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Marty K. Deniston

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Hubbard v. Boelt: The Fireman's Rule Extended

The California Supreme Court, in Hubbard v. Boelt, extended the reach of the fireman's rule to bar a suit brought by a policeman who was injured by the willful and wanton conduct of a speeding motorist, while pursuing that motorist. This is an important development in tort law because, traditionally, the fireman's rule had only been applied to bar suits by firemen and policemen who were injured by the negligent conduct of another which was the cause of their presence at the scene. This author suggests that the majority's rationale underlying this extension was flawed because of the fundamental difference between negligent conduct and willful and wanton conduct. Even if the majority's logic was correct, the rule should not have been applied in this case. Two of the reasons for this, which the dissent pointed out, are the two independent acts of misconduct by the defendant, one negligent and one willful and wanton, and that the policeman seemed to be a member of a statutorily protected class. Finally, the author looks to other jurisdictions and finds that the fireman's rule has never been applied in cases where a policeman is injured while pursuing a speeding motorist. Instead, the cases had always been decided on the general principles of negligence.

I. INTRODUCTION

As the flames of a fire hungrily begin to consume a house, a fire engine quickly arrives and the firemen begin attempting to put the fire out. During the course of extinguishing the fire, one of the firemen is overcome by smoke and falls, severely injuring himself. If the homeowner had been negligent in causing the fire, could the fireman sue for the injuries he suffered? After all, the homeowner's negligence caused the fire, and the smoke from the fire caused the fireman to fall and injure himself. The law has long been that negligence¹ can furnish no basis of liability for an action by a professional fireman or policeman injured in the course of duty. This is the so called "fireman's rule."

1. A good definition of negligence is:

either the omission of a person to do something which an ordinarily prudent person would have done under given circumstances or the doing of something which an ordinarily prudent person would not have done under such circumstances. It is not absolute or to be measured in all cases in accordance with some precise standard but always relates to some circumstance of time, place and person . . .

Fouch v. Werner, 99 Cal. App. 557, 564, 279 P. 183, 186 (1929) (quoting a jury instruction given in the case).

In California, in order for there to be a cause of action for negligence, the injuries incurred by the plaintiff must have been reasonably foreseeable by the defendant at the time of the act in question. See Dillon v. Legg, 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).

In the case of *Hubbard v. Boelt*,² the California Supreme Court extended the reach of the fireman's rule to bar, not only causes of action based on negligence, but also those based on willful and wanton conduct.³ In *Hubbard* the court applied the rule to the willful and wanton conduct of a driver speeding to evade getting a ticket from a police officer. The policeman's cause of action, for injuries sustained in an accident caused by the high speed chase, was barred by this extension of the fireman's rule.

One of the purposes of this note is to examine the fundamental underpinnings of the fireman's rule and to question their continued validity. These underpinnings are: (1) that firemen and policemen assume the risk of being injured by certain negligent and willful and wanton conduct because of the dangerous nature of their jobs; (2) that fireman and policemen are adequately compensated for facing such risks; and (3) that public policy requires this rule be imposed on firemen and policemen. Secondly, this note will examine the flaws in the majority's application of the rule in this case; namely that there were two independent acts of misconduct by the defendant, and that policemen should have been designated as a statutorily protected class for this type of willful and wanton conduct. Finally, this note will offer the alternate policy of speeder liability, a policy already adopted in many jurisdictions.

II. HISTORICAL BACKGROUND

The fireman's rule has a long history. In the 1892 case of *Gibson v. Leonard*,⁴ the court held that firemen were mere licensees when they entered private premises to perform their public du-

2. 28 Cal. 3d 480, 620 P.2d 156, 169 Cal. Rptr. 706 (1980). The City of San Diego intervened in support of the policeman's action and filed a separate claim against the defendant for reimbursement of worker's compensation and disability benefits (a claim not involved in this appeal).

3. An act can be described as "wilful and wanton" misconduct if:

The actor's conduct is in reckless disregard of the safety of another [or wilful or wanton misconduct] if he does an act or intentionally fails to do an act which it is his duty to the other to do, knowing or having reason to know of facts which would lead a reasonable man to realize, not only that his conduct creates an unreasonable risk of physical harm to another, but also that such risk is substantially greater than that which is necessary to make his conduct negligent.

RESTATEMENT (SECOND) OF TORTS § 500 (1965). The main difference between willful and wanton conduct and negligent conduct is that in the former the actor knows or has reason to know that his conduct is creating an unreasonable risk of physical harm to another which is *substantially* greater than it would be if he were acting negligently.

4. 143 Ill. 182, 32 N.E. 182 (1892), *overruled*, *Dini v. Naiditch*, 20 Ill. 2d 406, 170 N.E.2d 881 (1960). During the course of extinguishing a fire several firemen got into a freight elevator and were lowered to the basement. Shortly before reaching the basement the rope on which the elevator was suspended broke, causing the

ties. The court's rationale was that a fireman had an implied license or permission by law to enter the premises to save the property. Furthermore, the law was well established that "a mere naked license or permission to enter premises does not impose an obligation on the owner or person in possession to provide against the dangers of accident . . ." ⁵ No duty was owed the firemen by the landowner or occupier, other than to refrain from willful and wanton infliction of injuries.⁶ The court's line of reasoning in defining firemen as licensees is questionable.⁷ However, this became the all but universal rule⁸ until 1920 when the New York Court of Appeals, in *Meiers v. Fred Koch Brewery*, rejected the rule.⁹ The court observed that the fireman

entered by a driveway prepared for the use of those who had business with the defendant. Such persons at least were invited to use it. For their use he might assume that it was reasonably safe. . . . [The fireman] took the pathway that was apparently prepared for those who needed to go [to the barn]. In such a case we hold that some obligation rested on the owner.¹⁰

The duty owed by the landowner to the fireman was that of "reasonable care under all the circumstances."¹¹

After the *Meiers* decision, the licensee concept was frequently challenged.¹² For instance, it was held that when an owner or oc-

elevator to crash down on the basement floor. One of the fireman's legs was so severely injured that it had to be amputated.

5. *Id.* at 190, 32 N.E. at 184.

6. *Id.* at 189, 32 N.E. at 184.

7. See Comment, *Are Firemen or Policemen Licensees or Invitees?* 35 MICH. L. REV. 1157 (1937). The *Gibson* Court relied on a passage from T. Cooley, *Torts* 313 (1st ed. 1880), which did not "distinguish between bare licensees and business invitees, but includes all forms of permission to enter upon the land of another . . . under the headings 'Express Licensees' and 'Implied Licensees.'" 35 MICH. L. REV. at 1159. Firemen or policemen enter the land of another independent of invitation or consent and therefore "it is highly illogical to say that [a fireman or policeman] cannot be an invitee because there has been no invitation, but can be a licensee even though there has been no permission." *Id.*

8. See W. PROSSER, *TORTS* 629 (1st ed. 1941).

9. *Meiers v. Fred Koch Brewery*, 229 N.Y. 10, 127 N.E. 491 (1920). In that case a fire began one night in the defendant's barn. The plaintiff fireman while walking briskly up the driveway fell in a coal hole injuring himself. The court pointed out that firemen could not be bare licensees because a bare licensee's right to be on the property depended on the owner's consent, and here there was no such consent. On the other hand, firemen were not invitees because there had been no invitation by the landowner. Nevertheless, the court decided that firemen had a right to be there and use the driveway. *Id.* at 15, 127 N.E. at 492-93.

10. *Id.* at 15, 127 N.E. at 492-93.

11. *Id.* at 16, 127 N.E. at 493.

12. For a more in-depth discussion of the evolution of the fireman's rule, see Annot., 86 A.L.R.2d 1205 (1962).

cupier of land was aware of an unusual hazard and had the opportunity to warn, he had a duty to warn firemen of the hazard.¹³ Other courts stated that landowners and occupiers could be held liable to firemen for active negligence,¹⁴ failure to warn of hidden dangers,¹⁵ statutory violations,¹⁶ failure to keep means of access in a reasonably safe condition¹⁷ and willful and wanton conduct.¹⁸ Illinois entirely rejected the classification of licensee and declared the fireman performing his duty to be an invitee.¹⁹ Kentucky,

13. *Jenkins v. 313-321 W. 37th St. Corp.*, 284 N.Y. 397, 31 N.E.2d 503 (1940), *reh. denied*, 285 N.Y. 614, 33 N.E.2d 547 (1941).

14. *See, e.g., Anderson v. Cinnamon*, 365 Mo. 304, 282 S.W.2d 445 (1955). The court defined the fireman as a licensee who takes the premises how he finds it. Possessor owed no duty to a licensee except to refrain from wantonness, intentional wrong and active negligence. The failure to warn the fireman of a defective porch was not active negligence. If the owner "had urged . . . [the fireman] and the other firemen to go on the porch we would have a different case and circumstances under which active negligence could be claimed." *Id.* at 365 Mo. at —, 282 S.W.2d at 450. *Lamb v. Sebach*, 52 Ohio App. 362, 3 N.E.2d 686 (1935) (judgment for fireman because defendant had restricted the size of a vent on a gasoline tank, which exploded and injured the fireman, and he told the fireman that the area was safe).

15. *See, e.g., Shypulski v. Waldorf Paper Products Co.*, 232 Minn. 394, 45 N.W.2d 549 (1951) (failure to warn fireman, when owner or occupier had the opportunity, that wall could not withstand lateral pressure of any amount); *Beedenbender v. Midtown Properties*, 4 A.D.2d 276, 164 N.Y.S.2d 276 (1957) (landowner or occupier must warn policeman of dangerous conditions on the premises if he knows of the policeman's presence and believes he is unaware of the danger). *See also Netherton v. Arends*, 81 Ill. App. 2d 391, 225 N.E.2d 143 (1967); *Anavaris v. Eisenberg*, 237 Md. 242, 206 A.2d 148 (1965). For a discussion of *Shypulski* see *Negligence-Property Owner or Occupier's Duty to Warn Firemen of Hidden Dangers of Which He Has Knowledge and an Opportunity to Give Warning*, 35 MINN. L. REV. 512 (1951) and *Torts-Negligence-Duty of Landowner to Fireman*, 12 U. PITT. L. REV. 646 (1951).

16. *See, e.g., Dini v. Naiditch*, 20 Ill. 2d 406, 170 N.E.2d 881 (1960) (building owner liable for fireman's injuries when the building did not have fire doors, fire extinguishers, or enclosed stair wells, and where oil rags and waste were not kept in approved waste cans, all in violation of the municipal code); *Maloney v. Hearst Hotels Corp.*, 274 N.Y. 106, 8 N.E.2d 296 (1937) (operator of a painting establishment held liable for death of a fireman killed by an explosion of paints or chemical compounds, which were kept on the premises in violation of two city ordinances). *Contra, e.g. Buren v. Midwest Indus., Inc.* 380 S.W.2d 96 (Ky. Ct. of App. 1964); *Wax v. Coop. Ref. Ass'n*, 154 Neb. 805, 49 N.W.2d 707 (1951); *Aldworth v. F.W. Woolworth Co.*, 295 Mass. 344, 3 N.E.2d 1008 (1936).

17. *See notes 9-11 supra* and accompanying text. 4 A.D.2d 276, 164 N.Y.S.2d 276. *See generally Note, Landowner's Negligence Liability to Persons Entering as a Matter of Right or Under a Privilege of Private Necessity*, 19 VAND. L. REV. 407, 409-17 (1966).

18. *See, e.g., Bandoxz v. Daigger & Co.*, 255 Ill. App. 494 (1930) (keeping excess amounts of benzol, ether and gas, in violation of statute, and splashing benzol on the floor about a foot and a half away from a lighted hot-water heater, constituted willful and wanton conduct, resulting in fireman's death).

