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Public Protectors - A Different Kind of Bystander? - Court v. Grzelinski

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PUBLIC PROTECTORS— A DIFFERENT KIND OF BYSTANDER?— *COURT V. GRZELINSKI*

Since Justice Traynor's seminal opinion in *Greenman v. Yuba Power Products, Inc.*,[1] courts have struggled with the doctrine of strict liability.[2] One of the more difficult problems faced by the courts in this area is the claim of an injured bystander[3] against a manufacturer of a defectively dangerous product.

To resolve the bystander question, courts have focused on: (1) the relationship between the manufacturer and the bystander;[4] (2) the duty owed the bystander by the manufacturer;[5] and (3) the foreseeability of injury to

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1. 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963) (recovery was allowed under a strict liability claim to the injured user against the manufacturer of a defective lathe).

2. *See* Comment, *Strict Products Liability to the Bystander: A Study in Common Law Determinism*, 38 U. CHI. L. REV. 625 (1971); Note, *Strict Products Liability and the Bystander*, 64 COLUM. L. REV. 916 (1964).

The strict product liability doctrine is stated in *Greenman* as follows:

> [R]ules defining and governing warranties that were developed to meet the needs of commercial transactions cannot properly be invoked to govern the manufacturer's liability to those injured by its defective products . . . [T]he liability is not one governed by the law of contract warranties but by the law of strict liability in tort.

Greenman v. Yuba Power Products, Inc., 59 Cal. 2d 57, 63, 377 P.2d 897, 901, 27 Cal. Rptr. 697, 701 (1963).

In 1965 the American Law Institute included a provision concerning strict tort liability in the Second Restatement of Torts. Section 402A states: "[O]ne who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer or to his property . . . ." Restatement (Second) of Torts § 402A (1965).

3. A bystander has been described as a reasonably foreseeable non-user or consumer. White v. Jeffrey Galion Co., Inc., 326 F. Supp. 751, 754 (E.D. Ill. 1971). *See also* Winnett v. Winnett, 57 Ill. 2d 7, 11, 310 N.E.2d 1, 4 (1974); and notes 4, 5, and accompanying text *infra*.

4. Eliminating the privity requirement between the plaintiff and defendant in a products liability action was essential to protect the bystander. The erosion of the privity requirement started with food product cases and expanded to all types of products. *See* Jaeger, *Privity of Warranty: Has the Tocsin Sounded?*, 1 DUQ. L. REV. 1 (1963). *See also* Mieher v. Brown, 54 Ill. 2d 539, 301 N.E.2d 307 (1973); Genaust v. Ill. Power Co., 23 Ill. App. 3d 1023, 320 N.E.2d 412 (1974), *aff'd*, 62 Ill. 2d 456, 343 N.E.2d 465 (1976).

5. It has been said that duty extends to a bystander by his mere status as a human being. Greenman v. Yuba Power Products, Inc., 59 Cal. 2d 57, 62, 377 P.2d 897, 900, 27 Cal. Rptr. 697, 700 (1962). *See also* Cahn, *Law in the Consumer Perspective*, 112 U. PA. L. REV. 1, 14 (1963).

A minority of courts hold that recovery under strict liability is limited to users and consumers. *See, e.g.*, Davidson v. Leadingham, 294 F. Supp. 155 (E.D. Ky. 1968) (diversity action arising out of automobile accident).

the bystander.[6] When the injured party is a public employee engaged in an inherently dangerous occupation, such as that of policeman or fireman, the court also considers the affirmative defense of assumption of risk.[7]

It is well established in Illinois that a policeman or fireman may recover from an owner or occupier of land who fails to maintain the premises in a reasonably safe condition.[8] However, the "fireman's rule", which restricts a fireman's right of recovery, states that an injured fireman may not recover solely on the basis of the landowner's negligence in causing the fire.[9] In the recent case of *Court v. Grzelinski*,[10] the Illinois Supreme Court was asked to apply the fireman's rule to deny recovery to a fireman under a strict liability claim. The court denied such an extension of the rule and allowed the fireman to bring a strict liability action against a manufacturer and an automobile dealership.

This Note will trace the history of the fireman's rule in Illinois and review the *Grzelinski* analysis. It will question the court's reasoning in light of its failure to consider persuasive policy arguments underlying bystander recovery and significant recent precedent. Furthermore, the Note will evaluate the impact of *Grzelinski* in light of current Illinois trends.[11]

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6. Elmore v. Am. Motors Corp., 70 Cal. 2d 578, 586, 451 P.2d 84, 89, 75 Cal. Rptr. 652, 657 (1969) (action against automobile manufacturer for personal injuries allegedly caused by defect); Genaust v. Ill. Power Co., 23 Ill. App. 3d 1023, 320 N.E.2d 412 (1974), *aff'd*, 62 Ill. 2d 456, 343 N.E.2d 465 (1976) (action against power company for injuries sustained by plaintiff when an electrical current arced from uninsulated power lines of defendant).

7. Under this affirmative defense, the plaintiff is barred from recovery if it can be shown that the user or consumer knew of the defect and nonetheless proceeded to make use of the product. Sweeney v. Max A.R. Matthews & Co., 46 Ill. 2d 64, 264 N.E.2d 170 (1970) (action by carpenter against retailer for sale of nail which shattered when struck, injuring plaintiff's eye). Assumption of risk may also act as a bar to recovery under a negligence theory. Fancil v. Q.S.E. Foods, Inc., 60 Ill. 2d 552, 328 N.E.2d 538 (1975) (wrongful death action against store owner who failed to provide an outside light on premises; a policeman was killed during routine evening security check). *See also* Note, *Landlord's Duty to the Police—Fancil v. Q.S.E. Foods, Inc.*, 26 DEPAUL L. REV. 378 (1977); notes 10, 71, and accompanying text *infra*.

8. Dini v. Naiditch, 20 Ill. 2d 406, 416-17, 170 N.E.2d 881, 886 (1960) (plaintiffs, city firemen, were buried in burning debris while fighting a fire when a defectively attached stairway collapsed). *But see* Washington v. Atlantic Richfield Co., 66 Ill. 2d 103, 361 N.E.2d 282 (1976); Young v. Toledo, P. & W. R.R., 46 Ill. App. 3d 167, 360 N.E.2d 978 (3d Dist. 1977); Erickson v. Toledo, P. & W. R.R., 21 Ill. App. 3d 546, 315 N.E.2d 912 (1st Dist. 1974). These decisions limit the *Dini* holding to injuries resulting from causes independent of the fire. For a discussion of the *Arco* case *see* Note, *Landowners' Liability To Injured Firefighters In Illinois-Washington v. Atlantic Richfield Co.*, 27 DEPAUL L. REV. 137 (1977).

