

1987

Tortfeasor Liability for Disaster Response Costs: Accounting for the True Cost of Accidents

David C. McIntyre

Follow this and additional works at: <https://ir.lawnet.fordham.edu/flr>



Part of the [Law Commons](#)

Recommended Citation

David C. McIntyre, *Tortfeasor Liability for Disaster Response Costs: Accounting for the True Cost of Accidents*, 55 Fordham L. Rev. 1001 (1987).

Available at: <https://ir.lawnet.fordham.edu/flr/vol55/iss6/6>

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Law Review by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.

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.¹ Shortly after takeoff, the passenger jet struck the 14th Street/Rochambeau Bridge and crashed into the Potomac River.² Seventy-eight people were killed.³ 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.⁴ The crash apparently was due to Air Florida's failure to properly de-ice the wings of the aircraft before takeoff.⁵ In an action subsequently brought by the District of Columbia to recover these costs from Air Florida,⁶ the Court of Appeals for the District of Columbia Circuit followed established precedent⁷ and affirmed the trial court's dismissal of the complaint⁸ with the result that the District of Columbia taxpayers were left paying for the entire cost of the disaster response services.⁹

Man-made disasters¹⁰ such as the Air Florida crash unfortunately oc-

1. See N.Y. Times, Jan. 14, 1982, at A1, col. 6.

2. District of Columbia v. Air Fla., Inc., 750 F.2d 1077, 1079 (D.C. Cir. 1984).

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 5, 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.

5. See N.Y. Times, Aug. 11, 1982, at A16, col. 2.

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.

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.").

For further reading in the expanding field of disaster studies, see *Man and Society in Disaster* (G. Baker & D. Chapman eds. 1962) (basic reference work in the field of disaster studies); P. May & W. Williams, *Disaster Policy Implementation: Managing Programs under Shared Governance* (1986) (focusing on the intergovernmental implementation of selected emergency management programs on the federal and state levels); R. Perry, *Comprehensive Emergency Management: Evacuating Threatened Populations* (1985) (focusing in particular on the evacuation aspect of disasters); R. Perry & A. Mushkatel, *Disaster Management* (1984) (contemporary study of man-made and natural disasters and their socioeconomic effects); *Emergency Management: A Challenge for Public Administration*, 45 *Pub. Admin. Rev.* (1985) (special issue entirely devoted to the topic of emergency management).

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,¹² the potential for serious disasters increases.¹³ Bhopal,¹⁴ Three Mile Island,¹⁵ the Sandoz Rhine River contamination,¹⁶ and Mexico City's gas explosion¹⁷ 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,¹⁸ building collapses,¹⁹ toxic chemical spills and releases,²⁰ fires and explosions,²¹ and dam collapses²² that may affect fewer numbers of

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); Kasperon & 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.1.

14. See N.Y. Times, Dec. 4, 1984, at A1, col. 6 (initial report on gas leak at Union Carbide's Bhopal, India chemical plant).

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); McFadden, *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 phosphorous 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. Ruddy*, 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.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.²⁴ The costs incurred²⁵ by government response units during a disaster are exact-

that resulted in \$1 billion loss to surrounding communities and the death of 11 persons). See generally P. May & W. Williams, *supra* note 10, at 81-92 (chapter devoted to issue of dam safety mobilization).

23. See Settle, *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."); 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"). 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, *Our Hazardous Environment*, in *Environment* 20:7, 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)).

24. See *America Burning*, *supra* note 12, at 18-20 (1973) (discussing the diversity of fire-fighting service organizations in the United States); see also Drabek, *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. See R. Perry, *supra* note 10, at 6.

