TORT—IMMUNITY—PRIVATE WATER COMPANY HELD LIABLE FOR NEGLIGENT FAILURE TO PROVIDE SUFFICIENT WATER PRESSURE FOR FIGHTING FIRES TO EXTENT CLAIMS ARE UNDERINSURED OR UNINSURED—*Weinberg v. Dinger*, 106 N.J. 469, 524 A.2d 366 (1987).

Though firmly entrenched in English common law, in the United States the doctrine of tort immunity is slowly eroding through judicial and legislative channels.[1] Courts are becoming more concerned with fairness and public policy considerations than with upholding antiquated common law tort immunities.[2] Traditionally, municipal corporations enjoyed a broad spectrum of immunity.[3] In recent years, however, the trend seems to be the abolition of the immunities either in whole or part.[4]

Cause for concern was spurned with the transformation of the immunity doctrine.[5] Disputes emerged regarding the issue of whether the judiciary or the legislature should abrogate existing immunities.[6] Recently, the New Jersey Supreme Court, in *Wein-*

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[1] *See* W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS § 131, at 1052 (5th ed. 1984) [hereinafter PROSSER & KEETON].

[2] *See, e.g.*, Kelley v. Gwinnel, 96 N.J. 538, 476 A.2d 1219 (1984); Rappaport v. Nichols, 31 N.J. 188, 156 A.2d 1 (1959); Wytupeck v. Camden, 25 N.J. 450, 136 A.2d 887 (1957).

[3] *See* Note, *Government Liability in Tort*, 34 YALE L.J. 1, 1 (1924). Historically, Anglo-American law required the citizen to bear the burdens of the government's administrative errors *Id. See also* RESTATEMENT (SECOND) OF TORTS § 895C comment b (1977) [hereinafter RESTATEMENT].

> A local government entity has been regarded by the law as having a unique dual character, which in the past has considerably affected its liability in tort. On the one hand it is a subdivision of the State, endowed with governmental and political powers, and charged with governmental functions and responsibilities. On the other hand it is a corporate body, capable of much the same acts as a private corporation, and having much the same special and local interests and relations, not shared by the State at large. . . . Insofar as the local government represented the State, in its governmental, political or public capacity, it shared the same immunity of the State from liability in tort.

Id.

[4] *See* RESTATEMENT, *supra* note 3, ch. 45A introductory note. *See also* PROSSER & KEETON, *supra* note 1, §§ 131-135 (government immunity, public officer immunity, charitable immunity, infant immunity and immunity for the insane have been largely restricted or abolished).

[5] *See* PROSSER & KEETON, *supra* note 1, § 131, at 1055-56; Comment, *Judicial Abrogation of Governmental and Sovereign Immunity: A National Trend with a Pennsylvania Perspective*, 78 DICK. L. REV. 365, 386 (1973) (noting that in the absence of statutory abrogation, courts should be foreclosed from interfering with the immunity doctrines).

[6] PROSSER & KEETON, *supra* note 1, § 131, at 1055; Comment, *supra*, note 5, at

berg v. Dinger,[7] narrowed the framework of tort immunity despite existing statutory provisions.[8] The court held that private water companies were not immune from liability for losses caused by their negligent failure to maintain sufficient water pressure for fighting fires, except with regard to fire insurance companies' subrogation claims.[9]

Penns Grove Water Company (Penns Grove) operated pursuant to a filed tariff and in accordance with the rule and regulations set forth by the Board of Public Utility Commissioners (BPU).[10] The tariff provided that Penns Grove adopt the regulations promulgated by the BPU.[11] Penns Grove also was obligated under the tariff to exercise due diligence in all aspects of service to be performed.[12] Further, the terms of the tariff were to be incorporated into every service contract entered into by Penns Grove.[13] Accordingly, Penns Grove engaged in a service contract with Paul Weinberg which automatically included the BPU's rules and regulations and the tariff's conditions and terms.[14]

A fire occurred at the Twin Bridge Apartments in Penns

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386. A further issue is whether a court's decision to abolish immunity should apply retrospectively or prospectively. PROSSER & KEETON, *supra* note 1, § 131, at 1055. Also controversial is whether a restructuring of immunity law "can be achieved within a stable framework of law." *Id.* at 1055-56.

7 106 N.J. 469, 524 A.2d 366 (1987).

8 *See id.* at 492, 524 A.2d at 378.

9 *Id.* Abrogation of immunity was limited to those situations where the claimants were uninsured or underinsured. *Id.*

10 *Id.* at 472, 524 A.2d at 367.

11 *Id.* at 473, 524 A.2d at 367. Paragraph one of the tariff stated: "Pennsgrove Water Supply Company, Inc., . . . hereby adopted Regulations promulgated by the Board of Public Utility Commissioners . . . insofar as they may be applicable to Water Utilities . . . ." *Id.*

12 *Id.* Paragraph eight of the tariff stated:

> The Company will use due diligence at all times to provide continuous service of the character or quality proposed to be supplied but in case the service shall be interrupted or irregular or defective or fail, the Company shall be liable and obligated only to use reasonably diligent efforts in light of the circumstances then existing to restore or correct its characteristics.

Id.

13 *Id.* Paragraph ten of the tariff stated: "The standard terms and conditions contained in this tariff are a part of every contract for service entered into by the Company and govern all classes of service where applicable . . . ." *Id.*

14 *Id.*, 524 A.2d at 367-68. One BPU regulation, entitled "Pressure and volume of water service," provides: "(a) Each water utility shall supply water service at adequate pressure and volume to the curb, or point of connection with the customer's service line. (b) Each water utility shall maintain sufficient pressure and volume of water at all fire hydrants to assure adequate streams for the fighting of fires." N.J. ADMIN. CODE tit. 14, § 9-2.2 (1985).

Grove, New Jersey on November 23, 1980.[15] Fire fighters, due to insufficient water pressure from nearby hydrants, were incapable of extinguishing the blaze.[16] As a result, the entire building, consisting of twelve apartments, was destroyed.[17] The property owner, Paul Weinberg, and residents of the building instituted suit against Penns Grove for damages suffered as a result of the fire.[18] They maintained that there was inadequate water pressure for fighting fires because Penns Grove negligently failed to maintain, repair and inspect its water system.[19]

The trial court granted Penns Grove's motion for summary judgment and certified it as final.[20] The appellate division affirmed and concluded that absent an express contractual or statutory duty, a private water company could not be held liable for negligently failing to provide a sufficient supply of water.[21] The New Jersey Supreme Court reversed the appellate division decision, holding that private water companies were liable in tort for failing to provide sufficient water pressure for fighting fires, except in cases concerning subrogation claims maintained by fire insurance companies.[22]

At common law, it was well-established that, absent a contractual or statutory provision, a private water company had no duty to provide sufficient water pressure for combatting fires.[23]

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15 *Weinberg*, 106 N.J. at 472, 524 A.2d at 367.