19. 20 Ill. 2d at 415-16, 170 N.E.2d at 885-86. The major distinction between being a licensee or invitee is that the invitee is on the premises for the benefit of both the landowner and invitee, whereas a licensee is there merely for his own benefit. *See Comment, supra* note 7, at 1160-61. The court in *Dini* relied on this

New Jersey and Minnesota adopted neither the licensee nor invitee label, but defined firemen as occupying a status sui generis.²⁰

The above exceptions to the fireman's rule as established in the *Gibson* case obviously expanded the liability exposure of the landowner or occupier and provided for recovery for firemen and policemen in many situations. However, despite these exceptions and redefinitions, most states did and still do refuse to impose liability on the landowner or occupier if his only negligence was to cause the fire which necessitated the fireman's presence and proximately caused his injuries.²¹ This rule might be better defined as denying a fireman's or policeman's cause of action against one whose only negligence was to cause a situation for which the officer was summoned, and in which he was subsequently injured.²² This rule has won almost universal acceptance,²³ and, in California and other states, it has been based on public policy and/or assumption of risk.²⁴

III. FACTS OF THE CASE

On February 28, 1977, the plaintiff Hubbard, an on-duty San Diego police officer, was operating speed detection equipment while parked at a roadside. Defendant Boelt's vehicle registered a speed of fifty miles per hour, violating the twenty-five mile per hour speed limit. Hubbard immediately activated his emergency lights and siren and began pursuit. In response to this, Boelt accelerated to a high speed, which at one point reached 100 miles per hour, in order to avoid arrest. While passing another car on a blind curve, Boelt collided with a third vehicle, causing debris to

distinction in defining firemen as invitees. 20 Ill. 2d at 416, 170 N.E.2d at 885. See *Strong v. Seattle Stevedore Co.*, 1 Wash. App. 898, 902, 466 P.2d 545, 548 (1970).

20. 380 S.W.2d at 98; 232 Minn. at 396, 45 N.W.2d at 550; *Krauth v. Geller*, 31 N.J. 270, 273, 157 A.2d 129, 130 (1960); 4 A.D.2d at 281, 164 N.Y.S.2d at 280. "Sui generis" can be defined as "of its own kind or class; i.e. the *only* one of its kind; peculiar." *Black's Law Dictionary* 1286 (5th ed. 1979). The above courts used this term because they felt firemen and policemen did not readily fit into either the "licensee" or "invitee" categories.

21. See Note, *supra* note 17, at 419. See, e.g., 380 S.W.2d 96; *Aravanis v. Eisenberg*, 237 Md. 242, 206 A.2d 148 (1965); 31 N.J. 270, 157 A.2d 129 (1960). The rationale behind this rule will be discussed extensively in this note.

22. 28 Cal. 3d at 484, 620 P.2d at 158, 169 Cal. Rptr. at 708.

23. See generally notes 4-21 *supra* and the cases cited therein; Comment, *An Examination of the California Fireman's Rule*, 6 PAC. L.J. 660, 663 (1975).

24. See Comment, *supra* note 23, at 663; *Walters v. Sloan*, 20 Cal. 3d 199, 204-06, 571 P.2d 609, 612-13, 142 Cal. Rptr. 152, 155-56 (1977).

be scattered over the roadway. Hubbard, who was pursuing at a high rate of speed, was injured when he attempted to avoid the debris by driving his car up a grass embankment. The entire chase occurred within a half mile distance and lasted less than one minute.²⁵

Hubbard sued Boelt, alleging that Boelt's negligent and reckless driving proximately caused his injuries. The trial court dismissed Hubbard's action after granting Boelt's motion for summary judgment, based upon the California fireman's rule as defined in *Walters v. Sloan*.²⁶

IV. MAJORITY OPINION

The majority began by stating, "it is the business of a fireman or policeman to deal with particular hazards, and that accordingly 'he cannot complain of negligence in the creation of the very occasion for his engagement.'" ²⁷ The majority followed the rationale underlying the fireman's rule, which was clearly analyzed and established by the California Supreme Court in *Walters*.²⁸ The first underlying basis of the rule is assumption of risk.²⁹ In other

25. 28 Cal. 3d at 483-84, 620 P.2d at 157-58, 169 Cal. Rptr. at 707-08.

26. 20 Cal. 3d 199, 571 P.2d 609, 142 Cal. Rptr. 152 (1977). In *Walters*, a policeman had attempted to arrest a minor who was intoxicated in public, but the officer was precluded from recovering for injuries he sustained in that attempt. The officer had alleged that his injuries were a result of the defendant's minor daughter's unlawful serving of alcoholic beverages in the defendant's residence. The policeman had brought suit against the owners of the house.

27. 28 Cal. 3d at 484, 620 P.2d at 158, 169 Cal. Rptr. at 708 quoting in part from *Georgi v. Pacific Gas & Elec. Co.*, 266 Cal. App. 2d 355, 359, 72 Cal. Rptr. 119, 122 (1968).

28. The court in *Walters* upheld the fireman's rule upon two grounds. The first ground was on the principle that "one who has knowingly and voluntarily confronted a hazard cannot recover for injuries sustained thereby." 20 Cal. 3d at 204, 571 P.2d at 612, 142 Cal. Rptr. at 155. This the court termed "a principle as fundamental to our law today as it was centuries ago." *Id.* The second basis for the fireman's rule, the court said, was public policy. Stated another way, policemen and firemen cannot complain of negligence which creates the very occasions for which they are hired. The court reasoned that public safety officers were already specially compensated for the dangers they face by way of higher pay and specific statutory benefits, in addition to the usual medical and disability benefits which public employees get under the Workman's Compensation Act. *Id.* at 205-06, 571 P.2d at 612-13, 142 Cal. Rptr. at 155-56. Furthermore, the court agreed "it would be too burdensome to charge all who carelessly cause or fail to prevent fires with the injuries suffered by the expert retained with public funds to deal with those inevitable, although negligently created, occurrences." *Id.* at 205, 571 P.2d at 612, 142 Cal. Rptr. at 155 (quoting from *Krauth v. Geller*, 31 N.J. 270, 157 A.2d 129, 130-31 (1960)). So, because public safety officers knowingly and voluntarily confront these negligently created risks, for which they are well paid and compensated, and because the burden of liability on those who negligently create these risks would be too great, the court in *Walters* upheld the fireman's rule.

29. The theory behind assumption of risk is that the defendant's conduct involves certain dangers or risks, which the plaintiff voluntarily accepts. See *Morton*

words, one who knowingly and voluntarily confronts a hazard cannot recover for injuries sustained thereby.³⁰ Public policy is the other basis established.³¹ The *Walters* court felt that firemen and policemen are presumably adequately compensated (by special salary, retirement and disability benefits, and special statutory benefits) for undertaking their hazardous work and, therefore, should be precluded from bringing tort actions based on negligence for injuries sustained from hazards they are paid to deal with.³²

In extending the fireman's rule to willful and wanton conduct, the majority relied mainly on three arguments. They argued that the tort principle of assumption of risk and public policy could be applied to willful and wanton conduct just as they had previously been applied to negligent conduct in *Walters*. To support these contentions, the majority presented their third argument, that the fireman's rule had already been applied to willful and wanton conduct. These three arguments will be examined in detail, starting with the contention that the fireman's rule had already been applied to willful and wanton conduct.

The *Hubbard* court, relying on the *Walters* case and rationale, stated that assumption of risk, adequate compensation and public policy "seemingly would apply whether [the] defendant's conduct was reckless or merely negligent in nature."³³ The court's reasoning was that it would be rather strange if in facing substantially identical risks recovery was "to depend solely upon the nature of [the] defendant's conduct in creating that risk."³⁴ But the court then failed to adequately discuss two very crucial issues. Do po-

v. California Sports Car Club, 163 Cal. App. 2d 685, 688, 329 P.2d 967, 969 (1958); Comment, *Liability of Exhibitors to Spectators at Public Exhibitions; Assumption of Risk*, 24 CALIF. L. REV. 429 (1936); Comment, *Voluntary Assumption of Risk-Contributory Negligence-Injuries to Patrons at Places of Amusement*, 10 S. CALIF. L. REV. 67 (1936); RESTATEMENT (SECOND) OF TORTS § 496A (1966). The distinguishing factor between assumption of risk and contributory negligence as defenses in tort actions is the element of knowledge. This difference is well described in the RESTATEMENT (SECOND) OF TORTS § 496A comment d (1965): "A subjective standard is applied to assumption of risk, in determining whether the plaintiff knows, understands, and appreciates the risk. An objective standard is applied to contributory negligence, and the plaintiff is required to have the knowledge, understanding, and judgment of the standard reasonable man."

30. See note 28 *supra* and accompanying text.

31. *Id.*

32. 20 Cal. 3d at 204-06, 571 P.2d at 612-13, 142 Cal. Rptr. at 155-56.

33. 28 Cal. 3d at 484, 620 P.2d at 158, 169 Cal. Rptr. at 708.

34. *Id.*

licemen assume the risk of being injured by willful and wanton conduct? Are the risks created by negligent, and willful and wanton conduct substantially identical?

The court, answering both these questions in the affirmative, relied solely upon the case of *Holden v. Chunestudey*.³⁵ In *Holden*, the defendant was driving while intoxicated. His truck crashed into a tree on the side of a freeway and came to rest on a hillside. Sometime later, the plaintiff police officer arrived at the scene of the accident and injured himself when he fell while climbing the hill.³⁶ The court assumed that the defendant's driving while intoxicated constituted willful or wanton conduct³⁷ and was the proximate cause of the police officer's injuries. The *Hubbard* court's reliance on *Holden* was misplaced because *Holden* simply reiterated the reasons which were established in *Walters*³⁸ and stated that "accordingly, we apply the principles enunciated in *Walters* to willful and wanton misconduct."³⁹ This, however, totally evaded the issue because in *Walters* the conduct in question was negligent, not willful, wanton or reckless; the *Walters* court never discussed extending the fireman's rule to willful or wanton conduct. In fact, the *Walters* court specifically said that "[o]ther negligent conduct or willful misconduct may create liability to the injured fireman or policeman."⁴⁰

It was very questionable for the *Holden* court to extend the fireman's rule to willful or wanton conduct without any meaningful analysis and discussion when the *Walters* case, which it relied on, had specifically left the question open. Consequently, the *Hubbard* majority committed the same error in relying on *Holden*, a case which is devoid of any meaningful discussion on what the ramifications might be of such an extension of the fireman's rule.

V. ASSUMPTION OF RISK

Assumption of risk⁴¹ generally includes three main categories.⁴²

35. 101 Cal. App. 3d 959, 161 Cal. Rptr. 925 (1980).

36. *Id.* at 961, 161 Cal. Rptr. at 926.

37. *Id.* The court cited *Taylor v. Superior Court*, 24 Cal. 3d 890, 598 P.2d 854, 157 Cal. Rptr. 693 (1974), for this assumption. The court in *Taylor* stated that:

One who voluntarily commences, and thereafter continues, to consume alcoholic beverages to the point of intoxication, knowing from the outset that he must thereafter operate a motor vehicle demonstrates, in the words of Dean Prosser, 'such a conscious and deliberate disregard of the interests of others that his conduct may be called wilful or wanton.'

Id. at 899, 598 P.2d at 859, 157 Cal. Rptr. at 699.

38. 101 Cal. App. 3d at 961-62, 161 Cal. Rptr. at 926-27.

39. *Id.* at 962, 161 Cal. Rptr. at 927.

40. 20 Cal. 3d at 202 n.2, 571 P.2d at 611 n.2, 142 Cal. Rptr. at 154 n.2.

