

## Chapter

# 8

## NEGLIGENCE

THOMSON

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## 8.1 INTRODUCTION

When it comes to civil liability, the biggest area of concern to fire and emergency personnel is negligence. Most civil suits against fire departments, firefighters, and emergency medical personnel involve accusations of negligence. Unlike the torts discussed in Chapter 7, negligence is a non-intentional tort.

Negligence is a complex topic, and impossible to fully define in a sentence or two. As a result, there are a variety of definitions of negligence that differ in varying degrees. Some definitions of negligence emphasize certain facets of negligence, while other definitions focus on other aspects.

*Black's Law Dictionary* defines negligence as "The omission to do something which a reasonable man, guided by those ordinary considerations which ordinarily regulate human affairs, would do, or the doing of something which a reasonable and prudent man would not do."<sup>1</sup>

Professor Prosser wrote in his book, *Law of Torts*,<sup>2</sup> that negligence involves four basic elements: a duty requiring the actor to conform his conduct to a certain standard of care; a breach of this duty; a reasonable causal connection between the actor's conduct and the resulting injury; and actual damages.

A more concise definition that captures the most important issues involved in **negligence** is: the failure to exercise the care that the reasonably prudent person would have exercised under the circumstances which causes damages to another.

Despite any differences in the definitions of negligence from one source to another, some basic underlying principles pertain to negligence that transcend the definitional differences. These principles include duty, standard of care, breach of the standard of care, damages, and causation. We discuss these principles in the context of an examination of the elements of negligence.

### Legalese

**Negligence** (civil tort) The failure to exercise the care that the reasonably prudent person would have exercised under the circumstances which causes damages to another.

## 8.2 ELEMENTS OF NEGLIGENCE

In order for a cause of action for negligence to exist, the following elements must be present:

1. An act or omission
2. A legal duty
3. Damages to the plaintiff
4. Breach of the standard of care

### 8.2.1 An Act or Omission

For negligence to occur, there must be an **act** or an **omission** committed by the negligent party. The act or omission requirement for negligence is very similar to the act requirement for a crime discussed in Chapter 5.6.1. The act can be any affirmative act, such as driving a fire truck (**Figure 8-1**), operating a piece of equipment, or cooking a meal. An omission, or the failure to act, can only be grounds for negligence when one is under a legal duty to act.<sup>3</sup> An example of an omission would be an on-duty lifeguard who fails to help a swimmer in distress. The following section more fully explains the subject of legal duty and its relationship to acts and omissions.

### 8.2.2 A Legal Duty

The second element of negligence is that the negligent party must owe a legal duty to the injured person. When performing an affirmative act, a person is under a legal duty to protect others from foreseeable, unreasonable risks associated with, or created by, one's actions. An injured party who is outside the scope of foreseeability is not owed a legal duty and thus cannot recover for negligence.<sup>4</sup> The existence of a legal duty when a person fails to act is a more complex topic. As discussed in Chapter 5.6.1.1, the general rule is that no one is under an affirmative legal duty to act in the absence of a relationship or law that creates such a duty.<sup>5</sup>

The recognition of a legal duty to act was historically based upon the relationship (including a contractual relationship) between the individuals. A parent has a duty to come to the aid of a child, a lifeguard has a duty to come to the aid of a swimmer in distress (**Figure 8-2**), and the captain of a ship has a duty to come to the aid of a passenger. In the same way, an on-duty firefighter would have an affirmative duty to render aid when called upon to do so. The creation of the duty is based on the relationship between the parties. The following sidebar provides a list of relationships that commonly give rise to a legal duty to act.

<sup>3</sup>*Osterlind v. Hill*, 263 Mass. 73, 160 N.E. 201 (Mass., 1928).

<sup>4</sup>*Allen v. Albright*, 43 S.W.3d 643 (Tex. App., 2001) (occupant trapped by fire owes no duty to civilian who effects rescue and is injured in process).

<sup>5</sup>*Otis Engineering Corp. v. Clark*, 668 S.W.2d 307, 309 (Tex., 1983).

<sup>1</sup>*Black's Law Dictionary*, 5th ed. (St. Paul, MN: West Publishing Co., 1979), p. 930.

<sup>2</sup>4th ed. (St. Paul, MN: West Publishing Co., 1971), p. 143.



**Figure 8-1** Any affirmative act, such as driving a piece of apparatus, creates a duty to protect others from foreseeable, unreasonable risks.



**Figure 8-2** A duty to act is created by the relationship between the parties. (Photo by Robert A. Gread.)



#### SIDEBAR

##### Relationships That Give Rise to a Duty to Act

- Parent to child
- Spouse to spouse
- Innkeeper to guest
- Public carrier to passenger
- Employer to employee<sup>6</sup>
- Teacher to student
- Jailer to prisoner
- When a person's conduct creates the peril for another, the person is under a duty to render assistance<sup>7</sup>
- Voluntary assumption of rendering assistance such as someone who initiates a rescue effort, can create a duty, particularly when others are deterred from assisting the victim because they have observed someone already helping
- Contractually assumed duty (lifeguard at pool, ambulance attendant to patient, doctor to patient, nurse to patient)
- Sworn duty (police and fire personnel while on duty)

<sup>6</sup>*Otis Engineering Corp. v. Clark*, 668 S.W.2d 307, 309 (Tex., 1983); *Robertson v. LeMaster*, 301 S.E.2d 563 (W.Va., 1983); *Brockett v. Kitchen Boyd Motor Co.*, 264 Cal.App.2d 69, 70 Cal.Rptr. 136 (1968).

<sup>7</sup>*Commonwealth v. Levesque*, 436 Mass. 443 (2002).

Many states have created legal duties to act through the enactment of statutes. One of the most common statutory duties to act is placed upon the driver of a car that is involved in an accident. Most states place a legal duty upon the driver to render assistance to anyone who may have been injured in the accident.<sup>8</sup> A few states have gone even further and created a generalized duty to render aid to another. Consider the following statute from Rhode Island:


**EXAMPLE**
**Rhode Island General Laws § 11-56-1 Duty to assist.**—

Any person at the scene of an emergency who knows that another person is exposed to, or has suffered, grave physical harm shall, to the extent that he or she can do so without danger or peril to himself or herself or to others, give reasonable assistance to the exposed person. Any person violating the provisions of this section shall be guilty of a petty misdemeanor and shall be subject to imprisonment for a term not exceeding six (6) months, or by a fine of not more than five hundred dollars (\$500), or both.

While RIGL § 11-56-1 is a criminal law, it creates a legal duty on the part of anyone at an emergency scene who knows that another person is in grave physical harm. Hawaii, Minnesota, and Vermont have similar generalized duty to act laws.<sup>9</sup>

Many jurisdictions have duty-to-notify or duty-to-report laws that place an affirmative responsibility on doctors, nurses, paramedics, police officers, and firefighters to notify authorities of certain conditions, such as burns,<sup>10</sup> gunshot wounds, knife wounds,<sup>11</sup> child abuse or neglect,<sup>12</sup> and domestic violence.<sup>13</sup> Ohio has a

<sup>8</sup>Arkansas (Section 27-53-103—operator of a vehicle involved in an accident); Florida (FSS 316.062—operator of a vehicle involved in an accident); Kentucky (KRS Chapter 189.580—driver of a motor vehicle); Minnesota (Ch. 609.662—anyone firing a gun or witnessing a shooting); Nevada (NRS 484.223 operator of a vehicle involved in an accident); Oklahoma (47-10-104—operator of a vehicle involved in an accident); Utah (73-18-13(1)—operator of a vessel involved in an accident); and Vermont (23 VSA 1128—vehicle, 23 VSA §3211—snowmobile, 23 VSA §3313—vessels, 23 VSA §3511—all terrain vehicles).

<sup>9</sup>Hawaii Revised Statutes §663-1.6 (duty to act at crime scenes); Minnesota Statutes Ch. 604A-01; and Vermont Statutes 12 V.S.A. § 519.

<sup>10</sup>New Jersey R.S. 2C:58-8 (duty to report burns and gunshot wounds).

<sup>11</sup>Utah Statutes 26-23a-2.

<sup>12</sup>Vermont Statutes 33 V.S.A. § 4913.

<sup>13</sup>Colorado Revised Statutes 14-07.1-12 and 43-17-41.

law creating a duty on all persons to notify medical services or law enforcement if they find a person who is disabled.<sup>14</sup> The failure to act when one is under a legal duty to act can give rise to negligence.

### 8.2.3 Resulting in Damages

The act or the omission that constitutes negligence must result in actual damages to the victim. While many of the intentional torts have the benefit of presumed damages, there is no such presumption of damages with negligence. To establish a claim for negligence, a plaintiff must be able to prove that he suffered actual damages. Damages may consist of property damage, personal injury, medical bills, pain and suffering, or loss of income. However, being wronged in principle is not sufficient to constitute negligence.

In addition, the negligent act must be the proximate cause of the damages or harm. **Proximate cause** is a legal term referring to the fact that the act in question was the legal cause of the harm that resulted. It is a connection between an act and a result that is natural and continuous, unbroken by any **intervening act** for which the actor may be exculpated. Proximate cause requires a greater analysis of the circumstances than merely finding a “but for” connection. Harm that is remote or not proximately related to the conduct of the defendant is not actionable.


**EXAMPLE**
**Proximate Cause**

1. Simon sells Barbara a 50-foot sailboat. Two years later, Barbara is killed when the boat sinks at sea during a storm. “But for” the fact that Simon sold Barbara the boat, Barbara would not have died. However, the sale of the boat cannot reasonably be called the proximate cause of Barbara’s death. The proximate cause was the storm.
2. Simon takes Barbara out on his 50-foot sailboat. While at sea, fog rolls in and Simon fails to properly utilize the onboard radar to navigate through the fog. The boat runs aground and Barbara is killed. Simon’s failure to properly utilize the radar is a proximate cause of Barbara’s death.

<sup>14</sup>Ohio Revised Statutes 2305.45. “Disabled” refers to someone who is “unconscious, semiconscious, incoherent, or otherwise incapacitated to communicate”; see also Illinois Statutes 20 ILCS 2435/25 (duty to report abuse or neglect of an adult with a disability).

**Ford v. Peaches Entertainment Corp.**

83 N.C. App. 155, 349 S.E.2d 82 (1986)

*North Carolina Court of Appeals*

This is a civil action in which the plaintiffs seek to recover damages for personal injury arising out of a collision with a fire truck in Greensboro, North Carolina. The plaintiffs' complaint alleges that the defendant Peaches' employee, the defendant Drew Henderson, negligently tested a sprinkler system causing an alarm to sound at the fire department. On its way to Peaches' place of business a fire truck collided with the plaintiff Mr. Ford's car, resulting in his bodily injury. The trial court [dismissed the case and plaintiffs now appeal].

WEBB, Judge. The sole question presented by this appeal is whether the trial court properly allowed the defendants' motions to dismiss. The plaintiffs argue that the court incorrectly concluded that the defendants' negligence was not a proximate cause of this accident. We cannot agree.

A motion to dismiss for failure to state a claim upon which relief may be granted under G.S. 1A-1, Rule 12(b)(6) is addressed to whether the facts alleged in the complaint, when viewed in the light most favorable to the plaintiffs, give rise to a claim for relief on any theory. *Brewer v. Hatcher*, 52 N.C. App. 601, 279 S.E. 2d 69 (1981). For the plaintiffs' complaint to withstand a motion to dismiss the facts alleged must demonstrate that the defendants' negligence was a proximate cause of their injuries. "An essential element of causation is foreseeability, that which a person

of ordinary prudence would reasonably have foreseen as the probable consequence of his acts. A person is not required to foresee all results but only those consequences which are reasonable." *Bogle v. Duke Power Company*, 27 N.C. App. 318, 321, 219 S.E. 2d 308, 310 (1975), disc. rev. denied, 289 N.C. 296, 222 S.E. 2d 695 (1976). This collision was not a reasonable result of the defendants' negligently causing a fire truck to be summoned such that a person of ordinary prudence should have foreseen it. Their negligence was not a proximate cause of the plaintiffs' injury and the trial court properly allowed the motions to dismiss.

We believe that *Hairston v. Alexander Tank and Equipment Co.*, 310 N.C. 227, 311 S.E. 2d 559 (1984) upon which the plaintiffs rely is distinguishable. That case held a jury could find that there was proximate cause when the defendant negligently installed a wheel on the automobile of the plaintiff's intestate and the wheel came off, causing the vehicle to stop on the highway so that it was struck and the plaintiff's intestate was killed. It is reasonably foreseeable that the loss of a wheel will cause a vehicle to stop on a highway where it is at risk from other traffic. It is not reasonably foreseeable that in the event of a false alarm a fire truck will cause an accident in responding to the alarm.

Affirmed.

**SIDEBAR**

The court in *Ford* found as a matter of law that it is not reasonably foreseeable that a fire truck responding to an alarm would be involved in an accident. In other words, the court concluded that no reasonable jury could have decided that it was foreseeable that a fire truck responding to an alarm would be involved in an accident. Do you think if the judges who decided the case had been firefighters, the case would have come out the same way? How foreseeable does a result have to be? More than likely the judges were not aware of the fact that 25 to 30 percent of the firefighter fatalities that occur each year occur while responding to and returning from alarms.<sup>15</sup> Foreseeability bears not only on the issue of causation, but also on the issue of legal duty when acting, the second element of negligence. An actor has a legal duty to protect others from foreseeable, unreasonable risks. Some courts may approach a case by focusing on the foreseeability aspect of legal duty, while others may approach it from the perspective of a proximate cause analysis.

Another interesting case involving proximate cause is *Westbrook v. Cobb*, 105 N.C. App. 64 (1992). Plaintiff's house caught fire when a car struck a utility pole nearby, creating an electrical surge. While the fire department was on the scene extinguishing the fire, plaintiff entered the house to retrieve some personal items and injured his back. Plaintiff sued the driver of the automobile that collided with the utility pole for causing his back injury. The court ruled that plaintiff's entry into the house was an intervening act and that his injuries did not "naturally flow" from defendant's negligence. In other words, the car negligently striking the pole was not the proximate cause of plaintiff's injuries. It was plaintiff's running into his house that was still on fire that was the proximate cause of his injuries.

<sup>15</sup>See P. LeBlanc and R. Fahy, "U.S. Firefighter Fatalities for 2005." *NFPA Journal* (July/August 2006); P. LeBlanc and R. Fahy, "U.S. Firefighter Fatalities for 2004." *NFPA Journal* (July/August 2005); P. LeBlanc and R. Fahy, "U.S. Firefighter Fatalities for 2003." *NFPA Journal* (July/August 2004).



**Figure 8-3** Those with professional skills and training are held to the standard of the reasonably prudent professional.

#### 8.2.4 Breach of the Standard of Care

The final element for the civil action of negligence is a breach of the standard of care. Normally, when engaging in any activity, a person is expected to exercise the care that the reasonably prudent person would have exercised under the circumstances. If a person's conduct fails to live up to this **reasonably prudent person standard**, and someone else is injured or harmed, the injured party can sue for negligence.

The reasonably prudent person standard is sometimes referred to as the ordinary standard of care. The standard has also been equated with the reasonable person, the reasonable person of ordinary prudence, and the person of ordinary sense using ordinary care and skill. Viewed a different way, the standard of care is a measure of what the community expects and demands from everyone.<sup>16</sup>

In each case of negligence, it is a question of fact for the jury to determine if the defendant's conduct met or failed to meet the standard of care. At trial, the judge will instruct the jury about the reasonably prudent person standard. The jury then considers whether

<sup>16</sup>Some flexibility is allowed on the reasonably prudent person standard when the actor has a physical or mental characteristic such as blindness, old age, or mentally handicap. For example, the standard of care for someone who is blind may be the reasonably prudent person if he were blind. *Florida Central & P.R. Co. v. Williams*, 20 So. 558 (Fla. 1896). See also *Whittaker v. Brookline*, 318 Mass. 19 (1945) and *Keith v. Worcester & Blackstone Valley Street Railway*, 196 Mass. 478, 82 N.E. 680 (1907).

the defendant's actions met or failed to meet the reasonably prudent person standard. In making the determination of what the reasonably prudent person would have done under the circumstances, the jury takes into account the collective life experiences of each juror. As a general rule neither side is allowed to introduce evidence of what the reasonably prudent person would have done under the circumstances.<sup>17</sup>

#### 8.2.5 Professional Standard of Care

How does a jury evaluate the conduct of professionals in regard to negligence? Is a firefighter automatically negligent when he or she responds to a fire because the reasonably prudent person would not run into a building that is on fire? Is a surgeon automatically negligent because the reasonably prudent person would not cut another person open? This potential dilemma is solved by the establishment of a separate standard of care for people with special expertise and professional training, often referred to as the **professional standard of care**. A person with professional skills and training will be held to exercise the care that the reasonably prudent professional of like training and experience would have exercised under the circumstances (**Figure 8-3**). Professional acts of negligence are often referred to as **malpractice**.

<sup>17</sup>There are some exceptions to this general rule, such as the introduction of laws that help to establish what the reasonably prudent person would have done. However, generally it remains up to the collective life experiences of the jury to determine what the reasonably prudent person would have done.

Jurisdictions differ somewhat on the exact formulations of the standard of care for professionals, but the general principles are universal. An EMT-Basic would not be held to the standards of a paramedic; a paramedic would not be held to the standards of an emergency room doctor; and an emergency room doctor would not be held to the standards of a neurosurgeon. A paramedic in a given state would be evaluated according to how the reasonably prudent paramedic in that state would have acted under the circumstances.

### 8.2.6 Evidence of the Professional Standard of Care

While defining the standard of care for a professional is one thing, proving what the standard is in the context of an actual case is another matter entirely. When considering the reasonably prudent person standard, a jury is entitled to rely upon their own life experiences in determining what the reasonably prudent person would have done under the circumstances. Such a reliance makes sense when the jury is deciding matters such as whether the reasonably prudent person would have driven at 70 miles per hour in a 25-mile-per-hour zone, or whether the reasonably prudent person would have made sure her front steps were free of snow and ice four days after a blizzard. However, a jury cannot rely upon their own life experiences to determine whether a patient needed a certain type of medical procedure or a particular kind of medication for a certain condition.

