

# When Plaintiffs Are Premium Planners for Their Injuries: A Fresh Look at the Fireman's Rule

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## INTRODUCTION

As courts continue to increase tort liability by, in Professor Henderson's words, expanding and purifying the negligence concept,<sup>1</sup> another common law limit on liability being swept away is the fireman's rule. This rule bars firefighters, police officers, ambulance drivers, emergency medical technicians, and other professional rescuers from maintaining a tort suit against the private party, typically a crime victim or an occupant of a home or business, whose negligence triggered the peril in response to which the professional rescuer was injured.<sup>2</sup> An example of negligence that does not

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1. James A. Henderson, Jr., *Expanding the Negligence Concept: Retreat from the Rule of Law*, 51 IND. L.J. 467, 491 (1976).

2. See, e.g., *Whiting v. Cent. Trux & Parts, Inc.*, 984 F. Supp. 1096, 1106 (E.D. Mich. 1997) (U.S. customs inspector); *Moody v. Delta W., Inc.*, 38 P.3d 1139, 1142 (Alaska 2002) (police officer); *Calvert v. Garvey Elevators, Inc.*, 694 P.2d 433, 438 (Kan. 1985) (firefighter); *Pinter v. Am. Family Mut. Ins. Co.*, 613 N.W.2d 110, 119 (Wis. 2000) (EMT). *But see, e.g., Lees v. Lobosco*, 625 A.2d 573, 576 (N.J. Super. Ct. App. Div. 1993) (rule not extended to EMTs). In contrast, ordinary persons who are injured in an attempt to rescue others endangered

lead to liability thanks to the fireman's rule would be a homeowner's or restaurateur's negligent failure to turn off a stove, thereby starting a fire that leads to a responding firefighter being injured. Other examples include a business owner's negligent failure to secure the doors overnight, thereby enabling a robbery, or a crime victim's negligent provocation of a criminal assault against himself, both of which lead to a responding police officer being injured.

In the modern era, courts or legislatures in at least eight jurisdictions have rejected the fireman's rule.<sup>3</sup> Hence, once the professional rescuer in these jurisdictions shows that the defendant crime victim or home or business owner was negligent in triggering the peril and that the rescuer's injuries came from responding to the peril, the rescuer will establish a prima facie case against the defendant. At that point the defendant must resort to her only substantive defense, the rescuer's contributory negligence, which, this Article argues, the defendant will face severe difficulties establishing. Because the rescuer's tort recovery is likely to be reduced only slightly by the subrogation claims of those who provided first-party benefits to the rescuer—such as his accident, life, and health insurers, the administrators of his disability pension plan, or those paying for specially created death benefits<sup>4</sup>—that recovery may come on top of all the first-party benefits he also received.<sup>5</sup> As more than half of police and fire perils can be attributed

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by the negligence of a defendant often recover. *See, e.g.,* *Wagner v. Int'l Ry.*, 133 N.E. 437, 437 (N.Y. 1921). (“Danger invites rescue. The cry of distress is the summons to relief.”).

3. For cases abolishing or limiting the rule, see, for example, *Trousdell v. Cannon*, 572 S.E.2d 264, 266 (S.C. 2002); *Christensen v. Murphy*, 678 P.2d 1210, 1218 (Or. 1984); *Wills v. Bath Excavating & Constr. Co.*, 829 P.2d 405, 409 (Colo. Ct. App. 1991); *Mull v. Kerstetter*, 540 A.2d 951, 954 (Pa. Super. Ct. 1988). For legislation abolishing or limiting the rule, see, for example, FLA. STAT. § 112.182 (West 2002), MICH. COMP. LAWS § 600.2965 (West 2000); MINN. STAT. § 604.06 (West 2000); N.J. STAT. ANN. § 2A:62A-21 (West 2000); N.Y. GEN. OBLIG. LAW § 11-106 (McKinney 2001).

4. Courts have refused to imply a subrogation right either for life insurers to wrongful death awards or for accident insurers to personal injury awards. Nor does the federal government obtain subrogation rights after paying social security disability benefits. *See* ROBERT E. KEETON & ALAN I. WIDISS, *INSURANCE LAW* § 3.10(6), at 227 (1988). Providers of workers' compensation benefits and their equivalents, in contrast, will possess a subrogation right to the rescuer's tort recovery. *See* RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § B19 cmt. 1 (2000). But in many jurisdictions that subrogation right cannot be pursued unless the injured insured has been “made whole” by the tort recovery. Those possessing subrogation rights often encounter prohibitive difficulty establishing that prerequisite in personal injury cases, especially cases that settle. *See, e.g.,* *Ives v. Coopertools*, 559 N.W.2d 571, 575–83 (Wis. 1997) (illustrating the difficulty). Thus far subrogation claims, in practice, have reduced the tort recoveries (including settlements) of professional rescuers only slightly. *See, e.g.,* *Dianne Williamson, Obscure Rule Lets Police Double Dip: 'Rescue Doctrine' Pays a Second Time for Injury*, SUNDAY TELEGRAM (MASS.), Nov. 29, 1998, at B1 (noting all subrogation claims reduced a policeman's tort recovery of \$155,000 by only \$16,000).

5. On November 30, 2003, President Bush signed into law the Federal Hometown Heroes Survivors Benefit Act, Pub. L. No. 108-182, 117 Stat. 2649 (codified as amended at 42 U.S.C. § 3796(k) (Supp. III 2003)), which extended the federal benefits provided by the Public Safety Officers' Death Benefits Program (PSOB) to all public safety officers or other first responders throughout the country who die or are permanently disabled while on duty. *Id.* The PSOB benefit is to be paid in a lump sum after application and is set at \$295,194 (in 2006 dollars to be increased with inflation.) *See* 42 U.S.C. § 3796(a), (h) (2006); U.S. Department of Justice, Bureau of Justice Assistance, [http://www.ojp.usdoj.gov/BJA/grant/psob/psob\\_main.html](http://www.ojp.usdoj.gov/BJA/grant/psob/psob_main.html) (last

to the negligence of some potential defendants,<sup>6</sup> many of whom will possess liability insurance covering the rescuer's tort judgment,<sup>7</sup> abolishing the fireman's rule will invite many new lawsuits. Defendants, even if they possess some liability insurance coverage, will face these suits, with their accompanying annoyance and financial and reputational costs, at a time of particular vulnerability—when they are trying to cope with their own losses from the same peril that injured the professional rescuer.<sup>8</sup>

After explaining the fireman's rule in Part I, this Article discusses in Part II most of the arguments for and against the rule. Abolishing the rule, for example, will create more incentive for potential defendants to take precautions against these perils, and, to the extent that the rescuer's first-party-benefit providers enforce their subrogation rights to the tort recovery, may decrease the cost to the public of the rescuer's first-party benefits. But abolishing the rule would also give professional rescuers considerable discretion to select which crime victims or home or business owners to sue, thus raising the specter of invidious discrimination by these public servants. Abolishing the rule also threatens to render the public cynical about rescuers and their motivation as the proud motto, "to protect and serve," becomes in the public eye, "to protect and sue." Abolishing the rule, by injecting into the squad room the lottery-like prospect of tort recovery, may undermine the morale and team spirit of professional rescuers and impair their perception of their work and their relationship with the public. Abolishing the rule will also raise doubts about the integrity of police and fire investigations into these perils. Finally, abolishing the rule will inflict the scrutiny and grief of tort litigation on another group of potential defendants and on another area of human endeavor.

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visited Apr. 2, 2007). The PSOB award is not reduced by any state or local benefits, even though substantial state and local benefits, especially for death or permanent disability, are invariably provided. See 42 U.S.C. § 3796(f). Nor will the federal government possess a subrogation right to the rescuer's personal injury award or the heirs' wrongful death award.

The PSOB and other first-party benefits, which the federal, state, and local governments provide professional rescuers, render irrelevant a major argument against reliance on first-party benefits in lieu of tort liability. That argument maintains that the adverse selection and moral hazard problems that plague a key first-party benefit, disability insurance, assure that first-party benefits will always undercompensate the injured plaintiff. Gary T. Schwartz, *The Ethics and the Economics of Tort Liability Insurance*, 75 CORNELL L. REV. 313, 362 (1990) (criticizing George Priest's reliance on first-party benefits because he "fails to address the adverse selection and moral hazard problems that inevitably depress the . . . market for disability insurance"). See *infra* Part III.E.2.

6. The United States Fire Association estimates that 77% of the calls for firefighters could be said to arise from negligence on the part of residents or owners of the building to which the firefighters are summoned. UNITED STATES FIRE ASSOCIATION, *FIRE IN THE UNITED STATES: 1992–2001*, at 29, available at <http://www.usfa.fema.gov/downloads/pdf/publications/fius13/ch2.pdf>; see also *Furstein v. Hill*, 590 A.2d 939, 944 (Conn. 1991) (noting a high percentage of police perils caused by negligence); *Winn v. Frasher*, 777 P.2d 722, 725 (Idaho 1989) (same).

7. The liability insurance portion of the standard homeowner's policy will cover the homeowner's liability to professional rescuers. Likewise, a business's liability to rescuers will be covered by the standard business owner's policy (BOP), which sometimes includes both a "premises and operations in progress policy" and a "completed operations policy." See *Dash Messenger Serv., Inc. v. Hartford Ins. Co.*, 582 N.E.2d 1257 (1991).

8. *Rescue Work Is Risky*, HARTFORD COURANT, Apr. 13, 1999, at A12. Referring to one professional rescuer's tort recovery, the editors concluded "Imposing such a burden [of tort liability] on someone calling for help, usually in panic, is unreasonable." *Id.*

Part III presents the further arguments that arise from virtually every injured<sup>9</sup> professional rescuer receiving a package of first-party benefits that achieve, at least in large part, society's compensation goals.<sup>10</sup> Throughout the country, these first-party benefits are substantially more generous than those provided workers covered only by workers' compensation. Moreover, these packages of benefits can be budgeted based on reasonably accurate predictions of the chance and severity of the rescuer's injury. Part III therefore discusses the arguments for the fireman's rule that arise from a professional rescuer being what might be called a "premium planner" for his on-the-job injuries compared to most tort plaintiffs. Premium planners can be distinguished from other potential tort plaintiffs on the following criteria. First, premium planners, or their union or employer representatives, are better able to measure beforehand the risk of the injury and to insure against it through first-party methods. There are at least four reasons this may be the case: (1) the risk of this type of on-the-job injury is of sufficient magnitude to warrant prior planning, (2) these on-the-job injuries occur at a predictable rate, (3) the activity of the premium planners that subjects them to the risk of injury is sufficiently organized so that insurance coverage can be structured to it, and (4) these potential tort plaintiffs are sufficiently numerous and organized to plan for injury as a group. Second, premium planners or their representatives are not only better able than most plaintiffs to arrange first-party compensation for the types of injuries in question, they can also provide this compensation more accurately, promptly, and cheaply than the defendants can compensate them through the defendants' liability insurance. This is not merely because of the usual, and striking, administrative cost advantages of first-party benefits over tort liability.<sup>11</sup> This may also

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9. When this Article speaks of "rescuers", it henceforth refers to professional rescuers, unless otherwise indicated. When it speaks of "injured" rescuers, it refers both to those who are injured, and hence sue in their own name, and to those who die and whose heirs bring a wrongful death suit. The Article also assumes that all rescuers are public employees.

10. Compensation goals include income security and payment of medical and rehabilitative services. Admittedly, the first-party benefits do not expressly compensate for pain and suffering, and, hence, total less than would a tort judgment.

11. The administrative costs of liability consist primarily of the fees of the plaintiffs' and the defendants' attorneys, the fees for expert witnesses and for transcriptions of testimony, and the other administrative costs of the liability insurer. Total administrative costs include not just the costs of trials but also the costs of settlement. Ignoring the costs imposed on the court system by these suits, which the taxpayer must bear, a consensus exists that administrative costs account for at least 58% of all liability insurance costs. TILLINGHAST-TOWERS PERRIN, *U.S. TORT COSTS: 2002 UPDATE* iii (2003); *see also* DEBORAH R. HENSLER, MARY E. VALANA, JAMES S. KAKALIK & MARK A. PETERSON, *TRENDS IN TORT LITIGATION: THE STORY BEHIND THE STATISTICS* 25-29 (1987); JAMES S. KAKALIK & NICHOLAS M. PACE, *COSTS AND COMPENSATION PAID IN TORT LITIGATION* iii (1986); PATRICIA MUNCH, *COSTS AND BENEFITS OF THE TORT SYSTEM IF VIEWED AS A COMPENSATION SYSTEM* ix (1977). This stunning overhead suggests the great extent to which tort liability must achieve deterrence and other goals in order for the social benefits of that liability to exceed the social costs. *See* PATRICIA M. DANZON, *MEDICAL MALPRACTICE* 225-26 (1985) (estimating how much malpractice each malpractice award must deter for the deterrence benefits of liability to outweigh the administrative costs of liability).

The administrative costs associated with the provision of first-party benefits, in contrast, are sharply lower. The replacement of tort liability against employers with workers' compensation, where administrative costs, according to the Tillinghast study, consume at most 21% of total costs, illustrates some of the reasons for these savings. TILLINGHAST-TOWERS PERRIN, *TORT*

be because premium planners, their representatives, or their first-party-benefit providers possess better ability to estimate these risks and more reason to focus upon them than do defendants or defendants' liability insurers. Third, premium planners have actually arranged significant first-party benefits commensurate with these risks, thereby guaranteeing that no unforeseen obstacles prevent such planning.

The Article seeks to draw parallels between professional rescuers and other plaintiffs who are likely to be premium planners for their injuries. Other premium planners include professional racecar drivers injured by the negligent maintenance of a racetrack, homeowners whose property is damaged by a city-wide fire negligently started by another, and healthcare workers at mental institutions and facilities for Alzheimer's patients who are injured by the negligence of the patients. The suits of such plaintiffs, this Article contends, receive less generous treatment from modern courts than do suits of other plaintiffs. The rationales given for this less generous treatment vary, although they rarely, if ever, include the rationale suggested here—that plaintiff is a premium planner for his injuries. For instance, the injured professional racecar driver is more likely than other plaintiffs to find that the court will enforce his exculpatory agreement with the racetrack.<sup>12</sup> The homeowner is more likely to find that the court will excuse the negligent defendant who ignited the city-wide fire on the ground of “no duty” or “no proximate cause.”<sup>13</sup> The healthcare worker is offered a number of explanations for why his tort suit against the patient fails.<sup>14</sup>

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COST TRENDS: AN INTERNATIONAL PERSPECTIVE 16 (1989). *See also* ALI, ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY, 119 (15–20% of total claim costs are spent on administration under workers' compensation compared to 50–55% for tort liability). The assessment of first-party benefits does not require inquiry into the defendant's behavior, and the inquiry into the insured's behavior and the cause of the insured's injury is severely truncated. Those assessing first-party benefits have often adopted comparatively simple procedures for verifying the severity of their insured's injury. They will also have available, as a byproduct of planning the benefits, better information about the pre-injury condition of their insured and even about the insured's tendency to claim injury, thus reducing the threat of overclaiming. Assessment of first-party benefits does not require resolving widely divergent and highly uncertain claims for pain and suffering or loss of consortium. While individual valuation of all damages is the norm in tort, first-party benefits providers can often take advantage of much cheaper collective valuation through damage schedules. Early compromise between benefit providers and the insured is facilitated through awareness of comparable compensation accorded the insured's colleagues who have been injured in the past. Moreover, the previous and usually ongoing relationship between the benefit provider, the employer, and the injured employee is typically less adversarial than that between the parties in a tort case where the plaintiff is likely a stranger to the defendant and to the defendant's liability insurer. STEVEN SHAVELL, ECONOMIC ANALYSIS OF ACCIDENT LAW 263 n.2 (1987) [hereinafter SHAVELL, ACCIDENT LAW]. For all these reasons, the involvement of attorneys and the expense of experts and transcribers are dramatically less in the provision of first-party benefits than in the tort system.

12. *See, e.g., Bertotti v. Charlotte Motor Speedway*, 893 F. Supp. 565, 570 (W.D.N.C. 1995); *Potter v. Nat'l Handicapped Sports*, 849 F. Supp. 1407, 1411 (D. Colo. 1994).

13. *See, e.g., Homac Corp. v. Sun Oil Co.*, 180 N.E. 172 (N.Y. 1932); *Moch Co. v. Rensselaer Water Co.*, 159 N.E. 896 (N.Y. 1928).

14. *See, e.g., Creasy v. Rusk*, 730 N.E.2d 659, 669 (Ind. 2000) (holding that plaintiff healthcare worker is better able to avoid injury to herself); *Gould v. Am. Family Mut. Ins. Co.*, 543 N.W.2d 282, 287 (Wis. 1996) (holding that letting mental healthcare worker recover would impose an unreasonable burden on the institutionalized mentally ill). *See generally*, Sarah Light,

I readily acknowledge that the plaintiffs in the examples above, save the homeowner victimized by the city-wide fire, are probably better precaution takers against their injuries than are the defendants, and the less generous treatment of plaintiffs could be explained on that ground as well. The professional rescuer, the professional racecar driver, and the healthcare worker benefit from specialized training in dealing with the risk to themselves from the defendants' negligence and hence have an unusually good opportunity, compared both to other plaintiffs and to defendants, to minimize that risk. Furthermore, with the risk of injury to themselves being so significant and widely known, the plaintiffs, their employers, and their representatives, such as NASCAR, possess at least some practical opportunity to keep potential plaintiffs who are injury-prone or especially vulnerable off the job altogether.<sup>15</sup> I do not attempt to divine whether courts that treat the suits of these plaintiffs less generously are more influenced by plaintiff being a premium planner or a better precaution taker than defendant. Either ground warrants reduced enthusiasm for liability.

In all contexts in which the plaintiff is a premium planner for his injuries, this Article argues, the court should ask whether the social gain from imposing liability for ordinary negligence, which lies primarily in the improved safety from liability's deterrence of defendant's negligence, is likely modest.<sup>16</sup> When plaintiff is a premium planner, courts should not assume liability will improve deterrence but rather should consider the actual likelihood of deterrence in the context before it. For example, a number of reasons suggest the safety gain from the new liability that would be created by abolishing the fireman's rule is likely modest. To begin with, the defendants' negligent creation of these perils endangers their own property and themselves, unlike, for example, the negligence of product manufacturers in selling their products and of physicians in treating their patients. Hence the instinct of self-preservation and the wish to protect their families, their possessions, their homes, or their businesses give crime

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Note, *Rejecting the Logic of Confinement: Care Relationships and the Mentally Disabled Under Tort Law*, 109 YALE L.J. 381 (1999).

15. These three contexts also share the feature of plaintiff's consent to encounter the risk that materialized. But emphasizing plaintiff's consent has led to the unsatisfactory jurisprudence of the increasingly defunct doctrine of assumption of risk. That doctrine required courts and juries to answer such unanswerable inquiries as whether plaintiff consented to the risks created by defendant's negligence or merely the normal risks of plaintiff's work, whether the plaintiff knew and appreciated the frequency and severity of the risks defendant created, and whether plaintiff's decision to encounter those risks was "voluntary."

16. One may fairly question how a court is to ascertain whether the safety payoff from liability in the context before it is likely modest. I am sensitive to the evils of foisting on a court a judgment it cannot become competent to reach. But a court handling a negligence case should be able to identify the precautions the plaintiff claims defendant was negligent for not taking. At that point a court should be able to assess, as a matter of common sense, the likelihood that fear of liability will lead a defendant to take those precautions. Moreover, a court can consider any empirical evidence suggesting that liability will improve safety in that context. Courts have rejected some actions for negligent infliction of emotional distress partly based on their conclusion that defendant already possessed other incentives for taking the precautions that plaintiff has proposed and, hence, that allowing the tort action would not improve safety. *See, e.g., Lawson v. Mgmt. Activities*, 81 Cal. Rptr. 2d 745 (Cal. App. Ct. 1999) (noting that an airline's risk of loss from crashing its plane guards against their "moral indifference to the possibility of injury [to those on the ground]" and that "[n]othing is to be gained by extending the liability attendant upon air crashes to the emotional distress of ground spectators.").

victims and home and business owners incentive to avoid these perils.<sup>17</sup> How many homeowners would cease smoking in bed because of the risk of this liability who have not already ceased this behavior because of its risk to their home, their health and life, and the health and life of their family? Liability's deterrence value depends, after all, on its marginal contribution to safety. In addition, the first-party property insurers of home and business owners usually offer these potential defendants the incentive of lower premiums for taking precautions against these perils. Examples of such precautions are fireproofing and installing fire alarms and sprinkler systems. Most importantly, there is almost no chance that the defendants' liability insurers will increase defendants' premiums or cancel their coverage, based on their precautions against, or their past record of, injuring rescuers.<sup>18</sup> This separates potential defendants sharply from car drivers, a group which, at least some empirical evidence suggests, drive more carefully because of well-founded fear that negligent driving will result in increased liability insurance premiums or the cancellation of coverage.<sup>19</sup> This also separates the potential defendants here from product manufacturers who self-insure, another group which, empirical evidence suggests, will increase spending on safety in response to increased liability.<sup>20</sup>

Whenever the plaintiff is a premium planner for his injuries and the safety gain from imposing liability in the context before the court is likely modest, a court should next consider whether the benefits of liability are outweighed by the costs of administering

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17. The potential defendant's possession of first-party insurance on his property does not eliminate his incentive to avoid perils that threaten his property. That insurance will not cover the home or business owner's coinsurance, or his deductible, or the sentimental value of his property. Nor do life and health insurance eliminate the insured's incentive to avoid death or injury.

18. See Schwartz, *supra* note 5, at 319 (noting that liability insurers for home and business owners rarely experience rate, activity rate, or feature rate insureds. And unlike first-party property insurers, they do not offer lower insurance premiums to insureds who take safety measures); Stephen D. Sugarman, *Doing Away with Tort Law*, 73 CAL. L. REV. 555, 575-76 (1988) ("[S]o long as individual firms pay [for liability coverage] on the same basis, individual accident records and safety measures will have no impact on premiums."). See Kenneth S. Abraham, *Liability Insurance and Accident Prevention: The Evolution of an Idea*, 64 MD. L. REV. 573, 576-608 (2005) (describing the lack of rating in liability insurance).

19. See Marc Gaudry, *Measuring the Effects of the No-Fault 1978 Quebec Automobile Insurance Act with the DRAG Model*, in CONTRIBUTIONS TO INSURANCE ECONOMICS 471, 494 (Georges Dionne ed., 1992); Richard W. Grayston, *Deterrence in Automobile Liability Insurance—The Empirical Evidence*, 40 INS. COUNS. J. 117, 126 (1973); Elisabeth M. Landes, *Insurance, Liability and Accidents: A Theoretical and Empirical Investigation of the Effect of No-Fault Accidents*, 25 J.L. & ECON. 49, 65 (1982); R. Ian McEwin, *No-Fault and Road Accidents: Some Australasian Evidence*, 9 INT'L REV. L. & ECON. 13, 23-24 (1989); Frank A. Sloan, Bridget A. Reilly & Christoph M. Schenzler, *Tort Liability Versus Other Approaches for Detering Careless Driving*, 14 INT'L REV. L. & ECON. 53, 68 (1994). *But cf.* Craig Brown, *Deterrence in Tort and No-Fault: The New Zealand Experience*, 73 CAL. L. REV. 976, 986-89 (1985) (noting advent of no-fault seemed to decrease auto fatalities but previous prohibition of experience or class rating undermines significance of this finding).

20. See Richard C. Ausness, *An Insurance-Based Compensation System for Product-Related Injuries*, 58 U. PITT. L. REV. 669, 669-80 (1997) (summarizing the empirical evidence of the deterrent value of product liability).

that liability and by the liabilities' other disadvantages.<sup>21</sup> This Article attempts to show how a court might undertake this calculus in the context of the fireman's rule. It concludes that the calculus favors retaining the fireman's rule. More generally, it argues that when the overall social costs of imposing liability for ordinary negligence likely outweigh the social gains, courts should eliminate such liability by employing the rubrics of "no duty" or "no proximate cause" if a more specific rubric like the fireman's rule is unavailable.<sup>22</sup> This look at the effects of expanding liability for ordinary negligence to a domain of human activity historically free of it also provides an opportunity to reconsider generally the continuing expansion of that liability.

The case against the fireman's rule echoes the case against the assumption of risk defense. While the shortcomings of the assumption of risk defense justify its demise,<sup>23</sup> the defense provided a vehicle through which courts expressed a number of policy considerations that call for denying liability, many of which remain forceful and legitimate. Hence the demise of the assumption of risk defense both increases the value of other doctrinal vehicles, such as the fireman's rule, through which courts can

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21. Some scholars write as if liability is socially desirable as long as it adds more incentive for the defendant to take some cost-justified precautions against injury. But this is plainly erroneous when the safety gain from those precautions is modest and the administrative costs of suit are substantial. *See infra* notes 175–179 and accompanying text. From a social perspective, the administrative costs of the tort system are no less a part of the cost of accidents than the direct losses of the injured. GUIDO CALABRESI, *THE COST OF ACCIDENTS* 225 (1970); SHAVELL, *ACCIDENT LAW*, *supra* note 11, at 269. While this has long been recognized, and while the goal of reducing the overall costs of accidents has long been embraced, CALABRESI, *supra*, at 26, relatively few scholars have considered that reducing these administrative costs through rules that constrict liability, like the fireman's rule, may be the best way achieve that goal. For an exception, see JEFFREY O'CONNELL, *THE LAWSUIT LOTTERY: ONLY THE LAWYERS WIN* 159–60 (1979) (constricting liability when first-party benefits are substantial may reduce overall costs of accidents).