41. See note 29 *supra*.

42. The first category is the situation whereby the plaintiff expressly agrees or

The one which is normally involved with the fireman's rule is the plaintiff assuming a risk by voluntarily encountering a known, existing danger created by the defendant's negligence.⁴³ This willingness to take a chance is said to be "implied" or tacitly manifested.⁴⁴ The majority in *Hubbard* stated that this is a fundamental tort principle.⁴⁵ However, with the adoption of comparative negligence in California⁴⁶ and elsewhere,⁴⁷ the viability of the implied assumption of risk has been questioned.⁴⁸

gives his consent, in advance of the defendant's negligence, to relieve the defendant from the obligations arising from a known risk to the plaintiff. W. PROSSER, LAW OF TORTS 450 (3rd ed. 1964). See, e.g., *Gonzales v. Baltimore & Ohio R.R.*, 318 F.2d 294 (4th Cir. 1963) (accepting a gratuitous pass on a railway train); *O'Callaghan v. Waller & Beckwith Realty Co.*, 15 Ill. 2d 436, 155 N.E.2d 545 (1958) (entering into a lease); *Moss v. Fortune*, 207 Tenn. 426, 340 S.W.2d 902 (1960) (renting a horse); *Griffiths v. Henry Broderick, Inc.*, 27 Wash. 2d 901, 182 P.2d 18 (1947) (employing an agent), *overruled on other grounds*, 84 Wash. 2d 518, 527 P.2d 1115 (1974). The second category is the situation whereby the plaintiff impliedly assumes a risk by voluntarily entering into some relationship with the defendant, which necessarily involves a known risk to the plaintiff. The defendant will be relieved of any obligations toward the plaintiff arising from the risk. W. PROSSER, LAW OF TORTS 450 (3rd ed. 1964). See, e.g., *Hudson v. Kansas City Baseball Club Inc.*, 349 Mo. 1215, 164 S.W.2d 318 (1942) (spectator at a baseball game); *Lumsden v. L.A. Thompson Scenic Ry. Co.*, 130 A.D. 209, 114 N.Y.S. 421 (1909) (riding on a roller coaster); *Ven Rooy v. Farmers Mutual Auto. Ins. Co.*, 5 Wis. 2d 374, 92 N.W.2d 771 (1958) (riding in a car with an intoxicated driver).

43. See W. Prosser, *supra* note 41, at 451. Prosser uses the example of "an employee furnished with an unsafe machine continues to work with it after he has discovered the danger, or a customer who enters a store and finds the floor is slippery but proceeds nevertheless to walk across it." *Id.*

44. *Id.*

45. 28 Cal. 3d at 485, 620 P.2d at 158, 169 Cal. Rptr. at 708.

46. *Li v. Yellow Cab Co.*, 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975). In *Li*, the plaintiff made a left turn 70 feet before an intersection to enter a service station driveway. The defendant, coming in the opposite direction, passed through the intersection when the traffic light was yellow and struck the rear of the plaintiff's car as it turned in front of him. The trial court found the plaintiff to be contributorily negligent in turning in front of the defendant's oncoming car. Therefore, the trial court entered judgment in favor of the defendant.

47. See Fleming, *Forward: Comparative Negligence at Last-By Judicial Choice*, 64 CALIF. L. REV. 239, 239 n.1, 240 n.4 (1976).

48. *Id.* at 260-67. It is argued that it is one thing to permit a person to forego his rights to legal protection by expressly assuming a risk, but quite another to infer such a willingness from conduct alone where there is no unequivocal expression. *Id.* at 264. Thus, it has been urged that

merely encountering a known hazard and so consenting to the risk of being hurt would not suffice, in order to defeat a plaintiff entirely, he must be shown to have consented to run the risk at his own expense so that he, not the negligent defendant, should bear the loss in the event of an accident.

Id. at 266. This is the prevailing English view. J. FLEMING, LAW OF TORTS ch. 11 (4th ed. 1971). This view seems even more equitable where willful and wanton

A. *Affect of Comparative Negligence on Assumption of Risk*

The California Supreme Court, in *Li v. Yellow Cab Co.*,⁴⁹ discarded the rule that contributory negligence on the part of the plaintiff was a complete bar to recovery in a negligence action.⁵⁰ In its place, the court adopted the rule of comparative negligence.⁵¹ Under this rule, "in all actions for negligence resulting in injury to person or property, the contributory negligence of the person injured . . . shall not bar recovery, but the damages awarded shall be diminished in proportion to the amount of negligence attributable to the person recovering."⁵² This development was significant as far as the defense of assumption of risk is concerned because the defenses of assumption of risk and contributory negligence overlap. For instance, a "plaintiff's conduct in encountering a known risk may be in itself unreasonable, because the danger is out of all proportion to the advantage which he is seeking to obtain. . . ."⁵³ If that is the case, we are dealing with contributory negligence, not assumption of risk, because the negligence consists of "making the wrong choice and voluntarily encountering a known unreasonable risk."⁵⁴ The court in *Li* ruled that "the defense of assumption of risk is . . . abolished to the extent that it is merely a variant of the former doctrine of contributory negligence; [this is] to be subsumed under the general process of accessing liability in proportion to negligence."⁵⁵

A policeman's conduct in encountering a risk caused by the willful, wanton or reckless conduct of another could be argued to fall within this overlapping area. Is the danger in a high speed chase out of all proportion to what the policeman is seeking, namely a speeding citation? If such conduct on the part of a policeman is considered but a variant of contributory negligence, it

conduct is concerned. Because the degree of danger imposed with willful and wanton conduct is usually greater than that imposed by negligent conduct, it is less likely that someone would agree to assume that danger or risk. Implying such consent or agreement when the risk is so increased seems even more questionable than implying it when the conduct is negligent in nature.

49. 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975). See note 46 *supra*.

50. 13 Cal. 2d at 828-29, 532 P.2d at 1243, 119 Cal. Rptr. at 875.

51. There are two forms of comparative negligence. One is called the "pure" form because it apportions liability in direct proportion to fault in all cases. The second form applies apportionment based on fault up to a point where the plaintiff's fault is greater than or equal to the defendant's fault. When this point is reached the plaintiff is barred from recovery. This is referred to as the "50% system." The *Li* court adopted the "pure" form. *Id.* at 828-29, 532 P.2d at 1243, 119 Cal. Rptr. at 875.

52. *Id.* at 829, 532 P.2d at 1243, 119 Cal. Rptr. at 875.

53. See W. Prosser, *supra* note 42, at 451.

54. *Id.*

55. 13 Cal. 3d at 829, 532 P.2d at 1243, 119 Cal. Rptr. at 875.

was abolished as a valid defense in the *Li* case and should no longer be used to support the fireman's rule.

B. *The Police Officer's Duty to Act*

Assumption of risk has also been found inapplicable where the plaintiff is under a duty to act and cannot avoid the risk. In *Bilyeu v. Standard Freight Lines*,⁵⁶ a truck driver drove negligently, causing his trailer to upset, spilling heavy rolls of steel on the highway. While pushing these rolls off the highway, a highway patrolman injured himself. There was no discussion of the fireman's rule, and the court ruled that the patrolman had not voluntarily accepted the risk involved with pushing the steel rolls off the highway.⁵⁷

He was under an obligation to clear the highway of obstructions. His choice, being dictated by a legal and moral duty. . . . Moreover, even though the plaintiff may have had knowledge of the risk involved in pushing and pulling heavy rolls of steel, it cannot be said as a matter of law that he appreciated the magnitude of that risk. Under such circumstances the doctrine [of assumption of risk] does not apply.⁵⁸

In the *Hubbard* case, the officer was also under a legal and moral duty to pursue Boelt. He did not do it voluntarily. Did Hubbard really appreciate the magnitude of the risk involved? If he had known there would be an accident in which he would be injured, would he still have pursued? The *Bilyeu* decision indicates that these questions cannot be answered in the affirmative as a matter of law, and that, therefore, the doctrine of assumption of risk does not apply to this type of situation.

C. *Erosion of the Assumption of Risk Doctrine*

The defense of assumption of risk has been completely abolished in many employment areas. For example, the Federal Employer's Liability Act⁵⁹ and the California Labor Code⁶⁰ have done just that in master and servant cases which are still governed by

56. 182 Cal. App. 2d 536, 6 Cal. Rptr. 65 (1960).

57. *Id.* at 539-40, 6 Cal. Rptr. at 66-67.

58. *Id.* at 545, 6 Cal. Rptr. at 70.

59. In 1939, Congress amended the Federal Employers Liability Act to provide that an "employee shall not be held to have assumed the risk of his employment in any case where such injury or death resulted in whole or in part from the negligence of the officer, agents, or employees of such carrier" 45 U.S.C. § 54 (1972). This occurred after endless litigation over the dividing lines between the defenses of contributory negligence and assumption of risk. See *Tiller v. Atlantic Coast Line R.R.*, 318 U.S. 54 (1943). The Court there held "that every vestige of the

common law principles of tort liability. Similarly, the California Supreme Court totally abrogated the defense from all actions for violation of a statute in *Finnegan v. Royal Realty Company*.⁶¹

The court stated that "an ordinance enacted for the public good cannot be contravened by private agreement. Public policy requires that duties imposed by statute be discharged and that those who are affected cannot suspend the operation of the law either by waiver or by express contract."⁶²

Therefore, because of the *Finnegan* decision, one cannot expressly contract with another party, relieving that party from any liability towards him, if the party injures him in the course of violating a statute. Nor can one waive his right to sue that person, if that person injures him while violating a statute.

Finally, while some courts still permit assumption of risk as a complete defense (barring all recovery for the plaintiff),⁶³ there are also some distinguished commentators who advocate,⁶⁴ and several courts⁶⁵ which have adopted, an abolition of the defense

doctrine of assumption of risk was obliterated from the law by the 1939 amendment" *Id.* at 58.

60. CAL. LAB. CODE § 2801 (West 1971) provides in part:

It shall not be a defense that:

(a) The employee either expressly or impliedly assumed the risk of the hazard complained of.

(b) The injury or death was caused in whole or in part by the want of ordinary or reasonable care of a fellow servant.

No contract, or regulation, shall exempt the employer from any provisions of this section.

61. 35 Cal. 2d 409, 218 P.2d 17 (1950) (involving police regulations, i.e. ordinances designed to protect human life).

62. *Id.* at 431, 218 P.2d at 31. See also CAL. CIV. CODE § 1668 (West 1975) which states in part: "All contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law." In construing this statute, courts have concluded that an exculpatory provision can be valid only if it does not affect the "public interest." *Tunkl v. Regents of Univ. of Cal.*, 60 Cal. 2d 92, 96, 383 P.2d 441, 443, 32 Cal. Rptr. 33, 35 (1963). Violation of a statute presumptively involves the public interest and is therefore not subject to exculpatory provisions.

Although the rule established in *Finnegan* has long been shared by English law, see *Wheeler v. New Merton Board Mills, Ltd.* [1933] 2 K.B. 669, 675 (C.A.), it is not generally accepted in other states. RESTATEMENT (SECOND) OF TORTS § 496F, comment e, at 580 (1965).

63. This appears to be the position in Arkansas, Georgia, Mississippi, Nebraska and South Dakota. See V. SCHWARTZ, *COMPARATIVE NEGLIGENCE* 161-63 (1974).

64. See James, *Assumption of Risk: Unhappy Reincarnation*, 78 YALE L.J. 185 (1968); *Symposium-Assumption of Risk*, 22 LA. L. REV. 1 (1961) (hereinafter cited as *Symposium*).

65. Several decisions rendered mostly prior to the introduction of comparative negligence purported to abolish the defense of assumption of risk. See *Hale v. O'Neill*, 492 P.2d 101 (Alaska 1971) (plaintiff had ridden horse six times before falling and was aware of dangerous proclivities); *Meistrich v. Casino Arena Attraction, Inc.*, 31 N.J. 44, 155 A.2d 90 (1959) (plaintiff injured while ice skating); *Ritter v.*

of assumption of risk, unless there is an express assumption.