In a negligence case where the professional standard of care is an issue, the jury must be educated about what the reasonably prudent professional of like training and experience would have done under the circumstances. This educational process involves the introduction of four categories of evidence: expert witnesses, learned treatises, laws, and industry-wide standards.

**8.2.6.1 Expert Witnesses** Witnesses who have professional expertise in a given subject area are permitted to testify to explain their conclusions about how a person with like training and experience should have acted under the circumstances, as well as what the standard of care should have been. As discussed in Chapter 2.5.1, expert witnesses may be allowed to provide their opinions in the course of giving their testimony.

**8.2.6.2 Learned Treatises** The term “learned treatises” is a fancy way of saying authoritative books, journal articles, and other pre-eminent writings that help to explain what the standard of care should be. The learned treatises may be admitted directly into evidence or may be admitted through the testimony of expert witnesses.

**8.2.6.3 Laws and Regulations** There is an assumption in the law that the reasonably prudent person or professional

would comply with applicable laws. While some jurisdictions give compliance with laws more weight than other jurisdictions, statutes, ordinances, and regulations are evidence of what the reasonably prudent professional would have done. Of particular concern to the fire service is that OSHA regulations, even in non-approved plan states, can be used as evidence of what the reasonably prudent fire department, fire chief, fire officer, or firefighter would have done. Failure to comply with an OSHA regulation can serve as evidence of negligence.

**8.2.6.4 Industry-Wide Standards** Industry-wide standards can be used to provide the jury with evidence of what the reasonably prudent professional would have done under the circumstances. Obviously in the fire service, the National Fire Protection Association standards are a major source of evidence about the standard of care of the reasonably prudent firefighter, fire officer, fire chief, or fire department.

#### Legalese

TM

**Act** Any affirmative action taken, or the failure to act when one is legally required to act. In addition an act can refer to a statute or law passed by a legislature.

**Intervening act** The act of a third person that breaks the chain of causation and eliminates liability between an original wrongdoer and an injured party.

**Malpractice** An act of negligence committed by a professional.

**Omission** The failure to act when one is legally required to act.

**Professional standard of care** The standard of care that a person with professional skills and training is required to exercise, namely the care that the reasonably prudent professional of like training and experience would have exercised under the circumstances.

**Proximate cause** A legal term referring to the fact that the act in question was the legal cause of the harm that resulted.

**Reasonably prudent person standard** The care that the reasonably prudent person would have exercised under the circumstances.

## 8.3 FIRE SERVICE NEGLIGENCE CASES

In negligence cases, the jury will take the evidence presented and make two separate but equally important factual determinations: what should the standard of care have been and whether the defendant’s conduct met or fell short of the appropriate standard of care. The following three negligence cases against firefighters and fire departments are provided to help identify some of the issues that commonly arise.

In *Kenavan v. New York*, 523 NYS 2d 60 (1987), an engine company arrived at the scene of a car fire. Smoke was obscuring the scene, so the engine company drove through the smoke and pulled past the burning car. As the crew stretched a line, the captain took a hand light and went down the road to warn oncoming traffic. A car drove past the captain through the smoke, striking four firefighters, killing one of them.

The widow of the deceased firefighter and the injured firefighters sued the fire department, the captain, and the driver of the apparatus, among a number of other defendants. The plaintiffs alleged negligence in the placement of the apparatus and the failure to establish a “fire line.” They also alleged that the city was negligent for allowing abandoned cars to remain in the location of the fire. The jury found for the plaintiffs. The case was later reversed on appeal for the driver and captain, based on immunity (to be discussed in Chapter 9).

In *McGuckin v. Chicago* 191 Ill.App.3d 982, 548 N.E.2d 461 (1989), a fire was discovered in the basement of Chicago’s Union Station. The fire department responded and extinguished the visible fire. The fire was believed to have been limited to trash near an electrical chase. Companies left the scene without fully checking the upper floors due to locked doors. Shortly thereafter, a fire erupted on an upper floor directly above where the basement trash fire had been. The fire department made several heroic rescues, but one occupant of

the building succumbed to his injuries. His widow sued the fire department and the building owners. The jury found both the fire department and the building owner negligent. On appeal the verdict against the fire department was reversed, based on the special duty rule (to be discussed in Chapter 9.7.3).

In *Harry Stroller v. City of Lowell*, 587 NE 2d 78 (1992), the plaintiff owned a sprinklered building that had a fire. The fire department arrived, but did not supplement the sprinkler system. Instead the fire department used water from nearby hydrants to supply their hand lines and master streams. The fire spread to five of plaintiff’s buildings. After the fire the owner sued the fire department alleging it was negligent by diverting water away from the sprinklers. The jury found that the fire department was negligent and awarded an \$850,000 judgment. On appeal the verdict was upheld but reduced to meet a statutory damages cap.

In all three of these cases, juries found that fire departments and fire personnel were guilty of negligence and held them liable for damages. We will revisit each of these cases in Chapter 9 when we discuss immunity. For purposes of understanding negligence, it is important to recognize that cases involving fire ground decision making are well beyond the general knowledge of the average juror. Evidence must be presented to help the jury establish the appropriate standard of care. Consider the evidence of the standard of care in the following case.

**Commerce and Industry Insurance Company, et. al v. Grinnell Corporation, and City of New Orleans, Individually and doing business as City of New Orleans Fire Department**

280 F.3d 566 (5th Cir., 2002)

*United States Court of Appeals for the Fifth Circuit*

WIENER, Circuit Judge:

Plaintiffs—Appellants are insurance companies (collectively, “the Insurance Companies”) which brought a subrogation suit against . . . Defendant-Appellee City of New Orleans (“the City”) to recover payments that they had made to their insured for losses incurred in a warehouse fire. The Insurance Companies now appeal the district court’s grant of the City’s motion for summary judgment based on Louisiana’s discretionary function immunity statute, La. R.S. 9:2798.1 (“R.S. 9:2798.1”). Concluding that the Insurance Companies successfully raised genuine issues of material fact on the first prong of the test used to determine whether R.S. 9:2798.1 applies, we reverse the grant of sum-

mary judgment and remand the case for further proceedings consistent with this opinion.

**I. Facts and Proceedings**

West Coast Liquidators (“WCL”) operated a vast warehouse in eastern New Orleans and used it as a distribution center to serve the retail outlets of MacFrugal’s Bargains-O-Closeouts, Inc. (“MacFrugal’s”) in the southeastern United States. Early on the morning of March 21, 1996, WCL employees called the New Orleans Fire Department (“NOFD”) after discovering a fire in the portable storage racks in the warehouse. The heat-activated sensors for the automatic sprinkler system were located on the high

ceiling, more than 50 feet above the portable shelves where the fire had started. This allowed the fire [to] grow and spread for some 20 minutes before the temperature at the ceiling rose sufficiently to activate the sprinkler system.

The result was a five-alarm fire. Four engines and ladder trucks were dispatched initially, but a total of 17 engine companies ultimately participated. In the course of fire-suppression efforts, the NOFD called on the local electrical utility company, New Orleans Public Service, to turn off all power to the building, after first confirming that doing so would not deactivate the sprinkler system. The NOFD later ordered the power restored, but did so without first either having the electrical system checked by an electrical engineer or obtaining a permit. During the course of its continuing fire-suppression efforts following its declaration that the fire was “under control,” the NOFD ordered the automatic sprinkler system turned off in an effort to reduce the water damage to merchandise in the areas of the warehouse that were unaffected by the fire. In addition, the NOFD commander at the scene ordered that the large bay doors of the warehouse be opened to ventilate the building, notwithstanding a wind velocity in excess of 20 miles per hour.

The firefighters continued their fire-suppression activities, finally declaring the fire “out” at 11:54 a.m. and thereafter conducting “overhaul” activities—the search for still-smoldering materials or “hot spots” that were not completely extinguished and could re-ignite. In this search, however, they did not inspect the upper levels of the 65-foot fixed racks (which covered the majority of the warehouse), but confined their search to the shorter portable racks. Six minutes after declaring the fire out—just before noon—the NOFD returned responsibility for the facility to WCL employees and departed, leaving one engine and a company of four firefighters as a fire watch. When the NOFD left, the bay doors were still open and the automatic sprinkler system was still off.

At 2:20 p.m., the fire rekindled in the upper level of the fixed racks, over 275 feet away from the area of the first fire. As the Insurance Companies put it, “[w]ithout any sprinkler system, and with the wind blowing through the open doors, the fire quickly spread and destroyed the warehouse and its contents.”

The first fire was determined to have resulted from arson, but the cause of the later fire is disputed. Materials ignited by the first fire might have re-ignited, or the second fire might have resulted from the re-energizing of the electrical power rails following the first fire. In any event, the Insurance Companies paid the full claim submitted by their insured for the loss of the merchandise in the warehouse, then filed this subrogation suit to recover their payments from the parties the Insurance Companies allege were actually responsible for the loss—including the City, which the Insurance Companies insist was vicariously liable for the acts of NOFD personnel.

The Insurance Companies alleged that the NOFD’s negligent actions and omissions included: (1) attempting to restore electrical power before an electrical inspection had been conducted, in violation of code and policy; (2) turning off the sprinkler system without posting personnel with two-way radios at the sprinkler valves, in contravention of a specific regulation; (3) opening the large bay doors before the fire was declared out, despite wind velocities of 21 mph; (4) failing to “overhaul” any of the upper level racks even though they had been subjected to intense heat; and (5) departing the scene “under these conditions” within six minutes after declaring the fire out, without leaving adequate personnel and equipment for a fire watch.

The City filed a motion for summary judgment based on its contract with WCL, but that motion was ultimately denied in response to the Insurance Companies’ motion for reconsideration. The City then filed a second motion for summary judgment, this one based on two Louisiana statutes that immunize the City and its employees from civil suits for damages based on allegations of acts negligently taken in the course of their duties: (1) R.S. 9:2798.1 (forbidding the imposition of liability on public entities or their employees when they perform policymaking or discretionary acts within the course and scope of their lawful powers and duties), and (2) R.S. 9:2793.1 (denying a cause of action against a public entity for damage caused by remedial acts reasonably taken to abate a public emergency). The district court granted this second motion for summary judgment, ruling that the City was immune from suit under R.S. 9:2798.1. The district court denied the Insurance Companies’ motion for reconsideration or relief from judgment, or, in the alternative, certification of the judgment as final for immediate appeal. After all other defendants in the case were dismissed through settlement, voluntary dismissal, or summary judgment, the Insurance Companies’ appeal of summary judgment in the City’s favor became ripe.

## II. Analysis

The Insurance Companies argue that the New Orleans building code and fire department procedural policy imposed an obligation to have an electrical engineer inspect the building and to obtain a permit before the electricity could be turned on again. The New Orleans building code applicable at the time of the fire provided that no repair or alteration of electrical equipment shall be commenced before obtaining an electrical inspection and a permit. In addition, Fire Captain Wayne Verges stated emphatically in his deposition that it is the fire department’s procedural policy not to restore power:

*If I can reiterate, on that policy that we have, it is our policy to, you know, have the electric shut off to the building. And we’re not to re-energize, you know, the building without—well, we don’t*

*(continued)*

(continued)

re-energize. NOPSI or Entergy or whatever, whoever, you know, kills the power and they restore it. Now, we'll kill the power in times of life and limb, you know, in danger, you know, prior to Entergy arriving. But as far as re-energizing, we don't. In other words, as best you recall or understand standard operating procedure to be within the Fire Department, that once the electricity is eliminated to the building by Energy or NOPSI, whichever, — Uh-huh (affirmatively).

—the Fire Department normally would not ask Entergy to restore power? Is that what you're telling me?

Correct.

And the reason for that policy is both for the safety of the firemen who may be inside the building, correct? That's one reason?

Uh-huh (affirmatively).

Correct?

Correct.

And secondly is that the Fire Department doesn't know what damage may have been sustained by the electrical system during the fire. Correct?

Correct.

The likelihood that this was the fire department's procedural policy is further strengthened by the deposition testimony of Larry Chan, the City's Chief Electrical Inspector, which was offered by the Insurance Companies in support of their position:

*If power was terminated to that facility on the morning of the fire at the request of the Fire Department and Entergy in fact turned off the power, is the normal practice or the proper practice that prior to the facility being reenergized [sic], that your department has to go to that facility to give its approval before Entergy can re-energize the property?*

*I would say that's the normal practice.*

*Okay. Normal practice. Is there any type of codal requirement imposed by the City with respect to re-energizing a property after the power to the facility has been turned off as a result of a fire?*

*As I say, a normal practice is that it goes through Department of Safety and Permits, the Electrical Division. I don't know if any other agencies has [sic] the right or not to do the same.*

*So you don't know if the Fire Department has the right to tell the utility company to turn on and off the power? Is that what you're saying?*

Correct.

*If I were to tell you that the Fire Department instructed that the power be turned off and then*

*turned back on again at those times that I mentioned earlier, and if there was no one from your department there, that would not be, to use your words, the normal practice. Is that correct?*

*Correct. They normally order it off, but I—I am not aware of them putting it back on.*

*What is the reason why you follow the normal practice or what is the rationale for the normal practice?*

*Well, in our department, I mean throughout the years, I mean, as chief I just picked up from practices that have been done, but it's not just a practice. The fact is that when power is off, they are required to make an inspection to make sure it's safe to re-energize it. And when you file a permit application, that's got to come through us and we're the ones that have to approve it to Entergy.*

In the face of these clear mandates from the building code and long-established NOFD policy, continues the argument of the Insurance Companies, NOFD firefighters ordered the power restored without the requisite inspection, after they had ordered it turned off in the first place.

With respect to the building code provision, the parties disagree whether it applies during fire emergencies (the City contends that it does not) and whether a fire emergency continued to exist by the time that attempts were made to re-energize the building (the City contends that there was). As for the NOFD policy, the City challenges Chan's deposition testimony by pointing to other excerpts and arguing that Chan actually did not know how a situation involving the NOFD's re-energizing of a building should be handled. As the Insurance Companies note, however, the City's contention is pregnant with its failure to address the testimony of Captain Verges at all.

From the foregoing we conclude that the parties have joined on at least three genuine issues of material fact: (1) Did the building code provision that requires a permit before restoring power to a building apply in fire emergencies; (2) was there still a fire emergency at the time attempts were made to re-energize the building; and (3) regardless of whether the ordinance applied, was it NOFD policy to refrain from restoring power after having it turned off during fire-suppression efforts. This, coupled with the fact that at least one theory of the second fire's rekindling implicates the re-energizing of the building, forces us to conclude that the district court erred when it determined at the summary judgment stage that the firefighters' conduct was not dictated by statute, regulation, or policy.

As the *Berkovitz* Court explained, the discretionary function exception applies only when a court determines that (1) a statute, regulation, or policy did not dictate the actor's conduct, and (2) the actor's conduct was grounded in social, economic or public policy. The Insurance Companies have demonstrated the existence of a genuine issue of

material fact with respect to the first step of the *Berkovitz* inquiry. At this preliminary summary judgment phase of this lawsuit, therefore, the district court cannot advance to the second step of the *Berkovitz test*, and the City cannot be afforded the immunity provided by R.S. 9:2798.1.(18).

Accordingly, we reverse the district court's summary judgment and remand the case for further proceedings consistent with this opinion.

REVERSED and REMANDED.

AUTHOR'S NOTE: Footnotes omitted.

The term **subrogation** refers to the fact that when an insurer pays out a claim to an insured, the insurer is entitled to file suit against who ever was responsible for causing the damage to the same extent that the insured could have sued. Insurers will sue fire departments when the insurer believes that the fire department's negligence contributed to the damages to their insured. Both the *New Orleans* case as well as the *Harry Stroller* case involved subrogation suits filed against fire departments by insurers.

### Legalese

**Subrogation** The right of a person to assume the legal claims of another party. The right of an insurer who pays out a claim to an insured to file suit against who ever was responsible for causing the damage to the same extent that the insured could have sued.

## 8.4 EMERGENCY MEDICAL CARE AND NEGLIGENCE

Negligence actions arising out of firefighting are but one aspect of the liability problem facing firefighters and fire departments. Lawsuits alleging negligence in the rendering of emergency medical treatment raise some areas of particular concern.<sup>18</sup> For one thing, states have adopted comprehensive regulations governing pre-hospital emergency care. These regulations establish strong, if not conclusive, evidence of the standard of care for paramedics and emergency medical technicians (**Figure 8-4**). Deviation from these pre-hospital protocols make it relatively easy for an injured patient to establish negligence on the part of emergency medical technicians and paramedics.

<sup>18</sup>*Thomas v. Dekalb County*, 227 Ga. App. 186, 489 SE2d 58 (1997); *Carrola v. Guillen*, 935 S.W.2d 949 (Tex. App., 1996).



**Figure 8-4** Pre-hospital care protocols issued by state or local authorities are strong evidence of the standard of care for emergency medical personnel.

### 8.4.1 Consent to Treat, Battery, and Negligence

In Chapter 7.3 we discussed the importance of consent to medical treatment in regard to the potential liability of medical providers for battery. Many jurisdictions now consider issues of patient treatment, consent, informed consent, and implied consent to be matters better suited to consideration as negligence rather than battery.<sup>19</sup> In other words, rather than analyze a case by determining if the patient gave his or her informed consent to treatment or whether the medical provider committed battery, courts will look instead at the standard of care of the reasonably prudent medical provider and determine if the provider was negligent in (a) not providing enough information to the patient, (b) not obtaining valid consent, or (c) exceeding the scope of the consent granted.

Some states refuse to consider informed consent cases as intentional tort/battery cases, and consider them strictly as cases of the breach of the standard of care.<sup>20</sup> However, most states recognize that an action for battery will exist when a medical practitioner treats a patient without consent.<sup>21</sup>

### 8.4.2 Patient Abandonment

Another important issue related to rendering patient care involves patient **abandonment**. As discussed in Chapter 7.3.11, abandonment is the intentional stopping of medical care without legal excuse or justification. A patient's informed refusal of care provides a medical provider with a legal justification for stopping care, as would the transfer of care from a paramedic to a hospital emergency room.