16 *Id.*

17 *Id.*

18 Weinberg v. Penns Grove Water Co., 216 N.J. Super. 409, 410, 524 A.2d 403, 403 (App. Div. 1984), *rev'd*, 106 N.J. 469, 524 A.2d 366 (1987).

19 *Weinberg*, 106 N.J. at 472, 524 A.2d at 367. Penns Grove was the private water company responsible for installing and maintaining the water mains and fire hydrants in the municipality. *Id.*

20 *Weinberg*, 216 N.J. Super. at 411-12, 524 A.2d at 404.

21 *See id.* at 412-13, 524 A.2d at 405.

22 *Weinberg*, 106 N.J. at 492-93, 524 A.2d 378. The supreme court remanded for a full trial, which was to include a determination regarding whether the case involved subrogation claims and whether plaintiffs have been compensated for their losses. *Id.* at 496 & n.8, 524 A.2d at 380 & n.8. The court instructed: "To the extent that plaintiffs' claims are identified as subrogation claims by fire-insurance carriers, such claims should be dismissed unless the claimants are prepared to prove that increases in water company insurance costs because of liability for such subrogation claims would be substantially offset by decreases in fire-insurance premiums." *Id.* at 496 n.8, 524 A.2d at 380 n.8. In May 1987, the plaintiffs unsuccessfully petitioned the New Jersey Supreme Court for rehearing.

23 *See, e.g.*, Reimann v. Monmouth Consol. Water Co., 9 N.J. 134, 87 A.2d 325 (1952) (denying recovery against water company for failure to supply sufficient water pressure for fire fighting in the absence of a contract between water company and individual); Atlas Finishing Co. v. Hackensack Water Co., 10 N.J. Misc. 1197, 163 A. 20 (N.J. 1932) (determining there is no implied contract between a customer

The New Jersey Supreme Court first addressed the issue of a private water company's duty to provide water in *Olmsted v. Proprietors of the Morris Aqueduct*.[24] In *Olmsted*, the proprietors of the Morris Aqueduct sought to expand their facilities for supplying water to Morristown by diverting certain streams and springs.[25] The waters of these streams and springs flowed through the lands owned by Olmsted and others.[26] The expansion was necessary to provide water to the rapidly growing number of inhabitants in Morristown.[27] Olmsted objected to the unconstitutional taking of water from his lands and mill.[28] He requested the appointment of three commissioners to assess the ensuing damages and to ascertain his rightful compensation.[29]

The court held that a water company could exercise the right of eminent domain to further the public interest.[30] Noting that

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and a water company that the water company will supply adequate water pressure for extinguishing fires); Baum v. Somerville Water Co., 84 N.J.L. 611, 87 A. 140 (N.J. 1913) (holding that a water company is not liable for inadequate water pressure where no contractual relationship existed between plaintiff and water company); Hall v. Passaic Water Co., 83 N.J.L. 771, 85 A. 349 (N.J. 1912) (denying recovery to a mill for fire loss caused by insufficient water supply where contractual relation existed between water company and city but not between the mill and the water company).

[24] 46 N.J.L. 495 (N.J. 1884).

[25] *Id.* The waters of "Sand Spring" were on the lands owned by the proprietors of the Morris Aqueduct and were to be diverted. *Id.* Also, Mills Baily Brook, a rivulet crossing the road leading from Morristown to Basking Ridge and flowing down to the lands owned by Olmsted and occupied by his tenants, was to be diverted. *Id.* at 495-96.

[26] *Id.* at 496. Olmsted was the owner of 116 acres of land and a grist-mill. *Id.* William Stull and Frederick Stull were tenants of Olmsted and operated the grist-mill. *Id.*

[27] *Id.* at 500-01. The court noted:

> The object is to furnish water to the people of Morristown. Morristown is a growing municipality, covering a large extent of territory, and containing about six thousand inhabitants. Improved facilities for rapid transit have brought the town so near New York that it may almost be called a suburban town. The number of permanent residents is rapidly increasing. Spacious houses are multiplying. The population is of such a character as to demand those conveniences and comforts of life developed by what are termed "modern improvements." To retain such a population an abundance of pure spring water is essential.

Id.

[28] *Id.* at 496.

[29] *Id.* Olmsted contended that he had a "perpetual right and privilege" to have the water flow through his lands. *Id.* He urged that diverting the water away from his property constituted an unjust taking without compensation. *Id.* Olmsted maintained that his land would be damaged and his mill could not operate properly if the water was diverted. *See id.*

[30] *Id.* at 499. The court posited that private rights may be infringed if the public interest will be benefited. *Id.* Thus, it concluded that corporate entities are justi-

the object of the proprietors was to furnish water to a growing municipality[31] and that supplying an abundance of spring water was essential,[32] the supreme court posited that for a water company to fulfill its public duty, "it must provide water for ordinary purposes, as well as unexpected contingencies."[33] The court asserted: "[I]t is necessary to anticipate the condition of things which experience teaches will frequently occur, and in time make provision by increased facilities to supply water abundantly at a period when it shall be most needed."[34] It reasoned that the health and comfort of the people demanded no less.[35] It also asserted that "[w]hen a company undertakes to supply a town with water the ordinary methods to obtain water to extinguish fires are abandoned by the people, and under such circumstances it would be gross negligence [for] the company to permit the supply of water to be intermitted or diminished to any considerable extent, and thus endanger the property within the town."[36] Thus, even though there was no contract between the water company and its citizens, the court imposed a duty on the water company for policy reasons.[37]

Six years later, the court elaborated on a private water company's contractual duty to supply water, in *Middlesex Water Co. v. Knappman Whiting Co.*[38] The plaintiff water company entered into a contract with the defendant, a manufacturing company.[39] Pursuant to the terms of the contract, the water company was to provide water "with a pressure sufficient for fire purposes" for a period of five years.[40] On May 18, 1898, the principal water main broke where it crossed a stream and caused unusually low water

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fied in taking private property for the purpose of bringing water to towns and cities. *Id.* at 499-500.

31 *Id.* at 500. *See supra* note 27 and accompanying text.

32 *Olmsted*, 46 N.J.L. at 501.