22. I believe the creation of the Victims Compensation Fund for the victims of 9/11 reflected the congressional judgment that when, for whatever reason, tort liability is unlikely to deter a defendant's wrongdoing, it is better to compensate through what amounts to first-party methods and to eliminate costly lawsuits. *See also* STEVEN SHAVELL, *FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW* 284 (2004) [hereinafter SHAVELL, *ECONOMIC ANALYSIS*] ("Thus, the use of the liability system will be socially worthwhile if and only if the savings from accident reduction it brings about exceed its administrative costs."); SHAVELL, *ACCIDENT LAW*, *supra* note 11, at 269 ("[B]ecause the administrative costs of the liability system seem to be large, the incentives toward safety created by the liability system must be substantial to warrant its use. Yet these incentives may not always be very strong, especially when account is taken of factors other than liability that operate to reduce risk. . . . Where the added incentives created by the liability system are not sufficient to justify its use, we have seen that it may still be very much in the private interests of victims who have sustained large losses to bring suit. Hence some sort of social intervention may be required to reduce use of the liability system." (citation omitted)). Granted, many other reasons for eliminating the tort liability of the airlines, the airline-security companies, and the managers of the World Trade Center were given. For the possible state of affairs if no Victims Compensation Fund had been passed and if the tort system had been allowed to function normally, *see infra* text accompanying notes 223–231. Because most plaintiffs in the 9/11 context were not premium planners for their injuries, as professional rescuers are, the argument for rejecting tort liability in the context of the fireman's rule is stronger.

23. For the shortcomings of the assumption of risk defense, *see supra* note 15.



express these policy considerations and creates a need for new doctrinal vehicles serving the same purpose. An example of another doctrinal vehicle that substitutes for the assumption of risk doctrine is the “no duty” rule various courts have embraced to bar suits against sports clubs by spectators who are injured by baseballs or hockey pucks that enter the stands. An example of a new doctrinal vehicle that substitutes for the assumption of risk doctrine is the requirement that an injured sporting participant show recklessness, and not merely negligence, to recover from a fellow participant who injured him.<sup>24</sup> Another new doctrinal vehicle would be the rule that exculpatory agreements signed by an injured patron of a recreational vendor will be enforced when the patron is injured in a context in which he possesses ample ability to protect himself, unless the patron shows the recreational vendor acted outrageously in regard to the patron’s safety.<sup>25</sup>

### I. EXPLANATION OF THE FIREMAN’S RULE

Whether the fireman’s rule applies is an issue for the court.<sup>26</sup> As the fireman’s rule goes to the threshold question of whether a defendant bears a duty of care toward the injured rescuer, applying the rule usually results in dismissal based on “no duty.”<sup>27</sup> In some states, however, the burden of pleading and proving that the rule applies falls on the defendant.<sup>28</sup>

Jurisdictions disagree considerably about the exceptions to and the scope of the fireman’s rule. In some jurisdictions retaining the rule, the rule seems but a prelude to its exceptions.<sup>29</sup> A prominent exception arises when the defendant negligently injures rescuers after those rescuers have arrived at the scene.<sup>30</sup> Under this exception, a fireman injured when the defective front steps of a home collapsed while he was en route to a kitchen to douse a negligently started kitchen fire would be barred by the fireman’s rule from suing the defendant homeowner for negligently starting the fire. But the fireman could still sue the homeowner for negligently failing to warn him, after

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24. See *Knight v. Jewett*, 834 P.2d 696, 710–11 (Cal. 1992) (concluding that a touch-football player must show recklessness, not merely negligence, in order to recover from another player who injured him).

25. See Robert Heidt, *The Avid Sportsman and the Scope for Self-Protection: When Exculpatory Clauses Should Be Enforced*, 38 U. RICH. L. REV. 381 (2004) (arguing that in the absence of outrageous behavior by, for example, a ski area, an exculpatory clause signed by a skier should be enforced to protect the ski area from liability for injuries the skier suffers when skiing—a context in which a skier possesses an opportunity to protect himself—but should not be enforced to protect a ski area from liability for the collapse of a chair lift).

26. *Espinoza v. Schulenburg*, 108 P.3d 936, 940 (Ariz. Ct. App. 2005), vacated on other grounds, 129 P.3d 937 (Ariz. 2006).

27. *Vroegh v. J & M Forklift*, 651 N.E.2d 121 (Ill. 1995).

28. *Schulenburg*, 108 P.3d at 940.

29. For a succinct summary of exceptions, see CAL. CIV. CODE § 1714.9 (West 1998).

30. A rescuer injured by a defendant’s negligence that occurs after the rescuer arrives on the scene, although not affected by the fireman’s rule, may yet be barred from recovery by familiar no-duty rules. Examples include the “no duty to rescue” rule, which may shield from liability a defendant whose negligence after the rescuer arrives consists of nonfeasance as opposed to misfeasance, and the rules that limit the duty of those occupying premises to licensees.

he reached the scene, of the defective condition of the steps.<sup>31</sup> Likewise, some courts hold the fireman's rule does not apply to negligence that is "separate and apart" from the negligence which brought the rescuer to the scene.<sup>32</sup> Hence the fireman in the example above could also sue a homeowner for her earlier negligence in failing to maintain the steps, provided the court found that her negligent maintenance was sufficiently separate and apart from the negligence that started the kitchen fire and brought the firemen to the scene. A different result would be reached in those jurisdictions that apply the fireman's rule as long as the rescuer is injured while responding to an emergency.<sup>33</sup> Courts invoking this limit implicitly require the defendant to show that an emergency, however defined, existed. But once an emergency is shown, the fireman's rule will apply regardless of whether the defendant's negligence brought the rescuer to the scene or occurred months before the rescuer's arrival.<sup>34</sup> Accordingly, the firefighters in the example above would be barred from suing for the defendant's negligent failure to maintain the steps. But if the firefighter was injured by the steps collapsing during a non-emergency visit to the defendant's premises, his suit would not be barred by the fireman's rule.<sup>35</sup> In some jurisdictions, however, any negligence by a potential defendant that causes injury to a rescuer when the rescuer is acting within the scope of his employment is subject to the rule.<sup>36</sup>

In most states the fireman's rule will not shield intentional wrongdoers from liability.<sup>37</sup> Hence a home or business owner who commits arson in response to which firefighters or police are injured may not invoke the rule.<sup>38</sup> Nor will the rule shield

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31. *E.g.*, *Shypulski v. Waldorf Paper Prods. Co.*, 45 N.W.2d 549, 553 (Minn. 1951) (manufacturing plant owner incurred liability after failing to warn firefighters of known instability of a concrete wall).

32. *See Wiley v. Redd*, 885 P.2d 592, 594-95 (Nev. 1994).

33. *See Gray v. Russell*, 853 S.W.2d 928, 930-31 (Mo. 1993); *Labrie v. Pace Membership Warehouse*, 678 A.2d 867, 869-70 (R.I. 1996) (limiting the fireman's rule to rescuers injured during emergencies).

34. *See, e.g.*, *Lee v. Luigi, Inc.*, 696 A.2d 1371 (D.C. 1997) (policeman who slipped on oil while responding to suspected burglary unable to sue); *Day v. Caslowitz*, 713 A.2d 758 (R.I. 1998) (policeman who slipped on ice while investigating activated security alarm unable to sue).

35. The suit may still face obstacles created by the rules limiting the duty of premise owners or occupiers. *E.g.*, *Knorpp v. Hale*, 981 S.W.2d 469 (Tex. App. 1998) (the only duty of an occupier of premises to a licensee on the premises is to warn of dangerous conditions on the premises that the licensee is not likely to discover himself).

36. *E.g.*, *Gottas v. Consol. Rail Corp.*, 623 N.E.2d 1244, 1246 (Ohio Ct. App. 1993) (holding that "the application of the fireman's rule is not limited to emergency situations").

37. *Gibbons v. Caraway*, 565 N.W.2d 663 (Mich. 1997) (intentional and willful or wanton conduct renders application of the fireman's rule unjust); *Migdal v. Stamp*, 564 A.2d 826 (N.H. 1989) (same); *Clark v. Corby*, 249 N.W.2d 567 (Wis. 1977) (same).

38. *E.g.*, *Grable v. Varela*, 564 P.2d 911 (Ariz. 1977). I suspect the exception arises because the defendant's behavior is more culpable than ordinary negligence, not because the defendant intended to damage his property. A farmer who lawfully but intentionally burned down an old barn in order to clear land, I predict, will still be allowed to invoke the fireman's rule should he be sued by a fireman who was injured in attempting to control the fire. One would think both this exception and the exception for negligence after the professional rescuer arrived on the scene would allow police to sue drivers who fail to heed a police demand to

those who misrepresent to rescuers the extent of the hazards facing them.<sup>39</sup> Another exception arises for rescuers injured by a defendant's ultrahazardous conditions, such as a defendant's storage of explosives or toxic chemicals.<sup>40</sup> Some courts narrow the fireman's rule further by refusing to apply it when a defendant has violated an ordinance or safety statute aimed specifically at preventing fires or at protecting firemen or policemen.<sup>41</sup>

Because the rescuer's injury often occurs while entering the defendant's premises, an occasional court will suggest that a necessary relation exists between the fireman's rule and the rules regarding premises liability and hence can be invoked only by those defendants who occupy the premises on which the injury occurred.<sup>42</sup> This is much the minority view. Most courts have concluded that the rules of premises liability have little to do with the policies implicated when rescuers suffer injuries during a rescue attempt.<sup>43</sup> Hence, those courts allow virtually any potential defendant, whether an individual or entity, who has triggered a police or fire emergency to invoke the rule. Nor does the defendant need to show the rescuer's injury occurred on the defendant's premises.<sup>44</sup>

If only to limit the scope of this Article, the fireman's rule should be kept distinct from the related rule, sometimes called the municipal cost recovery rule or the free public services doctrine, which bars a government entity, typically a municipality, from recovering the costs of public services occasioned by a private tortfeasor's wrongdoing.<sup>45</sup> For example, private tortfeasors who have negligently started a fire may invoke the municipal cost recovery rule to escape having to reimburse the government entity for its expenses in suppressing the fire. One of the rationales for the municipal cost recovery rule, namely, that governments ought not seek reimbursement through tort suits for public service expenditures,<sup>46</sup> resembles the community benefit rationale for the fireman's rule that is discussed in the next section. Another rationale for the

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"stop" when the police are injured in the subsequent chase. *But see* *Gail v. Clark*, 410 N.W.2d 662 (Iowa 1997).

39. *E.g.*, *Lipson v. Superior Court*, 644 P.2d 822, 828–29 (Cal. 1982).

40. Amy J. Fanzlaw, Comment, "A Sign of the Times:" *How the Firefighter's Rule and the No-Duty-to-Rescue Rule Impact Convenience Stores' Liability for Failure to Aid a Public Safety Officer*, 23 STETSON L. REV. 843, 853–54 (1994). Although the fireman's rule does not apply when perils are triggered by ultrahazardous activities, the rule will protect sellers of defective products that trigger an emergency. *See Price v. Tempo, Inc.*, 603 F. Supp. 1359, 1365 (E.D. Pa. 1985).

41. *E.g.*, *Dini v. Naiditch*, 170 N.E.2d 881, 886–88 (Ill. 1960).

42. *See e.g.*, *Court v. Grzelinski*, 379 N.E.2d 281, 283–85 (Ill. 1978) (because the rule grew out of the old premises liability case, the rule only shields from liability occupiers of premises).

43. *E.g.*, *Giorgi v. Pacific Gas & Elec. Co.*, 72 Cal. Rptr. 119 (Ct. App. 1968) (rejecting any significance of premises liability principles and allowing the rule to be invoked against a fireman who never entered defendant's property); *Flowers v. Rock Creek Terrace P'ship*, 520 A.2d 361 (Md. 1987) (same).

44. *Kreski v. Modern Wholesale Elec. Supply Co.*, 415 N.W.2d 178 (Mich. 1987); *Steelman v. Lind*, 634 P.2d 666 (Nev. 1981).

45. *See generally* Timothy D. Lytton, *Should Government Be Allowed to Recover the Costs of Public Services from Tortfeasors?: Tort Subsidies, the Limits of Loss Spreading, and the Free Public Services Doctrine*, 76 TUL. L. REV. 727 (2002) (discussing the free public services doctrine also known as municipal cost recovery rule).

46. *Allenton Volunteer Fire Dep't v. Soo Line R.R.*, 372 F. Supp. 422, 423 (E.D. Wis. 1974); *Town of Howard v. Soo Line R.R.*, 217 N.W.2d 329, 330 (Wis. 1974).

municipal cost recovery rule relies on the peculiar nature of a state or local government as a tort plaintiff. Because these plaintiffs are viewed as intangible persons who cannot be assaulted, slandered, or injured like an individual, the only common law rights they enjoy are property rights.<sup>47</sup> Thus they can only recover for a violation of their property rights, such as damage to public lands, buildings, or equipment.<sup>48</sup> They may not attack behavior by private persons that merely triggers government expenditures.<sup>49</sup>

The existence of the municipal cost recovery rule bears on the wisdom of abolishing the fireman's rule. Not only are both rules informed by some similar concerns, but if the fireman's rule is abolished, the municipal cost recovery rule may prevent government entities that have provided rescuers substantial first-party benefits from reimbursing themselves through a subrogation action against the private tortfeasor. If the subrogation action is barred, the rescuer, by taking advantage of the collateral source rule, can recover all his tort damages with no obligation to pay back anything to his first-party-benefit providers.<sup>50</sup> The taxpayers who pay the first-party benefits are never reimbursed, their costs of providing the benefits are never reduced, and the duplicate recovery of the benefits yields a windfall for the rescuer.<sup>51</sup>

## II. THE PROS AND CONS OF THE RULE WITHOUT REGARD TO THE RESCUER BEING A PREMIUM PLANNER FOR HIS INJURIES

### A. *The Common Rationales for the Rule and the Objections to Them*

The most common rationale argues that these rescuers consent to taking the increased risks inherent in their chosen profession, some of which inevitably arise from the negligence of the public. Under this rationale, courts focus on separating the increased risks inherent in the profession from risks that are not.<sup>52</sup> The New York Court of Appeals illustrated this rationale:

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47. *State Highway & Pub. Works Comm'n v. Cobb*, 2 S.E.2d 565, 567 (N.C. 1939).

48. *Id.*

49. *Id.*

50. The rescuer's ability to recover for all his special damages in his tort suit, such as his medical and rehabilitative expenses and lost wages, will also, as a practical matter, increase his recovery of general damages, such as damages for pain and suffering. STEPHEN CARROLL, ALLAN ABRAHAMSE & MARY E. VALANA, *THE COSTS OF EXCESS MEDICAL CLAIMS FOR AUTOMOBILE PERSONAL INJURIES* 9 (1995). Because liability insurers tend to overpay small tort claims against their insureds, a successful claim by a rescuer for a small injury will almost always result in duplicate payment. Indeed, small injuries, which a rescuer might ignore altogether if he is limited to his first-party benefits, may well lead to both a claim for those benefits and a tort claim in the hope that the defendant's liability insurer will settle the small tort claim generously enough to justify the inconvenience of advancing those claims. Much waste results. P. S. ATTYAH, *THE DAMAGES LOTTERY* 133-34 (1997) (limiting recovery to first-party benefits "saves money for the benefit of all by eliminating trivial and duplicated claims").

51. The dispute about the fireman's rule should also be kept distinct from the dispute about whether injured professional rescuers should be able to sue their colleagues, and hence their public employer, for their negligence, at least when their colleagues or their employer violated state laws or internal rules. See Kevin Flynn, *Police Demand a Right to Sue if Broken Rules Cause Injuries*, N.Y. TIMES, Jan. 20, 2002, § 1, at 31 (reporting that the New York legislature has considered a statute that would allow such suits).

52. *Maltman v. Sauer*, 530 P.2d 254, 257 (1975) (embracing consent rationale).

For example, if a police officer who is simply walking on foot patrol is injured by a flower pot that fortuitously falls from an apartment window, the officer can recover damages because nothing in the acts undertaken in the performance of police duties placed him or her at increased risk for that accident to happen.<sup>53</sup>

On the other hand, the rescuers in the consolidated cases before the Court were injured by risks inherent in their profession and were barred from suing. In one case, the police officer “slipped and fell on a snow-covered [and negligently maintained] metal plate as he was approaching a picketer who was packing snowballs, presumably to throw at departing buses.”<sup>54</sup> In another consolidated case, two police officers were injured while “rushing down a flight of [negligently maintained] stairs leading into the subway in response to a radio call for assistance from another officer.”<sup>55</sup> In the other consolidated case, two firemen were injured when, during a fire emergency, the wall of a burning building collapsed on them.<sup>56</sup> The consent rationale also explains the unanimous agreement of courts that the rule does not apply when the rescuer is injured in his capacity as a private citizen.<sup>57</sup> Hence an off-duty policeman asleep in his apartment who is burned because of an electrician’s negligent wiring is as able to recover for that negligence as any private citizen would be.

The consent rationale suffers because many other public employees are allowed to recover against negligent members of the public when risks inherent in the employees’ chosen vocation materialize. Highway and construction workers, mail carriers, inspectors, and meter readers have long recovered from negligent members of the public who injure them in the course of their work.<sup>58</sup> These employees know that their chosen vocation will subject them to increased risks from negligently driven cars, negligently controlled dogs, and negligently maintained private premises. Arguably, they consent to these increased risks that “come with the territory” no less than professional rescuers consent to the risks to which the fireman’s rule applies.

A rationale closely related to the consent rationale emphasizes that professional rescuers should not be able to sue for the very hazards that create a need for their services and that they are paid and specially trained to confront.<sup>59</sup> The analogy is to the repair contractor cases which deny an action to a contractor hired to repair a dangerous condition, like a rotting roof, when the contractor is injured in the course of the

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53. *Zanghi v. Niagara Frontier Transp. Comm’n*, 649 N.E.2d 1167, 1172 (N.Y. 1995). Similarly, police are able to recover for injuries caused by negligent drivers who collide with them or who create dangerous conditions. *But see Gail v. Clark*, 410 N.W.2d 662, 666 (Iowa 1987) (suggesting that the fireman’s rule will bar suits by police against drivers who injure the police by fleeing from them).

54. *Zanghi*, 649 N.E.2d at 1170.

55. *Id.* at 1171.

56. *Id.* at 1170.

57. J.D. LEE & BARRY A. LINDAHL, *MODERN TORT LAW LIABILITY AND LITIGATION*, § 39:29, at 39–62 (2d ed. 2002).

58. *E.g.*, *Rivas v. Oxon Hill Joint Venture*, 744 A.2d 1076, 1081 (Md. Ct. Spec. App. 2000) (holding that postal workers, sanitary and building inspectors, garbage men, and tax collectors able to recover for negligence of the public); *see, e.g.*, *Neighbarger v. Irwin Indus., Inc.*, 882 P.2d 347, 351 (Cal. 1994).

59. *Neighbarger*, 882 P.2d 347.

repair.<sup>60</sup> That injured contractor is barred from suing the person, typically the person hiring the contractor, whose earlier negligence led to the rotting of the roof. The shifting of responsibility from the negligent party is sometimes said to be implicit in the contractor accepting the work. Like the consent rationale, this rationale, which might be called the *raison d'etre* rationale, suffers from the demise of the assumption of risk defense to which it is closely akin. Also like the consent rationale the *raison d'etre* rationale justifies denying a tort action to professional rescuers while allowing an action to ordinary members of the public injured during their rescue attempts. One cannot infer from the chosen work of ordinary members of the public that they consent to dealing with police and fire perils. Nor does dealing with police and fire perils form the public's *raison d'etre*. Nor is the public paid or specially trained to deal with those perils.

Unlike the consent rationale, the *raison d'etre* rationale focuses more on whether, from an objective perspective, dealing with negligently created risks without hope of compensation for injury is an implicit term of the rescuer's employment than on whether the rescuer "consented" to deal with such risks. One implication is that the consent rationale more clearly calls for applying the fireman's rule to volunteer firefighters. The *raison d'etre* rationale, in contrast, suggests that the small or non-existent pay the volunteer receives raises doubts about whether an implicit term of his employment requires that he deal with negligently created risks without hope of tort compensation. Similarly the *raison d'etre* rationale, compared to the consent rationale, better justifies limiting the fireman's rule to professional rescuers and not extending it to other public employees injured on the job by the negligence of the public.<sup>61</sup> While highway and construction workers, mail carriers, inspectors, and gas meter readers may foreseeably deal with risks created by the negligence of the public as a side effect of their work, they are not so clearly paid or trained precisely for dealing with those risks. In other words, dealing with those risks is not their *raison d'etre*. In contrast, dealing with the risks that the public negligently creates is one of the very purposes for which professional rescuers are paid and trained. While negligently created risks may come upon the other public employees in the course of their work, such risks define the rescuer's work. The professional rescuer's true workplace, as it were, is wherever these risks arise.<sup>62</sup> While the duties of other public employees may call for them to avoid, to cope with, or to protect themselves against negligently created risks, the duty of professional rescuers calls for them to confront and neutralize such risks.<sup>63</sup>

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60. *Taylor v. Moseley*, 698 So. 2d 3, 6 (La. Ct. App. 1997); *Peneschi v. Nat'l Steel Corp.*, 295 S.E.2d 1, 11-12 (W. Va. 1982) (while an unrelated third party can recover for injuries, a contractor and his employees cannot). See *Oceanside v. Superior Court*, 96 Cal. Rptr. 2d 621 (Ct. App. 2000) (injured lifeguard barred by the fireman's rule from suing fellow lifeguards or public safety personnel). Insofar as animal control officers are hired to confront negligently created animal perils, the *raison d'etre* rationale would also extend the fireman's rule to them.

61. The reduced first-party benefits these other public employees receive may also help to explain, under this rationale, why the fireman's rule does not apply to them.

62. "In firefighting, . . . the unsafe conditions in the work environment are fundamental to the occupation and are not subject to elimination by administrative action as they would be in industry. Risk acceptance is essential to the task and sets this type of work apart from most other occupations." WILLIAM CLARK, *FIREFIGHTING PRINCIPLES AND PRACTICES* 201-203 (2d ed. 1991).

63. Unlike professional rescuers who are trained to confront danger, garbage men, for

The *raison d'être* rationale, and the repair contractor cases that illustrate it, also suggest why concerns of corrective justice<sup>64</sup> support the fireman's rule. As the term is used here, corrective justice calls for tort liability only when liability is needed in order to redress the wrong which the injured plaintiff rightly feels the defendant, by her negligence, has inflicted upon him. Liability thus leaves the injured plaintiff feeling that defendant and he are now "even." But no repair contractor hired to repair a rotted roof will feel wronged by the party whose negligence led to the roof rotting. True, that party's negligence has indirectly endangered the repair contractor and has led to his injury. But when the danger is one the repair contractor is paid and specially trained to confront, the repair contractor will not experience the infliction of that danger as a wrong of any kind. While the repair contractor may deem the defendant a fool for her negligence, defendant's negligence has not only created a demand for the repair contractor's services but an opportunity for the repair contractor to demonstrate his training, skill, and bravery and to obtain the defendant's indebtedness. Negligence that creates such an opportunity for another usually does not trigger in the other a sense of being wronged. A person who renders herself dependent on another and in need of being rescued by the other puts herself in a subordinate posture and, if anything, suffers an indignity rather than inflicts one. Nor will a doctor feel wronged by a patient who negligently injured herself and whose treatment endangers the doctor. Nor will the injured police or firefighter feel wronged by the crime victim or home or business owner whose negligence led to a police or fire peril.<sup>65</sup> Especially when the parties are strangers before the peril arose, the potential defendant's negligence inflicts little if any dignitary harm on the rescuer and gives the rescuer no reason to take defendant's negligence personally. With no sense on plaintiff's part of defendant having wronged him, there is no need under the goal of corrective justice for liability.<sup>66</sup>

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example, are instructed not to attempt to pick up garbage when they see that doing so would endanger them.

64. "Corrective justice" carries different meanings. In England the term refers to what in this country is typically called retributive justice, the wish to penalize wrongdoers regardless of whether the plaintiff is deserving. See ATYAH, *supra* note 50, at 36. Others use the term to mean the wish to redress any invasion of plaintiff's legal rights. E.g., Richard Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151, 168-69 (1973). As used here, corrective justice refers to the wish to impose liability as a matter of justice between defendant and plaintiff, thereby vindicating plaintiff's reasonable feeling that defendant has unfairly wronged him and rectifying that wrong. For a similar concept of corrective justice, see ARISTOTLE, THE NICOMACHEAN ETHICS bk. 5, ch. 4 (J.L. Ackrill & J.O. Urmson eds., David Ross trans., 1980) ("Now the judge restores equality; it is as though there were a line divided into unequal parts, and he took away that by which the greater segment exceeds the half, and added it to the smaller segment."). For a view that subsumes corrective justice in distributional justice, see Jules L. Coleman, *The Mixed Conception of Corrective Justice*, 77 IOWA L. REV. 427 (1992).

