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TORTFEASOR LIABILITY FOR DISASTER RESPONSE COSTS: ACCOUNTING FOR THE TRUE COST OF ACCIDENTS

INTRODUCTION

On January 13, 1982, Air Florida Flight 90 departed from Washington, D.C.'s National Airport into a heavy snowstorm. Shortly after takeoff, the passenger jet struck the 14th Street/Rochambeau Bridge and crashed into the Potomac River. Seventy-eight people were killed. The District of Columbia incurred expenses in excess of $750,000 in rescuing the survivors, recovering the bodies of those killed in the crash, raising the airplane and its contents from the river, and performing other related emergency services. The crash apparently was due to Air Florida's failure to properly de-ice the wings of the aircraft before takeoff. In an action subsequently brought by the District of Columbia to recover these costs from Air Florida, the Court of Appeals for the District of Columbia Circuit followed established precedent and affirmed the trial court's dismissal of the complaint with the result that the District of Columbia taxpayers were left paying for the entire cost of the disaster response services.

Man-made disasters such as the Air Florida crash unfortunately oc-

3. See id. Some of those killed were on the bridge. See id.
4. See Air Florida, 750 F.2d at 1079. The actual damages claimed by the District of Columbia were described as follows:
   property damage to its streets, sidewalks and bridge; damage to its equipment;
   substantial extraordinary labor expenses for emergency rescue, salvage and clean-up operations; special contract costs; and, the costs of providing law enforcement officials for a substantial period of time to safeguard and secure the area of the aforementioned crash.
   Complaint of the District of Columbia, filed July 21, 1983, ¶ 8, quoted in Brief for Appellee at 8, District of Columbia v. Air Fla., Inc., 750 F.2d 1077 (D.C. Cir. 1984) (No. 84-5041). The claim for damages to the bridge was settled out of court. See Air Florida, 750 F.2d at 1079 n.1.
6. See Air Florida, 750 F.2d at 1078. The District of Columbia sued primarily on a theory of equitable cost allocation. See id. For a discussion of the equitable cost allocation doctrine see infra notes 83-84 and accompanying text. The other major theory of recovery was based on the public trust doctrine. See Air Florida, 750 F.2d at 1078. For a discussion of the public trust doctrine and its application to tortfeasor liability for disaster response costs, see infra notes 145-64 and accompanying text.
7. See Air Florida, 750 F.2d at 1078. The traditional rule that taxpayers bear the cost of response services is discussed at length infra notes 40-66 & 124 and accompanying text.
8. See id. at 1086. The district court had dismissed the complaint for failure to state a claim upon which relief could be granted. See id. at 1078.
9. See id. at 1080.
10. For the purposes of this Note, a man-made disaster will be defined as any industrial, nuclear or transportation accident, explosion, fire, power failure or other condition such as the release of injurious environmental contaminants that threaten or cause damage to property, human suffering, hardship or loss of life (modified from Va. Code Ann.

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cur with great frequency in modern society.11 As human population continues to grow, and as technology advances, bringing with it useful yet

§ 44-146.16 (1986)). For an elaboration of the disaster concept, see B. Brown, Disaster Preparedness and the United Nations: Advance Planning for Disaster Relief 5-6 (1979) (discussing the various meanings of the term "disaster"); Hilliard, Local Government, Civil Defence and Emergency Planning: Heading for Disaster?, 49 Mod. L. Rev. 476, 481 (1986) ("Major accidents . . . are perceived as those which by the nature of the hazard or the number or seriousness of the casualties are likely to create problems far beyond what it is reasonable to expect the three normal emergency services of police, fire and ambulance to deal with unaided."); Zimmerman, The Relationship of Emergency Management to Governmental Policies on Man-Made Technological Disasters, 45 Pub. Admin. Rev. 29, 32 (1985) (compilation of definitions and references to "emergency" in selected environmental legislation pertaining to toxic and hazardous chemicals). The terms "disaster" and "emergency" are used interchangeably throughout this Note.

This Note focuses on liability for response costs involving only man-made, as opposed to natural, disasters. Taxpayers always bear the cost of responding to natural disasters because no fault exists in such situations. The Disaster Relief Act of 1974 and the 1982 Amendments, 42 U.S.C. §§ 5121-5202 (1982) [hereinafter the Act], provide limited monetary relief to communities hit by disasters such as hurricanes, earthquakes and other natural disasters. Although the Act principally addresses natural disasters, relief also may be given to communities hit by man-made disasters. See S. Rep. No. 891, 96th Cong., 2d Sess. 6, reprinted in 1980 U.S. Code Cong. & Admin. News 6925, 6927 (noting that while the Act relates principally to "physical or natural occurrences," it also can cover man-made disasters such as Love Canal, though such disasters represent "extreme case[s] of the acceptable limits" of the Act's coverage). Funding through the Act is limited, and aid is available only when the President has declared a federal emergency. See 42 U.S.C. § 5141 (1982).

Classifying disasters as either natural or man-made is somewhat misleading, however, as man-made disasters can be exacerbated and sometimes even initiated by natural forces. See B. Brown, Disaster Preparedness and the United Nations: Advance Planning for Disaster Relief 6 (1979); B. Raphael, When Disaster Strikes 11 (1986); see also R. Perry, Comprehensive Emergency Management: Evacuating Threatened Populations 14-21 (1985) (comparing natural and man-made disasters). The managerial problems presented by man-made and natural disasters, in fact, are very different. See Kasperson & Pijawka, Societal Response to Hazards and Major Hazard Events: Comparing Natural and Technological Hazards, 45 Pub. Admin. Rev. 7, 8 (1985) ("Natural hazards are familiar and substantial accumulated trial-and-error responses exist to guide management; technological hazards are often unfamiliar and lack precedents in efforts at control.").


11. For example, during the period 1981-83, excluding military aviation accidents, there were 200 catastrophic accidents (defined as those in which five or more persons are killed) in the United States resulting in the death of a total of almost 2,000 persons. See Bureau of the Census, U.S. Dep't of Commerce, 1986 Statistical Abstract of the United States 78 (Chart No. 121) (106th ed. 1985) [hereinafter 1986 Bureau of the Census Statistics]; see also Weinstein, Preliminary Reflections on the Law's Reaction to Disasters, 11 Colum. J. Envtl. L. 1, 1 n.1 (1986).
often dangerous devices and substances, the potential for serious disasters increases. Three Mile Island, the Sandoz Rhine River contamination, and Mexico City's gas explosion are some prominent examples of modern man-made technological disasters that have affected large numbers of people. Other man-made disasters such as airline crashes, building collapses, toxic chemical spills and releases, fires and explosions, and dam collapses that may affect fewer numbers of

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12. See National Commission on Fire Prevention and Control, America Burning 7 (1973) [hereinafter America Burning] (noting the novel hazards to firefighting posed by new materials and products); Kasperson & Pijawka, supra note 10, at 7-8 (1985) ("technology has emerged as the major source of hazard for modern society"); see also Zimmerman, supra note 10, at 29-30 (summarizing information on the incidence of modern chemical emergencies).

13. R. Perry & A. Mushkatel, supra note 10, at 3; B. Raphael, supra note 10, at 20; Weinstein, supra note 11, at 1 & n.i.


15. See N.Y. Times, Mar. 29, 1979, at A1, col. 2 (reporting on the radiation leak at the Three Mile Island nuclear power plant near Harrisburg, Pa.).

16. See N.Y. Times, Nov. 13, 1986, at A3, col. 4 (calling this chemical accident "one of the gravest European ecological disasters in decades").

17. See N.Y. Times, Nov. 20, 1984, at A1, col. 6 (reporting on the liquified gas explosion near Mexico City that killed over 250 people and caused the evacuation of 100,000 others).

18. See, e.g., District of Columbia v. Air Fla., Inc., 750 F.2d 1077, 1079 (D.C. Cir. 1984) (seventy-eight people killed in air crash); see also B. Raphael, supra note 10, at 20 (discussing the growth in number of air disasters).

19. See, e.g., In re Federal Skywalk Cases, 680 F.2d 1175, 1177 (8th Cir.) (Kansas City Hyatt Regency skywalk collapse), cert. denied, 459 U.S. 988 (1982); McFedden, Building Collapse Takes a Toll on Exhausted Rescue Workers, N.Y. Times, Apr. 27, 1987, at B1, col. 2 (28 people feared dead in Bridgeport, Conn. building collapse); see also B. Raphael, supra note 10, at 18 (noting problem of the collapse of various man-made structures).

20. See, e.g., City of Flagstaff v. Atchison, T. & Santa Fe Ry., 719 F.2d 322, 323 (9th Cir. 1983) (threatened release or explosion of liquified petroleum gas necessitated evacuation of all persons within one mile of site); see also Hilliard, supra note 10, at 485 (reporting on spill in Md. of 13,000 gallons of highly toxic phosphorus trichloride, necessitating the evacuation of 23,000 people, 418 of whom required treatment at area hospitals); The Ability to Respond to Toxic Chemical Emergencies: Hearing Before the Senate Committee on Environment and Public Works, 99th Cong., 1st Sess. 88-90 (1985) (attachment to statement of Maj. Harold Spedding, N.J. State Police) (listing 15 toxic chemical releases in the Linden, N.J. area during a 3-month period).

21. See, e.g., Coburn v. 4-R Corp., 77 F.R.D. 43, 44 (E.D. Ky. 1977) (Beverly Hills Supper Club fire); Mayor of Morgan City v. Jesse J. Fontenot, Inc., 460 So. 2d 685, 686 (La. Ct. App. 1984) (fuel truck explosion and fire); see also B. Raphael, supra note 10, at 18 (briefly summarizing the destructive effects of past building and city fires).

22. See, e.g., State ex rel. Dresser Indus. v. Rudd, 592 S.W.2d 789, 790-91 (Mo. 1980) (en banc) (rupture of mining waste holding pond dam); see also Dam Safety: Hearings Before a Subcommittee of the House Committee on Government Operations, 95th Cong., 1st Sess. 1 (1977) (statement of Hon. Leo J. Ryan, Chairman of Subcommittee) (reporting that the Buffalo Creek Dam disaster resulted in 125 persons killed and $50 million in damages and that the Canyon Lake Dam disaster killed 230 people and caused $100 million in damages); Teton Dam Disaster: Hearings Before a Subcommittee of the House Committee on Government Operations, 94th Cong., 2d Sess. 2 (1976) (statement of Hon. Leo J. Ryan, Chairman of Subcommittee) (hearings on the 1976 Teton Dam disaster
people, nevertheless can have an equally severe social and financial impact on local areas.\textsuperscript{23}

To respond to such disasters, a myriad of disaster and emergency service organizations, ranging from small volunteer groups to large, highly organized agencies have been established in the United States.\textsuperscript{24} The costs incurred\textsuperscript{25} by government response units during a disaster are exact-

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that resulted in $1 billion loss to surrounding communities and the death of 11 persons). \textit{See generally} P. May \& W. Williams, supra note 10, at 81-92 (chapter devoted to issue of dam safety mobilization).
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23. See Settle, \textit{Financing Disaster Mitigation, Preparedness, Response, and Recovery}, 45 Pub. Admin. Rev. 101, 101 (1985) ("A disaster can result in severe economic consequences for an afflicted area. State and local monies deplete rapidly, costly liability demands arise in court, and insurance claims increase quickly, placing the community in an unexpected economic crisis."); \textit{see also} R. Perry, supra note 10, at 9 (noting that local communities are the entities most directly subject to the "harsh realities of disasters"). \textit{See generally} B. Raphael, supra note 10 (extensive analysis of how individuals and communities cope with the effects of catastrophes); Reconstruction Following Disaster (J. Haas, R. Kates \& M. Bowden eds. 1977) (detailed study of the reconstruction process of communities following a disaster); Man and Society in Disaster (G. Baker \& D. Chapman eds. 1962) (comprehensive work on the socioeconomic effects of disasters). It has been estimated that overall expenditures and losses due to technological hazards in the U.S. "may be as high as $200 to $300 billion or 10-15\% of the Gross National Product." R. Harriss, C. Hohenemser \& R. Kates, \textit{Our Hazardous Environment}, in Environment 207, at 8 (1978) (citing, J. Tuller, The Scope of Hazard Management Expenditure in the U.S., working paper, Hazard Assessment Group, Clark Univ., Worcester, Mass. (1978)).
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24. See America Burning, supra note 12, at 18-20 (1973) (discussing the diversity of fire-fighting service organizations in the United States); \textit{see also} Drabek, \textit{Managing the Emergency Response}, 45 Pub. Admin. Rev. 85, 85-88 (1985) (surveying various types of American disaster response units and noting their four distinct structural qualities: localism; lack of standardization; unit diversity; and fragmentation). Among the types of disaster response activities are search and rescue, evacuation, fire-fighting, emergency medical care and securing of the impact site. \textit{See} R. Perry, supra note 10, at 6.
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erbated by such factors as an extraordinary amount of labor required to contain the disaster,\textsuperscript{26} the necessity of purchasing or renting special materials or equipment,\textsuperscript{27} and damage sustained by emergency service equipment during response efforts.\textsuperscript{28}