Concerns over abandonment in a pre-hospital setting arise from cases against physicians for the abandonment of patients.<sup>22</sup> These cases arose from physicians who left patients in the care of less qualified medical personnel or failed to properly monitor patients they

had been treating. The legal concepts surrounding abandonment have been transposed onto the pre-hospital environment seemingly in the absence of case law by well-intentioned writers and lecturers on the subject.

There is a split of opinion on whether abandonment is a type of negligence, where the analysis is focused on whether the provider rendered the appropriate standard of care or whether abandonment is an intentional tort. Most authorities now seem to conclude that abandonment is based on negligence, and have identified specific areas of concern. For emergency medical personnel, these areas include:

1. Stopping care and leaving the scene
2. Leaving a patient temporarily unattended or unsupervised
3. Allowing a patient who lacks capacity to decline medical treatment
4. Transferring responsibility for the care of a patient to a lower level of care (for example, a paramedic transferring a patient to an EMT-Basic or first responder)

Another common scenario occurs when a doctor gratuitously attends to a patient at the scene of an accident, and then passes care on to paramedics or EMTs upon their arrival.<sup>23</sup> There is no case law on this subject. Given that the weight of authority applies a negligence analysis to abandonment cases, the proper focus is on what the reasonably prudent doctor would have done under the circumstances.

An analogous situation arises when a paramedic is on scene and turns care of the patient over to those with lesser qualifications to transport the patient. State and local pre-hospital protocols may address these situations and if so will be an important consideration in establishing the appropriate standard of care for abandonment. In the absence of clear pre-hospital protocols, paramedics and EMTs will be held to what the reasonably prudent professional of like training would have done under the circumstances.

#### Legalese

**Abandonment** The intentional stopping of medical care without legal excuse or justification. The act of a medical provider who, having assumed care and control of a patient in need of medical attention, either stops providing care—leaving the patient unattended—or leaves the patient under the care of someone with lesser qualifications.

<sup>19</sup>*Blanchard v. Kellum*, 975 S.W.2d 522 (Tenn. 1998); *Natanson v. Kline*, 186 Kan. 393, 350 P.2d 1093 (1960), modified, 187 Kan. 186, 354 P.2d 670 (1961); *Trogun v. Fruchtman*, 58 Wis.2d 596, 207 N.W.2d 297 (1973). See also Michael B. Gallub, "Assessing Culpability in the Law of Torts: A Call for Judicial Scrutiny in Comparing 'Culpable Conduct' under New York's CPLR 1411." *Syracuse L. Rev.* 37; (1987): 1079, 1121–1127.

<sup>20</sup>*King v. Dodge County Hospital Authority*, 274 Ga. App. 44, 616 SE2d 835 (2005) (explaining that issues of consent and withdrawal of consent become intertwined with medical decision making, making it preferable that such cases be examined under a standard of care analysis); *Darviris v. Petros*, 442 Mass. 274 (2004), *Harnish v. Children's Hosp. Med. Ctr.*, 387 Mass. 152 (1982).

<sup>21</sup>*Blanchard v. Kellum*, 975 S.W.2d 522 (Tenn. 1998); *Lacey v. Laird*, 166 Ohio St. 12, 139 N.E.2d (1956).

<sup>22</sup>See Chapter 7.3.11 for a list of abandonment cases.

<sup>23</sup>Besides being a civil tort, abandonment by a licensed medical provider may result in disciplinary action by the licensing authority such as the county or state department of health.

## 8.5 BEYOND NEGLIGENCE

Between ordinary negligence on one hand and intentional torts on the other, are two additional types of conduct that can also create liability. These two types of conduct are gross negligence and recklessness.

**Gross negligence** is an aggravated form of negligence that involves an extreme departure from the ordinary standard of care. States differ upon an exact formulation for gross negligence.<sup>24</sup> Some courts have described gross negligence as willful misconduct, recklessness, or such utter lack of care as to be evidence of either willful misconduct or recklessness.<sup>25</sup> However, most jurisdictions draw a sharp distinction between gross negligence and recklessness, finding that gross negligence differs from negligence in degree, whereas recklessness differs from negligence in kind. In most cases the question of whether an act constitutes negligence or gross negligence is left to a jury to decide.

**Recklessness**, which is also referred to as willful, wanton, and reckless behavior, is an aggravated form of gross negligence. The key focus with recklessness is that the actor had knowledge that harm was likely to result from her behavior and consciously chose to act (or refused to act when under a duty to act) despite the risk. It is the knowledge that harm was likely to result that separates recklessness from gross negligence.<sup>26</sup> In many cases reckless conduct is considered the equivalent of intentional conduct, and the perpetrator may be liable to the same extent as one who acted intentionally.<sup>27</sup>

Persons guilty of gross negligence or recklessness can be held liable for damages to the same extent as someone who is negligent, and in some jurisdictions may be liable for punitive damages. In addition there are certain situations where negligence is not enough to create liability, in the absence of gross negligence or recklessness. For example, sovereign and statutory immunity usually provide liability protection for acts of negligence, but not for grossly negligent, reckless, or intentional acts. See Chapter 9.7.1.

### Patino v. Suchnik

770 A.2d 861 (RI, 2001)

Supreme Court of Rhode Island

This appeal challenges a trial justice's jury instructions concerning the alleged gross negligence of emergency rescue workers (EMTs) in deciding not to transport an injured party to a hospital. Following complications ensuing from a head wound, the injured party died approximately one year after the incident in question. The plaintiffs, Cindy L. Patino, as administratrix of the estate of Eugene J. Janarelli (Janarelli), and Denise Laurens on behalf of her minor children, Crystal Laurens and Kayla Laurens, appeal from a Superior Court judgment in favor of the defendants,

Frank Suchnik in his capacity as Treasurer for the City of Central Falls, Robert Noury, Steven Ouellette, K.L.C. Associates, Inc. d/b/a Macondo and Augusto Garrces a/k/a Luis Garces. After reviewing the parties' pre-briefing statements, a single justice of this Court ordered the parties to show cause why the issues raised in this appeal should not be summarily decided. Because no such cause has been shown, we proceed to do so.

The key question for the jury in this case was whether the defendant EMTs were grossly negligent in deciding  
(continued)

<sup>24</sup>*Crooks v. Moses*, 138 S.W.3d 629 (Tex.App., 2004): "Gross negligence includes two elements: (1) viewed objectively from the actor's standpoint, the act or omission must involve an extreme degree of risk, considering the probability and magnitude of the potential harm to others, and (2) the actor must have actual, subjective awareness of the risk involved, but nevertheless proceed in conscious indifference to the rights, safety, or welfare of others" (p. 640).

<sup>25</sup>*Hunter v. City of Columbus*, 139 Ohio App.3d 962 (2000): Discretionary appeal to the Supreme Court of Ohio was not allowed 91 Ohio St.3d 1493, 745 N.E.2d 439 (2001) (operation of ambulance); *City of San Antonio v. Schnieder*, 787 S.W.2d 459 (Tex. App., 1990) (fire apparatus strikes vehicle).

<sup>26</sup>With regard to recklessness, many courts use the term "indifference" to indicate that the person had knowledge of the risk of serious harm, and consciously chose to act (or refused to act) without regard to the consequences. *Hayes Sight & Sound, Inc. v. Oneok, Inc.* 281 Kan. 1287, 136 P.3d 428 (2006) (case involved a series of fires and explosions in a community resulting from the underground storage of natural gas). See also *Jones v. Hansen*, 254 Kan. 499, 867 P.2d 303 (1994).

<sup>27</sup>Not all jurisdictions recognize the distinction between gross negligence and recklessness. Some simply recognize that *wanton and reckless behavior* exists between negligence and intentional conduct. See *Duckers v. Lynch*, 204 Kan. 649, 465 P.2d 945 (1970).

(continued)

that the injured Janarelli did not need to go to the hospital. Earlier in the evening Janarelli had been struck on the head by a beer bottle at a nightclub. He was nursing a small head wound and reposing at his girlfriend's apartment when he started to complain about his aching head. The rescue personnel arrived to examine him in the early morning hours of January 2, 1993. Earlier, Janarelli's girlfriend had called 9-1-1 at Janarelli's request and asked for emergency assistance. Shortly thereafter, two EMTs arrived at the apartment and the girlfriend escorted them to the bedroom where Janarelli was lying diagonally face down on a bed.

The EMTs testified that shortly after they arrived they asked Janarelli whether he wanted to go to the hospital. Initially, Janarelli indicated that he wanted to go to the hospital, and the EMTs ordered an ambulance to be dispatched. According to the EMTs, they began to take Janarelli's vital signs, but he increasingly resisted their ministrations. Although the EMTs asked Janarelli some questions, Janarelli's girlfriend did not recall seeing them perform any diagnostic tests on him. The EMTs asserted that because Janarelli pulled away from them, they could not use the blood pressure cuff to take his blood pressure; as a result, they were forced to take it by hand from his wrist. After observing and questioning Janarelli further and after checking other diagnostic indicators, the EMTs concluded that Janarelli was not in need of medical attention. Nevertheless, because Janarelli had indicated previously that he wanted to go to the hospital, the EMTs were prepared to help him do so. While waiting for the ambulance to arrive, the EMTs suggested to Janarelli that he put some pants on for the trip out to the ambulance. Even with the assistance of his girlfriend, however, Janarelli apparently experienced problems in attempting to do so. Finally, after becoming very impatient and frustrated, he eventually refused to dress. Janarelli then reportedly told the EMTs that he did not want to go to the hospital. The EMTs testified that they repeatedly asked if he was sure he did not want to go, but that he did not change his mind. Therefore, on the basis that they did not believe Janarelli was in need of hospital care anyway, the EMTs called and canceled the ambulance.

As they were leaving the apartment, the EMTs testified that they told Janarelli's girlfriend to call them immediately if Janarelli started to exhibit any signs of further medical problems, such as vomiting. Janarelli's girlfriend denied that they gave her this advice. In any event, although Janarelli began vomiting only an hour or so after the EMTs left the apartment, his girlfriend insisted that she was unaware that this development signaled a potential problem for Janarelli that called for further medical attention. By the next morning when he was finally taken to the hospital, Janarelli was unconscious. After spending a year in the hospital, Janarelli died from the head injury he received on the night in question.

The plaintiffs offered expert testimony from a neurologist who testified that Janarelli's symptoms indicated that "something [was] not right" and that further evaluation (that is, a CT scan) was necessary to properly diagnose and treat his injury. In addition, plaintiffs offered the expert testimony of an EMT trainer. Relying upon the Department of Health protocol in this state governing the conduct of EMTs, he concluded that the EMTs had breached their duty of care. In contrast, defendants offered the expert testimony of an EMT trainer who opined—based upon the same protocol and based upon the materials used to train the EMTs—that the EMTs had acted in accordance with the standard of their profession.

Before jury deliberations began, plaintiffs requested jury instructions based in part on the Department of Health protocol for EMTs. The trial justice rejected these instructions and charged the jury generally that Rhode Island law provides qualified immunity for EMTs and that they could be held liable only if their alleged misconduct was a result of gross negligence or willful misconduct. The trial justice then gave the jury a broad definition of gross negligence without specifying in detail the specific duty of care owed by the EMTs to Janarelli. The plaintiffs objected generally to the instructions: "[t]he definition of gross negligence, I would suggest that it ought to have been in accordance with my request for charge, and would object as far as it is inconsistent. With respect to my request [*sic*] 4 through 13, with regard to duty and so forth owed by the defendants to plaintiffs, I respectfully object. These have not been given." The trial justice refused to amend or supplement his instructions and the jury found that plaintiffs failed to prove by a fair preponderance of the evidence that the acts or omissions of either of the EMTs individually or in their joint capacity constituted gross negligence or willful misconduct that had proximately caused Janarelli's death.

### Analysis

The key issue in this case was whether the EMTs were grossly negligent in concluding that Janarelli did not need further treatment at the hospital. Both EMTs testified that, after observing Janarelli and questioning him, they did not believe that he needed to go to the hospital. The instructions requested by plaintiffs, however, would have removed this issue from the jury's consideration because they required the EMTs to warn Janarelli of the potential adverse consequences of his refusing hospital treatment—irrespective of whether the workers ever had offered him such treatment or had been grossly negligent in concluding that Janarelli needed no such treatment. Thus, the proffered instructions improperly assumed that the rescue workers had been grossly negligent in failing to determine that Janarelli needed hospital treatment, in failing to proffer that treatment to him, and in failing to warn him that his refusal of needed and proffered hospital treatment might still result in serious adverse consequences to him.

The plaintiffs argue that the trial justice committed reversible error by refusing to charge the jury consistent with their requests. Allegedly, without these instructions, the jury was not properly informed of the standard of care owed by the EMTs to Janarelli and therefore could not have correctly assessed whether the EMTs were grossly negligent. The plaintiffs' proposed instructions were based upon the Rhode Island Department of Health Ambulance/Rescue Report Form Instructions (protocol), which define an EMT's duty of care with respect to a patient who has refused proffered care or assistance. According to the protocol:

"The EMT must inform the patient that if s/he does not permit the EMT to provide *the particular service or treatment recommended* that the patient may suffer some particular harm. If the patient declines assistance, the EMT must urge the patient to consent to care, in recognition of the possibly harmful consequences of not being treated or taken to a medical facility. If a competent patient declines examination, treatment, or transportation with the knowledge that harm may (or is likely to) result, then the patient's refusal is an informed one, and legally valid." Division of Emergency Medical Services, Department of Health, State of Rhode Island and Providence Plantations, *Ambulance/Rescue Report Form Instructions*, § 3.5 at 16 (June 1986). (Emphasis added.)

This protocol, however, contains an implicit predicate that an EMT or some other health-care provider already has determined that the patient needs further medical "assistance" and that some "particular service or treatment [has been] recommended" to the patient. Only *after* an EMT or some other health-care provider has made such a determination and recommended it to the patient and only after the patient has "decline[d] assistance" that has been recommended to him or her is the EMT then required by the protocol to "urge the patient to consent to care" and "inform" the patient of "the possibly harmful consequences of not being treated or taken to a medical facility." The plaintiffs, however, proposed to misstate this standard of care to the jury by omitting the predicate requirement that EMTs (or some other health-care provider) must *first* determine that a patient needs hospital care and recommend that treatment to the patient—who then refuses it—*before* the EMTs would be bound to "urge" and "inform" the patient to consent to "the particular service or treatment recommended." Specifically, plaintiffs proposed to instruct the jury that "[i]n this case the EMTs had a duty to inform Mr. Janarelli that if he refused transportation to a hospital, he could suffer severe brain injury and die." Such an instruction clearly would have confused the jury and led them to the incorrect assumption that either there were

no predicate requirements to EMTs giving such a warning, as described above, or that the predicate requirements had been satisfied in this case, a conclusion that was very much in dispute given the evidence before the court and jury.

Although a trial justice must "determine and instruct the jury concerning what legal duty is owed to the plaintiff under the various alternative factual scenarios supported by the evidence," *Kuzniar v. Keach*, 709 A.2d 1050, 1055 (R.I. 1998), he or she may not interfere with the jurors' exclusive role as fact-finders by instructing them to make or to assume any particular finding of fact when that fact is disputed by the evidence presented. *See id.*; *see also Morinville v. Old Colony Co-operative Newport National Bank*, 522 A.2d 1218, 1222 (R.I.1987) ("A trial justice fulfills his or her obligation to charge the jury properly by framing the issues in such a way that the instructions 'reasonably set forth all of the propositions of law that relate to material issues of fact which the evidence tends to support.'). Therefore, because the EMTs had *no* duty to "urge" and "inform" hospital treatment upon Janarelli *unless* they (or some other health-care provider) first had concluded that Janarelli actually needed such care, and then had recommended it to him, only to have him refuse it, and because the question of whether they were grossly negligent in concluding that he did not need such care was a question of fact reserved for the jury, the trial justice properly refused plaintiffs' incomplete and misleading instructions.

The plaintiffs also proposed that the trial justice instruct the jury that the EMTs "shall be considered liable to plaintiffs," if they failed to "urge" or "inform" Janarelli as required by the protocol. But giving such an instruction would have been a clear misstatement of the law. Even if the EMTs had breached their duty under the protocol, they would not necessarily have been liable to the plaintiffs. Under G.L. 1956 § 23-4.1-12(a), the EMTs could not be held liable "unless [their] act or omission was the result of gross negligence or willful misconduct." Finally, because it was not the law that the EMTs had an absolute duty to transport Janarelli to the hospital or that they had a duty to attend to Janarelli "until they were relieved by an ambulance crew," the instructions proposed by plaintiffs that so provided were also properly rejected. . . .

### Conclusion

Therefore, we conclude that because the plaintiffs did not object to the trial justice's instructions with sufficient specificity beyond pointing to their alleged inconsistency with their own flawed proposed instructions, they failed to preserve for appeal any objection to the given standard-of-care instruction. Accordingly, we deny the plaintiffs' appeal and affirm the trial court's judgment.

In the *Patino* case, the EMTs concluded that the patient did not need to go to the hospital, and thus they did not provide additional information to the patient about the possible consequences of his refusal. As the court aptly points out, had the EMTs concluded that the patient did need to be transported, the protocols would have required the EMTs to provide additional information so the patient's refusal would have been "informed." The plaintiff wanted the jury to be instructed that the EMTs had a duty to inform the patient of the risks of declining aid. Such an instruction would have been the equivalent of a conclusion that the EMTs were wrong by not concluding that the patient needed medical attention. The court rightfully left that decision to the jury for determination.

### Legalese

**Gross negligence** An aggravated form of negligence that involves an extreme departure from the ordinary standard of care.