65. Insofar as tort liability sends the message that the defendant has wronged the plaintiff, abolishing the fireman's rule will encourage a rescuer to believe that defendant has wronged him. See *infra* text accompanying notes 116-122.

66. Tort actions also serve the purpose of giving the injured plaintiff a non-violent method of expressing his justifiable anger at the defendant. But much of the negligent behavior by the defendants in this context, such as a defendant's failure to check the batteries in his smoke alarm, seems unlikely to arouse anger. Moreover, the reasons given in the text which suggest that the professional rescuer will not experience such negligence as a wrong to him also suggest the rescuer will not harbor much anger toward these defendants. Less than 10% of victims of

Another related rationale for the fireman's rule, which might be called the community benefit rationale, maintains that the community's payment of a professional rescuer's regular compensation package in effect buys protection for all members of that community from the rescuer's suit. Protection from suit by the professional rescuer is part of the consideration each taxpayer-member of the community receives in return for her tax contribution to the rescuer's compensation package. One implication of this rationale is that the fireman's rule would not apply to private professional rescuers. Specialists in handling oil fires, like the famous "Red" Adair, exemplify the private professional rescuer. Those hiring these private rescuers do not collect taxes from the person whose negligence caused the peril, often have no relation with that person whatsoever, and certainly are not compensating the private rescuer in order to persuade him to forego his tort claims against that person.<sup>67</sup>

Some courts invoking the *raison d'être* or the community benefit rationale argue that without the fireman's rule, the defendant would be made to pay twice to handle the perils which bring the rescuer to the scene, once indirectly as a taxpayer funding the compensation package of the rescuer and again as a tortfeasor. This argument suffers from appearing to apply as well to other public employees like highway and construction workers, mail carriers, inspectors, and readers of gas meters. Yet the taxpayer's payment of workers compensation benefits and other first-party benefits to these public employees in no way reduces her tort exposure to them should she negligently injure them. Another objection to this double payment rationale argues that double payment can be avoided by allowing the professional rescuer's first-party insurers to bring subrogation claims against the tortfeasor for the benefits they provided the injured professional rescuer. With the subrogation claims allowed, the defendant taxpayer's payment as a tortfeasor would enable her, in theory, to reduce the future taxes she owes the employer of the professional rescuer, thus avoiding double payment.

Two further rationales dovetail so closely with the *raison d'être* and community benefit rationales that they could be seen merely as arguments in support of those rationales. The first might be called the expectations rationale, for it simply asserts that after paying taxes for police and firemen, the crime victim and home and business

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negligently caused injuries remain angry at their injurers. LOUIS KAPLOW & STEVEN SHAVELL, *FAIRNESS VERSUS WELFARE* 154 (2002).

A related reason for allowing tort actions is to give the injured plaintiff an opportunity to regain his self-respect and self-esteem. But, again, there will usually be no reason to believe the defendant's negligence has threatened the rescuer's self-respect or self-esteem. Yet another related reason for allowing actions lies in the cathartic benefit from giving victims of trauma a public forum in which to speak of their injury and its consequences. It seems unlikely that most professional rescuers, in light of their typical background and attitude toward public expression of their unhappiness, will attach much value to this benefit, which accrues in any event only to those few rescuers whose suits are actually tried rather than settled.

67. *E.g.*, *Kowalski v. Gratopp*, 442 N.W.2d 682 (Mich. Ct. App. 1989) (allowing private professional rescuers to sue unrelated third parties whose negligence triggered the peril in response to which the rescuer was injured). While the community benefit rationale would support suits by these private plaintiffs, neither the consent rationale nor the *raison d'être* rationale would. Not only do private professional rescuers consent to the risks which create a demand for their services, they, no less than repair contractors, are paid to confront these risks and receive a hazard premium for doing so. Like the repair contractor, therefore, they should not be able to sue the person hiring them.



owner expects that in a police or fire peril the professional rescuers will aid her without threat of later suit regardless of whether the peril resulted from her negligence. As the court in one leading case put it, "No one expects the rendering of a bill (other than a tax bill) if a policeman apprehends a thief."<sup>68</sup> Were the rule abolished, another court has stated, "expectations of both business entities and individuals, and of their insurers, would be upset substantially."<sup>69</sup> The rationale seems to posit that the rescue efforts of police and firefighters are the type of public activities whose costs the public has long expected to absorb. In contrast, the public expects to pay for other public activities, like those of the post office or of a public utility, based on the amount of individual use. That difference in expectation about how these activities are funded, the argument seems to be, leads to different expectations about whether the members of the public should face liability when their negligent conduct harms the public employee performing the activity. At bottom, the argument seems to reduce to the notion that settled expectations, whatever their basis, should be protected. The second rationale, which might be called the deference rationale, sees in the legislative or municipal authorization of these police and firefighting activities a wish by those branches of government to provide the activities free of charge. In other words, because the legislature or municipality currently bears the cost of these activities and has taken no action to shift that cost elsewhere—whether for reasons of economic efficiency or even as a subsidy to the defendants—shifting these costs to defendants would interfere with what may be a matter of fiscal policy committed to the discretion of the respective legislative bodies.<sup>70</sup>

Yet another rationale—this one based on the benefits of spreading the cost of injuries—points out that the fireman's rule spreads the risk of injury to rescuers among the wide base of the taxpaying members of the public. Abolishing the fireman's rule means, foolishly, incurring transaction costs in order to reconcentrate that well-spread risk. Even when the risk is spread to the liability insurers of the defendant crime victims and home and business owners, rather than to those defendants personally, the risk will not be spread as widely as under the fireman's rule.<sup>71</sup>

Still another common rationale asserts that the fireman's rule is needed to avoid placing a burden on occupiers of premises always to guarantee the reasonable safety of their premises to strangers like the rescuers, even when they have no expectation of a stranger entering.<sup>72</sup> The rationale seems to posit that when no outsiders are expected, such a burden is unreasonable. Occupiers should not need to take care for the safety of rescuers who may suddenly descend on their premises in response to a peril and whose

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68. *City of Bridgeton v. B.P. Oil, Inc.*, 369 A.2d 49, 54 (N.J. Super. Ct. Law Div. 1976). See generally, Timothy D. Lytton, *Should Government Be Allowed to Recover the Costs of Public Services from Tortfeasors?: Tort Subsidies, the Limits of Loss Spreading, and the Free Public Services Doctrine*, 76 TUL. L. REV. 727 (2002).

69. *City of Flagstaff v. Atchison, Topeka & Santa Fe R.R.*, 719 F.2d 322, 323 (9th Cir. 1983) (applying Arizona law).

70. *Id.* at 324.

71. "Government is a far better agency to distribute losses than individuals or most businesses." Fleming James, Jr., *Accident Liability Reconsidered: The Impact of Liability Insurance*, 57 YALE L.J. 549, 556 n.23 (1948). Abolishing the fireman's rule will reconcentrate the loss from the rescuer's injury and then inflict that loss on one who may not have enough liability insurance to spread it fully.

72. PROSSER AND KEETON ON THE LAW OF TORTS, § 61, at 431 (5th ed. 1984).

entry and behavior on their premises the occupiers are powerless to control. This rationale does not explain application of the fireman's rule to injuries occurring outside the occupiers' premises even though that is where most police emergencies occur. Nor does the rationale explain why the rule shields from liability occupants who expect strangers, whose premises are open to the public, or who have summoned the professional rescuers. Nevertheless, this rationale helps to reply to one argument against the fireman's rule. That argument maintains that the rule unjustifiably treats rescuers more harshly than invitees such as the customers of an occupant's business who are injured on the occupant's premises. But entry on her land by an invitee is usually an entry an occupant can expect, prepare for, and control.<sup>73</sup> Hence an occupant's burden to keep her premises reasonably safe for the entry of rescuers, who may come at any time and without warning, exceeds her burden to keep her premises reasonably safe for invitees. Imposing the lesser burden of taking care for invitees does not implicitly call for imposing the greater burden of taking care for rescuers.<sup>74</sup> Furthermore, the occupant can argue, the professional rescuer is less deserving of the occupant's care than is an invitee because the rescuer is duty bound to serve the interest of the public throughout his intrusion while the invitee is more likely to serve the interest of the occupant.

A final rationale, which might be called the reciprocity rationale, deems the fireman's rule an appropriate counterpart to the rule that prevents crime victims and home and business owners from maintaining a suit against professional rescuers whose negligence injures them.<sup>75</sup> Such suits against professional rescuers are routinely dismissed under the rubric of "no duty."<sup>76</sup> In contrast, crime victims or home or business owners who are injured by the negligence of a private party who has

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73. This rationale also helps to justify treating policemen and firemen less generously than other public employees, such as readers of gas meters, who are injured on an occupant's premises. The occupier of premises knows that from time to time the reader of his gas meter will enter his premises; in contrast the occupier has no idea whether police or firemen ever will and thus lacks the same opportunity to take precautions for their safety.

74. Unlike the community benefit rationale and the double payment argument, both of which rely in part on the significance of the professional rescuer's regular compensation package, this rationale of avoiding an unreasonable burden on the occupier, like the consent rationale, calls for applying the fireman's rule to volunteer firemen despite their lack of regular compensation. Compare *Roberts v. Vaughn*, 543 N.W.2d 79, 82 (Mich. Ct. App. 1995) (grounding the fireman's rule on the professional rescuer's consent to encounter the risks and hence applying the rule to volunteer firemen) with *Baker v. Superior Court*, 181 Cal. Rptr. 311, 318 (Ct. App. 1982) (grounding the rule on the first-party compensation package the professional rescuer receives).

75. *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 203 (1989). Admittedly, modern courts are struggling with whether and when a professional rescuer who makes a specific commitment toward a member of the public will be charged with a duty of care. See *Cuffy v. City of New York*, 505 N.E.2d 937, 940 (N.Y. 1987) (setting forth four factors that would charge police with a duty of care toward an injured member of the public).

76. Even with the fireman's rule, a well-established exception to that rule provides that the crime victim or home or business owner loses her immunity to an injured professional rescuer when that defendant's negligence takes place after the rescuer has arrived on the scene. See *supra* text accompanying notes 30-32. Negligent professional rescuers, in contrast, remain immune from suit by those they injure regardless of when their negligence occurred.

attempted to rescue them may sue the private party.<sup>77</sup> Arguably the immunity professional rescuers enjoy when they negligently injure crime victims or home or business owners renders only fair the immunity these potential defendants enjoy under the fireman's rule when they negligently injure professional rescuers.

The more hostile treatment the fireman's rule accords professional rescuers compared to other workers injured on the job becomes especially conspicuous and, perhaps, hard to justify when the defendant is not a victim of crime or a maintainer of premises but a manufacturer of a product whose defect led to the peril in response to which the rescuer was injured.<sup>78</sup> For example, a defective product used in a business may start a fire that injures both workers in the business and responding firefighters. While the fireman's rule bars the firefighters from suing the product's manufacturer, the workers in the business face no such impediment. Neither the injured workers' ability to receive worker's compensation and other first-party benefits, nor their knowledge about the likelihood of the product triggering a peril, nor the fact that dealing with the manufacturer's product was part of, and a reason for, their work prevents them from suing the manufacturer.<sup>79</sup> Juxtaposing the different treatment of the workers and the rescuers embarrasses the fireman's rule. Perhaps one difference between rescuers and these workers is pertinent, however: the product manufacturer may be a better precaution taker against injuries to her customer's workers should the product trigger a peril than against injury to the professional rescuers. As a by-product of manufacturing the product, the manufacturer will learn about the perils that the product can trigger and about the precautions for dealing with these perils. But while the manufacturer may face little difficulty instructing and training the workers of her customers about dealing with these perils, the manufacturer may face greater difficulty instructing and training the professional rescuers, who lack any connection to the manufacturer and are farther removed from the product. Moreover the safety gain from the manufacturer's efforts to instruct and train the professional rescuers may be less.<sup>80</sup> The professional rescuer's other training in protecting himself should exceed the worker's, rendering more of his training by the manufacturer redundant. Insofar as the peril has partly passed by the time the rescuer arrives on the scene, the safety gain from the manufacturer's efforts to instruct and train the rescuer should be less.

Apart from the disparate treatment of rescuers and workers, the question arises whether workers, insofar as they are premium planners against their on-the-job injuries, should be barred from suing manufacturers of defective products that injure them. But there are reasons for finding that the social gain from tort liability's deterrence is more

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77. *Zelenko v. Gimbel Bros.*, 287 N.Y.S. 134 (Sup. Ct. 1935); RESTATEMENT (SECOND) OF TORTS § 324 (1965).

78. Police and firefighters may ordinarily sue manufacturers of defective products that injure them, such as the manufacturer of a defective weapon. The fireman's rule only bars suit when the product defect led to the peril in response to which the police or firemen were injured. See *Price v. Tempo, Inc.*, 603 F. Supp. 1359, 1365 (C.D. Pa. 1985).

79. Product liability suits by workers against the manufacturers and sellers of defective products which injure the worker in the workplace account for roughly 60% of all product liability suits.

80. True, the manufacturer of a defective product is clearly the better precaution taker against the defect, and hence against the peril itself, than is the professional rescuer. Indeed potential defendants will invariably be better precaution takers against the peril than is the professional rescuer.

significant in the context of the manufacturer of a defective product and the workers of her customers. Unlike most defendants in the context of the fireman's rule (or a car driver or plane pilot), the manufacturer of a defective product will rarely endanger herself should the product's defect endanger her customer's worker. No instinct for self-preservation will inspire the manufacturer to take precautions against the danger to these workers. Nor are the manufacturer's other incentives to avoid endangering her customer's workers so compelling or self-evident that a court can be confident the marginal effect of tort liability on manufacturer precaution taking is modest.<sup>81</sup> Hence a court, applying the calculus suggested here, might retain the current liability on the manufacture of a defective product which injures her customer's worker, regardless of whether the worker is a premium planner for his injuries.<sup>82</sup>

### *B. Other Concerns*

While the common rationales for the fireman's rule and the objections to them provide ample arguments for retaining or abolishing the rule, their shortcomings suggest the value of a fresh look at the rule. How does the retention or abolition of the rule affect the proof problems the factfinder will encounter, the resources devoted to litigation, and the power of a rescuer and his attorneys vis-à-vis the crime victim, home, or business owner defendants? How might abolishing the rule affect the behavior or perceived behavior of professional rescuers during emergencies or of the public investigators during their investigation of the emergencies? Might the rescuer's prospect of tort recovery from these defendants affect the élan of the squad or the perception of the rescuer's profession? Might the decisions by professional rescuers to sue some negligent defendants but not others smack of unjustifiable discrimination? To what extent do concerns of retributive justice and deterrence of defendant's negligence call for abolishing the rule? And might the abolition of the rule encourage crime victims and imperiled home or business owners to choose self-help rather than to summon the professionals?

#### 1. Proof Problems With and Without the Rule

The fireman's rule will generally avoid the proof problems of ascertaining whether the defendant was negligent in triggering the peril and whether that negligence was a cause in fact of the professional rescuer's injury. But the rule inflicts on the judicial system the proof problems connected with ascertaining whether its exceptions apply. Hence the fireman's rule may require the factfinder to ascertain whether the defendant's negligence occurred after the rescuer arrived on the scene, whether the defendant's negligence was separate and apart from the negligence which brought the

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81. To be sure, the customer's wish to purchase his business products from a manufacturer who will preserve the safety of the customer's workers gives the manufacturer some incentive for precaution taking on behalf of those workers. On the other hand, the customer's preference for products that will safeguard his workers is reduced to some extent by the customer's blanket immunity from tort liability for injuries to his workers that is afforded by worker's compensation laws.

82. If workers are rightly seen as "premium planners" for these injuries, then, despite the arguments suggested here, the approach recommended in this Article raises doubt about continuing to allow them to sue those who supply products to their employers.

rescuer to the scene, or whether the defendant was guilty of intentional wrongdoing or of violating a statute intended for the protection of professional rescuers. Each exception requires a court to determine not only whether the defendant's behavior fit the exception, but also whether that behavior was a cause in fact of the rescuer's injuries.

These proof problems of ascertaining whether an exception to the fireman's rule applies do not seem daunting. Placing defendants' negligence before or after the professional rescuers arrived, for example, should be straightforward if only because the rescuers themselves are likely to be witnesses to any negligence occurring after they arrive. To be sure, resolving the "but for" issue to decide cause in fact may be more difficult just because ascertaining how and why injuries came about during an emergency is generally difficult. Likewise, applying the exception for negligence that is separate and apart from the negligence that triggered the peril presents the problem of ascertaining whether that separate negligence was a "but for" cause of the rescuer's injury. For example, suppose the alleged separate negligence was negligent maintenance of the steps of a burning building, which occurred long before the negligence that triggered the fire. To meet the "but for" test, a fireman injured when the steps collapsed under him would need to show that the steps probably would not have collapsed had they been maintained with ordinary care. But if the fire that brought the firemen to the scene reached the steps themselves, the "but for" test will require the factfinder to separate the effects on the steps of the fire from the effects on the steps of the earlier negligent maintenance.

How do these proof problems of the fireman's rule compare to the proof problems of abolishing the rule? With the fireman's rule abolished, factfinders will confront in every case the issues of whether defendant was negligent and whether her negligence caused the peril. When the peril is a fire, for example, the factfinder must determine whether the defendant was negligent in creating an unreasonable risk of a fire and whether that negligence caused the fire. Determining the cause of fires is notoriously difficult, if only because the fire and its aftermath often destroys the crucial evidence. Typically expert testimony is needed and is dispositive.<sup>83</sup> When the fire investigators assert that the fire was caused by defendant's negligence, defendant will face, at least, considerable expense in challenging that assertion. These proof problems are compounded by the official investigators being colleagues, or at least coworkers, of the plaintiff-rescuer. Some fire investigators, for example, may feel bound by the traditionally strong sense of solidarity among firefighters to help their comrade on the force recover from the stranger-defendant. One need not be cynical to assert that abolishing the fireman's rule will increase proof problems by raising new doubts about the impartiality of the official investigation.

Even when the historic facts about the defendant's behavior are clear, it may be inappropriate for a jury to evaluate whether that behavior was negligent. Consider the problems of inviting the jury to second-guess a defendant crime victim's precautions against being victimized. When a policeman is injured while responding to a mugging, the jury might find the defendant victim of the mugging negligent because she was

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83. See TECHNICAL WORKING GROUP ON FIRE/ARSON SCENE INVESTIGATION, U.S. DEP'T OF JUSTICE OFFICE OF JUSTICE PROGRAMS, FIRE AND ARSON SCENE EVIDENCE: A GUIDE FOR PUBLIC SAFETY PERSONNEL 3-5 (2000) (emphasizing the difficulty of determining, after the fact, the cause of a fire).

walking alone in a high crime area.<sup>84</sup> Such a finding may undervalue the importance of the defendant's interest in being free to walk in public areas without fear that her doing so will be held against her should she be mugged. There is something to be said for the notion that persons, even in high crime areas, should be able to go about their business without regard to the possibility that they are inadvertently inviting crimes. Succumbing to the risk of crime by avoiding any behavior inviting crimes, some would argue, concedes too much to the criminals. A number of commentators have argued that juries, in assessing whether a defendant was negligent, fail to give sufficient weight to the abstract, non-safety values that defendant would sacrifice by foregoing her allegedly negligent behavior.<sup>85</sup> Rather, the jury, with the injuries of a professional rescuer before them, will tend to overweigh the safety interest in avoiding the peril and will thus call too quickly for more precaution taking by defendant.

Whether a crime victim took sufficient measures to prevent the crime resembles what Professor Henderson has called a polycentric issue, namely an issue where the many relevant factors are related to one another in such a way that it is impossible for a decision-maker to address himself to any one factor apart from a consideration of the others.<sup>86</sup> Asking "whether defendant created an unreasonable risk of becoming a crime victim and triggering a police peril" seems just as polycentric a question as "whether a basketball coach picked the most effective group of five players to play together" or "whether a parole board negligently granted a parole."<sup>87</sup> As Professor Henderson has argued, polycentric issues are often too open-ended for resolution by a jury. Ignoring the jury's incapacity to resolve polycentric issues so leaves the party's fate to the jury's unfettered discretion as to threaten the rule of law. In short, abolishing the fireman's rule and compelling a jury to decide whether a crime victim negligently triggered the crime carries significant error and decision-making costs.<sup>88</sup>

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84. Similarly, when a policeman is injured in responding to a rape, the jury might find the defendant victim of the rape negligent for inviting the rape by her dress, location, or other behavior.

85. Professor Gerla has reviewed the psychological literature suggesting that juries will ignore many disadvantages of a plaintiff's proposed precaution. Harry S. Gerla, *The "Reasonableness" Standard in the Law of Negligence: Can Abstract Values Receive Their Due?*, 15 U. DAYTON L. REV. 199, 205-14 (1990); see also Robert Heidt, *The Avid Sportsman and the Scope for Self-Protection: When Exculpatory Clauses Should Be Enforced*, 38 U. RICH. L. REV. 381, 423 (2004).

86. James A. Henderson, *Judicial Review of Manufacturers' Conscious Design Choices: The Limits of Adjudication*, 73 COLUM. L. REV. 1531, 1534-42 (1973) (discussing the problems of polycentricity previously identified by Lon Fuller).

87. *E.g.*, *Dawson v. Chrysler Corp.*, 630 F.2d 950, 956-57 (3d Cir. 1980) (asking the jury to determine whether a car is defectively designed under a risk-utility test).

88. The California Court of Appeals felt that abolishing the fireman's rule would lead to further expansion of defendant's liability. Those expansions would entail inappropriate second-guessing of defendants' behavior and yield liability disproportionate to defendants' culpability:

What of obvious expansions of [abolishing the fireman's rule]? Would an ambulance driver, responding to a call to pick up victims of an automobile collision caused by negligence, be allowed recovery from the negligent driver in that first collision . . . ? What of an attendant or nurse in the contagious disease ward of a public hospital? Would he be permitted recovery for an illness contracted from a patient confined in that ward because of disease contracted

If the fireman's rule is abolished, a negligent defendant can only resort to the defense that the plaintiff-rescuer was contributorily negligent.<sup>89</sup> And in the era of comparative negligence, even showing contributory negligence may only reduce the damages the defendant must pay. The defendant will also need to establish that the plaintiff's negligence was a cause in fact of his injury. This requires showing that, but for the rescuer's contributory negligence, the rescuer would not have been injured, or at least would not have been injured as severely. Defendants' proof problems on both these elements are daunting. In the service of his case, the professional rescuer may feel obliged to suppress any responsibility he bears for his injury and insist he was following the prescribed or customary practice for a professional rescuer in his position. In fire cases the key witnesses to the rescuer's behavior besides the rescuer himself will often be the rescuer's brother firemen. Again, the traditionally strong sense of solidarity among professional rescuers means fellow rescuers, even more than the fire investigators, may feel bound by that solidarity to testify so as to help each other recover from the stranger-defendant. On the issue of contributory negligence, as on cause in fact, the strong solidarity between members of the force, so essential to the work of the force, threatens the integrity of the litigation that would be unleashed by abolishing the fireman's rule. While an industry of ready experts for both sides of the contributory negligence issue is likely to develop in time, one suspects that in the years immediately after the fireman's rule is abolished, rescuers will enjoy a decisive advantage in finding experts.

Moreover, evidence of the rescuer's contributory negligence may backfire on defendant with the jury. A defendant may appear ungrateful in the jury's eyes just for presenting such evidence. After all, the rescuer has deliberately endangered himself—and been injured—in responding to a peril occasioned by defendant's negligence. The jury may resent defendant for second-guessing the rescuer's behavior. Defendant's lawyer may abandon the costly and difficult effort needed to adduce evidence of the rescuer's contributory negligence in light of the risk that this evidence will alienate the jury.

In sum, abolishing the fireman's rule would likely create greater proof problems and related administrative concerns than exist under the rule. And while rules limiting liability typically present fewer administrative concerns than rules expanding liability, the administrative concerns created by abolishing the fireman's rule seem particularly troubling.

## 2. Effect on Resources Devoted to Litigation

Even when narrowed by its exceptions, the fireman's rule avoids a substantial amount of litigation. A significant percentage of emergencies to which professional rescuers respond arise from negligence. The United States Fire Association estimates that 77% of the calls for firefighters could be said to arise from negligence on the part

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through the patient's negligent exposure of himself to the infection which caused his own confinement?

Giorgi v. Pacific Gas & Elec. Co., 72 Cal. Rptr. 119, 123–24 (Ct. App. 1968).