25. Substantial amounts have been sought in various response cost recovery actions. See, e.g., *Wyandotte Transp. Co. v. United States*, 389 U.S. 191, 195 (1967) (\$3,081,000 to raise sunken barge containing large amounts of a toxic substance); *District of Columbia v. Air Fla., Inc.*, 750 F.2d 1077, 1079 (D.C. Cir. 1984) (over \$750,000 in airplane crash response costs); *City of Flagstaff v. Atchison, T. & Santa Fe Ry.*, 719 F.2d 322, 323 (9th Cir. 1983) (\$41,954.81 in evacuation and related costs); *Town of East Troy v. Soo Line R.R.*, 653 F.2d 1123, 1126 (7th Cir. 1980) (\$543,000 in water pollution abatement costs), *cert. denied*, 450 U.S. 922 (1981); *United States v. Denver & R. G. W. R.R.*, 547 F.2d 1101, 1104 (10th Cir. 1977) (\$22,514.28 in direct fire suppression costs and \$5,628.57 in "overhead"); *United States v. Boone*, 476 F.2d 276, 277 (10th Cir. 1973) (\$31,475.11 for fire suppression and property damage); *United States v. American Oil Co.*, 417 F.2d 164, 170 (5th Cir. 1969) (\$89,676.60 in firefighting services and supplies), *cert. denied*, 397 U.S. 1036 (1970); *United States v. Andrews*, 206 F. Supp. 50, 52 (D. Idaho 1961) (\$24,616.68 for cost of fire suppression and restoration of burned area); *People v. Southern Cal. Edison*, 56 Cal. App. 3d 593, 597, 128 Cal. Rptr. 697, 700 (1976) (\$21,584.19 in fire suppression costs); *People v. Wilson*, 240 Cal. App. 2d 574, 575, 49 Cal. Rptr. 792, 793 (1966) (\$14,772.29 in fire suppression costs); *Mayor of Morgan City v. Jesse J. Fontenot, Inc.*, 460 So. 2d 685, 686-87 (La. Ct. App. 1984) (\$38,267.03 for fuel oil fire suppression costs and damage to emergency equipment and city streets); *Brandon Township v. Jerome Builders, Inc.*, 80 Mich. App. 180, 182, 263 N.W.2d 326, 327-28 (1977) (balance of \$15,431.96 for emergency dam repair costs); *Department of Env'tl. Protection v. Arlington Warehouse*, 203 N.J. Super. 9, 12, 495 A.2d 882, 884 (App. Div. 1985) (over \$1,200,000 for cleanup of chemical products discharged in fire). Lesser amounts have been sought in a number of other actions. See, e.g., *United States v.*

erated by such factors as an extraordinary amount of labor required to contain the disaster,²⁶ the necessity of purchasing or renting special materials or equipment,²⁷ and damage sustained by emergency service equipment during response efforts.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.²⁹ This rule may not be the most equitable solution to the problem, however, especially in modern society. Due to a number of factors,³⁰ including recent cuts in federal revenue-sharing programs,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).

26. *See, e.g.*, *City of Flagstaff v. Atchison, T. & Santa Fe Ry.*, 719 F.2d 322, 323 (9th Cir. 1983) (overtime pay); *Pennsylvania v. General Pub. Utils. Corp.*, 710 F.2d 117, 120 (3d Cir. 1983) (same); *Mayor of Morgan City v. Jesse J. Fontenot, Inc.*, 460 So. 2d 685, 687 (La. Ct. App. 1984) (same); *City of Bridgeton v. B.P. Oil, Inc.*, 146 N.J. Super. 169, 171, 369 A.2d 49, 50 (Law Div. 1976) (same); Brief for Appellant at 6 n.2, *District of Columbia v. Air Fla., Inc.*, 750 F.2d 1077 (D.C. Cir. 1984) (No. 84-5041) (extensive overtime and holiday pay). Obviously, with a volunteer fire department or other volunteer response agency, such costs would not be incurred.

27. *See, e.g.*, *City of Flagstaff v. Atchison, T. & Santa Fe Ry.*, 719 F.2d 322, 323 (9th Cir. 1983) (purchase of food for evacuated residents); *Pennsylvania v. General Pub. Utils. Corp.*, 710 F.2d 117, 120 (3d Cir. 1983) (emergency purchases required in responding to nuclear incident); *United States v. American Oil Co.*, 417 F.2d 164, 166 (5th Cir. 1969) (over \$35,000 worth of chemical foam used in extinguishing ship fire), *cert. denied*, 397 U.S. 1036 (1970); *Mayor of Morgan City v. Jesse J. Fontenot, Inc.*, 460 So. 2d 685, 686 (La. Ct. App. 1984) (\$9,720.00 for chemical foam used in fighting fire); *City of Bridgeton v. B.P. Oil, Inc.*, 146 N.J. Super. 169, 171, 369 A.2d 49, 50 (Law Div. 1976) (special chemicals and equipment purchased in response to oil spill); Brief for Appellant at 7 n.2, *District of Columbia v. Air Fla., Inc.*, 750 F.2d 1077 (D.C. Cir. 1984) (No. 84-5041) (\$85,000 for rental of special equipment, primarily cranes, to raise airplane wreckage from river).