9. Erickson v. Toledo, P. & W. R.R., 21 Ill. App. 3d 546, 315 N.E.2d 912 (1st Dist. 1974).

10. 72 Ill. 2d 141, 379 N.E.2d 281 (1978).

11. The growing trend in the United States is to abolish absolute bars to recovery, particularly where the plaintiff has acted reasonably. This is evidenced in the abolishment or limitation of the assumption of risk doctrine in negligence cases. Assumption of risk as a total bar to recovery has been abolished in the following jurisdictions: Alaska, Leavitt v. Gillaspie, 443 P.2d 61, 68 (Ala. Sup. Ct. 1968); California, Li v. Yellow Cab Co., 13 Cal. 3d 804, 829, 532 P.2d 1226, 1243, 119 Cal. Rptr. 858, 875 (1975); Kentucky, Parker v. Redden, 421 S.W.2d 586, 592

FACTS AND PROCEDURAL HISTORY

On May 26, 1978, plaintiff, a Chicago fireman, responded to a call of an automobile fire. While he was attaching the fire hose to a hydrant approximately 35 feet away from the burning vehicle, the gasoline tank exploded, resulting in severe burns to plaintiff. A product liability action was filed by the fireman against Nickey Chevrolet Sales, Inc., the seller,[12] and General Motors, the manufacturer of the automobile.[13] The trial court dismissed the product liability counts, applying a strict application of the fireman's rule,[14] and the appellate court reversed.[15] The Illinois Supreme Court affirmed the appellate court's decision, rejecting the argument of General Motors that firemen comprise a special class to which no duty is owed because of the inherent danger of their occupation.[16]

(Ky. App. Ct. 1967); New Jersey, McGrath v. Am. Cyanamid Co., 41 N.J. 272, 274-76, 196 A.2d 238, 239-41 (1963); New Mexico, Williamson v. Smith, 83 N.M. 336, 341, 491 P.2d 1147, 1152 (1971); Texas, Farley v. M.M. Cattle Co., 529 S.W.2d 751, 758 (Tex. Sup. Ct. 1975); Massachusetts (MASS. GEN. LAWS ANN. ch. 231, § 85 (West Cum. Supp. 1978)), abolishing the affirmative defense of assumption of risk in contributory negligence cases; Oregon (OR. REV. STAT. ch. 18, § 18.475(2)(1977)), abolishing implied assumption of risk.

Illinois courts have followed this trend by confining the affirmative defense of assumption of risk to cases that involve an express consent or contractual or employment relationship. Barrett v. Fritz, 42 Ill. 2d 529, 248 N.E.2d 111 (1969). *See also* ILL. PATTERN JURY INSTRUCTIONS §§ 13.01, 13.02 (1961), which require a contractual or employment relationship in order for defendant to raise the affirmative defense of assumption of risk. It should be noted that the Illinois Pattern Jury Instructions were amended in 1977 to include § 400.03, a strict liability section, that does not require any special relationship between the plaintiff and defendant. The comment to the instructions states that the policy considerations of the strict liability doctrine require proof of a greater degree of culpability on the plaintiff's part than mere contributory negligence for the defendant to prevail. *Cf.* Lewis v. Stran Steel Corp., 57 Ill. 2d 94, 311 N.E.2d 128 (1974) (assumption of risk by a person using the product will not operate as a defense in an action for injuries to a bystander who did not assume the risk).

At least one jurisdiction has refused to adopt the fireman's rule, stating: "At the outset we are confronted with [defendant's] argument that the 'fireman's rule' should preclude recovery. Although many jurisdictions forbid recoveries by firemen for injuries suffered at the scene of the negligently caused conflagration Texas has no such rule." Harris v. Atchison, Topeka & Santa Fe R.R., 538 F.2d 682, 686 (5th Cir. 1976).

12. Plaintiff claimed that Nickey, the used car dealer from whom defendant purchased the car, assembled, installed, and positioned the gas tank in a defective manner. 72 Ill. 2d at 145-46, 379 N.E.2d at 282-83.

13. Plaintiff claimed that GM placed into the stream of commerce a gas tank which was defective and that plaintiff's injury, which was caused by the defective product, was reasonably forseeable. 72 Ill. 2d at 146, 379 N.E.2d at 282.

14. Relying on Erickson v. Toledo, P. & W. R.R., 21 Ill. App. 3d 546, 315 N.E.2d 912 (1st Dist. 1974) which strictly applied the fireman's rule, the *Grzelinski* trial court held that the plaintiff should be barred from recovery since his injuries were sustained in the course of his employment from a cause not independent of the fire. 48 Ill. App. 3d 716, 719-20, 363 N.E.2d 12, 14 (1st Dist. 1977).

15. *Id.*

16. 72 Ill. 2d at 146-49, 379 N.E.2d at 283-84. General Motors' argument was predicated on a classification of firemen as invitees. This classification is rooted in common law, instituted at a

HISTORY OF THE FIREMAN'S RULE

As early as 1892[17] the Illinois Supreme Court viewed firemen as licensees to whom no duty of ordinary care was owed.[18] A licensee has often been described as one who comes upon the land with the landowner's consent, but for his own purposes.[19] Recovery was available only if the fireman could show that the cause of his injury was willful and wanton conduct on the part of the owner or occupier of the land.[20] In 1942 the court recognized the harshness of this rule and upgraded the classification of firemen to that of invitees.[21] An invitee has been described as one who is invited upon the land for the landowner's purposes and to whom the landowner owes a duty of reasonable care to make the premises safe.[22]

Not until 1960 was the Illinois Supreme Court again asked to review the question of the legal duty owed to a fireman to protect him from injuries incurred during performance of his job.[23] At that time, in *Dini* v.

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time when the status of the person entering upon property determined the duties of the landowners or occupiers of the land. *See* Bohlen, *Fifty Years of Torts*, 50 HARV. L. REV. 725 (1937). Such classifications have been considered by Illinois courts in evaluating the propriety of suits against landowners brought by injured firemen or policemen.