89. Wilson v. Gordon, 354 A.2d 398 (Me. 1976). In New York, the rescuer's contributory negligence will not diminish his recovery. Mullen v. Zoebe, Inc., 654 N.E.2d 90, 92 (N.Y. 1995).

of residents or owners of the building to which the firefighters are summoned.<sup>90</sup> While no comparable data is available for police emergencies, many surely arise from the negligence of crime victims or of other parties besides the criminals themselves.<sup>91</sup>

And a substantial percentage of potential defendants who are causally negligent will be worth suing. Because of vicarious liability, the causal negligence of all business employees is automatically attributed to the employing business. All standard liability insurance policies for businesses cover this liability risk. The dollar limits of that coverage are typically the highest of any part of the business's insurance coverage.<sup>92</sup> Generally the only businesses that lack such liability insurance are those large enough to self-insure. They too will be worth suing. Because all standard homeowner's policies include liability coverage for bodily injury to others on the insured premises when the injury is caused by the negligence of an insured,<sup>93</sup> individual homeowners will also be worth suing.

The costs to society of this new litigation extend well beyond the obvious costs to the taxpayer and to other litigators from the added burden on courts and juries.<sup>94</sup> Granted, the personal cost to the plaintiff rescuers should be discounted on the assumption that they would not sue unless their expected benefits swamped their expected costs. But even some rescuers who decide not to sue will expend some time and energy to ascertain, invariably through meetings with lawyers, whether suit is worth bringing. Beyond that, however, the new litigation will divert the time and energy of rescuers, defendants, and witnesses, including public investigators, from other pursuits. The defendants and witnesses, whether willingly or not, must endure the litigation's phone calls, meetings, time at lawyers' offices, depositions, occasional court appearances, as well as the time spent waiting for all of these, much of which will be spent waiting on the convenience of lawyers. The taxpayers may discover that in order to maintain the requisite number of professional rescuers on duty, more must be hired.<sup>95</sup> The fireman's rule, when it applies, avoids all these costs.

Once union and other representatives of professional rescuers learn to exploit fully the abolition of the fireman's rule, suits by rescuers, along with the subrogation claims

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90. U.S. FIRE ADMIN., FIRE IN THE UNITED STATES 1992–2001 ch. 2 (2004), <http://www.usfa.fema.gov/downloads/pdf/publications/fius13/ch2.pdf>.

91. *Furstein v. Hill*, 590 A.2d 939, 944 (Conn. 1991) (recognizing that a high percentage of police perils are caused by negligence); *Winn v. Frasher*, 777 P.2d 722, 725 (Idaho 1989) (same).

92. BEST'S INSURANCE REVIEW 37 (2003) (Even when a business has so few assets that no first-party insurance is appropriate, \$2 million is normally the lowest limit of liability coverage obtained. Most businesses also purchase an umbrella policy for further liability coverage.).

93. See Insurance Information Institute, What is in a Standard Homeowner's Insurance Policy?, <http://www.iii.org/individuals/homei/hbasics/whatisin/> (last visited Apr. 2, 2007). Of course, those few individuals who have more comprehensive liability insurance than that provided by the typical homeowner's policy will likewise be worth suing.

94. In 1990, figures published for the Superior Courts of Orange County, California showed an annual cost to the taxpayers of \$380,000 for one courtroom, including the salaries of the judge, bailiff, clerk, and court reporter. ROBERT V. WILLS, LAWYERS ARE KILLING AMERICA: A TRIAL LAWYER'S APPEAL FOR GENUINE TORT REFORM 70 (1990).

95. Ronny J. Coleman, *Will Firefighter Benefits Break the Chief's Back?*, FIRE CHIEF 18 (June 2003) (emphasizing the substantial replacement costs created by any job-related activity that takes firefighters away from the squad room).



by those providing first-party benefits (including the disputes between those subrogated parties),<sup>96</sup> may constitute a noticeable fraction of judicial dockets.<sup>97</sup> Supported by union funds, lawyers specializing in these cases may appear on the scene and routinize the practice of this new subspecialty. Liability insurers for potential defendants will want their usual lawyers to learn to defend these cases just as they now defend similar cases. Their wishes will create demand for increased instruction in defending these cases. Industries of private investigators, paralegals, and expert witnesses for both sides—attracted away from other pursuits—may develop.<sup>98</sup>

An accounting of the costs of litigation must consider litigation's toxic and protracted character. The incessant wrangling, especially throughout discovery, will leave many professional rescuers and defendants dispirited. Discovery will often entail extravagant spending of the currency of defendant's and witnesses' privacy. The litigation will require all parties and witnesses to relive the circumstances of the injury and to relive the peril generally. The litigation may stretch on for years, during which the parties and witnesses experience stress, recriminations, bitterness, and frustration with the system.<sup>99</sup>

Any expansion of liability means more power to the plaintiff's lawyers to frustrate and annoy potential defendants. Under the fireman's rule, crime victims and home or business owners affected by a police or fire peril need not fear the plaintiff's attorneys nosing themselves into the ultimate cause of the perils, at least when neither arson nor other crimes are suspected. Abolishing the fireman's rule means extending the reach of tort law into a domain of human activity that had been free of it. Plaintiff's lawyers will be empowered to hit defendants with a mailing that will tie defendant up for years. Yet the plaintiff's lawyer will be able to walk away with no sanction, and few consequences of any kind, should his allegations of defendant's causal negligence prove unfounded. Even the ultimately victorious defendant suffers the punishment of the process. While plaintiff has volunteered to play the litigation game, defendants play it under conscription. So great is the cost of the litigation game for uninsured defendants that most industrialized countries provide public funds to help defray defense costs.<sup>100</sup>

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96. See *Walters v. Sloan*, 571 P.2d 609, 613 (Cal. 1977) (“[A]bolition of the fireman’s rule would burden our courts with litigation among the employer public agency, the retirement system, and the negligence insurer”). *Neighbarger v. Irwin Indus., Inc.*, 882 P.2d 347, 355 (Cal. 1994) (expressing the view that litigation of subrogation and indemnity claims would be “pointless”).

97. As Fleming James Jr. noted, the key factors which affect whether suits which the law allows actually will be brought include “the extent to which ambulance chasing is organized” and “the general population [of potential plaintiffs] is ‘claim wise.’” James Jr., *supra* note 71, at 552 n.7.

98. To be sure, the rise of specialists, by making the lawsuits more routine, may reduce the disruptive effect of these suits on the rescuers.

99. Learned Hand famously wrote “After now some dozen years of experience [as a Judge] I must say that as a litigant I should dread a lawsuit beyond almost anything else short of sickness or death.” *E.g.*, PETER A. BELL & JEFFREY P. O’CONNELL, *ACCIDENTAL JUSTICE* 131 (1997). Those who second Learned Hand’s observation contradict themselves when they simultaneously support the continued expansion of liability.

100. BASIL MARKESINIS, MICHAEL COESTER & GUIDO ALPA, *COMPENSATION FOR PERSONAL INJURY IN ENGLISH, GERMAN AND ITALIAN LAW* 215–17 (2005).

### 3. Effect on the Power of Rescuers to Treat Potential Defendants Differently

Abolishing the fireman's rule, like most expansions of liability, empowers the injured, here the injured professional rescuers, to sue for some injuries and not for others and to sue some defendants and not others. This power to treat like-behaving potential defendants differently may not concern us when the plaintiffs are private persons who are not performing a public function. But professional rescuers are public servants performing a vital public function. The public, rightly, may show greater concern when professional rescuers do not treat like-behaving members of the public equally. With the fireman's rule abolished, professional rescuers will sue certain potential defendants whose negligence injured them but not others equally negligent and whose negligence resulted in equal injury. Even when the rescuer's injury arises from a single incident, the rescuer will have the power to choose among possible defendants as long as each defendant's negligence was a cause of his injury.

When private persons are treated so differently, especially private persons who are themselves victims of the peril, the public cannot help but wonder why. Why was one victim of a fire which led to a professional rescuer being injured sued but not the others, especially when all victims were equally negligent? Why did one incident in which a rescuer was injured lead to suit, but not similar incidents? The fact that, at least in regard to fires, more than half of all incidents can be attributed to some negligence by some private person compounds the power of the rescuer to select among potential defendants and heightens the appearance of unequal treatment. Did the rescuer let the negligence of some private persons pass without suit because the person was a celebrity, or because the person was "connected," or because the person offered a bribe? Why did these professional rescuers sue one homeowner who negligently started a kitchen fire but not another homeowner who just last year had been negligent in exactly the same way, despite rescuers being injured in both incidents?<sup>101</sup>

The decisions about whether and whom to sue will probably turn in part on the judgment of the plaintiff's lawyer about such matters as a jury's likely perception of the rescuer and of the potential defendant. The eagerness of the rescuer to sue will also affect these decisions. But the public may conclude that these factors do not justify public servants treating similar behavior so differently.

### 4. Effects on the Behavior of Professional Rescuers During Emergencies

The fireman's rule avoids any risk that the prospect of tort recovery will dilute the rescuer's natural incentive to protect himself. That natural incentive operates when the rescuer decides both on his self-protective precautions and on his activity level. For example, a firefighter decides on a self-protective precaution when he decides whether to wear a protective mask when entering a burning building. A firefighter decides on his activity level when he decides whether to enter a burning building in the first place.

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101. Richard Colbey, *If You Save My Life, I Might Sue You*, GUARDIAN (LONDON), Feb. 13, 1999, Money Page, at 17 ("Australian authorities[] announce[d] last month that they wanted redress from former British soldier, Clive Sutton, who had to be rescued from an ill-advised walking expedition in Papua New Guinea jungle. Interestingly, no such claim was intimated after even more was spent by that country on fishing the equally deft solo yachtsman, Tony Bullimore, out of the Indian Ocean in a blaze of publicity.")

By denying liability, the rule rightly discourages rescue attempts when the expected benefit from the attempt, for example, the expected value of the lives and property saved if the fireman attempts the rescue discounted by the chance the rescue attempt will fail, is swamped by the expected costs of the attempt, which includes the expected injury cost to the rescuer and the expected damage to property. Plainly society prefers that the rescuer refrain from such rash rescue attempts, despite the homage society pays to rescuers injured in such attempts. To be sure, rescuers may lack the capacity in the midst of an emergency to compare the expected costs and benefits of attempting rescue with confidence. Still, the rashness of some rescue attempts will be obvious.

Abolishing the fireman's rule means incorporating the prospect of tort recovery into the rescuer's on-the-spot decision making. It means dangling the possibility of a windfall before all rescuers considering rash rescue attempts. Most rescuers doubtless will ignore this possibility. But the risk of enticing some rescuers to undertake these rash attempts should not be dismissed too summarily.

Because the professional rescuer arrives on the scene after any negligence by the defendant, a rule that pressures the rescuer to opt for the optimum activity level is desirable even when the defendant is clearly the cheaper precaution taker against the peril. For example, although defendant's cost of avoiding the peril originally through care (by putting out her cigarette, for example) or through a lower activity level (such as not smoking) was trivial and much less than the cost of any self-protective measure the rescuer could take at any stage, society prefers a rule that will pressure the rescuer to consider whether his rescue attempt is rash. Were the care and activity level decisions by the parties made simultaneously, the case for ruling against the cheaper precaution taker of the peril would be stronger. But the sequential nature of the parties' decisions calls for a rule that will preserve the rescuer's incentive not to risk himself unduly once the peril has occurred, regardless of how cheaply defendant could have avoided the peril in the first place. Although here this analysis favors the tort defendant, the analysis is analogous to that which supported the pro-plaintiff last clear chance doctrine, which was prominent when contributory negligence was a complete defense. The last clear chance doctrine allowed plaintiffs to prevail despite their being the cheaper precaution taker against their injury. The classic example is of a plaintiff motorist whose contributory negligence led to his car being stranded on a train track where it was later struck by a train whose employee saw the plaintiff on the track but negligently failed to stop the train in time. Thanks to the doctrine, the plaintiff could prevail against the defendant train despite the plaintiff's negligence and despite plaintiff being the cheaper precaution taker against his injury. The last clear chance rule was designed to induce optimal behavior from the party (the potential defendant) with the last clear chance to avoid an injury to another (the potential plaintiff). The last clear chance rule achieved this result by giving the defendant incentive to take care despite defendant's knowledge of the earlier contributory negligence of the plaintiff. Absent the last clear chance rule, the defendant's knowledge of the earlier contributory negligence of the plaintiff would have assured the defendant that she could be careless toward the plaintiff with impunity, for the plaintiff's earlier negligence protected the defendant from any chance of being held liable for the plaintiff's injuries.

This point illustrates that the law should not be content merely to maintain proper incentives for the professional rescuer to perform the rescue with care. Retaining the defense of contributory negligence would suffice for that purpose, even if the fireman's rule was abolished. The law also wants to maintain proper incentive for a professional rescuer to refrain from undesirable rescue attempts. Only a rule of no liability on

defendant, such as the fireman's rule, serves that purpose. Merely retaining a contributory negligence defense, which focuses only on how the rescue attempt was performed and which allows those undertaking rash rescue attempts to recover, does not. This is just another way of saying that the law should be concerned with incentives for optimum levels of activity as well as with incentives for optimal levels of care.<sup>102</sup>

Too much should not be made of the rule's tendency to increase the care that professional rescuers take for themselves. The rescuer's instinct for self-preservation will remain a powerful incentive to protect himself even if the fireman's rule is abolished. The rescuer's training in self-protection, his habits, and the preference most rescuers would give to their health over the prospect of a tort recovery reinforce that instinct for self-preservation. One suspects abolishing the rule would tempt only a few rescuers to endanger themselves rashly.

The most disturbing effect of abolishing the rule on the professional rescuer's behavior springs from the distorted incentive it gives rescuers to undertake rescues for some more than for others. Without the rule, professional rescuers may become more willing to risk injury when prospects for a tort recovery are promising. While this suggestion may sound preposterous, or even insulting to the noble image of rescuers, the fireman's rule may have promoted that image. Consider what a firefighter, for example, may eventually learn if the fireman's rule is abolished and successful suits by firefighters no longer elicit surprise. The firefighter may soon learn that more than half of all rescue calls can be traced to some negligence by some possible defendant,<sup>103</sup> that the collateral source rule and related rules<sup>104</sup> mean that a successful tort action offers him the prospect of a financial windfall, and that his lawyers and union representatives have learned how to bring these actions in a manner that is not too disruptive and costly to his comrades and himself. Is it preposterous to think a firefighter so alerted may consider the possibility of a tort recovery when he deals with a particular call? Abolishing the fireman's rule tempts a firefighter to risk injury more when, for instance, the residents or owners of the burning building are likely to have substantial liability insurance. Fires threatening expensive homes may elicit, or (nearly as undesirably) appear to elicit, greater rescue efforts than fires threatening less expensive homes. Fires threatening commercial buildings, where levels of liability insurance are typically higher, may elicit greater rescue efforts than those threatening homes. Of course, any doubts the firefighter harbors at the time he acts about the extent of defendant's liability insurance or financial responsibility should mitigate his temptation to behave differently. But many emergency calls, merely by indicating the neighborhood of the peril or the person or type of structure endangered, will signal the

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102. See WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW*, 92–93, 141–42 (1987) (emphasizing the role of liability rules in establishing incentive for optimal activity levels). *But see* GEORGE L. PRIEST, *MODERN TORT LAW AND ITS REFORM* 47 (1987) (the effect of liability on activity levels is “trivial”). Of course if one assumes professional rescuers as a rule undervalue the expected benefit from attempting the rescue—compared to the actual social benefit—or overvalue the expected cost of injury to themselves, then one might opt for a rule that would regularly subsidize rescue attempts. The prospect of a tort recovery could serve as that subsidy.

103. See *supra* text accompanying note 90.

104. See, e.g., *Nuncz v. Palmer* 902 A.2d 660, 663 (Conn. App. Ct. 2006) (reaffirming the collateral source rule); *Leitinger v. Van Buren Mgmt., Inc.*, 720 N.W.2d 152, 156 (Wis. Ct. App. 2006) (also upholding the collateral source rule).

rescuer at once that those who negligently triggered the peril will lack funds or insurance to pay a tort judgment.

As these tort recoveries by rescuers become more common, and more widely seen to give injured rescuers a windfall, the poor may begin to suspect rescuers of providing less aggressive rescue services to them than to the financially responsible even if no difference in fact exists. Indeed there is evidence that the poor already believe they receive inferior treatment at the hands of professional rescuers compared to the more affluent.<sup>105</sup>

Arguably courts should avoid creating any incentive structure for rescuers that is even conceptually inconsistent with the ideal of equal service to all or with the rescuer's stated mission. The fireman's rule—by eliminating the distraction of a possible tort recovery—creates incentive for these rescuers to give their single-minded attention to their stated mission.<sup>106</sup>

### 5. Effect on Public Investigations of Emergencies

Abolishing the fireman's rule may also affect the subsequent investigation into the peril in response to which the rescuers were injured. With the fireman's rule, the fire investigation squad, for example, is encouraged to conduct a largely untrammelled investigation of the cause of the fire, an investigation which focuses on ascertaining the fire's cause for future preventive purposes. To be sure, the fire investigators have reason to gather and preserve evidence of arson. But once arson is ruled out, the investigators have little reason to care whether the fire arose from the negligence of some financially responsible private party or whether injured firefighters were causally negligent in failing to protect themselves. Under the fireman's rule, there is little pressure on the investigators to reach any particular findings on these matters. Much the same is also true for investigation of police perils.

Abolishing the fireman's rule, in contrast, heightens the importance of gathering and preserving evidence on all the elements and defenses to the rescuer's possible tort action.<sup>107</sup> What had been of interest primarily to the fire investigation squad will

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105. *See* Confidence in the Police, [http://texaspolitics.laits.utexas.edu/html/just/features/0500\\_01/policeopinion.html](http://texaspolitics.laits.utexas.edu/html/just/features/0500_01/policeopinion.html) (last visited Apr. 2, 2007).

106. For firemen that mission is first, to stop the spread of fires, and second, to minimize the damage to life, health and property from the fire. *See, e.g.*, AboutIFD, <http://www.indygov.org/eGov/City/DPS/IFD/About/home.htm> (last visited Apr. 2, 2007); Mission Statement of the Los Angeles Fire Department, <http://www.lafd.org/mission.htm> (last visited Apr. 2, 2007). For police, that mission is to enforce the law and protect the innocent. *See, e.g.*, About NYPD, <http://www.nyc.gov/html/nypd/html/mission.html> (last visited Apr. 2, 2007); Mission Statement of the LAPD, [http://www.lapdonline.org/search\\_results/content\\_basic\\_view/844844](http://www.lapdonline.org/search_results/content_basic_view/844844) (last visited Apr. 2, 2007). For emergency medical technicians, that mission is to stabilize pre-hospital emergencies and transport the ill and injured safely and expeditiously to the appropriate medical facility. *See*, Austin/Travis County Emergency Medical Services, <http://www.ci.austin.tx.us/ems/mission.htm> (last visited Apr. 2, 2007). For the Coast Guard, that mission is to minimize the loss of life, injury, and property in the maritime environment.

107. This includes evidence of any of the following: negligence by the defendant crime victim or occupant, the cause-in-fact and proximate cause connection between that negligence and the rescuer's injury, the rescuer's contributory negligence, and the cause-in-fact and proximate cause connection between that contributory negligence and the rescuer's injury.

become of interest to the rescuers, their brother officers, potential defendants, and any investigators they may employ. Gathering, organizing, and storing this evidence carries its own costs in more repositories, more staff, less time for the staff's other duties, and a general hindering of the effort to finish the investigation of the peril and move on.

As mentioned above, abolishing the fireman's rule also threatens the integrity of the investigation because of the increased pressure on investigators to support their brother rescuer's tort suit. While an investigator may strive to be independent, a brother officer is likely much closer to him than is the defendant crime victim or home or business owner, typically a stranger with no relationship whatsoever to the investigator. To some extent, fire investigators now encounter similar pressure from prosecutors to find evidence supporting criminal prosecutions for arson. But the pressure to find evidence of arson is eventually offset, at least somewhat, by the prosecution's need to prove arson beyond a reasonable doubt. Nothing similar offsets the pressure in the brother rescuer's tort case to find evidence of the defendant's causal negligence. The brother rescuer's personal stake in his tort case may be so significant that investigators feel obligated, even without any communication, to look for evidence favorable to the rescuer. In light of this unequal pressure on the public investigator, the statutes that exist in every state to give the public investigator greater and earlier access to the emergency scene than any investigator of the tort defendant<sup>108</sup> conflict with civil procedure norms that call for allowing each party in a tort suit roughly equal access to the critical evidence. Indeed the great advantage the public investigator now understandably enjoys suggests the plaintiff rescuer will be able to gather favorable evidence much more easily than the private defendant.

The possible effects of abolishing the fireman's rule on the rescuer's behavior during the peril and on the peril's investigation seem disturbingly negative. The only positive effect—if it is positive—is that the prospect of tort recovery will further encourage rescuers to risk their lives and physical well-being to save the life and property of the victims of the peril. Whether that effect is in fact positive will depend on one's view of the willingness of professional rescuers to take these risks now when most jurisdictions still embrace the fireman's rule. There is some evidence that the public approves and would not change what it believes to be the current willingness of professional rescuers to take these risks.<sup>109</sup>

## 6. Other Effects on the Careers of Professional Rescuers

Abolishing the fireman's rule may also affect the job-related behavior of rescuers by increasing, at least in the short term, the variance and amount of the rescuers' total compensation.<sup>110</sup> The professional rescuers' total compensation will increase simply

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108. See ALA. CODE § 36-19-4 (2001); VA. CODE ANN. § 27-32.1 (2004).

109. See Confidence in the Police, *supra* note 105.

110. Economic theory suggests this increase should eventually be reflected in lower money wages or less generous first-party benefits as would be the case when any fringe benefit is increased. But econometric studies yield varying answers about whether an increase in post-injury compensation results in reduced wages. See generally PRICE V. FISHBACK & SHAWN E. KANTOR, A PRELUDE TO THE WELFARE STATE: THE ORIGINS OF WORKER'S COMPENSATION 48-49 (2000). The increased income, at least until that increase is offset by lower wages, should attract higher quality applicants.

because subrogation by the rescuer's first-party insurers is sure to be incomplete.<sup>111</sup> Granted, the prospect of tort recovery amounts to a highly irregular and unpredictable compensation increase, which of course will accrue only to a fraction of injured rescuers and their heirs. This irregularity and unpredictability justifies comparing the prospect of tort recovery to a lottery ticket, albeit the prospect of tort recovery where none existed before more resembles giving the rescuers a free lottery ticket than offering the rescuers a lottery ticket for a price.<sup>112</sup> Importing the unpredictability and irregularity of tort recovery into work which was notable for offering predictable and regular compensation may affect professional rescuers in a number of ways.

According to economic theory, the new prospect of tort recovery should attract more recruits away from other careers and inspire current rescuers to work longer, increasing the average number of years these trained professionals stay on the job. While that is likely to be the dominant effect, those rescuers who are successful as tort plaintiffs may react differently. They may be more inclined to take their chances with self-employment or to opt for earlier retirement or for work that poses less risk of physical injury.<sup>113</sup>

Similarly, the prospect of tort recovery should alter at the margin the type of person attracted away from other pursuits into professional rescuing. Professional rescuing will appear more attractive to the claim-prone—that is, those who, for any number of reasons, are most likely to sue. The lottery-like aspect of tort liability should also increase this work's appeal to those whose attitude toward financial risk attracts them to lotteries.

This change in the type of persons who apply to be rescuers may become more conspicuous if the prospect of tort recovery alters the public recognition accorded professional rescuers. At present public recognition of these rescuers is exceptional as the adjectives frequently applied to rescuers—heroic and unselfish—suggest. The public esteem and glory add to the financial attraction of the work. But the publicized specter of rescuers successfully suing the private parties responsible for the peril, most

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111. See, e.g., Diane Williamson, *Obscure Rule Lets Police Double Dip*, SUNDAY TELEGRAM (Worcester, Mass.), Nov. 29, 1998, at B1.

112. See ATIYAH, *supra* note 50, at 5. Deborah Hensler has compared the asbestos litigation to a lottery:

Results of jury verdicts are capricious and uncertain. Sick people and people who have died a terrible death from asbestos are being turned away from the courts, while people with minimal injuries who may *never* suffer severe asbestos disease are being awarded hundreds of thousands of dollars, and even in excess of a million dollars. The asbestos litigation often resembles the casinos sixty miles east of Philadelphia more than a courtroom procedure.

DEBORAH R. HENSLER, WILLIAM L.F. FELSTINER, MOLLY SELVIN & PATRICIA A. EBENER, *ASBESTOS IN THE COURTS: THE CHALLENGE OF MASS TOXIC TORTS* 41 (1985) (emphasis in original).

113. The substitution away from other vocations may be less than if the expected value of the tort recovery took the form of a wage increase. People may undervalue the prospect of tort recovery compared to a wage increase. One reason may be that a non-pecuniary loss, such as the pain and suffering from an injury, does not increase their marginal utility for money. Hence they have little reason to purchase insurance against that loss and will not value compensation for that loss as highly as they would value compensation for, say, the loss of a bread-winner. See George L. Priest, *Can Absolute Manufacturer Liability Be Defended?*, 9 YALE J. ON REG. 237 (1992); ATIYAH, *supra* note 50, at 114.

of whom the rescuers came to aid, may compromise that public esteem. The public may look at the police in a different way once their proud mandate “to protect and serve” begins to resemble “to protect and sue.”<sup>114</sup> Much of the public may be shocked to learn that almost all of the rescuer’s tort recovery comes on top of the first-party benefits that the taxpayer already provided. Allowing the rescuer to recover tort damages for his lost income and medical expenses when, thanks to the combined effect of the rescuer’s first-party benefits and the collateral source rule, the rescuer did not lose any income or bear any medical expenses may strike the public as ingenuous. To the public, the formerly virtuous rescuers may now seem grasping. Abolishing the fireman’s rule, therefore, threatens today’s esteem for professional rescuers. If the public starts to look at injured rescuers with a jaundiced eye, then this career will tend to attract applicants who prefer the increased chance to sue over the diminished public recognition—hardly a desirable demographic.