28. *See, e.g.*, *United States v. Chesapeake & O. Ry.*, 130 F.2d 308, 309 (4th Cir. 1942) (some firefighting equipment destroyed in suppressing forest fire); *Mayor of Morgan City v. Jesse J. Fontenot, Inc.*, 460 So. 2d 685, 686 (La. Ct. App. 1984) (damaged fire trucks, damaged and lost fire equipment and nozzles, and damaged electrical equipment); Complaint of the District of Columbia, filed July 21, 1983, ¶ 8, *quoted in* Brief for Appellee at 5, *District of Columbia v. Air Fla., Inc.*, 750 F.2d 1077 (D.C. Cir. 1984) (No. 84-5041) (equipment damaged in air crash response operation).

29. *See infra* notes 40-66 & 124 and accompanying text.

30. One factor is the erosion of the principle of sovereign immunity that has proven costly to local governments because of the increase in successful liability suits. *See International City Management Ass'n*, 1985 Municipal Yearbook 71 (1985); Kusler, *Liability as a Dilemma for Local Managers*, 45 Pub. Admin. Rev. 118, 119-20 (1985).

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. *See International City Management Ass'n*, 1986 Municipal Yearbook 63 (1986); *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).

31. *See Herbers, States Act to Give Localities More Power to Collect Taxes*, N.Y.

budgets.³² 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.³³ 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.³⁴ 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.³⁵ In addition, several other theories of recovery such as the public trust doctrine³⁶ and strict liability for abnormally dangerous activities³⁷ 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.³⁸ Part I discusses the traditional rule

Times, Feb. 9, 1987, at A14, col. 2 (reporting that since 1986 when Congress eliminated general revenue sharing, which had provided \$4 billion a year to cities and counties, many local governments have desperately been seeking new ways to finance basic public services).

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.

36. See *District of Columbia v. Air Fla., Inc.*, 750 F.2d 1077, 1080-86 (D.C. Cir. 1984). For a full discussion of the public trust doctrine, see *infra* notes 145-64 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 tortfeasors³⁹ 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: Nuclear 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) (aircrash 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., *Allenton 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.

texts such as toxic chemical spills,⁴² airline crashes,⁴³ and power failures.⁴⁴ This traditional rule is said to be justified for a variety of rea-

1984) (denying recovery of fire suppression costs in absence of authorizing statute); *Town of Freetown v. New Bedford Wholesale Tire, Inc.*, 384 Mass. 60, 61-62, 423 N.E.2d 997, 997-98 (1981) (denying recovery of fire-fighting costs on private land); *Town of Howard v. Soo Line R.R.*, 63 Wis. 2d 500, 503, 217 N.W.2d 329, 330 (1974) (noting defendant's argument that in the absence of statute, no recovery for fire suppression services).

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).

43. *See, e.g.*, *District of Columbia v. Air Fla., Inc.*, 750 F.2d 1077, 1080 (D.C. Cir. 1984) (denying recovery of costs incurred by government in response to air crash).

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:

[t]he 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.⁴⁵ 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.⁴⁶

For instance, in *City of Bridgeton v. B.P. Oil, Inc.*,⁴⁷ a New Jersey court denied recovery⁴⁸ 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 cost 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 exercise of 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 "[fire] 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 Dep't 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.

47. 146 N.J. Super. 169, 369 A.2d 49 (Law Div. 1976).

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.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,⁵⁰ the court held that fire suppression efforts "remain[] an area where the people as a whole absorb the cost"⁵¹ despite the existence of user charges for certain other government services.⁵²

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.*

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.

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.*

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,⁵³ citizens also have a duty not to act negligently or recklessly and thereby cause harm to others.⁵⁴ It can be argued that one who creates an emergency situation has an affirmative duty both to aid the victims and to minimize damages,⁵⁵ and if the government responds to the emergency, it assumes the tortfeasor's duty.⁵⁶

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.⁵⁷ 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.⁵⁸

B. *Settled Expectations*

In *City of Flagstaff v. Atchison, Topeka & Santa Fe Railway*,⁵⁹ involving the derailment of railroad tank cars carrying liquified gas,⁶⁰ 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.

53. See U.S. Const. preamble (function of government is to "promote the general welfare"); see also *Town of East Troy v. Soo Line R.R.*, 653 F.2d 1123, 1127-32 (7th Cir. 1980) (local government obligated to provide for health, safety and welfare of its citizens), *cert. denied*, 450 U.S. 922 (1981); *City of Bridgeton v. B.P. Oil, Inc.*, 146 N.J. Super. 169, 178-79, 369 A.2d 49, 54-55 (Law Div. 1976) (same).