**Recklessness (civil action)** An aggravated form of gross negligence. Recklessness requires that the actor have knowledge that harm was likely to result from his or her behavior and that a conscious choice to act (or refusal to act when under a duty to act) despite the risk. It is the knowledge that harm is likely to result that separates recklessness from gross negligence.

## 8.6 DEFENSES TO NEGLIGENCE

The law recognizes several defenses to negligence. These defenses include assumption of risk, contributory/comparative negligence, rescue doctrine, last clear chance, and the fireman's rule.

### 8.6.1 Assumption of Risk

The defense of assumption of risk applies to situations where an injured party knew of the danger or peril, understood the risks, and freely and voluntarily chose to act. For example, a novice skier who chooses to ski down a trail that is clearly marked "Warning: Steep Trail—Experts Only" assumes the risk that he may be injured in a fall because the ski trail is so steep and/or difficult. Assumption of risk serves to limit the liability of a person who negligently creates or maintains a hazard, when the injured party is fully aware of the risks of engaging in an activity.

In some ways, the assumption of risk defense is analogous to the concept of consent that applies with regard to battery. See Chapter 7.3. With assumption of risk, a person knows of the risk and voluntarily agrees to accept the consequences. Factual issues may arise

where the assumption of risk defense is used, such as whether the assumption of risk was knowing and whether it was truly voluntary.

### 8.6.2 Contributory and Comparative Negligence

Many times a victim's injury or property damage is primarily caused by the defendant's negligence, but is also caused in some small part by her own negligence. The law was traditionally rather harsh in this regard. At common law, if the plaintiff's own negligence contributed in any way toward her own injuries, then the defendant could not be held liable for negligence. This **contributory negligence** rule was an absolute defense in negligence cases. Over the years, all states have abolished the contributory negligence rule in favor of a system called **comparative negligence**.

Under comparative negligence, the jury is responsible for apportioning fault among the various parties to a lawsuit as a question of fact. Comparative liability is assigned on a 100 percent scale, with each party receiving a percentage of fault as determined by the jury. States differ on some of the finer points of comparative negligence, but the major principles of comparative negligence operate in much the same way. In a car accident case where the plaintiff sustains \$100,000 in damages, if the jury determines that the defendant was 80 percent at fault, and plaintiff was 20 percent at fault, plaintiff would be awarded \$80,000.

Because the common law contributory negligence rule was such a harsh rule, a variety of exceptions developed, such as the rescue doctrine and the last clear chance doctrine. Despite the implementation of comparative negligence, many of the doctrines that developed under contributory negligence remain.

### 8.6.3 Rescue Doctrine

The rescue doctrine is a principle that developed under contributory negligence to ensure that someone who comes to the rescue of another is not barred from recovering from those who negligently created the situation that necessitated the rescue (**Figure 8-5**). It prevents a defendant from raising assumption of risk or contributory negligence when a rescuer is injured or suffers damages during the course of effecting the rescue. The rationale for the rescue doctrine is that courts should not discourage people from helping others who are in distress. It is further justified on the basis that someone who negligently creates a situation where another must be rescued should not be absolved of liability for damages to a rescuer.

States differ in how the rescue doctrine is applied under modern comparative negligence systems. The *Ouellette* case shows one way that courts still handle rescue doctrine cases under comparative negligence systems.



**Figure 8-5** The rescue doctrine is based on the recognition that danger invites rescue. A rescuer who comes to the aid of another is not prohibited by contributory negligence or assumption of risk from suing for negligence. (Photo by Rick Blais.)



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### **Ouellette v. Carde**

612 A.2d 687 (1992)

*Supreme Court of Rhode Island*

#### **OPINION**

MURRAY, Justice.

This civil action in negligence is before the court on the defendants' appeal from a judgment entered in favor of the plaintiff. We affirm.

On March 18, 1986, defendant Orin V. Carde attempted to change the muffler and tailpipe of his 1979 Mercury Cougar. The defendant parked his car in the closed garage connected to his home and elevated the back of the car with a hydraulic jack. He placed two stanchion jacks underneath the rear axle and removed the hydraulic jack so that the car's rear axle rested on the stanchion jacks. He blocked the front wheels of the car and unloosened the bolts connecting the tailpipe and muffler to the chassis. He was unable to remove the tailpipe, however, because the car chassis pressed too closely to the rear axle resting on the stanchion jacks to allow him to pull it free. To provide an adequate opening defendant placed a bumper jack underneath the right rear bumper and jacked the car up so that the right side of the rear axle was no longer resting on a stanchion jack. This position tilted the car at a precarious angle but created a space through which the tailpipe could pass.

The defendant again tried to remove the tailpipe, but it was rusted to the exhaust pipe and would not slide off. He

began pulling on the muffler and exerted such pressure in attempting to wiggle it free that the right side of the car fell off the bumper jack onto the stanchion jack and trapped defendant underneath the car. Because of the angle at which the car fell, the gas tank landed on the right stanchion jack puncturing the tank and releasing approximately ten gallons of gas onto the garage floor. The defendant remained trapped under the car in a semiconscious state for an unknown period. He eventually recovered and worked himself free, and called the plaintiff, Beverly Ouellette, from the garage telephone. In the middle of the conversation he passed out, and plaintiff, a long time friend and neighbor, immediately drove to defendant's house. She entered the front door of the home and made her way to the garage through the laundry room. She nearly slipped in a puddle of gasoline on the garage floor as she entered the garage and found defendant lying on the ground beneath the dangling phone. She attempted to call a rescue squad but was unable to get a dial tone, and defendant became agitated. He told plaintiff that they should leave through the garage door and directed her to press the electric door opener. When the door was one-half to three-quarters open, the gas ignited in an explosion. Both plaintiff and defendant

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escaped but were severely burned. The plaintiff was taken directly to the emergency room where she was treated for third-degree burns to her left ankle and to both feet. She was released later that day but was readmitted one week later. She stayed in the hospital for fifteen days during which time she had a series of operations and a skin graft. She was subsequently released and entered a home-care program through which a nurse would visit and change her bandages three times a day. In addition to the physical injuries, plaintiff experienced extreme anxiety and panic attacks. She received treatment for anxiety over a three-year period and was still taking medication at the time of the trial.

The plaintiff filed a civil action in negligence in Kent County Superior Court on February 25, 1987. The complaint requested money damages for personal injuries sustained in the fire at defendant's home on March 18, 1986. A five-day jury trial commenced on March 27, 1990, during which defendant filed two motions for directed verdict. The trial justice denied the first motion and reserved decision on the second motion filed at the end of the presentation of evidence. The case was submitted to the jury on April 2, 1990, and the following day the jury returned a verdict in favor of plaintiff for \$85,000 plus interest and costs. The court thereafter reconsidered and denied defendant's second motion for directed verdict. The defendant subsequently filed a motion for a new trial, which was also denied. On appeal defendant raises six issues. We address each issue separately.

I  
The defendant's first claim is that the trial justice erred in prohibiting the defendant from arguing comparative negligence to the jury and in instructing the jury on the rescue doctrine. The defendant argues that Rhode Island's comparative-negligence statute incorporates the public-policy principles of the rescue doctrine and that the jury should have been instructed to apply standards of comparative negligence to plaintiff's case. The plaintiff responds that the rescue doctrine survives the adoption of comparative negligence because comparative negligence inadequately promotes the public policy of encouraging a person under no duty to rescue to save the life of a human being in peril.

The rescue doctrine is a rule of law holding that one who sees a person in imminent danger caused by the negligence of another cannot be charged with contributory negligence in a nonreckless attempt to rescue the imperiled person. 57A Am. Jur.2d Negligence § 1079 (1989). The doctrine was developed to encourage rescue and to correct the harsh inequity of barring relief under principles of contributory negligence to a person who is injured in a rescue attempt which the injured person was under no duty to undertake. *Wilson v. N.Y., N.H. & H.R.R. Co.*, 29 R.I. 146, 161, 69 A. 364, 371 (1908); *Willis v. Providence Telegram Publishing Co.*, 20 R.I. 285, 38 A.

947 (1897). In practice the doctrine may be used either to establish a plaintiff's claim that the defendant was guilty of actionable negligence in creating the peril which induced the rescue attempt or to eliminate the defenses of contributory negligence and assumption of risk. The instant case, however, raises the question of whether Rhode Island's adoption of the comparative-negligence doctrine, G.L.1956 (1985 Reenactment) § 9-20-4, requires that rescue-doctrine cases be adjudicated under standards of comparative negligence.

Comparative fault removes the harsh consequences of contributory negligence because a rescuer is not barred completely from recovery for negligently performing a rescue. Under a comparative-negligence standard the trier of fact apportions fault among responsible parties, and the negligent rescuer is entitled to recover only that percentage of total damages for which the party creating the peril is responsible. The comparative-negligence doctrine, therefore, arguably incorporates this policy consideration of the rescue doctrine, but there is a split in authority whether the doctrine of comparative negligence fully addresses the other policy considerations of the rescue doctrine. See Annot., Rescue Doctrine: Applicability and Application of Comparative Negligence Principles, 75 A.L.R.4th 875 (1990). Most courts addressing this issue focus on the fact that comparative negligence removes the harsh consequences of contributory negligence and have ruled that a plaintiff who is negligent in performing a rescue should recover only a pro rata share of the damages sustained attributable to the defendant. See, e.g., *Zimny v. Cooper-Jarrett, Inc.*, 8 Conn. App. 407, 513 A.2d 1235 (1986); *Ryder Truck Rental, Inc. v. Korte*, 357 So.2d 228 (Fla. Dist. Ct.App.1978); *Sweetman v. State Highway Department*, 137 Mich. App. 14, 357 N.W.2d 783 (1984); *Pachesky v. Getz*, 353 Pa.Super. 505, 510 A.2d 776 (1986).

We are of the opinion, however, that the comparative-negligence doctrine does not fully protect the rescue doctrine's underlying policy of promoting rescue. No common-law duties changed as a result of the enactment of Rhode Island's comparative-negligence statute, and there is nothing other than an individual's moral conscience to induce a person under no legal duty to undertake a rescue attempt. The law places a premium on human life, and one who voluntarily attempts to save a life of another should not be barred from complete recovery. Only if a person is rash or reckless in the rescue attempt should recovery be limited; accordingly we hold that the rescue doctrine survives the adoption of the comparative-negligence statute and that principles of comparative negligence apply only if a defendant establishes that the rescuer's actions were rash or reckless. See *Allison v. Sverdrup & Parcel and Associates, Inc.*, 738 S.W.2d 440 (Mo. Ct. App.1987). In adopting this reasoning we recognize that the oft quoted words of Justice Cardozo apply now as they did in 1921:

“Danger invites rescue. The cry of distress is the summons to relief. The law does not ignore these reactions of the mind in tracing conduct to its consequences. It recognizes them as normal. \* \* \* The risk of rescue, if only it be not wanton, is born of the occasion. The emergency begets the man. The wrongdoer may not have foreseen the coming of a deliverer. He is accountable as if he had.” *Wagner v. International Railway Co.*, 232 N.Y. 176, 180, 133 N.E. 437, 437–38 (1921).

In the instant case, defendant was not entitled to a jury instruction on comparative negligence unless plaintiff’s rescue was rash or reckless. Because defendant did not assert that plaintiff acted recklessly, the trial justice did not err in denying defendant’s requested jury instruction on comparative negligence. . . .

Accordingly, the defendant’s appeal is denied and dismissed. The judgment in favor of the plaintiff is affirmed, and the case is remanded to Superior Court.

### 8.6.4 Last Clear Chance

The **last clear chance doctrine** comes into play when two parties have both been negligent, but the second party had the opportunity to avoid the harm and failed to do so.<sup>28</sup> The typical last clear chance case occurs when a party’s own negligence creates a situation rendering him helpless. A second party discovers the peril that the first party is in and could avoid injury to the first party, but negligently fails to do so. Consider the following example.



#### EXAMPLE

Jones is driving his pickup truck on a highway late at night. He dozes off and his truck strikes a barrier. Jones is shaken up but otherwise uninjured. Soon a fire truck, ambulance, and police cruiser arrive on scene. Jones is seated in the police cruiser while waiting for a tow truck. Shortly thereafter a tractor trailer driven by Smith at an excessive rate of speed slams into the police cruiser and fire truck, injuring Jones. Without the last clear chance doctrine, traditional contributory negligence law would prohibit Jones from suing Smith because Jones was contributory negligent in creating the accident scene on the highway. Under the last clear chance doctrine, Jones’s negligence may have created the situation leading to his own injuries, but Smith had the last clear chance to avoid injury to Jones. The case could also be analyzed from the perspective of proximate cause. Smith’s negligence could be viewed as the proximate cause of Jones’s injuries, since Jones’s injuries did not “naturally flow” from his own negligence, but rather resulted from the intervening act of Smith.

<sup>28</sup>It should be pointed out that the last clear chance doctrine is not a defense to negligence per se, but rather is a defense to the defense of contributory negligence, insofar as it allows a plaintiff to sue a defendant despite plaintiff’s own contributory negligence.

After comparative negligence laws were adopted, some states abolished the last clear chance doctrine, choosing instead to have the jury apportion fault. Some states require that for the plaintiff in a last clear chance situation to be able to recover, the defendant’s conduct must involve a higher degree of fault than mere negligence, such as gross negligence or recklessness. Some states also approach the last clear chance issue from the perspective of proximate cause, finding the defendant liable only when the defendant’s negligence was the proximate cause of plaintiff’s injuries.

### 8.6.5 Fireman’s Rule

The **fireman’s rule** is a defense to lawsuits filed by firefighters and police officers who are injured in the line of duty against persons who (1) negligently caused the incident to which they responded or (2) negligently created a dangerous condition at the scene that caused their injuries (**Figure 8-6**).

The fireman’s rule has been considered to be an exception to the rescue doctrine, as well as being founded on both the assumption of risk and last clear chance doctrines. The rationales for limiting the ability of firefighters and police officers to sue based on the fireman’s rule are:<sup>29</sup>

- Concerns about placing too heavy a burden on property owners to maintain their premises in a prepared and safe condition at all times in the event that firefighters or police officers may respond
- Concerns that citizens may be discouraged from calling for help if they think they may be subject to liability, resulting in delayed responses and an increase in civilian casualties and property damage
- The presumption that firefighters and police officers know the risks and voluntarily assume them

<sup>29</sup>*Krauth v. Geller*, 31 N. J. 270, 157 A.2d 129 (1960) provides an excellent analysis of the rationale for the rule.



**Figure 8-6** The fireman's rule prohibits an injured firefighter from suing the person who negligently causes a fire or emergency, or negligently maintains the property on which a fire or emergency occurs. (Photo by Rick Blais.)

- The presumption that firefighters and police officers are adequately compensated through sick leave and disability programs paid for by taxpayers
- The presumption that the cost of injuries to firefighters and police officers should be spread among all the taxpayers in a community, not just those who have a fire or emergency

### **Hack v. Gillespie**

74 Ohio St.3d 362, 658 N.E.2d 1046 (1996)

*Ohio Supreme Court*

Appellant Stephen Hack was a fire fighter for the city of Lakewood, Ohio. On March 1, 1989, Hack responded to a fire at 1589 Larchmont Avenue. He gained access to the residence by entering a porch located on the second floor. While on the porch, Hack leaned over a decorative railing to retrieve some equipment. The railing, however, gave way, causing Hack to fall to the ground. As a result, Hack suffered a broken hip and elbow.

At the time of the fire, it appears that there were no occupants in the house. On December 2, 1988, the owner of the premises, Kevin Gillespie, appellee, had entered into an agreement with Patrick T. Cullen and Thom Rodgers III, whereby Cullen and Rodgers were given an option to purchase the property. It appears that Cullen and Rodgers entered into the agreement for the purpose of renovating the residence and, pursuant to the agreement, they were to have exclusive possession and control of the premises for the term of the option. However, Gillespie remained the owner of the premises. He

retained a key to the house and, additionally, furniture and other items apparently owned by Gillespie were kept on the premises.

Following the accident, Jack L. Henderson, Fire Marshal for the Lakewood Fire Department, investigated the cause of Hack's fall. Henderson determined that the railing on the porch had not been properly secured to the roof of the house. Henderson informed the city building inspector about the railing and, according to Henderson, the inspector cited Gillespie for violating the Lakewood Building Code. . . .

The issue presented for our consideration concerns the liability of an owner of private property to a fire fighter who enters the premises and, while performing his official duties, suffers harm as a result of the condition of the premises. Specifically, we are asked to reexamine the rule in Ohio regarding a landowner's liability to police officers and fire fighters, set forth in *Scheurer*, supra, and generally referred to as Ohio's "Fireman's Rule."

The term “Fireman’s Rule,” which is used to include fire fighters and police officers, refers to a common-law doctrine originally formulated in *Gibson v. Leonard* (1892), 143 Ill. 182, 32 N.E. 182. See Strauss, *Where There’s Smoke, There’s The Firefighter’s Rule: Containing The Conflagration After One Hundred Years* 1992 Wis.L.Rev. 2031. *Gibson* classified fire fighters as licensees entering upon property for their own purposes and with the consent of the property owner or occupant. *Id.* at 2034. Thus, the landowner or occupant owed no duty to the fire fighter unless the fire fighter’s injury was caused by the owner’s or occupier’s willful or wanton misconduct. *Id.* at 2031, fn. 2.

The rule was originally created to apply to fire fighters, but it has evolved and has been extended to include police officers. *Id.* at 2032. See, also, *Brady v. Consol. Rail Corp.* (1988), 35 Ohio St.3d 161, 163, 519 N.E.2d 387, 388-389, citing *Scheurer*, supra. It appears that a vast majority of our sister states have adopted or have retained some form of the Fireman’s Rule. The rule, however, is by no means a uniform rule. Rather, those jurisdictions which have adopted or retained some vestige of the rule have done so by applying various legal theories and principles, resulting in several different versions. See, generally, *Strauss*, supra, 1992 Wis.L.Rev. 2031. See, also, *Pottebaum v. Hinds* (Iowa 1984), 347 N.W.2d 642, 643; and *Calvert v. Garvey Elevators, Inc.* (1985), 236 Kan. 570, 572, 694 P.2d 433, 436.