Seeing a few of their colleagues pocket a tort recovery for injuries identical to those for which other professional rescuers are limited to first-party benefits may also impair morale on the job. The importance of minimizing envy and resentment is particularly keen in a vocation where teamwork, esprit de corps, and a willingness to risk injury to help fellow officers play such a large role in the success of the rescuers’ mission.<sup>115</sup>

Encouraging injured professional rescuers to “name, blame, claim”<sup>116</sup> against the potential defendants will leave many rescuers conflicted. Becoming an “action-taking knave”<sup>117</sup> against the endangered and suffering will seem to some rescuers contrary to their oath. The attempt to enrich themselves by displaying their disabled condition to sympathetic juries may strike professional rescuers as dishonorable. The prospect of a windfall for being injured may also reduce their intrinsic motivation.

Suing may tarnish the rescuer’s image of his work as a noble mission and lower his self-esteem. The invitation to sue may also affect the rescuer’s view of his injury and his recovery. The fireman’s rule encourages an injured rescuer to view his injury as a scar earned in a noble battle on behalf of the public against crime or natural danger, a view likely to promote his recovery. Abolition of the fireman’s rule encourages the injured rescuer to turn against the defendants, to cultivate his disappointment about his injury, and to channel that disappointment into blaming the defendants and assigning to them the responsibility for his injuries. Through the process of suing, the injured rescuer tends to undergo a transformation from seeing himself as defendant’s savior into seeing himself as defendant’s victim. The process of suing tends to turn his

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114. Professor Dauber argues that the receipt of aid beyond one’s first-party benefits changes the public perception of a person from that of a virtuous victim to that of an untrustworthy supplicant. Michele L. Dauber, *The War of 1812, Sept. 11, and the Politics of Compensation*, 53 DEPAUL L. REV. 289, 337 (2003).

115. See Richland Center Police Department, <http://www.ci.richland-center.wi.us/police.htm> (last visited Apr. 2, 2007) (listing teamwork as part of the Richland Center, Wisconsin Police Department’s mission statement); John M. Violanti, *Residuals of Police Occupational Trauma* (1997), <http://www.massey.ac.nz/~trauma/issues/1997-3/violant1.htm> (describing teamwork for police as necessary for survival against the enemy).

116. See William L.F. Felstiner, Richard L. Abel & Austin Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .*, 15 LAW & SOC’Y REV. 631 (1981); Austin Sarat, *Imagining the Law of the Father: Loss, Dread, and Mourning in The Sweet Hereafter*, 34 LAW & SOC’Y REV. 3 (2000).

117. WILLIAM SHAKESPEARE, KING LEAR act 2, sc. 2.



injuries from a warrior's badge of honor into the grievance of a supplicant. Does society want to encourage professional rescuers to feel so aggrieved?

To be sure, some rescuers may derive satisfaction from the belief that their suits, with the attendant publicity, focus public attention on the dangers of defendant's negligence. This satisfaction from raising the public's consciousness may bolster the rescuer's self-esteem. Empowering the professional rescuer with the option to sue may bolster his self-esteem indirectly as well. The professional rescuer who views his work as a noble mission of service to the public, wholly inconsistent with suing the public's careless members, will then be able to express that view by scorning his option to sue. In refusing to sue the defendants he strove to aid, he gains the satisfaction Portia in Shakespeare's *Merchant of Venice* expressed in rejecting Antonio's offer to compensate her for her assistance: "He is well paid who is well satisfied; and I delivering you / am satisfied and therein do account myself well paid."<sup>118</sup> Alas, giving rescuers the option to sue foments dissension in the squad because those who refuse to sue may thereby appear to be judging critically those who sue.

The prospect of tort recovery creates a perverse incentive for professional rescuers to exaggerate their injuries and to malingering.<sup>119</sup> With the fireman's rule abolished, the stalwart who takes pride in minimizing his injuries by recovering quickly and returning to work or by working despite his injury will look a bit more foolish. To be sure, the current first-party benefits create similar undesirable incentives. But such self-seeking abuse of first-party benefits is constrained, at least somewhat, through an informal web of incentives regarding promotion and job assignment<sup>120</sup> that take account of the rescuer's record of claiming benefits. Abuse of first-party benefits is also constrained through building solidarity and brotherly spirit among the squad. These constraints on overclaiming will not exist in the professional rescuer's tort case against the negligent strangers who can be sued once the fireman's rule is abolished. A RAND Institute study showed the effect of the prospect of tort recovery on the tendency of those injured in car accidents to visit doctors for treatment of "soft injuries," such as the injury to soft tissues from whiplash.<sup>121</sup> In states like New York and Michigan where the no-fault statutes covered such visits but did not allow recovery in soft tissue cases for general damages such as pain and suffering, only seven doctor visits for soft injuries

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118. WILLIAM SHAKESPEARE, *MERCHANT OF VENICE* act 4, sc. 1.

119. ORIN KLAMER & RICHARD BREFFALT, *WORKER'S COMPENSATION: SHARING THE SOCIAL COMPACT* 37 (2001) ("By emphasizing recovery for, rather than recovery from, their injury, litigation leads workers to dwell on their injuries, slowing down their return to work and delaying commencement of vocational rehabilitation . . . . No one gets well while his claim is pending.")

120. *E.g.*, City of Lawton, Okla. Administrative Policy 3-21, *Light (Limited) Duty Following an On the Job Injury* (May 2, 2005), available at [http://www.cityof.lawton.ok.us/CityCode/Administrative\\_Policies/Section\\_3/21.html](http://www.cityof.lawton.ok.us/CityCode/Administrative_Policies/Section_3/21.html) (police or firefighters who because of injury spend more than a specified number of hours on light duty are not assured of returning to their former position); Interview with Bill Johnson, Director of National Police Officers Association, September 18, 2006, (officers suspected of milking insurance benefits by falsely claiming injury or sickness are not likely to be promoted); Interview with Detective Christopher Armstrong, San Diego Police Department, September 19, 2006, (police on light duty because of injury are ineligible for promotion or transfer).

121. STEPHEN J. CARROLL, ALLAN F. ABRAHAMSE & MARY E. VAIANA, *THE COSTS OF EXCESS MEDICAL CLAIMS FOR AUTOMOBILE PERSONAL INJURIES* 12 (1995).

were made for every ten visits for hard injuries. In California, where all injury claims were handled by the tort system, and thus the injured could increase their general damages by "building up their specials" through more doctor visits for soft injuries, twenty-five visits for soft injuries were claimed for every ten visits for hard injuries. The authors concluded that in 1988 these excess medical visits and claims for soft injuries added almost \$150 to the liability insurance premiums of the average driver in a tort state. Should society encourage police and firefighters to take advantage of a tort system that so rewards them for magnifying their injuries? Should society remain indifferent to the specter of lawyers telling professional rescuers that the more miserable, depressed, and incapable of getting back to work they claim to be, and the more they visit doctors and psychiatrists, the more damages they are likely to recover?<sup>122</sup>

Once these lawsuits become a recognized feature of their work, professional rescuers collectively may respond with measures to mitigate some of the lawsuits' undesirable effects on morale and on the irregularity of the rescuer's compensation. For instance, rescuers' unions may feel that spreading tort recoveries among all the rescuers who suffer injuries similar to those of the successful tort plaintiff would reduce envy and resentment and improve esprit de corps. Creating a fund of tort recoveries and dispersing the fund among all rescuers, or at least all similarly injured rescuers, at regular intervals during the year would also even out and render more predictable the rescuer's compensation. Whether unions or other representatives of rescuers will be able to induce successful plaintiffs to donate their tort recovery in whole or in part for this purpose is uncertain. Union provisions that would compel successful plaintiffs to share their recoveries in this manner may be unenforceable. After all, in the eyes of tort law, the rescuer's first-party benefits are all ignored. In the eyes of tort law, the rescuer's tort recovery, rather than creating any windfall that should be shared with his brother officers, merely makes the rescuer whole.

### 7. Concerns of Retributive Justice

As discussed earlier, there is no serious case for abolishing the fireman's rule on the ground of corrective justice.<sup>123</sup> But the goal of retributive justice calls for sanctioning the culpable defendant regardless of whether the plaintiff experiences defendant's behavior as a wrong to him. One of the most conspicuous shortcomings of the fireman's rule is that it fails to sanction behavior by defendant crime victims or a home or business owner which creates an unreasonable risk of a peril that endangers responding professional rescuers. As defendant's negligence becomes more culpable, the harm to a professional rescuer from her behavior more foreseeable, and the other sanctions for defendant's behavior fewer and less significant, the fireman's rule more offends tort law's goal of sanctioning culpable wrongdoers. But negligence has become such a weak concept in modern tort law that much behavior deemed negligent will not

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122. The effect of suing the public on the professional rescuer's mental health is unclear. Presumably, a professional rescuer, thanks to his training and experience, suffers less dread than the usual plaintiff from reliving his injury over and over as litigation requires. Litigation may nevertheless prevent a professional rescuer from "letting go" of his injury, thus delaying him from completing his mourning about his injury.

123. See *supra* text accompanying notes 64-66.

be viewed as culpable to any significant extent, even by plaintiffs.<sup>124</sup> Fires and crimes to which professional rescuers are eventually summoned can be triggered by a moment of inadvertence while cooking or while closing up a home or business for the evening. Harmless fires can be turned into perils by a defendant forgetting to change the batteries on his smoke alarm. While such momentary inadvertence routinely is viewed as negligence, few would claim it implicates the concerns of retributive justice.<sup>125</sup> When the negligence is committed not by the defendant business owner personally but merely by an employee for whom defendant is vicariously liable, concerns of retributive justice do not enter the picture. Behavior by defendant more egregious than ordinary negligence, after all, can be attacked by injured rescuers despite the fireman's rule.

The notion that imposing tort liability in proportion to the tortfeasor's wrongdoing will achieve retributive justice is undermined by the fact that tort liability is, as a practical matter, only imposed on those with insurance or those who are otherwise financially responsible. Judgment-proof crime victims, renters, homeowners, and occupants of business premises escape liability to professional rescuers however badly they behave. Tort law in practice accords sharply disparate treatment to persons who have behaved with equal culpability, dumping liability on the financially responsible and allowing the negligence of the judgment proof to pass without sanction. Tort liability in practice only threatens the financially responsible; to them alone the norms of tort law are meaningful. Abolishing the fireman's rule means extending this discriminatory character of tort liability into another domain of human activity. Why this discriminatory character of tort liability has not sapped the enthusiasm for expanding liability among those who emphasize retributive justice remains a mystery—a mystery that some observers explain by citing the financial gain from liability to the legal profession.<sup>126</sup>

#### 8. Deterring Defendants' Negligence

The worst utilitarian drawback of the fireman's rule stems from the rule's failure to deter potential defendants from the negligence that triggered the peril.<sup>127</sup> The rule externalizes from these potential defendants the loss to responding professional rescuers. By allowing potential defendants to ignore the risk to responding rescuers, the fireman's rule invites them to underestimate the total expected loss from a peril.

Abolishing the fireman's rule would likely inspire certain types of cost-justified precautions by crime victims and by home and business owners more than others. The

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124. See Gary T. Schwartz, *The Beginning and the Possible End of the Rise of Modern American Tort Law*, 26 GA. L. REV. 601, 623 n.104 (1992) (noting how the notion of negligence has weakened from its pre-1960 meaning of "clear moral culpability substantially antagonistic to social norms").

125. Professor Atiyah sees nothing objectionable about letting such negligence go unpunished or even uncorrected. ATIYAH, *supra* note 50, at 57.

126. Cf. WALTER OLSEN, *THE RULE OF LAWYERS* 211 (2004) (noting the connection between the amount of liability and the wealth of attorneys).

127. An enormous and continually expanding literature deals with the extent to which tort liability actually deters negligence. *E.g.*, G. EADS & P. REUTER, *DESIGNING SAFER PRODUCTS: CORPORATE RESPONSES TO PRODUCT LIABILITY LAW AND REGULATION* 39 (1983). Even a summary review of this literature is outside the scope of this Article.

threat of liability is not so likely to inspire potential defendants to take spur-of-the-moment precautions like putting out a cigarette carefully before sleeping. The threat is more likely to inspire durable precautions that are taken or not taken only after reflection. For example, there may be durable precautions which a homeowner designing her home should take against fire that would not be taken, because not viewed by the homeowner as cost-justified, when the risk to the responding rescuers is ignored. Every decision by the homeowner designing her home, from the relative location of rooms to the flammability of the wallpaper selected, to the installation of high quality fire alarms, might change once the safety of professional rescuers is considered. Likewise, potential crime victims would be more likely to buy a home security system, fence, or personal firearm when negligently becoming a crime victim carries with it the possibility of liability to the police who are injured in responding to the crime.<sup>128</sup> In time, the liability risk to the potential defendants should influence their choice of suppliers. Builders and trade associations of builders, for example, who establish the standards for safe construction, may now insufficiently appreciate the effect of their standards on responding rescuers because their customers give them no financial reason to care about the rescuers. Consequently, the standards they promulgate may not incorporate all the precautions that would be cost-justified if the safety of responding rescuers was fully considered. Abolishing the fireman's rule should alert potential defendants and those with whom they deal to the risk to rescuers and should more closely align the private and social costs of the peril.

A number of considerations mitigate this drawback of the fireman's rule. First, representatives of police and firefighters have long acted to further the safety of rescuers. Their influence has led the National Fire Protection Association to develop standards for construction that are designed specifically to improve the safety of firefighters. The U.S. Department of Labor, through the Occupational Safety and Health Administration, has likewise promulgated various rules for the safety of firefighters.<sup>129</sup> Statutory regulations also aim to protect rescuers. Statutes requiring sprinkler systems and prohibiting the carrying of concealed weapons provide examples. These regulations reduce the need for, and the safety gain from, relying on tort liability to inspire precautions for professional rescuers.<sup>130</sup>

Second, the number of additional precautions elicited from potential defendants by imposing tort liability is likely to be modest. Because injuries to rescuers for which the potential defendant's liability insurer must pay will be sporadic from the insurer's point of view, because a potential defendant's past liability to rescuers does not predict her future liability, and because most potential defendants are not large enough to merit individualized attention from the insurer, liability insurers are not likely to refine their risk classifications through experience, feature, or activity rating of potential defendants.<sup>131</sup> Liability insurers who offer flat rate policies and no safety advice will

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128. Some precautions that jurors or liability insurers insist upon may carry disadvantages that jurors or liability insurers do not fully appreciate. For example, carrying a firearm may increase the risk of accidental injury; dismantling fireplaces because of their risk to firefighters may impair aesthetics.

129. CLARK, *supra* note 62, at 172.

130. To be sure, regulations are likely to render unnecessary the deterrent value of tort liability only when and if injuries to professional rescuers become a salient public concern.

131. Unlike first-party fire and property insurers and liability insurers for car owners, liability insurers for homeowners rarely experience rate. Nor do liability insurers for

exert little pressure on potential defendants to take extra precautions. Because the potential defendants who negligently fail to take precautions for the safety of rescuers will pay the same premium as those who take those precautions, liability simply results in the safe potential defendants subsidizing the unsafe. As Professor Abraham has said:

If a form of coverage uses little classification or is not sensitive to changes in claims experience through experience rating, the degree of control [over precaution taking] that might in the abstract be exercised by [insurers] who have that coverage is not very relevant. . . . At best [the extra liability] will affect the level of the activity engaged in, but not the safety of the activity itself.<sup>132</sup>

For a homeowner, a decreased activity level—because of the additional liability and the resulting higher liability insurance premiums—would typically take the form of refraining from buying a home. But because the cost of the added premiums is trivial in comparison to the other costs of buying a home, the added liability and liability premiums may not change the homeowner's behavior at all.<sup>133</sup>

A defendant's possession of a flat rate liability insurance policy that will not be cancelled does not render her indifferent about her tort liability, however. The defendant must still concern herself with the possibility that a jury award against her will exceed the limits of her liability coverage. But this danger is not as great as a simple comparison of the limits of his liability coverage with the amount of current jury awards would suggest. First, insurance law principles eliminate this danger whenever the plaintiff can be induced to accept a settlement offer within the limits of the defendant's liability coverage.<sup>134</sup> Second, there exists a well-entrenched, if unspoken, custom among the plaintiffs' bar against seeking to collect—at least from

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homeowners feature rate (based on the presence of dangerous features in the home), activity rate (based on the range of activities in the home), or schedule rate (based on the results of inspections or surveys). The resulting "flatness" of the homeowner defendants' premiums arguably prevents any possible deterrence from tort liability. In contrast, insurers of businesses do engage in schedule rating. See STEVE P. SUGARMAN, *DOING AWAY WITH PERSONAL INJURY LAW* 17 (1989); Gary T. Schwartz, *The Ethics and the Economics of Liability Insurance*, 75 *CORNELL L. REV.* 313, 320 (1991). The failure of so much liability insurance to rate, either by experience, features, activities, or schedules reflects the long-standing indifference of the liability insurance industry to accident prevention. See Kenneth S. Abraham, *Liability Insurance and Accident Prevention: The Evolution of an Idea*, 64 *MD. L. REV.* 573, 576–608 (2005) (describing the history of this indifference).

The existence of the fireman's rule, by eliminating any fear that their insureds will be liable to professional rescuers, may contribute to liability insurers' failure to rate their insureds and to their failure to insist on their insureds taking precautions for the safety of rescuers.

132. KENNETH S. ABRAHAM, *DISTRIBUTING RISK: INSURANCE, LEGAL THEORY, AND PUBLIC POLICY* 139 (1986).

133. As a practical matter, most home and business owners will lack the option of dropping their liability insurance because their lenders will require them—as a condition of continuing the loan—to retain their property and fire insurance, and the standardized property and fire insurance policies include liability coverage.

134. Liability insurers must either accept such a settlement, which should save the defendant from having to pay, or be liable for a judgment in excess of the policy limits—a result that also saves the defendant from having to pay. *Cresci v. Sec. Ins. Co.*, 426 P.2d 173, 177 (Cal. 1967); see also *Doe v. S.C. Med. Malpractice Liab. Joint Underwriting Ass'n*, 557 S.E.2d 670 (S.C. 2001).

individual defendants—“blood money,” that is, money beyond the defendant’s liability insurance limits.<sup>135</sup>

Potential defendants have other incentives to take cost-justified precautions to avoid the peril besides the fear of tort liability to possible rescuers. As mentioned earlier, their instinct to preserve themselves, their family, their possessions, and their businesses provides powerful incentives to avoid the peril. While the self-preservation instinct ought as well to deter negligence by car drivers, there is empirical evidence that imposing liability for negligent driving leads to perceptibly less negligent driving.<sup>136</sup> No such empirical evidence exists of a comparable safety payoff from imposing liability in our context.<sup>137</sup>

The fireman’s rule is not the only factor reducing defendants’ incentive to take precautions against these perils. Defendants’ possession of first-party property and health insurance against some of their own losses from these perils also reduces the defendants’ incentive to take precautions. But first-party property insurers have long combated the extra risks created by this moral hazard through such measures as deductibles, coinsurance provisions, and coverage only for the depreciated value of the property without regard to the associational or sentimental values. These measures contain the tendency of first-party insurance to reduce the home or business owner’s incentive to take precautions.

This Article does not attempt to add to the enormous literature on the deterrent value of tort liability except to express doubt about the assumption that the amount of damages juries award in cases of personal injury—as opposed to cases of mere property loss—provides the most accurate measure of the social cost of the injury, and hence, that making defendant pay that amount provides optimal deterrence. Along with Gary Schwartz, I reject the notion that tort damage awards better measure social injury costs, and thereby provide more appropriate incentives for safety, than lesser estimates of injury costs, such as worker’s compensation awards.<sup>138</sup>

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135. Tom Baker, *Blood Money, New Money and the Moral Economy of Tort Law in Action*, 35 LAW & SOC’Y REV. 275 (2001) (describing the custom of not seeking “blood money” except from large businesses that self-insure).

136. See *supra* text accompanying note 19. There are other contexts where tort liability for negligence is warranted on deterrence grounds, even though the instinct for self-preservation ought to induce defendant to take all cost-justified precautions. An example would be airline liability for the negligence of the airline’s pilot that led to an air crash. While the pilot’s instinct for self-preservation ought to induce him to be careful, the severity of such crashes and the importance of the airline taking appropriate care in selecting, training, and disciplining their pilots warrants liability.

137. Arguably, the most conspicuous example of negligently endangering professional rescuers in the modern era was the decision of so many residents of New Orleans to ignore orders to evacuate before Hurricane Katrina struck. Foreseeably, their failure to evacuate put in grave danger the legions of professional, and amateur, rescuers who would respond to their plight. Were the fireman’s rule abolished, and the residents aware of their liability to injured rescuers, is it likely that the threat of that liability would have increased the number of residents who heeded the order to evacuate? Through such questions, asked context by context, a court may be able to render a common sense judgment of the deterrent value of liability for negligence in the context before it, even when the deterrent value of such liability more generally is indeterminate.

138. Gary T. Schwartz, *Reality in the Economic Analysis of Tort Law: Does Tort Law Really Deter?*, 42 UCLA L. REV. 377, 392 (1994) (“From an economic perspective, it is unclear

Finally, those who emphasize the beneficial incentives for precaution taking from imposing tort liability for negligence must concede that the incentives will elicit no extra precautions from potential defendants who are judgment-proof. No expansion of liability will change the behavior of those who know their lack of liability insurance or financial responsibility renders the sanctions of tort law irrelevant to them. Perhaps because nothing can be done about the substantial percentage of possible defendants who are judgment proof, commentators have tended to ignore tort liability's failure to elicit precautions from those defendants and the resulting unequal application of the tort weapon in action. A torts system that treats some of those who have behaved with equal culpability far more harshly than it treats others is, for that reason, a flawed system. And this flaw, far from being irrelevant, argues strongly against expanding that system. A criminal law that discriminates so grossly in its application based on wealth and the presence of liability insurance would have long since been deemed to violate the equal protection clause. Whatever the other merits of that law, however socially undesirable the behavior it proscribes, a consensus would proclaim "better no law than one that cuts so unevenly."

#### 9. Discouraging Defendants from Summoning Professional Rescuers

While the fireman's rule fails to encourage a potential defendant to take precautions to avoid these perils altogether, the rule encourages desirable behavior from her once the peril is discovered. For the rule sends the message, loudly and clearly, to a potential defendant and to anyone acting on her behalf: "Summon the professional rescuers at once!"<sup>139</sup> Abolishing the rule, in contrast, invites a potential defendant—especially one wealthy enough to be worth suing but who lacks liability insurance coverage<sup>140</sup>—to deal with the peril so as to avoid any liability risk to rescuers. Abolishing the rule

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whether a tort system or workers compensation provides better incentives for workplace safety . . . "); see also James R. Chelius, *The Influence of Workers' Compensation on Safety Incentives*, 35 INDUS. & LAB. REL. REV. 235 (1982). It is arbitrary to award damages for the plaintiff's pain and suffering but not for, say, the plaintiff's inconvenience, interrupted plans, lost opportunities, boredom, harm to reputation, and embarrassment. Tort awards may overstate the costs of injury to the plaintiff because they ignore the taxes the plaintiff would have needed to pay on awards for lost income, the benefits the plaintiff receives from not having to work to obtain that income, the plaintiff's ancillary costs of earning that income, the possibility that other events would have prevented plaintiff from earning that income or from enjoying the lost pleasures for which pain and suffering damages are awarded, the plaintiff's ability to adjust to his injury, and the (admittedly less than 50%) chance that plaintiff's injury would have occurred even if defendant has not been negligent. Arguably an accounting of the net social costs of a personal injury should also consider the benefits from plaintiff's injury to plaintiff's rivals in every domain from business to romance.

The tort scholars who assume, usually without discussion, that tort damage awards provide the most accurate measure of social injury costs for deterrence purposes are legion. See, e.g., ROBERT COOTER & THOMAS ULEN, *LAW AND ECONOMICS* (3d ed. 2000); A. MITCHELL POLINSKY, *AN INTRODUCTION TO LAW AND ECONOMICS* (1983); George L. Priest, *The Problematic Structure of the September 11th Victim Compensation Fund*, 53 DEPAUL L. REV. 527 (2003).

139. See *Neighbarger v. Irwin Indus., Inc.*, 882 P.2d 347, 356 (Cal. 1994) ("[T]he public good is best served by a quick response to [emergencies] without questions asked as to the cause of the [emergency] . . .").