33 *Id.* The court stated: "A company that undertakes to supply a city or town with water does not perform its duty to the public unless it provides, not only for ordinary seasons, but for long summer droughts. Provision must be made in advance for such contingencies, for when the drought shall come it will be too late to apply a remedy." *Id.*

34 *Id.*

35 *Id.*

36 *Id.*

37 *See id.*

38 64 N.J.L. 240, 45 A. 692 (N.J. 1900).

39 *Id.* at 240-41, 45 A. at 692-93.

40 *Id.* at 241, 45 A. at 693. The water company agreed to furnish water for drinking, domestic uses and fire fighting, for $600 per year. *Id.* at 241-42, 45 A. at 693.

pressure.[41] Workers, unable to repair the main immediately because of high tide, were unable to restore normal water pressure until the afternoon of May 19, 1898.[42] The defendant's factory caught fire on the morning of May 19, and was destroyed.[43] The water company sued the defendant for breach of contract for failure to make subsequent payments for water supplied.[44] The defendant counter-claimed for damages sustained as a result of the water company's failure to supply sufficient water pressure for fire fighting as required by contract.[45]

The court held that the water company was liable to the manufacturing company, even though the company was not at fault for its failure to maintain adequate water pressure for fire prevention.[46] The court concluded that, because the contract was "clear and unqualified," the contractor was bound to perform unless it was absolutely impossible.[47] The court stated: "where one of two innocent persons must sustain a loss, the law casts it upon him who has agreed to sustain it, or, rather, the law leaves it where the agreement of the parties has put it."[48]

The court was confronted with a similar issue in *Hall v. Passaic Water Co.*[49] The plaintiff, a mill owner, entered into a contract for water with the defendant water company.[50] A fire broke out and the mill was destroyed due to insufficient water pressure.[51] The water company claimed that the superintendent never contracted nor had the authority to contract to supply water for fire purposes.[52] Additionally, the water company's contract records contained no other contracts of this type.[53] The court reasoned that the plaintiff failed to establish that the superintendent had the authority to guarantee a sufficient amount of

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41 *Id.* at 244, 45 A. at 694. The company was notified of the low water pressure at 11:00 p.m., but did not determine there was a break in a pipe until 4:00 a.m. the following day. *Id.*

42 *Id.*

43 *Id.* The defendant's loss, after insurance and salvage, was estimated to be $16,889. *Id.*

44 *Id.* at 243, 45 A. at 693.

45 *Id.* at 242, 45 A. at 693.

46 *Id.* at 254, 45 A. at 697.

47 *Id.* at 251, 254, 45 A. at 696, 697. *See supra* note 40 and accompanying text.

48 *Middlesex Water Co.*, 64 N.J.L. at 251, 254, 45 A. at 696, 697. "No distinction [was] made between accidents that could be foreseen when the contract was entered into and those that could not have been foreseen." *Id.* at 251, 45 A. at 696.

49 83 N.J.L. 771, 85 A. 349 (N.J. 1912).

50 *Id.* at 772-73, 85 A. at 349-50.

51 *Id.* at 772, 85 A. at 350.

52 *Id.* at 773-74, 85 A. at 350-51.

53 *Id.* at 775, 85 A. at 351.

water pressure for fighting fires.[54] Absent authority and an express contractual provision, the court was reluctant to impose liability on the water company.[55]

The court in *Baum v. Somerville Water Co.*,[56] followed the holdings of *Middlesex* and *Hall*.[57] The plaintiff, Michael Baum, brought an action against the water company to recover for losses sustained when a fire destroyed his stove factory and warehouse.[58] Both hose and engine companies were dispatched, but they were not able to extinguish the fire because of insufficient water pressure.[59] The plaintiff contended that the defendant water company breached its duty to provide a constant supply of water at reasonable pressure.[60] The supreme court noted that there was no contract between the plaintiff and defendant, but rather, with the defendant and the town.[61] The court held that absent a contract between Baum and the water company, the company could not be held liable for plaintiff's damages.[62] The court further asserted that neither common law nor statutory provision imposed such liability.[63] Thus, no liability attached in the absence of an enforceable contract.[64]

Nearly twenty years after the *Baum* decision, the court reaffirmed its position on water company liability in *Atlas Finishing Co. v. Hackensack Water Co.*[65] The plaintiff instituted suit against the defendant, a public utility operating a water company, sounding in tort, implied contract and statutory duty arising under the

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54 *See id.* at 774, 85 A. at 350.

55 *See id.* at 774-75, 85 A. at 350-51.

56 84 N.J.L. 611, 87 A. 140 (N.J. 1913).

57 *See id.* at 612-13, 87 A. at 140-41.

58 *Id.* at 611-12, 87 A. at 140.

59 *Id.* at 612, 87 A. at 140. The water company "was incorporated for the purpose of supplying the towns of Somerville and Raritan with water." *Id.*

60 *Id.* at 612-13, 87 A. at 140-41. Baum claimed that the defendant company had a duty to the citizens of Somerville and Raritan to adequately supply water at a sufficient pressure for fire fighting. *Id.*

61 *See id.*

62 *Id.* at 615, 87 A. at 141. The court stated: "[i]n the absence of contract no liability exists on the part of the defendant for the benefit of the plaintiff." *Id.* The court asserted that as neither the common law nor a relevant statutory provision imposed such liability, it did not exist absent a contract. *Id.* The court distinguished *Middlesex*, because unlike the case at bar, in that case the water company had entered into a contract with a factory owner whereby the company was to supply the owner with sufficient water pressure for fighting fires. *Id.* at 612-13, 87 A. at 140. *See also supra* notes 39-40 and accompanying text (discussing *Middlesex*).

63 *Baum*, 84 N.J.L. at 615, 87 A. at 141.

64 *Id.*

65 10 N.J. Misc. 1197, 163 A. 20 (N.J. 1932).

Public Utility Act when a fire broke out at the plaintiff's plant and completely destroyed his building and property.[66] Plaintiff alleged that the fire was uncontrollable due to inadequate water pressure supplied by the water company.[67]

The court recognized neither a common law nor statutory duty of a water company to supply water for extinguishing fires.[68] The court asserted that although breach of the Public Utility Act's provision requiring safe property and adequate service constituted a misdemeanor,[69] it did not establish a private cause of action. The court posited that the central duty of a water company was simply "to furnish water as a commodity."[70]

The next significant development affecting the potential liability of a water company was marked by the New Jersey Supreme Court's decision in *Reimann v. Monmouth Consolidated Water Co.*[71] In *Reimann*, a fire at a recreation center destroyed the building and its contents when volunteer firefighters were unable to extinguish the blaze because of insufficient water volume and pres-

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[66] *Id.* at 1197-99, 163 A. at 21-22. The water pipes in the plaintiff's plant were connected to the defendant's water main. *Id.* at 1197-98, 163 A. at 21. There were outlets for discharging water and fire hydrants for extinguishing fires. *Id.*

[67] *Id.* at 1198, 163 A. at 21.

