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# Note

## ***Cooper v. City of New York: The Fellow Servant Rule—Wanted Dead or Alive***

### I. Introduction

The New York Court of Appeals in *Cooper v. City of New York*<sup>1</sup> has implicitly revived a long-dead common law rule in New York: the Fellow Servant Rule.<sup>2</sup> In doing so, the court highlights the intermingling of two closely related doctrines: the Fellow Servant Rule and the Firefighter's Rule.<sup>3</sup> The Fellow Servant Rule, which has its roots in English common law, evolved in this country in the mid-nineteenth century and prevented employees who were injured in job-related accidents caused by their co-workers' negligence from recovering financially from their employers.<sup>4</sup> Similarly, the common-law Firefighter's Rule prevented firefighters and police officers from recovering from their municipal employer for injuries sustained in the line of duty.<sup>5</sup> Although the two doctrines are similar in that they both preclude recovery by workers injured during the course of their employment, there are important differences in their philosophical underpinnings, application, and viability which are vital to their relevance in *Cooper*.<sup>6</sup>

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1. 81 N.Y.2d 584, 619 N.E.2d 369, 601 N.Y.S.2d 432 (1993).

2. See discussion *infra* part II.A.

3. The Firefighter's Rule has historically been referred to by some writers as the Fireman's Rule. For the purposes of this Note, the gender-neutral designation will be used.

4. See discussion *infra* part II.A.

5. See discussion *infra* part II.B.

6. See discussion *infra* part IV.

The Firefighter's Rule and the Fellow Servant Rule presented an onerous burden for workers injured on the job.<sup>7</sup> Recovery under the common law was extremely difficult and often left injured workers uncompensated. Courts and commentators have suggested that doctrines such as the Fellow Servant Rule and Firefighter's Rule were used strategically by nineteenth century courts to support and protect industry, which was beginning to blossom at that time.<sup>8</sup>

During the mid-twentieth century, however, courts began to express disfavor with both the Fellow Servant Rule and the Firefighter's Rule.<sup>9</sup> After a series of decisions by the state's lower courts,<sup>10</sup> New York finally abrogated the Fellow Servant Rule from its common law in 1982 with *Buckley v. City of New York*.<sup>11</sup> Similarly, New York retreated from its rigid stance with regard to professional rescuers, minimizing the harsh effects of the Firefighter's Rule, by enacting various statutory schemes to specifically allow recovery where in the past recovery had been precluded.<sup>12</sup>

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7. The common-law tort principle, assumption of risk, is often mentioned in conjunction with, and used as support for, the Fellow Servant Rule and the Firefighter's Rule. For a discussion of assumption of risk, see *infra* notes 25-26, 81-84 and accompanying text.

8. For example, Judge Gabrielli in *Buckley v. City of New York*, 56 N.Y.2d 300, 303, 437 N.E.2d 1088, 1089, 452 N.Y.S.2d 331, 332 (1982), stated that "the [Fellow Servant] rule simply reflected a 19th century bias by the courts in favor of business."

See also, Comment, *The Creation of a Common Law Rule: The Fellow Servant Rule, 1837-1860*, 132 U. PA. L. REV. 579, 580 (1984) [hereinafter *Creation of a Common Law Rule*] (To economic and social determinists, "the Fellow Servant rule is an example of the general development of tort law in the direction of protecting nascent industry in an industrializing society.") (citing LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 262 (1973)).

9. See *Poniatowski v. City of New York*, 14 N.Y.2d 76, 198 N.E.2d 237, 248 N.Y.S.2d 849 (1964); *Lawrence v. City of New York*, 82 A.D.2d 485, 447 N.Y.S.2d 506 (2d Dep't 1981). See also *Jakes v. City of New York*, 88 Misc. 2d 355, 357, 388 N.Y.S.2d 507, 509 (Sup. Ct. Kings County 1976) ("[This] court would much prefer to declare the fellow-servant rule at long last dead and obsolete.").

10. See, e.g., *Lawrence v. City of New York*, 82 A.D.2d 485, 447 N.Y.S.2d 506 (2d Dep't 1981); *Jakes v. City of New York*, 88 Misc. 2d 355, 357, 388 N.Y.S.2d 507, 509 (Sup. Ct. Kings County 1976).

11. 56 N.Y.2d 300, 437 N.E.2d 1088, 452 N.Y.S.2d 331 (1982).

12. E.g., N.Y. GEN. MUN. LAW §§ 205-a, 205-e (McKinney 1986 & Supp. 1995). See *infra* parts II.B.2 and II.B.5.

In *Cooper v. City of New York*,<sup>13</sup> however, the Court of Appeals took a dramatic turn in this area of the law. The plaintiff in *Cooper* was a police officer who was injured when the police car in which she was riding as a passenger-recorder<sup>14</sup> collided with a car driven by a third party.<sup>15</sup> The injured Officer Cooper sued the city, the officer who was driving at the time of the accident, and the driver of the other car.<sup>16</sup> The majority of the Court of Appeals denied recovery for the plaintiff relying extensively in its analysis on the Firefighter's Rule and its rationale. The majority paid little attention to the Fellow Servant Rule, dismissing it with minimal discussion.<sup>17</sup> The sole dissenter, Judge Titone, sharply criticized the majority's holding and its reasoning.<sup>18</sup> An analysis of both doctrines and their application to the facts in *Cooper* posits that the holding by the New York Court of Appeals launched into dangerous, unprecedented territory in New York's common law. This Note suggests that the holding in *Cooper* not only resurrects a long buried doctrine—the Fellow Servant Rule—but, for various policy reasons, works an extreme hardship on professional rescuers.

Part II of this Note reviews the establishment and development of both doctrines, discusses some of the policy reasons advanced both for and against their application, and examines several statutory schemes which have limited their effectiveness or eliminated them entirely. Part III discusses the injury that gave rise to the *Cooper* decision, the procedural history, and the majority and dissenting opinions. Part IV of this Note analyzes the implications of the *Cooper* decision and suggests that the court's holding was both inappropriate and alarming.

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13. 81 N.Y.2d 584, 619 N.E.2d 369, 601 N.Y.S.2d 432 (1993).

14. The police officer who acts as the passenger-recorder is required to ride in the front seat of the patrol car and is responsible for, among other things, operating the radio, and recording in the activity log radio messages directed to the car, including time, location of call and type of case. NEW YORK CITY POLICE DEP'T, PATROL GUIDE § 103-2 (May 15, 1987).

15. *Cooper*, 81 N.Y.2d at 587, 619 N.E.2d at 370, 601 N.Y.S.2d at 433.

16. *Id.* at 587-88, 619 N.E.2d at 370, 601 N.Y.S.2d at 433.

17. The court noted that the plaintiff argued "that all fellow-servant claims of negligence against the City are actionable because [the court has] abrogated the general common-law fellow-servant doctrine" and that "[n]othing in . . . *Santangelo* . . . supports that argument." *Id.* at 591, 619 N.E.2d at 372, 601 N.Y.S.2d at 435 (citations omitted).

18. *Id.* at 592, 619 N.E.2d at 373, 601 N.Y.S.2d at 436 (Titone, J., dissenting).

Finally, this Note concludes by calling for a statutory remedy or another alternative to minimize the impact of the decision.

## II. Background

### A. *The Fellow Servant Rule*

#### 1. *The Creation and Growth of the Doctrine*

The Fellow Servant Rule is a common law doctrine which traditionally prohibited an employee from recovering from his employer for injuries sustained as a result of the negligence of a fellow employee.<sup>19</sup> The rule was established in England in *Priestly v. Fowler*,<sup>20</sup> and was carried over to the United States in *Murray v. South Carolina*.<sup>21</sup> The rule "carved out an exception"<sup>22</sup> to the deeply rooted theory of respondeat superior.<sup>23</sup> Some commentators have attributed the development of the doctrine to the desire of courts to protect employers during the time of tremendous commercial growth during the late nineteenth and early twentieth centuries.<sup>24</sup> Frequently, the Fellow Servant Rule is discussed in conjunction with the theories of

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19. 4 C.B. LABATT, COMMENTARIES ON THE LAW OF MASTER AND SERVANT § 1393, at 4007 (1913).

20. 150 Eng. Rep. 1030 (1837).

21. 26 S.C.L. (1 McMul.) 385 (1841). Justice O'Neill wrote a noteworthy dissent in *Murray*. He stated that, while a servant takes "as a consequence of his contract, the usual and ordinary risks of his employment," negligence by a fellow servant "does not result from the ordinary risks of employment." *Id.* at 403. Justice O'Neill also cited authority for the position that the master should be liable for the negligent acts of his employees since such acts "result from the doing of their business, by one employed by them." *Id.* at 404.

This recognition by Justice O'Neill of the inherent flaws in the Fellow Servant Rule foreshadowed the policy arguments made 144 years later when New York abolished the doctrine. His dissent evidenced that, despite its viability for a time, the doctrine's reasoning was questioned from its genesis. See *Buckley v. City of New York*, 56 N.Y.2d 300, 437 N.E.2d 1088, 452 N.Y.S.2d 331 (1982). For a discussion of *Buckley*, see *infra* part II.A.2.

22. *Creation of a Common Law Rule*, *supra* note 8, at 579.

23. The term literally means "[l]et the master answer." BLACK'S LAW DICTIONARY 1311 (6th ed. 1990). This doctrine stands for the proposition that an employer may be held liable for the wrongful or tortious acts of his employee committed while the employee is acting within the scope of his employment. *Id.* For further discussion of the doctrine of respondeat superior, see W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 69, at 499 (5th ed. 1984).

24. For a good discussion of the political and historical atmosphere of this period and its effect on the development of the Fellow Servant Rule, see *Creation of a Common Law Rule*, *supra* note 8.

assumption of risk<sup>25</sup> and contributory negligence. In fact, the doctrines have been referred to as "the unholy trinity"<sup>26</sup> of common-law defenses because of their devastating use by employers to avoid liability and to thwart employees' claims for on-the-job injuries.

The Fellow Servant Rule was first established in New York in *Coon v. Syracuse & Utica R.R.*<sup>27</sup> Originally, the rule received much support in New York,<sup>28</sup> as well as in other jurisdictions.<sup>29</sup>

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25. The Appellate Division, Second Department, summarized the assumption of risk theory as applied to the Fellow Servant Rule this way: "[T]he rationale of the term 'assumption of risk' as applied to the fellow-servant rule is that: 'One who engages in work with others takes the chances, not only of his own negligence, but of the negligence of which his fellow servants may be guilty . . .'" *Lawrence v. City of New York*, 82 A.D.2d 485, 497, 447 N.Y.S.2d 506, 513 (2d Dep't 1981) (quoting *Stringham v. Hilton*, 111 N.Y. 188, 198, 18 N.E. 870, 873 (1888)). The court also noted that: "The rule does not rest on the ground that the negligence of the co-employee is imputed to the servant, but on the ground that it is not imputed to the master." *Id.* (citations omitted).

26. See, e.g., KEETON ET AL., *supra* note 23, § 80, at 569; Edward J. Higgins, Comment, *So Much "Quo" for So Little "Quid": Time for Michigan to Re-examine the Intentional Tort Exception to Workers' Compensation Exclusivity*, 1992 DET. C.L. REV. 27, 33 ("Even in the rare case that an employee could establish fault on the part of the employer, the employee would be extremely hard-pressed to overcome the 'unholy trinity' of common law defenses . . ."); Jane P. North, Comment, *Employees' Assumption of Risk: Real or Illusory Choice?*, 52 TENN. L. REV. 35, 36 (1984) ("the [assumption of risk] doctrine was seen as a bar not just to the worker's recovery, but also to the ends of justice").

27. 5 N.Y. 492 (1851). The Supreme Court of New York first cited the *Priestly* holding in *Brown v. Maxwell*, 6 Hill 592 (N.Y. Sup. Ct. 1844), but the New York Court of Appeals did not decide the viability of the Fellow Servant Rule in that jurisdiction until *Coon*. Citing *Priestly* and *Murray*, the court held: "The decision of this [case] depends on a very important principle [the Fellow Servant Rule], one which has been unfolded and brought to view within the last twenty years . . ." *Coon*, 5 N.Y. at 495. "It must now be considered as settled, and hereafter to form a part of the common law of the country." *Id.* at 496.

28. See, e.g., *Judson v. Village of Olean*, 116 N.Y. 655, 22 N.E. 555 (1889); *Byrnes v. New York, Lake Erie & W. R.R.*, 113 N.Y. 251, 21 N.E. 50 (1889); *Hussey v. Coger*, 112 N.Y. 614, 20 N.E. 556 (1889); *Stringham v. Hilton*, 111 N.Y. 188, 18 N.E. 870 (1888); *Hudson v. Ocean S.S. Co.*, 110 N.Y. 625, 17 N.E. 342 (1888); *Webber v. Piper*, 109 N.Y. 496, 17 N.E. 216 (1888); *Anthony v. Leeret*, 105 N.Y. 591, 12 N.E. 561 (1887); *Neubauer v. New York, Lake Erie & W. R.R.*, 101 N.Y. 607, 4 N.E. 125 (1885); *Crispin v. Babbitt*, 81 N.Y. 516 (1880); *Henry v. Staten Island Ry.*, 81 N.Y. 373 (1880).

29. Massachusetts followed South Carolina's decision in *Murray* with *Farwell v. Boston & W.R. Corp.*, 45 Mass. (4 Met.) 49 (1842), establishing the Fellow Servant Rule in that jurisdiction. The rule was followed, in various forms, in early state cases: *Cook & Scott v. Parham*, 24 Ala. 21 (1853); *Hobson v. New Mexico & Ariz. Ry.*, 11 P. 545 (Ariz. 1886); *Bloyd v. St. Louis & San Fran. Ry.*, 22 S.W. 1089 (Ark. 1893); *Yeomans v. Contra Costa Steam Navigation Co.*, 44 Cal. 71 (1872);

Although the Fellow Servant Rule was applied to police officers and firefighters, the doctrine developed and applied with great force to other professions, particularly railroad workers and seamen.<sup>30</sup> The Fellow Servant Rule quickly gained momentum, and "[b]y 1880 the rule, in one form or another, was so firmly entrenched in nearly every American jurisdiction that late nineteenth-century treatise writers warned legislatures and courts against tampering with 'a rule of the common law, based upon the wisdom and precedent of the ages.'"<sup>31</sup>

By the 1960s, the legal tide had changed and the courts and commentators began to express disapproval with the doctrine.<sup>32</sup>

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Deep Mining & Drainage Co. v. Fitzgerald, 43 P. 210 (Colo. 1895); Wilson v. Willimantic Linen Co., 50 Conn. 433 (1883); Parrish v. Pensacola & Atl. R.R., 9 So. 696 (Fla. 1891); Scudder v. Woodbridge, 1 Ga. 195 (1846); Snyder v. Viola Mining & Smelting Co., 26 P. 127 (Idaho 1891); Pittsburgh, Ft. W. & Chi. Ry. v. Powers, 74 Ill. 341 (1874); Madison & Indianapolis R.R. v. Bacon, 6 Ind. 205 (1855); Sullivan v. Mississippi & Mo. R.R., 11 Iowa 421 (1861); Dow v. Kansas Pac. Ry. 8 Kan. 642 (1871); Louisville & Nashville R.R. v. Robinson, 67 Ky. (4 Bush) 507 (1868); Towns v. Vicksburg, S. & Pac. R.R., 37 La. Ann. 630 (1885); Beaulieu v. Portland Co., 48 Me. 291 (1860); Hanrath v. Northern Cent. R.R., 46 Md. 280 (1876); Michigan Cent. R.R. v. Leahey, 10 Mich. 193 (1862); Brown v. Winona & St. P. R.R., 6 N.W. 484 (Minn. 1880); Howd v. Mississippi Cent. R.R., 50 Miss. 178 (1874); McDermott v. Pacific R.R., 30 Mo. 115 (1860); Kelley v. Cable Co., 14 P. 633 (Mont. 1887); Chicago, B. & Q. R.R. v. Howard, 63 N.W. 872 (Neb. 1895); Jacques v. Great Falls Mfg. Co., 22 A. 552 (N.H. 1891); Collyer v. Pennsylvania R.R., 6 A. 437 (N.J. 1886); Atchison, Topeka & Santa Fe R.R. v. Martin, 34 P. 536 (N.M. 1893); Dobbin v. Richmond & Danville R.R., 81 N.C. 446 (1879); Elliott v. Chicago, M. & St. P. Ry., 41 N.W. 758 (Dakota 1889); Miller v. Southern Pac. R.R., 26 P. 70 (Or. 1891); Lehigh Valley Coal Co. v. Jones, 86 Pa. 432 (1878); Gaffney v. New York & New England R.R., 7 A. 284 (R.I. 1887); Fox v. Sandford, 36 Tenn. (4 Sneed) 36 (1856); St. Louis, Ark. & Tex. Ry. v. Welch, 10 S.W. 529 (Tex. 1888); Allen v. Logan City, 37 P. 496 (Utah 1894); Norfolk & W. R.R. v. Donnelly, 14 S.E. 692 (Va. 1892); Davis v. Central Vt. R.R., 55 Vt. 84 (1882); Sayward v. Carlson, 23 P. 830 (Wash. 1890); Beuhring v. Chesapeake & Ohio Ry., 16 S.E. 435 (W. Va. 1892); Dwyer v. American Express Co., 52 N.W. 304 (Wis. 1892).