140. Wealthy renters without liability insurance are one example of those who might be tempted to delay summoning rescuers because of their fear of being liable to injured rescuers. .

encourages a potential defendant fearful of a tort claim against her to delay calling the professional rescuer on the chance that the potential defendant, or her employees, will successfully deal with the peril themselves.<sup>141</sup> Professor Prosser deemed preposterous the possibility that a potential defendant would hesitate to summon professional rescuers in the absence of the rule.<sup>142</sup> But he seems to have ignored that employees trained to deal with such perils will be barred by the workers' compensation laws from suing their employer for any injury and consequently they will become—in the view of their business employer—the preferred rescuers.<sup>143</sup> Hence once a fire has started at such a business, for example, it is not preposterous to think that fear of liability to the firefighters may lead the business to delay calling the professionals in the hope that its employees—the preferred firefighters—can deal with the fire. Abolishing the fireman's rule, therefore, sends a potential defendant who discovers a peril the message: "First, see if your employees can handle it."<sup>144</sup>

While this message may serve the interests of potential defendants, it offends the interest of society. Defendants and their employees may overestimate their relative competence to deal with the peril compared to the professionals. Moreover, the incentives facing current professional rescuers coincide much more with society's wishes. The top priority of firefighters, for example, is to contain the fire. Only when that priority is met do firefighters turn to the secondary priority of reducing the damage to the structure set afire. Society's wish to mitigate the overall social loss from a fire calls for these priorities. But defendant's employees, or the firms the defendant contracts with, are likely to reverse those priorities. Even if defendant instructs its employees or contractors to adopt the socially desired priorities (e.g., "contain the fire before reducing the damage to what has been set afire"), one cannot realistically expect employees or contractors to have the same whole-hearted commitment to society's wishes as firefighters and policemen are trained to have.<sup>145</sup> As a result, the damage

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141. Abolishing the rule also encourages potential defendants to urge rescuers who have reached the scene not to endanger themselves. In an extreme case, it could lead panicking potential defendants to impede rescuers who are about to endanger themselves.

142. PROSSER AND KEETON ON THE LAW OF TORTS 431 (W. Page Keeton, ed., 5th ed. 1984 & Supp. 1988).

143. In Connecticut, where the fireman's rule has been virtually abolished, a defendant who suffered a heart attack was sued by an emergency medical technician who slipped on defendant's steps while moving defendant into an ambulance. After years of dealing with the EMT's suit, the defendant's widow vowed to "haul" anyone on her property who needed ambulance services "to the curb" in order to avoid future suits by injured rescuers. Jane E. Dee, *Are Homeowners Liable for Rescuers' Injuries?—The 'Fireman's Rule' Debate Broadens After an EMT, Who Slipped on Ice, Wins Lawsuit*, HARTFORD COURANT, April 2, 1999, at A1.

144. Once the fireman's rule is abolished, this preference may lead businesses to hire and to train more employees to deal with these perils. The business preference for rescuers who will not sue may even bring into existence private security firms which, by contract, offer the rescue services policemen and firefighters have long offered but which promise not to sue, or to allow their employees to sue. This promise could be provided either through contract between the security firm, its employees, and the business, or—if contracts not to sue are unenforceable—through a promise by the security firm to indemnify the business should a renegade employee of the security firm sue the business successfully.

145. The common law public necessity privilege reflects the importance of providing rescuers the proper incentives in emergencies. That privilege currently relieves those acting to quell a public danger from fear of liability. RESTATEMENT (SECOND) OF TORTS § 263 (1965)



from perils, including the risk to the professional rescuers who are eventually summoned, may increase.<sup>146</sup>

Granted, the liability insurance coverage that many defendants possess for injuries to professional rescuers should contain this undesirable effect of abolishing the fireman's rule. Knowing they have some liability coverage if professional rescuers are injured, defendants facing an emergency should be more inclined to call in the professional rescuers immediately, as society would wish. The defendant's liability insurance is especially likely to have this effect if a successful suit against defendant by the rescuer will not lead to an increase in defendant's liability insurance premiums. And, as discussed before, these liability insurers are not likely to experience rate insureds for this sporadic and irregular liability risk.<sup>147</sup> Of course, insofar as defendants believe their liability insurance limits may fall short of the expected liability to the rescuer, their liability insurance may not overcome their undesirable incentive created by abolition of the fireman's rule to deal with perils without involving the professionals.

In summary, the case for abolishing the fireman's rule derives its best argument from the improved incentive for potential defendants to take care to avoid perils. On the other hand, abolishing the rule creates an inappropriate incentive for potential defendants to delay summoning the professionals once a peril is discovered.

#### 10. Other Effects of the Rule on Defendants

The financial effect of abolishing the fireman's rule on a defendant will naturally turn on whether the defendant possesses adequate liability insurance to cover the tort judgments against him. Of the potential defendants liable to rescuers, home and business owner defendants are more likely to have liability insurance than crime victim and renter defendants. The standardized liability insurance policies for home and business owners should cover the rescuer's tort judgment. Those policies do not yet contain any exclusions from coverage that might give the insurer grounds for refusing to defend, or refusing to indemnify, the defendant. The standard exclusion for "expected and intended harm"<sup>148</sup> would not jeopardize defendant's coverage unless he intentionally caused the emergency by, for example, committing arson. A defendant who committed arson or intended some other harm, of course, could not invoke the fireman's rule in the first place.<sup>149</sup> As long as defendant did not desire the peril, but

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(destruction of chattel in order to avoid public disaster is privileged); *see also* *Preudhomme v. Stebbins*, 55 N.Y.S.2d 397, 400 (1945) (defendant privileged to seize or destroy dogs suspected of rabies). One salutary effect is to give the actor the socially desirable incentive of mitigating the overall harm, rather than the incentive to mitigate the harm to any particular business or individual like the potential defendant. The fireman's rule preserves this incentive.

146. Brandon K. Dreiman, Comment, *Extending the Fireman's Rule to Great Britain: Protecting British Citizens from Tort Liability for Firefighters' Line-of-Duty Injuries*, 8 IND. INT'L & COMP. L. REV. 381 (1998) (describing the increase in overall risk from amateur efforts to deal with perils for which professional rescuers are trained).

147. *See supra* text accompanying note 131.

148. KENNETH S. ABRAHAM, *INSURANCE LAW AND REGULATION* 172 (4th ed. 2005) (standard homeowner policy).

149. An exception to the fireman's rule exists for intentional wrongdoing. *See supra* text accompanying notes 37-39.

caused it negligently, no doubts about his coverage under the current liability policies should arise.

One possible effect of abolishing the firemen's rule, then, is that liability insurers will seek to change their policies in order to avoid covering the risk of liability to professional rescuers. The likely method of doing so would be to add an exclusion tailored to this liability risk. But there is no obvious reason why liability insurers should be more reluctant to cover the liability risk to rescuers than they are to cover the liability risks they currently cover. From their perspective, abolition of the fireman's rule would create a business opportunity to offer coverage of this new liability risk now facing their insureds. Rather than exclude coverage, liability insurers would be more likely to point out to their insureds their new tort exposure, increase the premiums they charge their insureds, and, perhaps, urge them to opt for a higher limit.<sup>150</sup>

Abolishing the rule imposes more severe dislocation costs on those defendants who lack any liability insurance or self-insurance. Crime victims and preinjury renters exemplify such defendants.<sup>151</sup> An uninsured premises renter is at least as likely as an insured premises owner to be negligent in a manner that causes a peril. In such cases the injured professional rescuer, though preferring to sue someone with liability insurance, may find no such party.<sup>152</sup> After all, those owning residences are not vicariously liable for the negligence of their renters. With no financially responsible defendant, the injured rescuer may opt to sue a crime victim or renter who lacks liability insurance rather than not sue at all.

While tort suits against those without any liability insurance or self-insurance are rarely brought,<sup>153</sup> the dislocation costs<sup>154</sup> of such suits when brought deserve some attention. In such suits, of course, the defendant alone bears his attorney fees and other defense expenses regardless of the outcome, and those fees and expenses may be considerable. Moreover, the same peril which led to the rescuer's injury is also likely to have caused the defendant a recent and significant financial loss. A defendant who lacks liability insurance to cover his loss from the rescuer's suit is also likely to lack first-party insurance for his own loss, as modern homeowner's and renter's insurance typically cover both losses. While an ample literature supports imposing liability in order to mitigate the dislocation costs of an injured plaintiff who lacks first-party insurance, comparatively little attention has been accorded the dislocation costs of

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150. Because mortgage lenders insist on borrowers obtaining homeowner's or business insurance as a condition of the loan, many individual borrowers may feel this insurance was forced upon them and may resent premium increases on this insurance more than on more elective insurance.

151. The renter's guests are also less likely to have liability insurance than a property owner.

152. In some states guests and renters are treated as additional insureds under the liability insurance policy of the landlord. This liability insurance coverage would naturally render injured rescuers more inclined to sue the negligent guest or renter. See *Lexington Ins. Co. v. Raboin*, 723 A.2d 397, 397 (Del.) (embracing what is known as the *Sutton* rule), *aff'g* 712 A.2d 1011 (Del. Super. Ct. 1998); *Sutton v. Jondahl*, 532 P.2d 478, 482 (Okla. Civ. App. 1975).

153. Baker, *supra* note 135, at 275 (discussing how rarely suits are brought against those without liability insurance).

154. The term "dislocation costs" comes from Calabresi and refers here to the disruptive effect that tort liability can have on the life of a liable defendant without liability insurance. CALABRESI, *supra* note 21, at 97.

liability on a defendant who lacks liability insurance.<sup>155</sup> Yet the financial blow to such a defendant of having to pay a tort judgment will often exceed the blow to injured plaintiffs denied recovery if only because, thanks to the tradition of plaintiff's attorneys charging contingency fees, unsuccessful plaintiffs escape paying for their attorney and for other litigation expenses,<sup>156</sup> while a liable defendant cannot.<sup>157</sup>

Naturally the fireman's rule, like all "no duty" or "no proximate cause" rules, saves defendant from the expense and risks of defending against false claims and being subjected to mistaken verdicts. It also protects defendants against tort law's notorious disregard of the relative fault of one defendant compared to another. For example, a fire peril may be caused by minor negligence of a landlord and by much more culpable negligence of a tenant. But if the landlord is richer or better insured than the tenant, the liability burden is likely to fall disproportionately on the landlord. Tort law gives the injured firefighter the power to decide to sue only the landlord. Alternatively, even when the tenant's greater culpability is recognized by the factfinder, the tort principle of joint and several liability, where it still exists, may lead to the landlord paying the entire judgment while the renter is protected by his lack of wealth or lack of liability insurance. Joint and several liability exemplifies a number of pro-plaintiff tort principles which are based on the assumption—more likely true in the era when the principles were propounded—that an injured plaintiff must recover in tort to be compensated at all. All these principles can operate unjustly, and hence should not be uncritically applied, when first-party benefits are ample.

On balance, this discussion in Part II.B, which attempts to look beyond the rationales for the fireman's rule and their shortcomings to the ease of application and the various possible effects of the rule, argues forcefully in favor of the rule. Abolition of the rule would inflict serious problems of proof on factfinders. It would devote more of society's limited resources to litigation, and would further enhance the power of lawyers over the public. Abolition will lead to professional rescuers suing some member of the public but not others who appear equally negligent. In time, abolition would threaten to create at least the appearance of professional rescuers being more willing to risk themselves to save the life and property of some members of the public than of others similarly situated. Suits by professional rescuers arising from a peril may raise doubts about the integrity of the subsequent investigation of the peril, and undermine the public perception of rescuers, the morale of the squad, and the self-respect of individual rescuers. The incentive the prospect of tort recovery gives rescuers to exaggerate their injuries and malingering collides head-on with the culture and the norms that help rescuers serve their mission. Crime victims and home and business owners who are aware of the toxic character of litigation, especially for defendants,

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155. *Cresci v. Sec. Ins. Co.*, 426 P.2d 173 (Cal. 1967), depicts the plight of a tort defendant whose liability insurance was insufficient and who actually ended up paying "blood money." Yet that tort defendant, despite her many travails, at least avoided the further burden facing the wholly uninsured of being forced to pay her attorney fees.

156. Litigation expenses are typically forwarded by plaintiff's attorneys who, in the event the case fails, do not seek reimbursement from their client.

157. So great is the expense of defending a tort suit without liability insurance that many foreign governments finance legal aid agencies for such defendants. See MARKESINIS ET AL., *supra* note 100, at 215–17; Earl Johnson Jr., *The Right to Counsel in Civil Cases: An International Perspective*, 19 LOY. L.A. L. REV. 345 (1985).

may, when faced with a peril, think twice about summoning the professionals, much to the disadvantage of society.

A fair assessment must lay against these and other disadvantages of abolishing the fireman's rule the advantages of better deterrence of negligence by crime victims and home and business owners that endangers responding professional rescuers, as well as the moral gain from retribution for this negligence. But in light of the other incentives operating on potential defendants, liability seems likely to yield only a modest improvement in precaution taking against police and fire perils. Because the value of retribution will turn on the severity and degree of culpability of the defendant's negligence, few generalizations are possible beyond the observation that many of these perils are triggered by momentary inadvertence or other negligence that arouses little desire for retribution.

Part II has evaluated the fireman's rule in light of such suggested tort goals as corrective justice, retributive justice, ease of administration, and the encouragement of socially desirable behavior. It is time to evaluate the rule in light of compensation goals, in particular, in light of the rescuers being premium planners for their injuries compared to most tort plaintiffs.

### III. HOW PLAINTIFF BEING A PREMIUM PLANNER FOR HIS INJURIES AFFECTS THE CASE FOR THE FIREMAN'S RULE

In looking at the advantages to society of handling the injury to professional rescuers solely through first-party benefits rather than also through a tort suit, the reader must remember that the issue is not which method of handling these injuries is better, but rather whether, given that first-party benefits will be provided to professional rescuers,<sup>158</sup> the rescuer should also be allowed a tort suit against the negligent crime victim or home or business owner. Because the issue is whether additional compensation should be allowed, it is more pertinent to show, for example, that the rescuer's first-party benefits adequately compensate him than to show that those first-party benefits can be provided to the injured rescuer at much lower cost to society than can the benefits of a tort action. Nevertheless, appreciating the savings from handling these injuries through first-party benefits, rather than through a tort action, sheds light on whether a tort action should also be allowed.

Society gains when injuries are adequately insured against at the lowest cost. Hence society incurs unnecessary costs when tort law shifts the cost of an injury to a party who can only insure against the injury by paying higher insurance premiums than another party would need to pay for equal coverage. Other things equal,<sup>159</sup> tort law will avoid excess accident costs by finding the better insuring party and placing the injury risk on it.<sup>160</sup> In addition, accurate grading of premiums is an important policy goal in

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158. The uncertainty and delay of tort recovery assure that professional rescuers and their representatives will arrange for substantial first-party benefits even if the fireman's rule is abolished.

159. The major factor that needs to be equal is the relative precaution-taking ability of the parties—assuming that some cost-justified precaution against the injury was available to at least one of those parties.

160. It has long been recognized that tort law imposes unnecessary costs on society when it imposes liability on a party who can only cover that liability by paying relatively high insurance premiums. Making defendant insure accomplishes desired accident cost avoidance at an

any insurance scheme. As the discussion below demonstrates, those providing a professional rescuer's first-party benefits are better able to estimate the likelihood of a professional rescuer being injured on the job than the defendant's liability insurer is able to estimate the likelihood of its insured negligently causing a peril that leads to a rescuer's injury.<sup>161</sup> The first-party-benefit providers are also better able to estimate the likely severity of such injuries. Hence the first-party-benefit providers, facing less uncertainty,<sup>162</sup> can better evaluate this risk.

*A. Why the Professional Rescuers' First-Party Insurers Can Insure Better than Defendant's Liability Insurers Against the Injury Risk to Rescuers*

The better evaluator of the likelihood and severity of the injury will not always be the better insurer. If, for example, the better risk evaluator cannot purchase insurance or otherwise diversify against the injury for some reason—and there are many reasons why the market might fail to make such insurance available to him<sup>163</sup>—then the better risk evaluator may be a poorer insurer against the injury risk than a party with less ability to evaluate the risk but less difficulty in insuring against it. But this qualification need not detain us, for the market generally makes insurance coverage of injuries to professional rescuers available both to the rescuers and to most defendants. First-party-benefit providers are readily available to the rescuers, and liability insurers are readily available at least to those defendants who own a home or business.<sup>164</sup> Moreover, actual experience confirms that a great deal of first-party benefits and liability insurance covering these injuries to rescuers is in fact purchased, thereby eliminating any concern that unforeseen obstacles against coverage exist. If we assume plaintiffs and defendants enjoy equal ability to diversify against the losses arising from these injuries by buying insurance, the superior ability of one party or his representative or insurer to evaluate the risk of injury argues for assigning the risk of injury to that wiser insurer. Such a tort

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unnecessary cost when an equally good accident-cost-avoiding plaintiff could buy insurance at a lower rate:

The effect of allocating costs to parties that can spread only by paying relatively high insurance premiums is that unnecessary costs of spreading are introduced into the system . . . . [B]y ignoring which of the litigants is the cheapest avoider of secondary costs, the [fault system] may burden a litigant who is not the cheapest avoider of the sum of primary and secondary costs. And this ultimately results in unnecessary costs being borne.

CALABRESI, *supra* note 21, at 252–53.

161. Another way to state this is that the rescuer's first-party benefit providers can inject the cost of rescuer injuries into their budget for rescuers more accurately than liability insurers can inject the cost of their insured's liability to rescuers into the insurer's cost estimates and liability insurance premiums.

162. *Cf. Hadley v. Baxendale*, 9 Ex. 341, 156 Eng. Rep. 145 (1854) (denying recovery when plaintiff faces less uncertainty than defendant in estimating the severity of plaintiff's loss).

163. Ideally, for insurers to offer insurance against a risk, the risk should be independent of other covered risks; should occur at a regular, predictable rate; and the insurance pool should contain enough risks for the law of large numbers to operate. ABRAHAM, *supra* note 132, at 213 (describing the prerequisites for a risk to be insurable).

164. The extent to which crime victims have liability insurance that will cover their liability to policemen injured in attempts to rescue them is unknown. To the extent crime victims lack such insurance, the case for retaining the fireman's rule to bar suits against them is naturally stronger.

rule will preserve the optimal incentive on the better insurer to plan appropriately for the risk of the rescuer being injured and will achieve for society his economies in doing so.

In assessing whether the wiser insurers against the risk of injury to professional rescuers are the rescuers themselves through their first-party-benefit providers or the potential defendants through their liability insurers, the notion of rational ignorance offers some guidance. Social scientists argue that when risks are too difficult to measure, those affected by the risk will, rationally, remain ignorant about the risk even when the loss threatened if the risk materializes is substantial.<sup>165</sup> A party facing a risk about which he is rationally ignorant will rarely be the wiser insurer against that risk. For example, the likelihood that consumers of a product will rationally remain ignorant about remote risks to themselves from using the product provides a powerful reason for presuming that the product seller is a wiser evaluator of the product's risks and for assigning to the seller the risks of injury, even though the consumer has a clearer vision of how he will use the product.

The concept of rational ignorance bears on the inquiry here because, if the fireman's rule is abolished, the liability insurers of potential defendants may yet remain rationally ignorant about the liability risk to a rescuer from their insured's behavior. The liability risk to rescuers after all, will never constitute a significant fraction of what does concern these liability insurers, namely, the total liability risk to persons and property from their insured home or business owner's covered behavior.<sup>166</sup> Defendant's liability insurers, in short, have relatively little reason to become specialists in evaluating the liability risk just to professional rescuers. Hence, abolishing the fireman's rule is unlikely to elicit from these liability insurers an especially accurate measurement or pricing of that liability risk.<sup>167</sup>

In contrast, the risk to a firefighter or policeman of being injured or killed while responding to fire or police perils is not a risk about which their union representatives and other first-party-benefit providers remain rationally ignorant. The injury risk, consisting of the rate and severity of injuries and disability claims, is large enough to warrant these agents of professional rescuers undertaking substantial efforts to measure it accurately. Far from being one of a great many liability risks for injury or property damage that are being covered, as it is for defendant's liability insurers, the injury risk to firemen and policemen is the primary focus of the first-party-benefit providers. They are the natural specialists in evaluating this risk and designing first-party-benefit packages to insure against it efficiently.

Nor would the liability insurers who did attempt to measure the liability risk to rescuers from the behavior of their insured home or business owners possess much

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165. See Howard Kunreuther & Paul Slovic, *Economics, Psychology, and Protective Behavior*, 68 AM. ECON. REV. 64 (1978).

166. For example, the insurers will not be covering the liability risk from the insured's intentional torts and hence will only need to estimate the liability risk to professional rescuers from the insured's negligence. See Michael Sean Quinn, *Liability Coverage for Breaches of Contract*, INS. J., Nov. 20, 2000, <http://www.insurancejournal.com/magazines/southcentral/2000/11/20/legalbeat/20904.htm> (stating that standardized liability insurance policies cover the insured's negligence but not the foreseeable results of intentional acts). Of course, the fireman's rule applies only to suits arising from the insured's negligence.

167. Wiser pricing of insurance against a loss means a social savings in handling the loss. ABRAHAM, *supra* note 132, at 218.

capacity to do so. Unlike the first-party-benefit providers, these liability insurers lack practical access to the factors that determine the injury risk to professional rescuers. Those factors include: the particular techniques used in each department, the training and qualifications of the firemen and police, the location of the department and the type of community it serves, the department's injury record, the quality of the department's leadership, and the severity of the secondary results of the rescuer's injury. First-party-benefit providers are also better able to monitor how the injury risk varies with each particular type of firefighting or police work. Compared to the rescuer's first-party-benefit providers, the potential defendant's liability insurer knows little about these criteria and lacks any power to influence them.

True, the liability insurer is better able to learn the characteristics of the defendant or of the defendant's premises which bear on the risk of a fire or police peril. Accordingly, the defendant's liability insurer can better estimate the likelihood of a peril of some kind at the defendant's premises. Its acquaintance with defendant, however slight, may also give it a more informed hunch about the chance of defendant negligently causing a peril. Its great difficulty, however, and the aspect on which it is likely to remain rationally ignorant and markedly inferior to the first-party insurers, lies in translating its knowledge about the risk of the peril into an estimate of the injury risk to the rescuers who respond to that peril.

Certain features of our tort system exacerbate the difficulty in measuring liability risks and suggest that first-party insurers will often be better risk evaluators. One is the likelihood that there will be many other parties that the rescuer will be able to sue. With joint and several liability no longer being as widespread as three decades ago,<sup>168</sup> the number of financially responsible defendants before the court substantially affects the liability burden of each. When an insured homeowner negligently starts a fire that originates from a stove or furnace, for example, the injured firefighter may also be able to sue the manufacturer and other sellers of the stove or furnace. If firefighters responding to the negligence of the insured homeowner are injured by the collapse of a floor, the firefighters may also be able to sue the builder and even the architect. Because the liability exposure may turn on a comparison of the culpability of several defendants, uncertainty about the number of defendants impairs the ability of the homeowner's liability insurer to predict its exposure and to price the coverage it offers.

Measuring the liability insurer's exposure should the fireman's rule be abolished also becomes more difficult because of the number of contingencies that must materialize before that liability occurs. The greater the number of contingencies and the greater the difficulty in ascertaining the likelihood of each, the greater the insurer's difficulty in estimating the risk being covered. The insurer must estimate the likelihood of a peril occurring, of the peril leading to a professional rescuer's injury, of the injured rescuer deciding to sue, of the rescuer being able to adduce sufficient evidence of each element of its negligence case, and of the defendant not being able to adduce sufficient evidence of each element of the contributory negligence defense. The insurer must also estimate the average damages awarded in such cases, which in turn requires a host of estimates about, for example, the apportionment of causal negligence under each state's comparative negligence scheme, and how the jury will resolve highly

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168. See, e.g., IND. CODE § 34-51-2-7 (2006) (abolishing joint and several liability except for medical malpractice); UTAH STAT. § 78-27-38 (1990) (abolishing joint and several liability generally).

disparate claims of pain and suffering. Empirical work indicating that awards are significantly higher in poor and African-American neighborhoods means the liability insurer must also consider the locale in which a trial is likely to be held.<sup>169</sup> The greater the liability insurer's difficulty in measuring the liability risk, the poorer its pricing of the defendant's liability insurance.