[68] *See id.* at 1204, 163 A. at 24. The court stated:

> In the absence of a statutory mandate imposing liability upon the utility company in behalf of an individual consumer who has been damaged by a failure to comply with any such order, the order itself could impose no such liability. As already stated, our statute imposes no such liability, and, as enunciated in the decisions last cited above, it will be presumed that the legislature does not intend by statute to make any change in the common law beyond what it declares either in express terms or by unmistakable implication.

Id. The court posited that such enormous liability should not be imposed on a private water company "by mere implication." *Id.*

[69] *Id.* at 1203, 163 A. at 23. The relevant provision provided: "Nor shall any public utility as herein defined provide or maintain any service that is unsafe, improper or inadequate." *Id.*

[70] *Id.* at 1199, 163 A. at 22. The court explained:

> The primary business of a water company, so far as private customers are concerned, is to furnish water as a commodity. Keeping this in mind, and further recognizing that under the law of this state the defendant is a *quasi*-public corporation engaged in the exercise of a public use in discharging a public duty which would otherwise devolve upon the municipality itself, and furnishing water at rates fixed exclusively by a state agency, it would appear plain that it was never contemplated that from the simple relation of distributor and consumer, the former undertook to assume liability for failure to furnish water to extinguish fires.

Id. at 1199-1200, 163 A. at 22.

[71] 9 N.J. 134, 87 A.2d 325 (1952).

sure.[72] The plaintiff, the owner and operator of the recreation center, brought a tort action against the public utility responsible for supplying the water.[73] A majority of the court, relying on *Baum*, determined that absent a specific obligation concerning water pressure for extinguishing fires, a water company could not be held liable to a plaintiff for losses sustained.[74] The court reasoned that to recover against a water company for misfeasance or nonfeasance, the plaintiff must establish a contractual, statutory or common law duty to provide water.[75] The court recognized that if liability was imposed on water companies, regardless of the company's size, the cost of providing water would be increased.[76] The court also noted that abolishing tort immunity for water companies would open the floodgates to potentially limitless litigation.[77] The court declined, without a legislative directive to the contrary, to abrogate the immunity doctrine.[78]

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72 *Id.* at 135-36, 87 A.2d at 325. Apparently, even with a special "boost" from the fire equipment, the water pressure was inadequate to combat the fire. *Id.*

73 *Id.*, 87 A.2d at 325-26. The first count alleged nonfeasance, in that the defendant failed to provide the reasonable volume of water that the plaintiff and township believed it would. *Id.* at 136, 87 A.2d at 326. The second count asserted misfeasance, as the water company allowed two hours to pass before acting on information that there was insufficient volume and water pressure to extinguish the fire. *Id.* at 137, 87 A.2d at 326. The third count repeated the allegations of misfeasance and nonfeasance and alleged damages in business losses. *Id.* Plaintiff urged that the defendant "exercised exclusive control over the fire hydrants and the exclusive function of furnishing water . . . for inhabitants and the property owners of the township and for the fire department." *Id.*, 87 A.2d at 325-26. Plaintiff also alleged that the defendant had knowledge of his building and business. *Id.*

74 *Id.* at 135, 140, 87 A.2d at 325, 327-28. The court noted that *Baum*, the controlling case in New Jersey for the past forty years, had "never been attacked or weakened." *Id.* at 139, 87 A.2d at 327. The supreme court affirmed the trial court's grant of defendant's motion to dismiss for failure to state a cause of action. *Id.* at 135, 87 A.2d at 325. For a discussion of *Baum*, *see supra* notes 56-64 and accompanying text.

75 *Id.* at 137, 87 A.2d at 326. The court observed that in the case at bar there was no contract or relevant statute. *Id.* It also noted that faced with a similar factual scenario, the New Jersey Court of Errors and Appeals had held in *Baum* that the common law did not impose a duty on a public utility supplying a municipality with water to provide sufficient water to extinguish fires. *Id.* at 137-38, 87 A.2d at 326.

76 *See id.* at 139, 87 A.2d at 327.

77 *Id.* The court asserted: "If such a broad liability as that sought by the plaintiff were established, the ensuing litigation would doubtless be great." *Id.*

78 *See id.* at 140, 87 A.2d at 327. The court stated:

> We conclude that if our law is to be overturned, the result should be effected by the Legislature, vested with the law-making power. Statutory changes are accompanied by publicity and on opportunity for all interested persons to be heard; incidents which are quite impossible in a suit between parties.

Id.

In a dissenting opinion, Justice Vanderbilt observed that a public utility "enjoys extensive privileges by reason of the franchise granted it by the State."[79] Therefore, the Justice declared that in return for these privileges, a water company should be deemed to assume "a concomitant duty to the public" to provide water at sufficient quantity and pressure for ordinary use, including firefighting.[80] Justice Vanderbilt contended that even in the absence of an express contract, a water company should not be immunized from liability for failure to supply water at sufficient pressure for extinguishing fires.[81]

Thirty-five years after *Reimann*, the New Jersey Supreme Court abrogated the common law immunity for private water companies in *Weinberg v. Dinger*.[82] The court held that a property owner could sue a private water company in tort for injuries sustained, to the extent that such losses were uninsured or underinsured for negligent failure to supply sufficient water to combat fire.[83] In so doing, the *Weinberg* majority overturned *Reimann* and its progeny.[84]

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[79] *Id.* at 141, 87 A.2d at 328 (Vanderbilt, C.J., dissenting).

[80] *Id.*

[81] *Id.* at 148, 87 A.2d at 332 (Vanderbilt, C.J., dissenting). The Chief Justice stated:

> There is no sound reason why a water company should be in a preferred position of immunity on the theory that it is merely the supplier of a commodity and therefore not liable in the absence of an express contract for a failure to supply water at a pressure sufficient for ordinary fire extinguishment purposes. If the plaintiff can prove the allegations of his complaint that the defendant knowingly reduced the water pressure to a point where it knew or had reason to know that it would not be sufficient to fight a fire, he should be permitted to recover because of the defendant's misfeasance or active wrongdoing. It is significant that the question of liability for misfeasance or active wrongdoing was not passed upon in any of the decisions relied upon by the majority.