For a thorough discussion of the early development of the Fellow Servant Rule in each jurisdiction, see 2 WILLIAM F. BAILEY, *THE LAW OF PERSONAL INJURIES RELATING TO MASTER AND SERVANT* §§ 1796-2493 (1897).

30. See, e.g., Russell v. Hudson River R.R., 17 N.Y. 134, (1858) (applying the Fellow Servant Rule to railroad workers); Hudson v. Ocean S.S. Co., 110 N.Y. 625, 17 N.E. 342 (1888) (longshoremen); Hussey v. Cogger, 112 N.Y. 614, 20 N.E. 556 (1889) (carpenters); Stringham v. Hilton, 111 N.Y. 188, 18 N.E. 870 (1888) (grain elevator operators).

31. *Creation of a Common Law Rule*, *supra* note 8, at 579 (quoting 1 EDWARD J. WHITE, *THE LAW OF PERSONAL INJURIES ON RAILROADS* § 315, at 417 (1909)).

32. For example, the New York Court of Appeals, in *Poniatowski v. City of New York*, 14 N.Y.2d 76, 198 N.E.2d 237, 248 N.Y.S.2d 849 (1964), noted Dean Prosser's criticism of the doctrine. The court stated: "Dean Prosser has character-

*Poniatowski v. City of New York*<sup>33</sup> “signaled the beginning of the end”<sup>34</sup> of the Fellow Servant Rule in New York. In *Poniatowski*, a police officer was riding as a passenger-recorder<sup>35</sup> in a police car driven by a fellow officer when the car collided with another automobile in pursuit of a third vehicle.<sup>36</sup> The plaintiff sued the city under sections 50-a<sup>37</sup> and 50-b<sup>38</sup> of the General Municipal Law,<sup>39</sup> which was enacted to make municipalities liable for the

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ized the fellow-servant rule as ‘wicked’ . . . and one court has described it as resulting in ‘gross injustice’ and as ‘callous to human rights.’” *Id.* at 81, 198 N.E.2d at 238, 248 N.Y.S.2d at 851 (citations omitted).

Another author has referred to the Fellow Servant Rule as a “nefarious judicial device for minimizing the burdens of industry . . .” I. Leo Glasser, *Torts and Workmen’s Compensation*, 16 SYRACUSE L. REV. 373, 382 (1964). See also *supra* note 8.

33. 14 N.Y.2d 76, 198 N.E.2d 237, 248 N.Y.S.2d 849 (1964).

34. *Buckley v. City of New York*, 56 N.Y.2d 300, 304, 437 N.E.2d 1088, 1089, 452 N.Y.S.2d 331, 332 (1982).

35. For a definition of passenger-recorder, see *supra* note 14.

36. *Poniatowski*, 14 N.Y.2d at 79, 198 N.E.2d at 237, 248 N.Y.S.2d at 850.

37. General Municipal Law § 50-a, provides, in relevant part:

Every city, town and village shall be liable for the negligence of a person duly appointed by the governing board or body of the municipality . . . to operate a municipally owned vehicle within the state in the discharge of a statutory duty imposed upon the municipality, provided the appointee at the time of the accident or injury was acting in the discharge of his duties and within the scope of his employment.

N.Y. GEN. MUN. LAW § 50-a (McKinney 1986).

38. General Municipal Law § 50-b, provides, in relevant part:

Every county, city, town, village and other subdivision of government . . . shall be liable and shall assume the liability for the negligence of, and shall save harmless, a person duly appointed by the governing board or body of the municipality . . . in the operation of a municipally owned vehicle provided the appointee at the time of the accident or injury was acting in the discharge of his duties and within the scope of his employment. Every such appointee shall, for the purpose of this section, be deemed an employee of the municipality, notwithstanding the vehicle or other facility of transportation was being operated in the discharge of a public duty for the benefit of all citizens of the community and the municipality derived no special benefit in its corporate capacity.

N.Y. GEN. MUN. LAW § 50-b (McKinney 1986 & Supp. 1995).

39. Both sections were enacted in 1936 and were derived from section 282-g of the Highway Law. Act of Apr. 9, 1936, ch. 323, [1936] N.Y. Laws 674 (codified as amended at N.Y. GEN. MUN. LAW §§ 50-a, 50-b (McKinney 1986 & Supp. 1995)). The Highway Law was enacted in 1929 and imposed liability on municipalities for injuries to third parties caused by the negligence of police officers and firefighters. Act of Apr. 10, 1929, ch. 466, [1929] N.Y. Laws 993. The difference between sections 50-a and 50-b is that “Section 50-a . . . continued municipal liability for torts committed by municipal employees, in the operation of municipally-owned cars,



negligent acts of city employees while operating municipally-owned vehicles.<sup>40</sup>

The Supreme Court, Kings County, entered judgment against the city after a jury verdict in favor of the plaintiff.<sup>41</sup> The city appealed, claiming that the common-law Fellow Servant Rule precluded recovery.<sup>42</sup> The Appellate Division, Second Department reversed the judgment of the trial court and dismissed the officer's complaint, holding that "since the plaintiff was injured by a fellow servant, the common-law fellow-servant doctrine constitutes a complete defense."<sup>43</sup>

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while in the performance of a governmental function. Section 50-b provided for the assumption of liability by the City for such negligence by the employee while operating a municipally-owned vehicle." *Schwartz v. City of New York*, 16 Misc. 2d 822, 824, 25 N.Y.S.2d 964, 966 (Sup. Ct. Queens County 1941).

40. *Fiebinger v. City of New York*, 182 Misc. 1007, 1009, 51 N.Y.S.2d 383, 384 (Sup. Ct. Kings County 1944). At the time of *Poniatowski*, General Municipal Law sections 50-a and 50-b applied to the City of New York, but a 1979 amendment expressly exempted New York City from these provisions. Act of July 13, 1979, ch. 673, §§ 2, 3, [1979] N.Y. Laws 1302-03 (codified as amended at N.Y. GEN. MUN. LAW §§ 50-a, 50-b (McKinney 1986 & Supp. 1995)).

Not raised by the plaintiff in *Poniatowski* was the statutory remedy provided for in General Municipal Law § 50-c, which states, in relevant part:

Every city . . . shall be liable for, and shall assume the liability to the extent that it shall save harmless any duly appointed policeman of the municipality . . . or fire district for, the negligence of such appointee in the operation of a vehicle upon the public streets . . . . A policeman of a municipality or a paid fireman of a municipality or fire district . . . shall be deemed to be acting in the discharge of duty when engaged in the immediate and actual performance of a public duty imposed by law and such public duty performed was for the benefit of all the citizens of the community and the municipality or fire district derived no special benefit in its corporate capacity.

N.Y. GEN. MUN. LAW § 50-c (McKinney 1986 & Supp. 1995). This section also included New York City in its coverage until the 1979 sovereign immunity amendment. Act of July 13, 1979, ch. 673, § 4, [1979] N.Y. Laws 1303 (codified as amended at N.Y. GEN. MUN. LAW § 50-c (McKinney 1986 & Supp. 1995)).

These three provisions read together reveal "a series of statutes intended to cover all possible situations." *Schwartz v. City of New York*, 16 Misc. 2d 822, 824, 25 N.Y.S.2d 964, 966 (Sup. Ct. Queens County 1941).

41. *Poniatowski v. City of New York*, 19 A.D.2d 64, 65, 241 N.Y.S.2d 770, 771 (2d Dep't 1963).

42. *Id.* The city had pleaded the Fellow Servant Rule as an affirmative defense in its answer, *id.* at 66, 241 N.Y.S.2d at 772, but it is not clear whether the trial court simply did not reach the issue at all or ruled adversely to the city.

43. *Id.* Justice Hopkins dissented and voted to grant a new trial. Notably, he stated: "We should not be astute to expand the fellow-servant rule to police officers, since . . . in the statute imposing liability upon the city . . . there is no exception whereby the city is exempted from responsibility for the negligent acts of a fellow

The New York Court of Appeals reversed, relying on a strict interpretation of the General Municipal Law. The court noted that, at common law, police officers and firefighters had not been considered municipal employees but were rather, considered to be "agents performing a public duty and a governmental function."<sup>44</sup> Since at common law, municipalities could not be held liable for the negligent acts of its employees, the city could not be held liable in this case on a theory of respondeat superior for damages caused by these professional rescuers.<sup>45</sup> The court reviewed the history of sections 50-a and 50-b of the General Municipal Law, and concluded that it was the intent of the legislature that a remedy be afforded to individuals injured by the negligent operation of municipal vehicles.<sup>46</sup> The court held that there was no reason that the statutory remedy available to the general public by virtue of those General Municipal Law sections should not be available to police officers injured by fellow servants as well.<sup>47</sup>

Although *Poniatowski* was decided on a strict interpretation of the statutory language of General Municipal Law sections 50-a and 50-b, the court made clear its disapproval of the

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servant." *Id.* at 68-69, 241 N.Y.S.2d at 774-75 (Hopkins, J., dissenting) (citing *Robinson v. City of Albany*, 14 A.D.2d 626, 218 N.Y.S.2d 421 (3d Dep't 1961)).

44. *Poniatowski*, 14 N.Y.2d at 79, 198 N.E.2d at 237, 248 N.Y.S.2d at 850.

45. *Id.* The court relied on *In re Evans*, 262 N.Y. 61, 67-68, 186 N.E. 203, 204-05 (1933), and *Bernadine v. City of New York*, 294 N.Y. 361, 366, 62 N.E.2d 604, 605 (1945). See also *Pascarella v. City of New York*, 146 A.D.2d 61, 538 N.Y.S.2d 815 (1st Dep't 1989), wherein the court remarked:

The law is well-settled that "[p]ublic entities remain immune from negligence claims arising out of the performance of their governmental functions, including police protection, unless the injured person establishes a special relationship with the entity, which would create a specific duty to protect that individual, and the individual relied on the performance of that duty."

*Id.* at 67, 538 N.Y.S.2d at 819 (quoting *Miller v. State of New York*, 62 N.Y.2d 506, 510, 467 N.E.2d 493, 495, 478 N.Y.S.2d 829, 831 (1984)). For a complete discussion of *Pascarella*, see *infra* notes 150-66 and accompanying text.

46. *Poniatowski*, 14 N.Y.2d at 80, 198 N.E.2d at 238, 248 N.Y.S.2d at 851.

47. *Id.* The court noted that in the past, police officers had been permitted to recover based on the negligence of fellow officers. In particular, it cited *Wiseman v. City of New York*, 10 N.Y.2d 952, 180 N.E.2d 57, 224 N.Y.S.2d 275 (1961), wherein a police officer was injured in circumstances similar to Officer *Poniatowski*. While the Court of Appeals recognized that the defendant city in *Wiseman* had not asserted the Fellow Servant Rule as a defense, it stated: "[the city] did oppose recovery on the closely related ground of assumption of risk . . . and this court had no hesitancy in affirming the judgment in favor of the plaintiff." *Poniatowski*, 14 N.Y.2d at 81, 198 N.E.2d at 238, 248 N.Y.S.2d at 851.

Fellow Servant Rule in general, stating: "The inherent injustice of a rule which denies a person, free of fault, the right to recover for injuries sustained through the negligence of another over whose conduct he has no control merely because of the fortuitous circumstance that the other is a fellow officer is manifest."<sup>48</sup>

In *Lawrence v. City of New York*,<sup>49</sup> the Appellate Division, Second Department, also strongly criticized the Fellow Servant Rule. In *Lawrence*, the plaintiff, a New York City fireman, was fighting a fire when he was struck by a couch which a fellow firefighter had either thrown or pushed from a window of a burning building.<sup>50</sup> In its defense, the city asserted the common-law Fellow Servant Rule.<sup>51</sup> The trial court submitted the case to the jury, which returned a verdict in favor of the plaintiff.<sup>52</sup> Following the jury's verdict, the city's motion to dismiss the complaint on the grounds that the plaintiff was barred by the Fellow Servant Rule was denied.<sup>53</sup>

The Second Department affirmed in an opinion which traced the history of the Fellow Servant Rule from its origin.<sup>54</sup> The court noted that the rule had been rendered useless by a host of judicially created exceptions which "engraft[ed] upon it so many modifications that little [was] left of its original import."<sup>55</sup>

After evaluating the theories expounded for and against the rule, the court concluded that it should be abolished, stating: "it is both illogical and self-defeating to continue a practice of engrafting exception after exception upon a flawed rule of

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48. *Id.*

49. 82 A.D.2d 485, 447 N.Y.S.2d 506 (2d Dep't 1981).

50. *Id.* at 485-86, 447 N.Y.S.2d at 507.

51. *Id.* at 486, 447 N.Y.S.2d at 507.

52. *Id.* The jury was given several interrogatories, and specifically found that the negligence of the city was the proximate cause of the accident, that the plaintiff was not contributorily negligent, and that he had not assumed the risk of the incident which caused his injuries. *Id.*

53. *Id.* at 489, 447 N.Y.S.2d at 509.

54. *Id.* at 485, 447 N.Y.S.2d at 506.

55. *Id.* at 502, 447 N.Y.S.2d at 516. The court continued: "Amongst the multitudinous number of exceptions to the rule are the nondelegable duty to furnish a safe place to work, the duty to instruct and to warn, the 'vice-principal rule,' the 'superior servant rule,' the 'different department rule,' the 'dangerous agency rule,' ad infinitum." *Id.*

law, which was founded not on natural justice but on an absurd and disingenuous public policy, and which has been universally discredited almost from its inception."<sup>56</sup> The *Lawrence* court declared the Fellow Servant Rule "hereby abrogated."<sup>57</sup>

While the appellate division opinion in *Lawrence* would seem to have been overshadowed by the subsequent Court of Appeals decision,<sup>58</sup> it is important because it represents a turning point in New York's common law. Prior to the *Lawrence* decision, courts had almost universally applied the Fellow Servant Rule without question,<sup>59</sup> but the *Lawrence* court sharply criticized the doctrine and questioned its soundness.<sup>60</sup> This set the stage for the Court of Appeals to abrogate the Fellow Servant Rule completely.

## 2. *The Death of the Fellow Servant Rule in New York*

The New York Court of Appeals finally laid the Fellow Servant Rule to rest in *Buckley v. City of New York*,<sup>61</sup> a consolidation of two cases, *Buckley v. City of New York*,<sup>62</sup> and *Lawrence v. City of New York*.<sup>63</sup> These cases were brought up to the Court of Appeals for the sole purpose of determining the viability of the

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56. *Id.* at 502-03, 447 N.Y.S.2d at 516.

57. *Id.* at 504, 447 N.Y.S.2d at 517. Judge Titone, the author of the *Lawrence* decision, has continued to hold this position as a member of the New York Court of Appeals. As a Court of Appeals Judge, Judge Titone dissented in *Kenavan v. City of New York*, 70 N.Y.2d 558, 570, 517 N.E.2d 872, 877, 523 N.Y.S.2d 60, 65 (1987) (Titone, J., dissenting) and in *Cooper v. City of New York*, 81 N.Y.2d 584, 592, 619 N.E.2d 369, 373, 601 N.Y.S.2d 432, 436 (1993) (Titone, J., dissenting). See *infra* note 133 and part III.D.

58. *Lawrence* was affirmed by the New York Court of Appeals in *Buckley v. City of New York*, 56 N.Y.2d 300, 437 N.E.2d 1088, 452 N.Y.S.2d 331 (1982). See *infra* part II.A.2 for a discussion of *Buckley*.

59. But see *Poniatowski*, 14 N.Y.2d 76, 81, 198 N.E.2d 237, 238-39, 248 N.Y.S.2d 849, 851 (1964) (refusing to extend the rule into an area to which it had not previously been applied).