The possibility of a punitive damage award against their insured, at least when neither the liability insurance policy nor each state's law clearly excludes such an award from coverage, further increases the unpredictability of the liability insurer's exposure. The more unpredictable the awards, the more resources are required to estimate them, the greater the reserve the insurer must maintain to cover them, and the higher the premiums liability insurers must charge.<sup>170</sup>

*B. Other Savings from Handling These Injuries Through  
First-Party Benefits Rather than Tort Liability*

The cost of insuring is reduced not only by having the insurance arranged and purchased by the party who can do so more wisely, but also by having that insurance administered at lower cost. A look at administrative costs will bring into relief the shortcomings of compensating injuries through tort liability rather than through first-party benefits. Getting a dollar's worth of benefits to rescuers through worker's compensation requires administrative costs of less than thirty cents, through health insurance ten cents, through social security disability a mere eight cents, and through most pension plans for police and firefighters one to five cents.<sup>171</sup> While no comparable data indicates the administrative costs of getting a dollar's worth of benefits to rescuers under the Public Safety Officers' Benefits Program (PSOB), the fact that it provides a one-time benefit of a flat amount (\$267,245.00 to be adjusted for inflation after passage in 2003) only to those killed on the job (an inexpensive determination), or permanently injured on the job (a more expensive determination), suggests that its administrative costs will be greater than Social Security's but less than Worker Compensation's. To give rescuers a dollar of benefit through the tort system, in stunning contrast, will require between one and two dollars in administrative costs.<sup>172</sup>

This difference stems primarily from the decreased involvement of attorneys in the administration of first-party benefits. This, in turn, stems from a number of factors, including the first-party-benefit provider's greater familiarity with the rescuer's pre-injury condition and both the benefit provider's and the rescuer's greater familiarity with the benefits previously provided to the rescuer's injured colleagues. Collective

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169. ERIC HELLAND & ALEXANDER TABARROK, JUDGE AND JURY: AMERICAN TORT LAW ON TRIAL 72 (2006).

170. Paul Rubin, *BMW v. Gore: Mitigating the Punitive Economics of Punitive Damages*, 5 SUP. CT. ECON. REV. 179, 184 (1977) (discussing the effect of punitive damages awards on the overall variance and predictability of tort awards).

171. BELL & O'CONNELL, *supra* note 99, at 105; TILLINGHAST-TOWERS PERRIN, *supra* note 11, at 402.

172. TILLINGHAST-TOWERS PERRIN, *supra* note 11, at 423; *see also* STAFF OF J. ECON. COMM., 108TH CONG., CHOICE IN AUTO INSURANCE: UPDATED SAVINGS ESTIMATES FOR AUTO CHOICE, app. A, at 14 (Comm. Print 2003) (report of Dan Miller). In 2001, attorneys' fees in auto injury cases alone totaled \$16.74 billion. *Id.*



valuation of damages, such as the valuation of lost earnings through damage schedules, yields significant savings in the administration of first-party benefits. All of these factors also reduce concerns about overclaiming by the rescuer. In contrast, allowing the rescuer to sue will set in motion the entire individualized apparatus of torts. The stigma that liability for negligence still carries would itself probably guarantee attorney involvement, even if the procedures of torts did not. That attorney involvement, in turn, guarantees a stunning increase in the costs of administration. Efforts to compare the costs of worker's compensation systems in different states emphasize how even slight increases in attorney involvement in the operation of that system can dramatically raise its administrative costs.<sup>173</sup>

Granted, greater attorney involvement results from the different, and more ambitious, goals of the tort system. These goals include resolving the culpability of the parties, improving safety by identifying and deterring negligence, and compensating the rescuer for his pain and suffering. These goals naturally call for much more evidence, time, and argument.<sup>174</sup>

The following example suggests that when the safety gain from liabilities' deterrence of defendant's negligence is modest, the administrative costs of determining tort liability need not be very high to swamp that safety gain and render the tort action a social loss.

Assumptions:<sup>175</sup>

- Cost of accident when it occurs (as measured by the tort system when it awards damages): \$10,000<sup>176</sup>
- Chance of accident when defendant is negligent<sup>177</sup> (i.e., does not take care): 5%
- Expected costs of accidents when defendant is negligent: \$500 (\$10,000 x 5%)
- Chance of accident when defendant is not negligent (i.e., does take care): 4%
- Expected costs of accidents when defendant is not negligent: \$400 (\$10,000 x 4%)

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173. ORIN KRAMER & RICHARD BRIFFAULT, *WORKER'S COMPENSATION: STRENGTHENING THE SOCIAL COMPACT* 91 (2001) (increasing attorney involvement in some jurisdictions has increased the worker's compensation insurer's spending on claims administration per premium dollar from sixteen cents to fifty-nine cents, with a corresponding reduction in the percentage of the insurer's total costs that reach the claimant).

174. CALABRESI, *supra* note 21, at 219–22.

175. The assumptions do not specify the time period over which the costs are measured. The reader may assume these are the costs over any time period (e.g., a month).

176. As discussed *supra*, see text accompanying notes 141–142, assuming that the social cost of an injury equals the average tort damage award for the injury is highly suspect. Nevertheless, that assumption has become conventional in legal scholarship, and for the limited purpose of this example, I adopt that convention.

177. The jury must find both that defendant was negligent and that his negligence was a cause-in-fact of plaintiff's injury before it can find defendant liable. For simplification, a finding of cause-in-fact is assumed whenever defendant is found negligent.

- Reduction in expected costs of accident from defendant taking care: \$100 (\$500 - \$400)
- Defendant's cost of taking care: \$80 (So, \$80 being less than \$100, taking care is cost-justified and defendant who does not take care is negligent.)
- Chance of court system finding defendant negligent and liable even when defendant has taken care, and hence, is not negligent: 10%
- Chance of court system finding defendant negligent and liable when defendant has not taken care and hence is negligent: 100%
- Plaintiff's cost of suing (i.e., administrative costs): \$900<sup>178</sup>
- Defendant's cost of defending (i.e., administrative costs): \$900

#### Results of Assumptions:

- Plaintiff will always sue after an accident because his expected benefit from suing, even when defendant has taken care, is \$1000 (10% chance of winning x \$10,000), which exceeds his \$900 cost of suing.
- Because plaintiff will always sue, defendant will have sufficient incentive to take care. Doing so only costs defendant \$80 and reduces defendant's expected liability expense much more than that, from \$545 ((5% chance of accident) x (\$10,000 cost of accident + \$900 cost of defending)) to \$43.60 ((10% chance of losing despite taking care) x (4% chance of accident) x (\$10,000 cost of accident + \$900 cost of defending)), a gain of \$501.40.
- Total cost to society of a rule imposing liability on defendant when defendant is negligent: \$552 (\$80 cost of defendant taking care + 4 % chance of accident x (\$10,000 + \$1800 cost of suing and defending when there is an accident)).
- Total cost to society of a rule rejecting liability even when defendant is negligent: \$500 (5% x \$10,000).

In other words, it is quite easy for the plaintiff's administrative costs of suing plus defendant's administrative costs of defending (in light of the risk of an erroneous judgment of liability) to swamp the social benefits inhering in the extra precaution taking by defendant that liability for negligence induces. The administrative costs of liability are even more likely to swamp liability's precaution-taking benefits if the prospect of tort recovery reduces plaintiff's incentive to take care for himself, thereby reducing the overall precaution-taking benefit of liability. As long as imposing liability for negligence does not greatly reduce accident costs, and the administrative costs when plaintiffs sue are substantial, society may be better off enduring the extra accident costs that imposing liability for negligence would eliminate.

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178. Unlike the amount of liability, which is a mere wealth transfer, these administrative costs are no less of a cost to society than the accident costs.

The example also suggests that even when liability for negligence is socially undesirable, plaintiff's private gain from suing—the expected settlement or judgment he will receive minus his cost of suing—may render suing desirable for plaintiff. After all, plaintiff need not bear any of the costs that his suit inflicts on defendant, nor need plaintiff bear the risk of an erroneous finding that the defendant was liable. Indeed, whenever the chance of an erroneous verdict in plaintiff's favor is greater than the chance of an erroneous verdict in defendant's favor, it may be sensible for plaintiff to sue.<sup>179</sup>

*C. Further Reasons for Handling These Injuries Through  
First-Party Benefits Rather than Tort Liability*

Another advantage of handling injuries to rescuers through first-party benefits only is the far greater horizontal equity in compensation among injured rescuers that first-party benefits compared to tort liability achieve. Horizontal equity refers to the extent to which like injuries receive like compensation and different injuries receive different compensation commensurate with their severity. The standardized payment schedules of the first-party-benefit providers tend to assure like compensation for like injuries. The experience over time from encountering many injuries enables first-party-benefit providers to refine their sense of how disabling and serious a given injury is relative to others—a sense that they are able to reflect in their standardized payment schedules. In contrast, tort damage awards for the same injury fluctuate wildly.<sup>180</sup> First-party benefits also achieve horizontal equity among injured rescuers in that rescuers injured by non-negligently caused perils receive the same compensation as those injured by negligently caused perils. The tort action, in contrast, only benefits those rescuers injured by negligently caused perils, and only the fraction of those rescuers who can find a financially responsible defendant to sue.

The importance of achieving horizontal equity increases the more the injured plaintiffs are seen as members of a single community. One advantage of handling the losses of 9/11 through the Victims Compensation Fund (VCF) rather than through tort liability against the airlines, the airline security companies, the builders of the World Trade Center, and the many other potential defendants, was the far greater horizontal equity that was achieved among the injured and the survivors of the dead. The VCF operated as, and shared the features of, a first-party benefit not unlike the Public Safety Officers' Benefits Program (PSOB). Those operating the fund put a high priority on horizontal equity in part because the victims soon tended to see themselves as members of a single community.<sup>181</sup> Horizontal equity was called for by the sense of community

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179. This point—that private plaintiffs may find suing worthwhile even when society does not—has been made by many others. *See, e.g.*, SHAVELL, ACCIDENT LAW, *supra* note 11, at 290.

180. PATRICIA DANZON, MEDICAL MALPRACTICE: THEORY, EVIDENCE, AND PUBLIC POLICY 161–62 (1986) (“Under current damage rules, the range of uncertainty is enormous because of the discretion left to the court in determining such factors as rates of inflation of wages and medical expense, discounting, treatment of taxes, compensation for pain and suffering, and now in some states, discretionary offset of collateral compensation and periodic payment of future damages.”).

181. Robert Rabin, *The September 11th Victim Compensation Fund: A Circumscribed Response or an Auspicious Model?*, 53 DEPAUL L. REV. 769, 776 (2003); KAI T. ERICKSON,

between the victims and in turn helped to build more solidarity and sense of community, a result widely seen to be therapeutic and desirable in itself.<sup>182</sup> Plainly, these rationales apply a fortiori to professional rescuers. Few, if any, vocations develop closer affinity or a more compelling sense of membership in a community. Few missions benefit more from strengthening those bonds.

Several factors render the loss from injury to professional rescuers more amenable to scheduling and hence more appropriately handled through first-party benefits than, say, the loss to those injured in car accidents.<sup>183</sup> Injured professional rescuers are drawn from a more homogeneous economic group than are the young children, housewives, retired persons, and high-income adults who may be injured in car accidents. The typical professional rescuer is a wage earner within a fairly narrow age range and even narrower salary range. In addition, the on-the-job injuries to professional rescuers do not vary quite as much from each other as do the injuries to those in car accidents.

The need to compensate professional rescuers for their non-pecuniary losses, such as pain and suffering, is also less compelling than for many plaintiffs. As mentioned previously, the firefighter or policeman injured in attempting a rescue of the potential defendant or his property suffers little dignitary harm from the defendant's negligence compared to other tort plaintiffs. The professional rescuer's training and expectations render it less likely that the professional rescuer will feel wronged by the defendant. As the potential defendant and the professional rescuers are invariably strangers before the peril, the professional rescuer will possess less reason than many other plaintiffs to feel defendant's negligence was a personal affront.<sup>184</sup> Insofar as non-pecuniary damages, in particular damages for pain and suffering, aim to redress the dignitary harm the defendant has inflicted on the plaintiff, the argument for awarding them to professional rescuers loses much of its force. Of course the pain and suffering from the rescuer's injuries are a genuine loss. But with job-related injury and its attendant pain being such an omnipresent aspect of his work, the rescuer lives with the anticipation of that pain and suffering every day, a factor that, according to some research, mitigates its

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EVERYTHING IN ITS PATH: DESTRUCTION OF COMMUNITY IN THE BUFFALO CREEK FLOOD 186–245 (1976) (disasters often lead victims to a heightened emphasis on community).

182. Other societies also attach great importance to horizontal equity in the compensation of persons they regard as victims of terrorism. Janet Alexander, *Procedural Design and Terror Victim Compensation*, 53 DEPAUL L. REV. 627, 658–60 (2003). For example, the government of Israel provides the same compensation to all victims of terrorism, even though its tort system, like ours, gives much more divergent compensation to tort plaintiffs. The Israeli government is even careful to provide civilian victims of terrorism with the same compensation provided injured soldiers. Victims of Hostile Action (Pensions) Law, 5730–1970, 24 LSI 131 (1969–70) (Isr.). In the midst of its civil disorders, Northern Ireland likewise created a compensation fund that strove to provide equal compensation to equally-injured victims of intentional wrongdoing in order to achieve horizontal equity. Criminal Injuries Compensation (Northern Ireland) Order 2003 para. 30 (N.I. 1 of 2003) (N. Ir.); see also Hellel Sommer, *Providing Compensation for Harm Caused by Terrorism: Lessons Learned in the Israeli Experience*, 36 IND. L. REV. 335 (2003).

183. Ray Brown, *Automobile Accident Litigation in Wisconsin: A Factual Study*, 10 WIS. L. REV. 170 (1934).

184. The rescuer is much more likely to view as a personal affront the negligence by the defendant that occurs after the rescuer has arrived at the scene. But the fireman's rule does not block the rescuer's suit for damages inflicted by such negligence.

effect.<sup>185</sup> Compared to other injured plaintiffs, injured premium planners like professional rescuers can be more justly confined to their pecuniary losses, which their first-party benefits typically eliminate.

Fans of tort liability may insist that the goal of compensatory justice can never be achieved unless injured plaintiffs are allowed to recover for pain and suffering.<sup>186</sup> But it may yet be true that the administrative costs of compensating for pain and suffering exceed the social value of that compensation. Certainly the administrative costs of compensating for pain and suffering, especially when these damages are determined individually, are unusually high. Compared to the claims for other items of damages, the claims for pain and suffering damages diverge more wildly. And opponents must take these claims seriously, given the jury's unlimited discretion over them. The great divergence and uncertainty of possible awards for pain and suffering means that establishing the amount of this compensation will call for more evidence, attorney involvement, and time than would establishing the amount of other compensation. Is the social value of empowering the jury to set a monetary measure of plaintiff's pain and suffering great enough to swamp the measurement difficulties and other costs of doing so? Similar measurement difficulties have led some courts to refuse to allow damages for the loss of consortium suffered by the parents or children of injured plaintiffs.<sup>187</sup>

Handling the professional rescuer's loss through his first-party benefits rather than through a tort suit will also economize on the social costs of exaggerated or fraudulent claims. Tort suits between strangers, like the professional rescuer and his defendant, invite overclaiming. Thanks in part to the pre-injury relationship between the first-party-benefit provider and the claimant, the first-party-benefit provider, in contrast, likely knows the claimant's earlier condition and can better limit overclaiming.

Finally, an advantage of first-party benefits over tort awards is that first-party benefits are rarely paid in a lump sum. As a result they can be adjusted based on the injured person's recovery over time. This capacity to adjust benefits over time further reduces the social costs of overclaiming.

#### *D. Why Professional Rescuers Are Likely to Obtain Sufficient First-Party Benefits*

Many of the arguments for expanding liability rely on the empirical claim that potential plaintiffs are unlikely to value the injury risk to themselves properly, and hence will not obtain sufficient, or even nearly sufficient, first-party benefits for themselves and their survivors. Guido Calabresi is perhaps the most notable champion of this view. Calabresi argues that what he calls optimal loss-spreading can therefore only be achieved by tort liability. But none of the reasons he gives for why plaintiffs

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185. TERRY BURNHAM & JAY PHELAN, *MEAN GENES* 123–28 (2000) (citing research showing that anticipation of loss reduces the emotional impact of the loss).

186. Because pain and suffering from an injury is not a loss most people would voluntarily buy insurance against, one can infer that most people view compensation for pain and suffering as less important to them than compensation for those losses against which they do buy insurance. Of course, when tort law forces defendants to pay for the rescuer's pain and suffering, that law forces all defendant crime victims and home or business owners who buy liability insurance to insure against the rescuer's pain and suffering.

187. *See, e.g., Borer v. American Airlines*, 563 P.2d 858 (Cal. 1977).

are unlikely to value their injury risk properly and buy sufficient first-party benefits apply to groups of professional rescuers or their representatives.

Calabresi insists that potential plaintiffs undervalue the injury risk to themselves for three reasons. First, they lack “the data necessary to determine how great the risk is, how large the losses are apt to be if they occur, and how serious the secondary results of such losses would be.”<sup>188</sup> Calabresi contrasts these plaintiffs with parties, typically defendants, who can “view the injury risk as a statistic,” and who therefore can “evaluate it clearly.”<sup>189</sup> These are the parties to whom, Calabresi maintains, tort law should allocate the injury risk. Yet in the context of the fireman’s rule, the better evaluators of the risk of injury to the professional rescuers, as discussed above, are the rescuers’ own representatives and first-party-benefit providers who specialize in covering that risk.

Calabresi’s second reason relies on his assertion that the future plaintiff is psychologically unable to evaluate the risk sensibly even when he possesses all the pertinent data. However plausible this may be when plaintiff is an isolated individual facing a remote risk of injury to himself, its plausibility is nil in the context of the fireman’s rule. Invariably, the professional rescuer is represented by union employees or civil servants who accept as part of their job description the obligation to understand and predict the rescuer’s injury risk. The cognitive distortions Calabresi mentions primarily interfere with a person’s ability to evaluate the risk of injury to himself. But the representatives of professional rescuers are not evaluating the risk of injury to themselves. Moreover, the representatives of large police or fire departments will regularly see professional rescuers actually injured, an experience that should help them overcome any tendency to understate the injury risk. The existence of the rescuers’ representatives guarantees that the cognitive breakdowns that would prevent proper evaluation of, and planning against, the rescuer’s injury risks will not materialize.

Calabresi’s third reason for believing plaintiffs undervalue the injury risk to themselves is what he terms “the Faust attitude,” by which he means an unduly high personal discount rate which leads potential plaintiffs to value properly only immediate costs, while undervaluing long-run costs like the chance and aftereffects of an on-the-job injury.<sup>190</sup> Calabresi notes immediately that this reason would not apply to those who purchase first-party benefits and plan for injury as a group: “[a] correlate of this view is that people as a group, or people when they set up general or collective norms, are less likely to view only the short run than are people deciding individually. They are less likely to yield to temptation collectively.”<sup>191</sup> As the rescuer’s first-party benefits are arranged by a group, this reason for assuming those benefits will be insufficient does not apply.

Calabresi further suggests that a devious Faust may fail to arrange first-party benefits because he believes that if his injury renders him destitute, society’s public assistance programs will come to his rescue. But throughout the country, the amount of the professional rescuer’s first-party benefits render him ineligible for such public

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188. CALABRESI, *supra* note 21, at 56.

189. *Id.*

190. According to legend, Faust made a pact with the Devil for immediate, earthly gains in return for the loss of his soul.

191. CALABRESI, *supra* note 21, at 57.

assistance. The rescuer's representative is not a Faust who underpurchases first-party benefits knowing that Marguerite's hard work<sup>192</sup> in the form of public assistance will save the rescuer in the end.<sup>193</sup>

*E. Reasons for Believing the Professional Rescuers' Actual First-Party Benefits Adequately Fulfill Society's Compensation Goals*

1. Facts about Current Benefits

While the first-party-benefit packages of professional rescuers injured in attempting a rescue or in responding to a police or fire peril vary considerably from place to place,<sup>194</sup> their similarities support some generalizations: These packages were constructed in the expectation that the rescuer would enjoy no other major source of compensation such as a tort recovery. The packages are substantially more generous than the package of benefits offered other public employees, one reason being that the other employees do not face as significant a risk of physical injury. The package of first-party benefits for police and firemen is also substantially more generous than the usual workers compensation package, even though many workers covered only by worker's compensation face a greater risk of on-the-job injury.<sup>195</sup>

Professional rescuers injured through responding to a peril on the job will not be limited to what are often called "ordinary disability benefits."<sup>196</sup> These are the benefits available to rescuers injured while employed but not injured on the job. These "ordinary disability benefits," which are themselves rarely available to other full-time

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192. In some versions of the Faust legend, Faust is allowed out of his bargain and redeemed in the end because of the pleas and virtuous efforts of his lover, Marguerite.

193. Calabresi acknowledges that when tort liability does not yield clear gains in primary or secondary accident cost avoidance, courts should reject tort liability in favor of the relative administrative efficiency of first-party compensation:

The third subgoal of accident cost reduction . . . involves reducing the costs of administering our treatment of accidents. It may be termed "tertiary" because its aim is to reduce the costs of achieving primary and secondary cost reduction. But in a very real sense this "efficiency" goal comes first. It tells us to question constantly whether an attempt to reduce accident costs, either by reducing accidents themselves or by reducing their secondary effects, costs more than it saves.

CALABRESI, *supra* note 22, at 28.

What Calabresi calls "secondary costs" are not real costs but rather the distributive consequences of the failure to transfer payment to one injured by an accident. The absence of this transfer payment in itself carries no allocative results. Only that fraction of the premium required to buy insurance against the accident that represents the insurer's loading costs is a real cost. See Richard Posner, Book Review, 37 U. CHI. L. REV. 636 (1970).

194. The benefits described in this subsection do not necessarily apply to volunteer firemen. For the benefits of volunteers, see NATIONAL VOLUNTEER FIRE COUNCIL, STATE BY STATE COMPARISON: WORK COMP, <http://www.nvfe.org/benefits/state-by-state-work-comp.php> (last visited Apr. 2, 2007).

195. See *Walters v. Sloan*, 571 P.2d 609 (Cal. 1977) (listing some benefits in California and describing how they compare with worker's comp benefits).

196. See, e.g., 40 ILL. COMP. STAT. 5/5-155 (2006) (describing ordinary duty benefits for illnesses such as cancer and who is limited to them).

employees, usually amount to about 50% of current salary.<sup>197</sup> Rather, the professional rescuers who would be able to sue if the fireman's rule was abolished<sup>198</sup> will be entitled to what are called "disability duty benefits," or in some states "line of duty benefits."<sup>199</sup> These benefits more commonly equal 67–80% of current salary.<sup>200</sup> Moreover, these disability benefits are tax-free.<sup>201</sup> The result is that the injured rescuer's disability benefits approach his pre-injury income, after subtracting from that pre-injury income his taxes and his non-deductible costs of employment, such as his expenses for commuting and for dress. Several large cities, like New York, provide unlimited sick leave to police and firemen injured on the job, partly to reduce the cost of processing claims.<sup>202</sup> Injured rescuers who are totally disabled in responding to a police or fire peril remain eligible for the Social Security disability benefits available to all so disabled.<sup>203</sup>

These disability benefits should be kept distinct from the retirement pensions for professional rescuers, the generosity of which is well known.<sup>204</sup> Time spent on

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197. *See id.* ("Ordinary disability benefits shall be 50% of the policeman's salary . . .").

198. Firemen who could sue, for example, would include all those who suffer "fireground" injuries (i.e., injuries at the site of the fire), as well as those injured en route (e.g., through collisions involving the fire truck), and those injured at the station house in preparation for response (e.g., in descending the fire pole). In 1997 the total number of injuries to firemen was 43,080, which included ninety-one deaths. UNITED STATES FIRE ADMINISTRATION, FEMA, FIREFIGHTER FATALITIES IN THE UNITED STATES IN 1998 (1999), available at [http://usfa.fema.gov/pdf/ff\\_fat98.pdf](http://usfa.fema.gov/pdf/ff_fat98.pdf). *See also* National Fire Protection Association Survey of Fire Departments for U.S. Fire Experience (1998). In eight of the ten years preceding 2003, deaths totaled between ninety and 105, with heart attacks being the most common cause of death. Rita Fahy & Paul LeBlanc, *On Duty Deaths: Firefighter Fatalities 2002*, NAT'L FIRE PROTECTION ASS'N J., Jul.–Aug. 2003, at 56.

199. *E.g.*, 40 ILL. COMP. STAT. 5/5-154(a) (2006) (line of duty benefits); VA. CODE ANN. §§ 9.1-400 to 402 (2006) (disability duty benefits).

200. *E.g.*, 40 ILL. COMP. STAT. 5/5-154 (Illinois's disability benefits, at 75% of wages, are typical.). Given their special disability coverage, injured professional rescuers are not usually entitled to worker's compensation benefits. *See, e.g.*, MD. CODE ANN., PUB. SAFETY § 7-206 (West 2006); MINN. STAT. ANN. § 176.011 (West 2006); TEX. LAB. CODE ANN. §§ 504.001-.073 (Vernon 2006); WIS. STAT. ANN. § 102.03 (West 2003).

201. 1.R.C. § 104(a)(1) (2002).

202. N.Y. CITY INDEP. BUDGET OFFICE, BUDGET OPTIONS FOR NEW YORK CITY 36 (2005), available at <http://www.ibo.nye.ny.us/iboreports/options2005.pdf>.

203. *See* SOCIAL SECURITY ONLINE, DISABILITY AND S.S.I., <http://www.ssa.gov/d&s1.htm> (last visited Apr. 2, 2007); *see also* CONCERNS OF POLICE SURVIVORS, INC., LINE-OF-DUTY DEATH BENEFITS: BENEFITS FOR ALL OFFICERS 11–13 <http://www.nationalcops.org/forms/benefits/all.pdf> (2006) (informing survivors of police officers about their eligibility for Social Security benefits); WISCONSIN PROFESSIONAL POLICE ASSOCIATION, [http://www.wppa.com/news/archive/nuts\\_and\\_bolts\\_of\\_duty\\_disabilit.htm](http://www.wppa.com/news/archive/nuts_and_bolts_of_duty_disabilit.htm) (last visited Apr. 2, 2007). These benefits are limited to about \$2000 per month.