Id.

[82] *Weinberg*, 106 N.J. at 492, 524 A.2d at 378.

[83] *Id.* The court determined:

> [W]e abrogate the water company's immunity for losses caused by the negligent failure to maintain adequate water pressure for fire fighting only to the extent of claims that are uninsured or underinsured. To the extent that such claims are insured and thereby assigned to the insurance carrier as required by statute, we hold that the carrier's subrogation claims are unenforceable against the water company.

Id. at 492-93, 524 A.2d at 378 (citation and footnote omitted).

[84] *See id.* at 496, 524 A.2d at 380. "[W]e impose on private companies the duty to act with reasonable care in providing water for extinguishing fires, and overrule *Reimann v. Monmouth Consolidated Water Co.* and cases decided in reliance on it." *Id.* at 495, 524 A.2d at 380. Since *Reimann*, the New Jersey Supreme Court asserted that it had narrowed or abrogated several common law tort immunities. *Id.* at 485, 524 A.2d at 374 (citing Foldi v. Jeffries, 93 N.J. 533, 461 A.2d 1145 (1983) (narrow-

Justice Stein, writing for the majority, began by noting that a water company's duty to provide adequate water for fire fighting may be derived from three distinct sources—contract, statute or common law.[85] The court asserted that under the majority rule, absent express contractual or statutory provisions, a water company has no duty to furnish a sufficient supply of water for extinguishing fires.[86] It observed that decisions applying the majority rule, however, were "frequently conclusory."[87]

The supreme court observed that a minority of states recognize a cause of action against water companies for failure to supply sufficient water pressure for fighting fires.[88] In these cases,

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ing parental immunity); Merenoff v. Merenoff, 76 N.J. 535, 388 A.2d 951 (1978) (limiting interspousal immunity); Willis v. Department of Conservation & Economic Dev., 55 N.J. 534, 264 A.2d 34 (1970) (narrowing sovereign immunity); Collopy v. Newark Eye & Ear Infirmary, 27 N.J. 29, 141 A.2d 276 (1958) (limiting charitable immunity)).

[85] *Id.* at 474, 524 A.2d at 368 (citing Reimann v. Monmouth Consol. Water Co., 9 N.J. 134, 137, 87 A.2d 325, 326 (1952)).

[86] *Id.* at 479, 524 A.2d at 371 (citing German Alliance Ins. Co. v. Home Supply Water Co., 226 U.S. 220 (1912); Luis v. Orcutt Town Water Co., 204 Cal. App.2d 433, 22 Cal. Rptr. 389 (1962); Earl E. Roher Transfer & Storage Co., Inc. v. Hutchinson Water Co., Inc., 182 Kan. 546, 322 P.2d 810 (1958); Gatewood v. Detroit Water Dep't, 121 Mich. App. 57, 329 N.W.2d 34 (1982); Clark v. Meigs Equip. Co., 10 Ohio App.2d 157, 266 N.E.2d 791 (1967)). The supreme court stated that majority-rule decisions generally construe contracts for water service strictly and deny recovery unless specific provisions regarding water pressure were incorporated into the contract. *Id.*

[87] *Id.* at 480, 524 A.2d at 372. The majority observed that "[s]ome courts insist that the only possible source of a duty of care is contractual." *Id.* It further stated that some courts hold that no tort liability can attach where there is no contract imposing an obligation on the water company, as there can be no breach of a duty owed. *Id.* at 480, 524 A.2d at 372 (quoting German Alliance Ins. Co. v. Home Water Supply Co., 226 U.S. 220 (1912)). The court noted that other cases, relying on the distinction between nonfeasance and misfeasance, hold that where a water company did not expressly assume responsibility to supply water for fire fighting, it owed no duty to a consumer. *Id.* at 481, 524 A.2d at 372.

[88] *Id.* at 482, 524 A.2d at 372-73 (citing Harris v. Board of Water and Sewer Comm'rs of Mobile, 294 Ala. 606, 320 So.2d 624 (1975) (liability based on third-party beneficiary status or tort); Veach v. Phoenix, 102 Ariz. 195, 427 P.2d 335 (1967) (municipality liable in tort for breach of duty to provide water for fire protection); Woodbury v. Tampa Water Works Co., 57 Fla. 243, 49 So. 556 (1909) (water company liability grounded in tort); Pineville Water Co., Inc. v. Bradshaw, 266 S.W.2d 305 (Ky. 1953) (recovery against water company based on theory of third-party beneficiary); Potter v. Carolina Water Co., 253 N.C. 112, 116 S.E.2d 374 (1960) (third-party beneficiary recovers against water company); Doyle v. South Pittsburgh Water Co., 414 Pa. 199, 199 A.2d 875 (1964) (recognizing valid cause of action in tort against a water company); White v. Tennessee-American Water Co., 603 S.W.2d 140 (Tenn. 1980) (water company held liable in tort); Shannon v. Grand Coulee, 7 Wash. App. 919, 503 P.2d 760 (Ct. App. 1972) (liability predicated upon negligence)).

the claim is upheld regardless of the existence of statutory or contractual provisions with respect to water pressure.[89] The minority rule jurisdictions base liability on theories of third-party contract beneficiaries or traditional tort doctrines.[90]

The *Weinberg* court noted that although Weinberg and Penns Grove had an express agreement incorporating water pressure specifications, its decision would rest solely on tort law.[91] It stated that the imposition of a duty "ultimately is a question of fairness," which "involves a weighing of the relationship of the parties, the nature of the risk, and the public interest in the proposed solution."[92] The majority stressed that tort law requires that persons wrongfully injured should be fairly compensated by the tortfeasor responsible for their injuries.[93]

The majority first considered the public benefits that would be derived from the imposition of a duty of care on water companies.[94] The court asserted that requiring tortfeasors to pay for the damages that they have caused provides an incentive for reasonable conduct.[95] The majority also posited that "[b]y acting non-negligently, water companies will decrease the risk of fire damage and loss of life in ways property owners cannot, and, at the same time, minimize their own exposure to tort liability."[96]

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[89] *Id.* *See supra* note 88 and accompanying text.

In the leading minority-rule case, *Doyle v. South Pittsburgh Water Co.*, 414 Pa. 199, 199 A.2d 875 (1964), the court imposed a duty on a water company based on the foreseeability of the harm involved. *See id.* The *Doyle* court stated:

> The physical situation in the case at bar and the facts evolving therefrom bring this litigation squarely within the rule that where a party to a contract assumes a duty to the other party to the contract, and it is foreseeable that a breach of that duty will cause injury to some third person not a party to the contract, the contracting party owes a duty to all those falling within the foreseeable orbit of risk of harm.