17. In Gibson v. Leonard, 143 Ill. 182, 32 N.E. 182 (1892), a fireman was injured when a rope broke and caused an elevator counterweight to fall on his leg. The court determined that the plaintiff was a licensee to whom no duty of care was required. *Id.* at 190, 32 N.E. at 186. Later the court similarly denied recovery to a policeman who fell through an unguarded elevator shaft while on the job. Casey v. Adams, 234 Ill. 350, 84 N.E.2d 933 (1908).

18. Gibson v. Leonard, 143 Ill. 182, 190, 32 N.E. 182, 186 (1892).

19. *See, e.g.*, W. PROSSER, HANDBOOK OF THE LAW OF TORTS 376 (4th ed. 1971); Bohlen, *The Duty of a Landowner Towards Those Entering His Premises of Their Own Right*, 69 U. PA. L. REV. 340, 344 (1921); Comment, *Are Firemen and Policemen Licensees or Invitees?*, 35 MICH. L. REV. 1157 (1937).

20. Gibson v. Leonard, 143 Ill. 182, 189, 32 N.E. 182, 183 (1892). *See also* note 17 *supra*.

21. Ryan v. Chicago & N.W. Ry. Co., 315 Ill. App. 65, 42 N.E.2d 128 (1st Dist. 1942). This case changed the status of a public protector (fireman and policeman) from that of licensee and gave them a unique status. *See* Dini v. Naiditch, 20 Ill. 2d 406, 170 N.E.2d 881 (1960), which states "since firemen have a unique status, it follows that the duties owed to them may properly be unique; and that same approach was followed by our Illinois Appellate Court in Ryan v. Chicago and Northwestern Railway Co. . . ." *Id.* at 415, 170 N.E.2d at 885.

The *Ryan* decision further elevated the legal duty of a landowner/occupier of land from a duty to refrain from willful and wanton conduct to a duty of reasonable care to make the premises safe. 315 Ill. App. 65, 76, 42 N.E.2d 128, 133 (1st Dist. 1942). *See e.g.*, W. PROSSER, HANDBOOK OF THE LAW OF TORTS 385-86, 395-98 (4th ed. 1971).

22. W. PROSSER, HANDBOOK OF THE LAW OF TORTS 385-86 (4th ed. 1971). Prosser also discusses how courts have distinguished between those classified as invitees and licensees on two theoretical grounds: the economic benefit theory and the representation of reasonable care theory. *Id.* at 386-88.

23. Dini v. Naiditch, 20 Ill. 2d 406, 170 N.E.2d 881 (1960). For a complete discussion of landowner/occupier duty *see* Appel, *Premises Liability*, 67 ILL. BAR J. 96 (October, 1978). Although various jurisdictions have made significant changes in the common law approach to premises liability, such as the elimination of the distinction between licensees and invitees, Illinois has continued to adhere to these principles and retains the common law distinctions of

Naiditch,[24] the court held that an injured fireman could recover when defendant's negligence caused the fire which resulted in the injury, as well as for injuries resulting from unknown or hidden conditions which increased fire-fighting risks.[25] In *Washington v. Arco*,[26] the court narrowed the *Dini* holding and limited a fireman's recovery to include only those injuries caused by unsafe conditions independent of those which caused the fire.[27] In *Grzelinski*, the court expanded that protection and allowed a fireman to bring an action against a manufacturer and others when the fireman's injuries resulted from a defective product.[28]

THE *GRZELINSKI* RATIONALE

The *Grzelinski* court, applying a bystander theory,[29] enabled the fireman to bring a product liability action. In so doing, it rejected the defendant-manufacturer's argument that the fireman's rule should apply in all circumstances where a fireman was injured in the performance of his duties.[30] The court reasoned that the Illinois fireman's rule is a compromise between two conflicting policies[31] enabling a fireman to recover for non-fire related injuries caused by a landowner's negligence.[32] The landowner, however, owes no duty to a fireman to exercise due care to prevent fires from occurring on his premises.[33]

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trespassers, invitees, and licensees in spite of judicial dissatisfaction. *See* Washington v. Arco, 66 Ill. 2d 103, 361 N.E.2d 282 (1976) (Dooley, J., dissenting), where Justice Dooley states, in reference to the common law distinctions of invitee and licensee, that "the time to abolish all labels is now." *Id.* at 115, 361 N.E.2d at 288.

24. 20 Ill. 2d 406, 170 N.E.2d 881 (1960).

25. *Id.* at 416-17, 170 N.E.2d at 886. *See also* note 26 *infra*. Prosser notes that *Dini* "was somewhat weakened as authority by the fact that the violation of statutes was given as an alternative ground." W. PROSSER, HANDBOOK OF THE LAW OF TORTS 398 n.93 (4th ed. 1971).

26. 66 Ill. 2d 103, 361 N.E.2d 282 (1976). Two Chicago firemen were injured in a fire caused by a defective shutoff valve on a gasoline pump at defendant's gas station. The Illinois Supreme Court held that *Dini* did not apply to situations where the fire-fighter's injury was a result of the landowner's negligence in causing the fire.

27. *Id.* at 108, 361 N.E.2d at 285.

28. 72 Ill. 2d at 151, 379 N.E.2d at 285.

29. *See* note 3 *supra*.

30. 72 Ill. 2d at 148-49, 379 N.E.2d at 284.

31. *See* note 32 *infra*.

32. Recognizing that the risk of harm from fire is inherent in a fireman's occupation, the Illinois courts have defined a compromise rule. The Illinois version of the rule is stated as: a landowner or occupier of land owes a duty to firemen to exercise reasonable care to prevent unsafe conditions on the premises which may cause injury but has no duty to prevent injury resulting from the fire itself. *See* Washington v. Atlantic Richfield Co., 66 Ill. 2d 103, 108, 361 N.E.2d 282, 285 (1976). *See also* Young v. Toledo, P. & W. R.R, Co., 46 Ill. App.3d 167, 169, 360 N.E.2d 978, 980 (3d Dist. 1977); Erickson v. Toledo, P. & W. R.R. Co., 21 Ill. App. 3d 546, 548, 315 N.E.2d 912, 914 (1st Dist. 1974).

33. *See* note 32 *supra*.