The rule in Ohio, like many of our sister jurisdictions, contains exceptions to the “no duty” approach as originally established in *Gibson*, supra. In *Scheurer*, supra, paragraphs one and two of the syllabus, this court held:

“1. A policeman entering upon privately owned premises in the performance of his official duty without an express or implied invitation enters under authority of law and is a licensee.

“2. Where a policeman enters upon private premises in the performance of his official duties under authority of law and is injured, there is no liability, where the owner of the premises was not guilty of any willful or wanton misconduct or affirmative act of negligence; there was no hidden trap or violation of a duty prescribed by statute or ordinance (for the benefit of the policeman) concerning the condition of the premises; and the owner did not know of the policeman’s presence on the premises and had no opportunity to warn him of the danger.”

In the case at bar, appellants ask this court to reexamine and, specifically, overrule *Scheurer* and hold that a landowner owes a duty of reasonable care, in all instances, to fire fighters who enter upon the private premises in the exercise of their official duties. In this regard, appellants suggest that fire fighters who enter upon private premises should be classified as invitees and, accordingly, may recover for personal

injuries suffered as a result of the possessor’s ordinary acts of negligence. Alternatively, appellants contend that *Scheurer* should be limited so that a fire fighter can recover against a negligent landowner where, as here, the dangerous condition that caused the injury was in no way associated with the emergency to which the fire fighter responded.

The contentions posed by appellants, however, miss the fundamental purpose upon which the holding in *Scheurer* is based. We concede that this court has, previously, determined that the duty of care owed by a landowner to a fire fighter (or police officer) stems from common-law entrant classifications, i.e., licensees or invitees. However, Ohio’s Fireman’s Rule is more properly grounded on policy considerations, not artificially imputed common-law entrant classifications. Indeed, persons such as fire fighters or police officers who enter land pursuant to a legal privilege or in the performance of their public duty do not fit neatly, if ever, into common-law entrant classifications. See, e.g., Note, *Equal Protection and the Fireman’s Rule in Ohio* (1987-1988), 38 Case W.Res.L.Rev. 123, 124 (“Because firemen and policemen acquire the right to enter property by virtue of authority granted by the state, they ought to fall between the classifications of licensee and invitee.”); Strauss, supra, 1992 Wis.L.Rev. at 2034-2035; *Pearson v. Canada Contracting Co., Inc.* (1986), 232 Va. 177, 183, 349 S.E.2d 106, 110 (“Policemen and firemen, however, do not fit into any of these categories; they enter premises as of right, under a privilege based on a public purpose. They clearly are not trespassers. Nor can they be classified as licensees or invitees, who enter with consent or invitation of the occupant, as consent and invitation are irrelevant to a policeman’s or fireman’s privileged entry.”); and *Buren v. Midwest Industries, Inc.* (Ky. 1964), 380 S.W.2d 96, 98.

In *Scheurer*, supra, a police officer responded to investigate that “kids” were attempting to break into a church. After arriving at the church, the officer proceeded, on foot, down the church’s driveway toward the church’s side entrance. While proceeding down the driveway in absolute darkness, the officer fell into a large unguarded excavation site, sustaining serious injuries. The side entrance light of the church was not working and there was nothing in the area to alert the officer to the excavation. In determining that the injured police officer could not recover against the church, we concluded that:

“Policemen and firemen come on the premises at any hour of the day or night and usually because of an emergency, and they go to parts of the premises where people ordinarily would not go. Their presence can not reasonably be anticipated by the owner, since there is no regularity as to their appearance and in most instances their appearance is highly improbable.

“Reasoning and experience support the public policy that the duty of an owner of private

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*premises toward policemen and firemen who come upon his premises by authority of law in the performance of their official duties and suffer injury should be only that duty owed to a licensee, and that the owner should only be liable where such injury is inflicted by willful or wanton misconduct, or an active act of negligence, or by a violation of a duty created by statute or ordinance (for the benefit of policemen or firemen), or where a hidden trap caused the injury or where the owner had knowledge of the presence of the policeman or fireman on the premises and the opportunity to warn him of the danger and failed to do so."*

Id., 175 Ohio St. at 171-172, 23 O.O.2d at 458, 192 N.E.2d at 43.

As can be gleaned, this court's holding in *Scheurer* is based on certain legal theories and various public policy concerns. First, fire fighters and police officers can enter the premises of a private property owner or occupant under authority of law. Hence, fire fighters and police officers can be distinguished from ordinary invitees. Id., 175 Ohio St. at 168-169, 23 O.O.2d at 456, 192 N.E.2d at 41-42. Second, because a landowner or occupier can rarely anticipate the presence of safety officers on the premises, the burdens placed on possessors of property would be too great if fire fighters and police officers were classified, in all instances, as invitees to whom a duty of reasonable care was owed. Id., 175 Ohio St. at 170, 23 O.O.2d at 457-458, 192 N.E.2d at 43. Third, the rule has been deemed to be justified based on a cost-spreading rationale through Ohio's workers' compensation laws. In this regard, this court has recognized that all citizens share the benefits provided by fire fighters and police officers and, therefore, citizens should also share the burden if a fire fighter or police officer is injured on the job. Id., 175 Ohio St. at 170-171, 23 O.O.2d at 457, 192 N.E.2d at 43.

We believe that many of the reasons supporting the rule in *Scheurer* are well founded and are still sound and valid in our society today. Fire fighters and police officers assume risks by the very nature of their chosen profession. The risks encountered are not always directly connected with arresting criminals or fighting fires. Members of our safety forces are trained to expect the unexpected. Such is the nature of their business.

The risks they encounter are of various types. A fire fighter, fighting a fire, might be attacked by the family dog. He or she might slip on an object in the middle of a yard or on a living room floor. An unguarded excavation may lie on the other side of a closed doorway, or the fire fighter might be required to climb upon a roof not realizing that it has been weakened by a fire in the attic. Fortunately, Ohio has statutory compensation schemes which can temper the admittedly harsh reality if one of our public servants is injured in the line of duty.

Further, appellants argue that fire fighters and police officers are treated unfairly in Ohio because they are not

entitled to the same protection as other individuals/employees who enter a landowner's or occupier's premises. However, unlike water, electric and gas meter readers, postal workers and others, fire fighters can enter a homeowner's or occupier's premises at any time, day or night. They respond to emergencies, and emergencies are virtually impossible to predict. They enter locations where entry could not be reasonably anticipated, and fire fighters often enter premises when the owner or occupier is not present. We believe that under these circumstances abrogation of Ohio's Fireman's Rule, as suggested by appellants, would impose too great a burden on Ohio landowners and occupiers and their insurers.

Moreover, *Scheurer* does not stand for the proposition that a possessor of land owes no duty to a fire fighter or police officer. Rather, this court in *Scheurer* has cogently set forth several exceptions to the "no duty" rule.

We are aware that a few jurisdictions have abolished or modified their original rule. See, e.g., *Mounsey v. Ellard* (1973), 363 Mass. 693, 297 N.E.2d 43; *Dini v. Naiditch* (1960), 20 Ill.2d 406, 170 N.E.2d 881; and *Christensen v. Murphy* (1984), 296 Ore. 610, 678 P.2d 1210. We are also cognizant that the Fireman's Rule has been the subject of considerable commentary. See, e.g., Annotation, *Liability of Owner or Occupant of Premises to Fireman Coming Thereon in Discharge of His Duty* (1982), 11 A.L.R.4d 597, 601-602; Prosser & Keeton, *Law of Torts* (5 Ed. 1984) 430-432, Section 61; *Strauss*, supra, 1992 Wis.L.Rev. 2031; Note, supra, 38 Case W.Res.L.Rev. 123; Stern, *Firemen's Recovery from Negligent Landowners* (1967), 16 Cleve. Mar.L.Rev. 231; Riley, *The Fireman's Rule: Defining its Scope Using the Cost-Spreading Rationale* (1983), 71 Cal.L.Rev. 218; and Note, *Assumption of the Risk and the Fireman's Rule* (1981), 7 Wm. Mitchell L.Rev. 749. However, we believe that the principles set forth in *Scheurer*, supra, strike an appropriate balance between the interests of a possessor of land and the right of a fire fighter or police officer to avoid exposure to unlimited or unreasonable risks of injury.

Accordingly, we hold that an owner or occupier of private property can be liable to a fire fighter or police officer who enters premises and is injured in the performance of his or her official job duties if (1) the injury was caused by the owner's or occupier's willful or wanton misconduct or affirmative act of negligence; (2) the injury was the result of a hidden trap on the premises; (3) the injury was caused by the owner's or occupier's violation of a duty imposed by statute or ordinance enacted for the benefit of fire fighters or police officers; or (4) the owner or occupier was aware of the fire fighter's or police officer's presence on the premises, but failed to warn them of any known, hidden danger thereon.

Based on the foregoing, we hold that summary judgment was properly granted in favor of Gillespie. We affirm the judgment of the court of appeals.

Judgment affirmed.

Some states that recognize the firemen's rule consider it to be an extension of property and trespass laws, and limit the application of the fireman's rule to circumstances where firefighters or police officers come upon a defendant's property.<sup>30</sup> Such states would not apply the fireman's rule to injuries to a firefighter that occur on public streets or locations anywhere other than the defendant's property. Other states focus more on the assumption of the risk aspect, and apply the fireman's rule to all emergency scenes,<sup>31</sup> including motor vehicle accidents.<sup>32</sup>

As the court in the *Hack* case indicated, there are a number of exceptions to the fireman's rule that permit injured firefighters to sue those responsible for causing the fire or creating the dangerous conditions at the scene that caused their injury. The following sidebar lists the most common exceptions to the fireman's rule.



#### SIDEBAR

##### Exceptions to the Fireman's Rule

1. *Willful, wanton, or intentional conduct.* In *Miller v. Bock*, 223 Mich. App. 159 (1997), the court found that the willful and wanton exception to the fireman's rule applied to a drunk driver who collided with a police cruiser. In *Grable v. Varela*, 115 Ariz. 222, 564 P.2d 911 (1977) the court recognized that an arsonist exception to the fireman's rule exists, but found that it did not apply to a child playing with matches. Numerous other cases also suggest that such an arsonist exception exists, including *Giorgi v. Pacific Gas and Electric Company*, Cal App., 266 Cal.App.2d 355, 72 Cal.Rptr. 119, 123 (1968) ("We do not deal with the arsonist or with one who prankishly or maliciously turns in a false alarm") and *Krauth v. Geller*, 31 N.J. 270, 157 A.2d 129 (1960).
2. *The injury was the result of a hidden trap.* *Steinwedel v. Hilbert*, 149 Md. 121, 131 A. 44 (1925).
3. *The injury was the result of a violation of law enacted to protect firefighters or police officers.* In *Giuffrida v. Citibank Corp.*, 100 N.Y.2d 72, 790 N.E.2d 772, 760 N.Y.S.2d 397 (N.Y., 2003), a firefighter was injured at a fire in donut shop where the fire was caused by an accumulation of grease in ventilations system, in violation of fire safety laws. The fireman's rule was held to be not applicable based upon a state statute that

expressly granted firefighters and police officers the right to sue for injuries sustained in the line of duty resulting from statutory or regulatory law violations.

4. *The owner/occupier was aware of a hidden danger on the property, and failed to warn the firefighters or the police officers of its presence.* *Johnson v. Miller*, 371 N.W.2d 94 (Minn.App., 1985) and *Lipson v. Superior Court of Orange County*, 644 P.2d 822 (Cal., 1982).
5. *A manufacturer is subject to strict liability for any defective products it manufactures.* In *Hauboldt v. Union Carbide*, 467 N.W. 2d 508 (WI, 1991), Hauboldt, a firefighter, responded to a fire in an automobile repair garage. An acetylene cylinder manufactured by Union Carbide exploded, injuring Hauboldt. The court ruled that the fireman's rule did not limit Hauboldt from suing Union Carbide. Hauboldt would have to prove at trial that the cylinder in question was defective. See also *Mahoney v. Carus Chemical Company, Inc.*, 510 A. 2d 4 (NJ, 1986).
6. *The rescuer was off duty, stopped voluntarily at an accident scene to offer assistance, and was injured by another driver.* In *Espinoza v. Schulenberg*, 129 P.3d 937 (Ariz., 2006),<sup>33</sup> the court ruled that the fireman's rule should be narrowly construed, and allowed the injured firefighter to sue not only the second driver, but the original driver whose negligence precipitated the rescuer stopping in the first place. Interestingly, the fact that the firefighter was granted line-of-duty workers' compensation benefits for the injuries she sustained did not affect the court's decision that an off-duty rescuer who voluntarily stops at an accident scene is not subject to the fireman's rule.

Some states, such as Oregon, have completely abolished the fireman's rule by case law. See *Christensen v. Murphy*, 296 Or. 610 (Or., 1982). Other states, such as New Jersey, have abolished it by statute.<sup>34</sup> However, most states continue to recognize and apply the fireman's rule to firefighters and police officers.

<sup>33</sup>See also *Espinoza v. Schulenberg*, 108 P.3d 936, 210 Ariz. 157 (AZ, 2005).

<sup>34</sup>See NJPS 2A:62A-21. See also California Civil Code Section 1714.9: "(a) Notwithstanding statutory or decisional law to the contrary, any person is responsible not only for the results of that person's willful acts causing injury to a peace officer, firefighter, or any emergency medical personnel employed by a public entity, but also for any injury occasioned to that person by the want of ordinary care or skill in the management of the person's property or person, in any of the following situations:

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<sup>30</sup>*Johnson v. Steffen*, 685 N.E.2d 1117 (Ind., 1997).

<sup>31</sup>*Bycom Corp. v. White*, 187 Ga. App. 759; 371 SE2d 233 (1998).

<sup>32</sup>*Matarese v. Nationwide Mutual Ins. Co.*, 141 N.H. 311 (1996).


**SIDEBAR**
**Additional Examples of Fireman's Rule Cases**

- *Roberts v. Vaughn*, 543 N.W.2d 79, 214 Mich. App. 625, (1995). Fireman's rule is applicable to volunteer firefighters as well as career firefighters.
- *Johnson v. Steffen*, 685 N.E.2d 1117 (Ind., 1997). Fireman's rule applies to property owners/occupiers, and does not apply to accidents occurring on public streets. Same in *Heck v. Robey*, 659 N.E.2d 498 (Ind., 1995)
- *Matarese v. Nationwide Mutual Ins. Co.*, 141 N.H. 311 (1996). Statutory fireman's rule is applicable to bar suit against motorist who negligently collided with police officer's cruiser. NH General Statutes 507:8-h.
- *Bycom Corp. v. White*, 187 Ga. App. 759; 371 SE2d 233 (1998). Fireman's rule is extended to off-premises incidents in Georgia.
- *Gaither v. Metropolitan Atlanta Rapid Transit Authority*, 235 Ga. App. 603, 510 SE2d 342 (1998). The fireman's rule does not prevent a firefighter from suing a party who—while not responsible for the original emergency that caused the fire department to respond—arrived on the scene after the firefighters and then negligently injured a firefighter.
- *Campus Management, Inc. v. Kimball*, 991 S.W. 2d 948 (Tex. App. Dist., 1999). This interesting case discusses the origins of the fireman's rule in Texas as arising out of property law. The court recognized the difference between the duty that a property owner owes to an invitee versus the duty owed to a licensee. The court noted that in Texas, a firefighter comes upon the property of another as a licensee, and thus is owed a duty (1) not to injure the firefighter by willful, wanton, or gross negligence; (2) to warn the firefighter of known dangerous conditions of which the firefighter is unaware; and (3) not to injure the firefighter through active negligence after the firefighter arrives at the premises to combat the blaze. The case discusses the difference between the duty of a landowner not to injure firefighters through affirmative negligence and the duty with regard to passive negligence.

**Legalese**

**Comparative negligence** A procedure whereby a jury is responsible for apportioning fault among the various parties to a lawsuit. Comparative liability is assigned on a 100 percent scale, with each party receiving a percentage of fault as determined by the jury.

**Contributory negligence** A traditional defense to a negligence action where if the plaintiff was shown to be in any way contributorily negligent in causing his or her own injuries, then the defendant could not be held liable. The contributory negligence rule was an absolute defense to a suit for negligence. It has been abolished in favor of comparative negligence.

**Fireman's rule** A commonly recognized defense to lawsuits filed by firefighters and police officers who are injured in the line of duty against persons who (1) negligently caused the incident to which they responded or (2) negligently created a dangerous condition at the scene that caused their injuries.

**Last clear chance doctrine** A defense to a civil action for negligence when two parties have both been negligent, but the second party had the opportunity to avoid the harm and failed to do so.

(continued)

(1) Where the conduct causing the injury occurs after the person knows or should have known of the presence of the peace officer, firefighter, or emergency medical personnel.

(2) Where the conduct causing injury violates a statute, ordinance, or regulation, and the conduct causing injury was itself not the event that precipitated either the response or presence of the peace officer, firefighter, or emergency medical personnel.

(3) Where the conduct causing the injury was intended to injure the peace officer, firefighter, or emergency medical personnel.

(4) Where the conduct causing the injury is arson as defined in Section 451 of the Penal Code.

(b) This section does not preclude the reduction of an award of damages because of the comparative fault of the peace officer, firefighter, or emergency medical personnel in causing the injury.

(c) The employer of a firefighter, peace officer, or emergency medical personnel may be subrogated to the rights granted by this

section to the extent of the worker's compensation benefits, and other liabilities of the employer, including all salary, wage, pension, or other emolument paid to the employee or the employee's dependents.

(d) The liability imposed by this section shall not apply to an employer of a peace officer, firefighter, or emergency medical personnel.

(e) This section is not intended to change or modify the common law independent cause exception to the firefighter's rule as set forth in *Donohue v. San Francisco Housing Authority* (1993) 16 Cal.App.4th 658." See also Florida Statutes 112.182: "Firefighter rule abolished. (1) A firefighter or properly identified law enforcement officer who lawfully enters upon the premises of another in the discharge of his or her duty occupies the status of an invitee. The common-law rule that such a firefighter or law enforcement officer occupies the status of a licensee is hereby abolished."