Id. at 207, 199 A.2d at 878 (citing MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916)).

[90] *Weinberg*, 106 N.J. at 482, 524 A.2d at 372-73. *See supra* note 88 and accompanying text.

[91] *Weinberg*, 106 N.J. at 483-84, 524 A.2d at 373. The court stated: "Although the agreement and the regulation it adopts could serve as an independent basis for the water company's liability, we choose to rely primarily on settled principles of tort law as the bases for our decision." *Id.*

[92] *Id.* at 485, 524 A.2d at 374 (quoting Goldberg v. Housing Auth., 38 N.J. 578, 186 A.2d 291 (1962)).

[93] *Id.* at 486-87, 524 A.2d at 375 (quoting People Express Airlines, Inc. v. Consolidated Rail, 100 N.J. 246, 255, 495 A.2d 107, 111 (1985)).

[94] *See id.* at 486-87, 524 A.2d at 375.

[95] *Id.* at 487, 524 A.2d at 375.

[96] *Id.* The court noted: "Since the applicable standard of liability is negligence, and not liability without fault, a water company that exercises due care will not be liable in tort." *Id.*

The court rejected the argument that as property owners are ordinarily insured against fire loss, a rule imposing liability on water companies would inure only to the benefit of insurance companies whose subrogation rights would allow them to recover from water companies the moneys paid to property owners under their insurance policies.[97] The majority emphasized that the risks of loss covered by property insurance were "narrower than those that a water company's exposure to liability would encompass."[98] The court noted that insufficient water for fire fighting may result in loss of life, as well as loss of property.[99] Moreover, the majority asserted that the abrogation of a water company's immunity did not dictate imposition of liability in favor of insurance carriers on subrogation claims.[100] It explained that subrogation is an equitable doctrine which is not applied as a matter of right.[101]

The majority was not persuaded by the concern that ultimately the consumer would have to bear the cost of water companies' additional insurance costs.[102] The court also was not convinced that elimination of water company immunity would cause "shrinkage of the casualty insurance market" and increase casualty insurance premiums.[103] The court observed that in jurisdictions that have imposed liability on water companies, resulting claims have not been substantial.[104] It further noted that water companies in such jurisdictions were able to satisfy their obligations to claimants by insurance, self-insurance or reserve

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97 *Id.*

98 *Id.*

99 *Id.* (citing Reimann v. Monmouth Consol. Water Co., 9 N.J. 134, 149, 87 A.2d 325, 332 (1952) (Vanderbilt, C.J., dissenting)).

100 *Id.* at 489, 524 A.2d at 376. The court noted that subrogation clauses that assign to the insurer the insured's claims against a third-party tortfeasor are statutorily authorized. *Id.* (citing N.J. STAT. ANN. § 17:36-5.20 (West 1985)). The cited statutes provides in relevant part:

> Every . . . fire insurance policy shall contain certain standard provisions which shall be in the words . . . hereinafter set forth:
>
> . . . .
>
> The Company may require from the insured an assignment of all right of recovery against any party for loss to the extent that payment therefor is made by this Company.

N.J. STAT. ANN. § 17:36-5.20 (West 1985).

101 *Weinberg*, 106 N.J. at 489, 524 A.2d at 377-78.

102 *See id.*, 524 A.2d at 375-76.

103 *Id.* at 487-88, 524 A.2d at 376. The court stated that "the rate escalation prevalent in the insurance industry has already caused water companies in New Jersey and elsewhere to experience a sharp increase in premiums and reduction in coverage, independent of any impact our decision in this matter may have." *Id.*

104 *Id.*

funds.[105]

The majority held that a private water company is liable for negligent failure to provide sufficient water pressure for fighting fires to the extent that such claims are under-insured or uninsured.[106] It stressed, however, that its decision "is made without prejudice to the right of a subrogation claimant . . . to offer proof tending to demonstrate that any increase in water rates resulting from liability for subrogation claims would be substantially offset by reductions in fire-insurance premiums."[107] The court stated that it would reconsider its denial of insurance carriers' subrogation claims if such a correlation was established.[108]

The majority rejected the argument that imposing liability on water companies would expose them to unlimited suits.[109] The court reasoned that "judicial obstruction of a fairly grounded claim for redress" was not proper; rather the answer lies in a "more sedulous application of traditional concepts of duty and proximate causation to the facts of each case."[110] The majority emphasized that reasonable care is the appropriate stan-

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105 *Id.* at 488-89, 524 A.2d at 376.

106 *Id.* at 492, 524 A.2d at 378. The court stated:

> [W]e abrogate the water company's immunity for losses caused by the negligent failure to maintain adequate water pressure for fire fighting only to the extent of claims that are uninsured or underinsured. To the extent that such claims are insured and thereby assigned to the insurance carrier as required by statute, *N.J.S.A.* 17:36-5.20, we hold that the carrier's subrogation claims are unenforceable against the water company.

Id. at 492-93, 524 A.2d at 378 (footnote omitted). *See supra* note 100 and accompanying text.

107 *Id.* at 493, 524 A.2d at 378. Justice Stein explained the exclusion of subrogation claims from liability because it "would inevitably result in higher water rates" paid by customers, and thus shift the risk of liability from the fire-insurance company to the customer. *Id.* at 492, 524 A.2d at 378. In effect, the customer, the justice observed, would pay twice in its property insurance premiums and in higher water rates to pay for liability insurance. *Id.* This result, Justice Stein maintained, was contrary to public policy. *Id.*

108 *Id.*, 524 A.2d at 378-79. The court stated:

> If insurance rates were set on the basis of risk and experience, one would expect a high correlation between the increase in water company liability rates and the decrease in fire-insurance rates occasioned by the abrogation of water company immunity in cases like this. If that correlation were to be proven in subsequent litigation, we would be prepared to reconsider our denial of the carrier's right to subrogation against a water company.

Id.

109 *Id.* at 493-94, 524 A.2d at 379.

