavior, such as the defendant's, to go unpunished.[84] Moreover, the court asserted that public policy dictated that reckless behavior of this nature be deterred and punished.[85] Ultimately, the Supreme Court of New Jersey held that the fireman's rule would not insulate the defendant from liability if the conduct which created the fire hazard, and caused the plaintiff's injuries, was willful and wanton.[86]

Justice Clifford began his dissent by acknowledging that the fireman's rule was based primarily upon policy considerations, not principles of law.[87] The justice, however, characterized the fireman's rule as a sensible, straight-forward principle "distinguished by its ease of application."[88] The justice asserted that

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83 *See Mahoney*, 102 N.J. at 577, 510 A.2d at 11. The *Mahoney* court observed that "most fires are attributable to negligence." *Id.* (quoting Krauth v. Geller, 31 N.J. 270, 274, 157 A.2d 129, 131(1960)). The court asserted that one of the underlying justifications for the fireman's rule is that because most fires are carelessly started, it would be too cumbersome to hold liable all those who negligently create fire in which firemen are injured. *Id.* (quoting Krauth v. Geller, 31 N.J. 270, 274, 157 A.2d 129, 131(1960)). *See supra* note 37 and accompanying text.

84 *Mahoney*, 102 N.J. at 577, 510 A.2d at 11.

85 *Id.*

86 *Id.* at 579, 510 A.2d at 12. The court remanded the matter for further proceedings. *Id.* at 583, 510 A.2d at 14.

Mahoney was decided with the companion cases Wietecha v. Peoronard, 102 N.J. 591, 510 A.2d 19 (1986), and Entwistle v. Draves, 102 N.J. 559, 510 A.2d 1 (1986). In *Wietecha*, two policemen were investigating an accident when they were injured because their patrol cars were struck by motorists. *Wietecha*, 102 N.J. at 544, 510 A.2d at 20. The *Wietecha* court held that the corollary of the fireman's rule "is that independent and intervening negligent acts that [cause] injur[y] are not insulated." *Id.* at 595, 510 A.2d at 21.

In *Entwistle*, several police officers brought suit against a tavern owner, its employee, and landlord for injuries sustained when called to the premises to quiet an unruly mob. *Entwistle*, 102 N.J. at 560-61, 510 A.2d at 2. The plaintiffs' original compliant, based upon claims of negligence, was dismissed as being barred by the fireman's rule. *Id.* at 561, 510 A.2d at 2. The plaintiffs later amended the complaint to include willful and wanton misconduct. *Id.* The plaintiffs alleged that the defendants' failure to provide adequate safeguards against violent patrons, in light of similar prior incidents, constituted reckless misconduct. *Id.* Justice Stein writing for the majority emphasized that the bar of the fireman's rule could not be circumvented merely by labeling negligent conduct "willful and wanton" for the purposes of a lawsuit. *Id.* at 562, 510 A.2d at 2.

87 *Mahoney*, 102 N.J. at 583, 510 A.2d at 14 (Clifford, J., dissenting).

88 *Id.* at 584, 510 A.2d at 14 (Clifford, J., dissenting). Justice Clifford stated:

> What has evolved from *Krauth* in the twenty-six years that have passed since it was decided is a sensible, straightforward, bright-line rule, distinguished by its ease of application: if a fireman is hurt as a result of his exposure to the risks of injury that are inevitably involved in firefighting, then his recourse lies with the public fisc, not with the tortfeasor.

the majority's arbitrary attempt to carve an exception into the rule was not sound policy.[89] Justice Clifford averred that the majority's opinion would result in unequal treatment of injured firemen.[90] The justice emphasized that under such an exception, two firefighters responding to identical fires, in different locations could sustain the same injuries, yet may not receive the same recovery.[91] The legal remedy, the justice noted, would be dependent upon whether one fire was carelessly started, and the other caused by recklessness.[92]

Further, Justice Clifford criticized the majority's assertion that firemen would "undoubtedly prefer" this modification of the rule.[93] The justice opined that during both the long history of the fireman's rule and the many years since the *Ferraro* holding, neither the Firemen's Association nor the New Jersey Police Benevolent Association had made any efforts to convince the legislature to abolish the rule.[94] Moreover, inaction by the legislature was viewed by Justice Clifford as indicative of their satisfaction with the fireman's rule as originally adopted.[95] Therefore, Justice Clifford suggested that the majority, if dissatisfied with the

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Id. (citing Berko v. Freda, 93 N.J. 81, 459 A.2d 663 (1983)).

89 *Id.* at 586, 510 A.2d at 16 (Clifford, J., dissenting).

90 *Id.* at 585-86, 510 A.2d at 15-16 (Clifford, J., dissenting).

91 *Id.* at 586, 510 A.2d at 16 (Clifford, J., dissenting).

92 *Id.*

93 *Id.* at 586-87, 510 A.2d at 16 (Clifford, J., dissenting).

94 *Id.* at 587, 510 A.2d at 16 (Clifford, J., dissenting).