The court's criticism of defendant's attempt to expand the fireman's rule beyond the narrow context of landowner-occupier liability[34] stems from Illinois' limited use of the affirmative defense of assumption of risk in both negligence and strict liability actions.[35] The court acknowledged that extending the fireman's rule beyond the landowner-occupier context would be "tantamount to imposing the doctrine of assumption of risk" on firefighters.[36] Such an imposition, the court concluded, would be contrary to Illinois law which recognizes that doctrine as an affirmative defense but not as a theory upon which to base a complete bar to recovery.[37]

In support of its position that firemen should be barred from recovery for injuries resulting from risks inherently involved in fire-fighting,[38] the defendant–manufacturer cited two California Appellate Court decisions.[39] The *Grzelinski* court noted that the California courts refused to base their holdings upon the assumption of risk doctrine. Instead the California courts relied upon two policy considerations, risk spreading and efficient judicial administration. Since it is well settled in Illinois that a fireman may recover from a landowner or occupier of land for injuries caused by factors independent of the fire,[40] the *Grzelinski* court concluded that risk spreading[41] was not an appropriate reason for denial of recovery; therefore, the two California cases were not controlling. The *Grzelinski* court also concluded that the judicial efficiency argument was unpersuasive in light of Illinois' statutory requirement that all fires resulting in property damage be investigated.[42] The Illinois courts presumably would have the benefit of these investigations in determining the cause of a fire. The statutory requirement,

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34. 72 Ill. 2d at 148-51, 379 N.E.2d at 284-85.

35. In Krauth v. Geller, 31 N.J. 270, 157 A.2d 129 (1960), the New Jersey Supreme Court stated: "[i]n terms of duty, it may be said there is none owed the fireman to exercise care so as not to require the special services for which he is trained and paid." *Id.* at 274, 157 A.2d at 131. *See also* Moran v. Raymond Corp., 484 F.2d 1008 (7th Cir. 1973), *cert. denied*, 415 U.S. 932 (1974), which supports the proposition that assumption of risk is available in strict liability actions.

36. 72 Ill. 2d 141, 148-49, 379 N.E.2d 281, 284 (1978).

37. *Id.* at 149, 379 N.E.2d at 284.

38. *Id.*

39. Scott v. E.L. Yaeger Constr. Co., 12 Cal. App. 3d 1190, 91 Cal. Rptr. 232 (4th Dist. 1970); Giorgi v. Pac. Gas & Elec. Co., 266 Cal. App. 2d 355, 72 Cal. Rptr. 119 (1st Dist. 1968). In *Giorgi* a fireman brought suit against defendant for negligent maintenance of a pole and wires which caused a forest fire. The fire trapped federal employees who were trained to fight forest fires as part of their duties. The California Court of Appeals found for defendant and determined that "a paid fireman has no cause of action against one whose passive negligence caused the fire in which he was injured." 266 Cal. App. 2d at 360, 72 Cal. Rptr. at 123.

40. *See* note 32 *supra*.

41. "Risk spreading is based upon the rationale that the cost of injuries to fire fighters should be distributed among the community at large rather than be imposed upon the party responsible for the injuries." 72 Ill. 2d 141, 150, 379 N.E.2d 281, 284 (1978).

42. 72 Ill. 2d at 150, 379 N.E.2d at 285. *See* ILL. REV. STAT. ch. 127-1/2, § 6 (1977).

coupled with the principle of judicial responsibility demanding that courts not avoid "inconvenient" cases, caused the court to decline to follow the California holdings.[43]

Having rejected the California analysis, the *Grzelinski* court made a determination that the Illinois fireman's rule, limiting a landowner's duty to maintain safe premises, had no application in strict product liability actions. Referring to Justice Traynor's argument supporting strict liability,[44] the court held that public policy demands that a fireman be protected from the type of injury sustained by the plaintiff.[45] Justice Traynor's argument was based on

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43. 72 Ill. 2d at 149-51, 379 N.E.2d at 284-85.

44. In Escola v. Coca Cola Bottling Co., 24 Cal. 2d 453, 150 P.2d 436 (1944) (Traynor, J., concurring), it is stated that: "public policy demands that responsibility be fixed wherever it will most effectively reduce the hazards to life and health inherent in defective products that reach the market." *Id.* at 462, 150 P.2d at 440.

45. 72 Ill. 2d at 150-51, 379 N.E.2d at 285. Justice Ryan, disagreeing with the majority's analysis, predicated his dissent upon various flaws in that reasoning. Relying upon Washington v. Atlantic Richfield Co., 66 Ill. 2d 103, 361 N.E.2d 282 (1976), Justice Ryan claimed that the present Illinois fireman's rule is not solely related to the duty of the landowner or occupier of land as determined by the status of the persons upon the premises. By restricting the fireman's rule to the limited context of landowner/occupier liability, the majority neglected to focus on the threshold issue of assumption of risk. Further, citing authority from other jurisdictions, Justice Ryan added that the assumption of risk doctrine defines the degree of *duty* owed a fireman and should not be considered an affirmative defense to a negligence or products liability case. He noted that the fireman should be barred from recovery under a products liability claim because his training prepared him for the very hazard which resulted in his injury. Therefore, no duty should flow to the fireman in situations where the danger should have been anticipated. *Id.* at 151-55, 379 N.E.2d at 285-89.

Justice Ryan also criticized the opinion as over-extending the bounds of the strict product liability doctrine in Illinois. The majority relied upon Winnett v. Winnett, 57 Ill. 2d 7, 310 N.E.2d 1 (1974), ignoring the court's responsibility to determine the duty question and willingly allocating such responsibility to the factfinder. *Id.* at 157, 379 N.E.2d at 288. Further, Justice Ryan claimed that the majority attempted to equate the foreseeability concept with that of duty contrary to precedent stating that the two concepts are not coextensive. 72 Ill. 2d at 157, 379 N.E.2d at 288.