The courts traditionally have held that the taxpayers must bear the entire cost of such services, even if the disaster was caused by negligence or recklessness on the part of a tortfeasor.\textsuperscript{29} This rule may not be the most equitable solution to the problem, however, especially in modern society. Due to a number of factors,\textsuperscript{30} including recent cuts in federal revenue-sharing programs,\textsuperscript{31} local municipalities are facing very tight

Morehart, 449 F.2d 1283, 1283 (9th Cir. 1971) ($9,736.58 for fire suppression); United States v. Chesapeake & O. Ry., 130 F.2d 308, 309 (4th Cir. 1942) ($1,928.20 in fire suppression costs); State v. Long Island Lighting Co., 129 Misc.2d 371, 372, 493 N.Y.S.2d 255, 256 (Nassau County Ct. 1985) ($3,660.12 in labor and $1,603.06 in equipment for diversion of highway traffic in vicinity of fallen power lines).


29. \textit{See infra} notes 40-66 & 124 and accompanying text.


At the same time, insurance companies recently have raised premiums and even cancelled municipal liability insurance policies, thereby placing even greater financial pressures on local governments. \textit{See} International City Management Ass'n, 1986 Municipal Yearbook 63 (1986); \textit{see also} N.Y. Times, July 21, 1986, at B5, col. 1 (reporting that towns in the N.Y. metropolitan area are trying to form their own insurance systems in an effort to avoid staggering rate increases for liability insurance).

The great frequency and severity of modern man-made disasters with their associated financial effects only add to existing pressures on state, county and local government budgets. It is more equitable under these circumstances to allocate the costs of disaster response services to tortfeasors, rather than to taxpayers who are free from any wrongdoing.

Furthermore, the traditional rule of tortfeasor non-liability is inconsistent with the established tort principle of liability of negligent parties for harm proximately caused. A number of limited exceptions to the rule of non-liability of negligent tortfeasors for the cost of response services have, in fact, been recognized by the courts. In addition, several other theories of recovery such as the public trust doctrine and strict liability for abnormally dangerous activities recently have been considered by some courts.

This Note argues for broader recognition of common law liability of negligent tortfeasors for disaster response costs incurred by municipalities, state and local governments. Part I discusses the traditional rule

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32. See id.; see also Rybeck, The Property Tax as a Super User Charge, in The Property Tax and Local Finance 134 (C. Harriss ed. 1983) (noting that due to federal spending cutbacks, local governments are being "forced to cut corners to meet urgent service needs").

33. See Settle, supra note 23, at 102-03; see also America Burning, supra note 12, at 5 (noting that the financial plight of local governments leads to greater pressure on fire departments to produce favorable cost/benefit ratios). In addition, some municipalities also are facing an increasing scarcity of volunteers for emergency service units. See Johnson, Suburban Fire and Rescue Services Have Worrisome Volunteer Shortage, N.Y. Times, May 19, 1986, at B1, col. 1 (reporting on the critical manpower shortage on volunteer fire and rescue squads in New York City suburbs, raising concerns about the adequacy of emergency response services particularly where new commuting population has little time for volunteering).

34. See infra notes 111-14 and accompanying text.

35. See City of Flagstaff v. Atchison, T. & Santa Fe Ry., 719 F.2d 322 (9th Cir. 1983). Although denying recovery to plaintiff, the court in City of Flagstaff recognized several instances when recovery for the cost of response services has been allowed: when authorized by statute or regulation, when required to effect the intent of federal legislation, when the acts of a private party create a public nuisance that the government seeks to abate, and, when the government incurs expenses to protect its own property. See id. at 324.

Recovery for response costs also has been allowed both on the theory of quasi-contract, Brandon Township v. Jerome Builders, Inc., 80 Mich. App. 180, 183, 263 N.W.2d 326, 328 (1977), and on a breach of contract theory, United States v. Morehart, 449 F.2d 1283, 1284 (9th Cir. 1971); see also infra notes 179-92 and accompanying text.


37. For elaboration of the strict liability theory of recovery, see infra notes 165-78 and accompanying text.

38. This Note argues only for reimbursement for the cost of services and materials used in response to the occurrence of a particular disaster. It does not argue for reim-
against common law liability and responds to the major arguments against expansion of such liability. Part II argues in favor of expanded liability for response costs under negligence, public nuisance, protection of government property, public trust, strict liability, quasi-contract, and contract theories. Part III outlines statutory bases for recovery as an alternative to common law liability. This Note concludes that disaster response costs should be recoverable from negligent tortfeasors49 either under common law or, alternatively, by statutory authority.

I. TRADITIONAL COMMON LAW RULE OF NON-LIABILITY

Courts traditionally have declined to impose common law liability on tortfeasors for the cost of disaster response services.40 This rule emerges most frequently in fire suppression cases, almost all of which reject common law liability.41 The rule also surfaces in a variety of disaster con-

bursement of the capital costs of buildings, equipment and other infrastructure that taxpayers would continue to subsidize. For one case attempting, albeit unsuccessfully, to recover "overhead" costs see United States v. Denver & R. G. W. R.R., 547 F.2d 1101, 1104-06 (10th Cir. 1977) (awarding direct costs of fire suppression but denying recovery of overhead or indirect costs).

Similarly, financial responsibility for disaster management plan preparation also would continue to rest with the taxpayer. Consider, however, the Nuclear Regulatory Commission requirements for nuclear power plant operators to prepare, at their own cost, on-site emergency response plans, see 10 C.F.R. § 50.47 (1986) and Emergency Planning Around U.S. Nuclear Powerplants, NRC Regulatory Commission Oversight—Hearings Before a Subcomm. of the House Comm. on Government Operations, 96th Cong., 1st Sess. 194-95 (1979) (addendum to record submitted by Hon. Toby Moffett, Rep. Conn.), and the trend in Britain to require certain industries to do the same. See Hilliard, supra note 10, at 484 (noting that these regulations not only require manufacturers to prepare on-site emergency plans but also allow local authorities to recover from manufacturers the cost of preparing off-site plans).

39. This Note does not address liability of intentional actors, such as arsonists, for disaster response costs. Actions for restitution from criminals involve issues beyond the scope of this Note.

40. See, e.g., District of Columbia v. Air Fla., Inc., 750 F.2d 1077, 1080 (D.C. Cir. 1984) (aircraft response cost recovery action following the general common law rule of other jurisdictions that negligent tortfeasors are not liable for disaster response costs); City of Flagstaff v. Atchison, T. & Santa Fe Ry., 719 F.2d 322, 323-24 (9th Cir. 1983) (denying recovery at common law of costs incurred during response to toxic chemical railroad tank car incident); City of Bridgeton v. B.P. Oil, Inc., 146 N.J. Super. 169, 178-80, 369 A.2d 49, 54-55 (Law Div. 1976) (no recovery at common law of cost of response services provided during oil spill incident); see also W. Keeton, D. Dobbs, R. Keeton & D. Owen, Prosser & Keeton on the Law of Torts, § 2 at 7 (5th ed. 1984) [hereinafter Prosser & Keeton] ("The state never can sue in tort in its political or governmental capacity, although as the owner of property it may resort to the same tort actions as any individual proprietor to recover for injuries to the property, or to recover the property itself.") (footnotes omitted).

41. See, e.g., Allentown Volunteer Fire Dep't v. Soo Line R.R., 372 F. Supp. 422, 424 (E.D. Wis. 1974) (claim for recovery of cost of suppressing fires dismissed); People v. Wilson, 240 Cal. App. 2d 574, 576-77, 49 Cal. Rptr. 792, 794 (1966) ("No case has been cited, and we have found none, which permits, in the absence of a statute, the recovery of fire suppression expenses by one not protecting his own property. Thus, recovery for fire suppression expenses by a state or other public agency is a creature of statute.") (citation omitted); Mayor of Morgan City v. Jesse J. Fontenot, Inc., 460 So. 2d 685 (La. Ct. App. 1987).
texts such as toxic chemical spills, airline crashes, and power failures. This traditional rule is said to be justified for a variety of rea-


42. See, e.g., City of Flagstaff v. Atchison, T. & Santa Fe Ry., 719 F.2d 322, 323 (9th Cir. 1983) (rejecting tortfeasor liability for costs incurred by city in responding to incident involving derailed tank cars containing liquified gas).


44. See Koch v. Consolidated Edison Co., 62 N.Y.2d 548, 560-61, 468 N.E.2d 1, 7-8, 479 N.Y.S.2d 163, 170 (1984) (cost of blackout disaster response services not recoverable at common law), cert. denied, 469 U.S. 1210 (1985). The court in Koch examined other cases on point and held:

[the general rule is that public expenditures made in the performance of governmental functions are not recoverable. The general rule is grounded in considerations of public policy, and we perceive nothing in the different and somewhat closer relationship between Con Edison and plaintiffs in this case which would warrant departure from that rule.]

Koch, 62 N.Y.2d at 560-61, 468 N.E.2d at 8, 479 N.Y.S.2d at 170 (footnote and citations omitted).

There are a number of cases that reject common law liability of public utilities for the cost of response services provided by the government during other types of utility-caused emergencies. See, e.g., In re TMI Litig. Gov't Entities Claims, 544 F. Supp. 853, 855-56 (M.D. Pa. 1982) (in action to recover from public utility the costs incurred by municipalities during emergency response to nuclear incident at Three Mile Island, court follows rule of no recovery in tort absent statutory authority), aff'd in part, vacated, and remanded in part sub nom. Pennsylvania v. General Pub. Utils. Corp., 710 F.2d 117 (3d Cir. 1983); State v. Long Island Lighting Co., 129 Misc. 2d 371, 376, 493 N.Y.S.2d 255, 259 (Nassau County Ct. 1985) (denying plaintiff leave to amend complaint to include cost of labor and equipment used in diverting traffic on highway near fallen power lines owned by defendant and granting summary judgment for defendant); City of Pittsburgh v. Equitable Gas Co., — Pa. Commw. —, 512 A.2d 83, 84 (1986) (denying recovery of cost of supplying police personnel to gas line explosion site), petition denied, 520 A.2d 1386 (1987); Department of Natural Resources v. Wisconsin Power & Light Co., 108 Wis. 2d 403, 407, 321 N.W.2d 286, 288 (1982) (“Any liability for the cost of extinguishing the instant fire must be imposed by statute, for there is no common law liability permitting a governmental entity to charge an electric utility for fire suppression expenses.”) (citation omitted). But cf. Southern Cal. Edison Co. v. United States, 415 F.2d 758, 759 (9th Cir.), cert. denied, 396 U.S. 957 (1969) (holding a privately-owned power company liable for fire-fighting costs pursuant to provision of special use permit). The rule against public utility liability for emergency response costs makes sense because the taxpayers on whose behalf the suit is brought, for the most part, are identical to the utility rate-payers upon whom the cost of any judgment would fall.