## 8.7 STRICT LIABILITY

In addition to intentional torts such as battery, and unintentional torts such as negligence, there is a third category of civil liability known as strict liability. Throughout much of the study of law, there is a principle that equates liability with responsibility. Implicit in our justice system is the belief that before someone should be held liable, whether criminally or civilly, there should have to be some degree of fault. It offends our notions of justice to think that someone, through no fault of his own, could be held liable.

However, some activities are of such a nature that society has demanded that responsibility not be limited to situations where fault must be proven. These situations result in what we call **strict liability**. If harm results, the actor will be responsible for any and all harm without regard to fault. Whether the actor exercised due care, or even exceeded due care, she will be liable for any damage that occurs.

The categories for which strict liability is applied are few: keepers of dangerous animals, workers' compensation, strict product liability, dram shop liability, and abnormally dangerous activities.

### 8.7.1 Keepers of Dangerous Animals

The owner of a dangerous animal is strictly liable for any damage done by the animal. In the case of animals that are considered to be normally dangerous, such as lions, tigers, bears, and wolves, the owners are strictly liable for any and all damages that their animals cause.

In the case of animals that are normally harmless, such as dogs, cats, cattle, or sheep, if the owner knows of their propensity to be dangerous, the owner is strictly liable for any damages. This latter rule is often referred to as the *one free bite rule*. If the owner of a dog is unaware of its propensities to bite, normal rules of negligence will apply. Once the owner is aware that the dog has bitten someone, strict liability attaches.

The principle underlying the one free bite rule has been applied to other types of animals. For example, the owner of cattle with a known propensity to escape and go upon the roadways could be strictly liable for the harm that results.<sup>35</sup>

<sup>35</sup>In some states the keepers of animals likely to roam and do damage are strictly liable for any damage they cause if they escape. See *McKee v. Trisler*, 311 Ill. 536, 143 N.E. 69 (1924). In other states there must be a known propensity to trigger strict liability. See *Mann v. Stanley*, 141 Cal. App.2d 438, 296 P.2d 921 (1956).

### 8.7.2 Workers' Compensation

While not a common law doctrine, statutory workers' compensation systems have created, in effect, strict liability systems whereby employers are automatically liable for workplace injuries to employees, even when the injuries are the result of the employee's own negligence. Workers' compensation systems are discussed in detail in Chapter 10.10.

### 8.7.3 Strict Product Liability

The sellers of goods are held strictly liable for defects in their goods that injure users. This form of strict liability includes foods that may be defective as well as other items placed into the stream of commerce that cause harm. Liability attaches even when the manufacturer and seller exercised reasonable care in the manufacture and sale of the items. The case of *Rucker v. Norfolk & Western Ry. Co.*<sup>36</sup> arose out of a train derailment and subsequent series of massive explosions of propane tank cars that devastated Crescent City, Illinois, in June, 1970 (**Figure 8-7**). The court specifically rejected the defense by the manufacturer of the tank car that it was "state of the art," finding such a defense to be irrelevant in strict liability cases.

### 8.7.4 Dram Shop Liability

The seller of liquor to an intoxicated patron can be held strictly liable for damages that the patron may cause to a third party under laws passed by many states, commonly referred to as *dram shop laws*.<sup>37</sup> Liability is strict, and no showing of negligence on the part of the seller is required. Most states require that employees at the establishment knew or should have known that the patron was intoxicated.<sup>38</sup> Volunteer fire

<sup>36</sup>64 Ill. App.3d 770, 381 N.E. 2d 715 (Ill.App. Dist., 1978). See also I. M. Hill, *Crescent City Remembers* (Crescent City, IL: Scheiwe's Print Shop, 1995).

<sup>37</sup>Some states extend dram shop liability to social hosts, including homeowners. See New Jersey N.J.S.A. 2A:15-5.7. In addition, providing alcohol to someone who is already intoxicated may be actionable under common law negligence. See *Kelly v. Gwinnell*, 96 N.J. 538, 548, 476 A.2d 1219 (1984).

<sup>38</sup>Most states follow the "knew or should have known" rule, which usually focuses upon how visibly intoxicated the patron appeared. See Idaho Code § 23-808(3) and *McLean v. Maverik Country Stores, Inc.*, 135 P.3d 756, 142 Idaho 810 (ID, 2006). However, Illinois does not require such a showing, instead merely requiring that the patron was sold liquor by the establishment, the sale contributed to the patron's intoxication, and the intoxication was a proximate cause of the third party's injuries. See Illinois 235 ILCS 5/6-21, Ill. Rev. Stat. 1989, ch. 43, par. 135. However, the Illinois statute places statutory damage caps on the seller's liability.



**Figure 8-7** Liquefied petroleum gas tank car explosion, Crescent City, Illinois, at 6:53 a.m. on June 21, 1970. (Photo courtesy of Scheiwe's Print Shop, Crescent City, Illinois.)

companies have been found liable under such dram shop laws when intoxicated patrons leave a fire company function and cause an accident.<sup>39</sup>

### 8.7.5 Abnormally Dangerous Activities

Those who engage in an abnormally dangerous activity, also termed an ultra-hazardous activity, will generally be strictly liable for any damage that results. The challenge is in defining “abnormally dangerous” or

“ultra-hazardous.” The most common example of an abnormally dangerous activity is blasting, which is almost universally recognized as a strict liability activity. The flying of airplanes at one time fit the definition of abnormally dangerous, making the aircraft owner liable for all ground damage resulting from a crash. While fortunately air travel no longer fits the definition of ultra-hazardous, the concept has been incorporated into Federal legislation that imposes strict liability on aircraft owners and pilots.

The *Apodaca* case discusses most of the major issues associated with abnormally dangerous activities in the context of a liquid propane explosion and fire.

<sup>39</sup>See *Buchanan v. Littlehales*, 606 A. 2d 567, 146 Pa. Commw. 423 (1992), in Chapter 9.2.3.

#### **Apodaca v. AAA Gas Co.**

134 N.M. 77, 73 P.3d 215 (2003)

*Court of Appeals of the State of New Mexico*

BUSTAMANTE, Judge. . . .

On July 29, 1997, Plaintiffs Gilbert Apodaca and Jeffrey Velasquez suffered serious personal injuries when a propane tank they were repairing leaked liquid propane and

exploded. A third mechanic, Joe Salazar, suffered severe injuries which led to his death on August 14, 1997. Apodaca, Velasquez, and Salazar were employed as mechanics by Cañada, a repair shop that advertised itself as specializing

in the repair of utility equipment, including liquid propane delivery trucks. AAA Gas, a seller of propane, owned the liquid propane gas and delivery truck involved in the explosion. LPGE, a distributor of liquid propane gas equipment, sold the internal cargo tank valve at issue, as a distributor of Fisher Controls, Inc. (Fisher Controls).

On July 14, 1997, AAA Gas delivered one of its delivery trucks to Cañada for repair of a belly valve that would not close. Cañada requested AAA Gas to pick up the truck to empty the propane from the tank so the valve and pump could be replaced. After retrieving and emptying the truck, it was returned to Cañada, and Cañada performed certain repairs. AAA Gas retrieved the truck on July 25 and after testing the system, discovered that the tank still would not pump propane. After several attempts to troubleshoot the problem, AAA Gas called Cañada, which instructed AAA Gas to bring the truck back to the shop a third time.

At trial the parties disputed whether AAA Gas informed Cañada that there was propane in the truck when it arrived at Cañada's garage the third time. However, it was undisputed that the truck was about eighty percent full of propane. Salazar moved the loaded truck into the garage for repair. When Salazar loosened the bolts under the pump, there was a sudden release of liquid propane. The propane reached an ignition source after Salazar and Apodaca made their way to the back of the truck. Salazar died of his injuries, Apodaca suffered severe third degree burns to twenty percent of his body, and Velasquez suffered second degree "flash" burns to over thirteen percent of his body. . . .

Plaintiffs filed the present action in Bernalillo County. The complaint alleged negligence and products liability against AAA Gas, LPGE, and Fisher Controls.

Specifically, Plaintiffs alleged AAA Gas was directly and vicariously liable under theories of common law negligence, negligence per se, and products liability for failing to remove propane from the truck before delivering it for repair. . . . In addition to compensatory and punitive damages sought by Apodaca and Velasquez, their wives sought damages for loss of consortium and spousal services.

Some three months later, on May 15, 2000, Plaintiffs moved to amend their complaint against LPGE . . . alleg[ing] AAA Gas had created an ultrahazardous condition by delivering the truck for repair loaded with propane in violation of the Albuquerque Fire Code, which prohibits the repair of a cargo tank system inside a building unless all liquid propane gas is removed and the system purged. . . .

The first complaint was tried before a jury of twelve. At the conclusion, the jury answered special interrogatories in favor of Defendants on all theories of liability. The jury answered "no" to whether AAA Gas was negligent and "no" to whether AAA Gas failed to take reasonable precautions necessary to avoid harm. The jury also answered "no" to whether LPGE was negligent and "no" to whether LPGE was liable under products liability. The trial court entered

a judgment on the verdict and denied Plaintiffs' motion for a new trial. Plaintiffs timely filed this appeal. . . .

### I. Ultrahazardous Activity

Plaintiffs contend that the trial court erred in refusing to instruct the jury on strict liability for ultrahazardous activity. . . .

Plaintiffs argue that AAA Gas alone had special responsibilities for any hazard arising from the extremely volatile and explosive nature of the propane. Whereas AAA Gas was licensed, trained in the safe handling and storage of propane gas, and specifically knowledgeable in the safety requirements for having their trucks repaired in a mechanics garage, Plaintiffs correctly note that they were not required to be licensed and assert they had no special training in the safe handling of propane gas. Plaintiffs characterize the ultrahazardous activity as the "delivery of a loaded truck for [mechanical] repairs to those not expert and trained in handling l.p. gas . . . [at a repair shop located in the heart of Albuquerque]."

### Standard of Review

The question whether an activity is ultrahazardous or "abnormally dangerous" is determined by the court. . . . Abnormally dangerous activity as referred to in Restatement (Second) of Torts §§ 519-20 (1977) is recognized to be the same as what was previously referred to as "ultrahazardous activity" in the first edition of Restatement of Torts §§ 519-20 (1938). *Saiz v. Belen Sch. Dist.*, 113 N.M. 387, 397 n.8, 827 P.2d 102,112 n.8 (1992). This inquiry is different from questions of negligence, or the failure to use reasonable care, which is a question for the jury. Restatement cmt. 1. "[S]trict liability . . . involves a characterization of the defendant's activity or enterprise itself, and a decision as to whether he is free to conduct it at all without becoming subject to liability for the harm that ensues even though he has used all reasonable care." *Id.* Thus, the determination of whether an activity is abnormally dangerous is a question of law for a court to decide. . . .

### Analysis

The doctrine of strict liability for an abnormally dangerous activity derives from the notion that "one who conducts [the activity] should prepare in advance to bear the financial burden of harm proximately caused to others by such activity." *Arlington Forest Assocs. v. Exxon Corp.*, 774 F. Supp. 387, 389 (E.D. Va. 1991) (mem.) (quoting *C. Morris & C.R. Morris on Torts*, Ch. IX at 231 (2d ed. 1980)). It is a "social policy [that] requires the defendant to make good the harm which results to others from abnormal risks which are inherent in activities that are not considered blameworthy because they are reasonably incident to desirable industrial activity." *McLane v. Northwest Natural Gas Co.*, 467 P.2d 635, 637 (Or. 1970). "The basis of the liability is the intentional behavior [that exposes] the community to

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the abnormal risk[s].” *Id.* Abnormal risks “will be tolerated by the law, but [the company] must pay its way by insuring the public against the injury it causes.” *Arlington Forest Assocs.*, 774 F. Supp. at 389-90 (internal quotation marks and citation omitted). In short, the company is the insurer of the activity because it is impossible to eliminate the abnormal risk of the activity. The doctrine is not to be imposed where negligence law provides an adequate remedy.

Strict liability was developed “to govern accidents that negligence liability cannot adequately control.” *Indiana Harbor Belt R.R. Co. v. Am. Cyanamid Co.*, 916 F.2d 1174, 1177 (7th Cir. 1990). The doctrine provides a remedy for uncommon and extraordinarily dangerous activities where negligence liability is an inadequate deterrent or remedy. See, e.g., *Brooks v. Beech Aircraft Corp.*, 120 N.M. 372, 375-77, 902 P.2d 54, 57-59 (1995). And, it “imposes responsibility upon persons engaged in such activities for any resulting harm even though all reasonable precautions have been taken against the risk of harm the activity creates.” *Saiz*, 113 N.M. at 397, 827 P.2d at 112. But where the “hazards of an activity can be avoided by being careful . . . , there is no need to switch to strict liability.” *Indiana Harbor Belt R.R. Co.*, 916 F.2d at 1177.

New Mexico first recognized the doctrine of strict liability for ultrahazardous activities in *Thigpen v. Skousen & Hise*, 64 N.M. 290, 293, 327 P.2d 802, 805 (1958). . . . Since *Thigpen*, our courts have measured a number of activities against the ultrahazardous standard, refusing to apply the theory to any. See, e.g., *Saiz*, 113 N.M. at 397, 827 P.2d at 112 (installing high voltage lighting system is not ultrahazardous); *Gutierrez v. Rio Rancho Estates, Inc.*, 93 N.M. 755, 757, 605 P.2d 1154, 1156 (1980) (declining to impose strict liability for artificial collection and channeling of large quantities of water in rural area); *Rodgers v. City of Loving*, 91 N.M. 306, 310, 573 P.2d 240, 244 (Ct. App. 1977) (burning weeds in open field within city limits and near buildings is not ultrahazardous); *First Nat’l Bank*, 88 N.M. at 79, 537 P.2d at 687 (marketing highly toxic chemical commonly used as a seed disinfectant is not ultrahazardous); *Otero v. Burgess*, 84 N.M. 575, 577, 505 P.2d 1251, 1253 (Ct. App. 1973) (storing dynamite is not ultrahazardous).

Defendants argue that ultrahazardous activity should be limited to dynamite blasting, asserting that because our courts have refused to extend the doctrine beyond such cases, we should not do so here. However, this Court is not foreclosed from such a finding, if the facts warrant. See *Thigpen*, . . . . Thus, an analysis of the Restatement factors is appropriate.

Section 519 of the Restatement sets forth the general rule regarding strict liability in tort for abnormally dangerous activities as follows:

(1) [o]ne who carries on an abnormally dangerous activity is subject to liability for harm . . . resulting from the activity, although he has exercised the utmost care to prevent the harm.

(2) This strict liability is limited to the kind of harm, the possibility of which makes the activity abnormally dangerous.

Section 520 of the Restatement defines “abnormally dangerous” as “abnormal dangers [that] arise from activities that are in themselves unusual, or from unusual risks created by more usual activities under particular circumstances.” Restatement § 520 cmt. f. The Restatement then sets out six factors that a court must consider in determining whether an activity is abnormally dangerous.

- a) existence of a high degree of risk of some harm to the person, land or chattels of others;
- b) likelihood that the harm that results from it will be great;
- c) inability to eliminate the risk by the exercise of reasonable care;
- d) extent to which the activity is not a matter of common usage;
- e) inappropriateness of the activity to the place where it is carried on; and
- f) extent to which its value to the community is outweighed by its dangerous attributes.

Restatement § 520. The commentary explains that the court must consider each factor, apportioning weight to each in accordance with the evidence. See *Id.* cmts. f & l. While each factor need not be present, “ordinarily several of them will be required for strict liability. . . . [although] it is not necessary that each of them be present, especially if others weigh heavily.” *Id.* cmt. f. According to Restatement Section 520, “[t]he essential question is whether the risk created is so unusual, either because of its magnitude or because of the circumstances surrounding it, as to justify the imposition of strict liability for the harm that results from it, even . . . without the need of a finding of negligence.” *Id.*

#### High Degree of Risk and Likelihood of Harm Will Be Great

Defendants concede that factors (a) and (b) are satisfied because propane is a flammable gas that explodes when ignited by the smallest spark. . . .

#### Elimination of Risk by the Exercise of Reasonable Care

Although the Restatement instructs courts to consider each factor, the question of whether reasonable care can eliminate the high degree of risk is often central to the determination of whether an activity is abnormally dangerous. . . . This is so because it is the inability to eliminate the risks by taking precautions that distinguishes strict liability from negligence. See *Saiz*, 113 N.M. at 396-97, 827 P.2d at 111-12.

While some jurisdictions read Restatement § 520(c) to require a complete elimination of the risk, see, e.g., *McLane*, 467 P.2d at 638; *Zero Wholesale Gas Co. v. Stroud*, 571 S.W.2d 74, 76, 78 (Ark. 1978), the elimination of any and all risks is virtually impossible in most cases.

This Court finds the better rule is that subsection (c) refers to an inability to eliminate the high degree of risk, i.e., an inability to reduce the risk to reasonable levels. . . .

Undeniably, propane is a dangerous substance, but reasonable precautions can reasonably reduce the risk of, if not prevent, explosions. . . . Moreover, Plaintiffs and Defendant AAA Gas agree the accident could have been avoided if the tank and its delivery system had been purged of propane or the repair had been performed outside the garage.

To avoid the necessary consequences of these facts, Plaintiffs define the activity subject to strict liability to include characteristics of the Plaintiffs that made the situation more dangerous—handing over a fully loaded propane truck for repair to mechanics, *who are unlicensed and inexperienced in the safe handling of propane, at a repair shop located in the heart of Albuquerque*. In short, Plaintiffs' position is that no amount of reasonable care can make the repair safe when the truck is fully loaded and handed over to inexperienced mechanics. However, Plaintiffs' characterization would swallow the rule.