Justice Ryan also believed that an anomaly existed in the majority opinion. As an example, he noted that in the case of an injury sustained by a fireman fighting a fire in an automobile parked in a driveway, recovery would be barred. However, if the same injury occurred due to an automobile fire on a public street, there would be liability. Such an anomaly results from the majority's insistence upon retaining the fireman's rule in its limited landowner/occupier context. He also perceived constitutional problems. These questions involve the rationale for creating classifications which grant protection to one segment of society while denying that same protection to another segment of society on arbitrary grounds. *Id.* at 152-53, 379 N.E.2d at 286. *See* Harvey v. Clyde Park Dist., 32 Ill. 2d 60, 203 N.E.2d 573 (1964) (action for damages for injuries caused by defendant's negligence in maintenance of playground facilities); Grasse v. Dealer's Transport Co., 412 Ill. 179, 106 N.E.2d 124 (1952) (action for damages sustained by plaintiff during the course of his employment. Plaintiff was injured in a motor vehicle collision resulting from the negligence of one of defendant's employees).

the rationale that responsibility be placed where it will most effectively reduce the hazards to life and health inherent in defective products.[46] The *Grzelinski* court, in applying Justice Traynor's reasoning, concluded that firemen should not be expected to assume the undue risks presented by a defective product which may result in injuries.[47]

CRITIQUE

The threshold issue in *Grzelinski* involved a legal duty[48] which is often determined by the relationship between the parties.[49] The question of duty owed a "bystander" is presented whenever injuries are caused by a defective product and the injured party is not a user of the product at the time the injury occurs.[50] A further difficulty arises in cases, such as *Grzelinski*, in which the bystander is a public employee performing his duties. Whether a public employee should be viewed differently from any other bystander because of the dangerous nature of his occupation is a question which must be determined before any court can allow a fireman-bystander to recover under a strict liability theory.

Public Policy

In rejecting defendant's proposed classification,[51] the Illinois Supreme Court looked to the policy considerations underlying the fireman's rule.[52] A more appropriate starting point, however, would have been the policy reasons underlying strict product liability.[53] Illinois courts have agreed that public policy is of primary importance in imposing strict liability.[54] The

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46. *See* note 44 *supra*.

47. 72 Ill. 2d at 151, 379 N.E.2d at 285.

48. 72 Ill. 2d at 146, 379 N.E.2d at 283. *See also* Defendant's Petition for Leave to Appeal at 8-13 (General Motors Corp.); Plaintiff's Reply Brief at 2-4.

49. Barnes v. Washington, 56 Ill. 2d 22, 26, 305 N.E.2d 535, 538 (1973) (action by conservator for injuries to incompetent who accidentally locked himself in a boxcar of defendant railroad and sustained injuries from the cold); Boyd v. Racine Currency Exch., Inc., 56 Ill. 2d 95, 97, 306 N.E.2d 39, 40 (1973) (wrongful death action against currency exchange and a teller for negligence in teller refusing to comply with an armed robber's demands which resulted in plaintiff's husband's death). *See also* Fancil v. Q.S.E. Foods, Inc., 60 Ill. 2d 552, 554-55, 328 N.E.2d 538, 540 (1975).

50. *See* notes 3-5 and accompanying text *supra*.

51. 72 Ill. 2d at 147-48, 379 N.E.2d at 283-84. *See also* note 16 and accompanying text *supra*.

52. *Id.* The policy reasons behind the fireman's rule were primarily to prevent the placement of an undue burden upon an owner or occupier of improved land on the assumption that most fires occur because of the landowner's or occupier's negligence. *See also* Washington v. Atlantic Richfield Co., 66 Ill. 2d 103, 108, 361 N.E.2d 282, 284 (1976).

53. *See* Sipara v. Villa Olivia Country Club, 63 Ill. App. 3d 985, 990, 380 N.E.2d 819, 823 (4th Dist. 1978). *See also* note 2 *supra*.

54. Suvada v. White Motor Co., 51 Ill. App. 2d 318, 325-27, 201 N.E.2d 313, 317-18 (1st Dist. 1964), *aff'd*, 32 Ill. 2d 608, 210 N.E.2d 182 (1964). *See also* White v. Jeffrey Galion, Inc., 326 F. Supp. 751, 753 (E.D. Ill. 1971).

major policy reasons which support recovery under a strict liability claim are loss spreading[55] and economic efficiency.[56]

The doctrine of loss spreading shifts losses caused by defective products to the parties in the best position to lessen the economic impact of the loss, i.e., manufacturers and distributors of the product.[57] The fact that the *Grzelinski* court placed the risk of loss on the manufacturer and the automobile dealership without discussing the principle of loss spreading is a serious defect in the analysis. Such a discussion would have strengthened the court's position by responding to some of the many recent criticisms of the loss spreading principle. First, in certain cases the manufacturer may not be in the best position to absorb the loss.[58] Second, it may be unfair to require all consumers to pay the increased price of "insured"[59] products when some consumers may choose to accept the risk of uninsured products.[60] Third, it has been suggested that another legal theory may provide ample loss spreading without imposing strict liability.[61]

The *Grzelinski* court, by finding for plaintiff, has actually implemented a loss spreading policy. Therefore, a point by point discussion of the criticisms along with reasons why they were not persuasive in this case would have been worthwhile.[62] Refusal to do so places the adequacy of the court's analysis in question.

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55. *See* K. LLEWELLYN, CASES AND MATERIALS ON THE LAW OF SALES 204, 340-41 (1930) where the loss spreading doctrine was suggested. The doctrine was subsequently adopted in Greenman v. Yuba Power Products, Inc., 59 Cal. 2d 57, 63, 377 P.2d 897, 901, 27 Cal. Rptr. 697, 701 (1963).

56. This policy was developed for the purpose of deterring the manufacturer from marketing defective products. *See* Escola v. Coca Cola Bottling Co., 24 Cal. 2d 453, 461-62, 150 P.2d 436, 440-41 (1944), for a summarization of this principle. The more sophisticated policy considerations of economic efficiency has recently been specifically applied to products liability. *Symposium—Products Liability: Economic Analysis and the Law*, 38 U. CHI. L. REV. 1 (1970).

57. This is premised on the belief that the manufacturer can either absorb the loss or insure against it, thus spreading the added cost among the purchasers. The doctrine is predicated on the fact that the purchaser pays for the cost of insurance covering losses resulting from defective products as well as the product itself. *See* Escola v. Coca Cola Bottling Co., 24 Cal. 2d 453, 462, 150 P.2d 436, 440-41 (1944) (Traynor, J., concurring).

58. G. CALABRESI, THE COST OF ACCIDENTS—A LEGAL AND ECONOMIC ANALYSIS 50-51 (1970).

59. An "insured" product is one in which the manufacturer has incorporated the cost of protecting himself against potential economic loss due to injuries sustained by users. *See* W. BLUM & H. KALVEN, PUBLIC LAW PERSPECTIVES ON A PRIVATE LAW PROBLEM: AUTO COMPENSATION PLANS 59 (1965).

60. *Id.*

61. An argument can be made that under the *res ipsa loquitur* doctrine, a negligence action may provide adequate loss spreading without resorting to strict liability. *See* Comment, *Strict Products Liability to the Bystander: A Study in Common Law Determinism*, 38 U. CHI. L. REV. 625, 637 (1971).