The rule against common law liability for the cost of government services also has surfaced in a line of cases involving suits to recover from criminals or criminal suspects the costs incurred during their apprehension or detention. See Department of Mental Hygiene v. Hawley, 59 Cal. 2d 247, 251, 379 P.2d 22, 24-25, 28 Cal. Rptr. 718, 720-21 (1963); Napa State Hosp. v. Yuba County, 138 Cal. 378, 381, 71 P. 450, 452 (1903); State Highway & Pub. Works Comm'n v. Cobb, 215 N.C. 556, 558-59, 2 S.E.2d 565, 567 (1939); see also Prosser & Keeton, supra note 40, § 2, at 7-8 (“It has been held . . . that the state as a government has no cause of action against an escaped convict for the expenses incurred in recaptur[ing him].”); cf. County of Champaign v. Anthony, 33 Ill. App. 3d 466, 466-67, 337 N.E.2d 87, 87-88 (1975) (no recovery of $10,287.50 for police protection services provided witness threatened by defendant), aff'd, 64 Ill. 2d 532, 356
sons including a pre-existing duty of government to act, "settled expectations" and the rule that economic loss generally is not recoverable in tort.

A. Pre-existing Duty of Government to Act

A primary rationale for the general rule is that the provision of emergency response services is a traditional government duty funded by taxpayers. In essence, the argument is that no legal cause of injury results when response services are provided without charge to tortfeasors because the government is merely performing its pre-existing duty.

For instance, in City of Bridgeton v. B.P. Oil, Inc., a New Jersey court denied recovery of excessive fire prevention and emergency

N.E.2d 561 (1976). But see County of Champaign v. Anthony, 33 Ill. App. 3d 466, 469-70, 337 N.E.2d 87, 89-90 (1975) (Trapp, J., dissenting) (arguing for the imposition of liability on the grounds that the police protection provided the witness for 2 months constituted "unusual services provided at an additional expense to the county" and that, even though precedent was against allowing recovery of such costs, "[o]ur courts have, however, adopted new concepts of liability where it was deemed that public interest required the imposition of liability."). aff'd, 64 Ill. 2d 532, 356 N.E.2d 561 (1976).

Along these lines, a statute recently has been passed in West Virginia that authorizes county commissions and municipalities to seek reimbursement from convicts for costs of medical care and clothing provided to them by county jails. See W. Va. Code § 7-8-2 (Supp. 1986).

Finally, it is interesting to note that the rule at common law against liability for the cost of such governmental services as police and fire-fighting also has been applied to a civil protest. See County of San Luis Obispo v. Abalone Alliance, 178 Cal. App. 3d 848, 223 Cal. Rptr. 846 (1986) (denying recovery in tort for expenses incurred by county in its police powers during civil disobedience protest of a nuclear power plant).

45. See, e.g., Town of Freetown v. New Bedford Wholesale Tire, Inc., 384 Mass. 60, 61, 423 N.E.2d 997, 998 (1981) (denying recovery of excessive firefighting expenses: "[governmental] [s]afeguards against fire are maintained 'for the benefit of the public and without pecuniary compensation or emolument' ") (quoting Tainter v. Worcester, 123 Mass. 311, 316 (1877)); Portsmouth v. Campanella & Cardi Constr. Co., 100 N.H. 249, 253, 123 A.2d 827, 830 (1956) (denying recovery of costs of fire suppression services upon finding that plaintiff's "[f]ire chief and his department acted solely in the discharge of their duties as firewards"); City of Bridgeton v. B.P. Oil, Inc., 146 N.J. Super. 169, 179, 369 A.2d 49, 54-55 (Law Div. 1976) (holding that "a municipal corporation may not recover as damages the costs of its governmental operations which it was created to perform"); State v. Long Island Lighting Co., 129 Misc. 2d 371, 373, 493 N.Y.S.2d 255, 257 (Nassau County Ct. 1985) (denying state government recovery of costs of diverting traffic from vicinity of fallen power lines: "[t]he plaintiff may not recover damages for undertaking its duty to ensure the safety of the travelling public"); see also Allenton Volunteer Fire Dept' v. Soo Line R.R., 372 F. Supp. 422, 423 (E.D. Wis. 1974) (denying recovery to volunteer fire department of costs incurred in extinguishing fires because the town had a contract with plaintiff to provide fire protection, and therefore "plaintiff was doing no more than discharging its contractual obligation to the town"). But see United States v. American Oil Co., 417 F.2d 164, 168 (5th Cir. 1969) (maritime action rejecting the preexisting duty defense and allowing recovery of salvage-type award for expenses incurred by U.S. Navy and Air Force in assisting U.S. Coast Guard's firefighting efforts on defendant's ship), cert. denied, 397 U.S. 1036 (1970).

46. See supra note 45.


48. See id. at 179-80, 369 A.2d at 54-55. The court determined that the city could not recover its fire prevention and extinguishment costs because "[t]hat is the very purpose of government for which it was created." Id. at 179, 369 A.2d at 55.
cleanup costs incurred by a municipality in response to an oil spill.\textsuperscript{[49]} Noting first that a private party would have been liable on a theory of strict liability for the operation of an ultra-hazardous activity,\textsuperscript{[50]} the court held that fire suppression efforts “remain an area where the people as a whole absorb the cost”\textsuperscript{[51]} despite the existence of user charges for certain other government services.\textsuperscript{[52]}

\textsuperscript{49} The spill originated from tanks located on defendants’ property. See id. at 171, 369 A.2d at 50. In responding to the spill, the Bridgeton fire department was required to be at the site for one week. See id. In the process, the City expended money for extensive overtime work and had to purchase special chemicals and equipment. See id. The City sought reimbursement for these response costs from both the owner and lessee of the property on which the spill occurred. See id.

\textsuperscript{50} See id. at 177, 369 A.2d at 53-54. The court held that “this is the proper time to extend the concept of strict liability in this state to those who store ultra-hazardous or pollutant substances. This means that a defendant becomes liable for damages caused to a proper plaintiff.” Id. Nonetheless, the court determined that in this case the government was not a “proper plaintiff” and denied recovery. See id. at 178-79, 369 A.2d at 54-55.

\textsuperscript{51} Id. at 179, 369 A.2d at 54. In support, the court analogized to police protection services, noting that “[n]o one expects the rendering of a bill (other than a tax bill) if a policeman apprehends a thief.” Id. The court went on to conclude that firefighting services fall “within this ambit” and therefore “may not be billed as a public utility.” Id.

\textsuperscript{52} See id. at 178-79, 369 A.2d at 54. The government services listed by the court as examples of areas where revenue had been derived were turnpikes, water or power supply and postal services. See id.

The concept of user charges or fees for government services is not a novel one. See National Comm’n on Urban Problems, 90th Cong., 2d Sess., Impact of the Property Tax: Its Economic Implications for Urban Problems, 39-40 (Comm. Print 1968) (hereinafter Impact of the Property Tax) (discussing the implementation by local governments of user charges for public services to increase general revenue funds). In fact, user charges, in the past, have comprised a significant source of general revenue for cities and other local governments. See Oakland, Central Cities: Fiscal Plight and Prospects for Reform, in Current Issues in Urban Economics 341 (P. Mieszkowski & M. Straszheim eds. 1979); Impact of the Property Tax, supra, at 39.

The virtues of the imposition of user charges for governmental services have been described as follows:

Besides raising revenue, user charges are considered outstanding fiscal devices because they can promote fairness, ration scarce resources, and contribute to economic efficiency. Their most immediate appeal is equity—those who receive public benefits pay for them and pay according to the degree of benefits obtained. Those who derive no benefits are not forced to subsidize beneficiaries. Rybeck, supra note 32, at 145. The attractiveness of user charges for government services has been receiving increased attention. See, e.g., President’s Private Sector Survey on Cost Control Report on User Charges, 5-16, 181-83 (1983) (discussing the revenue-enhancing benefits for the federal government of the imposition of user fees for such activities as Coast Guard search and rescue services in “non-life threatening” emergencies involving recreational boat owners running out of gas offshore); Moak, The Revenue Source With Vitality—A New Look at Some Ancient Concepts—Non-Tax Revenues, in Cities Under Stress 475-92 (R. Burchell & D. Listokin eds. 1981) (discussing potential for expansion of the use of non-tax sources of revenue such as user charges to ease financial pressures on local governments); see also Impact of the Property Tax, supra, at 39 (“[T]here is considerable potential for greater exploitation of user-charges, in connection with activities which do not have significant income-redistribution objectives.”) (emphasis in original); cf. A.B.A.J., Mar. 1, 1987 at 30 (reporting Congress’ recent decision to raise the fees for filing civil and bankruptcy actions; Sen. Warren Rudman commented on the decision: “It was a question of having to shut down some of the activities of the judiciary
This rationale does not address the issue of overlapping or intersecting duties. Although government may have an obligation to provide for the health, safety and welfare of its citizens, citizens also have a duty not to act negligently or recklessly and thereby cause harm to others. It can be argued that one who creates an emergency situation has an affirmative duty both to aid the victims and to minimize damages, and if the government responds to the emergency, it assumes the tortfeasor's duty.

A related point is that the government's undertaking to respond to an emergency does not mean necessarily that it also is obligated to subsidize or indemnify the tortfeasor who negligently created the emergency in the first place. Finally, there is no reason why a municipality's financial interests should not be entitled to legal protection, particularly since it is suing on behalf of its taxpayers to whom the money ultimately belongs.

B. Settled Expectations

In City of Flagstaff v. Atchison, Topeka & Santa Fe Railway, involving the derailment of railroad tank cars carrying liquified gas, the Court of Appeals for the Ninth Circuit denied recovery to a municipality for

or raising the filing fees. We finally decided we ought to have more user fees and people ought to pay for the use of the system . . . .”

In the disaster response cost context in particular, the phrase “user charge,” see Note, Government Recovery of Emergency Service Expenditures: An Analysis of User Charges, 19 Loyola L.A.L. Rev. 971, 972 n.8 (1986) [hereinafter User Charges], is somewhat imprecise. It would make little sense to impose user charges on the innocent victims of disasters, see Rybeck, supra note 32, at 138, who might be said to be the true users of such emergency services as rescue operations and evacuations. On the other hand, tortfeasors causing disasters would be considered users of the emergency services if they or their property were being saved. Semantics aside, it does not offend principles of equity to charge the tortfeasor, as opposed to an innocent victim, for the use or provision of the emergency services as long as such services are required as a result of the tortfeasor's actions.


54. See infra notes 111-14 and accompanying text.
55. See infra note 186 and accompanying text.
56. See infra notes 186-87 and accompanying text.

57. See discussion of user charges supra note 52. It should also be noted that public safety services can be contracted out to private parties. See International City Management Ass'n, 1983 Municipal Yearbook 199-217; America Burning, supra note 12, at 23; cf. President's Private Sector Survey on Cost Control, Report on Privatization 1-7 (1983) (discussing the fiscal benefits to the government of privatization of certain governmental services). In fact, many of the early fire companies in the United States were incorporated and provided service on a contract basis. See America Burning, supra note 12, at 23. Thus, charging for emergency response services is appropriate because such services appear to be more akin to a proprietary, as opposed to a governmental function.

58. See infra note 115 and accompanying text.
59. 719 F.2d 322 (9th Cir. 1983).
60. See id. at 323. The four derailed railroad cars were operated by the named defendant. See id.
emergency evacuation costs. Applying the rule set forth in City of Bridgeton, the City of Flagstaff court observed that the imposition of liability would disrupt the "settled expectations" of businesses and individuals. According to the City of Flagstaff court, society's "settled expectations" mandate that the cost of emergency services be spread by taxes, and that the government provide the response services free of charge to negligent tortfeasors. Although acknowledging that in some instances the disruption of such expectations is justified, the court concluded that tortfeasor liability for disaster response costs would not be imposed because the existing system of taxpayer subsidies was neither "irrational nor unfair."

There are a number of counter-arguments, equally grounded in considerations of policy, that can be made against the settled expectations ra-
tionale. Although the traditional rule of non-liability for emergency response costs may have served well in an earlier era when disasters were on a much smaller scale, the rule is not well-suited to modern society.\(^6\)

The increasing severity, frequency and complexity of modern disasters\(^6\) has led to unpredictable, and often extraordinary outlays of local tax dollars\(^9\) at a time when local budgets are particularly tight.\(^70\)

Inequities arise from application of the traditional rule, given the trans-jurisdictional nature of modern disasters, particularly transportation-related disasters\(^7\) such as airline crashes\(^7\) and railroad accidents.\(^73\)

\(^{67}\) See supra notes 30-33 and accompanying text.