For strict liability purposes, the danger cannot be predicated on mere causal or collateral negligence of others with respect to [the activity] under the particular circumstances . . . . [Plaintiff's] particularized approach to defining the nature of an activity would, in effect, enable plaintiffs to invoke strict liability for all negligently-conducted activity. . . .

The fact remains that if Defendants had delivered the tank unloaded and purged of gas, or if Plaintiffs had repaired the truck outside the garage, the risk of an explosion would likely have been greatly reduced. See NFPA 58, §§ 6-6.2.2(a), 6-6.2.3(c). This is not a case where the risk of harm is *impossible to predict* because serious injuries may result despite every reasonable precaution. See *Thigpen*, 64 N.M. at 294, 327 P.2d at 805 (“Blasting is ultrahazardous because high explosives are used and *it is impossible to predict* with certainty the extent or severity of its consequences.”) (quoting Restatement § 520(c)). . . .

The high degree of risk inherent in an activity can be reduced to a minimum by compliance with adequate regulations. The handling of liquid propane is heavily regulated by a nationally recognized regulatory code that was adopted by state law and city ordinance at the time of the accident. See NFPA 58; State Liquefied Petroleum Gas and Compressed Natural Gas Act (“LPG & CNG Act”), NMSA 1978, §§ 70-5-1 to -23 (1947, as amended through 1999); Albuquerque Fire Code, § 14-2-1(B)(3) (1993). As discussed below, the national standard, as adopted by New Mexico, applies to the general public within the state, and, as adopted by the City of Albuquerque, it applies to all commercial businesses within the city. Propane is relatively safe if it is handled in accordance with these regulations. It is when the precautions prescribed by NFPA 58

are not taken that handling propane becomes extremely dangerous.

Moreover, Plaintiffs have offered no reason why the negligence regime is inadequate to remedy or deter accidental explosions resulting from the repair of a loaded propane truck. Propane is highly flammable, but there is no evidence it is so corrosive or otherwise destructive that it will unpredictably damage or weaken a tanker's valve or delivery system. The cause of the explosion in this case was carelessness—whether it was a defective valve supplied by LPGE, or the delivery of a loaded propane tank by AAA Gas, or the mechanics' decision to pull the truck into the garage for repair, or any combination of these factors. “Accidents that are due to a lack of care can be prevented by taking care; and when a lack of care can . . . be shown in court, such accidents are adequately deterred by the threat of liability for negligence.” See *Indiana Harbor Belt R.R. Co.*, 916 F.2d at 1179; see also *Arlington Forest Assocs.*, 774 F. Supp. At 390. Strict liability is appropriate only where the activity remains dangerous despite all reasonable precautions. *Id.* At 391. Since some precautions could have reasonably reduced the danger of repairing the propane truck, this factor has not been satisfied.

#### Uncommon Usage

The Restatement defines common usage as an activity “customarily carried on by the great mass of mankind or by many people in the community.” Restatement § 520 cmt. i. It is the activity, not the substance, that must be of common usage. *Indiana Harbor Belt R.R. Co.*, 916 F.2d at 1181. The fact that an activity is not carried on by the “great mass of mankind,” however, is not decisive. What is customary activity in the community has come to encompass customary industrial activity throughout the country. . . .

AAA Gas cites to the widespread use of propane in every town, home, and business, noting that anyone can buy propane at the convenience store. However, the focus of factor (d) is not on the *substance* but on whether the *activity* is commonplace. Thus, Plaintiffs' argument that repairing a loaded propane truck is uncommon to the mass of our citizenry is appropriate. The more accurate question here, however, is whether delivering loaded propane trucks for repair is uncommon industrial activity across the country. Plaintiffs have offered no such evidence. To the contrary, at least two witnesses testified that delivering a propane truck for repair with propane in the tank and delivery system to assist in troubleshooting is common in the industry. Therefore, on balance, this factor is not satisfied.

#### Appropriateness of Locale

Restatement Section 520(e) considers the appropriateness of an activity to its location. According to the Restatement, this factor is sometimes referred to as strict liability for a “‘non-natural’ use of the defendant's land.” Restatement §520 cmt. j. In other words, the activity “must

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be . . . inappropriate to the place where it is maintained, in the light of the character of that place and its surroundings.” *Otero*, 84 N.M. at 579, 505 P.2d at 1255.

Plaintiffs, in effect, argue that their own employer’s business was situated in a locale that was inappropriate for working on propane tanks, yet two to five percent of their business, about six trucks in the six months prior to the accident, involved such work. The remaining business involved heavy industrial equipment. At the time of the accident, Cañada was located a few hundred feet from the Wyoming gate of Kirtland Airforce Base, surrounded by residential and commercial property. An Albuquerque Fire Department investigator testified that he believed there were some repair shops like Cañada around town but he was unsure of the number.

Given that the property was surrounded by commercial property and that Plaintiffs do not argue otherwise, we assume the property was zoned for commercial use. Thus, Cañada was not improperly located from that standpoint. The record reveals no information either about the location of Cañada’s customers or other shops providing the same services as Cañada. It can reasonably be said that Defendants have no choice but to take their trucks to locations where there are shops to service them. It would be unrealistic to hinge imposition of strict liability on the existence of a hypo-

thetical mechanic in the countryside or to expect mechanics to move their businesses out of town and away from other customers. The simple proximity of residences to Cañada’s garage is not enough to meet the requirements of this factor.

#### Value to the Community

“Even though the activity involves a serious risk of harm that cannot be eliminated with reasonable care and it is not a matter of common usage, its value to the community may be such that the danger will not be regarded as an abnormal one.” Restatement § 520 cmt. k. Propane has clear value to the community given its prevalent use in industry, residential heating, and recreation. See *New Meadows Holding Co.*, 687 P.2d at 216. It seems to us that to have propane safely delivered, it is desirable that the delivery trucks be in good working order. Thus, repairing propane trucks is inherently valuable to the community. Moreover, despite the danger, the state and city allow the handling of propane by imposing regulations to minimize the risk. The value to the community is clear.

#### Conclusion

We are compelled by our precedent and the policy behind the doctrine of strict liability for abnormally dangerous activities to hold that the repair of propane trucks is not an ultrahazardous activity in New Mexico.

## DELMAR LEARNING

The *Apodaca* case provides an interesting analysis of the abnormally dangerous activity based strict liability. It is easy to see how an activity at one time and in one place may be abnormally dangerous, while at a different time and a different place it may not be.

There are two primary rationales for imposing strict liability on abnormally hazardous activities. The first is to encourage those who engage in such activities to use all possible efforts (not just reasonable efforts) to prevent harm. The second rationale takes an economic approach that supposes that those who create a hazard and intend to profit from it should pass the cost of any harm that actually occurs on to their customers as a cost of doing business.

#### AUTHOR’S COMMENTARY

##### Fire and Strict Liability

According to one noted authority on tort law, Professor William L. Prosser, author of the *Law of Torts*,<sup>40</sup> landowners were held strictly liable at early common law for fires that started on their property and that damaged the property of another. English

case law recognized some exceptions to strict liability for fires, such as for acts of God or the intervening act of a stranger. This policy was changed by statute in 1707 and amended in 1774 to prevent liability against a landowner for accidental fires. Thereafter, English courts held landowners liable for fires only if they were intentionally set or caused by negligence.

The American courts have taken the approach that absent negligence, gross negligence, recklessness, or intentional conduct, there is no liability on the part of a landowner for fire. There are statutes in some states that recognize that some uses of fire are very dangerous, and apply strict liability.<sup>41</sup> Some examples include strict liability for people who start fires during a specified dry season and for railroads for fires started by trains along the tracks. However, such use of strict liability for fire is the exception and generally limited to wildland fire situations.<sup>42</sup>

<sup>41</sup>See J. Yoder, M. Tilley, D. M. Engle, and S. Fuhlendorf, “Economics and Prescribed Fire Law in the US.” *Rev Agr Econ* 25: 218–233.

<sup>42</sup>See NMSA 1978, §30-32-4, making a person who starts a wildland fire (even on one’s own property) liable for double damages to any person who is damaged.

<sup>40</sup>W. L. Prosser, *Law of Torts*, 4th ed. (St. Paul, MN: West Publishing Co., 1971), p. 503.

The fire problem in the United States is significantly higher than the fire problem in any other industrialized country in the world.<sup>43</sup> Given our ability to put men on the moon and conquer a host of previously fatal illnesses, it stands as a paradox of American society that fire remains such a problem. In many countries, people who have accidental fires are considered to be at fault and strictly liable for the damage that occurs. In some countries those who have what we in the United States would consider to be an accidental fire can be charged criminally.<sup>44</sup>

One has to wonder what the effect would have been on the fire problem in the United States if strict liability for fire had remained the common law rule. Would owners/occupiers of land have been encouraged to take extra precautions? Would our overall approach to the fire problem continue to be as complacent as it has been to date?

## 8.8 RESPONDEAT SUPERIOR

Respondeat superior is a legal doctrine that holds an employer liable for the torts of its employees, provided the torts are committed within the scope of employment.<sup>45</sup> Respondeat superior is a form of strict liability for the employer because it does not matter that the employer was not negligent. The negligence of the employee is imputed to the employer.<sup>46</sup> This type of liability is often referred to as **vicarious liability**.

An important limitation on the respondeat superior doctrine is that for the employer to be held liable, the tort must be committed within the scope of the employee's employment. The *Thorn* case below thoroughly discusses this issue in the context of one of the world's most well-known serial arsonists, former Glendale Fire Department Captain John Orr.<sup>47</sup>

### **Thorn v. City of Glendale**

28 Cal.App.4th 1379, 35 Cal.Rptr.2d 1 (1994)

*Court of Appeal, Second District, Division 2, California*

GATES, Acting P. J.

James Thorn and his business, Glendale Spa City, Inc. (Spa City), appeal from a judgment upon demurrer entered in favor of the City of Glendale (Glendale) in their action against Glendale and its employee and fire marshal, John Orr, for fire damage to Spa City. The complaint alleges that Orr set a fire at Spa City while acting in his official capacity and that Glendale is liable for the ensuing loss both under respondeat superior principles and for negligently supervising Orr. Appellants contend:

*"[I.] John Orr was acting within the scope of his employment for the City of Glendale when he set the incendiary devices which damaged appellants' premises. [II.] The City is liable for negligently supervising its fire marshal."*

Upon appeal from the sustaining of a demurrer without leave to amend, we assume the truth of all facts properly pleaded in the complaint. "If on consideration of all the facts stated it appears that the plaintiff is entitled to  
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<sup>43</sup>*America Burning: The Report of the National Commission on Fire Prevention and Control* (Washington, DC: U.S. Government Printing Office, 1973), p. 1.

<sup>44</sup>For example, someone who negligently causes a fire in Japan can be liable for the offense of "negligence by fire," besides civil liability to anyone injured. (Information provided by Housing Welcome Center, U.S. Naval Forces Japan, PSC 473 BOX 131 FPO AP 96349-0131.)

<sup>45</sup>Respondeat superior may also be referred to as the master-servant rule. See R. Resmini, *Tort Law and Personal Injury Practice* (Salem, NH: Butterworth Legal Publishers, 1990), Vol. 2, §683, p. 172 and Vol. 1, §141, p. 159.

<sup>46</sup>A public official such as a fire chief cannot be held personally liable for the negligence of fire personnel under respondeat superior. See *Robertson v. Sichel*, 127 U. S. 507 (1888). The employer is the fire department, not the fire chief.

<sup>47</sup>Joseph Wambaugh wrote a book about Orr, titled *The Fire Lover*, published by William Morrow (2002). HBO produced a movie in 2002 about Orr, titled *Point of Origin*. Orr's fires were also chronicled by a Nova PBS documentary, *Hunt for a Serial Arsonist*, and by numerous news programs. As unbelievable as it sounds, John Orr himself also wrote a book, titled *Points of Origin: Playing with Fire*, about a fictional arson investigator. The manuscript for the book was seized from his home at the time of his arrest and later published by Infinity Publishing (West Conshohocken, PA: 2001). Many believe the book was a thinly veiled account of his exploits as a serial arsonist.

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any relief, the order of dismissal upon the sustaining of a demurrer should be reversed. [Citation.]” (*Hill v. People ex rel. Dept. of Transportation* (1979) 91 Cal.App.3d 426, 429 [154 Cal.Rptr. 142].)

The complaint alleges the following. On February 22, 1991, Orr entered Thorn’s premises under color of authority to conduct a fire inspection. He then committed arson by setting incendiary devices which destroyed the premises and the business conducted thereon. Since Orr was acting within the scope of his employment, Glendale is liable for the resulting damage. Moreover, Glendale knew or should have known that the fire marshal was an arsonist and negligently failed to supervise him.

Appellants urge that Glendale is liable under the doctrine of respondeat superior because Orr’s alleged acts were committed within the scope of employment. They rely, inter alia, upon our Supreme Court’s holding in *Mary M. v. City of Los Angeles* (1991) 54 Cal.3d 202 [285 Cal.Rptr. 99, 814 P.2d 1341], which expanded the scope of vicarious governmental liability to cover the rape of a woman by an on-duty police officer.

Historically, the scope of employment doctrine has been limited to acts which are directly or indirectly in furtherance of the employer’s purpose, precluding vicarious liability for criminal acts not related to the employer’s enterprise. Section 228 of the Restatement Second of Agency, which states the traditional rule, provides in relevant part that an act is within the scope of employment only if “(a) it is of the kind [the employee] is employed to perform; (b) it occurs substantially within the authorized time and space limits; (c) it is actuated, at least in part, by a purpose to serve the master, and (d) if force is intentionally used by the servant against another, the use of force is not unexpected by the master.”

Under that test, employers have been held liable for the wrongful and unauthorized acts of their employees where they were committed in the course of a series of acts of the agent which were authorized by the principal. (See *Fields v. Sanders* (1947) 29 Cal.2d 834 [180 P.2d 684, 172 A.L.R. 525] [truck driver strikes motorist with wrench in course of dispute over driving incidents]; *Carr v. Wm. C. Crowell Co.* (1946) 28 Cal.2d 652 [171 P.2d 5] [employee of subcontractor throws hammer at employee of a general contractor in the course of a dispute]; *Ruppe v. City of Los Angeles* (1921) 186 Cal. 400 [199 P. 496] [city employee assaults an apartment building manager while attempting to enter a building to install city electrical meters]; *Jones v. City of Los Angeles* (1963) 215 Cal.App.2d 155 [30 Cal. Rptr. 124] [assault and battery by police officers].) No liability arises “where the agent for however brief a space of time, has ceased to serve his principal . . .” (*Fields v. Sanders*, supra, 29 Cal.2d at p. 839, quoting *Andrews v. Seidner* (1942) 49 Cal.App.2d 427, 430 [121 P.2d 863]; see *Martinez v. Hagopian* (1986) 182 Cal.App.3d 1223, 1229 [227 Cal.Rptr. 763] [farmworkers kill visitor to farm over

dispute about the treatment of another visitor’s wife]; *Golden West Broadcasters, Inc. v. Superior Court* (1981) 114 Cal.App.3d 947, 955 [171 Cal.Rptr. 95] [stage manager on assignment away from home engages in barroom brawl with stranger]; *Monty v. Orlandi* (1959) 169 Cal.App.2d 620, 623 [337 P.2d 861] [bartender assaults plaintiff over personal dispute].)

More recently, our Supreme Court stated, “A risk arises out of the employment when “in the context of the particular enterprise an employee’s conduct is not so unusual or startling that it would seem unfair to include the loss resulting from it among other costs of the employer’s business. [Citations.] In other words, where the question is one of vicarious liability, the inquiry should be whether the risk was one ‘that may fairly be regarded as typical of or broadly incidental’ to the enterprise undertaken by the employer. [Citation.]”” (*Mary M. v. City of Los Angeles*, supra, 54 Cal.3d at p. 209.)

Policy reasons suggested for imposing vicarious liability include that it will tend to (1) provide a spur towards accident prevention; (2) provide greater assurance of compensation for accident victims; and (3) assure that accident losses will be broadly and equitably distributed among the beneficiaries of the enterprise that entail them. (*John R. v. Oakland Unified School Dist.* (1989) 48 Cal.3d 438, 451 [256 Cal.Rptr. 766, 769 P.2d 948]; *Perez v. Van Groningen & Sons, Inc.* (1986) 41 Cal.3d 962, 967 [227 Cal.Rptr. 106, 719 P.2d 676].)

None of the foregoing tests favor liability in the present case. A fire marshal’s entering a building and setting an incendiary device for the purpose of burning it down is so startling and unusual an occurrence as to be outside those risks which should fairly be imposed upon the public employer. The alleged act did not arise from the pursuit of the employer’s purpose but was rather the result, we must assume, of a personal compulsion.

While Orr’s ability to request access to private areas of a building arose from his employment, that ability is not unique. Similar permissive access is available to security guards, repairpersons, and utility workers. Glendale would have no greater reason to guard against and deter the alleged acts than would employers of other workers whose duties entail their entering private premises. Moreover, property damage resulting from fire, as distinguished from personal injury and trauma, is commonly insurable by the business enterprise victim. In truth, property owners would appear far better able to insure against the loss than would the public entity, particularly where the conduct in question is felonious in nature.

*Mary M. v. City of Los Angeles*, supra, 54 Cal.3d 202, relied upon by appellants, is distinguishable in each of these particulars. There our Supreme Court imposed respondeat superior liability for rape by an on-duty police officer, emphasizing that a police officer is entrusted with

“extraordinary power and authority over its citizenry.” (*Id.* at p. 216.) The court contrasted that authority with the role of a school ground custodian accused of rape in *Alma W. v. Oakland Unified School Dist.* (1981) 123 Cal.App.3d 133 [176 Cal.Rptr. 287]: “The danger that an officer will commit a sexual assault while on duty arises from the considerable authority and control inherent in the responsibilities of an officer in enforcing the law. Those responsibilities do not at all resemble the duties of a school custodian, as involved in *Alma W.*, supra.” (*Mary M. v. City of Los Angeles*, supra, 54 Cal 3d at p. 218.)