60. The court stated: "With respect to the rule itself, the theory upon which it is based . . . not only is untenable but is fallacious." *Lawrence*, 82 A.D.2d at 503, 447 N.Y.S.2d at 517.

61. 56 N.Y.2d 300, 437 N.E.2d 1088, 452 N.Y.S.2d 331 (1982).

62. *Buckley v. City of New York*, 81 A.D.2d 1044, 439 N.Y.S.2d 785 (1st Dep't 1981).

63. 82 A.D.2d 485, 447 N.Y.S.2d 506 (2d Dep't 1981). See *supra* notes 49-60 and accompanying text.

Fellow Servant Rule in New York.<sup>64</sup> The two cases presented similar scenarios.

In *Buckley*, a police officer was shot in the leg by a fellow officer who was attempting to reload his gun in the locker room of the police station house.<sup>65</sup> The Court of Appeals discussed several theories supporting the Fellow Servant Rule; the most convincing was that the rule "promotes the safety of the public and of the workers by encouraging each employee to be watchful of the conduct of others for his own protection."<sup>66</sup> The court also acknowledged the role that the doctrine of assumption of risk had played in the historical development of the Fellow Servant Rule<sup>67</sup> and noted that public sentiment at the time of the rule's inception "simply reflected a 19th century bias by the courts in favor of business."<sup>68</sup> The court criticized that rationale, however, noting that "the class of persons most frequently endangered by the negligence of an employee"<sup>69</sup> are his fellow workers. Therefore, the court suggested that employers should be held liable for the negligent acts of their employees, since they are in the best position to select competent personnel.<sup>70</sup> The court acknowledged the damaging blow the *Poniatowski* decision had dealt to the Fellow Servant Rule, stating: "In *Poniatowski v. City of New York* . . . our court signaled the beginning of the end of the fellow-servant rule in New York."<sup>71</sup>

Finally, the court noted that the thrust of the Fellow Servant Rule had been "drastically curtailed"<sup>72</sup> by the arrival and development of the workers' compensation legislation.<sup>73</sup> In con-

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64. *Id.*

65. *Buckley*, 56 N.Y.2d at 302, 437 N.E.2d at 1088, 452 N.Y.S.2d at 331.

66. *Id.* at 303, 437 N.E.2d at 1089, 452 N.Y.S.2d at 332. Presumably the argument is that if an employee knows she cannot recover from her employer for the negligent acts of her fellow employee, it will cause her to be more cautious in her work.

67. *Id.* The court stated: "It has also been suggested that the rule was based upon the notion that an employee assumes the risk of negligence on the part of his fellow servants . . . ." *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.* at 304, 437 N.E.2d at 1089, 452 N.Y.S.2d at 332.

72. *Id.* at 303, 437 N.E.2d at 1089, 452 N.Y.S.2d at 332.

73. *Id.* The New York Workers' Compensation Law specifically provides that "it shall not be necessary [for an employee] to plead or prove freedom from contributory negligence nor may the defendant plead as a defense that the injury was

clusion, the court stated that the Fellow Servant Rule "merely work[ed] an unjustifiable hardship upon individuals injured in the workplace"<sup>74</sup> and held that it was no longer to be followed in New York.<sup>75</sup>

## B. *The Firefighter's Rule*

### 1. *Justification and Early Application*

The common law doctrine known as the Firefighter's Rule was introduced in the United States in the late nineteenth century by *Gibson v. Leonard*,<sup>76</sup> and was adopted in New York shortly thereafter.<sup>77</sup> The rule essentially prohibits recovery by firefighters who sustain injuries in the line of duty.<sup>78</sup> Unlike the Fellow Servant Rule, however, the Firefighter's Rule is applied when the firefighter's injuries are the result of a third party's negligence, not the negligence of a fellow firefighter or officer. As the law developed, the Firefighter's Rule was extended to apply to police officers as well.<sup>79</sup> The courts have re-

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caused by the negligence of a fellow servant nor that the employee assumed the risk of his employment . . . ." N.Y. WORK. COMP. LAW § 11 (McKinney 1986) (emphasis added). However, the remedies of the Workers' Compensation Law are available to police officers and firefighters only on an extremely limited basis. See N.Y. WORK. COMP. LAW § 30 (McKinney 1986). See also N.Y. GEN. MUN. LAW § 207-c (McKinney 1986 & Supp. 1995).

74. *Buckley*, 56 N.Y.2d at 305, 437 N.E.2d at 1090, 452 N.Y.S.2d at 333.

75. *Id.*

76. 32 N.E. 182 (Ill. 1892).

77. The earliest New York court citing *Gibson* as authority for the Firefighter's Rule was the Court of Appeals in *Meiers v. Fred Koch Brewery*, 229 N.Y. 10, 127 N.E. 491 (1920) (holding that a fireman entering premises to extinguish a fire is not merely a licensee, and thus property owners owe a duty to exercise care to keep the premises in reasonably safe condition). However, more recent New York cases typically only cite *McGee v. Adams Paper & Twine Co.*, 20 N.Y.2d 921, 233 N.E.2d 289, 286 N.Y.S.2d 274 (1967), as authority for the Firefighter's Rule. For a discussion of *McGee*, see *infra* notes 96-108 and accompanying text.

78. David L. Strauss, Comment, *Where There's Smoke, There's the Firefighter's Rule: Containing the Conflagration after One Hundred Years*, 1992 Wis. L. Rev. 2031, 2031 n.2. As Strauss points out, the *Gibson* court, while holding that a firefighter who was injured in the line of duty could not recover against the landowner for negligence in maintaining an elevator shaft, analyzed the liability issue "on the basis of traditional status categories of entrants upon property of another and classified the firefighter as a licensee." *Id.*

79. *Santangelo v. State of New York*, 71 N.Y.2d 393, 521 N.E.2d 770, 526 N.Y.S.2d 812 (1988), is given credit as being the first decision to apply the common-law Firefighter's Rule to police officers as well. *But see Racine v. Morris*, 136 A.D. 467, 121 N.Y.S. 146 (1st Dep't 1910) (holding that a police officer is a licensee

ferred to this extension as the *Santangelo* Rule after the New York Court of Appeals' decision in *Santangelo v. State of New York*.<sup>80</sup>

The traditional Firefighter's Rule is based on several theories. The first is the principle of assumption of risk,<sup>81</sup> which has long been a defense to negligence actions.<sup>82</sup> Various courts have commented on this theory as a basis for supporting the Firefighter's Rule. For instance, the Appellate Division, First Department, has stated:

Firemen and fire patrolmen are bound to anticipate that many fires do start from carelessness on the part of someone . . . . Once a fire starts and the firemen or fire patrolmen arrive on the scene, they assume the usual risks inherent in their work, including those arising from contact with flames or smoke, or from the collapse in the ordinary course of the fire of ceilings, walls and floors of buildings.<sup>83</sup>

Similarly, the New York Court of Appeals in *Santangelo* observed that "persons who choose to become firefighters assume the risks of fire-related injuries, including the risk of negligence

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by operation of law through public necessity and therefore cannot recover for injury due to negligence of landowner).

80. 71 N.Y.2d 393, 521 N.E.2d 770, 526 N.Y.S.2d 812 (1988). See, e.g., *Damiani v. City of Buffalo*, 198 A.D.2d 814, 814, 603 N.Y.S.2d 1006, 1007 (4th Dep't 1994); *Starkey v. Trancamp Contracting Corp.*, 152 A.D.2d 358, 360, 548 N.Y.S.2d 722, 723 (2d Dep't 1989); *Pascarella v. City of New York*, 146 A.D.2d 61, 68, 538 N.Y.S.2d 815, 810 (1st Dep't 1989) (all citing *Santangelo* as applying the Firefighter's Rule to police officers). For a complete discussion of *Santangelo*, see *infra* notes 134-49 and accompanying text.

81. This principle of tort law, derived from the maxim *volenti non fit injuria*, essentially means that "a person may not recover for an injury received when he voluntarily exposes himself to a known and appreciated danger." BLACK'S LAW DICTIONARY 123, 1575 (6th ed. 1990). For a good discussion of assumption of risk as a tort principle, see KEETON ET AL., *supra* note 23, § 68, at 480.

82. "At common law, firefighters were held to have assumed the risks of their profession and were denied recovery for injuries sustained while combatting fires even though the owner of the premises on which the fire occurred was negligent in creating the condition that caused the accident." *Kenavan v. City of New York*, 70 N.Y.2d 558, 566, 517 N.E.2d 872, 874, 523 N.Y.S.2d 60, 62 (1987). Some courts have attempted to further distinguish between so-called "primary" and "secondary" assumption of the risk; "secondary" assumption of the risk being something akin to contributory negligence. See *Winn v. Frasher*, 777 P.2d 722 (Idaho 1989) (citing *Salinas v. Vierstra*, 695 P.2d 369 (Idaho 1985) and *Fawcett v. Irby*, 436 P.2d 714 (Idaho 1968)).

83. *McGee v. Adams Paper & Twine Co.*, 26 A.D.2d 186, 190, 271 N.Y.S.2d 698, 706 (1st Dep't 1966). See *infra* notes 96-108 and accompanying text.

of property owners and occupants in maintaining their premises."<sup>84</sup>

The second reason most frequently asserted in support of the common-law Firefighter's Rule also comes from the basic law of torts, and addresses the status of firefighters as entrants upon property.<sup>85</sup> Traditionally, firefighters and police officers have been held to be licensees<sup>86</sup> when they entered property in the course of their official duties.<sup>87</sup> The general duty owed to licensees is merely the duty to refrain from intentional harm or willful or wanton misconduct;<sup>88</sup> in general, there is no obligation to inspect or prepare the premises for them in any way.<sup>89</sup> More recently, firefighters have been classified not in terms of traditional entrant status categories—that is, licensees, invitees or trespassers—but as a special class unto themselves, *sui generis*,<sup>90</sup> "privileged to enter the land for a public purpose, irrespective of consent."<sup>91</sup>

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84. 71 N.Y.2d at 397, 521 N.E.2d at 771, 526 N.Y.S.2d at 813.

85. Indeed, this is how the Illinois Supreme Court in *Gibson v. Leonard* focused its analysis. The *Gibson* court, while recognizing that firefighters, in the course of extinguishing fires, may lawfully enter the property of another, nevertheless held that the plaintiff-firefighter "when he entered the building, was, by the rules of the common law, a mere naked licensee . . . ." *Gibson*, 32 N.E. at 184.

86. The Court of Appeals in *Santangelo* stated that the initial rationale for the Firefighter's Rule was that firemen were typically treated as licensees. *Santangelo*, 71 N.Y.2d at 396-97, 521 N.E.2d at 771, 526 N.Y.S.2d at 813. This argument, while not fully explained in the *Santangelo* opinion, reasons that when firefighters entered a premises to extinguish a fire, they were merely licensees, and therefore "took the property as they found it." *Id.* See *Racine v. Morris*, 136 A.D. 467, 121 N.Y.S. 146 (1st Dep't 1910) (holding that police officers are licensees by operation of law through public necessity); *Eckes v. Stetler*, 98 A.D. 76, 90 N.Y.S. 473 (1st Dep't 1904) (holding that a fireman is a licensee). But see *Meiers v. Fred Koch Brewery*, 229 N.Y. 10, 15, 127 N.E. 491, 492 (1920) (stating that it would be a "misuse of terms" to call a fireman a licensee).

87. KEETON ET AL., *supra* note 23, § 61, at 429. Professors Prosser and Keeton also note that although a small number of states have treated firefighters and police officers as invitees, "there does not appear to be any trend in this direction nor sufficient reason on balance for moving the law this far." *Id.* at 432.

88. *Id.* at 430.

89. *Id.*

90. The term literally means "[o]f its own kind or class." BLACK'S LAW DICTIONARY 1434 (6th ed. 1990). See also Larry D. Scheaffer, Annotation, *Liability of Owner or Occupant of Premises to Fireman Coming Thereon in Discharge of His Duty*, 11 A.L.R. 4th 597, 602-07 (1982) (discussing classification of firefighters *sui generis*).

91. *McGee*, 26 A.D.2d at 191, 271 N.Y.S.2d at 707. See *infra* notes 96-108 and accompanying text.



A third argument which has been raised in support of the Firefighter's Rule is grounded in what has been called public policy.<sup>92</sup> The rationale is that firefighters and police officers are not only specially trained to confront the dangers of their work, but are also amply compensated for the hazards they encounter, both through their wages and through retirement benefits.<sup>93</sup> Thus, it is argued, to allow them to recover for line-of-duty injuries would be anomalous.<sup>94</sup> One court summarized this concept as follows:

[M]unicipalities employ firefighters precisely because special skills and expertise are required to confront certain hazards—usually of an emergency nature—that expose the public to danger, these hazards often arise from negligence, and *as a matter of public policy* firefighters trained and compensated to confront such dangers must be precluded from recovering damages for the very situations that create a need for their services.<sup>95</sup>

An example of a strict application of the traditional common-law Firefighter's Rule in New York is *McGee v. Adams Paper & Twine Co.*<sup>96</sup> In *McGee*, New York City firefighters were

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92. See, e.g., *Santangelo*, 71 N.Y.2d 393, 397, 521 N.E.2d 770, 771, 526 N.Y.S.2d 812, 813. ("The 'fireman's rule' has also been grounded on public policy . . .").

93. See, e.g., N.Y. GEN. MUN. LAW § 205 (McKinney 1986) (authorizing payments to injured or representatives of deceased volunteer firefighters); N.Y. GEN. MUN. LAW §§ 207, 207-a, 207-c (McKinney 1986 & Supp. 1995) (authorizing hospitalization benefits for injured firefighters, as well as payment of salary, medical and other expenses); N.Y. GEN. MUN. LAW § 208-b (McKinney 1986) (authorizing death benefits for firefighters and police officers). See also N.Y. RETIRE. & Soc. SEC. LAW §§ 360-363-c (McKinney 1987 & Supp. 1995) (describing death benefits and disability retirement for police officers and firefighters).

94. See, e.g., *Santangelo*, 71 N.Y.2d at 398, 521 N.E.2d at 772, 526 N.Y.S.2d at 814. The court stated:

[O]ur decision is . . . predicated upon . . . sound considerations of public policy resting on the nature of the occupation—which often requires police to confront negligently created emergencies . . . . Here the anomaly of permitting recovery by police officer would be particularly evident: allowing recovery against the State for injuries incurred while apprehending an escaped mental patient *would result in the payment of damages by the public for injuries sustained by the experts it employs to deal with such situations.*

*Id.* (emphasis added). For a discussion of *Santangelo*, see *infra* notes 134-49 and accompanying text.

95. *Santangelo*, 71 N.Y.2d at 397, 521 N.E.2d at 771, 526 N.Y.S.2d at 813 (emphasis added).

96. 20 N.Y.2d 921, 233 N.E.2d 289, 286 N.Y.S.2d 274 (1967).

called to the scene of a fire in a six-story building.<sup>97</sup> While attempting to extinguish the fire, the building collapsed, killing two firemen and four fire patrolmen.<sup>98</sup> The plaintiffs, who represented the respective estates of the firefighters,<sup>99</sup> sued New York City, the Fire Commissioner, the Commissioner of Buildings, as well as the landlord and owner of the building.<sup>100</sup> At the close of trial, the Supreme Court, New York County, dismissed the claims against the first three defendants, leaving only the owner and landlord in the action.<sup>101</sup> Claims by the plaintiffs against the owner and landlord were grounded in negligence, and included allegations of careless smoking by employees, overloading of a storeroom in the building, and installation and maintenance of an unsafe recreation room, among others.<sup>102</sup>

The appellate division reversed and vacated a judgment by the trial court which had been entered upon a jury verdict for the plaintiffs; dismissed the plaintiffs' complaint as to the owner and landlord; and affirmed the judgment of the trial court dismissing the complaint against the municipality, the fire commissioner, and the commissioner of buildings.<sup>103</sup> The appellate division used the assumption of risk argument to support its application of the Firefighter's Rule and to undermine the plaintiffs' claims against the city and the fire commissioner, stating that the fire patrolmen had "voluntarily entered the premises during the fire on their own responsibility in performance of their duties *independent of the fire-fighting operations in charge of the Fire Department employees of the city.*"<sup>104</sup> Because their entry into the building "was not performed at or under the specific direction of the Fire Chief"<sup>105</sup> the firefighters "had no

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97. *McGee v. Adams Paper & Twine Co.*, 26 A.D.2d 186, 189, 271 N.Y.S.2d 698, 704 (1st Dep't 1966).

98. *Id.* at 188, 271 N.Y.S.2d at 704.