110 *Id.* (citing People Express Airlines, Inc. v. Consolidated Rail, 100 N.J. 246, 254, 495 A.2d 107, 111 (1985)).

dard to be applied to all suits.[111]

Finally, the court observed that the immunity previously afforded private water companies was an "anomaly of [judicial] creation."[112] As such, the *Weinberg* court noted that the judiciary was responsible for its elimination.[113] The court explained that when a principle of law fails to serve justice, it should be discarded by the same branch of government that introduced it into the system.[114]

Justice Handler filed a separate opinion concurring in part and dissenting in part.[115] Justice Handler agreed with the majority's decision to abrogate water company immunity for negligent failure to provide sufficient water pressure to extinguish fires.[116] The justice, however, disagreed with the majority's decision to limit recovery to underinsured or uninsured victims.[117] He stressed the importance of "principled, consistent rules, applied uniformly," and posited that liability for negligence should attach regardless of whether the claimant is an insurance carrier.[118] The justice concluded that as the record before the court was insufficient regarding the consequences of total abrogation of tort immunity, the court should have imposed liability broadly, and allowed the legislature to reimpose immunity for societal interests if later required.[119]

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111 *See id.*

112 *Id.* at 495, 524 A.2d at 380.

113 *Id.* The court noted that although only a minority of jurisdictions had abrogated water company immunity, it was proper. *Id.* at 494, 524 A.2d at 379. It observed that application of the immunity doctrine in New Jersey was largely attributable to *stare decisis*. *Id.* at 494-95, 524 A.2d at 379.

114 *Id.* at 495, 524 A.2d at 380 (quoting Collopy v. Newark Eye & Ear Infirmary, 27 N.J. 29, 47-48, 141 A.2d 276, 287 (1958)).

115 *Id.* at 496, 524 A.2d at 380 (Handler, J., concurring in part and dissenting in part).

116 *Id.*

117 *Id.*

118 *Id.* at 497, 524 A.2d at 381 (Handler, J., concurring in part and dissenting in part). Justice Handler stated: "The judicial role in cases such as this one is to cleanse the tort system of its irrational and anomalous elements." *Id.*

119 *Id.* The justice asserted:

> The principle against immunity from tort liability should, for the moment, stand. The legislature is the proper forum for determining whether societal interests require a reimposition, in whole or in part, of the water companies immunity, and if there is to be partial or limited immunity, whether that should be achieved directly, or indirectly by modifying the insurance laws. There is no reason to believe that the legislature will not act if such action is warranted.

Id. at 497-98, 524 A.2d at 381 (citation omitted) (Handler, J., concurring in part and dissenting in part).

In her dissenting opinion, Justice Garibaldi asserted that the majority's decision is contrary to legislative policies concerning regulation and immunity of private water companies.[120] She posited that the legislature's failure to act, despite a direct invitation by the *Reimann* court, indicates its acceptance of the *Reimann* doctrine.[121] Justice Garibaldi noted that justice maintained that any decision to abrogate water company immunity should have been made by the legislature.[122]

Justice Garibaldi also supported the BPU's argument in support of the *Reimann* doctrine which urged that the imposition of liability "could easily precipitate an insurance crisis in the water industry."[123] The justice asserted that given the BPU's expertise, the court should have accepted its recommendation.[124] She stated that there was no evidence to support the majority's assumption that these adverse economic consequences could be avoided simply by disallowing subrogation claims.[125]

Justice Garibaldi asserted that the majority's decision concerning subrogated claims was erroneous.[126] She asserted that the determination conflicted with the statutory provisions which specifically granted subrogation rights to insurance companies.[127] The justice further opined that the determination precluding subrogation claims was not decided on a sufficient record because this was not a subrogation matter nor were insurance companies involved.[128] Finally, Justice Garibaldi citing the high

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[120] *Id.* at 498-503, 524 A.2d at 381-84 (Garibaldi, J., dissenting). *See* Foldi v. Jeffries, 93 N.J. 533, 545, 461 A.2d 1145, 1151 (1983) (Justice Garibaldi stating that the court is free to intervene concerning parental immunity where the legislature has not yet acted).

[121] *Weinberg*, 106 N.J. at 499, 524 A.2d at 382 (Garibaldi, J., dissenting).

[122] *Id.* at 499, 524 A.2d at 381 (Garibaldi, J., dissenting). Justice Garibaldi asserted:

> The sweeping policy change effected by the majority's no immunity/no subrogation scheme—a change that affects a basic service to so many consumers—should be made by the Legislature based on information and forecasts supplied by the BPU and the Commissioner of Insurance. It should not be based upon judicial speculation. Most certainly this Court should not decree such a change in contravention of the express position of the governmental agency charged with regulating the industry.

Id.

[123] *Id.* at 500-02, 524 A.2d at 382-83 (Garibaldi, J., dissenting).

[124] *Id.* at 502, 524 A.2d at 383 (Garibaldi, J., dissenting).

[125] *Id.* at 498, 524 A.2d at 381 (Garibaldi, J., dissenting).

[126] *Id.* at 503-05, 524 A.2d at 384-85 (Garibaldi, J., dissenting).

[127] *Id.* at 503-04, 524 A.2d at 384 (Garibaldi, J., dissenting). *See supra* note 100 and accompanying text.

[128] *See Weinberg*, 106 N.J. at 505, 524 A.2d at 385 (Garibaldi, J., dissenting).

cost of insurance, disagreed with the majority that the subrogation doctrine would reduce the costs borne by the consumer.[129]

The justice concluded that as most property owners carry adequate fire insurance, abolition of the immunity was unnecessary and inefficient.[130] Justice Garibaldi asserted that only those who were uninsured or underinsured would benefit from the majority's decision.[131] She opined that a rule which benefits few, and has burdensome consequences on most consumers, was unjustified.[132]

As time-honored immunities are slowly being eradicated from an ever-changing society,[133] there is a constant battle be-

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[129] *Id.* at 505-06, 524 A.2d at 385 (Garibaldi, J., dissenting). Justice Garibaldi stated:

> With or without subrogation, water companies will need new liability insurance policies to cover claims by underinsured or uninsured property owners. It is simply unreasonable in this time of reduced insurance availability and escalated premiums to assume that this insurance will not be costly, particularly in light of the fact that water companies have no way of knowing which properties within the zone of danger—residential or commercial, within or without their service areas—are fully insured for fire loss; which are insured only for the structure and not the contents; and which are underinsured for the structure and/or the contents.

Id. at 506, 524 A.2d at 385 (footnote omitted) (Garibaldi, J., dissenting).

[130] *Id.* at 506, 524 A.2d at 385 (Garibaldi, J., dissenting).