204. Police and firefighters typically may retire with full pension benefits at a younger age and with less service than other private or public sector employees. Two-fifths of police and firefighters need to fulfill only a service requirement before becoming eligible for full benefits at any age. Another two-fifths have an age requirement of 55 or younger. This compares with less than 10% of other full-time employees who could retire after meeting a service requirement only, and fewer than 5% who could retire with full benefits at age 55 or younger. In addition to being able to retire younger with full benefits, police and firefighters tend to receive more



disability, especially when the disability arises from a line-of-duty injury, counts toward the time in service needed to qualify for the retirement pension.<sup>205</sup> Departments differ, however, on the extent to which a person whose disability prevents his return to the force will qualify for the full retirement pension.<sup>206</sup>

Most professional rescuers still enjoy what had historically been an expensive feature of all worker's compensation plans as well: first dollar coverage of all medical expenses arising from on-the-job injuries. First dollar coverage means complete coverage with no obligation to pay a deductible or co-insurance portion and sometimes with no restriction on the insured's choice of physician or facility.<sup>207</sup> The package of benefits also includes COBRA health insurance coverage for rescuers leaving the profession.<sup>208</sup>

When rescuers responding to a peril are killed, the first-party benefits for their survivors fulfill society's compensation goals even more clearly. Not surprisingly, the packages provide for funeral expenses and some life insurance. In addition, the packages include as many as three special death benefits. Every state has provided some special death benefit for which survivors of professional rescuers who die on

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generous pension benefits than do other public and private employees. BUREAU OF LABOR STATISTICS, U.S. DEP'T LABOR, BULL. NO. 2398, EMPLOYEE BENEFITS IN STATE AND LOCAL GOVERNMENTS, 1990, at 86-87 (1992). Because the percentage of their salary used to determine the final pension benefit is often greater than that for other employees, the percentage of final salary replaced by the pension benefit is typically higher. Indeed police and firemen have the highest defined benefit pension plan replacement rates of any occupational group. *See id.* at 84-85; *see also* MD. CODE ANN., [STATE PERS. & PENS.] §§ 28-101 to -403 (LexisNexis 2004); 40 ILL. COMP. STAT. ANN. 5/4-101 to -144 (LexisNexis 2004); 40 ILL. COMP. STAT. ANN. 5/6-101 to -226 (LexisNexis 2004); D.C. CODE §§ 4-601 to -634 (2001); ALASKA STAT. §§ 39.35.010 to .690 (2004); GA. CODE ANN. §§ 47-7-1 to -126 (2000). Although the professional rescuers' defined benefit plans would allow them to be exempt from Social Security taxes, about two-thirds of professional rescuers participate, allowing them to supplement their other retirement benefits with Social Security. *See* I.R.C. § 3121(b)(7)(F) (2002); *see also* Michael Bucci, *Police and Firefighter Pension Plans*, 115 MONTHLY LAB. REV. 37 (Nov. 1992).

205. *See, e.g.*, PORTLAND, OR., CITY CODE § 5-305 (2006), available at <http://www.portlandonline.com/auditor/index.cfm?a=21454&c=28295> (providing retirement benefits to past employees of the Bureau of Fire and the Bureau of Police, including those who fail to return to work after recovery from disability).

206. *See, e.g.*, NEWARK, DEL., PENSION PLAN § 6.4 (2006) (providing those injured in line of duty at least 75% of current pay and, with minimal time of service, at least 75% of the full retirement pension); FORT WORTH, TEX., DISABILITY PENSION BENEFITS, available at <http://www.fortworthgov.org/retirement/disbenefits.htm> (providing full pension at the earliest normal retirement date for members injured in the line of duty). *But see* OKLAHOMA FIREFIGHTERS, PENSION RETIREMENT SYSTEM, OKLA. STAT. tit. 11, § 49-109 (2004), available at <http://www.ok.gov/fprs/documents/RULES%20AND%20STATUTES.doc> (providing a reduced pension to firefighters injured in the line of duty unless they served more than twenty years).

207. Lucy Logniovoff Ins. Agency, Insurance Glossary: First-Dollar Coverage, <http://www.autohealthhomeinsurance.com/glossary/first-dollar-coverage.html> (last visited Apr. 2, 2007).

208. In a few states, professional rescuers must choose a doctor from a list prepared by their employer or a doctor whose charges are subject to approval by their employer. *See, e.g.*, WASH. CIVIL TWP. (IND.), *Schedule of Benefits*, in EMPLOYEE SUMMARY PLAN DESCRIPTION 12-19 (1992) (setting forth insurance packages and parameters for drug, dental, and medical benefits); *see also* *Coordination of Benefits, Continuation of Coverage*, in EMPLOYEE SUMMARY PLAN DESCRIPTION, *supra*, at 47-49 (providing for the extension of insurance benefits package after leaving the fire service).

duty would qualify.<sup>209</sup> Many cities have supplemented these with special death benefits of their own.<sup>210</sup> At the federal level, the PSOB provides upwards of a quarter-of-a-million dollars to professional rescuers who are permanently disabled and to the survivors of those who die while on duty.<sup>211</sup> State and local benefits must not be reduced by benefits received under the PSOB Act, and the PSOB benefit is not reduced by any benefit received at the state or local level.

Another common benefit at the state or local level is payment of tuition at public junior colleges and state universities for the spouse and children of rescuers who are killed or permanently disabled on duty.<sup>212</sup> Similarly, at the federal level, the Public Safety Officers' Educational Assistance (PSOEA) program, established in 1998, provides spouses and children of such rescuers tuition, room and board, books, supplies, and education-related fees for up to forty-five months of full-time education or training at any institution.<sup>213</sup> Apparently PSOEA benefits are not reduced by similar benefits provided at the state or local level.

## 2. Why the Adverse Selection and Moral Hazard Problems of Disability Insurance Do Not Lead to Undercompensating Professional Rescuers Who Suffer a Disability Loss

Of the arguments against relying on first-party benefits in lieu of tort liability, the most popular—and forceful—stems from the reduced incentive for precaution taking by the potential tort defendants. But the next most popular stems from the supposed inability of first-party disability benefits, as a matter of economic theory, to provide adequate compensation, no matter how generous in fact those benefits appear to be.<sup>214</sup> This supposed inability arises from the adverse selection and moral hazard problems that are said to guarantee that first-party disability benefits will be less than the amount that would be called for by compensation purposes. The argument maintains that if disability benefits increase to the amount that is appropriate for compensation purposes, adverse selection among the young adults who might become professional rescuers, and the moral hazard by actual professional rescuers, will so raise the cost of the package of disability benefits that the package can no longer feasibly be offered.

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209. For example, Minnesota's death benefit is \$100,000. MINN. STAT. § 299A.44 (2006); see also THE CITY PENSION FUND FOR FIREFIGHTERS AND POLICE OFFICERS IN THE CITY OF TAMPA SUMMARY OF PLAN DESCRIPTION (2006), [http://www.tampagov.net/dept\\_fp\\_pension/files/Plan%20Documents/spd%2010%2006.pdf](http://www.tampagov.net/dept_fp_pension/files/Plan%20Documents/spd%2010%2006.pdf).

210. For example, Fayetteville, North Carolina guarantees a minimum death benefit of \$25,000 after one year on the job or the decedent's salary for the preceding year, whichever is more. Fayetteville Police Department, Salary/Benefits, <http://police.ci.fayetteville.nc.us/reccalarybcenefits.aspx> (last visited Apr. 2, 2007).

211. Public Safety Officer Benefit Act of 1976, 42 U.S.C. § 3796 (2002).

212. *E.g.*, 1996 Mich. Pub. Acts 195 (codified at MICH. COMP. LAWS § 390.1242 (1996)), described at <http://www.michigan.gov/msp/0,1607,7-123-1564-83066--,00.html>.

213. U.S. DEP'T JUSTICE, BUREAU OF JUSTICE ASSISTANCE FACT SHEET: PUBLIC SAFETY OFFICERS' EDUCATIONAL ASSISTANCE PROGRAM (2001), available at <http://www.ncjrs.gov/pdffiles1/bja/fs000270.pdf>.

214. Gary T. Schwartz, *The Ethics and the Economics of Tort Liability Insurance*, 75 CORNELL L. REV. 313, 362 (1990) (arguing that adverse selection and moral hazard problems generally prevent first-party disability benefits from achieving compensation goals).

The adverse selection problem presupposes that persons who might consider applying to become professional rescuers know something about themselves that the public employer selecting them cannot learn in time, namely, their tendency to claim disability. Their tendency to claim is a function of many factors, including how injury-prone they are (both as to chance and severity of injury); how long they require to recover from injury and to return to work; how likely they are to make a claim once injured; how much they prefer subsidized unemployment to working; how likely they are to fake or exaggerate claims or to malingering; and how likely they are to stand their ground when suspected of faking, exaggerating, or malingering. Those who know they have a high tendency to claim disability, the argument continues, will disproportionately apply for this work and will constitute a disproportionate percentage of the force should disability benefits increase to the point where they approach full compensation. The problem is most obvious when a working person, instead of obtaining group disability benefits through his work, buys an individual disability insurance policy in the private market. One can expect that those workers who buy an unusual amount of disability insurance will be disproportionately those with a tendency to claim. These claim-prone individuals become high-risk insureds. When the high-risk insureds disproportionately buy coverage, coverage becomes a poorer deal for the low-risk insureds. If the low-risk insureds drop coverage as a result, the insurer will be left covering only the high-risks who remain. Nor can the insurer survive by raising his premiums to the level appropriate for the remaining high-risks, because as premiums rise toward that level, the lower of the remaining risks drop out, threatening to unravel his risk pool until no one is covered.<sup>215</sup> One countermeasure said to be necessary to hold down the amount of adverse selection is to keep disability benefits well below working income. And in the individual market, disability plans offering more than 50–60% of working income are rare.

There are a number of methods available to the public employers of rescuers to minimize the concern that the claim-prone will adversely select this work.<sup>216</sup> First, the employers minimize adverse selection the same way private employers do—by providing their first-party-benefit package automatically to all who are hired rather than by offering that package, or any part of it, as an option. The individual rescuers have no choice about buying these benefits. The only selection left to individual rescuers who know they are claim-prone is whether to join the force in the first place, and the tendency to make disability claims is presumably only one of many factors influencing that selection. Second, employers, through their medical exams, fitness tests, and character investigations of applicants, screen out some of the claim-prone. Third, by linking job assignments and promotions, if only informally, with a rescuer's record of disability claims, employers can render this work less attractive to the claim-prone. Fourth, the employers, being public, may offer disability benefits more generous

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215. Insurers have financial reasons to combat adverse selection, even when the possibility of complete unraveling, sometimes called the “death spiral,” does not exist.

216. Doubts have been raised about the significance of adverse selection. See generally Peter Siegelman, *Adverse Selection in Insurance Markets: An Exaggerated Threat*, 113 YALE L.J. 1223 (2004). For example, the claim-prone as a group may include more members who would shy away from dangerous work compared to the group which is not claim-prone. Hence generous disability benefits for dangerous work may attract as many applicants who are not claim-prone as applicants who are.

than private insurers could profitably offer in the marketplace. That is, the first-party benefits offered by a public employer may more resemble government insurance than private insurance, government insurance being a euphemism for government welfare. COBRA temporary health insurance benefits for those who leave employment are an example of government insurance. The government originally hoped to fund these optional benefits through private insurance. But when private insurers deemed this insurance unprofitable, perhaps because the benefits would be adversely selected for primarily by those who anticipated above-average health expenses, the government subsidized what could not be offered profitably.

Moral hazard in our context refers to the tendency, arising from disability compensation, for professional rescuers, intentionally or unintentionally, to take the risk of and to claim disability more than they would otherwise.<sup>217</sup> It includes relaxing the care the rescuers would normally take for their safety as well as more blatant examples like malingering. Just as patients who are covered by health insurance providing 100% reimbursement consume a far higher volume of medical services than do patients whose policies include a substantial cost-sharing provision,<sup>218</sup> one can posit that rescuers who receive disability compensation equal to their regular income will be more claim-prone than rescuers who receive less.

Employers of rescuers may not be able to defend against moral hazard as readily and completely as they defend against adverse selection. Still, the problem does not justify skepticism about whether apparently adequate disability compensation is adequate in fact. First, as we saw with adverse selection, an employer designing disability benefits for its public employees need not necessarily put together a package that a private disability insurer could offer profitably. Offering more generous disability benefits than would be available to workers receiving the same salary in the private sector may be a disguised salary raise and may be more convenient and politically salient than a straightforward raise.<sup>219</sup> Second, the employer may see some benefit in encouraging professional rescuers, at certain obvious times, to resist their natural inclination to protect themselves at the expense of endangered members of the public or endangered property. Benefits that induce rescuers to behave at certain times as if they were more indifferent to danger may actually serve the employer's purpose. For this reason the employer may object less to the demand of the professional rescuers' unions to increase disability compensation than to an equally costly demand for higher salaries. Indeed the advent of collective bargaining and the unionization of professional rescuers have increased fringe benefits like disability compensation four times as much as they have increased salaries.<sup>220</sup>

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217. "Claiming disability" here does not require a formal claim. Simply taking sick leave when one would otherwise come in to work would be an example.

218. Mitchell D. Wong et. al., *Effects of Cost Sharing on Care Seeking and Health Status: Results from the Medical Outcomes Study*, 91 AM. J. PUB. HEALTH 1889, 1892 (2001) (the larger the co-payment for medical services, the less medical care is sought).

219. See *supra* text accompanying note 196.

220. Casey Ichniowski, *Economic Effects of the Firefighters' Union*, 33 INDUS. & LAB. REL. REV. 198, 206 (1980). Among the reasons given for the greater impact of firemen's unions on fringes than on salaries, and for the higher ratio of fringe benefits compared to salaries of professional rescuers generally, are that the fringes do not take effect immediately. A bargaining representative for the Yonkers firefighters "has found, for example, that bargaining with a lame-duck administration, when there is going to be a change in party control, allows the union local

Of course, only a small fraction of the professional rescuers' time on the job is devoted to facing perils. During the bulk of the professional rescuers' time on the job, employers will not want their professional rescuers to relax their care for themselves. And after an injury, however caused, the employer will not want professional rescuers to malingering. But at least two measures, other than lowering benefits, are available to employers to counter this moral hazard behavior. First, as indicated before, employers monitor claims for disability benefits,<sup>221</sup> and, at least informally, link the record of disability claims to promotion and job assignment. Second, to varying extents, employers use the same measure that proved successful with the workingmen's cooperative accident insurance associations in the second half of the nineteenth century: fostering solidarity among the members of the squad.<sup>222</sup> The intimacy of rescuers' face-to-face relationships with each other and their mutual dependence help them to monitor one another's claims, and forging norms of brotherly spirit and manly resistance to injuries further reduces the incidence of self-seeking claims.

In sum the argument that adverse selection and moral hazard necessarily prevent the first-party-benefit providers of rescuers from arranging a benefit package that adequately achieves societies' compensation goals relies on certain assumptions drawn from the private market for individual disability insurance that need not apply in the public sector. The argument also fails to appreciate some of the measures by which this opportunistic behavior can be controlled. The argument is further undermined by empirical evidence that the package of first-party benefits actually offered rescuers comes close to assuring what every worker who faces a risk of injury may regard as the ideal financial protection—constant income through one's working career regardless of injury. There is little reason to assume that rescuers, through their representatives, fail to buy the amount of compensation for their injuries that they want, subject to the usual budget restraints affecting the compensation of all public employees.

#### CONCLUSION

The Victim Compensation Fund (VCF)<sup>223</sup> for those injured and for the survivors of those killed on 9/11, thanks to largely displacing tort liability,<sup>224</sup> finished virtually all

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to make significant gains in fringes." *Id.* He says the administration of one political party will sometimes purposely agree to increase personnel costs in subsequent years in order to exacerbate the budget difficulties of the rival party's incoming administration, while, at the same time, winning for themselves the future support of the firemen's union. *Id.* at 606–07.

221. See Michael J. Karter, Jr. & Stephen G. Badger, *United States Firefighter Injuries of 2000*, 95 J. NAT'L FIRE PROTECTION AGENCY 49–54 (2001).

222. See John Fabian Witt, *Toward a New History of American Accident Law: Classical Tort Law and the Cooperative First-Party Insurance Movement*, 114 HARV. L. REV. 692, 781, 787 (2001) (pointing out that cooperative associations succeeded in offering sustained disability benefits, whereas otherwise identical commercial insurance failed, and attributing the different results to the cooperative associations' better control of adverse selection and moral hazard).

223. Eleven days after the 9/11 attacks, Congress enacted the "September 11th Victim Compensation Fund of 2001," Pub. L. No. 107-42, 115 Stat. 237-241 (2001) (codified as amended at 28 C.F.R. §§ 104.1 to .71 (2006)).

224. The VCF did not in any way pursue deterrence. See Kenneth S. Abraham & Kyle D. Logne, *The Genie and the Bottle: Collateral Sources Under the September 11th Victim Compensation Fund*, 53 DEPAUL L. REV. 591, 596, 613 (2003).

its work by the end of 2004.<sup>225</sup> Consider how matters would likely stand today, more than five years after 9/11, had the losses of the victims been handled in the usual way<sup>226</sup> through our tort system. The lawsuits by the victims for the causal negligence of the many companies they could sue<sup>227</sup> would probably be grinding their way through the court system, with final appeals and payment to the victims still an unknown number of years away. Some of the older parents of those killed would have come to realize that they would see their graves before they would see the lawsuits finally resolved.<sup>228</sup>

By now, in light of the visibility and interest in these suits and the public's solicitude for the victims, the tort system, more than the behavior of the defendants, would be on trial in the public mind. The public would have learned the savage percentage of the defense payments likely to go to expenses and to the various attorneys.<sup>229</sup> The causal negligence and solvency of the defendants being uncertain, at

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225. Ninety-five percent of survivors who had the choice of pursuing a claim in tort or a claim under the VCF opted into the VCF and out of the tort system. David W. Chen, *Applicants Rush to Meet Deadline for Sept. 11 Fund*, N.Y. TIMES, Dec. 23, 2003, at A1. Of course they had the added incentive that came from the decision by Congress to hold the total amount of each defendant's tort liability to the limit of each defendant's liability insurance. See Air Transportation Safety and System Stabilization Act, Pub. L. No. 107-42, §§ 201, 408(a), 115 Stat. 230, 234-36, 240-41 (2001) (codified as amended at 28 C.F.R. § 104 (2006)). For many survivors the choice was easy, even though it meant dispensing with their following rights under tort law: (1) an individualized jury trial; (2) a jury determination of their economic, noneconomic, and punitive damages; (3) their election of the timing and, to some extent, the forum for their claims; (4) their chance to give their personal testimony at trial; and (5) their right to vigorous adversarial representation in a litigation setting. See Roger Parloff, *Tortageddon*, AM. LAW., Mar. 2002, at 106, 106; Stuart Taylor, Jr., *How 9/11 Shines a Spotlight on Litigation Lottery*, 34 NAT'L J., Jan. 5, 2002, at 12-13. Arguably, the public reaction to 9/11 that was reflected in public support for the VCF was itself an indictment of the tort system.

226. By the "usual way," I mean in particular with the attorneys and experts charging their usual fees. As is widely known, a more than ample number of attorneys offered to help the victims of 9/11 process their claims with the VCF free of charge. See *Warily Circling the Sept. 11 Fund*, N.Y. TIMES, June 5, 2002, at A26 (noting efforts of the American Trial Lawyers Association in providing volunteer attorneys to assist claimants in preparing claim application forms and other papers.) It is entirely possible that, absent the VCF, attorneys and experts might have been willing to pursue the victims' tort claims free of charge as well, perhaps partly in the hope that the prominence of the cases would result in good advertising. Even so, there is no reason to think the attorneys for the defense would have reduced their usual fees. Although the administrative expenditures per dollar of benefit received by the victims have not yet been published, it is clear that those expenditures were dramatically lower per dollar of benefit received than they would have been under the tort system.

227. Potential defendants include the airline security companies, the airports, the airlines, the aircraft manufacturers, the managers, owners and builders of the World Trade Center, and the Pentagon and other government entities.

228. See generally Daniel W. Shuman, *When Time Does Not Heal: Understanding the Importance of Avoiding Unnecessary Delay in the Resolution of Tort Cases*, 6 PSYCHOL. PUB. POL'Y & L. 880 (2000) (examining the psychological harm both to plaintiffs and defendants of unnecessary delay in the resolution of tort cases).

229. Despite thirty years of effort through class actions, consolidation, and multidistrict panels to narrow the issues and streamline the litigation in the asbestos cases, 69% of all defense payments in those cases still go for expenses and attorneys fees. See Deborah Hensler, *The Asbestos Cases After 30 Years*, 54 DEPAUL L. REV. 211, 247 (2004).

least some victims would emerge from their years in the tort system empty handed—a result widely denounced as cruel. The usual linedrawing of torts—whereby damage awards for similarly situated plaintiffs differ dramatically<sup>230</sup>—would seem arbitrary to a public that overwhelmingly viewed the victims as members of a single community who should receive roughly equal damages.<sup>231</sup> Imagine 2000 individualized evaluations of the pre-death pain and suffering of each decedent and perhaps 5000 individualized evaluations of the loss of companionship suffered by each wrongful death plaintiff. Is it any wonder that the Fund's decision to measure these damages with a grid (at least presumptively) was generally well received?

In light of the public's concern for the victim's vulnerability, the public would likely recoil at the enormous stress the protracted litigation, especially the defendant's brutal counter-discovery, was inflicting on the victims. Each publicized occasion in which the victims were required to relive their anguish would further undermine the legitimacy of the system. The usual jockeying of some victims' attorneys to sign up more victims, and to gain priority for their victims over other victims in pursuing the dwindling liability insurance of the defendants, would likely attract public scorn.<sup>232</sup> Even the defendants, however negligent the evidence unearthed through litigation may show them to have been, would be increasingly viewed as more sinned against than sinning, sinned against not only by the terrorists but by the tort process itself. Given the many precautionary measures against future terrorist attacks that the government will mandate without the influence of tort liability, the public would likely find absurd the notion that this tort liability will produce more appropriate precaution taking by these defendants.<sup>233</sup> Perhaps the litigation would have vividly brought home to the public a point many scholars have admitted but then ignored: that our tort system cannot be justified on compensation or insurance grounds.

Plaintiffs who are premium planners for their injuries have created a less generous version of their own VCF, albeit their first-party benefits suggest an ex ante model for continuing injuries rather than an ex post response to a discrete event. When the type

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230. There are many reasons to believe the damage awards in 9/11 cases, especially for pain and suffering, would vary from jury to jury as much as they usually vary in tort litigation. *See, e.g.,* Neal R. Feigenson, *Emotion, Risk Perceptions and Blaming in 9/11 Cases*, 68 *BROOK. L. REV.* 959 (2003) (discussing possible cognitive biases that might cause jurors to be sympathetic either to claimants or potential defendants in litigation over 9/11 claims).

231. Most of the plaintiffs viewed themselves as members of a single community as well. *See* Kellyanne Conway, *The Microeconomic Effects of the Terrorists Attacks on September 11: Americans Helping Americans*, 16 *NOTRE DAME J.L. ETHICS & PUB. POL'Y* 101, 113–16 (2002) (describing the many efforts of the injured and the survivors to group themselves with each other after 9/11).

232. Because the VCF did not cover the claims for property damage, those claims would have competed with claims of the victims and may have nearly exhausted the limits of the defendants' liability insurance.

233. Even assuming these defendants were causally negligent (the unprecedented nature of the terrorists' behavior and the past experience with airplane hijackings, almost all of which ended safely, argue against any negligence), is there any reason to believe that a guarantee of tort liability for such negligence would have led the defendants to take better precautions against such hard-to-foresee behavior as that of the terrorists? As the 9/11 Commission found, the essential problem was lack of overall security planning. Would a guarantee of tort liability have addressed that problem?

of injury these plaintiffs have anticipated occurs through the ordinary negligence of another, courts should pause before assuming that imposing tort liability on the other will serve society's interests. Courts should consider the marginal improvement in safety that such liability, in the context before them, is likely to achieve, keeping in mind the other incentives for safety operating on the defendants. When the safety gain from liability appears modest, courts should consider whether the costs of imposing liability for negligence outweigh the benefits. This Article has suggested—in the context of the fireman's rule—some of the considerations that should lead courts to conclude that the social calculus favors denying liability, a conclusion courts should express by giving serious consideration to defendant's motion to dismiss on the ground of "no duty" or "no proximate cause," or by invoking rules such as the fireman's rule. As Professor Henderson has argued, the expansion and purification of the negligence concept threatens the rule of law and carries consequences both unintended and undesirable.<sup>234</sup>

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234. See Henderson, Jr., *supra* note 1, at 491.