99. *McGee*, 20 N.Y.2d at 921, 233 N.E.2d at 289, 286 N.Y.S.2d at 274.

100. *Id.*

101. *McGee*, 26 A.D.2d at 188, 271 N.Y.S.2d at 704.

102. *Id.* at 189-90, 271 N.Y.S.2d at 705-06. While one plaintiff alleged a cause of action against the remaining defendants based upon General Municipal Law § 205-a, the Court of Appeals never even reached the issue. *Id.* at 194, 271 N.Y.S.2d at 709-10. See *infra* notes 109-14 and accompanying text for a discussion of General Municipal Law § 205-a.

103. *McGee*, 26 A.D.2d at 198-99, 271 N.Y.S.2d at 713-14.

104. *Id.* at 196, 271 N.Y.S.2d at 711 (emphasis added).

105. *Id.*

right to assume that the Fire Department employees were under any obligation with respect to their safety other than to refrain from reckless acts or affirmative acts of carelessness . . . ."<sup>106</sup> The Court of Appeals affirmed, without opinion.<sup>107</sup> Although *McGee* was decided in 1967, after the enactment of General Municipal Law section 205-a,<sup>108</sup> it represents the traditional common-law Firefighter's Rule and provides a glimpse of the inequity the rule worked on professional rescuers.

## 2. *Statutory Relief for Firefighters and Limitations of That Remedy*

In 1935, in response to the absence of a remedy for firefighters injured in the line of duty, the New York Legislature enacted General Municipal Law section 205-a<sup>109</sup> to provide firefighters with a remedy where none had existed previously.<sup>110</sup> The statute allows firefighters to recover from third parties for their failure to comply with statutory requirements which result in a fire and a subsequent injury to a firefighter.<sup>111</sup> One court stated that section 205-a was enacted "[i]n an attempt to ameliorate the harsh result of the common-law rule,"<sup>112</sup> and that the statute had "the intention of creating a cause of action where otherwise there would be no right of recovery for the in-

106. *Id.* at 196, 271 N.Y.S.2d at 712.

107. *McGee v. Adams Paper & Twine Co.*, 20 N.Y.2d 921, 233 N.E.2d 289, 286 N.Y.S.2d 274 (1967).

108. *See infra* notes 109-14 and accompanying text.

109. General Municipal Law § 205-a provides, in relevant part:

[I]n the event any accident, causing injury, death or a disease which results in death, occurs 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 . . . and requirements of the federal, state, county, village, town or city governments . . . the person or persons guilty of said neglect, omission, wilful or culpable negligence at the time of such injury or death shall be liable to pay any officer, member, agent, or employee of any fire department injured, or whose life may be lost while in the discharge or performance of any duty . . . a sum of money . . . .

N.Y. GEN. MUN. LAW § 205-a (McKinney 1986 & Supp. 1995).

110. The predecessor of General Municipal Law § 205-a was section 761 of the Greater New York Charter. 1901 N.Y. Laws 316 and 1882 N.Y. Laws 116 (repealed 1935), *cited in* *Kenavan v. City of New York*, 70 N.Y.2d 558, 566, 517 N.E.2d 872, 874-75, 523 N.Y.S.2d 60, 62-63 (1987).

111. N.Y. GEN. MUN. LAW § 205-a.

112. *Kenavan*, 70 N.Y.2d at 566, 517 N.E.2d at 874, 523 N.Y.S.2d at 62.

jury or death of a firefighter.”<sup>113</sup> This was an important development because one of the basic tenets underlying the Firefighter’s Rule was that “firefighters injured while extinguishing fires generally cannot recover against the property owners or occupants whose negligence in maintaining the premises occasioned the fires.”<sup>114</sup>

The statutory remedy was not designed to cover all situations, however, and thus did not bury the Firefighter’s Rule. For example, the New York Court of Appeals, in *Kenavan v. City of New York*, expressly limited the scope of section 205-a to property owners.<sup>115</sup> In *Kenavan*, four firemen and the estate of a fifth brought an action against New York City to recover for damages they sustained while extinguishing a fire that ignited an abandoned car on the street.<sup>116</sup> The driver of the fire truck was attempting to direct traffic around the scene, but a second car, not visible to the firefighters because of heavy smoke conditions, struck all five plaintiffs, killing one.<sup>117</sup>

The plaintiffs sued the city, the fire department captain, and the driver of the fire truck, asserting claims sounding in common law negligence and under section 205-a of the General Municipal Law.<sup>118</sup> In addition, the plaintiffs alleged a cause of action against the driver of the vehicle which struck them.<sup>119</sup> The plaintiffs’ common-law claim of negligence was based on the theory that the city had breached its duty to keep public streets in a safe condition when it failed to remove the abandoned car from the street.<sup>120</sup> The plaintiffs also argued that the city’s failure to remove the car from the street constituted a violation of the Vehicle and Traffic Law<sup>121</sup> and several other New

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113. *Id.*

114. *Santangelo*, 71 N.Y.2d at 396, 521 N.E.2d at 771, 526 N.Y.S.2d at 813 (citing *Kenavan*, 70 N.Y.2d 558, 517 N.E.2d 872, 523 N.Y.S.2d 60; *McGee*, 26 A.D.2d 186, 271 N.Y.S.2d 698).

115. 70 N.Y.2d 558, 517 N.E.2d 872, 523 N.Y.S.2d 60 (1987).

116. *Id.* at 564-65, 517 N.E.2d at 873-74, 523 N.Y.S.2d at 61-62.

117. *Id.* at 564, 517 N.E.2d at 873, 523 N.Y.S.2d at 61.

118. *Kenavan v. City of New York*, 120 A.D.2d 193, 195, 507 N.Y.S.2d 24, 26 (2d Dep’t 1986).

119. *Id.*

120. *Id.* at 195, 507 N.Y.S.2d at 27.

121. N.Y. VEH. & TRAF. LAW § 1224 (McKinney 1986 & Supp. 1995).

York City regulatory provisions,<sup>122</sup> thus constituting the requisite statutory violation for purposes of invoking section 205-a of the General Municipal Law.<sup>123</sup>

After both sides had rested, the trial court denied the city's motion to dismiss the complaint and submitted the case to the jury.<sup>124</sup> The jury found the city liable, and the court entered judgment on the verdict.<sup>125</sup> The Appellate Division, Second Department, reversed, holding that the complaint should have been dismissed before submission to the jury.<sup>126</sup> With regard to the cause of action under General Municipal Law section 205-a, the court acknowledged that:

The Legislature, in creating such additional cause of action, in the interests of protecting firemen against the hazards of such [statutory] violations, may be considered as having intended to impose liability in any case *where there is any practical or reasonable connection between a violation and the injury or death of a fireman*.<sup>127</sup>

In this case, however, the appellate division noted that the statutory provisions alleged to have been violated "were clearly enacted and promulgated in order to enable the city to take title to abandoned cars for the limited purpose of removing these cars from the streets where they are eyesores, and, after giving proper notice, to sell [them] . . . ." <sup>128</sup> As such, "[t]hose legal requirements are not fire preventive in nature and the violations thereof were not practically or reasonably connected to the injuries suffered by the plaintiffs."<sup>129</sup> Thus, the appellate division concluded that the cause of action under section 205-a should not have been sent to the jury.<sup>130</sup>

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122. Plaintiffs alleged violations of § 31 of the Administrative Code of the City of New York and General Order 5 of the Department of Sanitation. *Kenavan*, 70 N.Y.2d at 565, 517 N.E.2d at 874, 523 N.Y.S.2d at 62. These provisions, as well as § 1224 of the Vehicle and Traffic Law, all "impose a duty on the City to promptly remove abandoned vehicles from the roadways . . . ." *Id.*

123. *Kenavan*, 120 A.D.2d at 28, 507 N.Y.S.2d at 196.

124. *Kenavan*, 70 N.Y.2d at 565, 517 N.E.2d at 874, 523 N.Y.S.2d at 62.

125. *Id.*

126. *Kenavan*, 120 A.D.2d at 29, 507 N.Y.S.2d at 197.

127. *Id.* at 31, 507 N.Y.S.2d at 198 (quoting *McGee*, 26 A.D.2d at 195, 271 N.Y.S.2d at 698) (emphasis added).

128. *Id.* at 33, 507 N.Y.S.2d at 199.

129. *Id.*

130. *Id.*

The New York Court of Appeals affirmed, stating that the statutory antecedent<sup>131</sup> of the statute in question “compels the conclusion that the scope of section 205-a is limited to property owners and the maintenance of premises in a safe condition for firefighters.”<sup>132</sup> The court also noted that the statutory violations referred to in section 205-a could include, but were not limited to, violations of fire preventive regulations.<sup>133</sup> This limitation of the scope of section 205-a was an example of further refinement of the statutory remedy granted to firefighters.

### 3. *Application of the Firefighter's Rule to Police Officers*

Notwithstanding the hardship that the Firefighter's Rule worked on professional rescuers, the doctrine was extended to police officers in *Santangelo v. State of New York*.<sup>134</sup> In *Santangelo*, the plaintiffs were two police officers who sustained injuries while attempting to bring into custody a patient who had escaped from a state mental facility.<sup>135</sup> Although the patient “had a history of confinement and escape”<sup>136</sup> from the facility, the hospital did not notify the police of his escape but simply marked the patient's file “discharged.”<sup>137</sup> After a telephone call from the patient's uncle, the plaintiff police officers were dispatched to apprehend the patient.<sup>138</sup> During a scuffle with the patient, both officers were injured.<sup>139</sup> They brought suit against

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131. See *supra* note 110.

132. *Kenavan*, 70 N.Y.2d at 566, 517 N.E.2d at 875, 523 N.Y.S.2d at 63.

133. *Id.* at 567, 517 N.E.2d at 875, 523 N.Y.S.2d at 63. Judge Titone dissented and voted to reverse in a separate opinion. He stated:

That the municipality does owe a duty of care to the firefighters it employs is apparent from such cases as *Buckley v. City of New York* . . . in which the City was held liable for injuries suffered by a firefighter as a result of a co-worker's negligence. Indeed, the holding in *Buckley*—that the former fellow-servant rule is no longer viable—would make little sense if the court's intention was to preclude recovery where a firefighter's injury resulted from the carelessness of a colleague.

*Id.* at 571, 517 N.E.2d at 878, 523 N.Y.S.2d at 66 (Titone, J., dissenting) (citations omitted). Judge Titone's policy views on this issue have remained consistent throughout his tenure in the New York Court system. See *supra* note 57 and *infra* part III.D.

134. 71 N.Y.2d 393, 521 N.E.2d 770, 526 N.Y.S.2d 812 (1988).

135. *Id.* at 395-97, 521 N.E.2d at 770-71, 526 N.Y.S.2d at 812-13.

136. *Id.* at 395, 521 N.E.2d at 770, 526 N.Y.S.2d at 812.

137. *Id.*

138. *Id.* at 395-96, 521 N.E.2d at 770, 526 N.Y.S.2d at 812.

139. *Id.* at 396, 521 N.E.2d at 771, 526 N.Y.S.2d at 813.

the state alleging one cause of action under common-law negligence and another alleging that the state had violated certain Department of Mental Hygiene regulations.<sup>140</sup>

The New York Court of Claims found that the state was negligent by allowing the patient to escape and by marking his file "discharged" after he had escaped.<sup>141</sup> Nonetheless, the court refused to grant recovery for the plaintiffs because (1) "public policy precluded it";<sup>142</sup> (2) the plaintiffs were "not within the class intended to be protected by the regulations";<sup>143</sup> and (3) even if the plaintiffs were within the class, appropriate notification had been made.<sup>144</sup> The Appellate Division, Second Department, affirmed.<sup>145</sup>

The New York Court of Appeals likewise affirmed, examining the various theories used to support the Firefighter's Rule. The court focused on the public policy argument, which it felt "most aptly support[ed] the rule,"<sup>146</sup> noting that firefighters receive special training for their duties and are compensated for the on-the-job risks they take.<sup>147</sup> The court found that these

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140. *Id.* The regulations dealt with escapees, first in marking the patient "discharged," and second, in failing to give the police department the appropriate "particular notice" of his escape and history of dangerousness. *Id.*

141. *Id.* at 396, 521 N.E.2d at 771, 526 N.Y.S.2d at 813. The court stated:

Based on the manner in which [the patient] was confined, given his many successful escapes, three of which were accomplished in the same manner, the record clearly indicates a casual, almost cavalier attitude, on the part of the State toward the safety of the public as it related to the custody and supervision of this dangerous individual. The administration of this hospital in dealing with [the patient] during his confinement was almost reckless in failing to more closely supervise him.

*Santangelo v. State of New York*, 129 Misc. 2d 898, 901-02, 494 N.Y.S.2d 49, 51 (Ct. Cl. 1985).

142. *Santangelo*, 71 N.Y.2d at 396, 521 N.E.2d at 771, 526 N.Y.S.2d at 813. The Court of Claims stated:

The denial of recovery for injuries to policemen caused by another's negligence which creates the very occasion for their engagement cannot be said to violate our concepts of justice. The many benefits available to policemen to compensate them for the hazards they face, fully justify, for sound public policy reasons, denial of double recovery from the public trough.

*Santangelo*, 129 Misc. 2d at 907, 494 N.Y.S.2d at 54-55.

143. *Santangelo*, 71 N.Y.2d at 396, 521 N.E.2d at 771, 526 N.Y.S.2d at 813.

144. *Id.*

145. 127 A.D.2d 647, 511 N.Y.S.2d 666 (2d Dep't 1987).

146. 71 N.Y.2d at 397, 521 N.E.2d at 771, 526 N.Y.S.2d at 813.

147. *Id.*

policy considerations applied equally to police officers,<sup>148</sup> and extended the doctrine to include those professionals as well. The court concluded that a negligence action was not maintainable by police officers against their municipal employers.<sup>149</sup>

The Appellate Division, First Department, in *Pascarella v. City of New York*<sup>150</sup> added what appeared to be a further gloss to the *Santangelo* Rule.<sup>151</sup> The court emphasized the assumption of risk rationale as a basis for narrowing the scope of the inquiry when a police officer is injured in the line of duty.<sup>152</sup>

In *Pascarella*, the plaintiff was a New York City police officer who had recently been assigned to the Headquarters Security Unit (HSU) at One Police Plaza.<sup>153</sup> On New Year's Eve 1982, a terrorist group detonated a series of bombs in lower Manhattan.<sup>154</sup> Since one of the functions of the HSU is to "maintain a high level of security at, and around the perimeter of, One Police Plaza, for the protection of both the employees of the Police Department and the public,"<sup>155</sup> Officer Pascarella was instructed to conduct a perimeter check of the police headquarters.<sup>156</sup> In conducting the search he came across what appeared to be a small bag containing trash.<sup>157</sup> When he walked away from the bag, a bomb exploded, causing extensive damage to the area and severing the lower portion of the officer's right leg.<sup>158</sup>

Officer Pascarella sued the New York City Police Department and the City of New York in common-law negligence,

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148. *Id.* at 397-98, 521 N.E.2d at 771-72, 526 N.Y.S.2d at 813-14.

149. *Id.* Subsequent to the dismissal of Officer Santangelo's common-law negligence claim, he filed a second action in the Court of Claims in 1990 alleging a violation of N.Y. GEN. MUN. LAW § 205-e which was given retroactive effect by the legislature in 1990. See *infra* part II.B.5 for a full discussion of § 205-e. The second suit is still being litigated in the courts. *Santangelo v. State of New York*, 193 A.D.2d 25, 601 N.Y.S.2d 305 (2d Dep't 1993) (reversing and remitting opinion of the Court of Claims which declared the retroactivity of the amendment to N.Y. GEN. MUN. LAW § 205-e unconstitutional).

150. 146 A.D.2d 61, 538 N.Y.S.2d 815 (1st Dep't 1989).

151. In his dissent in *Cooper*, Judge Titone commented on the relevance of *Pascarella* to the application of the Firefighter's Rule. See *infra* notes 265-67 and accompanying text.

152. *Pascarella*, 146 A.D.2d at 69, 538 N.Y.S.2d at 820.

153. *Id.* at 63, 538 N.Y.S.2d at 816.

154. *Id.*

155. *Id.* at 64, 538 N.Y.S.2d at 817.