\(^{68}\) See supra notes 11-13 and accompanying text.

\(^{69}\) See supra notes 23 & 33 and accompanying text; cf. Brown, Disaster Preparedness and the United Nations: Advance Planning for Disaster Relief 6 (1979) ("It is difficult to predict precisely where and when a man-made disaster will occur, and therefore, it is more difficult [than in the case of natural disasters] to prepare for one.").

An alternative to the imposition of tort liability for disaster response costs is that of increasing property taxes. This alternative is not practical, however, in view of the tremendous political volatility of increasing property taxes. See Netzer, *Does the Property Tax Have a Future?*, in The Property Tax and Local Finance 231 (C. Harriss ed. 1983); D. Paul, The Politics of the Property Tax 1 (1975). In addition, local politicians would be reluctant to impose special assessments on industries in their jurisdiction for fear of driving industry away. Other financial arrangements do not offer much better hope for success. See Settle, *supra* note 23, at 101 (examining various alternative financing devices such as mutual aid compacts, joint powers agreements, various types of bonds, insurance programs, tax anticipation notes, and budget transfers, and concluding that "[i]t is difficult to earmark these revenue sources for emergency purposes when so many other demands are made on community leaders for these funds."). In any case, use of any of these alternative financing devices would thwart the policy of holding tortfeasors responsible for the damage they inflict on society.

\(^{70}\) See supra notes 30-33 and accompanying text.

\(^{71}\) See *America Burning*, supra note 12, at 85-91 (discussing the growth of modern transportation-created fire hazards).

\(^{72}\) See, e.g., District of Columbia v. Air Fla., Inc., 750 F.2d 1077, 1079 (D.C. Cir. 1984) (airline crash requiring expenditure of over $750,000 in emergency response services). During the period 1981-1983 there were 39 catastrophic air transportation accidents (defined as those in which five or more persons are killed) in the United States alone, resulting in the death of a total of 520 persons. See 1986 Bureau of the Census Statistics, supra note 11, at 78 (Chart No. 121).

\(^{73}\) See, e.g., City of Flagstaff v. Atchison, T. & Santa Fe Ry., 719 F.2d 322, 323 (9th Cir. 1983) (derailment of railroad tank cars containing dangerous substance required evacuation of all persons within one mile of accident site); Town of East Troy v. Soo Line R.R., 653 F.2d 1123, 1125-26 (7th Cir. 1980) (action arising out of a railroad tank car spill), cert. denied, 450 U.S. 922 (1981); see also People Express Airlines v. Consolidated Rail Corp., 100 N.J. 246, 249, 495 A.2d 107, 108 (1985) (private action for economic damages arising from evacuation following tank car accident).

In 1984 there were 1,247 persons killed and 38,570 injured in railroad accidents in the United States. See 1986 Bureau of the Census Statistics, supra note 11, at 613 (Chart No. 1077). In addition, a U.S. EPA study reports that in the United States during the period Aug. 1964-Feb. 1973, there were 95 railroad accidents requiring evacuations of up to 10,000 persons. See J. Hans & T. Sell, Evacuation Risks—An Evaluation 104-09 (1974). The same study also reports four major chlorine transport barge incidents during the period Mar. 1961-Jan. 1973, one of which required the evacuation of 150,000 persons. See id. at 103; see also Wyandotte Transp. Co. v. United States, 389 U.S. 191, 194 (1967) (2,200,000 pounds of liquid chlorine in sunken barge).
The rule that the cost of response services be spread among the population "as a whole" breaks down where the relatively small population of taxpayers in a disaster "host" jurisdiction is left with the bill for disaster response and emergency cleanup services. The unfortunate disaster "host" population thus bears more than its fair share of the risks, but does not receive an equivalent share of the tax monies and other benefits flowing from a tortfeasor's business. In such cases, it is more equitable to impose liability for response costs on responsible parties than to let the costs fall where they may.

In addition, while it may be argued that local governments routinely budget for the cost of responding to home fires and the like, such budgeting cannot take into account disasters which, by definition, largely are

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75. See, e.g., District of Columbia v. Air Fla., Inc., 750 F.2d 1077, 1079 (D.C. Cir. 1984). In Air Florida, the court summarized plaintiff's risk distribution argument as follows:

Because the costs of emergency services occasioned by air disasters are quite high, the city urges that considerations of economic efficiency and equity require that these costs be allocated to the airline industry and its passengers, rather than to those distressed municipalities fortuitously located in the paths of crashes.

Id.

A similar argument was made by plaintiffs in Pennsylvania v. General Pub. Utils. Corp., 710 F.2d 117 (3d Cir. 1983). In an action to recover nuclear incident emergency evacuation costs and other damages, plaintiff argued that the costs should not be borne solely by the municipalities immediately surrounding the nuclear power plant, but should be spread generally across the nuclear power industry and their insurers:

[I]t defies reason to require the citizens of one state to bear the risk of substantial damage to their public treasuries as a result of a nuclear accident when there would be no risk of a nuclear accident at all but for a decision by the citizens of all the states to undertake, in the national interest, the development of a private nuclear power industry.


76. See supra note 75 and accompanying text.

77. See supra notes 74-76 and accompanying text; cf. Chavez v. Southern Pac. Transp. Co., 413 F. Supp. 1203 (E.D. Cal. 1976). In Chavez, an action was brought by private plaintiffs for personal injuries and property damage resulting from the explosion of bomb loaded boxcars in defendant's railroad yard. See id. at 1205. The court held defendant common carrier strictly liable for the conduct of an ultrahazardous activity, reasoning that "[t]hose which benefit from the dangerous activity bear the inherent costs. The harsh impact of inevitable disasters is softened by spreading the cost among a greater population and over a larger time period. A more efficient allocation of resources results." Id. at 1214; see also Smith v. Lockheed Propulsion Co., 247 Cal. App. 2d 774, 785, 56 Cal. Rptr. 128, 137 (1967) (holding a rocket-testing company strictly liable for damages resulting from its activities on the ground that defendant was in the best position to "administer the loss so that it will ultimately be borne by the public"); Note, Common Carriers and Risk Distribution: Absolute Liability for Transporting Hazardous Materials, 67 Ky. L.J. 441, 450-55 (1978-79) [hereinafter Common Carriers] (arguing for the imposition of strict liability of common carriers of hazardous materials on the basis of a risk distribution rationale).

78. See R. Perry, supra note 10, at 9-10.
A cost allocation system allowing for recovery of extraordinary costs from the negligent tortfeasor thus would achieve not only a "more precise" result, but a more "fair and sensible" one as well.

At the root of arguments in favor of liability are principles of equitable cost allocation and risk distribution. The theory of economic efficiency in law argues that tortfeasors, industry in particular, can better spread the risk of loss to the general public through increased prices or insurance coverage than can a system that permits the costs of accidents to be borne by the party directly harmed. Following this reasoning, tortfeasor liability for the cost of disaster response services would more accurately reflect the true cost of accidents than does the present system of localized taxpayer subsidies.

C. No Recovery in Tort for Pure Economic Loss

Another argument against the imposition of tortfeasor liability for emergency response costs is based on the rule that economic loss, in the absence of physical harm, generally is not recoverable in tort. This de-
The defense is sometimes based on the Restatement (Second) of Torts § 766C, which denies tort liability for pure economic losses. The Restatement (Second) of Torts rule, however, does allow for recovery when the economic loss is sustained in connection with physical damage to the person, land or chattels of plaintiff. Under this exception, "economic losses" such as disaster response costs can be recovered as "parasitic damages" when, for example, the government’s own property has been damaged or threatened with damage.

In addition to "parasitic loss" cases, courts have allowed recovery of economic loss in tort, despite the absence of any physical harm to plaintiff. For example, in People Express Airlines v. Consolidated Rail Corp., plaintiff brought an action to recover lost sales and profits resulting from defendant’s negligently caused disaster. The court held that one owes a duty of care to take reasonable measures to avoid the risk of causing economic harm to others, despite the absence of physical injury to plaintiff. The court carefully limited this liability to those plaintiffs

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86. The rule reads that "[o]ne is not liable to another for pecuniary harm not deriving from physical harm to the other, if that harm results from the actor's negligently . . . interfering with the other's performance of his contract or making the performance more expensive or burdensome . . . ." Restatement (Second) of Torts § 766C (1979). The rule is limited to interference with contractual relations; consequently, its application to response cost recovery actions is tenuous. The trial court in In re TMI Litig. Gov't Entities Claims, 544 F. Supp. 853 (M.D. Pa. 1982), aff'd in part, vacated, and remanded in part sub nom. Pennsylvania v. General Pub. Utilis. Corp., 710 F.2d 117 (3d Cir. 1983), based its holding in part on this rule, thus incorrectly characterizing plaintiff’s claims for civil defense efforts as "non-parasitic economic loss[es]" within the meaning of the Restatement (Second) of Torts § 766C (1979). See 544 F. Supp. at 856; cf. Dunlop Tire & Rubber Corp. v. FMC Corp., 53 A.D.2d 150, 153-54, 385 N.Y.S.2d 971, 974-74 (4th Dep’t 1976) (in awarding plaintiff recovery of economic losses sustained as a result of an explosion of defendant’s factory, the court rejected the contention that the tort was negligent interference with contract, noting instead that "[p]laintiff’s rights arise from an independent duty of care owed to it by defendant").

87. See Restatement (Second) of Torts § 766C comment b at 25 (1979). The Restatement refers to such losses as "‘parasitic' compensatory damages.” Id.

88. See infra note 137 and accompanying text.

89. See infra note 143 and accompanying text.

90. See, e.g., Union Oil Co. v. Oppen, 501 F.2d 558, 568 (9th Cir. 1974) (in an action for damages to commercial fishermen resulting from oil spill, recognizing duty not to negligently cause economic losses); People Express Airlines v. Consolidated Rail Corp., 100 N.J. 246, 267, 495 A.2d 107, 118 (1985) (allowing recovery at common law for economic losses suffered as a result of chemical emergency in absence of physical harm to plaintiff); Dunlop Tire and Rubber Corp. v. FMC Corp., 53 A.D.2d 150, 153-54, 385 N.Y.S.2d 971, 974 (4th Dep’t 1976) (recovery in negligence for economic losses sustained by private plaintiff as a result of chemical plant explosion).

91. 100 N.J. 246, 495 A.2d 107 (1985).

92. See id. at 249-50, 495 A.2d at 108-09 (1985). The action arose out of a fire that began in defendant Consolidated Rail Corporation's freight yard due to the escape of a flammable chemical from a tank car that had been punctured during a coupling operation. See id. at 249, 495 A.2d at 108. As a result of the fire, an evacuation within a one-mile radius of the site was ordered, which included the operations base of plaintiff. See id. The damage alleged by plaintiff consisted of the business-interruption losses incurred during the twelve hours of the evacuation event. See id. at 249-50, 495 A.2d at 108-09.

93. See id. at 263, 495 A.2d at 116.
comprising an identifiable class whom the defendant knew or had reason to know were likely to suffer damages from its negligent conduct.\textsuperscript{94} In holding for plaintiff, the court observed that "[t]he more particular is the foreseeability that economic loss will be suffered by the plaintiff as a result of defendant's negligence, the more just is it that liability be imposed and recovery allowed."\textsuperscript{95}

Finally, prospects for recovery of economic loss in tort, even in the absence of "physical harm" as currently defined, are improving, as recent criticism\textsuperscript{96} has been directed at the strained distinctions made between

\textsuperscript{94} See id. The court stressed that what it meant by an identifiable class of plaintiffs was not simply a foreseeable class of plaintiffs. See id. at 263, 495 A.2d at 116. It explained that "[a]n identifiable class of plaintiffs must be particularly foreseeable in terms of the type of persons or entities comprising the class, the certainty or predictability of their presence, the approximate numbers of those in the class, as well as the type of economic expectations disrupted." Id. at 264, 495 A.2d at 116.