D. Do Negligent and Willful and Wanton Conduct Create the Same Risks?

The majority failed to discuss whether the risks created by negligent, and willful and wanton conduct substantially identical?⁶⁶ Perhaps in some situations they are, such as the *Holden* case.⁶⁷ However, one need look no further than the facts of the *Hubbard* case to see that they usually are not. In *Holden*, the accident had already occurred when the officer arrived at the scene. Hence, the primary danger caused by the driver's willful or wanton conduct, the accident itself, was already past. Had the officer in *Holden* actually been pursuing the truck driver when the accident occurred, the danger to the officer and all third parties would have been much greater. The danger we are concerned with in cases of willful and wanton conduct is the danger created for others when the conduct is taking place, not after the conduct is over.

In *Hubbard*, after seeing the police officer, Boelt accelerated to a speed of 100 miles per hour in a twenty-five mile per hour zone in order to avoid receiving a speeding ticket. The risk of danger and injury to the pursuing officer, other drivers and pedestrians at

Beals, 225 Ore. 504, 358 P.2d 1080 (1961) (while testing a wheelchair ramp, employee fell and was injured); *Siragusa v. Swedish Hosp.*, 60 Wash. 2d 310, 373 P.2d 767 (1962) (nurse injured while working in hospital). Other courts have, or seem to have, approved "merger" of unreasonable assumption of risk (the risk to danger far outweighs the benefits hoped to be gained by assuming it) into contributory negligence, mostly after introduction of comparative negligence. See *Frelick v. Homeopathic Hosp. Ass'n of Delaware*, 51 Del. 568, 150 A.2d 17 (1959) (plaintiff tripped over a suspended chain in a parking lot when she could have easily walked a short distance around it); *Rosenau v. City of Estherville*, 199 N.W.2d 125 (Iowa Sup. Ct. 1972) (child injured by fireworks display); *Springrose v. Willmore*, 292 Minn. 23, 192 N.W.2d 826 (1971) (passenger injured in a car involved in a drag race); *Rosas v. Buddies Food Store*, 518 S.W.2d 534 (Tex. Sup. Ct. 1975) (slip and fall accident in grocery store); *Lyons v. Redding Constr. Co.*, 83 Wash. 2d 86, 515 P.2d 821 (1973) (tractor accident); *McConville v. State Farm Mut. Auto. Ins. Co.*, 15 Wis. 2d 374, 113 N.W.2d 14 (1962) (Passenger injured in an automobile accident).

66. In referring to assumption of risk, the court stated "the foregoing principles . . . seemingly would apply whether defendant's conduct was reckless or merely negligent in nature: In both situations, the plaintiff voluntarily confronts [the] hazard" 28 Cal. 3d at 484, 620 P.2d at 158, 169 Cal. Rptr. at 708. The court then went on to observe that the risks incurred by policemen and firemen in both situations are "substantially identical." *Id.*

67. The risk to a policeman climbing an embankment is substantially identical whether the car which drove over the embankment had been driven recklessly or negligently. 101 Cal. App. 3d 959, 161 Cal. Rptr. 925.

this time was substantial, and certainly more than when he was only driving negligently at fifty miles per hour.⁶⁸ Furthermore, the danger we are concerned with is that of driving at 100 miles per hour in a twenty-five mile per hour zone, not the danger of walking up to an accident which has already occurred. While it is true that the conduct of the defendants in both *Holden* and *Hubbard* was willful and wanton, the danger to the police officer in *Hubbard* was so much more immediate and threatening than that created for the officer in *Holden*. Hubbard was pursuing the reckless driver when the accident happened and was immediately threatened thereby. On the other hand, the officer in *Holden* arrived on the scene some time after the accident had occurred and was not immediately threatened thereby. The real difference between the two cases is that the willful and wanton conduct in *Hubbard* was a more immediate and threatening cause of the officer's injuries than was the willful and wanton conduct in *Holden*. It is hard to understand how the majority could say that the danger created by negligent and willful and wanton conduct is identical, and how the danger created in *Holden* was even remotely similar to that created in *Hubbard*.

E. Do Police Assume the Risk of Willful and Wanton Conduct?

The majority obviously believed that officers assume the risk of willful and wanton conduct.⁶⁹ However, as Justice Tobriner points out in his dissent, the same rationale could be utilized to imply that policemen assume the risk of intentionally inflicted injuries and, therefore, should be denied recovery for those also.⁷⁰ After all, policemen know when they are hired that some people will intentionally try to harm or even kill them. What complicates the majority's assumption of risk rationale is that, although a prospective police officer knows the job will involve many risks, the police officer's contractual agreement is reached long before he encounters the dangerous situation requiring his professional services. Consequently, it is difficult to establish that he voluntarily encountered a known, existing danger at the time the situation arose. This is especially so, since in light of the *Bilyeu* decision, it is his legal and moral duty to act.

68. See generally, Note, *Speeder Liability to Pursuing Police Officers—A New Cause of Action*, 21 SYRACUSE L. REV. 224 (1969) (the argument is made here for recognizing a cause of action for policemen in such a situation). This will be discussed extensively *infra* in the Speeder Liability Section.

69. See note 66 *supra*.

70. "[I]f the majority confine[s] their analysis—as they have done in this case—to the two broad policies which they equate with the fireman's rule, recovery should logically be denied for even such intentionally inflicted injuries" 28 Cal. 3d at 491, 620 P.2d at 162, 169 Cal. Rptr. at 712.

Is this synonymous to voluntarily acting? A policeman will engage in high speed chases because that is his job, and he is required to do so. It is highly doubtful that the same policeman would engage in a high speed chase when he is off duty. How can it then be said that a policeman voluntarily assumes the risk of danger involved? If a police officer would not voluntarily assume the risk as a private citizen, then the assumption is not truly voluntary. The police officer is assuming the risk because it is his duty, not because he freely chooses to do so. The voluntariness of the policeman's act is even more doubtful when the conduct of the one creating the risk changes from negligent to willful, wanton or reckless, and the corresponding danger increases proportionately. Therefore, it has been suggested that there should be a difference between those risks which a police officer agrees to remedy or assume and those which he merely knowingly encounters, but does not voluntarily assume.⁷¹ Taking all the above developments into consideration, it is far from clear that assumption of risk remains a fundamental tort principle in California⁷² or, keeping in mind the *Bilyeu* decision, whether assumption of risk should even have been applied in the *Hubbard* case.⁷³ The majority in *Hubbard* failed to make any sort of analysis considering the continued viability of this doctrine in our modern society. In summary, by extending the fireman's rule to willful and wanton conduct under such circumstances, the majority may have committed a serious error.

VI. PUBLIC POLICY

The majority also supported the extension of the fireman's rule to willful and wanton conduct because of public policy.⁷⁴ Again however, the majority mistakenly relied upon the public policy established in *Walters*, a negligence case, whereas *Hubbard* was dealing with reckless, willful or wanton conduct. This poses the question as to whether public policy is served in denying policemen and firemen a cause of action for injuries caused by willful or

71. Comment, *Negligence Actions by Police Officers and Firefighters: A Need for a Professional Rescuers Rule*, 66 CALIF. L. REV. 585 (1978) (hereinafter *Professional Rescuers*).

72. See notes 46-55 and 59-65 *supra* and accompanying text.

73. See notes 56-58 *supra* and accompanying text.

74. 28 Cal. 3d at 485, 620 P.2d at 158-59, 169 Cal. Rptr. at 708-09 (following *Holden v. Chunestudey*, 101 Cal. App. 3d 959, 961-62, 161 Cal. Rptr. 925, 926-27 (1980)).

wanton conduct, as well as for those caused by negligent conduct. The public policy rationale the *Hubbard* court used was twofold.

A. Are Policemen Adequately Compensated for the Risks They Face?

The first rationale was that firemen and policemen receive special benefits and pay because of the dangers they encounter and, therefore, should be denied a cause of action against those who negligently or recklessly injure them.⁷⁵ There are two fallacies to this argument. First of all, the rationale underlying this rule is that policemen and firemen are receiving adequate compensation for inherent risks in their employment. If this were a valid argument, it would seem that all employees would be barred from bringing a tort action whenever they are injured by a negligent or reckless tortfeasor, and when the risk of such an injury is inherent in their job. But such is not the case. "California courts have permitted injured employees to maintain traditional tort actions against third parties for virtually all negligently inflicted injuries"⁷⁶ For instance, highway workers, employees of construction subcontractors, high rise construction workers and mechanics all face substantial inherent risks in their jobs for which theoretically they all receive compensation. Yet, they have all been allowed causes of action for negligently inflicted job injuries.⁷⁷ Why do policemen and firemen deserve second class treatment?

Secondly, in addition to the *Bilyeu*⁷⁸ decision, there are two other California decisions which demonstrate that the theoretical compensation a policeman receives is not a sufficient basis for barring a policeman's cause of action against a negligent or reckless tortfeasor. In *Witt v. Jackson*,⁷⁹ the California Supreme

75. *Id.* at 485, 620 P.2d at 158-59, 169 Cal. Rptr. at 708-09.

76. 20 Cal. 3d 199, 209, 571 P.2d 609, 615, 142 Cal. Rptr. 152, 158 (1977) (Tobriner, J., dissenting).

77. For a highway worker's right to recover for injuries suffered as the result of a third party's negligence, *see, e.g.*, *Scott v. City & County of San Francisco*, 91 Cal. App. 2d 887, 206 P.2d 45 (1949); *Roddy v. American Smelting etc. Co.*, 34 Cal. App. 2d 457, 93 P.2d 841 (1939); *Mecham v. Crump*, 137 Cal. App. 200, 30 P.2d 568 (1934). For construction workers' right to recover tort damages for work-related injuries, *see, e.g.*, *Woodcock v. Fontana Scaffolding & Equip. Co.*, 69 Cal. 2d 452, 445 P.2d 881, 72 Cal. Rptr. 217 (1968); *Ferrel v. Safway Steel Scaffolds*, 57 Cal. 2d 651, 371 P.2d 311, 21 Cal. Rptr. 575 (1962). For mechanics' right to recover for job-related injuries, *see, e.g.*, *Housewright v. Pacific Far East Line, Inc.*, 229 Cal. App. 2d 259, 40 Cal. Rptr. 208 (1964).

78. *See* notes 56-58 *supra* and accompanying text.

79. 57 Cal. 2d 57, 366 P.2d 641, 17 Cal. Rptr. 369 (1961).

As *Witt* demonstrates, California courts have never viewed such benefits as a justification for barring a police officer's tort recovery. The provision of such special disability programs does not necessarily reflect an intent

Court allowed a policeman, who while pulling another car to the side of the road was struck from the rear by a third car, to recover full tort damages from the negligent driver. This was despite the fact that the policeman received workers' compensation for the injury, as well as his normal pay and fringe benefits. Certainly the risk of such an accident was inherent in the police officer's job. Why should a cause of action be allowed in the *Witt* case, where the tortfeasor's conduct was negligent, and be barred in the *Hubbard* case, where the tortfeasor's conduct was reckless, willful and wanton? In *McAllister v. Cummings*,⁸⁰ a policeman was in pursuit of a suspected traffic violator, just as in *Hubbard*. A third party's car hit the policeman's motorcycle, injuring the policeman. Although the risk of such an accident was unquestionably inherent in the officer's job, the court allowed recovery. In fact, the court specifically states, "[t]here is no dispute . . . about the fact that the plaintiff was pursuing a lawbreaker. Hence there was no basis for suggesting an assumption of risk with respect to ordinary traffic hazards or for instructing the jury on that subject."⁸¹

In the above three cases, policemen were allowed to maintain tort actions for their injuries against negligent drivers. In *Hubbard*, Boelt was driving recklessly in willful and wanton disregard for the safety of Hubbard and others, yet ironically, Hubbard was not allowed to maintain a cause of action against Boelt.