156. *Id.*

157. *Id.*

158. *Id.* at 65, 538 N.Y.S.2d at 817.



claiming that he had been given virtually no training in bomb detection.<sup>159</sup> At trial, the court read to the jury excerpts from *A Functional Guide for Fire Security Officers and Deputy Fire Security Officers*, which was developed to “establish a uniform set of procedures for officers to follow in the event of a fire, explosion or bomb threat at Police Headquarters.”<sup>160</sup> The jury was instructed that if it found that the procedures detailed in the handbook had been violated, and such violation was the proximate cause of the accident, it could consider those violations a breach of a duty of care.<sup>161</sup> The jury returned with a verdict in favor of the officer, and the court entered judgment thereon.<sup>162</sup>

The First Department reversed the lower court and dismissed the complaint.<sup>163</sup> The court relied heavily on the Court of Appeals’ recent decision in *Santangelo*, noting that police officers “‘receive both training that enables them to minimize the dangers their occupation requires them to face, and compensation and special benefits to help assure that the public will bear the costs of injuries suffered by its protectors in the line of duty.’”<sup>164</sup> The court continued: “Clearly, individuals who elect to join the uniformed services do so with knowledge of the dangers attendant upon those occupations and the distinct possibility that they might be hurt in the course of their employment.”<sup>165</sup> Finally, the appellate division rejected Officer Pascarella’s argument that the “Functional Guide” handbook created a special relationship between himself and the police department such that failure to adhere to the guidelines constituted *per se* negligence by the defendants.<sup>166</sup>

Thus, the *Pascarella* court reaffirmed the principle of *Santangelo* by using an “assumption of the risk argument”: that officers enter the uniformed forces aware of the possible dan-

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159. *Pascarella v. City of New York*, 135 Misc. 2d 719, 720, 516 N.Y.S.2d 579, 581 (Sup. Ct. N.Y. County 1987).

160. *Pascarella*, 146 A.D.2d at 65, 538 N.Y.S.2d at 817.

161. *Id.*

162. *Pascarella*, 135 Misc. 2d at 727, 516 N.Y.S.2d at 585.

163. *Pascarella*, 146 A.D.2d at 73, 538 N.Y.S.2d at 822.

164. *Id.* at 69, 538 N.Y.S.2d at 820 (quoting *Santangelo*, 71 N.Y.2d at 397-98, 521 N.E.2d at 772, 526 N.Y.S.2d at 814).

165. *Id.*

166. *Id.* at 70, 538 N.Y.S.2d at 821.

gers, and that this awareness precludes them from recovering from the public coffers for injuries sustained in the line of duty.

#### 4. *Erosion of the Doctrine*

*Furch v. General Electric Co.*<sup>167</sup> marked the beginning of what appeared to be an exception to the *Santangelo* Rule: the “separate and apart” theory.<sup>168</sup> In *Furch*, six firefighters were attempting to extinguish a fire in a state office building when the building’s electrical system malfunctioned.<sup>169</sup> When the fire broke out, large amounts of toxic substances were released and carried through the building by the ventilation system.<sup>170</sup> While extinguishing the fire and cleaning up the toxic substances, the plaintiff-firefighters inhaled the toxic fumes, sustaining injuries.<sup>171</sup> The firefighters sued the architect, engineer, and various contractors involved in the planning and construction of the building in common-law negligence, based on the defendants’ negligent installation and maintenance of the building’s electrical system.<sup>172</sup> The trial court denied the defendants’ motion to dismiss, and the defendants appealed.<sup>173</sup>

The Appellate Division, Third Department, held that the plaintiffs’ claim was “sufficiently separate and apart”<sup>174</sup> from the negligence that had occasioned the emergency for which the plaintiffs were summoned, and thus, the Firefighter’s Rule did not bar recovery. While the court eventually dismissed the plaintiffs’ complaint on another issue—that the defendants were not in control “*at the time of the injury*”<sup>175</sup> as required by section 205-a<sup>176</sup>—the recognition by the court of a possible erosion of the Firefighter’s Rule stood out as a signal of a possible turn of events.

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167. 142 A.D.2d 8, 535 N.Y.S.2d 182 (3d Dep’t 1988).

168. *Id.* at 12, 535 N.Y.S.2d at 184.

169. *Id.* at 10, 535 N.Y.S.2d at 183.

170. *Id.*

171. *Id.*

172. *Id.* at 10-11, 535 N.Y.S.2d at 182-83.

173. *Id.* at 8, 535 N.Y.S.2d at 182.

174. *Id.* at 12, 535 N.Y.S.2d at 184.

175. *Id.* at 13, 535 N.Y.S.2d at 185.

176. N.Y. GEN. MUN. LAW § 205-a.

Similarly, the Appellate Division, Second Department, in *Starkey v. Trancamp Contracting Corp.*,<sup>177</sup> recognized the "separate and apart" exception<sup>178</sup> to the common-law barrier to recovery imposed by the Firefighter's Rule that had been alluded to in *Furch*, though it did not cite its sister court. The plaintiff in *Starkey* was a police officer who responded to a citizen's complaint about children playing around a demolition site.<sup>179</sup> In the course of investigating the complaint, Officer Starkey tripped over debris and was injured.<sup>180</sup> The officer brought an action in common-law negligence<sup>181</sup> against the City of New Rochelle and Trancamp Contracting Corporation for the negligent maintenance of a demolition site.<sup>182</sup>

The Westchester County Supreme Court granted the city's motion for summary judgment, but denied the contractor's similar motion.<sup>183</sup> While recognizing the broad common-law bar to actions under the *Santangelo* Rule, the appellate division found that the acts surrounding the injury and the act which caused the need for the officer's services were "sufficiently separate and apart from the negligent acts which allegedly caused his injuries,"<sup>184</sup> to render *Santangelo* inapplicable. The court further noted that in considering actions by police officers injured in the line of duty, "the determinative factor [is] the degree of separation between the negligent act directly causing the injury and the act which occasioned the police officer's services."<sup>185</sup>

The Fourth Department also recognized the "separate and apart" exception to the Firefighter's Rule in *Guadagno v. Baltimore & Ohio R.R.*<sup>186</sup> There, the plaintiff-police officer was su-

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177. 152 A.D.2d 358, 548 N.Y.S.2d 722 (2d Dep't 1989).

178. *Id.*

179. *Id.* at 359, 548 N.Y.S.2d at 723.

180. *Id.* at 360, 548 N.Y.S.2d at 723.

181. The plaintiff in *Starkey* presumably could not bring an action under General Municipal Law § 205-e because the statute did not take effect until July 12, 1989. N.Y. GEN. MUN. LAW § 205-e (McKinney Supp. 1995). See *infra* part II.B.5 for a discussion of General Municipal Law § 205-e.

182. *Starkey*, 152 A.D.2d at 359, 548 N.Y.S.2d at 722.

183. *Id.* at 360, 548 N.Y.S.2d at 723. The supreme court also dismissed the contractor's cross-claim against the city based on the city's affirmative defense under the Workers' Compensation Law. *Id.*

184. *Id.* at 363, 548 N.Y.S.2d at 725.

185. *Id.* at 361, 548 N.Y.S.2d at 724.

186. 155 A.D.2d 981, 548 N.Y.S.2d 966 (4th Dep't 1989).

pervising the excavation of a derailed train when the train car toppled over and released methyl chloride gas, which caused the officer's injuries.<sup>187</sup>

The officer sued the railroad company, claiming that it had failed to properly warn the officers during the excavation attempt that the train contained toxic chemicals.<sup>188</sup> The defendants moved for summary judgment under *Santangelo*, but the supreme court denied the motion.<sup>189</sup> The appellate division affirmed, stating:

While *Santangelo* . . . bars a claim for negligence in causing the derailment, it does not preclude a claim for negligently failing to warn plaintiff of the hazard . . . . With respect to the hazard caused by dropping the car, the Fireman's Rule is inapplicable because that alleged negligence *was not the reason plaintiff was on the scene*.<sup>190</sup>

The First Department finally joined its sister courts in adopting the "separate and apart" exception<sup>191</sup> to *Santangelo* in *Sharkey v. Mitchell's Newspaper Delivery, Inc.*<sup>192</sup> The plaintiff's decedent, a New York City police officer, was directing traffic at the scene of an accident when he was struck and killed by a truck owned by the defendant newspaper company.<sup>193</sup> The administratrix of Officer Sharkey's estate sued the newspaper company and the driver of the truck.<sup>194</sup>

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187. *Id.* at 981, 548 N.Y.S.2d at 966.

188. *Id.* at 981, 548 N.Y.S.2d at 967. Officer Guadagno also sued L.C.P. Chemicals & Plastics and its subsidiary corporation, L.C.P. Chemicals. The defendants then impleaded the Town of Hamburg, New York, as a third party defendant. *Guadagno v. Baltimore & Ohio R.R.*, 142 Misc. 2d 712, 712, 538 N.Y.S.2d 386, 386 (Sup. Ct. Erie County 1988).

189. *Guadagno*, 142 Misc. 2d at 714, 538 N.Y.S.2d at 387.

190. 155 A.D.2d at 981, 548 N.Y.S.2d at 967 (emphasis added). After Officer Guadagno refused to stipulate that his injuries resulted from exposure only after the train had tipped over, the trial court precluded all parties from submitting proof that the officer's injuries resulted from exposure to methyl chloride during the evacuation. *Id.* The Appellate Division reversed that order, finding that the defendants' potential liability for failing to warn the officer "extends to the evacuation phase as well as the later phase when the tank car fell." *Id.* at 981-82, 548 N.Y.S.2d at 967.

191. See *infra* part III.C.1 for the New York Court of Appeals' discussion of the viability of the "separate and apart" exception.

192. 165 A.D.2d 664, 560 N.Y.S.2d 140 (1st Dep't 1990).

193. *Id.* at 664, 560 N.Y.S.2d at 140.

194. *Id.*

The defendants moved for summary judgment under *Santangelo*,<sup>195</sup> claiming that the Firefighter's Rule bars "recovery by uniformed officers injured while performing a function within the scope of their duties."<sup>196</sup> The trial court denied the motion, and the appellate division affirmed, stating that "since [the defendant] was not involved in the accident which created the need for the presence of decedent in the first instance and since [the] defendant's negligence was separate and apart from the act which occasioned the services of decedent as a police officer, this action [was] not governed by [*Santangelo*] . . . ."<sup>197</sup>

By 1990, all four departments of the appellate division recognized the apparent "separate and apart" exception to *Santangelo*.<sup>198</sup> In *Cooper*, however, the New York Court of Appeals explicitly rejected the exception.<sup>199</sup>

##### 5. *Statutory Restrictions on the Firefighter's Rule as Applied to Police Officers*

In 1989, the New York Legislature finally extended to police officers the statutory remedy already available to firefighters by enacting General Municipal Law section 205-e.<sup>200</sup> Subsection 1 of the statute provides, in relevant part:

[I]n the event any accident, causing injury, death or a disease which results in death, occurs directly or indirectly as a result of any neglect, omission, willful or culpable negligence of any person or persons in failing to comply with the requirements of any of the statutes, ordinances . . . and requirements of the federal, state, county, village, town or city governments . . . , the person or persons guilty of said neglect, omission, willful or culpable negligence at the time of such injury or death shall be liable to pay any officer, member, agent or employee of any police department in-

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195. See *supra* notes 134-49 and accompanying text.

196. *Sharkey*, 165 A.D.2d at 664, 560 N.Y.S.2d at 140.

197. *Id.* at 664, 560 N.Y.S.2d at 141.

198. See, e.g., *Sharkey v. Mitchell's Newspaper Delivery, Inc.*, 165 A.D.2d 664, 560 N.Y.S.2d 140 (1st Dep't 1990); *Starkey v. Trancamp Contracting Corp.*, 152 A.D.2d 358, 548 N.Y.S.2d 722 (2d Dep't 1989); *Furch v. General Electric Co.*, 142 A.D.2d 8, 535 N.Y.S.2d 182 (3d Dep't 1988); *Guadagno v. Baltimore & Ohio R.R.*, 155 A.D.2d 981, 548 N.Y.S.2d 966 (4th Dep't 1989).

199. See *infra* part III.C.1.

200. N.Y. GEN. MUN. LAW § 205-e (McKinney Supp. 1995).

jured, or whose life may be lost while in the discharge or performance . . . of any duty . . . a sum of money . . . .<sup>201</sup>

The legislative history of this statute indicated a desire for equality among professional municipal employees.

A substantial question of fairness is raised by the long term existence of a remedy for firefighters that negates the fireman's rule that is not enjoyed by police officers as well. The existing law provides firefighters with a right of action where death or injury is attributable to an "accident" encountered in the line of duty. Police officers are no better trained than are firefighters in avoiding accidents.<sup>202</sup>

Section 205-e has been amended three times since its enactment. Since the original version of the statute had only prospective effect,<sup>203</sup> the first amendment, in 1990, made the provision retroactive, reviving all causes of action which were viable in 1987, provided that an action was commenced before June 30, 1991.<sup>204</sup>

The second amendment, enacted in 1992, broadened the scope of the statute by inserting the language "at any time or place" into the body of subsection one.<sup>205</sup> This amendment resulted from the New York Legislature's displeasure with the

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201. N.Y. GEN. MUN. LAW § 205-e (McKinney Supp. 1995). While the texts of sections 205-a and 205-e are virtually identical, the Committee on Pattern Jury Instructions Association of Supreme Court Justices points out an important difference in the two statutory sections: "unlike General Municipal Law § 205-a, § 205-e does not 'expand or restrict any right afforded to or any limitation imposed' by virtue of the Workers' Compensation Law." 1 LEON D. LAZER ET AL., NEW YORK PATTERN JURY INSTRUCTIONS-CIVIL 96 (2d ed. Supp. 1995).

202. Memorandum of State Executive Department, *reprinted in* [1989] N.Y. Laws 2141.

203. The original version of § 205-e simply stated: "This act shall take effect immediately." See Act of July 22, 1990, ch. 762, [1990] N.Y. Laws 1552.

204. The relevant portion of the statute after the 1990 amendment stated:

[N]otwithstanding any other provision of law . . . every cause of action for the personal injury or wrongful death of a police officer which was pending on or after January 1, 1987, or which was dismissed on or after January 1, 1987 . . . , or which would have been actionable on or after January 1, 1987 had this section been effective *is hereby revived* . . . .

Act of July 22, 1990, ch. 762, [1990] N.Y. Laws 1551-52 (emphasis added). This amendment became effective on July 22, 1990. *Id.*

205. Act of July 17, 1992, ch. 474, [1992] N.Y. Laws 1325. This amendment became effective on July 17, 1992. *Id.*

way courts were interpreting section 205-e.<sup>206</sup> The Senate commented on the purpose of the amendment:

A problem has arisen with respect to the statute. Some appellate courts and lower courts of this State have held . . . that [section 205-e] allows a police officer to recover only when he or she is injured or killed by reason of the violation of some statute, regulation, rule or code pertaining to the safe maintenance and control of premises. . . . By limiting the application of Section 205-e to premises-related claims, many injured police officers have been deprived of any meaningful right of recovery under this statute.<sup>207</sup>

The Senate committee continued, noting that “[u]nlike firefighters, however, police officers sustain performance-related injuries in a variety of non-property related contexts.”<sup>208</sup> The official comment of the legislature in enacting the 1992 amendment states:

The legislature concludes that the duties of our state’s police officers are performed in a variety of contexts and that the liability imposed pursuant to [this section] should not be limited to violations pertaining to the safe maintenance and control of premises. Since our police officers are required to confront dangerous conditions under many and varied circumstances, there is a need to

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206. See generally Memorandum from Senator Dean G. Skelos and Assemblyman Eric Vitaliano in support of N.Y.S. 8474, 215th Sess. (1992) (on file with *Pace Law Review*).

207. Memorandum from Senator Dean G. Skelos and Assemblyman Eric Vitaliano in support of N.Y.S. 8474, 215th Sess. (1992) (on file with *Pace Law Review*).

208. *Id.* In a Memorandum in Support of the proposed amendment, Brian Shoot, a member of the Committee on State Legislation of the New York State Trial Lawyer’s Association, stated: “The problem is that while the statutory provisions [of § 205-e] explicitly apply to violation[s] of ‘any’ regulation, ordinance, etc. which causes injury, the courts have nonetheless generally limited recovery to violation[s] of mandatory provisions pertaining to maintenance of real property.” Memorandum of Brian Shoot in support of N.Y.S. 8474, N.Y.A. 11632, 215th Sess. (1992) (on file with *Pace Law Review*).