[131] *Id.* at 507, 524 A.2d at 486 (Garibaldi, J., dissenting). Justice Garibaldi observed:

> As the majority acknowledges, most of the people who will be injured by the water company's negligence already have fire insurance protection and will continue to insure their property adequately against the risk of fire damage regardless of today's decision. For these people, the abolition of immunity is unnecessary. Recovery for these owners under their fire insurance policy is a more reliable compensation mechanism than litigation seeking recovery for negligence. In short, for these insured property owners—and for tenants who have comprehensive property protection insurance—the only likely result is higher water rates. For these consumers, abandoning the immunity rule is not only inefficient, it is also unfair.

Id. at 506, 524 A.2d at 385 (Garibaldi, J., dissenting).

[132] *Id.* at 507-08, 524 A.2d at 386 (Garibaldi, J., dissenting). Justice Garibaldi concluded:

> In sum, the new rules benefit few. Granted there are some uninsured or underinsured persons whose property will be damaged and some persons who will be personally injured as the result of negligence of the water company that will receive reimbursement they presently are not entitled to receive. Nevertheless, to compensate these few, I believe that the vast majority of water consumers will pay higher utility rates.

Id. at 507, 524 A.2d at 386 (Garibaldi, J., dissenting).

[133] *See supra* note 1 and accompanying text.

tween the judiciary and the legislature.[134] Each branch is responsible for shaping laws in accordance with the demands of society,[135] and each has a duty to reconsider outdated doctrines.[136] The legislature's failure to act, however, does not provide adequate justification for the court to relinquish its obligations to review outmoded doctrines.

The *Weinberg* decision is incompatible with existing statutory provisions.[137] Instead of protecting the express statutory rights of insurance carriers, the court advanced only the interests of culpable water companies.[138] Surely, no one will benefit from barring an innocent carrier from recovering compensation from a third-party wrongdoer.

Another criticism of the *Weinberg* decision relates to the majority's belief that imposing liability on a water company will act as a deterrent against negligent conduct. Water companies in New Jersey, which are regulated by the BPU, are required to provide sufficient water pressure.[139] In light of the BPU provision, there is no need to hold water companies civilly liable.[140]

Compliance with the guidelines set forth by the BPU necessarily requires water companies to act reasonably.[141] As water companies are already compelled by the BPU to act reasonably, imposition of liability by the courts will not result in additional safeguards.[142] Both the *Weinberg* court and the BPU impose the same duty of care on the water companies, the difference is that breach of the BPU standard results in a misdemeanor,[143] whereas the breach under the *Weinberg* doctrine results in civil liability. The *Weinberg* holding also requires water companies to obtain additional insurance coverage. Thus, it is arguable that the majority could have employed a more efficacious means of attaining

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134 *See supra* notes 1 & 6 and accompanying text.

135 *See* Collopy v. Newark Eye & Ear Infirmary, 27 N.J. 29, 47, 141 A.2d 276, 287 (1958).

136 *See* Brief of Public Advocate at 8, Weinberg v. Dinger, 106 N.J. 369, 524 A.2d 355 (1987) (No. A-1).

137 *See Weinberg*, 106 N.J. at 503, 524 A.2d at 384 (Garibaldi, J., dissenting).

138 *See id.* at 504, 524 A.2d at 384 (Garibaldi, J., dissenting).

139 *See* N.J. STAT. ANN. § 48:2-13 (West Supp. 1972). "The board shall have general supervision and regulation of and jurisdiction and control over all public utilities . . . ." *Id. See supra* note 14 and accompanying text.

140 *See* Brief of Amicus Curiae Board of Public Utilities at 10, Weinberg v. Dinger, 106 N.J. 469, 524 A.2d 355 (1987) (No. A-1).

141 *See supra* note 14 & 69 and accompanying text.

142 *See* Brief of Amicus Curiae Board of Public Utilities at 10, Weinberg v. Dinger, 106 N.J. 469, 524 A.2d 355 (1987) (No. A-1).

143 *See supra* note 69 and accompanying text.

responsible management than through abrogation of immunity.[144]

Perhaps the most disturbing facet of the *Weinberg* decision is the fact that all parties involved in the litigation lost to some extent. The majority failed to recognize that in rejecting subrogation claims, the true purpose of tort law would be thwarted.[145] Redress for wrongful injuries is not recoverable against water companies in most instances.[146] Ultimately, most claimants will have to seek compensation from their own carriers, and not the tortfeasor's carrier.[147] Likewise, fire insurance carriers lost their statutory right to assert third-party subrogation claims against water companies.[148] Carriers, liable to policyholders for fire losses, are precluded from recouping moneys paid.[149]

Ironically, in an effort to protect the public, the court has subjected consumers to increased water rates. As a result of the *Weinberg* decision, water companies will be forced to obtain insurance policies to cover potential losses. Because of the high cost of such policies, operating costs will skyrocket.[150]

The ramifications of the *Weinberg* decision have yet to be fully realized. While the court may have usurped legislative power, the decision does not foreclose the legislature from reinstating water company immunity through statutory enactments.[151] In any event, the court's intentions are clear. It will continue to chip away at the vestiges of the immunity doctrine when given the opportunity to do so. At least for now, private water companies

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144 *See* Brief of Amicus Curiae Board of Public Utilities at 12, Weinberg v. Dinger, 106 N.J. 469, 524 A.2d 366 (1987) (No. A-1).

145 *See Weinberg*, 106 N.J. at 506-07, 524 A.2d at 385 (Garibaldi, J., dissenting).

146 *See id. See also supra* notes 130 & 131 and accompanying text.

147 *Weinberg*, 106 N.J. at 506-07, 524 A.2d at 385 (Garibaldi, J., dissenting). *See also supra* notes 130 & 131 and accompanying text.

148 *Weinberg*, 106 N.J. at 504, 524 A.2d at 384 (Garibaldi, J., dissenting).

149 *Id.*

150 *Id.* at 498, 524 A.2d at 381 (Garibaldi, J., dissenting). Justice Garibaldi asserted that consumers would have to pay twice—first for property insurance premiums, and then in the form of increased water rates to absorb the cost of the water company's liability insurance. *Id.*

151 In July 1987, the BPU submitted a tentative legislative draft to the Chief Counsel of Governor Thomas Kean. The purpose of the draft was to reinstate the water company immunity. On the Chief Counsel's approval, the draft will become an administration bill, subject to the legislature's ratification. Should the legislature decide to ratify the bill, the water company immunity doctrine will be reinstated. Telephone interview with Page Berry, Assistant Director, Board of Public Utilities, Newark, New Jersey (August 20, 1987). As of the date of this note's publication, there has been no other legislative action.

must adequately insure themselves against risk of loss for failure to supply sufficient water pressure for extinguishing fires.

Marina C. Perna