\textsuperscript{95} Id. at 263, 495 A.2d at 116; accord Union Oil Co. v. Oppen, 501 F.2d 558, 568-69 (9th Cir. 1974) (applying foreseeability principles in an action to recover damages for economic losses incurred in wake of oil spill).

In addressing the issue of recovery in tort of pure economic losses, an analogy can be made to the increased willingness of some courts to abrogate the requirement of physical harm in order to allow recovery for mental distress. See Hagerty v. L & L Marine Servs., Inc., 788 F.2d 315, 318 (5th Cir. 1986) (reversing summary judgment for defendant on claim based on fear of cancer despite absence of physical harm). The policies behind the physical harm requirement for recovery of mental distress damages, the prevention of feigned claims and protection against unforeseeable risks and unlimited liability, see Prosser & Keeton, supra note 40, \S 54, at 360-61, mirror those behind the physical harm requirement for recovery of economic losses in tort. As to the feigned claim policy, the argument against imposition of liability for economic loss is weak since the expenditure of money is a difficult claim to feign, as opposed to mental distress injuries, which are difficult to verify. See Rabin, Tort Recovery for Negligently Inflicted Economic Loss: A Reassessment, 37 Stan. L. Rev. 1513, 1524-25 (1985). Although the unlimited liability issue is perhaps the most critical concern, see id. at 1526 ("The common thread running through the limitations on recovery for emotional distress, consortium, and economic loss is not difficult to identify. . . . [I]t is an age-old concern about extending liability \textit{ad infinitum} for the consequences of a negligent act."). Checks on such liability are available to the courts. See People Express Airlines v. Consolidated Rail Corp., 100 N.J. 246, 264, 495 A.2d 107, 116 (1985) (applying foreseeability principles to a tort claim for economic loss damages); cf. Sinn v. Burd, 486 Pa. 146, 173, 404 A.2d 672, 686 (1979) (applying foreseeability principles in action seeking recovery of damages for mental distress where plaintiff was outside zone of physical danger). For other discussions of the issue of tort liability for economic loss see Note, Negligent Interference with Economic Expectancy: The Case for Recovery, 16 Stan. L. Rev. 664 (1964); Comment, Foreseeability of Third-Party Economic Injuries—A Problem in Analysis, 20 U. Chi. L. Rev. 283 (1953).

\textsuperscript{96} See City of Manchester v. National Gypsum Co., 637 F. Supp. 646, 649-50 (D.R.I. 1986). In City of Manchester, an action was brought to recover the cost of abating asbestos in buildings. See id. at 649. The court, in holding that the plaintiffs' injury was properly characterized as physical harm as opposed to economic harm, observed that it is at best, somewhat artificial to try to characterize the damage plaintiff claims as either one or the other, as either physical damage to its property or economic damage. Such pigeon holes may have been useful when tort and contract suits were less complex, but today . . . the reasons for such divisions are less clear and the ability to make such distinctions is questionable.

Id. at 649-50. The court also observed that "[t]he limitations of the Restatement [\textsuperscript{Second} of Torts] definition of 'physical harm' are particularly apparent when one realizes that the problem of characterizing highly toxic substances and the damage they cause is
"physical harm" injuries, where recovery generally is allowed, and "eco-
nomic loss" injuries, where recovery in tort generally is denied.

D. Unlimited Liability

An objection to the expansion of new areas of tort liability in general is
that it will lead to unlimited or widespread liability. This argument is
two-fold. First is the "floodgates" argument that the courts will be over-
come with litigation if a new area of tort liability is recognized. Second
is the fear of liability for damages disproportionate to defendant’s fault.

There are a number of points to consider in addressing these concerns.
First, liability for disaster response costs would be only for extraordinary
or excessive costs. Common every-day accidents would not trigger lia-
bility because such accidents are within the zone of risk anticipated by
response services. For instance, although residential fires and car acci-
dents are encompassed by this zone of risk, accidents of disaster propor-
tions such as major airline crashes, railroad derailments, toxic waste
spills and similar emergencies are not.

A second answer to the unlimited liability argument is that courts can
apply, and juries can be instructed on, foreseeability principles to keep
liability within reasonable bounds. In addition, courts always have re-
quired that any disaster response costs awarded be "necessary and

97. See Union Oil Co. v. Oppen, 501 F.2d 558, 563 (9th Cir. 1974); R. Rabin, supra
note 95, at 1513-38.

distress action noting floodgates defense). For a classic rebuttal of the floodgates defense
see Dillon v. Legg, 68 Cal.2d 728, 755 n.3, 441 P.2d 912, 917 n.3, 69 Cal. Rptr. 72, 77 n.3
(1968) ("we point out that courts are responsible for dealing with cases on their merits,
whether there be few suits or many; the existence of a multitude of claims merely shows
society’s pressing need for legal redress."); see also Sinn v. Burd, 486 Pa. 146, 162-63, 404

99. See In re Kinsman Transit Co., 388 F.2d 821, 825 n.8 (2d Cir. 1968) (giving the
example that a negligent driver who causes an accident in the Brooklyn Battery Tunnel
during rush hour could conceivably be responsible for astronomical economic losses).

100. See infra note 118 and accompanying text.

101. This only seems proper since tortfeasors pay taxes and therefore would be entitled
to at least some use of emergency services free of charge.

102. Also, as a practical matter it would not be cost-effective for a government entity
to entangle itself in an expensive lawsuit for the relatively small costs incurred in respond-
ing to minor emergencies such as car crashes and small home fires that are not properly
characterized as disasters. However, there can be exceptions. See Department of Natu-
rnal Resources v. Wisconsin Power & Light Co., 108 Wis. 2d 403, 404, 321 N.W.2d 286,
287 (1982) ($63.60 in fire suppression costs sought).

103. See People Express Airlines v. Consolidated Rail Corp., 100 N.J. 246, 254, 495
A.2d 107, 111 (1985). In allowing a private party to recover for economic losses sus-
tained as a result of a negligently caused fire, the New Jersey Supreme Court addressed
the unlimited liability argument as follows: "The answer to the allegation of unchecked
liability is not the judicial obstruction of a fairly grounded claim for redress. Rather, it
must be a more sedulous application of traditional concepts of duty and proximate causa-
tion to the facts of each case." Id. (citation omitted); see also Union Oil Co. v. Oppen, 501
A third way to limit liability is the use of applicable tort or contract statutes of limitations to bar stale claims for recovery of emergency response costs. Finally, if liability were imposed through statutory authority, a clause fixing limitations on liability could be included in the statute's provisions.

II. Common Law Theories of Recovery

Various exceptions to the traditional rule are used by some courts to impose common law liability on tortfeasors for disaster response costs. These include costs incurred during the abatement of a public nuisance and those incurred in the protection of the government's own property. In addition, at least one court has articulated a basis of recovery derived from the public trust doctrine, although no court has yet imposed liability on a negligent party under this theory. The most appropriate legal approach in a given situation depends on the particular facts involved. This part discusses these various theories and analyzes their relative strengths and weaknesses.

A. Negligence Theory of Recovery

Tort law traditionally has held that a plaintiff is entitled to recover damages in negligence if the defendant owed a duty of due care to the plaintiff, if the defendant breached that duty, and if the breach was reasonable. A third way to limit liability is the use of applicable tort or contract statutes of limitations to bar stale claims for recovery of emergency response costs. Finally, if liability were imposed through statutory authority, a clause fixing limitations on liability could be included in the statute's provisions.

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106. See supra note 35.

107. See infra notes 129-36 and accompanying text.

108. See infra notes 137-44 and accompanying text.


111. See Restatement (Second) of Torts § 281 (1965) (outlining the basic elements of a negligence cause of action); Prosser & Keeton, supra note 40, § 30, at 164-65 (same).

112. See Prosser & Keeton, supra note 40, § 53, at 356: "[I]n negligence cases, the duty is always the same—to conform to the legal standard of reasonable conduct in the light of the apparent risk." The determination by courts of the existence of a duty of care
the proximate cause of plaintiff's injury.\textsuperscript{114} For most negligently caused man-made disasters, these traditional elements of tort liability can be proved. First, in a disaster situation a duty of reasonable care is owed the public at large, which, in essence, is represented by the government plaintiff in a response cost recovery action.\textsuperscript{115} In addition, the need for emergency services in the event of a negligently caused disaster certainly is proximately caused by the tortfeasor.\textsuperscript{116}

... involves the weighing of numerous factors. For instance, in Vu v. Singer Co., 538 F. Supp. 26 (N.D. Cal. 1981), \textit{aff'd}, 706 F.2d 1027 (9th Cir.), \textit{cert. denied}, 464 U.S. 938 (1983), the district court stated that it must balance the following factors when determining the existence of duty in each particular case: (1) foreseeability of harm to plaintiff; (2) degree of certainty that plaintiff suffered injury; (3) closeness of connection between defendant's conduct and injury suffered; [(4)] moral blame attached to defendant's conduct; (5) policy of preventing future harm; (6) extent of burden to defendant and the consequences to the community of imposing a duty to exercise care with resulting liability for breach; and (7) availability, cost, and prevalence of insurance for the risk involved. Vu, 538 F. Supp. at 29.

It must be determined that a "definite legal obligation" is owed, Prosser & Keeton, \textit{supra} note 40, § 53, at 357, for "[n]egligence in the air, so to speak, will not do." Pollock, Law of Torts 468 (13th ed. 1920). A duty of care is owed if the wrongdoer could have foreseen the harm to plaintiff resulting from his tortious act. As stated by the New York Court of Appeals: "[t]he risk reasonably to be perceived defines the duty to be obeyed, and risk imports relation; it is risk to another or to others within the range of apprehension." Palsgraf v. Long Island R.R., 248 N.Y. 339, 344, 162 N.E. 99, 100 (1928).

113. Breach consists of a failure to conform to a standard of reasonable care. \textit{See} Restatement (Second) of Torts § 282 (1965); Prosser & Keeton, \textit{supra} note 40, § 31, at 169. For an application of these traditional tort law principles to the disaster response cost recovery situation see United States v. Andrews, 206 F. Supp. 50 (D. Idaho 1961). In Andrews, the court imposed liability in negligence for fire suppression and restoration costs upon finding that defendant failed to exercise due care in using acetylene torch in dry field. \textit{See id.} at 51-52.


115. \textit{See, e.g.}, District of Columbia v. Air Fla., Inc., 750 F.2d 1077, 1078 (D.C. Cir. 1984) (seeking recovery of the cost of "tax-supported emergency services"); City of Evansville v. Kentucky Liquid Recycling, Inc., 604 F.2d 1008, 1018 (7th Cir. 1979) (in public nuisance abatement costs recovery action, the court noted that "[t]he plaintiffs are municipal or public corporations, subdivisions of the state, that were required to spend \textit{public funds} because of pollution of an interstate waterway by acts done in another state") (emphasis added), \textit{cert. denied}, 444 U.S. 1025 (1980); \textit{In re TMI Litig. Gov't Entities Claims}, 544 F. Supp. 853, 854 (M.D. Pa. 1982) (actions seeking recovery "on behalf of the Commonwealth of Pennsylvania"), \textit{aff'd in part, vacated, and remanded in part sub nom. Pennsylvania v. General Pub. Utilities Corp.}, 710 F.2d 117 (3d Cir. 1983); \textit{see also} Brief of Appellant at 32 n.24, \textit{Pennsylvania v. General Pub. Utilities Corp.}, 710 F.2d 117 (3d Cir. 1983) (No. 82-3421) ("In asserting a right to recover extraordinary emergency expenses, the Commonwealth is asserting the public's right to recover in strict liability or negligence the expenses which the public reasonably incurred in the protection of itself and its property: . . . ").