Mr. Shoot cited the appellate division opinion of *Cooper v. City of New York*, 182 A.D.2d 350, 582 N.Y.S.2d 394 (1st Dep’t 1992), as well as *Sciarrotta v. Valenzuela*, 182 A.D.2d 443, 581 N.Y.S.2d 351 (1st Dep’t 1992); *Sutherland v. Hallen Constr. Co.*, 183 A.D.2d 887, 585 N.Y.S.2d 55 (2d Dep’t 1992); and *Austin v. City of Buffalo*, 179 A.D.2d 1075, 580 N.Y.S.2d 604 (4th Dep’t 1992) as examples of court decisions which had so limited § 205-e. Memorandum of Brian Shoot in support of N.Y.S. 8474, N.Y.A. 11632, 215th Sess. (1992) (on file with *Pace Law Review*).

ensure that a right of action exists *regardless of where the violation causing injury or death occurs.*<sup>209</sup>

Finally, in August 1994, the Legislature further expanded the retroactive effect of section 205-e, extending the time period in which officers had to bring an action to 1995.<sup>210</sup>

### III. *Cooper v. City of New York*

#### A. *Facts*

Gertrude Jones Cooper was a New York City police officer assigned to ride as a passenger-recorder<sup>211</sup> in a police car driven by another officer, Steven Bakal.<sup>212</sup> At approximately 9:00 p.m. on December 14, 1984, the officers received a top-priority "1013" call over the police radio, which required an immediate response from the officers<sup>213</sup> because it indicated that another officer was in need of assistance.<sup>214</sup> Bakal and Cooper proceeded at approximately forty miles per hour with the car's emergency lights flashing and siren sounding.<sup>215</sup> Officer Cooper was injured when the police car, through the negligent driving of Officer Bakal, crashed into the rear end of defendant Millicent Hall's car, which was stopped at a red light.<sup>216</sup> In the accident, Officer Cooper "slammed into the dashboard,"<sup>217</sup> suffering inju-

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209. Act of July 17, 1992, ch. 474, [1992] N.Y. Laws 1325 (emphasis added).

210. Act of Aug., 2, 1994, ch. 664, [1994] N.Y. Laws 1636.

211. Officer Cooper testified that a "recorder" officer "sits on the passenger side of the police car[,] answers the radio, [and] under normal circumstances fills out reports." Record on Appeal at 460, *Cooper v. City of New York*, 81 N.Y.2d 584, 619 N.E.2d 369, 601 N.Y.S.2d 432 (1993) (No. 15024/85) [hereinafter Record]. See also *supra* note 14 for a discussion of the recording officer's functions.

212. *Cooper v. City of New York*, 81 N.Y.2d 584, 587, 619 N.E.2d 369, 370, 601 N.Y.S.2d 432, 433 (1993).

213. *Id.*

214. Record at 465.

215. *Cooper*, 81 N.Y.2d at 587, 619 N.E.2d at 370, 601 N.Y.S.2d at 433.

216. *Id.* The opinion states that there was a conflict in the proof as to whether Hall had changed lanes immediately prior to the accident. *Id.* Hall testified at trial that she had been traveling in the right-hand lane of traffic for at least one block before the scene of the accident, and that she had not switched lanes at any point prior thereto. Record at 103. However, Officer Bakal testified that when he first observed Hall's vehicle, it was in the left-hand lane, *id.* at 214, but that Hall had moved over to the right-hand lane shortly before the accident. *Id.* at 216. Hall also testified at trial that she had been stopped at the red light with her foot on the brake for approximately sixty seconds before the accident occurred. *Id.* at 105.

217. *Id.* at 458.



ries primarily to her knees, which left her in considerable pain and unable to walk without use of a cane and a knee brace.<sup>218</sup>

### B. *Procedural History*

Officer Cooper sued New York City, Officer Bakal, and Hall, the driver of the other car, in common-law negligence.<sup>219</sup> Prior to trial, the action against Officer Bakal was dropped by stipulation.<sup>220</sup> At the close of the evidence, the city moved to dismiss Cooper's complaint, citing *Santangelo* where the Firefighter's Rule was extended to police officers.<sup>221</sup> The Supreme Court denied the motion and submitted the case to a jury, which concluded that Officer Bakal's negligence was the sole cause of the accident and awarded Officer Cooper \$4,820,500.<sup>222</sup>

The city made a post-trial motion to dismiss under *Santangelo*, as well as a motion to set aside the verdict.<sup>223</sup> The court denied both motions, but granted the city's alternative motion to reduce the verdict and, accordingly, entered judgment for a reduced sum.<sup>224</sup> The city appealed the verdict and Cooper cross-appealed on the issue of damages.<sup>225</sup> The Appellate Division, First Department, unanimously reversed the judgment of the supreme court and dismissed Officer Cooper's complaint against the city.<sup>226</sup> The Court of Appeals granted Officer Cooper leave to appeal to address her contention that the "separate and

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218. *Id.* at 468, 476, 484. Officer Cooper testified that her injuries progressively worsened after the accident, causing her knees to buckle under her. *Id.* at 479. Eventually, arthroscopic surgery to her right knee was required. *Id.* at 479.

Officer Cooper was reassigned to desk duties following the accident. *Id.* at 473. She was transferred several times and eventually discharged from the New York City Police Department in 1987. *Id.* at 482. When the accident occurred in 1984, Officer Cooper was 23 years old. *Id.* at 462.

219. *Id.* at 16a-20a.

220. *Id.* at 2.

221. *Cooper*, 81 N.Y.2d at 587, 619 N.E.2d at 370, 601 N.Y.S.2d at 433. See *supra* notes 134-49 and accompanying text for a discussion of *Santangelo*.

222. *Cooper v. City of New York*, 182 A.D.2d 350, 350, 582 N.Y.S.2d 394, 394 (1st Dep't 1992).

223. *Cooper*, 81 N.Y.2d at 588, 619 N.E.2d at 370, 601 N.Y.S.2d at 433.

224. *Id.* The supreme court set aside the verdict and ordered a new trial unless Officer Cooper stipulated to a reduction in the verdict. Record at 42a. She so stipulated, and judgment was entered for \$819,766. *Cooper*, 182 A.D.2d at 350, 582 N.Y.S.2d at 394. See also Record at 42a.

225. *Cooper*, 81 N.Y.2d at 588, 619 N.E.2d at 370, 601 N.Y.S.2d at 433.

226. *Id.* Although not pleaded in the complaint or raised at trial, the appellate division considered and rejected plaintiff's unpreserved, alternate claim of lia-

apart" exception<sup>227</sup> recognized by various departments of the appellate division rendered *Santangelo* inapplicable.<sup>228</sup>

### C. *The Majority Opinion*

#### 1. *"Separate and Apart"*

Before addressing Officer Cooper's assertion that the Court of Appeals should adopt the "separate and apart" theory recognized by the appellate divisions,<sup>229</sup> the court reviewed its prior holding in *Santangelo*.<sup>230</sup> It noted that the court in *Santangelo*, which applied the Firefighter's Rule to police officers, based its decision on the theory that police officers, like firefighters, assume the risk of injuries in carrying out the duties of their profession.<sup>231</sup> The court stated that the "policy considerations" underlying the Firefighter's Rule "are equally relevant to line-of-duty injuries sustained by police officers."<sup>232</sup> The court then concluded that Officer Cooper, like Officer Santangelo, "was performing a function endowed with the special risks inherent in the duties of a police officer."<sup>233</sup>

Cooper urged the court to adopt the test articulated in *Starkey v. Trancamp Construction Corp.*,<sup>234</sup> that "the application of *Santangelo* should depend on 'the degree of separation between the negligent act directly causing the injury and the act which occasioned the police officer's services.'"<sup>235</sup> In response, the

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bility under General Municipal Law § 205-e. *Id.* The record is unclear as to why Officer Cooper did not plead a cause of action under the statute.

227. See *infra* part III.C.1.

228. *Cooper*, 81 N.Y.2d at 588, 619 N.E.2d at 370, 601 N.Y.S.2d at 433. See *supra* part II.B.4 for a discussion of this exception. Cooper relied on the following cases in support of her "separate and apart" argument: *Janeczko v. Duhl*, 166 A.D.2d 257, 560 N.Y.S.2d 633 (1st Dep't 1990); *Sharkey v. Mitchell's Newspaper Delivery, Inc.*, 165 A.D.2d 664, 560 N.Y.S.2d 140 (1st Dep't 1990); *Starkey v. Trancamp Contracting Corp.*, 152 A.D.2d 358, 548 N.Y.S.2d 722 (2d Dep't 1989). *Cooper*, 81 N.Y.2d at 589, 619 N.E.2d at 371, 601 N.Y.S.2d at 434.

229. See *supra* part II.B.4.

230. *Cooper*, 81 N.Y.2d at 588-89, 619 N.E.2d at 370-71, 601 N.Y.S.2d at 433-34.

231. *Id.* at 589, 619 N.E.2d at 371, 601 N.Y.S.2d at 433-34.

232. *Id.* at 589, 619 N.E.2d at 371, 601 N.Y.S.2d at 434.

233. *Id.*

234. *Starkey*, 152 A.D.2d 358, 548 N.Y.S.2d 722. See *supra* notes 177-85 and accompanying text.

235. *Cooper*, 81 N.Y.2d at 590, 619 N.E.2d at 371, 601 N.Y.S.2d at 434 (alteration in original) (quoting *Starkey*, 152 A.D.2d at 361, 548 N.Y.S.2d at 724).

court stated that "[o]ur Court has never adopted the proposed 'separate and distinct' exception and, indeed, to do so would be inconsistent with the rationale of *Santangelo*."<sup>236</sup>

Instead, the court pointed to the First Department's decision in *Pascarella v. City of New York*,<sup>237</sup> where the court stated that the "determinative factor" was whether the injury to the officer was related to "particular dangers which police officers are expected to assume as part of their duties."<sup>238</sup> The majority also adopted the *Pascarella* court's statement that " 'individuals who elect to join the uniformed services do so with knowledge of the dangers attendant upon those occupations and the distinct possibility that they might be hurt in the course of their employment.' "<sup>239</sup>

The court in *Cooper* concluded that "there is no question that plaintiff's injuries were related to a particular risk that she had assumed as part of her duties. Part of that risk was the possibility of injury while rushing to the scene of an emergency."<sup>240</sup> The majority emphatically rejected the "separate and apart" test, concluding: "That no connection can be shown between Officer Bakal's negligence and the unknown incident that gave rise to the emergency call is of no moment. What matters is the connection between plaintiff's injury and the special hazard that plaintiff assumed as part of her police duties."<sup>241</sup>

## 2. *The Fellow Servant Rule*

The court then turned to Officer Cooper's alternative contention that the *Santangelo* rule should not apply because her injuries were the result of the negligence of a fellow officer.<sup>242</sup>

236. *Id.*

237. 146 A.D.2d 61, 538 N.Y.S.2d 815 (1st Dep't 1989). See *supra* notes 150-66 and accompanying text.

238. *Cooper*, 81 N.Y.2d at 590, 619 N.E.2d at 371, 601 N.Y.S.2d at 434 (citing *Pascarella*, 146 A.D.2d at 68-69, 538 N.Y.S.2d at 820).

239. *Id.* at 590, 619 N.E.2d at 372, 601 N.Y.S.2d at 435 (quoting *Pascarella*, 146 A.D.2d at 69, 538 N.Y.S.2d at 820).

240. *Id.*

241. *Id.* at 590-91, 619 N.E.2d at 372, 601 N.Y.S.2d at 435.

242. *Id.* at 591, 619 N.E.2d at 372, 601 N.Y.S.2d at 435. *Cooper* relied heavily on *Poniatowski* in her argument before the Court of Appeals. Her brief, states, in part:

In *Poniatowski*, . . . the plaintiff passenger-police officer was a recorder in a police vehicle operated by a fellow officer which collided with another vehicle

The majority framed the issue as follows: "In effect, [Cooper] argues that all fellow-servant claims of negligence against the City are actionable because we have abrogated the common-law fellow-servant doctrine [in *Buckley v. City of New York*] . . . ." <sup>243</sup> The court quickly dismissed that contention by stating: "Nothing in our *Santangelo* decision supports that argument. . . . We thus reject the broad 'fellow-servant exception' to *Santangelo* urged by plaintiff and apparently the dissent." <sup>244</sup>

Moreover, the court rejected a distinction between injuries a police officer sustains as the result of negligence of a fellow officer versus those resulting from the negligence of a civilian. <sup>245</sup> The court reasoned that the "policy reasons" <sup>246</sup> supporting the common-law Firefighter's Rule "apply equally whether these hazards relate to negligence of third parties or fellow servants." <sup>247</sup>

### 3. A "Wide Range of Claims" <sup>248</sup>

The majority attempted to stress that police officers and firefighters would not be left completely without a potential remedy from the city for injuries sustained in the line of duty at the hand of another officer, stating:

We emphasize, however, that the *Santangelo* Rule does not preclude *all causes of action* against a municipality for injuries resulting from a fellow police officer's negligence . . . . Obviously, injuries could be sustained by police officers as a result of negli-

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while in pursuit of a third vehicle. In reinstating a judgment against the City, *this Court ruled that the fellow servant doctrine was inapplicable, and cited numerous cases where judgments in favor of policemen or firemen were upheld who were injured in municipally owned vehicles as a result of the negligence of fellow officers.*

Brief for Plaintiff-Appellant at 25, *Cooper v. City of New York*, 81 N.Y.2d 584, 619 N.E.2d 369, 601 N.Y.S.2d 432 (1993) (No. 15024/85).

243. *Cooper*, 81 N.Y.2d at 591, 619 N.E.2d at 372, 601 N.Y.S.2d at 435 (citations omitted).

244. *Id.*

245. *Id.*

246. *Id.* The "policy reasons" cited by the court were "that police officers and firefighters are trained and compensated to encounter the special hazards inherent in their work and assumed as part of their employment . . . ." *Id.*

247. *Id.*

248. *Id.* at 592, 619 N.E.2d at 373, 601 N.Y.S.2d at 436.

gence of their fellow officers during the performance of their work which are wholly unrelated to the assumed risks of police duty.<sup>249</sup>

The court also stated: "[T]he *Santangelo* Rule bars *only* those claims for injuries caused by the negligence of a fellow police officer when the injury is related to the dangers that are associated with police functions . . . ."<sup>250</sup> The court cited injuries "resulting from the bomb explosion"<sup>251</sup> and from "the improper apprehension of a suspect"<sup>252</sup> as examples of injuries which would be outside the scope of *Santangelo*. The court stated that neither *Santangelo* nor the court's decision in the instant case would bar the "wide range of claims" where the risk factors "on which the *Santangelo* decision is predicated are not present."<sup>253</sup>

Finally, the court stated that its decision was not inconsistent with its prior holding in *Kenavan v. City of New York*,<sup>254</sup> which limited the scope of General Municipal Law section 205-a<sup>255</sup> to "property owners and the maintenance of premises in a safe condition for firefighters."<sup>256</sup> The court distinguished the two cases, stating that in *Kenavan*, the plaintiff's complaint was dismissed "for a different and unrelated reason; i.e., on the basis of the general governmental immunity rule protecting a municipality from liability for 'judgmental errors in the exercise of its governmental functions.'"<sup>257</sup>

#### D. *The Dissent*

Judge Titone, the sole dissenter in *Cooper*, questioned the validity of applying the Firefighter's Rule in cases where a pro-

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249. *Id.* at 591-92, 619 N.E.2d at 372-73, 601 N.Y.S.2d at 435-36.

250. *Id.* at 591, 619 N.E.2d at 372, 601 N.Y.S.2d at 435.

251. *Id.* at 591, 619 N.E.2d at 372, 601 N.Y.S.2d at 435 (citing *Pascarella*, 146 A.D.2d 61, 538 N.Y.S.2d 815). See *supra* notes 150-66 and accompanying text.

252. *Cooper*, 81 N.Y.2d at 591-92, 619 N.E.2d at 372, 601 N.Y.S.2d at 435 (citing *Buckley v. City of New York*, 56 N.Y.2d 300, 437 N.E.2d 1088, 452 N.Y.S.2d 331 (1982)). See *supra* part II.A.2.

253. *Cooper*, 81 N.Y.2d at 592, 619 N.E.2d at 373, 601 N.Y.S.2d at 436.

254. 70 N.Y.2d 558, 517 N.E.2d 872, 523 N.Y.S.2d 60. See *supra* notes 115-33 and accompanying text.

255. N.Y. GEN. MUN. LAW § 205-a (McKinney 1986 & Supp. 1995). See *supra* notes 109-14 and accompanying text. This statute provided firefighters injured during the performance of their duties with a right of action against third parties whose negligence caused the fire. N.Y. GEN. MUN. LAW § 205-a.

256. *Kenavan*, 70 N.Y.2d at 566, 517 N.E.2d at 875, 523 N.Y.S.2d at 63.