B. Would Liability for Willful and Wanton Conduct Be Overly Burdensome to Society?

The second basis for the public policy rationale which the *Walters* court relied on was strongly based upon the argument originally established in *Krauth v. Geller*.⁸² The court in *Krauth* pointed out that most fires were probably caused by negligence,

to bar the individual officer's tort action, but rather may simply reflect the fact that a policeman or fireman often sustains injury in the absence of demonstrable negligence or that even if negligence can be demonstrated, tortfeasors are not always capable of paying for the damage they cause.

20 Cal. 3d at 213 n.3, 571 P.2d at 617-18 n.3, 142 Cal. Rptr. at 160-61 n.3 (Tobriner, J., dissenting).

80. 191 Cal. App. 2d 1, 12 Cal. Rptr. 418 (1961).

81. *Id.* at 11, 12 Cal. Rptr. at 424.

82. 31 N.J. 270, 157 A.2d 129 (1960). In this case, a fireman was on a landowner's premises fighting a fire. The fireman went up a balcony on which the railing had not been installed. The fireman fell off, injuring himself.

and that "in the final analysis the policy decision is that it would be too burdensome to charge all who carelessly cause or fail to prevent fires with the injuries suffered by the expert retained with public funds to deal with those inevitable, although negligently created, occurrences."⁸³ The focus of the analysis seems to be on the unfair burden the taxpayer would be faced with if he negligently injured a policeman in the line of duty and had to pay for his injuries, which theoretically the taxpayer had already paid for through taxes.⁸⁴

Whether this rationale⁸⁵ is a valid one or not, it does not seem to stand up once the conduct becomes reckless, willful and wanton. It is probably true that many people may negligently injure a policeman or fireman in the line of duty. But how many of those same people would willfully and wantonly injure a police officer or fireman? How great would the burden be on taxpayers in general, if those few who willfully and wantonly injure a policeman are forced to account for their behavior? It does not appear that the fireman's rule was created for such a situation.⁸⁶ The rule was originally designed to protect the innocent homeowner from liability for injuries a fireman might incur.⁸⁷ It was not designed to protect the landowner or occupier who is not innocent.⁸⁸ As Justice Tobriner states in his dissent, the "majority's approach unhinges the fireman's rule from its traditional modest public policy

The *Walters* court relied on *Krauth* to support the contention that it would be unduly burdensome on the taxpayers to expose them to liability to firemen injured while fighting a fire, or policemen injured in the line of duty.

83. *Id.* at 274, 157 A.2d at 131.

84. 28 Cal. 3d 480, 492, 620 P.2d 156, 163, 169 Cal. Rptr. 706, 713 (dissent). See *Professional Rescuers*, *supra* note 71, at 597. Justice Tobriner compares this concept to that of insurance. The taxpayer theoretically pays taxes to the city for the special benefits firemen and policemen receive, just like they would pay insurance premiums to an insurance company. When the injuries do occur to the firemen or policemen the argument goes that the taxpayer should not have to pay for their injuries all over again. See 2 R. HARPER & F. JAMES, *THE LAW OF TORTS* 1503-04 (1956).

85. In *Walters*, the majority decided that the means by which they are presumably paid are, besides their salaries, by special presumptions of industrial causation as to certain disabilities and special death benefits that apply to public safety officers; they are entitled to optional leave of absence for up to one year with full pay, and permanent disability benefits are fully payable despite retirement. 20 Cal. 3d at 205-06, 571 P.2d at 613, 142 Cal. Rptr. at 156.

86. Justice Tobriner stated that the limited public policy rationale at least had "the virtue of confining the diminution of the rights of firemen and policemen within somewhat tolerable limits and of relieving only the least culpable of tortfeasors from liability for the officer's injuries." 28 Cal. 3d at 492, 620 P.2d at 163, 169 Cal. Rptr. at 713 (dissent). See *Bandosz v. Daigger & Co.*, 255 Ill. App. 494 (1930) (fireman's rule held not applicable to willful or wanton conduct).

87. See notes 4-8 *supra* and accompanying text.

88. See notes 9-19 *supra* and accompanying text.

rationale."⁸⁹ The majority has expanded the doctrine to relieve "persons who know of a firefighter's or police officer's presence of any duty to act with concern for the officer's safety or, indeed, of any duty even to avoid reckless, willful or wanton misconduct which poses an obvious danger to the officer."⁹⁰ This is in direct contradiction to the fireman's rule, as it existed before *Hubbard*, under which it was established that once the policeman or fireman was present, the defendant "must, of course, refrain from intentionally or wantonly injuring such officers."⁹¹

In conclusion, the majority has extended the fireman's rule far beyond its intended scope, without any real basis for doing so. The assumption of risk rationale is a very questionable one on which to base the extension, considering the modern attitude toward assumption of risk, the quickly growing and developing doctrine of comparative negligence and this factual situation. Likewise, the majority stretches the public policy rationale to the breaking point. Case law does not support denying policemen or firemen a cause of action for recklessly inflicted injuries just because they are theoretically compensated for those risks "inherent" in their jobs. Finally, the extreme burden on the taxpayer in imposing liability is simply nonexistent once the conduct becomes reckless, willful and wanton.

VII. DISSENTING OPINION

The dissent⁹² continued "to believe that the fireman's rule is inconsistent with California's fundamental statutory and common law tort principles"⁹³ However, conceding that the rule is

89. 28 Cal. 3d at 492, 620 P.2d at 163, 169 Cal. Rptr. at 713 (dissent).

90. *Id.*

91. *Id.* See R. HARPER & F. JAMES, *supra* note 84, at 1504. (This rule is conceded by even the most reactionary jurisdictions); *Bandosz v. Daigger & Co.*, 255 Ill. App. 494 (court also held that the statutes in question were meant to protect firemen and any others who had a right to be on the property).

92. The dissent was written by Justice Tobriner, and Chief Justice Bird concurred.

93. 28 Cal. 3d at 487, 620 P.2d at 160, 169 Cal. Rptr. at 710 (dissent). See 20 Cal. 3d 199, 571 P.2d 609, 142 Cal. Rptr. 152 (1977) (dissent). Justice Tobriner did not believe that there was sufficient California case law to support the argument that the fireman's rule should apply simply because the injuries the fireman or policeman incurred arose out of a foreseeable risk of his occupation. See notes 76-81 *supra* and accompanying text. He also rejected the argument that the fireman's rule "spread the risk" of a fireman's or policeman's injuries among all taxpayers instead of placing the entire burden on the negligent tortfeasor. He felt that the rule did not spread the risk at all, but totally eliminated it. Firemen and police-

almost universally accepted,⁹⁴ the dissent could still not agree with the extension of the rule to willful and wanton conduct. Writing the dissent, Justice Tobriner contended that the majority

transformed the fireman's rule from a restrained doctrine that simply protects the average homeowner or citizen from potentially severe liability for mere acts of negligence in creating a situation as to which firemen and policemen are employed to respond, into a sweeping, across-the-board rule that forbids firemen and policemen from recovering any damages from persons who, with knowledge of a safety officer's presence on the scene, intentionally engage in willful and wanton misconduct which results in serious injury to the officer.⁹⁵

VIII. THE INDEPENDENT ACT

Aside from the majority's questionable rationale for extending the rule to willful and wanton misconduct, the dissent observed⁹⁶ that the primary basis for permitting recovery in this case should have been that there was an additional, independent act of misconduct by Boelt after Hubbard arrived at the scene. As Justice Tobriner stated, this independent act "foreseeably created a new and additional risk of danger to the officer"⁹⁷

As the majority recognized,⁹⁸ the fireman's rule does not apply if the defendant's negligence in no way created the risk which was the cause of the officer's presence and could not have provided any occasion for the officer's engagement at the time and was, instead, the result of wholly independent factors.⁹⁹ This rule was recognized in the case of *Kocan v. Garino*.¹⁰⁰ Even accepting the majority's rationale for extending the fireman's rule to willful and wanton conduct, based on the *Kocan* case and *Bartholomew v. Klingler Co.*,¹⁰¹ there seems to have been an independent act of misconduct in the Hubbard case, and, therefore, the fireman's rule should not have been applied.

men were denied all recovery except for workmen's compensation, which most other employees could get in addition to their right to file suit as individuals, for their injuries. Therefore, firemen and policemen were required to bear a loss which was not required of other employees. He also pointed out that in many cases of a fire, for instance, the defendant would have liability insurance that would cover a fireman's tort action. The insurance itself would be spreading the risk of loss among all the policy holders. 20 Cal. 3d at 207-17, 571 P.2d at 614-20, 149 Cal. Rptr. at 157-63 (dissent). For another alternative to the fireman's rule, see *Professional Rescuers*, *supra* note 71, at 605-09.

94. See note 23 *supra*.

95. 28 Cal. 3d at 487, 620 P.2d at 160, 169 Cal. Rptr. at 710 (dissent).

96. *Id.* at 488, 620 P.2d at 160, 169 Cal. Rptr. at 710 (dissent).

97. *Id.*

98. See note 108 *infra*.

99. *Kocan v. Garino*, 107 Cal. App. 3d 291, 295-96, 165 Cal. Rptr. 712, 714-15 (1980).

100. 107 Cal. App. 3d 291, 165 Cal. Rptr. 712.

101. 53 Cal. App. 3d 975, 126 Cal. Rptr. 191 (1975) (officer responding to a burglar alarm fell through the defendant's ceiling while searching for possible intruders).

In the *Kocan* case, a police officer was injured going over a faulty fence while in pursuit of a felony suspect. The court held that the officer could recover from the owner of the property where the pursuit took place for negligently failing to maintain the fence. The negligence of the defendant landowner, if any, the court stated, was an independent act and not the cause of the officer's presence on the land to begin with, and that, therefore, the fireman's rule did not apply.¹⁰² In the *Hubbard* case, the cause of Hubbard's presence (original pursuit of Boelt) was Boelt's speeding. That was the original act of misconduct. The injury to Hubbard did not occur at that point, it occurred later when Boelt recklessly accelerated to approximately 100 miles per hour in order to evade getting a ticket. The attempt to avoid the ticket was an independent act of Boelt, separate and apart from his original negligent speeding. That act, not the original negligent speeding, was the cause of Hubbard's injuries. The Supreme Court of California, in the *Walters* case, has even recognized, hypothetically, that a "police officer who while placing a ticket on an illegally parked car is struck by a speeding vehicle may maintain an action against the speeder . . ."¹⁰³ *Hubbard* is comparable to that situation because the police officer in *Hubbard* was injured by a speeder, who was driving recklessly, while attempting to give a ticket to that speeder.

A corollary to the independent act rule, which has long been applied to the fireman's rule, is that the defendant's negligence must have been the cause of the officer's presence at the scene of the accident.¹⁰⁴ In the *Bartholomew*¹⁰⁵ case, the court held that if, after the police officer arrives on the scene, the property owner fails to advise him of some hidden danger, which he knows of, and ulti-

102. 107 Cal. App. 3d at 295-96, 165 Cal. Rptr. at 715.

103. 20 Cal. 3d at 202 n.2, 571 P.2d at 611 n.2, 142 Cal. Rptr. at 154 n.2.

104. See 20 Cal. 3d 199, 571 P.2d 609, 142 Cal. Rptr. 152; *Scott v. E.L. Yeager Constr. Co.*, 12 Cal. App. 3d 1190, 91 Cal. Rptr. 232 (1970); *Giorgi v. Pacific Gas & Electric Co.*, 266 Cal. App. 2d 355, 72 Cal. Rptr. 119 (1968). The defendant's negligence must have created a risk which is of the type usually dealt with by firemen and policemen, and that risk created must have been the direct cause of the officer's injury. 12 Cal. App. 3d at 1198-99, 91 Cal. Rptr. at 238. A fireman normally deals with the risks of getting burned or inhaling smoke in a fire. He does not normally deal with the risk of falling in a hole in a driveway as he walks up to fight a fire. See note 9 *supra* and accompanying text. A policeman normally deals with risks of being injured by a prowler, but he does not normally deal with the risk of falling through a ceiling as he searches for that prowler. See notes 105 *infra* and 103 *supra* and accompanying text.