116. \textit{See, e.g.}, United States v. Morehart, 449 F.2d 1283, 1284 (9th Cir. 1971) (in allowing recovery by government of expenses incurred in extinguishing fire, court acknowledged jury's finding of a violation by defendants of a duty owed the United States stating, "[o]bviously there was proximate cause"); \textit{see also} Brief of Appellant at 31, \textit{Pennsylvania v. General Pub. Utilities Corp.}, 710 F.2d 117 (3d Cir. 1983) (No. 82-3421) ("The Commonwealth further submits that damage to the treasuries of state and local governments re-
A negligence action also requires proof of injury. Plaintiffs assert that the injury sustained in response cost litigation is depletion of tax resources through the "excessive" or "extraordinary" use of governmental services. Although courts traditionally have held that economic loss in the absence of physical harm generally is not recoverable in tort, there are sound reasons for holding otherwise. In fact, the New Jersey Supreme Court recently held that foreseeable economic loss sustained by a private plaintiff as a consequence of a negligently caused disaster was recoverable in tort despite the absence of physical harm.

If one has a duty to act with due care and if in breaching this duty one causes a disaster, then it comports with traditional tort principles to impose, rather than to deny, liability for the cost of responding to that disaster. The expansion of the scope of negligence liability to include disaster response costs admittedly alters the common law, yet the

117. See Prosser & Keeton, supra note 40, § 30, at 165.
118. See District of Columbia v. Air Fla., Inc., 750 F.2d 1077, 1078 (D.C. Cir. 1984); Pennsylvania v. General Pub. Utils. Corp., 710 F.2d 117, 120-21 (3d Cir. 1983); City of Bridgeton v. B.P. Oil, Inc., 146 N.J. Super. 169, 178, 369 A.2d 49, 54 (Law Div. 1976); cf. County of Champaign v. Anthony, 33 Ill. App. 3d 466, 469, 337 N.E.2d 87, 89 (1975) (Trapp, J., dissenting) (in criminal response cost recovery action, arguing that recovery should be allowed because the injury sustained by the county was "the invasion of property, i.e., its tax resources as the result of the pleaded intentional acts of the defendant"), aff'd, 64 Ill. 2d 522, 356 N.E.2d 561 (1976).
120. See supra notes 90-96 and accompanying text (discussing the issue of recovery of economic loss in the absence of any physical injury).
122. See Prosser & Keeton, supra note 40, § 1, at 6-7; see also People Express Airlines v. Consolidated Rail Corp., 100 N.J. 246, 255, 495 A.2d 107, 111 (1985) ("[T]he over-arching purpose of tort law: that wronged persons should be compensated for their injuries so that those responsible for the wrong should bear the cost of their tortious conduct."). The purpose of compensatory tort damages is to restore the injured party to the position he would have been in but for defendant's tortious conduct. See United States v. Denver & R. G. W. R.R., 547 F.2d 1101, 1105 (10th Cir. 1977).
123. See Wyandotte Transp. Co. v. United States, 389 U.S. 191, 204 (1967) ("Denial of [recovery of response costs] would permit the result, extraordinary in our jurisprudence, of a wrongdoer shifting responsibility for the consequences of his negligence onto his victim."); cf. Sinn v. Burd, 486 Pa. 146, 164, 404 A.2d 672, 681 (1979) ("When we find a duty, breach and damage, everything has been said.") (quoting Prosser, Palsgraf Revisited, 52 Mich. L. Rev. 1, 15 (1953)).
change is neither drastic nor without compelling policy and legal reasons supporting it.  
Critic's of the traditional rules regarding liability for disasters have raised the issue of deterrence. According to this argument, liability for the cost of disaster response services would encourage the exercise of greater care on the part of potential defendants than exists under the traditional system. Although this argument is appealing, it is of questionable merit because the cost of disaster response services probably is minor relative to other costs such as personal injury and property damage claims that typically flow from a negligently caused disaster.

B. Public Nuisance Abatement Theory of Recovery

Courts recognize that the government can recover response costs in-
A public nuisance is defined as an "unreasonable interference with a right common to the general public." Some courts recently have expanded the concept of public nuisance to include activities interfering with aesthetic values or natural resources. There also is a growing recognition by federal courts of suits by government plaintiffs under the federal common law of nuisance. These trends arguably allow room for the expansion of liabili-


In addition to liability at common law, a party also may be liable for nuisance abatement costs pursuant to statute. See, e.g., Town of East Troy v. Soo Line R.R., 653 F.2d 1123, 1132 (7th Cir. 1980) (allowing recovery of groundwater pollution abatement costs pursuant to Wisconsin nuisance statute), cert. denied, 450 U.S. 922 (1981); Brandon Township v. Jerome Builders, Inc., 80 Mich. App. 180, 183-84, 263 N.W.2d 326, 328 (1977) (in action to recover costs incurred in emergency repair of defendant's dam, plaintiff granted leave to amend its amended complaint to comply with provisions of nuisance statute). Courts have upheld such statutes as "legitimate exercise[s] of a state's police power." See Department of Transp. v. PSC Resources, Inc., 175 N.J. Super. 447, 461, 419 A.2d 1151, 1159 (Law Div. 1980) (statutory remedies are in addition to those recognized at common law);

131. See, e.g., State ex rel. Dresser Indus. v. Ruddy, 592 S.W.2d 789, 793 (Mo. 1980) (en banc) (holding that statute does not preempt common law); State v. Arlington Warehouse, 203 N.J. Super. 9, 14, 495 A.2d 882, 885 (App. Div. 1985) (liability both at common law and under statute); Department of Transp. v. PSC Resources, Inc., 175 N.J. Super. 447, 461, 419 A.2d 1151, 1159 (Law Div. 1980) (statutory remedies are in addition to those recognized at common law); cf. United States v. Oswego Barge Corp., 664 F.2d 327, 339-44 (2d Cir. 1981) (in admiralty action seeking recovery of oil spill cleanup costs, the court held that § 1321(f) of the Federal Water Pollution Control Act, 33 U.S.C. § 1251 et seq., preempted maritime nuisance tort theory of recovery as well as other common law and statutory remedies for cleanup costs).

132. Restatement (Second) of Torts § 821B(1) (1979). Commentators note that a public nuisance "is an entirely different concept from that of a private nuisance. It is a much broader term and encompasses much conduct other than the type that interferes with the use and enjoyment of private property." Prosser & Keeton, supra note 40, § 90, at 643. The term "public nuisance," therefore, applies to a wide variety of situations involving community interests of public convenience. See id.

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bility for public nuisance abatement to encompass a greater number and type of disaster situations than previously recognized.

A major argument against the use of the public nuisance theory of recovery is that the theory encompasses only recurring or continuous activities and does not apply to sudden, one-time events. Although a particular disaster may in fact be a one-time event, there are many forms of disaster, such as oil spills, that if allowed to proceed unabated would present a significant threat to the public and therefore satisfy the requirement in a public nuisance cause of action of significant harm. Moreover, the conceptual distinction made in the past between situations such as hazardous waste dumpsite cleanup operations, in which recovery at common law is recognized, and toxic chemical spills, in which recovery at common law is denied, is difficult to justify or understand.


This federal common law doctrine is limited to pollution with interstate effects. See Illinois v. City of Milwaukee, 406 U.S. 91, 103 (1972), rev'd on other grounds, 451 U.S. 304 (1981); City of Evansville v. Kentucky Liquid Recycling, Inc., 604 F.2d 1008, 1018 (7th Cir. 1979), cert. denied, 444 U.S. 1025 (1980); Reserve Mining Co. v. EPA, 514 F.2d 492, 520 (8th Cir. 1975). The federal remedy is available, however, not only to the federal government, but to states, townships and other local governmental bodies as well. See Township of Long Beach v. City of New York, 445 F. Supp. 1203, 1213-14 (D.N.J. 1978).


133. See, e.g., State v. Amerada Hess Corp., 350 F. Supp. 1060, 1067-69 (D. Md. 1972); State v. Long Island Lighting Co., 129 Misc. 2d 371, 375, 493 N.Y.S.2d 255, 258-59 (Nassau County Ct. 1985); see also Restatement (Second) of Torts § 821F comment g at 107 (1979) ("It is often said by the courts and commentators that in order to constitute a nuisance the interference must continue or recur over some period of time.").

134. See Restatement (Second) of Torts § 821B(2)(c) (1979) ("Circumstances that may sustain a holding that an interference with a public right is unreasonable include . . . whether the conduct is of a continuing nature or has produced a permanent or long-lasting effect . . . .") (emphasis added); see also Restatement (Second) of Torts § 821F comment g, at 108 (1979):

The decisions do not, however, support a categoric requirement of continuance or recurrence in all cases as an established rule of law. If the defendant's interference with the public right or with the use and enjoyment of land causes significant harm and his conduct is otherwise sufficient to subject him to liability for a nuisance, liability will result, however brief in duration the interference or the harm may be.

Id.


136. See, e.g., City of Flagstaff v. Atchison, T. & Santa Fe Ry., 719 F.2d 322, 323 (9th
C. Theory of Recovery Based on Protection of Government's Own Property

The courts have applied another exception to the rule of non-liability for disaster response costs when disasters place government property at risk. The principal rationale for this exception is that the government as an owner of property should be treated no differently than a private owner of property.

A closely related situation exists when harm to government property has not actually been sustained but merely threatened. In United States v. Chesapeake & Ohio Railway, the government brought an action to recover the cost of suppressing a negligently caused fire that threatened a national forest. The Court of Appeals for the Fourth Circuit determined that plaintiff was entitled to relief both under a statute and in tort for the fire suppression costs. The tort theory of recovery was based on the principle that one "whose legally protected interests are endangered by the tortious conduct of another is entitled to recover" damages for a reasonable effort to avert the threatened harm. Courts could expand use of the government property exception because of the...
likelihood of harm to government property in some disaster situations if no action is taken. 144

D. Public Trust Doctrine Theory of Recovery

One federal court of appeals recently considered the public trust doctrine as a basis for recovery of disaster response costs. 145 The doctrine derives from the fact that waterways and certain other public properties are held in trust by the sovereign for the benefit of the public. 146 Trust responsibilities are vested in the sovereign states 147 and typically involve the protection of certain public uses such as navigation, commerce and}

144. For example, in District of Columbia v. Air Fla., Inc., 750 F.2d 1077 (D.C. Cir. 1984), not only was the Potomac River in a sense harmed by the aircrash, but the government-owned 14th Street/Rochambeau Bridge also was damaged. Id. at 1078; see also Brief of Appellant at 32 n.24, Pennsylvania v. General Pub. Utils. Corp., 710 F.2d 117 (3d Cir. 1983) (No 82-3421) (arguing that the evacuation expenses incurred during the Three Mile Island incident were "expenses which the public reasonably incurred in the protection of itself and its property from the pervasive threat of harm posed by the accident at TMI".)

145. See District of Columbia v. Air Fla., Inc., 750 F.2d 1077, 1080-86 (D.C. Cir. 1984); cf. State ex rel. Dresser Indus. v. Ruddy, 592 S.W.2d 789, 791 (Mo. 1980) (en banc) (recognizing viability of state's public nuisance damages claim of acting in its sovereign capacity as "trustee for its citizens").

146. See Shively v. Bowlby, 152 U.S. 1, 57 (1894); District of Columbia v. Air Fla., Inc., 750 F.2d 1077, 1082 (D.C. Cir. 1984); National Audubon Soc'y v. Superior Court, 33 Cal. 3d 419, 434, 658 P.2d 709, 718, 189 Cal. Rptr. 346, 356, cert. denied, 464 U.S. 977 (1983); see also Toomer v. Witsell, 334 U.S. 385, 408 (1948) (recognizing a state's right under the doctrine to "conserve or utilize its resources on behalf of its own citizens"); In re Steuart Transp. Co., 495 F. Supp. 38, 40 (E.D. Va. 1980) (holding that the right arising under the public trust doctrine to protect public interests in natural resources arises not from the ownership of the resources but "from a duty owing to the people"). The public trust doctrine is an ancient one, traceable to the Magna Carta, see Martin v. Lessee of Waddell, 41 U.S. (16 Pet.) 367, 409-410 (1842), and having its roots in ancient Rome, see District of Columbia v. Air Fla., Inc., 750 F.2d 1077, 1082 & n.17 (D.C. Cir. 1984).