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.⁶¹ Applying the rule set forth in *City of Bridgeton*,⁶² the *City of Flagstaff* court observed that the imposition of liability would disrupt the "settled expectations" of businesses and individuals.⁶³ 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.⁶⁴ Although acknowledging that in some instances the disruption of such expectations is justified,⁶⁵ 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."⁶⁶

There are a number of counter-arguments, equally grounded in considerations of policy, that can be made against the settled expectations ra-

61. *See id.* To protect the public from the danger of leakage or explosion, plaintiff's fire department ordered that all persons within a certain distance from the scene of the derailment be evacuated. The expense to the city for the evacuation, including overtime wages, emergency equipment, emergency medical personnel, and food provided to evacuated residents, was \$41,954.81. *See id.*

62. 146 N.J. Super. 169, 178-80, 369 A.2d 49, 54-55 (Law Div. 1976).

63. *City of Flagstaff*, 719 F.2d at 323. The court noted that "[e]xpectations of both business entities and individuals, as well as their insurers, would be upset substantially were we to adopt the rule proposed by the city." *Id.*

64. *See id.* In denying recovery, the court reasoned that because a "fair and sensible system for spreading the costs of an accident [was] already in place," the argument for the imposition of the new liability was "not so compelling" as to justify disrupting settled expectations. *See id.* The court noted a number of exceptions to the rule against common law liability. *See id.* at 324. Oddly, the court concluded that "[t]hese [exception] cases fall into distinct, well-defined categories unrelated to the normal provision of police, fire, and emergency services, and none are applicable here." *Id.* at 324. If the court meant that emergency services were not involved in any of the cases it cited, it was clearly incorrect; at least one of the cases it cited involved a fire—undeniably an emergency situation. However, if the court meant that liability cannot be imposed for the "normal" as opposed to "abnormal" or extraordinary use of the services, then it should have ruled in favor of liability, since plaintiff in *City of Flagstaff* was seeking to recover the expenses incurred during the excessive, as opposed to the normal, use of its fire department.

65. *See id.* at 323. The Court of Appeals for the Ninth Circuit observed that [s]ettled expectations sometimes must be disregarded where new tort doctrines are required to cure an unjust allocation of risks and costs. The argument for the imposition of the new liability is not so compelling, however, where a fair and sensible system for spreading the costs of an accident is already in place, even if the alternate scheme proposed might be a more precise one.

Id. (citations omitted) (emphasis added).

66. *Id.*; see also *District of Columbia v. Air Fla., Inc.*, 750 F.2d 1077, 1080 (D.C. Cir. 1984). In *Air Florida*, the court rejected liability for disaster response costs, observing that

[w]here emergency services are provided by the government and the costs are spread by taxes, the tortfeasor does not anticipate a demand for reimbursement. Although settled expectations must sometimes be disregarded when new tort doctrines are needed to remedy an inequitable allocation of risks and costs, where a generally fair system for spreading the costs of accidents is already in effect . . . we do not find the argument for judicial adjustment of liabilities to be compelling.

Id. (emphasis added).

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.⁶⁷ The increasing severity, frequency and complexity of modern disasters⁶⁸ has led to unpredictable, and often extraordinary outlays of local tax dollars⁶⁹ 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 disasters⁷¹ such as airline crashes⁷² 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"⁷⁴ 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.⁷⁵ 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.⁷⁶ 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.⁷⁷

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 disasters⁷⁸ which, by definition, largely are

74. *City of Bridgeton v. B.P. Oil, Inc.*, 146 N.J. Super. 169, 179, 369 A.2d 49, 54 (Law Div. 1976).

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.

Brief of Appellant at 14-15, *Pennsylvania v. General Pub. Utils. Corp.*, 710 F.2d 117 (3d Cir. 1983) (No. 82-3421) (emphasis in original) (footnote omitted).

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.

unanticipated.⁷⁹ A cost allocation system allowing for recovery of extraordinary costs from the negligent tortfeasor thus would achieve not only a "more precise"⁸⁰ result, but a more "fair and sensible"⁸¹ one as well.⁸²

At the root of arguments in favor of liability are principles of equitable cost allocation and risk distribution.⁸³ 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.⁸⁴ 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.⁸⁵ This de-

79. See B. Brown, *supra* note 69, at 6.

80. *City of Flagstaff v. Atchison, T. & Santa Fe Ry.*, 719 F.2d 322, 323-24 (9th Cir. 1983).

81. *District of Columbia v. Air Fla., Inc.*, 750 F.2d 1077, 1080 (D.C. Cir. 1984).