257. *Cooper*, 81 N.Y.2d at 592, 619 N.E.2d at 373, 601 N.Y.S.2d at 436 (quoting *Kenavan*, 70 N.Y.2d at 569, 517 N.E.2d at 876, 523 N.Y.S.2d at 64).

fessional rescuer is injured by the negligence of a fellow municipal employee.<sup>258</sup> Judge Titone argued that Officer Cooper's claim "has been permitted and is directly governed by an independent line of cases,"<sup>259</sup> and pointed out that the Firefighter's Rule had never been applied in New York to prevent recovery for line-of-duty injuries which are the result of the negligence of a fellow servant.<sup>260</sup>

Judge Titone argued that to disallow recovery for an injured employee would create an anomaly, since, if the injured person were a third party instead of a fellow employee of the tortfeasor, recovery would be allowed.<sup>261</sup> Judge Titone stated: "[In *Buckley*,] we reasoned that it was illogical to permit a third party, but not an employee, to recover from the employer for the negligence of a co-worker where 'in both instances the employer might have avoided the injury by selection of more careful employees.'"<sup>262</sup> Judge Titone continued: "Indeed, the *Buckley* Court acknowledged that 'the class of persons most frequently endangered by the negligence of an employee—his fellow workers—should not, without compelling reason, be denied a remedy accorded to the general public.'"<sup>263</sup> Judge Titone rebutted the majority's declaration that its decision was consistent with *Kenavan* by showing that the holdings in prior Court of Appeals cases would have been unnecessary if the Firefighter's Rule precludes recovery in *all* instances:

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258. 81 N.Y.2d at 592, 619 N.E.2d at 373, 601 N.Y.S.2d at 436 (Titone, J., dissenting). Judge Titone also dissented in *Kenavan*, 70 N.Y.2d at 570, 517 N.E.2d at 877, 523 N.Y.S.2d at 65 (Titone, J., dissenting), wherein he recognized the validity of the "broad legal proposition" of the Firefighter's Rule, but suggested that courts should examine the negligent act of the fellow servant and determine whether it was "a pure error in judgment and [thus] immune from liability or . . . outside the realm of accepted practice and therefore actionable." *Id.* at 571, 517 N.E.2d at 878, 523 N.Y.S.2d at 66.

259. *Cooper*, 81 N.Y.2d at 592, 619 N.E.2d at 373, 601 N.Y.S.2d at 436 (Titone, J., dissenting). Judge Titone cited *Kenavan*, 70 N.Y.2d at 558, 517 N.E.2d at 872, 523 N.Y.S.2d at 60, and *McCormack v. City of New York*, 80 N.Y.2d 808, 600 N.E.2d 211, 587 N.Y.S.2d 580 (1992), as examples of this independent line of cases. *Cooper*, 81 N.Y.2d at 592-93, 619 N.E.2d at 373, 601 N.Y.S.2d at 436 (Titone, J., dissenting).

260. *Cooper*, 81 N.Y.2d at 592, 619 N.E.2d at 373, 601 N.Y.S.2d at 436.

261. *Id.* at 594-95, 619 N.E.2d at 374-75, 601 N.Y.S.2d at 437-38.

262. *Id.* (quoting *Buckley*, 56 N.Y.2d at 303, 437 N.E.2d at 1089, 452 N.Y.S.2d at 332).

263. *Id.* at 595, 619 N.E.2d at 375, 601 N.Y.S.2d at 438 (quoting *Buckley*, 56 N.Y.2d at 303, 437 N.E.2d at 1089, 452 N.Y.S.2d at 332).

Indeed, if the 'firefighter rule' bars recovery for all line-of-duty injuries regardless of the source of the negligence, as the majority holds, application of the governmental immunity doctrine to bar a suit where the colleague's official action involves the exercise of expert judgment in policy matters would be unnecessary.<sup>264</sup>

Judge Titone also questioned the majority's assertion that *Pascarella* was decided by the application of the Firefighter's Rule. *Pascarella*, he stated, concerned "two separate aspects of the governmental immunity doctrine; the 'special duty' rule and the 'immunity for discretionary decisions'<sup>265</sup> rule."<sup>266</sup> Moreover, Judge Titone observed, the court in *Pascarella* specifically recognized "that a municipality could be responsible under the doctrine of respondeat superior 'for acts committed by its employees in the scope of their employment.'<sup>267</sup>

Judge Titone rebuffed the majority's suggestion that the Firefighter's Rule "does not preclude *all causes of action* against a municipality for injuries resulting from a fellow police officers' negligence,' but only those in which the injuries are 'related to the dangers that are associated with police functions.'<sup>268</sup> The majority, he stated, "fails to explain what 'obvious' category of cases would involve injuries during work performance which are 'wholly unrelated to the assumed risks of police duty.'<sup>269</sup> As Judge Titone pointed out, a municipality:

can only be held liable on respondeat superior theories for an employee's negligent conduct *that occurs during the scope of employment, i.e., during crime-fighting or firefighting*. Thus, despite the majority's protestation, it is hard to imagine any instance where

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264. *Id.* at 596, 619 N.E.2d at 376, 601 N.Y.S.2d at 439.

265. This doctrine holds that "when official action involves the exercise of discretion, the [municipal] officer is not liable for the injurious consequences of that action even if resulting from negligence or malice." *Tango v. Tulevech*, 61 N.Y.2d 34, 40, 459 N.E.2d 182, 185, 471 N.Y.S.2d 73, 76 (1983).

266. *Cooper*, 81 N.Y.2d at 594, 619 N.E.2d at 374, 601 N.Y.S.2d at 437 (Titone, J., dissenting).

267. *Id.* at 596, 619 N.E.2d at 375, 601 N.Y.S.2d at 438 (quoting *Pascarella*, 146 A.D.2d at 68, 538 N.Y.S.2d at 819).

268. *Id.* at 597, 619 N.E.2d at 376, 601 N.Y.S.2d at 439 (quoting majority opinion, *id.* at 591, 619 N.E.2d at 372, 601 N.Y.S.2d at 435).

269. *Id.* (quoting majority opinion, *id.* at 592, 619 N.E.2d at 372-73, 601 N.Y.S.2d at 436).

the majority's holding would not bar recovery for a fellow-servant's negligence.<sup>270</sup>

Noting that the New York Court of Appeals—the state's highest court—is at liberty to alter the common law at its choosing,<sup>271</sup> Judge Titone diverged from the majority on a public policy standpoint. He advocated a remedy for police officers who are injured in circumstances such as the one in *Cooper*, stating:

As between a negligent member of the general public and a trained police officer or firefighter, losses due to negligence at the scene of the emergency should be assumed by the trained expert. However, no similar policy consideration justifies application of [the Firefighter's] rule where the plaintiff and the tortfeasor are presumably equally trained, and where *the plaintiff*, a passenger in a negligently driven police car, *had no more opportunity than a member of the general public would have had to employ any special skills to avoid injury*.<sup>272</sup>

Judge Titone also differentiated between the risks associated with fighting fires or crime and the risks encountered when fellow employees are negligent.<sup>273</sup> He concluded that risks associated with the carelessness of co-workers should not be borne by the non-negligent employees, since they are not risks these professionals “expect to encounter in the ordinary course of their employment.”<sup>274</sup>

In the last segment of Judge Titone's dissent, he noted that the majority's holding is at odds with “a trend in other jurisdictions towards limiting application of the rule by creating exceptions for independent acts of negligence or willful and wanton conduct.”<sup>275</sup> Judge Titone concluded by stating that the majority's holding amounted to a revival of the Fellow Servant Rule

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270. *Cooper*, 81 N.Y.2d at 597, 619 N.E.2d at 376, 601 N.Y.S.2d at 439 (emphasis added).

271. *Id.*

272. *Id.* at 598, 619 N.E.2d at 376-77, 601 N.Y.S.2d at 439-40 (emphasis added).

273. *Id.* at 597, 619 N.E.2d at 376, 601 N.Y.S.2d at 439.

274. *Id.*

275. *Id.* at 598, 619 N.E.2d at 377, 601 N.Y.S.2d at 440. Judge Titone cited *Garcia v. City of South Tucson*, 640 P.2d 1117 (Ariz. Ct. App. 1982); *Rose v. City of Los Angeles*, 206 Cal. Rptr. 49 (Ct. App. 1984); *Winn v. Frasher*, 777 P.2d 722 (Idaho 1989); *Pottebaum v. Hinds*, 347 N.W.2d 642 (Iowa 1984); *Griffith v. Southland Corp.*, 617 A.2d 598 (Md. Ct. Spec. App. 1992); *Wagener v. Burmeister*, 858



as it pertains to firefighters and police officers which was abrogated in *Buckley*.<sup>276</sup>

#### IV. Analysis

*Cooper v. City of New York*<sup>277</sup> held that police officers, as professional rescuers, cannot recover from their municipal employers for injuries sustained in the line of duty. The majority of the Court of Appeals reached its decision based on a liberal interpretation of the rationale supporting the common-law Firefighter's Rule. This reasoning, however, is flawed in three respects.

First, the majority inappropriately looked exclusively to the Firefighter's Rule for support in denying Officer Cooper recovery. Since the facts of the case implicated both the Fellow Servant and the Firefighter's Rule, the court should have formulated its analysis with both doctrines in mind. Second, since the majority's decision has effectively resurrected the Fellow Servant Rule, it contradicts a trend in New York case law and statutory law granting recovery to municipal employees injured in the line of duty. Third, the majority's denial of recovery to Officer Cooper is premised on policy grounds which are inordinately harsh, and which contradict important public policies that the court recognized in *Buckley*.

##### A. *Revival of the Fellow Servant Rule*

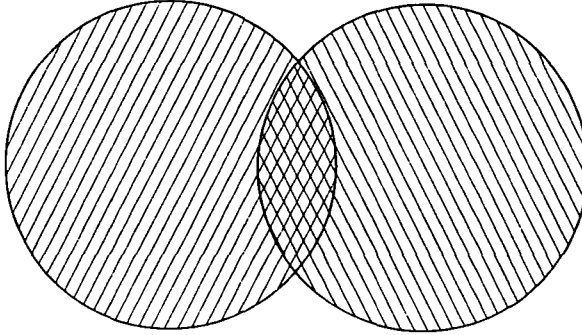
The majority of the New York Court of Appeals in *Cooper* placed far too much emphasis on the Firefighter's Rule in deciding the case. Standing alone, the *Cooper* decision amounts to a revival of the Fellow Servant Rule because it does not properly take into consideration the intersection of both the Fellow Servant Rule and the Firefighter's Rule under the facts of the case. The facts presented in *Cooper* do not fit neatly within either the Firefighter's Rule or the Fellow Servant Rule exclusively. The range of possible actionable injuries suffered by a police officer or firefighter in the line of duty may be summarized as follows:

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S.W.2d 865 (Mo. Ct. App. 1993); *Gould v. George Brox, Inc.*, 623 A.2d 1325 (N.H. 1993); *Mahoney v. Carus Chem. Co.*, 510 A.2d 4 (N.J. 1986).

276. *Cooper*, 81 N.Y.2d at 598, 619 N.E.2d at 377, 601 N.Y.S.2d at 440 (Titone, J., dissenting).

277. 81 N.Y.2d 584, 619 N.E.2d 369, 601 N.Y.S.2d 432 (1993).

Firefighter's RuleFellow Servant Rule

The left circle represents line-of-duty injuries suffered by police officers and firefighters as a result of another person's negligence. The right circle represents injuries suffered by employees at the hands of their co-workers. The shaded section represents professional rescuers such as Officer Poniatoski, Officer Buckley, and Officer Cooper: police officers and firefighters who are injured in the line of duty by other police officers and firefighters.

Because of the unique factual circumstances which give rise to the shaded portion of the chart, Judge Titone's observation that the Firefighter's Rule "has not previously been applied in New York to bar recovery for line-of-duty injuries occasioned by the plaintiff's fellow servant"<sup>278</sup> takes on tremendous significance. Injuries caused by a fellow worker have always been analyzed under the Fellow Servant Rule—an "independent line of cases"<sup>279</sup>—which ceased to be a part of New York's common law in 1982 with *Buckley v. City of New York*.<sup>280</sup> As Judge Titone stated in his dissent in *Cooper*: "The existence of this peculiarly applicable precedent renders the majority's extension of the 'firefighter rule' an unwarranted intrusion on settled principles

278. *Cooper*, 81 N.Y.2d at 593, 619 N.E.2d at 373, 601 N.Y.S.2d at 436 (Titone, J., dissenting).

279. *Id.* at 592-93, 619 N.E.2d at 373, 601 N.Y.S.2d at 436.

280. 56 N.Y.2d 300, 437 N.E.2d 1088, 452 N.Y.S.2d 331 (1982). *See supra* part II.A.2.

without compelling justification.”<sup>281</sup> Judge Titone also observed:

Significantly, both *Buckley* and its companion case . . . involved line-of-duty injuries sustained by members of the City’s uniformed services. Yet, the Court did not feel called upon to apply the “firefighter rule” as a bar to recovery even though that rule had been in existence for at least 14 years.<sup>282</sup>

This observation adds support to the conclusion that the Firefighter’s Rule was never intended to apply to injuries caused by a fellow employee and the Court of Appeals seems to have impliedly so held.

Although the Firefighter’s Rule and the Fellow Servant Rule are similar, in that they both work to preclude recovery at common law for injuries sustained in the course of employment, they are not identical. The Fellow Servant Rule contemplates a finite set of tortfeasors: the injured party’s fellow workers. The Firefighter’s Rule, however, anticipates a potentially infinite set of tortfeasors: any person, from a fellow employee to a third party who causes injury to a professional rescuer in the course of the rescuer’s employment. If the analysis ended there, the rationale for the Firefighter’s Rule would seem logical from a policy standpoint: fighting crimes or fires is dangerous, and if recovery were permitted every time a police officer or firefighter were injured, the cost of providing such services to the public would be astronomical. It can be argued that it is precisely because these occupations are so riddled with danger that legislative devices such as three-quarters disability and generous retirement packages have been instituted.<sup>283</sup> Indeed, the Court of Claims in *Santangelo* pointed out that allowing such actions would permit “double recovery from the public trough.”<sup>284</sup>

The Fellow Servant Rule, however, is based upon a different rationale than its common-law counterpart. As commentators have noted, the Fellow Servant Rule was a judicially-created device used to promote the growth of industry in the

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281. *Cooper*, 81 N.Y.2d at 594, 619 N.E.2d at 374, 601 N.Y.S.2d at 437 (Titone, J., dissenting).

282. *Id.* at 595, 619 N.E.2d at 375, 601 N.Y.S.2d at 438 (Titone, J., dissenting) (citations omitted).

283. See *supra* notes 93-95 and accompanying text.

284. *Santangelo*, 129 Misc. 2d at 907, 494 N.Y.S.2d at 54-55.

nineteenth century by protecting employers from costly litigation.<sup>285</sup> From a socio-economic standpoint, the policies underlying the development of the rule made sense, and, although the effects of the rule were harsh, it played an important role in the development of this country's industrial base during that period.

Notwithstanding its original logic, however, the rationale which was initially offered in support of the Fellow Servant Rule is simply not as compelling today as it was in the nineteenth century. During that period, the railroad industry was one of the largest in the United States. Railroads employed many thousands of workers to lay tracks literally from one end of the country to the other. With that infrastructure now in place, and absent any large-scale industry comparable to railroads since that time, the judicial shelter offered to employers in the form of the Fellow Servant Rule at the expense of injured workers is not as compelling or as necessary. In fact, it was precisely because of the rule's harsh effects and devastating consequences that the rule was severely criticized<sup>286</sup> and was eventually abrogated in *Buckley*. As the *Buckley* court acknowledged, "[t]he inherent injustice of a rule which denies a person, free of fault, the right to recover for injuries sustained through the negligence of another over whose conduct he has no control merely because of the fortuitous circumstance that the other is a fellow officer is manifest."<sup>287</sup>

Because of the unique facts presented in *Cooper*, as evidenced in the above diagram, it becomes clear that neither the Firefighter's Rule nor the Fellow Servant Rule sufficiently answers all legal questions entirely. Further, no case has ever considered the precise legal theories here presented: the intersection of both rules and their limitations and exclusions. Notably, the New York Court of Appeals considered the same factual but not legal circumstances of *Cooper* thirty years earlier in *Poniatowski v. City of New York*.<sup>288</sup> In *Poniatowski*, when con-

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285. See *supra* note 8.

286. See, e.g., *Lawrence v. City of New York*, 82 A.D.2d 485, 447 N.Y.S.2d 506 (2d Dep't 1981). See also *supra* note 32.