147. See Shively v. Bowlby, 152 U.S. 1, 57-58 (1894); Illinois Central R.R. v. Illinois,
fishing.\textsuperscript{148}

Originally, the public trust doctrine was used to restrain a state's power to alienate public trust lands\textsuperscript{149} and operated as a limitation on uses interfering with trust purposes.\textsuperscript{150} More recently, courts have construed a state's obligations under the doctrine to include the affirmative duty of protecting the land and its resources against impairment.\textsuperscript{151} Since its inception, courts have expanded the interests protected by the doctrine from simply those of navigation, commerce and fishing to include other interests such as aesthetics and the preservation of natural resources present on public trust lands.\textsuperscript{152} The public interests protected

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148. See Shively v. Bowlby, 152 U.S. 1, 11-12 (1894); Illinois Central R.R. v. Illinois, 146 U.S. 387, 452 (1892); District of Columbia v. Air Fla., Inc., 750 F.2d 1077, 1082 (D.C. Cir. 1984); Marks v. Whitney, 6 Cal. 3d 251, 259, 491 P.2d 374, 380, 98 Cal. Rptr. 790, 796 (1971). The court in Illinois Central R.R. v. Illinois, 146 U.S. 387 (1892), described in detail the nature of the interest of the state in public trust properties: [T]he State holds the title to the lands under the navigable waters . . . within its limits, in the same manner that the State holds title to soils under tide water, by the common law . . . and that title necessarily carries with it control over the waters above them whenever the lands are subjected to use. But it is a title different in character from that which the State holds in lands intended for sale. It is different from the title which the United States hold in the public lands which are open to preemption and sale. It is a title held in trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties.

Id. at 452.


151. See National Audubon Soc'y v. Superior Court, 33 Cal. 3d 419, 434-35, 658 P.2d 709, 719, 189 Cal. Rptr. 346, 356-57, 348-49. In vacating a Superior Court judgment for defendants, the California Supreme Court recognized the public trust doctrine as providing a substantive cause of action for the protection of public trust lands and waterways and noted that

the public trust is more than an affirmation of state power to use public property for public purposes. It is an affirmation of the duty of the state to protect the people's common heritage of streams, lakes, marshlands and tidelands, surrendering that right of protection only in rare cases when the abandonment of that right is consistent with the purposes of the trust.

Id. at 441, 658 P.2d at 724, 189 Cal. Rptr. at 360-61; see also In re Steuart Transp. Co., 495 F. Supp. 38, 40 (E.D. Va. 1980) (observing that under the public trust doctrine both "the State of Virginia and the United States have the right and the duty to protect and preserve the public's interest in natural wildlife resources").

152. See Marks v. Whitney, 6 Cal. 3d 251, 259-60, 491 P.2d 374, 380, 98 Cal. Rptr. 790, 796 (1971); see also Besig v. Friend, 463 F. Supp. 1053, 1059-60 (N.D. Cal. 1979) (citing Marks for the proposition that the public trust doctrine protects additional uses not within the traditionally protected uses of navigation, commerce and fisheries); Na-
under the doctrine have been held to be "sufficiently flexible to encompass changing public needs."\(^{153}\) The public trust doctrine received its most notable consideration as a proposed basis for recovery of disaster response expenditures in *District of Columbia v. Air Florida, Inc.*\(^{154}\) In *Air Florida*, one of defendant airline's jets crashed into the Potomac River, obstructing navigation of the waterway and damaging a major bridge en route.\(^{155}\) Plaintiff's theory of recovery, based on the public trust doctrine\(^{156}\) as outlined by the court,\(^{157}\) began with the point that the District of Columbia as public trustee is obligated to keep the Potomac River free from impediments to navigation and from pollution and other impurities.\(^{158}\) This obligation, plaintiff argued, forms the basis of a duty of care on the part of Air Florida not to interfere with trust obligations.\(^{159}\) A breach of this duty of care, the negligently caused plane crash, therefore should enable the District of Columbia to recover its crash response costs.\(^{160}\)

Although ruling in favor of defendant on other grounds,\(^{161}\) the court

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153. Marks v. Whitney, 6 Cal. 3d 251, 259, 491 P.2d 374, 380, 98 Cal. Rptr. 790, 796 (1971). In *Marks*, the court held that a patentee's title to trust lands is subject to a public trust easement allowing the state to enter the property in furtherance of public uses, see *id.* at 261, 491 P.2d 374, 380, 98 Cal. Rptr. 790, 797, and noted that an expansive rather than a limited view of public uses or interests protected under the doctrine was appropriate: "In administering the trust the state is not burdened with an outmoded classification favoring one mode of utilization over another." *Id.* at 259, 491 P.2d at 380, 98 Cal. Rptr. at 796 (citation omitted); see also United Plainsmen Ass'n v. North Dakota State Water Conserv. Comm'n, 247 N.W.2d 457, 463 (N.D. 1976) (observing that the public trust doctrine is playing an "expanding role in environmental law").


156. See *id.* at 1080-81. Plaintiff's other theory of recovery was based on the doctrine of rational cost allocation. See *id.* at 1079-80. For a discussion of this doctrine, see *supra* notes 83-84 and accompanying text.

157. 750 F.2d 1080-81.

158. See *id.* at 1080.

159. See *id.*

160. See *id.* at 1081.

161. See *id.* at 1080. The court followed the traditional rule as set forth in *City of Flagstaff v. Atchison*, T. & Santa Fe Ry., 719 F.2d 322, 323 (9th Cir. 1983), that absent
stressed that it did not reject plaintiff's public trust theory of recovery. Rather, the court reserved judgment on the viability of the theory as a means of recovery. The Air Florida decision, therefore, left open the possible use of the public trust doctrine as a substantive cause of action for the recovery by a government plaintiff of disaster response costs when public trust lands or waterways are injured or their use is impaired. At a minimum, the decision provides useful guidelines for applying the doctrine as the basis of tortfeasor liability for the cost of responding to and mitigating the effects of a disaster.

statutory authority, the cost of emergency response services is not recoverable from negligent tortfeasors. See Air Florida, 750 F.2d at 1080.

162. Air Florida, 750 F.2d at 1084.

163. See id. The court was careful to state that due to the "paucity of relevant precedent and the lack of pleadings referring to the doctrine," the trial court could not be expected to "ponder sua sponte" whether the public trust doctrine provided a trustee in plaintiff's position with a basis for recovery. See id. This problem arose because plaintiff failed to raise the issue first in the District Court. See id. An additional hurdle to overcome was the unresolved question of whether Congress intended to delegate to the District of Columbia, a municipal corporation, the federal government's public trust responsibilities for the Potomac River. See id. at 1086.


Only the states and the federal government as sovereigns may sue under the theory. See United States v. Pittsburg, 661 F.2d 783, 786-87 (9th Cir. 1981); In re Multidistrict Vehicle Air Pollution M.D.L. No. 31, 481 F.2d 122, 131 (9th Cir.), cert. denied, 414 U.S. 1045 (1973). Political subdivisions such as cities and counties may, however, bring an action "to vindicate such of their own proprietary interests as might be congruent with the interests of their inhabitants." American Motorcyclists Ass'n v. Watt, 534 F. Supp. 923, 931 (C.D. Cal. 1981) (quoting In re Multidistrict Vehicle Air Pollution M.D.L. No. 31, 481 F.2d 122, 131 (9th Cir.), cert. denied, 414 U.S. 1045 (1973)), aff'd, 714 F.2d 962 (9th Cir. 1983).

E. Theory of Recovery Based on Strict Liability for Abnormally Dangerous Activities

Another theory for the recovery of disaster response costs is strict liability for abnormally dangerous activities. In order for this theory to apply, a plaintiff first must demonstrate that the defendant’s activity is properly classified as abnormally dangerous. Activities such as operating airlines, transporting hazardous materials or substances, and storing hazardous chemicals, all high-risk sources of disasters, are some examples of such abnormally dangerous or ultra-hazardous activi-

165. The Restatement (Second) of Torts § 519 (1977) outlines the theory:

(1) One who carries on an abnormally dangerous activity is subject to liability for harm to the person, land or chattels of another 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.

Id.


166. The Restatement enumerates some of the factors to be considered 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 (Second) of Torts § 520 (1977).

167. See Restatement (Second) of Torts § 520A (1977) (specifically imposing strict liability for ground damage caused by aircraft).

In explaining the reason for this rule, comment c to § 520A at 43-44 states “[t]he position taken is that aviation has not yet reached the stage of development where the risks of accidental physical harm to persons or to land or chattels on the ground is properly to be borne by those who suffer the harm, rather than by the industry itself.” Id.


ties. In addition, a plaintiff must demonstrate that the injury sustained was within the general class of harm threatened by the activity.170

Thus far, courts considering the theory have limited the imposition of strict liability for response costs to hazardous substance cleanup cases.171 A rationale posited for limiting application of the theory is that only damages for direct harm to persons, real property or chattels are within the scope of the doctrine, thus placing outside the scope of liability economic harm such as excessive emergency service expenditures.172

These damages, however, arguably do fall within the scope of strict liability because they constitute harm that directly flows from the disaster.173 In addition, in most disasters at least some physical harm to a
“person, land or chattels”\textsuperscript{174} is likely to be sustained, and the cost of any materials or services provided in response to such an event is part and parcel of the “direct” harm.\textsuperscript{175} Finally, the Restatement (Second) of Torts distinguishes between the terms “harm” and “physical harm”\textsuperscript{176} and applies the strict liability rule only to “harm.”\textsuperscript{177} Liability for economic loss therefore is not explicitly excluded under the rule.\textsuperscript{178}

F. \textit{Quasi-contract Theory of Recovery}

A number of courts have considered restitution as a basis for recovery of disaster response costs.\textsuperscript{179} This theory of recovery was used successfully in \textit{Brandon Township v. Jerome Builders, Inc.}\textsuperscript{180} In \textit{Brandon}, plain-

\textsuperscript{174}Restatement (Second) of Torts § 519(1) (1977).
\textsuperscript{175}For example, in Pennsylvania v. General Pub. Utilities Corp., 710 F.2d 117 (3d Cir. 1983), the Third Circuit remanded on the economic loss issue for development of plaintiff's argument that the increased radioactivity and radioactive materials emitted during the nuclear incident at Three Mile Island constituted a sufficient showing of physical harm or injury to allow recovery for the damages flowing from such harm. See id. at 122-23. The Court never decided the issue because the parties settled the case without a further trial (telephone conversation with Pennsylvania Office of the Attorney General, November 11, 1986). Similarly, in District of Columbia v. Air Fla., Inc., 750 F.2d 1077 (D.C. Cir. 1984), damage to government property, the 14th Street/Rochambeau Bridge, was sustained during the course of the aircrash. See id. at 1079.

\textsuperscript{176}Restatement (Second) of Torts § 7 (1965).
\textsuperscript{177}See supra note 166. Compare Restatement (Second) of Torts § 519 (1977) (one carrying on an abnormally dangerous activity is subject to liability for “harm” to person, land or chattels of another) with Restatement (Second) of Torts § 402A (1965) (stating the rule that a seller of an unreasonably dangerous product is strictly liable for “physical harm”).

\textsuperscript{178}See Brief of Appellant at 24 & n.20, Pennsylvania v. General Pub. Utilities Corp., 710 F.2d 117 (3d Cir. 1983) (No. 82-3421).