82. A defendant may argue that because a particular jurisdiction has allowed, or even encouraged, a particular activity or business to be carried on within its borders, the risk of disaster has essentially been assumed. However, while a local government may encourage certain businesses to be carried on within its borders, it is reasonable for the local residents to expect that those businesses will be responsible and not negligent.

83. See generally G. Calabresi, *The Costs of Accidents: A Legal and Economic Analysis* (1970) [hereinafter Calabresi I] (classic work on theory of risk distribution and equitable cost allocation); Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 *Yale L.J.* 499 (1961) [hereinafter Calabresi II] (application of risk distribution theories to the law of torts); Coase, *The Problem of Social Cost*, 3 *J. Law & Econ.* 1 (1960) (development of the "Coase Theorem" of internalization of social costs).

For a short history of the growth of literature in the field of economic analysis of law, from which the risk distribution theory derives, see R. Posner, *Economic Analysis of Law* 19-20 (3d ed. 1986).

84. See Calabresi I, *supra* note 83, at 39-67; see also *People Express Airlines v. Consolidated Rail Corp.*, 100 N.J. 246, 255, 495 A.2d 107, 111 (1985) (noting that the fundamental policies of tort law are served by the shifting of risk of loss and associated costs of dangerous activities to those best able to bear them). The theory seeks to internalize the social costs of doing business because, as Professor Calabresi points out, "[n]ot charging an enterprise with a cost which arises from it leads to an understatement of the true cost of producing its goods . . ." Calabresi II, *supra* note 83, at 514.

85. See *In re TMI Litig. Gov't Entities Claims*, 544 F. Supp. 853, 856-58 (M.D. Pa. 1982) (plaintiff's claim for civil defense expenses and excessive government employee's wages are pure economic losses, not compensable without personal injury or property damage, neither of which plaintiff had alleged), *aff'd in part, vacated, and remanded in part sub nom. Pennsylvania v. General Pub. Utils. Corp.*, 710 F.2d 117 (3d Cir. 1983). *But see People Express Airlines v. Consolidated Rail Corp.*, 100 N.J. 246, 251-60, 263, 495 A.2d 107, 109-14, 116 (1985) (allowing recovery of economic losses suffered during an emergency and discussing at length the history of the rule in tort regarding economic loss).

fense is sometimes based on the Restatement (Second) of Torts § 766C, which denies tort liability for pure economic losses.⁸⁶ 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.⁸⁷ 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 damaged⁸⁸ or threatened with damage.⁸⁹

In addition to "parasitic loss" cases, courts have allowed recovery of economic loss in tort, despite the absence of any physical harm to plaintiff.⁹⁰ For example, in *People Express Airlines v. Consolidated Rail Corp.*,⁹¹ plaintiff brought an action to recover lost sales and profits resulting from defendant's negligently caused disaster.⁹² 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.⁹³ The court carefully limited this liability to those plaintiffs

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. Utils. 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, 973-74 (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.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.”⁹⁵

Finally, prospects for recovery of economic loss in tort, even in the absence of “physical harm” as currently defined, are improving, as recent criticism⁹⁶ has been directed at the strained distinctions made between

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.

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, § 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 *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).

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 [(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 “economic 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.⁹⁷ This argument is two-fold. First is the “floodgates” argument that the courts will be overcome with litigation if a new area of tort liability is recognized.⁹⁸ Second is the fear of liability for damages disproportionate to defendant’s fault.⁹⁹

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.¹⁰⁰ Common every-day accidents would not trigger liability because such accidents are within the zone of risk anticipated by response services.¹⁰¹ For instance, although residential fires and car accidents are encompassed by this zone of risk, accidents of disaster proportions such as major airline crashes, railroad derailments, toxic waste spills and similar emergencies are not.¹⁰²

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.¹⁰³ In addition, courts always have required that any disaster response costs awarded be “necessary and

of relatively recent origin. Tort law and its definitions are of a constantly evolving nature.” *Id.* at 650.

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

98. *Cf.* *Sinn v. Burd*, 486 Pa. 146, 162, 404 A.2d 672, 680 (1979) (in bystander mental 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 A.2d 672, 680-81 (1979).