62. The *Grzelinski* court could have easily responded to criticisms of implementing a loss spreading policy. It would be difficult, if not impossible, to dispute that General Motors is

The second policy consideration, economic efficiency, adds another dimension to the rationale underlying the imposition of strict liability. According to this principle, losses caused by defective products are imposed upon the party in the best position to prevent future injuries of the same type by making a safer product or by assuring careful use of the product.[63] The manufacturer's responsibility to produce a safe product is viewed in conjunction with the consumer's ability to prevent injuries by careful use of the product.[64] Courts therefore balance the cost of minimizing the accident with the cost of avoiding the accident.[65] An economic efficiency analysis would, appropriately, focus on the product itself and the adequacy of the manufacturer's safeguards against injury.[66] Had the court approached the problem in this way, it could have effectively warned both the manufacturer and consumer of their respective burdens.

When a product is defective, the innocent bystander as well as the consumer should be protected. The bystander status should not change the manufacturer's duty to provide a safe product. Nor should the bystander be asked to accept a standard of care lower than that expected by the consumer. The significance of public policy considerations is also not altered simply because the plaintiff's occupation enhances the likelihood of injuries caused by the

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better able to sustain economic loss than a private individual. However, manufacturers often minimize such economic loss by incorporating the cost of such a loss in the price of the product. A valid argument can be made that the consumer should be able to avoid this added cost by personally assuming the risk of loss. Imposing such a choice upon a consumer mandates the availability of complete and detailed information outlining the potential risk of loss. Since consumers are provided with little or no information as to the potential for economic loss due to a defective gas tank, the consumer is precluded from making a well-reasoned decision. In addition, an automobile is composed of various different products. Many problems would arise if the consumer assumed the risk of loss concerning one product and the manufacturer assumed the risk of loss in another.

63. This theory was applied in the context of a bystander's claim in Darryl v. Ford Motor Co., 440 S.W.2d 630 (Tex. Sup. Ct. 1969). Plaintiffs brought suit against Ford Motor Company for injuries arising out of an automobile collision. Both negligence and strict liability claims were pleaded. The negligence claim was ultimately abandoned and the strict liability claim was retained. The court held that: "[t]he reason for extending the strict liability doctrine to innocent bystanders is the desire to minimize risks of personal injury and/or property damage." *Id.* at 633.

64. *See* Wade, *Products Liability–Some Observations About Allocation of Risks*, 64 MICH. L. REV. 1329 (1966). *See also* Wade, *On the Nature of Strict Tort Liability for Products*, 44 MISS. L.J. 825 (1973); Wade, *Strict Liability of Manufacturers*, 19 SW. L.J. 5 (1965). In Phillips v. Kimwood Mach. Co., 525 P.2d 1033 (Ore. Sup. Ct. 1974), the court, using Professor Wade's balancing factors, considered a seven-pronged analysis for determining manufacturer responsibility which placed some of the burden for avoiding injuries upon the consumer. *Id.* at 1039 n.13.

65. This balancing might not be necessary if the manufacturer and consumer have exact, complete data regarding risks and transaction costs. *See* Coase, *The Problem of Social Cost*, 3 J. LAW & ECON. 1 (1960).

66. *See* Comment, *Strict Products Liability to the Bystander: A Study in Common Law Determinism*, 38 U. CHI. L. REV. 625, 639-40 (1971).

defective product. Accordingly, these policy reasons should have been fully discussed and analyzed by the *Grzelinski* court.

A discussion of these public policy considerations would have also helped to clarify the relationship between the bystander and the manufacturer which, like the relationship between manufacturer and consumer, encompasses a legal duty.[67] In strict product liability cases the manufacturer has a non-delegable duty to produce a reasonably safe product.[68] This duty is closely guarded by the courts and can only be set aside by a clear showing that the injury was unforeseeable,[69] the product was put to an unintended use,[70] or the plaintiff knowingly assumed a risk inherent in the product.[71] The necessity of establishing this duty should not be negated or ignored in a bystander situation.[72] Neither can this duty be circumvented by expecting that others will remove the burden of the duty from the manufacturer.[73] It

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67. *See* note 4 *supra*.

68. Rios v. Niagara Mach. & Tool Works, 59 Ill. 2d 79, 85, 319 N.E.2d 232, 235-36 (1974). For a complete discussion of this case *see* Hofeld, *Looking At a Decade of Products Liability Law in Illinois—Where We've Been and Where We're Going*, 64 ILL. BAR. J. 344, 349-50 (February, 1976).

69. "Foreseeability means that which is *objectively reasonable* to expect, not merely what might conceivably occur." Winnett v. Winnett, 57 Ill. 2d 7, 12-13, 310 N.E.2d 1, 5 (1974).

70. Sweeney v. Max A.R. Matthews & Co., 46 Ill. 2d 64, 264 N.E.2d 170 (1970). *See also* Knapp v. Hertz, 59 Ill. App. 3d 241, 375 N.E.2d 1349 (1st Dist. 1978) (strict liability action against rental car company for injuries sustained when brake system of rented car malfunctioned).

71. The doctrine of assumption of risk may be used as a defense to a product liability action. Coty v. U.S. Slicing Mach. Co., Inc., 58 Ill. App. 3d 237, 373 N.E.2d 1371 (2d Dist. 1978). *See* Krauth v. Geller, 31 N.J. 270, 157 A.2d 129 (1960). In *Krauth*, plaintiff fireman, injured while fighting a fire, was denied recovery under the theory that the fireman was trained and paid for the special services which he performed. This policy has been recognized by the Illinois Appellate Court in Horcher v. Guerin, 94 Ill. App. 2d 244, 236 N.E.2d 576 (2d Dist. 1968) (plaintiff fireman was injured when glass struck his eye after he broke a locked window to ventilate a burning building owned by defendant. Plaintiff alleged negligence by defendant in failing to obey a city ordinance prohibiting obstruction of windows); Netherton v. Arends, 81 Ill. App. 2d 391, 225 N.E.2d 143 (4th Dist. 1967) (plaintiff fireman was injured when he inhaled smoke produced by the fire. Plaintiff alleged the fire resulted from several negligent acts or omissions by defendant/landowner. The court held that plaintiff had no cause of action since smoke is a hazard normally present during fires).