105. 53 Cal. App. 3d 975, 126 Cal. Rptr. 191 (1973).

mately causes the officer's injury, then the owner can be held liable to the officer.¹⁰⁶ In the *Hubbard* case, Boelt knew that the officer was on the scene, and that, by attempting to escape from the officer as he did, he was exposing the officer to additional and more dangerous risks. Therefore, Boelt's conduct was very similar to an independent act not associated with the officer's presence. Like failing to warn of a hidden danger, Hubbard was exposed to additional and more dangerous risks than he would have normally faced had Boelt's conduct been reasonable. In other words, Boelt's reckless conduct was not the original cause of Hubbard's presence, Boelt's negligent speeding was.

While both the majority and dissent agreed that this was willful and wanton misconduct,¹⁰⁷ they differed in that the majority did not see the conduct as two independent acts.¹⁰⁸ The *Holden* case, upon which the majority relied, did not have separate acts of misconduct.¹⁰⁹ Perhaps one of the problems the majority had in seeing two independent acts was that in *Kocan*, *Bartholomew* and the court's own hypothetical example in *Walters*, the independent acts of misconduct occurred after the officer arrived on the scene and were committed by someone other than the one the policeman was originally pursuing. In the *Hubbard* case, the time differential between the officer's arrival and the defendant's attempt to evade arrest was obviously not much. Nevertheless, the act of

106. "[I]f the owner knows of the presence on the premises of officially privileged persons, such as firemen or policemen, is cognizant of a dangerous condition thereon, and has reason to believe that they are unaware of the danger, he has a duty to warn them of the condition and of the risk involved." *Id.* at 979, 126 Cal. Rptr. at 193 (citing *Beedenbender v. Midtown Properties*, 4 A.D.2d 276, 281, 164 N.Y.S.2d 276, 281 (1957)).

107. See 4 B. WITKIN, SUMMARY OF CAL. LAW 3025-27 (8th ed. 1974), for a summary of collected cases on willful and wanton misconduct.

108. The majority recognized that the fireman's rule was not intended to apply to independent acts of misconduct which were not the cause of the officer's presence at the scene. See, e.g., *Kocan v. Carino* 107 Cal. App. 3d 291, 165 Cal. Rptr. 712 (1980). See notes 99-106 *supra* and 109-11 *infra* and accompanying text. However, without any case support whatsoever, it is simply stated that the police officer "was injured while pursuing a speeding traffic violator, and in [the] discharge of his official duty incurred the very risk which occasioned his presence at the accident scene." 28 Cal. 3d at 486-87, 620 P.2d at 159, 169 Cal. Rptr. at 709. This view is particularly hard to reconcile with the *McAllister* case because the only difference there was that the accident was caused by a third party, not the traffic violator the police officer was pursuing. See notes 80-81 *supra* and accompanying text.

109. In *Holden*, the accident the officer was investigating was caused by the defendant driving while intoxicated. This act of misconduct created the occasion for the officer's presence on the scene. Since the officer arrived after the accident had occurred, no greater risk was created whether the accident had resulted from willful and wanton conduct or simple negligence. There was no independent act of misconduct after the officer had arrived at the scene. *Holden v. Chunestudey*, 101 Cal. App. 3d 959, 161 Cal. Rptr. 925 (1980). To the contrary, in the *Hubbard* case, there was a separate act of misconduct after the officer arrived on the scene and it did expose him to a greater risk of injury and degree of danger.

speeding and the act of evading arrest by driving recklessly can be separated. Furthermore, simply because these two independent acts of misconduct were committed by the same person should not have caused so much difficulty for the majority. In the *Kocan* and *Bartholomew* cases, the courts focused on, not the fact that the endangering act was committed by a party other than the individual pursued, but rather that the act was independent of the one which originally caused the officer's presence and created a greatly increased risk to the officer. If the majority had focused on Boelt's attempt to evade arrest, which greatly increased the risk involved for Hubbard, and not the original cause of Hubbard's presence, Boelt's negligent speeding, based on the *Kocan* and *Bartholomew* cases the fireman's rule would not have been applied. In addition to his original speeding, Boelt was also charged with violating three different code sections.¹¹⁰ This alone is sufficient evidence that there were separate acts of misconduct by Boelt.¹¹¹

Summarizing, it appears that the dissent has support in case law for their contention¹¹² that the fireman's rule has always been very restricted in nature.¹¹³ "[T]he fireman's rule has never been viewed as totally eliminating an individual's duty to utilize due care towards a fireman or policeman once the officer has already arrived on the scene."¹¹⁴ It is unquestionable that Boelt engaged in a separate act of misconduct after Hubbard arrived and made himself known.¹¹⁵ The conduct of attempting to evade arrest was

110. See notes 123-25 *infra*.

111. *Id.* Boelt was charged under CAL. VEH. CODE § 2800.1 for attempting to flee from a pursuing officer after seeing his car and hearing his siren and under CAL. PENAL CODE § 148 for willfully resisting an officer attempting to carry out his duty. CAL. PENAL CODE § 834a was charged for using force in resisting arrest. These three statutory violations are all separate and distinct from Boelt's original misconduct of mere speeding.

112. 28 Cal. 3d 480, 487, 620 P.2d 156, 159-60, 169 Cal. Rptr. 706, 710 (1980).

113. The fireman's rule has not been applied in cases of willful and wanton conduct, active negligence, failure to warn of hidden dangers, statutory violations, failure to keep means of access in a reasonably safe condition, or in cases where the defendant's negligence occurred after the officer arrived at the scene and materially enhanced the risk of harm, or created a new risk of harm. See notes 9-18 *supra* and accompanying text. See generally Bohlen, *The Duty of a Landowner Towards Those Entering His Premises of Their Own Right*, 69 U. PA. L. REV. 237 (1921).

114. 28 Cal. 3d at 488, 620 P.2d at 161, 169 Cal. Rptr. at 711 (dissent). See notes 100-03 *supra* and accompanying text.

115. Hubbard made himself known to Boelt by immediately activating his emergency lights and siren. 28 Cal. 3d at 483, 620 P.2d at 157, 169 Cal. Rptr. at 707.

not just negligent, but was willful and wanton, and it exposed Hubbard to a much higher degree of risk of injury to himself than he normally would encounter in giving someone a speeding ticket. Because there was a greater degree of risk created by an independent act of misconduct injuring Hubbard after he arrived at the scene, the majority's reliance on the fireman's rule was unfounded and misplaced.

IX. STATUTORY RIGHTS

It is well settled in California that if a statute is violated, there is a presumption of negligence, absent justification or excuse, provided that the "person suffering . . . the injury . . . was one of the class of persons for whose protection the statute . . . was adopted."¹¹⁶ A perfect example of this rule would be a violation of any traffic ordinance. For instance, if a driver goes through a red light, he would be presumed negligent if he collided with a car passing through the green light in the opposite direction. Therefore, another issue in *Hubbard* was, since Boelt was presumed negligent for his statutory violations, did Hubbard, as a policeman, fall within the class of persons intended to be protected by the statutes involved.¹¹⁷

In the past, there has been much debate as to whether violation of a statute, which caused injury to a fireman or policeman, would give rise to a cause of action despite the fireman's rule.¹¹⁸ While there does not seem to be a clear majority either way, New York, the first state to break from the original fireman's rule in the *Meiers* case,¹¹⁹ has declared that the legislature "may be considered as having intended to impose liability in any case where

116. CAL. EVID. CODE § 669, subd. (a)(4) (West 1966). The violation must also have been the proximate cause of the injury of the type which the statute was designed to prevent. *Vesley v. Sager*, 5 Cal. 3d 153, 164-65, 486 P.2d 151, 159, 95 Cal. Rptr. 623, 632 (1971) (plaintiff injured by an automobile driven by a person to whom defendant, a tavern keeper, had sold alcoholic beverages in violation of statute); 4 B. WITKIN, SUMMARY OF CAL. LAW 2810-11 (8th ed. 1974). An example of this would be a defendant running a red light and hitting the plaintiff's car which was coming in the opposite direction. The violation of the statute (running the red light) would have been the proximate cause of the accident, and avoiding collisions with cars coming in the opposite direction would have been an injury the statute was designed to protect against.

By recognizing the validity of the above "negligence per se" rule, the *Walters* court impliedly recognized that the fireman's rule does not preclude recovery when the defendant has violated a statute under the above required condition. 20 Cal. 3d at 206-07, 571 P.2d at 613, 142 Cal. Rptr. at 156. The only reason the *Walters* court did not apply the "negligence per se" doctrine was that they did not find the police officer within the statutorily protected class.

117. 28 Cal. 3d at 485-86, 490, 620 P.2d at 159, 169 Cal. Rptr. at 709.

118. See note 16 *supra*.

119. See notes 9-11 *supra* and accompanying text.

there is any practical or reasonable connection between a [statutory] violation and the injury or death of a fireman."¹²⁰ Consequently, New York has a statute which provides that a fireman may recover for injuries caused as a result of a fire prevention ordinance.¹²¹ This would of course include injuries sustained in a fire caused by such a statutory violation.¹²² While there is no such express California statute conferring a cause of action on firemen and policemen, it is important to examine the intent of the legislature in enacting the statutes in question here. Were firemen and policemen meant to be protected by these statutes?

Hubbard was charged with violating Vehicle Code section 2800.1,¹²³ Penal Code section 148,¹²⁴ and Penal Code section 834a.¹²⁵ Section 2800.1 makes it a misdemeanor to willfully disre-

120. *McGee v. Adams Paper and Twine Co.*, 26 A.D.2d 186, 195, 271 N.Y.S.2d 698, 710 (1966) (statutory smoking restrictions did not apply to all premises and parts of where paper and paper products were stored). See *Dagget v. Keshner*, 284 A.D. 733, 736, 134 N.Y.S.2d 524, 528 (1954) (when the basis for recovery is under a statute it is not necessary that plaintiff show "the same degree of proximate causal connection . . .").

121. N.Y. GEN. MUN. LAW § 205-a (McKinney 1974) provides in relevant part that any death or injury to a fireman caused

directly or indirectly as a result of any neglect omission, wilful or culpable negligence of any person or persons in failing to comply with the requirements of any of the statutes, ordinances, rules, orders and requirements of the federal, state, county, village, town, or city governments . . . [That person shall be liable for,] . . . in case of injury to person, not less than one thousand dollars, and in case of death not less than five thousand dollars

122. See *Carrol v. Pellicio Bros., Inc.*, 44 Misc. 2d 822, 255 N.Y.S.2d 771 (1964) (defendant violated a fire prevention ordinance and two smoke ordinances).

123. CAL. VEH. CODE § 2800.1 (West Supp. 1981) provides that:

Every person who, while operating a motor vehicle, hears a siren and sees at least one lighted lamp exhibiting a red light emanating from a vehicle which is distinctively marked and operated by a member of the California Highway Patrol or any peace officer of any sheriff's department or police department wearing a distinctive uniform and who, with the intent to evade the officer, willfully disregards such siren and light, and who flees or otherwise attempts to elude a pursuing peace officer's motor vehicle, is guilty of a misdemeanor.

124. CAL. PENAL CODE § 148 (West 1970) provides that:

Every person who wilfully resists, delays, or obstructs any public officer, in the discharge or attempt to discharge any duty of his office, when no other punishment is prescribed, is punishable by a fine not exceeding one thousand dollars, or by imprisonment in a county jail not exceeding one year, or by both such fine and imprisonment.

125. CAL. PENAL CODE § 834a (West 1970) provides that "[i]f a person has knowledge, or by the exercise of reasonable care, should have knowledge, that he is being arrested by a peace officer, it is the duty of such person to refrain from using force or any weapon to resist such arrest."

guard an officer's siren and red light and flee or attempt to elude pursuit. The majority stated that this section clearly was designed to protect the public from the hazard of high speed pursuits.¹²⁶ While this contention may be correct, the majority cited no authority for it and tends to forget that an officer involved in such a chase may be killed or seriously injured just as easily as anyone else.