Additional support for the expansion of strict liability beyond present limits comes from the theory of equitable risk distribution theory, discussed supra notes 77 & 83-84 and accompanying text; see also Calabresi II, supra note 83, at 541-43 (arguing for expansion of liability for “extra-hazardous” activities beyond present limits); \textit{Common Carriers}, supra note 77, at 450-55 (arguing for the imposition of strict liability on common carriers of hazardous materials on basis of risk distribution theory).


tiff Township had repeatedly warned defendants to repair their dam which was in imminent threat of breaking. 181 Despite the warnings, defendants failed to act. 182 The Township was then forced to take emergency action to repair the dam in order to avoid a collapse 183 and thereafter brought an action for recovery of its emergency response costs. 184 The court held that because plaintiff had performed defendants' duty, it was entitled to recover its response costs based on defendants' unjust enrichment. 185

An additional argument can be made in favor of a quasi-contractual theory of recovery. In causing a disaster, a tortfeasor has a duty to minimize the risk of harm created. 186 If the government is forced to assume this duty, it should be entitled to restitution for the cost of performance

181. See id. at 182, 263 N.W.2d at 327.
182. See id.
183. See id. The court observed "[b]ecause of heavy spring rainfall and runoff plaintiff determined that there was an imminent threat to the health, safety and welfare of township residents, and therefore repaired the dam and made it safe." Id.
184. See id. at 182, 263 N.W.2d at 327-28.
185. See id. at 183, 263 N.W.2d at 328. The court based its holding on the Restatement of Restitution § 115 (1937) that reads:

[a] person who has performed the duty of another by supplying things or services, although acting without the other's knowledge or consent, is entitled to restitution from the other if

(a) he acted unofficiously and with intent to charge therefor, and

(b) the things or services supplied were immediately necessary to satisfy the requirements of public decency, health, or safety.

The court in Brandon held that plaintiff's allegations "fall squarely within the situation envisioned by the Restatement [of Restitution § 115]" and concluded that "[d]efendants were enriched by the repairs made to its dam, and the enrichment was unjust because it was defendants' duty to repair the dam." 80 Mich. App. 180, 183, 263 N.W.2d 326, 328.

The defense to a quasi-contract action that plaintiff acted "officiously" and therefore is not entitled to recover is addressed in the Restatement (Second) of Restitution § 3 comment a (Tent. Draft No. 1, 1983):

[s]ome cases within the principle of this section are marked by a more or less compelling responsibility resting on the claimant to act as he did. So far as officiousness might otherwise be charged against him, the charge is cancelled by a belief that he would have been in some sense delinquent if he had done nothing in response to the situation of need.

Id. at 45; cf. Town of East Troy v. Soo Line R.R., 653 F.2d 1123, 1128-32 (7th Cir. 1980) (in response cost recovery action rejecting defense that town voluntarily acted in abating a public nuisance on ground that town is obligated to provide for the health, safety and welfare of its citizens), cert. denied, 450 U.S. 922 (1981).

186. See Restatement (Second) of Torts § 321 (1965) providing in pertinent part that "[i]f the actor does an act, and subsequently realizes or should realize that it has created an unreasonable risk of causing physical harm to another, he is under a duty to exercise reasonable care to prevent the risk from taking effect." Comment a to § 321 explains that "[i]f the act is negligent, the actor's responsibility continues in the form of a duty to exercise reasonable care to avert the consequences which he recognizes or should recognize as likely to follow." Id.; see also Restatement (Second) of Torts § 322 (1965) (duty to prevent further harm to others if have already caused injury). Comment a to the Restatement (Second) of Torts § 322 explains that if the actor's act, or an instrumentality within his control, has inflicted upon another such harm that the other is helpless and in danger, and a reasonable man would recognize the necessity of aiding or protecting him to avert further harm, the
in terms of the money saved by the tortfeasor.\textsuperscript{187}

G. Contract Theory of Recovery

If plaintiff and defendant have a contract and an emergency situation arises in connection with the contract, recovery for emergency service costs can be based on a breach of contract theory. Successful use of this theory is illustrated by \textit{United States v. Morehart}.\textsuperscript{188} In \textit{Morehart}, defendant had an agreement to perform certain work for plaintiff\textsuperscript{189} and, during performance, negligently started a fire.\textsuperscript{190} The court held that the agreement created an "implied-in-law covenant" to perform the work in a "workmanlike manner"\textsuperscript{191} and that defendant's breach of the covenant through his failure to exercise due care created liability for fire suppression costs.\textsuperscript{192}

\textit{Id.} This argument can be based on several sections of the Restatement of Restitution (1937) including § 112 (restitution recoverable where benefit conferred upon another under circumstances making such action necessary for the protection of the interests of the other or of third persons); § 113 (restitution recoverable for performance of another's noncontractual duty to supply necessaries to a third person); § 114 (restitution allowed for performance of another's duty to a third person in an emergency); and, § 115 (restitution for performance of another's duty to the public). E.g., \textit{Peninsular & Oriental Steam Navigation Co. v. Overseas Oil Carriers, Inc.}, 553 F.2d 830, 834 (2d Cir.) (imposing liability based on Restatement of Restitution § 114 for costs incurred by private plaintiff during emergency medical rescue at sea), \textit{cert. denied}, 434 U.S. 859 (1977).

Finally, a cause of action for recovery of emergency response costs might also be based on the Restatement (Second) of Restitution § 3 (Tent. Draft No. 1, 1983), which reads:

\textit{Id.} The rule in admiralty law that a salvor, or rescuer, is entitled to a reasonable reward for saving a ship, see R. Posner, \textit{supra} note 83, at 104, is analogous to these proposed causes of action based on restitution.

\textit{Id.} at 1283. The agreement was that in exchange for agricultural conservation money, defendant would clear his land of brush and would be reimbursed by the government for part of his cost. \textit{See id.} at 1283.

\textit{Id.} at 1283 & n.1.

\textit{Id.} at 1284.

In holding defendant liable, the court also noted that the expenditure incurred by plaintiff was one "in mitigation of damages that would have occurred had the fire remained uncheck[ed]." \textit{Id.} at 1284 n.3.

In addition, if there were to exist a prior agreement between the government and the defendant that, in the event of a disaster, the former would be reimbursed by the latter, then recovery could be based on a contract theory of indemnification. \textit{See, e.g., Southern Cal. Edison Co. v. United States}, 415 F.2d 758, 758-59 (9th Cir.) (power company liable pursuant to provision contained in defendant's special use permit imposing liability for expenses incurred by U.S. Forest Service in extinguishing fires originating on defendant's right of way), \textit{cert. denied}, 396 U.S. 957 (1969); \textit{cf. City of Bridgeton v. B.P. Oil, Inc.}, 146 N.J. Super. 169, 179-80, 369 A.2d 49, 55 (Law Div. 1976) ("If the facts were to develop
III. Statutory Enhancements

Deference to legislatures is used to deny common law liability for disaster response costs. For example, the Court of Appeals for the District of Columbia Circuit in *Air Florida* ruled that because the "government's decision to provide tax-supported services is a legislative policy determination," the legislature, not the court, was the proper forum in which to address the issue.

Countering the statutory deference argument is the observation that tort theories often implicate legislative concerns without a court declining to rule on the issue. Also, it is unlikely that any undue burden on the court system will result from recognition of response cost liability because calculation of the dollar amounts involved in a disaster response is a relatively simple matter. In addition, there are settled principles of law already in place such as foreseeability that can easily be applied by

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194. *Air Florida*, 750 F.2d at 1080.

195. See id.; see also *City of Flagstaff v. Atchison, T. & Santa Fe Ry.*, 719 F.2d 322, 324 (9th Cir. 1983) ("the legislature and its public deliberative processes, rather than the court, is the appropriate forum to address such fiscal concerns"). Subsequent to the *City of Flagstaff* decision, the Arizona legislature passed a statute that imposes liability for "extraordinary emergency services" required as a result of negligence or intentional misconduct in the use, storage or transportation of hazardous substances. See Ariz. Rev. Stat. Ann. §§ 12-971 & 12-972 (Supp. 1986).

196. See *Maryland Dep't of Natural Resources v. Amerada Hess Corp.*, 350 F. Supp. 1060, 1066-67 (D. Md. 1972). In *Amerada Hess*, an admiralty action was brought seeking recovery of compensatory damages and abatement costs incurred in an oil spill cleanup. See id. at 1062. In holding that plaintiff had a viable common-law action, the court rejected defendant's legislative deference argument, observing that

[i]t was not directed to and indeed is unaware of any rule of law which holds that the power of a state to legislate concerning a given matter precludes the state from bringing a common law suit to accomplish the same purpose and to redress the same wrong which a statute might seek to correct. This result would violate common sense; for if a state in order to best serve the public interest has the power to legislate regarding a given subject matter, does it not follow that the state also has the inherent power to protect the public welfare by bringing common law suits which seeks to attain the same result as

Id. at 1066-67; cf. *Kelly v. Gwinnell*, 96 N.J. 538, 552, 476 A.2d 1219, 1226 (1984) (in imposing common law liability on social host in action arising out of drunken driving accident, court rejects legislative deference argument, noting that "[d]eterminations of the scope of duty in negligence cases has traditionally been a function of the judiciary").

the courts in common law cost recovery actions.\textsuperscript{198}

Although this Note takes the position that common law theories of recovery should be expanded to encompass most, if not all, disaster response cost claims, to present a complete treatment of the issue, an alternative statutory basis for recovery must be discussed. Use of a statute or regulation to impose liability on tortfeasors for disaster response costs is considered an exception to the general rule that proscribes tortfeasor liability.\textsuperscript{199} A related exception provides that liability can be imposed in order to "effect the intent of federal legislation."\textsuperscript{200} This latter exception arguably gives a potential plaintiff latitude to build an argument for imposing liability, as many areas of activity that have the potential for causing major disasters already are regulated heavily. Activities such as handling toxic substances or hazardous wastes,\textsuperscript{201} nuclear power generation\textsuperscript{202} and petroleum product transportation\textsuperscript{203} fall within this heavily regulated category.

The exception\textsuperscript{204} also applies to state statutes. In addition to state hazardous substance\textsuperscript{205} and oil spill cleanup liability statutes,\textsuperscript{206} state statutes...
uates exist that impose response cost liability for negligent or intentional setting of forest fires.207 Furthermore, at least one state has enacted a disaster response cost recovery statute which is not limited solely to firefighting costs, but encompasses disaster response costs generally.208

Although there are both advantages and disadvantages to the use of statutes for the imposition of liability,209 legislative bodies at all levels of government would be well advised to consider passing disaster response cost liability legislation to protect against the adverse financial effects210 of future man-made disasters. While awaiting the passage of such response cost recovery legislation, recognition by the courts of common law liability would avoid the problem of the remediless plaintiff who is


207. See, e.g., Alaska Stat. § 41.15.160 (1983) (imposing double civil damages in addition to other criminal penalties).

208. See Va. Code Ann. § 44-146.18:1 (1986). The statute establishes a Disaster Response Fund, and authorizes the administrator of the Fund to "promptly seek reimbursement from any person causing or contributing to an emergency or disaster for all sums disbursed from the fund for the protection, relief and recovery from loss or damage caused by such person." Va. Code Ann. § 44-146.18:1(3) (1986); cf. Cal. Gov't Code § 53150 (West Supp. 1987) (imposing liability for expense of emergency response by a public agency to incident caused by negligent operation of motor vehicle by person under influence of alcohol or drugs); Cal. Gov't Code § 53151 (West Supp. 1987) (imposing liability for expense of emergency response by public agency to incident caused by negligent operation of boat or vessel by person under influence of alcohol or drugs); Cal. Gov't Code § 53152 (West Supp. 1987) (imposing liability for expense of emergency response by public agency to incident caused by negligent operation of civil aircraft by person under influence of alcohol or drugs).


210. See supra note 23 and accompanying text.
harmed in a jurisdiction lacking such legislation.211

CONCLUSION

The American tort system is based on the principle that one generally is liable for harm proximately caused. Among the costs to society of negligently caused disasters are those expenses incurred during emergency response efforts. These response efforts frequently not only save human lives, but also mitigate damages both to society and to the tortfeasor or his business or property. The common law provides ample grounds on which to base liability for response costs when legislation imposing liability is not already in place. It is only equitable that liability for the cost of emergency response services be imposed directly on those responsible in order to account for the true cost of accidents.

David C. McIntyre

211. Cf. People Express Airlines v. Consolidated Rail Corp., 100 N.J. 246, 259 n.2, 495 A.2d 107, 114 n.2 (1985) ("Absent forthcoming remedies from our coordinate branches of government, it would seem to serve justice better for a court of law to fashion a remedy in a particular case, and perhaps be corrected by the legislature, than for innocent victims to have no redress at all.").