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 responding 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 Natural 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 sustained 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 causation to the facts of each case.” *Id.* (citation omitted); *see also* *Union Oil Co. v. Oppen*, 501

reasonable."¹⁰⁴

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.¹⁰⁵ 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.¹⁰⁶ These include costs incurred during the abatement of a public nuisance¹⁰⁷ and those incurred in the protection of the government's own property.¹⁰⁸ In addition, at least one court has articulated a basis of recovery derived from the public trust doctrine,¹⁰⁹ 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.¹¹⁰ 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 negligence¹¹¹ if the defendant owed a duty of due care to the plaintiff,¹¹² if the defendant breached that duty,¹¹³ and if the breach was

F.2d 558, 568-70 (9th Cir. 1974) (limiting liability for economic losses arising from oil spill through use of foreseeability principles).

104. See *Town of East Troy v. Soo Line R.R.*, 653 F.2d 1123, 1132 (7th Cir. 1980), cert. denied, 450 U.S. 922 (1981); *Chesapeake & O. Ry. v. United States*, 139 F.2d 632, 633 (4th Cir. 1944); *People v. Southern Cal. Edison Co.*, 56 Cal. App. 3d 593, 605, 128 Cal. Rptr. 697, 705 (1976).

105. See, e.g., *United States v. P/B STCO 213*, 756 F.2d 364, 368 (5th Cir. 1985) (six year quasi-contract statute of limitations); *People v. Wilson*, 240 Cal. App. 2d 574, 578, 49 Cal. Rptr. 792, 795 (1966) (claim for fire suppression costs barred by 2-year contract statute of limitations).

106. See *supra* note 35.

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

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

109. See *District of Columbia v. Air Fla., Inc.*, 750 F.2d 1077, 1080-86 (D.C. Cir. 1984).

110. An action solely for the recovery of emergency response costs from negligent tortfeasors seems to be one with little or no precedent in most jurisdictions. See *District of Columbia v. Air Fla., Inc.*, 750 F.2d 1077, 1079 & n.4 (D.C. Cir. 1984) (case of first impression); *City of Flagstaff v. Atchison, T. & Santa Fe Ry.*, 719 F.2d 322, 323 (9th Cir. 1983) (same); see also *City of Pittsburgh v. Equitable Gas Co.*, ___ Pa. Commw. ___, ___, 512 A.2d 83, 84 (1986) (noting the "limited case law" on the issue), *petition denied*, 520 A.2d 1386 (1987).

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.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.¹¹⁵ In addition, the need for emergency services in the event of a negligently caused disaster certainly is proximately caused by the tortfeasor.¹¹⁶

involves the weighing of numerous factors. For instance, in *Vu v. Singer Co.*, 538 F. Supp. 26 (N.D. Cal. 1981), *aff'd*, 706 F.2d 1027 (9th Cir.), *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, *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. *See* Restatement (Second) of Torts § 282 (1965); Prosser & Keeton, *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. *See id.* at 51-52.

114. *See* Prosser & Keeton, *supra* note 40, § 41, at 563-64, § 42, at 272-73.

115. *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 public funds because of pollution of an interstate waterway by acts done in another state") (emphasis added), *cert. denied*, 444 U.S. 1025 (1980); *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"), *aff'd in part, vacated, and remanded in part sub nom.* *Pennsylvania v. General Pub. Utils. Corp.*, 710 F.2d 117 (3d Cir. 1983); *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) ("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. *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"); *see also* Brief of Appellant at 31, *Pennsylvania v. General Pub. Utils. 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.¹¹⁷ Plaintiffs assert that the injury sustained in response cost litigation is depletion of tax resources through the "excessive" or "extraordinary" use of governmental services.¹¹⁸ Although courts traditionally have held that economic loss in the absence of physical harm generally is not recoverable in tort,¹¹⁹ there are sound reasons for holding otherwise.¹²⁰ 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.¹²¹

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 principles¹²² to impose, rather than to deny, liability for the cost of responding to that disaster.¹²³ The expansion of the scope of negligence liability to include disaster response costs admittedly alters the common law,¹²⁴ yet the

quired to respond to a nuclear accident is likewise an indisputably foreseeable risk of the operation of a nuclear power plant . . .").

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 532, 356 N.E.2d 561 (1976).

119. See *In re TMI Litig. Gov't Entities Claims*, 544 F. Supp. 853, 857 (M.D. Pa. 1982), *aff'd in part, vacated, and remanded in part sub nom. Pennsylvania v. General Pub. Utils. Corp.*, 710 F.2d 117 (3d Cir. 1983); see also Restatement (Second) of Torts § 766C & comment b (1979) (no recovery for pure economic loss suffered as a result of interference in contractual relations with third parties).

120. See *supra* notes 90-96 and accompanying text (discussing the issue of recovery of economic loss in the absence of any physical injury).