Section 148 proscribes willful resistance, delay or obstruction of a police officer, while section 834a forbids using force or a weapon to resist arrest. The majority relied on *Walters* for its contention that "an officer called to enforce a criminal statute is [ordinarily] not one of the class of persons for whose protection the criminal statute is adopted."¹²⁷ This may be true for such ordinary criminal statutes as those for robbery, burglary, larceny, assault and battery. However, unlike *Walters*, in the *Hubbard* case the statutes Boelt violated have a special connection to the safety of a police officer. As Justice Tobriner stated in the dissent, they "are concerned specifically with ensuring that a person facing arrest does not commit additional acts which may pose increased risks both to the police officer and to the general public."¹²⁸ Despite the language of the statutes involved and the past interpretation of these two statutes, the majority arrived at the amazing conclusion that the statutes "may have been enacted to assist the officer in making arrests and performing other official functions, but it is unlikely that these provisions were intended to protect the officer from injuries received from traffic accidents."¹²⁹

First of all, it is important to point out that in the case of *McAllister v. Cummings* a policeman was allowed a recovery for injuries he sustained in a traffic accident while in pursuit of a traffic violator.¹³⁰ The driver with whom the police officer collided was obviously in violation of some traffic ordinance,¹³¹ yet there was

126. 28 Cal. 3d at 486, 620 P.2d at 159, 169 Cal. Rptr. at 709. It is interesting that the majority did not think that section 2800.1 was designed to protect policemen, considering that this law was strongly supported by the California Peace Officers Association. See *Crimes; unlawful flight by a motor vehicle operator*, 9 PAC. L.J. 434 (1978).

127. 28 Cal. 3d at 486, 620 P.2d at 159, 169 Cal. Rptr. at 709 (citing *Walters v. Sloan*, 20 Cal. 3d 199, 207, 571 P.2d 609, 609, 142 Cal. Rptr. 152, 152 (1977)).

128. 28 Cal. 3d at 490, 620 P.2d at 162, 169 Cal. Rptr. at 712 (dissent).

129. 28 Cal. 3d at 486, 620 P.2d at 159, 169 Cal. Rptr. at 709.

130. The *McAllister* court found that a statute intended for public safety is meant to protect policemen as well as the public, and that "assumption of the risk is not available as a defense to an action based upon the violation of a safety law intended to protect the plaintiff against the very risk which he is said to have assumed." 191 Cal. App. 2d 1, 11-12, 12 Cal. Rptr. 418, 424 (1961) (citing *Ewing v. Balan*, 168 Cal. App. 2d 619, 623, 336 P.2d 561, 564 (1959). See *Finnegan v. Royal Realty Co.*, 35 Cal. 2d 409, 218 P.2d 17 (1950).

131. The defendant violated CAL. VEH. CODE § 21804 (West 1971), which re-

no discussion that traffic ordinances were not enacted to protect policemen, as well as the general public.

Section 834a was enacted to do away with the former rule that a person could use reasonable force to resist an unlawful arrest.¹³² "The former rule inevitably led to riots and violence . . ." ¹³³ The section provides that if a person knows he is being arrested by an officer, he has the duty to refrain from using force or a weapon to resist arrest. If this statute is not designed to protect police officers, just who is it designed to protect? The police officer is the one making the arrest. Obviously, the statute is for general public protection. However, would not a police officer be the one most likely to be injured if a violator were to use force or a weapon in resisting arrest? Since the statute specifically refers to police officers, would not it be logical to assume they would be protected by it?

Section 148 has been interpreted in the case of *People v. Martensen*.¹³⁴ There, a police officer was attempting to ticket a speeding motorist who he had pulled over and stopped. While the police officer was attempting to get information from the defendant driver, the defendant pushed the officer off the running board of the car.¹³⁵ The court in *Martensen* applied section 148, saying that anyone who "willfully refuses, delays, or obstructs a public officer in the discharge [of his duties] . . . is punishable . . ." ¹³⁶ The police officer could have been injured in that case by the con-

quired a driver entering or crossing a highway from public or private property to yield the right-of-way to all approaching vehicles on the highway. If this section is for the protection of policemen as the *McAllister* court dictates (see note 130 *supra*), how can section 2800.1 not be for the protection of the policeman?

132. *People v. Burns*, 198 Cal. App. 2d 839, 841, 18 Cal. Rptr. 921, 922 (1961) (not error to refuse to instruct jury that a private person had the right to reasonably resist an unlawful arrest). See also *People v. Curtis*, 70 Cal. 2d 347, 450 P.2d 33, 74 Cal. Rptr. 713 (1969) (a person may not use force to resist any arrest, lawful or unlawful, except to defend life and limb); *People v. Gaines*, 247 Cal. App. 2d 141, 55 Cal. Rptr. 283 (1966) (defendant struck officer with officer's billy club after being arrested); *In re Bacon*, 240 Cal. App. 2d 34, 49 Cal. Rptr. 322 (1966) (it was delay and obstruction when defendant made his body go limp and forced officer to carry him to make the arrest). All of the above cases, except *Bacon*, deal with a defendant being prosecuted for committing assault and battery against a police officer. It seems clear from these factual situations that where sections 148 and/or 834a were involved, these statutes were enacted primarily for the protection of the arresting police officer.

133. *People v. Burns*, 198 Cal. App. 2d 839, 841, 18 Cal. Rptr. 921, 922 (1961).

134. 76 Cal. App. 763, 245 P. 1101 (1926).

135. *Id.* at 766, 245 P. at 1102.

136. *Id.* at 766, 245 P. at 1102.

duct of the defendant. In *Hubbard*, the officer was less fortunate in that he was actually injured. In both the *Hubbard* and *Martensen* cases the defendant driver was attempting to avoid getting a speeding ticket. Although there may be other purposes for this section, such as protecting other drivers on the road, one purpose clearly is to protect the police officer from evasive conduct whereby he may be injured while attempting to give a traffic ticket or make an arrest.¹³⁷

To summarize, a common sense reading of section 2800.1 would indicate that it was meant to protect police officers as well as the general public. A similar reading of sections 834a and 148 and past court interpretations would seem to imply that these are not the kind of statutes to which *Walters* referred when the court said that policemen were not in the class meant to be protected by ordinary criminal statutes. If this is the case, Hubbard should have had a cause of action against Boelt for Boelt's violation of these statutes, which proximately caused Hubbard's injuries.

X. DISCUSSION OF SPEEDER LIABILITY

Can a police officer, injured in an automobile accident during a chase, recover from the speeding driver he was pursuing, when that driver's negligent or willful and wanton operation of his vehicle was the proximate cause of the injury the policeman suffered? This has been the issue discussed throughout this note. The majority of the court found that because of the fireman's rule and because policemen were not a statutorily protected class, a cause of action was not stated. This author suggests that the majority made a serious error when they extended the fireman's rule to the above factual situation, and that another approach should have been adopted, just as in other jurisdictions.

The fact of the matter is that in the above factual situation (police officer pursuing a speeding driver) the fireman's rule has never been applied. Instead, the general principles of negligence¹³⁸ have always been applied and a cause of action has been

137. A review of the legislative history of section 148 reveals that one of the major laws on which it was based was the Crimes and Punishment Act (Stats 1850 ch. 99 § 92 at 240) as amended by Stats 1860 ch. 156 § 1 at 125. That act stated that "[i]f any person shall, knowingly and willfully . . . assault or beat any such officer [attempting to make an arrest] . . . every such person so offending shall be fined in any sum not exceeding \$5,000, and imprisoned in the county jail for a term not exceeding 5 years . . ." Since that act specifically mentions assaulting and beating an arresting officer it seems obvious that section 148 was likewise enacted to protect against the assaulting and/or beating of an arresting officer, and any other injury which might befall that officer as a consequence of the defendant's resisting arrest.

138. See note 1 *supra*.

allowed for policemen.¹³⁹ The first case to deal with speeder liability to a pursuing police officer was *Warner v. Strieder*.¹⁴⁰ The court found that the speed of the defendant was not the proximate cause of the policeman's collision with a third vehicle.¹⁴¹ Nothing was said in the case about the fireman's rule.¹⁴² However, the court pointed out, by way of dictum, that if there had been adequate evidence that the defendant was knowingly attempting to escape, "a situation suggesting liability might ensue."¹⁴³ In three later cases, *McKay v. Hargis*,¹⁴⁴ *Goddard v. Williams*,¹⁴⁵ and *Martin v. Rossignol*,¹⁴⁶ the main issue was that

139. See notes 144-60 *infra* and accompanying text.

140. 72 N.E.2d 470 (Ohio Ct. C.P. 1947). In *Warner*, the defendant was driving at seventy-one miles per hour at night in a densely populated residential area. When a police officer began to pursue him, the defendant accelerated. During the chase the police officer collided with a third vehicle and injured the plaintiff. The plaintiff brought suit against both the speeding motorist and the pursuing officer (who was dismissed from the suit).

141. At the time the collision occurred the police car was overtaking and beginning to pass the speeder in the intersection. The court found that the police officer was a cause of the accident because of that conduct, and stated that "the situation in which the officer found himself was the result of his own deliberate conduct and choice and no act, upon the part of the defendant, induced or caused the officer to choose the position which resulted in the impact with the plaintiff." *Id.* at 475.

142. This can be explained because the policeman did not bring the action.

143. *Id.* See *Reynolds v. Hart*, 26 Ohio L. Rptr. 256 (1927), where the court allowed an instruction to the jury that if extra speed was necessary to pursue a violator, it would be the officer's duty to pursue in that situation. Other jurisdictions have clearly followed this idea, which tends to negate finding the pursuing officer contributorily negligent simply because he pursued at a high rate of speed. See *Miami v. Horne*, 198 So. 2d 10 (Fla. 1967); *Brechtel v. Lopez*, 140 So. 2d 189 (La. Ct. of App. 1962); *Wrubel v. State*, 11 Misc. 2d 878, 174 N.Y.S.2d 687 (Ct. Cl. 1958).

144. 351 Mich. 409, 88 N.W.2d 456 (1958). While pursuing a traffic violator, the defendant violator accelerated to eighty-five to ninety miles per hour in a forty-five mile per hour zone. The police car collided with a tree while in pursuit. The court itself did not address the specific issue of the speeder's liability to the pursuing police officer. However, the court did uphold a jury verdict of \$20,000 for the police officer against the speeder on the general grounds of negligence.

145. 251 N.C. 128, 110 S.E.2d 820 (1959). While being pursued by a police officer, the speeder tried to make a left turn into a driveway. The officer, who was attempting to pass the speeder from the rear, collided with the speeder's car. Both the speeder and the police officer sued each other for their injuries, each alleging negligence. While the court did not question that a cause of action existed for both parties, it ordered a new trial on other grounds.

146. 226 Md. 363, 174 A.2d 149 (1961). In *Martin* a police officer was pursuing a speeder in a high speed chase (100 miles per hour at times), who he believed had struck and run down another officer. The speeder attempted to make a left turn and his car rolled over in front of the pursuing policeman. The policeman was injured in the collision which ensued. This case, like *McKay*, also addressed the issue of contributory negligence on the officer's part and said nothing specific about the duty owed by the speeder to the pursuing patrolman. Again however, the

of contributory negligence on the part of the police officer. Again, nothing was said about the fireman's rule.¹⁴⁷

Although none of the above four cases specifically discussed the duty of a speeding motorist to a pursuing police officer, all four cases did recognize that a cause of action exists against the speeding driver. Furthermore, in *McKay* and *Martin* the courts upheld jury verdicts for the police officer against the defendant speeder, for injuries incurred in an accident which was caused by the high speed chase. It is significant to note that despite the wide spread acceptance of the fireman's rule, it was not applied in any of the above four cases.¹⁴⁸ Instead, the decisions were based on the general principles of negligence, and not one of them even discussed the fireman's rule. Perhaps the "speeder" factual situations do not lend themselves to an application of the fireman's rule.