In *Horcher*, the court stated:

> As to the fire itself, it is the firemen's business to deal with this particular hazard. He is trained and paid for this . . . . The exposure to liability which would result from such rule [landowner's duty to exercise care to prevent fires on his premises] would impose an unreasonable burden upon a person who owned or occupied improved land.

Horcher v. Guerin, 94 Ill. App. 2d at 248, 236 N.E.2d at 579 (2d Dist. 1968).

72. Both plaintiff and defendant-manufacturer General Motors emphasized the duty requirement in their briefs to the Illinois Supreme Court. *See* note 48 *supra*.

73. Rios v. Niagara Mach. & Tool Works, 59 Ill. 2d 79, 319 N.E.2d 232 (1974); Rivera v. Rockford Mach. & Tool Co., 1 Ill. App. 3d 641, 274 N.E.2d 828 (1st Dist. 1971).

is clear that the obligation is upon the court to determine whether such a duty exists.[74] The inability or reluctance of the *Grzelinski* court to acknowledge this important step and affirmatively declare *why* such a duty was imposed makes it difficult to predict the outcome of future cases involving different fact situations. Finally, although defendants only addressed the question of an expansion of the fireman's rule, the court should have looked beyond this narrow question to provide clear guidelines for subsequent cases.

Precedent Ignored

Approximately three years prior to *Grzelinski*, the Illinois Supreme Court had no difficulty formulating clear rules for the imposition of duty in a negligence claim brought by a public protector. In that case, *Fancil v. Q.S.E. Foods, Inc.*,[75] assumption of risk was also a primary question. *Fancil* involved a police officer who was killed when a burglar emerged from the darkened doorway behind defendant's place of business. The decedent's wife brought a wrongful death action charging the store owner with negligence for disconnecting an exterior light. The court looked beyond the common law classifications of trespasser,[76] licensee,[77] and invitee[78] as not providing a satisfactory basis for a determination of duty.[79] Instead, the court focused its attention on the Restatement of Torts.[80]

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74. The question of duty, the legal obligation imposed upon one for the benefit of another, is one of law to be determined by the court. Barnes v. Washington, 56 Ill. 2d 22, 26, 305 N.E.2d 535, 538 (1973); W. PROSSER, HANDBOOK OF THE LAW OF TORTS 206 (4th ed. 1971).

75. 60 Ill. 2d 552, 328 N.E.2d 538 (1975).

76. Illinois subscribes to the broad proposition that an owner or occupier of land is under no duty to keep the land in any specific manner to protect trespassers. Hessler v. Cole, 7 Ill. App. 3d 902, 289 N.E.2d 204 (1st Dist. 1972).

77. A licensee is often described as someone who enters the premises with the landowner's consent, but for his own purposes. Dini v. Naiditch, 20 Ill. 2d 406, 170 N.E.2d 881 (1960). *See also* W. PROSSER, HANDBOOK OF THE LAW OF TORTS 376 (4th ed. 1971), note 19, and accompanying text *supra*.

78. *See* note 22 and accompanying text *supra*.

79. 60 Ill. 2d 552, 328 N.E.2d 538 (1975).

80. *Id.* The Illinois Supreme Court, relying on §§ 302(b), 448, and 449 of the Restatement of Torts (Second), claimed that the appellate court had failed to consider the relationship between the parties involved in determining the store owner's duty to the decedent. The *Fancil* court quoted at length from the Restatement:

> Section 302(b) provides:
>
> "An act or an omission may be negligent if the actor realizes or should realize that it involves an unreasonable risk of harm to another through the conduct of the other or a third person which is intended to cause harm, even though such conduct is criminal."
>
> Section 448 provides:
>
> "The act of a third person in committing an intentional tort or crime is a superseding cause of harm to another resulting therefrom, although the actor's negligent conduct created a situation which afforded an opportunity to the third person

The *Fancil* court was persuaded by two appellate court cases which denied recovery for injuries caused by inherent risks.[81] These two cases in turn relied heavily on *Dini v. Naiditch,* discussed at length by the *Grzelinski* court, which held that the owner of a building was under no duty to a fire fighter to use reasonable care in the maintenance of his premises.[82] The *Fancil* court found that the landowner had no legal duty with respect to a person injured on his premises due to some dangerous condition of the property unless two conditions were present. First, the dangerous condition must constitute an unreasonable risk of harm. Second, the injured party must not have at his disposal reasonable means to protect himself from the risks which caused the injury.[83] Following a traditional assumption of risk approach, the *Fancil* court concluded that police officers were barred from recovery for injuries resulting from risks inherent in their occupation when such risks of harm were reasonable in light of the officer's training and ability to protect himself.[84]

The similarities between *Fancil* and *Grzelinski* are striking and demand recognition. Both injured parties were public employees engaged in inherently dangerous occupations. Additionally, although *Fancil* was a wrongful death action based on negligence and *Grzelinski* was brought under a strict liability theory, plaintiffs in both cases argued that the relationship between the parties created a legal duty which was breached. Also, defendants in

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to commit such a tort or crime, unless the actor at the time of his negligent conduct realized or should have realized the likelihood that such a situation might be created, and that a third person might avail himself of the opportunity to commit such a tort or crime."

Section 449 provides:

"If the likelihood that a third person may act in a particular manner is the hazard or one of the hazards which makes the actor negligent, such an act whether innocent, negligent, intentionally tortious, or criminal does not prevent the actor from being liable for harm caused thereby."

Id. at 558-59, 328 N.E.2d at 541-42.

81. Horcher v. Guerin, 94 Ill. App. 2d 244, 236 N.E.2d 576 (2d Dist. 1968); Netherton v. Arends, 81 Ill. App. 2d 391, 225 N.E.2d 143 (4th Dist. 1967).

82. 20 Ill. 2d 406, 170 N.E. 2d 881 (1960). *See* note 8 *supra* for a list of cases which limited the *Dini* holding.

83. 60 Ill. 2d 552, 558-60, 328 N.E.2d 538, 541-43 (1975).

84. 60 Ill. 2d 552, 558, 328 N.E.2d 538, 541 (1975). The inherent risk doctrine is based upon two policy reasons. First, if liability was imposed upon a landowner for a negligently caused fire, landowners might be discouraged from summoning the aid of firemen for fear of a lawsuit should a fireman sustain injury while fighting the fire. Second, courts have determined that police officers and firemen assume the risks incidental to their respective professions. *See, e.g.*, Krauth v. Geller, 31 N.J. 270, 273-74, 157 A.2d 129, 130-31 (1960). *See also* Horcher v. Guerin, 94 Ill. App. 2d 244, 248, 236 N.E.2d 576, 579 (2d Dist. 1968); Buren v. Midwest Industries, Inc., 380 S.W.2d 96, 98 (Ky. App. 1964).