121. See *People Express Airlines v. Consolidated Rail Corp.*, 100 N.J. 246, 267, 495 A.2d 107, 118 (1985).

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 overarching purpose of tort law: that wronged persons should be compensated for their injuries and 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)).

124. Recovery of disaster response costs on a theory of negligence generally has been denied. See *District of Columbia v. Air Fla., Inc.*, 750 F.2d 1077, 1078 (D.C. Cir. 1984); *City of Flagstaff v. Atchison, T. & Santa Fe Ry.*, 719 F.2d 322, 323 (9th Cir. 1983); *State v. Long Island Lighting Co.*, 493 N.Y.S.2d 255, 256-57, 129 Misc. 2d 371, 372-73 (Nassau County Ct. 1985); *City of Pittsburgh v. Equitable Gas Co.*, — Pa. Commw. —, —, 512 A.2d 83, 84 (1986), *petition denied*, 520 A.2d 1386 (1987). *But see United States v.*

change is neither drastic nor without compelling policy and legal reasons supporting it.¹²⁵

Critics of the traditional rules regarding liability for disasters have raised the issue of deterrence.¹²⁶ 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.¹²⁷ 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.¹²⁸

B. *Public Nuisance Abatement Theory of Recovery*

Courts recognize that the government can recover response costs in-

Denver & R. G. W. R.R., 547 F.2d 1101, 1104 (10th Cir. 1977) (allowing recovery in negligence for fire suppression costs expended in protecting U.S. government property); *United States v. Chesapeake & O. Ry.*, 130 F.2d 308, 310 (4th Cir. 1942) (imposing liability on basis of statute and in negligence for costs of fire-fighting services used to protect national forest); *United States v. Andrews*, 206 F. Supp. 50, 52 (D. Idaho 1961) (imposing liability in negligence for costs incurred in suppressing fire in national forest).

125. Courts in the past have not hesitated to alter traditional rules of tort liability when there were strong public policy reasons to do so. *See, e.g.*, *Greenman v. Yuba Power Prods., Inc.*, 59 Cal. 2d 57, 63, 377 P.2d 897, 901, 27 Cal. Rptr. 697, 701 (1963) (adopting theory of strict liability for defective products on public policy grounds); *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 388-91, 111 N.E. 1050, 1052-54 (1916) (abolishing privity bar to liability for defective products due to societal changes). Duty is an evolving concept. *See Prosser & Keeton, supra* note 40, § 53, at 359 ("Changing social conditions lead constantly to the recognition of new duties. No better general statement can be made than that the courts will find a duty where, in general, reasonable persons would recognize it and agree that it exists.") (footnote omitted).

126. This criticism has come from courts, *see People Express Airlines v. Consolidated Rail Corp.*, 100 N.J. 246, 266, 495 A.2d 107, 117 (1985) ("[A]n underlying policy of the negligence doctrine [is that] imposition of liability should deter negligent conduct by creating incentives to minimize the risks and costs of accidents."), and commentators, *see Weinstein, supra* note 11, at 42; *User Charges, supra* note 51, at 971-93; *see also Calabresi I, supra* note 83, at 26-27; R. Posner, *supra* note 83, at 187;

127. *See User Charges, supra* note 51, at 987-88. The commentator bases his argument for the levying of emergency service user fees primarily on a deterrence rationale. *See id.* at 972-73. A major problem with this reasoning, however, is that it uses a model comparing the exercise of due care by a mountain climber with and without "user charges" for emergency rescue services. *See id.* at 988-91. The analogy is inapplicable to the negligent tortfeasor emergency situation because a mountain climber is primarily concerned with his *own personal safety* and not with profit margins or future economic losses. It also is questionable at best whether anyone would take less care for their own personal safety in the absence of liability for rescue services than they would were there to be such liability. In contrast, in the corporate world, monetary deterrence can have real impact on the day-to-day decisions made by businessmen acting in their companys' best economic interests.

128. Thus, imposition of liability for such costs, in all likelihood, would add little or no additional deterrence to negligent conduct beyond that which already exists.