When faced with the "speeder" factual situation which was outlined at the beginning of this discussion, courts have always applied the general principles of negligence.¹⁴⁹ In California, in order for a negligence cause of action for personal injuries to be successful, the injury must have been foreseeable by the average reasonable person, and the negligent conduct of the defendant must have been the proximate cause of the injury.¹⁵⁰ In the case of *Brechtel v. Lopez*,¹⁵¹ both of these elements were found by the court. In awarding damages to the injured police officer, the court observed that the criteria for establishing liability is "whether the person who created the danger could or should reasonably have foreseen that the accident or injury might occur."¹⁵² There was such foreseeability when the speeding driver accelerated to speeds in excess of eighty-five miles per hour, heard the police officer's siren, saw the officer pursuing him, and then suddenly turned causing the brakes to grab. The court also found that "the

court did uphold the trial court's judgment in favor of the policeman on the general principles of negligence. The subject of the fireman's rule was never brought up.

147. In these three cases the police officer was suing the speeder. Could it be that the fireman's rule was not brought up because it had never been applied in this type of factual situation; nor was it meant to? This author would answer in the affirmative.

148. See notes 151-60 *infra* and accompanying text for what type of standard has been applied in the "speeder" factual situation.

149. See note 1 *supra*.

150. See *Dillon v. Legg*, 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).

151. 140 So. 2d 189 (La. App. 1962). Defendant's (owner of the car) minor son was participating in a "drag race" when the chase began. When the brakes on the defendant's car grabbed, the police car swerved off the road into a utility pole, injuring the police officer.

152. *Id.* at 193.

proximate cause of the accident was *speed*, the grossly excessive speed of young Lopez which induced the speed of the police, who not only had the right but the duty to attempt to overtake and apprehend him."¹⁵³

In *City of St. Petersburg v. Shannon*¹⁵⁴ the court, citing extensively from *Brechtel* and relying also on *McKay* and *Martin*,¹⁵⁵ held that the defendant, who had violated numerous traffic laws and was being pursued by the plaintiff police officer, could reasonably foresee that an accident could occur because of this high speed chase and that speed alone was the proximate cause of the accident.¹⁵⁶

In *MacDonald v. Hall*¹⁵⁷ a Maine police officer was pursuing a felony suspect in a high speed chase when suddenly the defendant suspect applied his brakes and "fish tailed" in front of the oncoming police car. The police officer put on his brakes and the car

153. *Id.* at 193. In holding that police officers had the duty to pursue the fleeing speeder, the court pointed out that pursuit at a high rate of speed alone is not enough to constitute contributory negligence on the part of the policeman. *Id.* The court's reasoning was that the police officer had a duty to pursue and it would not be right if this duty could be invoked by the law violator as a legal defense against a suit for damages. *Id.*

The court relied entirely upon the general principles of negligence in establishing liability. It found negligence *per se* in violation of the statute, *id.* at 192, lack of contributory negligence in the duty to pursue, *id.* at 193, and, finally, the defendant's responsibility for foreseeable intervening causes springing from the creation of a hazardous condition. *Id.*

154. 156 So. 2d 870 (Fla. D.C. of App. 1963). In this case, the defendant was driving in a reckless manner and at a high rate of speed. With its red light flashing and siren sounding, the police car gave chase. While traveling at this high rate of speed the police car hit a curb and was damaged, with serious injuries resulting to the plaintiff policeman.

155. The court relied on *McKay* and *Martin* on the issue of contributory negligence. The rationale in those two cases, as it was in *Brechtel*, was that the officer had the duty to pursue, and that pursuing at a high rate of speed, without any reckless conduct, was not enough alone to constitute contributory negligence on the officer's part.

156. *City of St. Petersburg* is an important case because it recognized that speed alone by the defendant could be the proximate cause of the accident. This was pointed out and emphasized by Chief Justice Smith in his dissent. 156 So. 2d at 874. In *Brechtel*, the proximate cause of the accident was the speeder turning, causing his brakes to grab. Likewise, in *McKay*, the police officer lost control of his car when the speeder made a sudden left turn from the right hand lane; and in *Martin*, the speeder making a left hand turn caused his car to turn over and collide with the pursuing officer's car.

157. 244 A.2d 809 (Me. 1968). The court held that the jury could consider the driving conduct of the defendant during the entire chase in determining the defendant's negligence, not just at the time of, or immediately preceding, the accident. *Id.* at 813.

skidded off the road and rolled over, resulting in the officer's death. In ordering a new trial the court explained that,

[t]he operator [of the car being pursued] must foresee or reasonably anticipate, upon his failure to seasonably stop that the officer may pursue him, and in such pursuit that speed limits may be exceeded, and that the pursuing car may be driven closer to the rear of his car than would ordinarily be sanctioned by rule of the road, and eventually overtake him and cause him to stop. He is bound to anticipate that such pursuit invites danger, not only to all users of the highway, but to the occupants of the respective vehicles. He has induced a race in which only the officer has a right, by virtue of his sworn duty, to participate. Here by uncontroverted evidence the defendant was aware that a deputy sheriff was pursuing him. He was negligent as a matter of law.¹⁵⁸

Soon thereafter in 1970, in the case of *Rhea v. Green*,¹⁵⁹ Colorado recognized this cause of action for a policeman against a fleeing speeder. In affirming a directed verdict in favor of the plaintiff policeman, the court applied the general principles of negligence and relied on *Brechtel* in finding that "the danger to the plaintiff and others resulting from the defendant's conduct was clearly foreseeable, and the trial court was correct in ruling that the defendant's negligence constituted a proximate cause of the accident as a matter of law."¹⁶⁰

Although the above cases are not California cases, their holdings should be adopted as California law for three previously discussed reasons. First, the fundamental underpinnings of the fireman's rule, assumption of risk and public policy, do not merit extending the rule to willful, wanton, or reckless conduct. Secondly, in cases of fleeing speeders, the independent act of reckless flight will usually be the cause of the pursuing officer's injuries. Where an independent act is the cause of the harm to the officer, the fireman's rule cannot be applied. Thirdly, police officers are a statutorily protected class by traffic and arrest ordinances, and the fireman's rule should not be applied to circumvent these statutes. Since the fireman's rule should not be applied to this type of factual situation, it seems only fair and correct to apply the general principles of negligence just as other jurisdictions have done.

If the principles of foreseeability and proximate cause were applied to factual situations like *Hubbard*, there is no doubt that a cause of action for policemen against fleeing speeders would be recognized. In *Hubbard*, Boelt knew that Hubbard was pursuing

158. *Id.* at 814.

159. 476 P.2d 760 (Colo. App. Ct. 1970). In *Rhea* the defendant speeder, who had violated numerous traffic ordinances, was fleeing arrest. While pursuing the speeder, two police cars collided in an intersection. The injured police officer was a passenger in one of the pursuing police cars.

160. *Id.* at 761.

him because Hubbard had turned on his flashing light and siren, and because Boelt accelerated to a high rate of speed to get away. By applying the line of analysis in the above cases to the facts of *Hubbard*, it is clear that a different holding would result, for Boelt knew that he was exposing himself, others and Hubbard to a high degree of danger. In other words, an accident was foreseeable by him as a result of his willful and wanton conduct. Furthermore, had Boelt not fled at a high rate of speed, the accident in question would not have occurred. In other words, his conduct was the proximate cause of the accident, and hence Hubbard's injuries.¹⁶¹

Another interesting comparison to make with *Hubbard* is that of *Brechtel*, *City of St. Petersburg*, *McDonald* and *Rhea*, where the defendant speeders had all violated various traffic ordinances. All four courts found this to be negligence per se and the proximate cause of the accident as a matter of law.¹⁶² Although the courts did not discuss the traffic ordinance involved, one can assume that due to application of the negligence per se doctrine¹⁶³ the pursuing officers must have been within the class of persons those traffic ordinances were designed to protect. Knowing this, it is all the more baffling why the *Hubbard* majority, in an almost identical factual situation, did not find officer Hubbard to be within the protected class of the statutes involved in that case. Based on the foregoing cases and the statutes themselves,¹⁶⁴ Boelt should have been found negligent as a matter of law, and Hubbard's cause of action should have been allowed.

In summary, this cause of action has become part of the law of Maine,¹⁶⁵ Florida,¹⁶⁶ Louisiana,¹⁶⁷ Colorado,¹⁶⁸ Michigan,¹⁶⁹ Maryland¹⁷⁰ and North Carolina.¹⁷¹ None of the above mentioned cases even discussed the fireman's rule in allowing a cause of action for policemen in situations of fleeing speeders. The reasoning is

161. Boelt's conduct which caused the accident was traveling at a reckless, excessive speed while attempting to pass a car on a curve. Hubbard, when trying to avoid the accident, injured himself. See note 25 *supra* and accompanying text.

162. See 140 So. 2d at 192; 156 So. 2d at 871; 244 A.2d at 814; 476 P.2d at 761.

163. See note 116 *supra* and accompanying text.

164. See notes 123-37 *supra* and accompanying text.

165. See notes 157-58 *supra* and accompanying text.

166. See notes 154-56 *supra* and accompanying text.

167. See notes 151-53 *supra* and accompanying text.

168. See notes 159-60 *supra* and accompanying text.

169. See note 144 *supra*.

170. See note 146 *supra*.

171. See note 145 *supra*.

clear. Public policy would not be served if police officers injured in the performance of their duty were not protected, while a criminal, who has brought about the injury through his willful, wanton or reckless misconduct, is totally absolved of civil liability. Such logic should apply whether the officer is in California or some other state. Just as the above courts established, such determination of liability should be based on the general principles of negligence, not totally erased by a rule which was never meant to apply to such a situation.

There is substantial support in both the case law of other jurisdictions¹⁷² and statutory support, in states like New York,¹⁷³ that a cause of action should be allowed when someone intentionally, willfully or knowingly endangers the life of a policeman by speeding in an attempt to evade arrest. Recovery should be based on the general principles of negligence,¹⁷⁴ not barred by inappropriately applying the fireman's rule. Specifically, there should be a cause of action for speeder liability "where (1) the police officer believes that a statute has been violated; (2) is engaged in pursuit; (3) there is clear evidence that the speeder knew of the pursuit; and (4) an injury occurred as a consequence of the pursuit."¹⁷⁵ Public policy should require that this cause of action be recognized. There can be no burden on the general public when someone who willfully and wantonly endangers the life of a police officer and others is held liable for such conduct.

XI. CONCLUSION

By extending the fireman's rule to willful and wanton conduct, the majority has applied the rule to conduct for which it was never meant. The philosophical underpinnings of the rule do not support this extension, nor does past case law. Furthermore, based on California case precedent, an independent act of misconduct was involved in this case, and policemen were a statutorily protected class for this type of injury. Therefore, the fireman's rule should not have been applied to begin with, even if the conduct involved had only been negligent in nature. The application of this ruling will be extremely burdensome on policemen. Speeders will be allowed to willfully endanger the life and limb of policemen without any fear or civil liability, while policemen, who are doing their best to protect citizens from reckless be-

172. See notes 144-62 *supra* and accompanying text.

173. See notes 120-22 *supra* and accompanying text.

174. See notes 1, and 149-50 *supra* and accompanying text.

175. See Note, *supra* note 68, at 231.

havior, will be allowed no redress in the courts.¹⁷⁶ The far wiser approach seems to be to allow a cause of action for policemen based on the general principles of negligence, an approach long recognized by many other jurisdictions.

MARTY K. DENISTON

¹⁷⁶ In reality it is the taxpayers who must pay for this type of conduct through workman's compensation and disability benefits.