287. *Buckley*, 56 N.Y.2d at 304, 437 N.E.2d at 1089-90, 452 N.Y.S.2d at 333 (quoting *Poniatowski*, 14 N.Y.2d at 81, 198 N.E.2d at 238, 248 N.Y.S.2d at 851).

288. 14 N.Y.2d 76, 198 N.E.2d 237, 248 N.Y.S.2d 849 (1964). See *supra* notes 33-48 and accompanying text.

sidering the claim of a passenger-recorder police officer injured by the negligent driving of another officer, the Court of Appeals stated: "There is no reason for not extending the relief thus afforded private persons to the police driver's fellow officers as well."<sup>289</sup> The only relevant difference between *Poniatowski* and *Cooper* was that the plaintiff in *Poniatowski* sued under the General Municipal Law, whereas Officer Cooper sued in common-law negligence. However, the Court of Appeals seemed to downplay the significance of that distinction in its decision in *Poniatowski*, focusing more clearly on the public policy aspect of precluding recovery for the negligence of a fellow servant.<sup>290</sup>

The majority in *Cooper* barely acknowledged the precedential value of the *Poniatowski* decision or the strikingly similar factual circumstances of the two cases, referring to *Poniatowski* only by citation as an afterthought to its *Buckley* citations.<sup>291</sup> It would seem that if the majority intended to overrule, or even to restrict the application or significance of its prior decision in *Poniatowski*, it ought to have done more than simply cite the decision at the end of a sentence. Absent any explanation from the judges themselves, one cannot know why the *Cooper* court did not explore *Poniatowski's* effect more fully. In any event, after *Buckley*, the Fellow Servant Rule's barrier to recovery seemed conclusively eliminated in New York and the pathway to recovery seemed to be clear for injured police officers and firefighters. No caveat was announced in *Buckley* that the injured officer might have been denied recovery based on the Fellow Servant Rule. The majority in *Cooper*, however, chose to reinstate the barrier, as Judge Titone stated, "for reasons which are not apparent."<sup>292</sup> Thus, the Fellow Servant Rule has effectively been revived by the decision in *Cooper*,<sup>293</sup> at least as the rule applies to police officers and firefighters. With it, the inequity and devastating consequences of the Fellow Servant Rule are similarly revived.

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289. 14 N.Y.2d at 80, 198 N.E.2d at 238, 248 N.Y.S.2d at 852.

290. See *supra* text accompanying note 48.

291. *Cooper*, 81 N.Y.2d at 591, 619 N.E.2d at 371, 601 N.Y.S.2d at 435.

292. *Id.* at 594, 619 N.E.2d at 374, 601 N.Y.S.2d at 437 (Titone, J., dissenting).

293. *Id.* at 598, 619 N.E.2d at 377, 601 N.Y.S.2d at 440.

### B. *Contradicting the Trend*

The second reason the majority's decision in *Cooper* is improper and somewhat alarming is that it is counter to a distinct trend in New York case law and statutory law to grant recovery to professional rescuers for line-of-duty injuries.

The preclusion of recovery by a police officer for injuries caused by a fellow officer is illogical when one examines the statutory remedies granted to police officers by the New York State Legislature for recovery against third parties.<sup>294</sup> Since the legislature, in an attempt to minimize the effects of the Firefighter's Rule,<sup>295</sup> has already determined that professional rescuers should be permitted to recover from a potentially infinite set of tortfeasors, it contradicts reason that the majority in *Cooper* would not allow the same opportunity for recovery from a finite set of highly trained professionals—the injured officer's fellow employees.

While recovery was once precluded by both the common-law Fellow Servant Rule and Firefighter's Rule, those days have long since passed. With the complete abrogation of the Fellow Servant Rule, and the "chipping away" at the Firefighter's Rule by statute,<sup>296</sup> by statutory interpretation<sup>297</sup> and by judicial recognition that the rule is simply too severe, it is clear that a trend has emerged. New York courts and legislators have been unwilling to leave professional rescuers totally devoid of a remedy for injuries they may sustain in the line of duty. Thus, the majority's decision represents a clear reversal of the trend in New York State allowing recovery for on-the-job injuries.

Other states have also seen a limitation on the devastating effects of doctrines such as the Firefighter's Rule to their police officers and firefighters.<sup>298</sup> State courts and legislatures have

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294. See *supra* part II.B.5.

295. *Kenavan*, 70 N.Y.2d at 566, 517 N.E.2d at 874, 523 N.Y.S.2d at 62.

296. *E.g.*, N.Y. GEN. MUN. LAW §§ 205-a, 205-e (McKinney 1986 & Supp. 1995).

297. See, *e.g.*, *Kenavan v. City of New York*, 70 N.Y.2d 558, 517 N.E.2d 872, 523 N.Y.S.2d 60 (1987).

298. See, *e.g.*, *Garcia v. City of South Tucson*, 640 P.2d 1117 (Ariz. Ct. App. 1982) (applying test akin to the "separate and apart" test); *Pottebaum v. Hinds*, 347 N.W.2d 642 (Iowa 1984) (attempting to limit scope of Firefighter's Rule in Iowa); *Christensen v. Murphy*, 678 P.2d 1210 (Or. 1984) (rejecting Firefighter's Rule completely in Oregon).

increased the statutory and common-law remedies available to such professional rescuers. In addition to the changes in the law regarding professional rescuers, the advent of workers' compensation laws<sup>299</sup> and judicial interpretations thereof indicates a desire to protect workers from the relative dangers in the workplace.<sup>300</sup> This broad recognition—both within New York State and without—of the increasing need to provide a remedy for professional rescuers injured in the line of duty demonstrates the contradictory nature of the *Cooper* decision from the current legal trend.

### C. *Sound Public Policy?*

Finally, from a public policy standpoint, the majority's position is also inappropriate. The Firefighter's Rule and Fellow Servant Rule traditionally precluded recovery by professional rescuers<sup>301</sup> for injuries sustained in the line of duty based primarily on the fact that such rescuers were held to have assumed the risks inherent in their professions.<sup>302</sup> Similarly, one of the policy reasons offered in support of the Firefighter's Rule is that police officers and firefighters "receive both training that enables them to minimize the dangers their occupation requires them to face, and compensation and special benefits to help assure that the public will bear the costs of injuries suffered by its protectors in the line of duty."<sup>303</sup> This reasoning may support the preclusion of recovery against third parties, but it does not rationally support preclusion of recovery against a municipality for the negligent acts of another officer. For while it may be true that these professionals assume some of the risks inherent in their careers, it cannot be said that they assume the risk of negligence of their fellow employees. Police officers and firefighters are not any more equipped to avoid the negligence of

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299. See *supra* note 73 and accompanying text.

300. *In re Johannesen*, 84 N.Y.2d 129, 136-39, 638 N.E.2d 981, 984-86, 615 N.Y.S.2d 336, 339-41 (1994) (broadly construing the term "accidental injury" under Workers' Compensation Law to allow recovery where plaintiff's asthmatic condition worsened due to prolonged exposure in workplace to secondhand smoke).

301. See discussion *supra* parts II.A and II.B.

302. See *supra* notes 25-26, 81-84 and accompanying text.

303. *Cooper*, 81 N.Y.2d at 590, 619 N.E.2d at 371-72, 601 N.Y.S.2d at 434-35 (citing *Santangelo*, 71 N.Y.2d at 397-98, 521 N.E.2d at 772, 526 N.Y.S.2d at 814).

those with whom they work than they are to avoid the negligent acts of third parties.<sup>304</sup>

The majority's holding in *Cooper* also creates a double standard for professional rescuers, based on whether the person causing injury is a fellow worker or a third party. Since both doctrines left firefighters and police officers without any remedy for line-of-duty injuries, regardless of how negligent or careless a third party might have been, the rules were thought by many courts to be too harsh.<sup>305</sup> Realizing the need for a remedy for firefighters, the New York State Legislature explicitly created one, in the form of General Municipal Law section 205-a.<sup>306</sup> In 1989, this statutorily-created remedy was extended to police officers as well.<sup>307</sup> Thus, professional rescuers are now left with a double standard. If their injuries are caused by the negligence of a property owner or other responsible party,<sup>308</sup> recovery is allowed under the statute. If, however, a police officer or firefighter is injured as a result of the negligent act of another municipal employee, recovery is barred under *Cooper*.

All four departments of the appellate division attempted to reduce the impact of this inequity by creating an exception to the Firefighter's Rule: the "separate and apart" exception.<sup>309</sup> This offered professional rescuers some chance of recovery for line-of-duty injuries. If the negligence that caused their injuries was sufficiently "separate and apart" from the act which occasioned the need for the police officer or firefighter's services, re-

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304. See *supra* text accompanying note 274. In fact, since police officers and firefighters receive such special training, it may be fair to conclude that they are less likely to expect the negligence of a fellow officer or firefighter than they are to expect the same tortious conduct from a member of the public.

305. See, e.g., *Buckley v. City of New York*, 56 N.Y.2d 300, 437 N.E.2d 1088, 452 N.Y.S.2d 331 (1982); *Lawrence v. City of New York*, 82 A.D.2d 485, 447 N.Y.S.2d 506 (2d Dep't 1981). See *supra* notes 49-75 and accompanying text for a discussion of these cases. See also *supra* note 32.

306. See *supra* part II.B.2.

307. See *supra* part II.B.5.

308. For a discussion of the importance of this distinction, see *supra* notes 84-91 and accompanying text.

309. See *supra* part II.B.4. Even if the Court of Appeals had adopted the "separate and apart" theory of the appellate divisions, it is unlikely Officer Cooper would have recovered under that theory because of the court's finding that her injuries were "related to a particular risk that she had assumed as part of her duties," the risk being "the possibility of injury while rushing to the scene of an emergency." *Cooper*, 81 N.Y.2d at 590, 619 N.E.2d at 372, 601 N.Y.S.2d at 435.



covery would be allowed. Thus, as in *Starkey*, where a police officer responds to a citizen's complaint but, after investigating the complaint, he or she investigates another suspicious or dangerous situation, recovery would be permitted.<sup>310</sup> Similarly, if a police officer, in the course of investigating a crime, is injured when he trips over trash negligently left in the hallway by the owner of the building, recovery would also be permitted.<sup>311</sup> Further, if a police officer or firefighter is struck by a vehicle driven by a third party while responding to an emergency, he or she would also be allowed to recover.<sup>312</sup> Yet if the tortfeasor is another officer or firefighter, recovery is barred in New York State, simply because "individuals who elect to join the uniformed services do so with knowledge of the dangers attendant upon those occupations and the distinct possibility that they might be hurt in the course of their employment."<sup>313</sup> This double standard is not only inequitable, but illogical, since there is no rational basis for the distinction in fact.

One notion the Court of Appeals in *Cooper* did not mention, but might have been concerned about as a policy matter, is the possibility of collusion between injured police officers or firefighters and their negligent co-workers. It may be argued that when a police officer is injured in circumstances similar to the ones in *Cooper*, the police officer driving the vehicle at the time of the accident has no stake in the ensuing litigation, and therefore has nothing to lose by admitting his negligent acts.

This is not "collusion" in the traditional sense, but rather, the suggestion that fellow officers have little to gain by denying their negligence. Assuming that courts may be concerned with this possibility, it hardly makes sense to preclude recovery against a municipality when one of its employees is negligent merely because of the "possibility" of collusion. This is espe-

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310. See *Starkey v. Trancamp Contracting Corp.*, 152 A.D.2d 358, 548 N.Y.S.2d 722 (2d Dep't 1989).

311. See *Janeczko v. Duhl*, 166 A.D.2d 257, 560 N.Y.S.2d 633 (1st Dep't 1990) (holding that police officer who tripped on carpet remnant left in hallway of apartment building was not barred by Firefighter's Rule because the loose carpet was "separate and unrelated" to the complaint the officer was investigating).

312. See *Sharkey v. Mitchell's Newspaper Delivery, Inc.*, 165 A.D.2d 664, 560 N.Y.S.2d 140 (1st Dep't 1990).

313. *Cooper*, 81 N.Y.2d at 590, 619 N.E.2d at 372, 601 N.Y.S.2d at 435 (quoting *Pascarella*, 146 A.D.2d at 69, 538 N.Y.S.2d at 820)).

cially true when the facts of a case clearly suggest otherwise, or where, as in *Cooper*, the allegedly negligent officer is not even a party to the action and therefore cannot "prejudice" the municipality by admitting liability or negligence.

#### D. *The Lesson of Cooper and the Requisite Nexus*

*Cooper* sent a clear message to professional rescuers: it barred all common-law claims of negligence "when the injury is related to the dangers that are associated with police functions . . . ." <sup>314</sup> Although the Court of Appeals attempted to loosely define the actionable claims an officer would have when injured by another officer—claims based on injuries similar to Officer Pascarella or Officer Buckley<sup>315</sup>—those examples do not shed much light on the matter. In *Pascarella*, for example, the injury was not the result of a fellow officer's negligence. Rather, *Pascarella* was a strict application of the Firefighter's Rule as applied to police officers. Thus the majority's use of *Pascarella* as an example of an actionable claim under *Cooper* seems misplaced.

The other example cited by the majority was the fact pattern presented in *Buckley*.<sup>316</sup> However, in *Buckley*, although the facts are not clear, it appears that the city could very easily have asserted the Firefighter's Rule to successfully preclude recovery by the officer. Therefore, although the *Cooper* court referred to a "wide range of claims"<sup>317</sup> that would be actionable to an officer injured by the hand of another, it is not clear that such a "wide range" actually exists, at least not from the examples provided by the court.

Furthermore, in terms of actionable claims based not on the negligence of another officer but on the negligence of a third party, *Cooper* muddied the waters rather than clearing them up. The court rejected the "separate and apart" exception advanced by the appellate divisions, but did not provide any further definition. Instead, the court left the New York bar with

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314. *Cooper*, 81 N.Y.2d at 591, 619 N.E.2d at 372, 601 N.Y.S.2d at 435.

315. See *supra* notes 251-52 and accompanying text.

316. *Cooper*, 81 N.Y.2d at 591-92, 619 N.E.2d at 372, 601 N.Y.S.2d at 435 (citing *Buckley v. City of New York*, 56 N.Y.2d 300, 437 N.E.2d 1088, 452 N.Y.S.2d 331 (1982)).

317. 81 N.Y.2d at 592, 619 N.E.2d at 373, 601 N.Y.S.2d at 436.

an amorphous concept: recovery for a line-of-duty injury sustained by an officer is precluded when the injury is "related to the dangers that are associated with police functions . . . ." <sup>318</sup> The interpretation of that concept was left to the lower courts. <sup>319</sup>

## V. Conclusion

*Cooper* was a major step backward in the trend permitting recovery for professional rescuers injured in the line of duty. The revival of the Fellow Servant Rule by the Court of Appeals has erased the years of progress made in New York's statutory and common law. This departure from a distinct trend in New York to allow recovery for line-of-duty injuries must be remedied. Not only did the *Cooper* court ignore the earlier decisions and rationale of the New York Court of Appeals, but it presented an enormous obstacle to recovery for municipal employees that third parties do not face. This creates a unique hardship for firefighters and police officers who, as a result of *Cooper*, have no common-law recovery. In light of this harsh result, the legislature should remedy *Cooper's* limitations, since the Court of Appeals has evidenced its unwillingness to expose

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318. *Cooper*, 81 N.Y.2d at 591, 619 N.E.2d at 372, 601 N.Y.S.2d at 435.

319. On March 30, 1995, the New York Court of Appeals attempted to clarify the requisite nexus between a police officer's line-of-duty injury and the special hazards associated with the occupation of professional rescuers. In *Zanghi v. Niagara Frontier Transp. Comm'n*, Nos. 49, 50, 51, 1995 WL 137280 (N.Y. March 30, 1995), the court decided three cases involving the strict application of the Firefighter's Rule in New York. *Id.* at \*1. The court stated:

We hold that the necessary connection is present where the performance of the police officer's or firefighter's duties increased the risk of the injury happening, and did not merely furnish the occasion for the injury. In other words, where some act taken in furtherance of a specific police or firefighting function exposed the officer to a heightened risk of sustaining the particular injury, he or she may not recover damages for common-law negligence.

*Id.* at \*3.

Although none of the cases involved the negligence of a co-worker and, thus, are not directly relevant to the fellow servant aspect of *Cooper*, the decision is significant in that, in attempting to further define the "connection" required for the *Santangelo-Cooper* bar to apply, it unified the Court of Appeals on this issue. Judge Titone authored the opinion of the court. *Id.* at \*1.

municipalities to liability for injuries to this special class of professional rescuers.

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