95 *Id.* The justice asserted:

> [T]he fact remains that *Krauth*, with its clear implication that proof of a higher degree of recklessness would not serve to avoid the rule, has been on the books since 1960, and *Ferraro v. Dematrakis*, with its declaration that "wanton conduct with respect to the cause of a fire would not require waiver of the general [fireman's] rule," has been around for more than six years. During all or part of that time the *amicus curiae*, New Jersey State Firemen's Association, has lobbied in the legislative hallways for the interest of the firefighters, as have the New Jersey State Police Benevolent Association, *amicus curiae* in the companion case decided today, *Entwistle v. Draves*, for the interest of the State Police. It is almost a matter susceptible of judicial notice that those associations are among the most active, most vocal, and most effective in their representational endeavors. Despite this, their attorneys at oral argument before us could not point to one effort on the part of those associations—or for that matter on the part of any other firemen's or police organization—to persuade the legislature to abolish or limit the "fireman's rule," so firmly and so long established in our case law. One must assume that those associations . . . are satisfied with the rule as it has existed up until today.

Id. (citations omitted).

rule, should either abandon it completely or leave it untouched.[96]

Justice Handler, in his dissent, agreed with the *Mahoney* majority only insofar as the court recognized that an individual "at fault is not entitled to immunity."[97] The justice asserted that the majority's exception for wanton misconduct illustrated the capricious "hairsplitting" necessary to achieve equitable results.[98] Additionally, Justice Handler stated that entitlement to salary and disability insurance are rarely adequate compensation for injury and are poor excuses for eliminating the duty of care owed to public servants.[99] Finally, Justice Handler emphasized that Justice Clifford's concern regarding uneven treatment of plaintiffs was well-founded.[100] Therefore, Justice Handler concluded that the fireman's rule should be abolished, and firefighters and police officers should be given the same right to recover against tortfeasors as any other injured party.[101]

The fireman's rule, as originally adopted in *Krauth*, was a common sense solution to potentially excessive burdens that could have faced the taxpayers and the courts. The rule was adopted on the premise that it was impractical to permit firefighters to seek redress against all who carelessly caused fires, since most fires are attributable to negligent conduct. Additionally, the rule safeguarded the public in that once a fire was started, an

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96 *Id.* at 586, 510 A.2d at 16 (Clifford, J., dissenting).

97 *Id.* at 588, 510 A.2d at 17 (Handler, J., dissenting).

98 *Id.* at 589, 510 A.2d at 17 (Handler, J., dissenting). While Justice Handler sympathized with the majority's struggle to articulate a reasonable explanation for the equitable result it sought to achieve, he asserted that the majority's dilemma illustrates the inevitable "hairsplitting" that is necessitated by retaining the rule and attempting to identify credible reasons to distinguish suits where recovery is permitted from those where it is denied. *Id.* Justice Handler opined that the majority's "newly-adopted rationale," which would require the courts to distinguish independent causes from normal risks or abnormal risks, was "simply a convenient rationalization seized upon to overcome and ameliorate the arbitrary and regressive effects that inhere in the fireman's rule." *Id.*, 510 A.2d at 17-18 (Handler, J., dissenting) (citing Berko v. Freda, 93 N.J. 81, 459 A.2d 663 (1983)).

99 *Id.* at 590, 510 A.2d at 18 (Handler, J., dissenting).

100 *Id.* at 590-91, 510 A.2d at 18 (Handler, J., dissenting).

101 *Id.* at 591, 510 A.2d at 18 (Handler, J., dissenting). Justice Handler wrote:

> The rule draws artificial distinctions between police officers and firefighters who are denied recovery under the fireman's rule and other public employees who have the right to maintain traditional tort actions against third parties for virtually all negligently inflicted injuries arising in the performance of their employment. . . . [This] distinction impedes the effectuation of a fundamental tenet of our jurisprudence that should apply to firefighters and policemen: the right of redress for those injured as a result of the wrongdoing of others.

Id. at 590-91, 510 A.2d at 18 (Handler, J., dissenting).

individual would not hesitate to seek assistance for fear of a later suit by the firefighters. Moreover, the *Krauth* rule was equitable because the courts realized that firefighters are trained and paid to respond to fires.[102]

The supposition that the fireman's rule was based on sound public policy considerations and equity, has been perpetuated by the fact that the rule has been upheld by New Jersey courts for almost five decades. Further support is provided by the fact that the rule has met with general acceptance in most jurisdictions.[103] Given this wide base of support, the rule should not be abandoned, insofar as it applies to negligent behavior. On the contrary, the rule should be legislatively codified for two reasons. First, the admittedly sound policy of the fireman's rule would not have to rely solely on the judiciary for support. Second, and more importantly, the legislature could provide specific guidelines regarding proper application of the rule.

Recently, the fireman's rule has encountered difficulties with respect to whether different levels of culpability affect its application.[104] This problem, as well as other complications, could be resolved by the legislature's intervention. The legislature, by virtue of their position, would be better equipped to gauge the needs of the people, and to resolve the concerns associated with the rule. In addition, this approach would guarantee the preservation of the fireman's rule, as well as provide new justification for it. Furthermore, by providing relief for the difficulties that have arisen, a legislatively codified rule would resolve dissension among the courts. Finally, specific guidelines would permit the fireman's rule to remain a bright-line test, characterized by its inherent ease of application.

Sherilyn P. Lisowski

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102 *See generally* Krauth v. Geller, 31 N.J. 270, 157 A.2d 129 (1960).
103 *Id.* at 273, 157 A.2d at 130.
104 *See Mahoney*, 102 N.J. at 578, 510 A.2d at 11-12.