*Mary M.* distinguished but did not overrule *John R. v. Oakland Unified School Dist.*, supra, 48 Cal.3d 438, which applied “the historical and perhaps still prevailing point of view” that an employer could not be held vicariously liable for the criminal act of an employee committed in furtherance of the employee’s personal purpose. (*Id.* at p. 448 [teacher’s sexual molestation of student].) In so doing, the majority opinion of our Supreme Court appears to have established a special rule for the independent wrongful acts of police officers based upon their unique position of both trust and power in our society. We decline to extend that holding to one not equally endowed with authority, particularly where the victims of an employee’s aberrant behavior can, and virtually always do, guard themselves against the economic loss incurred.

Thorn also urges on appeal that Glendale is liable for negligent supervision of its fire marshal. Glendale takes the position that negligent supervision was waived below, and that in any event there is no statutory authority for an action based upon negligent supervision under the facts of the present case and that Glendale is immune from such liability.

We note first that Glendale raised the issues of statutory authority for negligent supervision and immunity in its points and authorities in support of its demurrer. Appellants did not address those issues, but urged only that Orr’s alleged arsonist activities fell within the scope of his employment as fire marshal and that therefore Glendale was liable under the doctrine of vicarious liability. Even assuming the issue may be raised for the first time

on appeal (see *Kittle v. Lang* (1951) 107 Cal.App.2d 604, 610 [237 P.2d 673]), we find it unpersuasive.

Appellants rely upon *John R. v. Oakland Unified School Dist.*, supra, and *Virginia G. v. ABC Unified School Dist.* (1993) 15 Cal.App.4th 1848 [19 Cal.Rptr.2d 671], in support of liability. In *John R.*, however, the issues of statutory authority and immunity were not discussed; the defendant had successfully demurred on the ground of timeliness below. In *Virginia G.*, the court ruled that the plaintiff could proceed with the cause of action for negligent hiring and supervision because a “special relationship” is formed between a school district and its students to take all reasonable steps to protect its students (*id.* at p. 1853) and reserved the issue of public entity immunity for negligent supervision. We reject appellants’ claim, made for the first time in their reply brief, that a special relationship was formed when Orr undertook an inspection. (See also *Cochran v. Herzog Engraving Co.* (1984) 155 Cal.App.3d 405, 410 [205 Cal.Rptr. 1] [immunity for inadequate fire inspection services based upon Gov. Code, § 818.6]; *Harshbarger v. City of Colton* (1988) 197 Cal. App.3d 1335, 1345-1347 [243 Cal.Rptr. 463] [immunity for fraudulent building inspection extends to liability based upon negligent supervision].)

In view of the exceedingly high cost of modern litigation, from the point of view of a defendant public entity, merely being named in a tort suit places it in a lose/lose situation. Except in those most rare instances permitting the recovery of attorney fees, the more procedural stages through which it must pass prior to vindication, the greater will be its “victorious losses.” This problem is particularly acute for today’s financially stressed governmental bodies. Consequently, if the governmental bodies’ immunity from respondeat superior liability is to be forfeited whenever a plaintiff’s counsel elects to add a second count founded on the same facts, but conclusionally couched in terms of negligent supervision, even the limited protection they are now afforded will be essentially eviscerated.

The judgment is affirmed.

Respondeat superior cases must be distinguished from cases where an employer is sued for the employer’s own negligence arising out of something that an employee did. Employers may be sued for:

- Negligent hiring of an employee
- Negligent retention of an employee
- Negligent supervision of an employee
- Negligent training of an employee

In each of these situations, the employer is sued for its own negligence, not the negligence of the

employee. Of course the negligent or intentional wrongdoing of the employee may be the cause of the harm that led to the litigation. Never-the-less, it is the employer’s conduct that is in question in negligent hiring, retention, supervision, and training cases.

The court in *Thorn* made an interesting argument at the end of the decision, justifying the decision not to hold the City liable for negligent supervision based on the fact that the conduct of the employee was outside the scope of the employment. Not all courts would agree with such an analysis and would view the issue

of whether an employer was negligent in hiring, supervising, and retaining an employee as one to be decided based upon the facts of the case.

### Legalese

**Vicarious liability** The legal responsibility or liability imposed upon a party as a result of the conduct of another.

## 8.9 JOINT LIABILITY

The legal term for someone who commits a tort is a **tortfeasor**. In the case of two or more individuals who jointly commit a tort, the term used is **joint tortfeasors**. The liability of joint tortfeasors is called **joint and several**. In other words, when the negligence of two or more persons combine to cause damages to a victim, each of the negligent parties can be held liable for the entire amount of damages.



### EXAMPLE

Sam and Harry decide to drag race their cars on a public street. During the course of the race, Harry's car narrowly misses a pedestrian who leaps out of the way and is then struck by Sam's car, sustaining serious injuries. The pedestrian can sue both Sam and Harry, or either one individually. If Harry has insurance and Sam does not, the pedestrian can collect the full amount of damages from Harry.

In the Sam and Harry example, either tortfeasor can be held personally liable for the full amount of the pedestrian's damages. This rule does not permit the injured party to collect more than the actual amount of the damages, but rather avoids the situation where the injured party is limited to collecting a pro-rata share from each joint tortfeasor. Once one joint tortfeasor has paid the victim, he or she may then seek an appropriate contribution from the other tortfeasor.<sup>48</sup> In the example above, if Harry pays the full amount of damages to the pedestrian, he may seek payment from Sam for one-half of the amount paid.

<sup>48</sup>In many jurisdictions, liability among joint tortfeasors may be apportioned by degree of fault. See RIGL §10-6-3.

### Legalese

**Joint and several** The liability of multiple parties to a plaintiff who may sue and obtain a judgment for all amounts owed from any one or more of the parties. The liability of joint tortfeasors in joint and several.

**Joint tortfeasors** Two or more individuals who commit a tort resulting in an injury to the same party.

**Tortfeasor** The legal term for someone who commits a tort.

## 8.10 WRONGFUL DEATH

At common law, the death of a person—whether due to intentional or negligent conduct—did not give rise to grounds for a civil lawsuit. The reason for this historical anomaly is complicated. At common law, a person's claims against others terminated upon his or her death. Furthermore, the death of a person did not create a new cause of action against those responsible for the death.<sup>49</sup>

All states have adopted statutes that create a cause of action, commonly referred to as **wrongful death**, against those responsible for a person's death. These statutes vary considerably from state to state, but in general allow the estate of a deceased person, or his or her surviving family members, to bring suit against those responsible for the death. The following is an example from Massachusetts.



### EXAMPLE

#### Massachusetts General Laws Chapter 229. ACTIONS FOR DEATH AND INJURIES RESULTING IN DEATH

##### Chapter 229: Section 2. Wrongful death; damages

Section 2. A person who (1) by his negligence causes the death of a person, or (2) by willful, wanton or reckless act causes the death of a person under such circumstances that the deceased could have recovered damages for personal injuries if his death had not resulted, or (3) operates a common carrier of passengers and by his negligence causes the death of a passenger, or (4) operates a common carrier of passengers and by his willful, wanton or reckless act causes the death of a passenger under such circumstances that the deceased could have recovered damages for personal injuries if his death had not resulted, or (5) is responsible for a

<sup>49</sup>See W. L. Prosser, *Law of Torts*, 4th ed. (St. Paul, MN: West Publishing Co., 1982), p. 989.

breach of warranty arising under Article 2 of chapter one hundred and six which results in injury to a person that causes death, shall be liable in damages in the amount of: (1) the fair monetary value of the decedent to the persons entitled to receive the damages recovered, as provided in section one, including but not limited to compensation for the loss of the reasonably expected net income, services, protection, care, assistance, society, companionship, comfort, guidance, counsel, and advice of the decedent to the persons entitled to the damages recovered; (2) the reasonable funeral and burial expenses of the decedent; (3) punitive damages in an amount of not less than five thousand dollars in such case as the decedent's death was caused by the malicious, willful, wanton or reckless conduct of the defendant or by the gross negligence of the defendant; except that (1) the liability of an employer to a person in his employment shall not be governed by this section, (2) a person operating a railroad shall not be liable for negligence in causing the death of a person while walking or being upon such railroad contrary to law or to the reasonable rules and regulations of the carrier and (3) a person operating a street railway or electric railroad shall not be liable for negligence for causing the death of a person while walking or being upon that part of the street railway or electric railroad not within the limits of a highway. A person shall be liable for the negligence or the willful, wanton or reckless act of his agents or servants while engaged in his business to the same extent and subject to the same limits as he would be liable under this section for his own act. Damages under this section shall be recovered in an action of tort by the executor or administrator of the deceased. An action to recover damages under this section shall be commenced within three years from the date of death, or within three years from the date when the deceased's executor or administrator knew, or in the exercise of reasonable diligence, should have known of the factual basis for a cause of action, or within such time thereafter as is provided by section four, four B, nine or ten of chapter two hundred and sixty.

Most wrongful death statutes permit recovery against those whose negligence, gross negligence, recklessness, or intentional conduct causes a person's death. Damages for wrongful death include lost income for the expected life of the decedent, as well as pain and suffering prior to death, medical expenses, and burial costs. Some states provide a statutory method for calculating damages.<sup>50</sup>

<sup>50</sup>See R. Resmini, *Tort Law and Personal Injury Practice*, Vol. 1. (Salem, NH: Butterworth Legal Publishers, 1990), Vol. 2, §583.

### Legalese

**Wrongful death** Statutory cause of action for the death of a person against those responsible for causing the death through intentional, reckless, grossly negligent or negligent conduct.

## 8.11 LAWSUITS AGAINST FIRE DEPARTMENTS

When an individual commits a tort such as negligence, it is clear who the defendant will be. To initiate the lawsuit, the injured party merely sues the person who was negligent. However, when the tort is committed by a fire department, or any corporation for that matter, how does one go about suing the organization? In a similar vein, when a tort is committed by a firefighter, how does the injured party go about suing the fire department as the employer under the doctrine of respondeat superior?

States differ procedurally in how corporate entities must be sued. Some states require that an actual person—such as the president or treasurer of a corporation—be sued as the agent for the corporation. In such a case the person named in the suit is not sued personally, but rather is sued in their capacity as an agent for the corporation. Someone who is sued in their capacity as an agent for a corporation is not personally liable for any damages that are awarded. The damages are the responsibility of the corporate entity. Other states allow a corporation to be sued directly, but require that an actual person, such as registered agent for service of process, be served.

Suits against municipal corporations, quasi-municipal corporations, state agencies, and regional fire organizations raise additional issues relative to the proper party to be sued. Municipal fire departments are agencies of municipal government, and do not have a separate legal existence apart from the municipality.<sup>51</sup>

<sup>51</sup>An analogy may help clarify why a municipal fire department does not have a separate existence apart from the municipality. Consider a person who is injured in a supermarket through the negligence of someone who works in the produce department. The injured person would sue the supermarket, not the produce department. While admittedly the supermarket has a produce department, and it may even have a produce manager, it is merely a department within the supermarket. It has no bank account, owns no property, and has no separate legal identity apart from the supermarket. In the same way, a fire department that is a municipal agency has no separate legal identity apart from the municipality. Having said this, some states allow a party to sue a municipal fire department by suing the fire chief in his capacity as chief. Other states require that the mayor or city treasurer be sued in his or her respective capacity as an agent for the municipality.

In the same way, county fire departments are agencies of county government, and state agencies are part of state government. However, fire districts and quasi-municipal corporations are corporate entities in and of

themselves, and may be sued directly, in the same manner as a city or town. State laws generally define the procedure for filing suit against state and municipal agencies and officials.



### EXAMPLE

#### Suits Against Fire Departments

Mrs. Smith's house was damaged by fire. She alleges the Smithville Fire Department was negligent in battling the fire, and should be held liable to her for damages. The Smithville Fire Department is a municipal fire department and an agency of the City of Smithville.

**Scenario 1:** Mrs. Smith alleges the fire department was negligent, and sues Fire Chief Jones, the fire chief of the Smithville Fire Department, in his capacity as fire chief.

**Analysis:** Because Chief Jones was sued in his capacity as fire chief, the chief cannot be held personally liable for the damages. Rather, the chief has been sued merely as a mechanism to sue the fire department and the City of Smithville. In addition to suing Chief Jones, or as an alternative, Mrs. Smith could sue the city treasurer or the mayor of Smithville, in their respective capacities.<sup>52</sup>

**Scenario 2:** Chief Jones was the incident commander of the fire, and Mrs. Smith alleges that Chief Jones was negligent in directing operations. Mrs. Smith has several options in this regard.

**Option A:** Mrs. Smith could limit her suit for negligence to suing Chief Jones in his personal capacity.

**Analysis:** The suit will be solely against Chief Jones, in which case the City of Smithville and the Smithville Fire Department are not parties and cannot be held liable. If Chief Jones loses, he will be personally liable for all of Mrs. Smith's damages.

**Option B:** Mrs. Smith could sue the city and the fire department by suing Chief Jones in his official capacity as fire chief, alleging the city and department are liable under respondeat superior because they are Chief Jones's employer.

**Analysis:** If Mrs. Smith wins, the city will be liable under respondeat superior for Chief Jones's negligence. However, because Chief Jones was not sued personally, he will not be personally liable, even though the lawsuit is based upon his negligence.<sup>53</sup>

**Option C:** Mrs. Smith could sue Chief Jones both in his capacity as fire chief and personally.

**Analysis:** If Mrs. Smith wins, the city as well as Chief Jones personally can be held liable.

**Scenario 3:** Mrs. Smith alleges that Captain White and Lieutenant Gray of the fire department were negligent, and she sues the fire department based on the doctrine of respondeat superior by naming Fire Chief Jones in his capacity as fire chief.

**Analysis:** As we saw in Scenario 1, if Chief Jones was sued in his capacity as the fire chief, he cannot be held personally liable for the damages. Although Mrs. Smith alleged negligence on the parts of Captain White and Lieutenant Gray, she did not name them as parties to the suit, so they cannot be held liable. As a result, only the Smithville Fire Department (and/or the City of Smithville) can be held liable.

The examples above can become much more complex when multiple parties, volunteer fire companies, regional fire departments, and county fire organizations

are added to the equation. In regard to the various options for suing a fire department, there are tactical reasons why an attorney may choose one option over another. The ultimate determinations in such cases will depend upon local law and practice, as well as the skill of the attorneys involved. The importance of competent local counsel cannot be overemphasized.

<sup>52</sup> It should be pointed out that states differ in their practice for suing corporations, including municipal corporations. Some states would require that the financial officer of the municipal corporation be sued in his capacity as the financial officer, while other states would allow a suit naming the fire chief in his capacity as chief to be binding against the city. In addition, most jurisdictions have tort claims acts that require that claims against a state or municipal entity be filed with the entity in advance of any lawsuit. See Chapter 9.2. The failure to comply with any such tort claims procedure can result in any subsequent lawsuit being dismissed.

<sup>53</sup> Note that the city could join Chief Jones as a party to the suit and/or seek a contribution from him for any damages the city must pay. See R. Resmini, *Tort Law and Personal Injury Practice*, Vol. 1, (Salem, NH: Butterworth Legal Publishers, 1990), Vol. 1, §145, pp. 170–171, citing *Darman v. Zilch*, 56 RI 413, 414, 186 A. 21 (1936).

## AUTHOR'S COMMENTARY

**SOPs and SOGs**

Somewhere along the line in the fire service, someone started a controversy by advocating that fire departments change the name of their standard operating procedures (SOPs) to standard operating guidelines (SOGs). The theory was that the use of the term “procedure” implied a mandatory prescription for action, much like an airline pilot’s pre-flight checklist. As such, the use of the term “procedure” left no room for discretion. Someone who failed to comply with one item on the SOP checklist would automatically be negligent. On the other hand, the use of the term “guideline” implied that some flexibility was involved.

The theory went on to somehow conclude that if a fire department simply changed the name of all of their standard operating procedures to standard operating guidelines, their liability would magically become less. And somehow normally skeptical firefighters bought into this belief with the enthusiasm of a six-year-old at Christmas.

Sad to say, no magical legal happenstance occurs when you change the name of your SOPs to SOGs. The same perils that await someone who violates a “procedure” await someone who violates a

“guideline.” The solution lies not in renaming, but in clearly defining. Fire departments need to define their SOPs or SOGs, in such a way as to make it clear that officers and firefighters have some degree of flexibility in their application. Officers and firefighters should explicitly be authorized by department rules and regulations to deviate from SOPs and SOGs when and where in their professional experience and training, such deviation is warranted.

On the other hand, SOPs or SOGs that are so absolute that they cannot be violated under any circumstance should clearly be identified. If personnel are absolutely prohibited from attempting a winter water rescue without an exposure suit, then the SOP/SOG should clearly state that fact. If personnel are absolutely prohibited from entering a structure fire without a self-contained breathing apparatus, the SOP/SOG should clearly state this. At the same time, when there are tactical options and choices, those options should be identified as well.

Most importantly SOPs or SOGs should be defined as tools that explicitly anticipate and require experienced personnel to deviate from when and where appropriate.

Above all, don’t believe in simple or magical solutions to complex legal problems.

**DISCUSSION QUESTIONS**

1. In the *Ford v. Peaches Entertainment Corp.* case, the court ruled that it was not foreseeable that a fire truck would be involved in a collision while responding to a accidental alarm. Foreseeability bears on two distinct issues in negligence. Can you identify the two issues and for each issue make the argument in favor of—or against—foreseeability based on the facts in the *Ford* case?
2. Consider the *Thorn v. Glendale* case. Was the court correct in ruling that the fire inspector was acting outside the scope of his employment? What is the difference between a fire inspector who negligently misses a fire hazard during an inspection—which leads to a fire—and a fire inspector who sets a fire while on an inspection? Why should the fire department be liable in one instance and not the other?
3. Is there a difference between the reasonably prudent person standard for a person driving a car and the standard of care expected of a firefighter driving a fire truck? Should the standard be the same, or should a special standard of care apply for the firefighter?
4. What is the rationale for applying strict liability when someone engages in an abnormally hazardous activity?