For a discussion of the inherent risk doctrine as it relates to the *Fancil* decision *see* Note, *Landlord's Duty to the Police—Fancil v. Q.S.E. Foods, Inc.*, 26 DEPAUL L. REV. 378, 380-84 (1977).

both cases argued that because certain risks were inherent in the plaintiff's occupation, recovery should be barred.

The *Fancil* court, in resolving the duty issue, outlined two requirements necessary for assumption of risk to act as a bar to recovery in a negligence action. It concluded that the plaintiff must be aware of the risks involved and that he must voluntarily expose himself to a *specific* known risk.[85] In applying this test, the court concluded that a policeman on a routine nightly security check of a store is trained and prepared to confront and handle the dangers involved in criminal activity. Awareness of the potential risk, coupled with the policeman's ability to cope with it, barred plaintiff's claim under the assumption of risk doctrine.

The *Grzelinski* court could have used a similar test to enable plaintiff to recover for the severe burn injuries he sustained when the gas tank exploded. It is obvious that a fireman is trained and prepared to fight fires. However, that training does not include, nor should it be expected to include, readiness for every danger which might be encountered. The plaintiff alleged that the proximate cause of the explosion which injured him was a *defect* in the automobile's gas tank.[86] While the public has a right to expect firemen to assume certain risks inherent in fire fighting,[87] the fire fighter has a right to expect that an unreasonably dangerous product will not be placed into the stream of commerce.[88] Since plaintiff could not have been aware of the *specific defect* which allegedly caused the explosion, he should not be expected to protect himself against it.[89]

It has been noted in another jurisdiction that the affirmative defense of assumption of risk, as suggested by defendant in the *Grzelinski* case, is only available when:

> (1) plaintiff actually knew of the specific defect involved;
> (2) that actually knowing and appreciating the specific defect involved, that plaintiff voluntarily and unreasonably took his chances and exposed himself to *that defect* and the resulting danger;
> (3) that this specific known and appreciated defect was the cause of plaintiff's injuries.[90]

The same reasoning should apply where, as in *Grzelinski*, the plaintiff's injury is proximately caused by a *hidden defect* of which he could not have been aware. Similarly, it is unreasonable to expect that a fireman's training

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85. 60 Ill. 2d 552, 557, 328 N.E.2d 538, 541 (1975).

86. 72 Ill. 2d at 145-46, 379 N.E.2d at 282-83 (1978).

87. Washington v. Atlantic Richfield Co., 66 Ill. 2d 103, 105-08, 361 N.E.2d 282, 284 (1976); Horcher v. Guerin, 94 Ill. App. 2d 244, 247-48, 248 N.E.2d 576, 578-79 (2d Dist. 1968); Netherton v. Arends, 81 Ill. App. 2d 391, 395, 225 N.E.2d 143, 146 (4th Dist. 1967).

88. *See* note 2 and accompanying text *supra*.

89. 72 Ill. 2d at 149, 379 N.E.2d at 284 (1978).

90. Haugen v. Minn. Mining & Mfg. Co., 15 Wash. App. 379, 383, 550 P.2d 71, 74 (1976).

will prepare him to cope with unknown, undiscoverable defects in products.[91] To deny protection in such instances would negate the purpose of the strict liability doctrine of protecting innocent persons from injuries caused by defective products.[92]

Unfortunately, no reason is given in *Grzelinski* for not discussing the *Fancil* test. This failure will place in question the applicability of the *Fancil* test when lower courts are confronted with a fact situation similar to that found in *Grzelinski*. An acknowledgement of the *Fancil* test by the *Grzelinski* court could have led to a limiting of the test to the facts presented in *Fancil*. Alternatively, the *Grzelinski* court could have recognized the *Fancil* test as applicable under the facts before it, yet for reasons previously indicated, could have reached the same result. The outcome of *Grzelinski* is that a fireman, injured due to the defective condition of a product, has a cause of action against the manufacturer and others in the chain of distribution subject only to the general rules controlling all product liability claims.[93] Yet to be determined is the assumption of risk question with respect to duty in the context of a products liability claim.

CONCLUSION

The *Grzelinski* holding is far from a definitive statement regarding the legal duty owed to a fireman or policeman injured while performing his job.[94] Whether firemen and policemen constitute a special group requiring specific limitations remains unsettled. By limiting its analysis to the narrow question of the applicability of the fireman's rule, the court ignored the broader, overriding issue of the availability of bystander protection to public employees pleading strict liability causes of action. Public policy reasons justify protection to any bystander, regardless of the theory of recovery.[95]

The failure of the Illinois Supreme Court to establish a sound rationale may cause confusion in future litigation. Just how much protection should be given a public protector is a question yet to be determined by the Illinois Supreme Court. Re-affirmation of the public policy reasons underlying by-

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91. *See* Fancil v. Q.S.E. Foods, Inc., 60 Ill. 2d 552, 558, 328 N.E.2d 538, 541 (1975). *See also* note 84 and accompanying text *supra*.

92. *See* note 2 *supra*.

93. 72 Ill. 2d at 151, 379 N.E.2d at 285 (1978). The general rules controlling all strict product liability claims under the Restatement (Second) of Torts § 402A (1965) include the following: (a) the seller is engaged in the business of selling such a product; and (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold. This rule applies even though: (a) the seller has exercised all possible care in the preparation and sale of his product; and (b) the user or consumer has not bought the product from or entered into any contractual relationship with the seller. *See also* McKean, *Products Liability: Trends and Implications*, 38 U. CHI. L. REV. 3, 17 (1970).

94. *See* note 8 and accompanying text *supra*.

95. *See* notes 51-74 and accompanying text *supra*.

stander recovery in a strict liability action would have been beneficial both to respond to the recent attacks upon these policy reasons and to demonstrate that the result which the court reached was in accordance with historical foundations of strict product liability actions.[96] The court's failure to do so in *Grzelinski* may well pave the way for faulty approaches to the resolution of public employee personal injury claims as attempts are made to ascertain a proper basis for public employee protection.

Trudy McCarthy

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96. *Id.*