An additional problem with the deterrence rationale in general is raised by Judge Weinstein: "The prospect of huge tort recoveries, of course, can be a strong factor in inducing large responsible manufacturers to exercise care. But the threat is unlikely to have any significant effect on thinly capitalized, 'fly by night' operators who may be responsible for a disproportionate number of disasters." Weinstein, *supra* note 11, at 42.

curred during the abatement of a public nuisance.¹²⁹ A public nuisance is defined as an "unreasonable interference with a right common to the general public."¹³⁰ Some courts recently have expanded the concept of public nuisance to include activities interfering with aesthetic values or natural resources.¹³¹ There also is a growing recognition by federal courts of suits by government plaintiffs under the federal common law of nuisance.¹³² These trends arguably allow room for the expansion of lia-

129. See *City of Flagstaff v. Atchison, T. & Santa Fe Ry.*, 719 F.2d 322, 324 (9th Cir. 1983) (dictum); *United States v. Illinois Terminal R.R.*, 501 F. Supp. 18, 21 (E.D. Mo. 1980); *State v. Ventron Corp.*, 94 N.J. 473, 493, 468 A.2d 150, 160 (1983); see also *City of Evansville v. Kentucky Liquid Recycling, Inc.*, 604 F.2d 1008, 1017-19 (7th Cir. 1979) (allowing recovery of toxic chemical spill abatement costs under federal common law of nuisance), *cert. denied*, 444 U.S. 1025 (1980).

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, 1158 (Law Div. 1980) (citing *Askew v. American Waterways Operations, Inc.*, 411 U.S. 325 (1973)).

The existence of such public nuisance abatement statutes raises questions of preemption of common law nuisance. See *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).

130. 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.*

131. See, e.g., *State ex rel. Dresser Indus. v. Ruddy*, 592 S.W.2d 789, 793 (Mo. 1980) (en banc) (noting "growing tendency 'to treat significant interferences with recognized aesthetic values or established principles of conservation of natural resources as amounting to a public nuisance.'") (quoting the Restatement (Second) of Torts § 821B comment e at 91 (1979)); see also *State v. Pankey*, 441 F.2d 236, 240 (10th Cir. 1971) (recognizing the "ecological rights" of a state pursuant to federal common law).

In *Georgia v. Tennessee Copper Co.*, 206 U.S. 230 (1907), in an opinion written by Justice Holmes, the Supreme Court held that a state has a right to sue in its quasi-sovereign capacity for injuries such as public nuisances because "[i]n that capacity the State has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain. It has the last word as to whether its mountains shall be stripped of their forests and its inhabitants shall breathe pure air." *Id.* at 237.

132. See *United States v. Illinois Terminal R.R.*, 501 F. Supp. 18, 21 (E.D. Mo. 1980); see also *Georgia v. Tennessee Copper Co.*, 206 U.S. 230 (1907) (enjoining foreign state

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.¹³³ 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.¹³⁴ 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,¹³⁵ and toxic chemical spills, in which recovery at common law is denied,¹³⁶ is difficult to justify or understand.

corporations from discharging air pollution over state territory under federal common law of nuisance); *City of Evansville v. Kentucky Liquid Recycling, Inc.*, 604 F.2d 1008, 1019 (7th Cir. 1979) (recognizing cause of action under federal common law of nuisance for recovery of costs incurred due to defendant's discharges of toxic chemicals into drinking water supply), *cert. denied*, 444 U.S. 1025 (1980). *But see* *Pennsylvania v. General Pub. Utils. Corp.*, 710 F.2d 117, 121-22 (3d Cir. 1983) (refusing to adopt federal common law theory of nuisance as basis for recovery of response costs).

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).

Equitable remedies as well as damages are recoverable under the federal common law of nuisance. *See* *City of Evansville v. Kentucky Liquid Recycling, Inc.*, 604 F.2d 1008, 1019 (7th Cir. 1979), *cert. denied*, 444 U.S. 1025 (1980); *United States v. Illinois Terminal R.R.*, 501 F. Supp. 18, 21 (E.D. Mo. 1980).

133. *See* *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 categorical 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.

135. *See, e.g.*, *State v. Arlington Warehouse*, 203 N.J. Super. 9, 14-15, 495 A.2d 882, 885 (App. Div. 1985) (recognizing substantive liability at common law and pursuant to statutory authority for cost of cleanup of chemical products discharged in fire).

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.¹³⁷ 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.¹³⁸

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*,¹³⁹ the government brought an action to recover the cost of suppressing a negligently caused fire that threatened a national forest.¹⁴⁰ The Court of Appeals for the Fourth Circuit determined that plaintiff was entitled to relief both under a statute¹⁴¹ and in tort¹⁴² 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.¹⁴³ Courts could expand use of the government property exception because of the

Cir. 1983) (denying recovery at common law for costs incurred in response to emergency created by derailment of four railroad tank cars containing liquified gas).

137. See *United States v. Denver and R. G. W. R.R.*, 547 F.2d 1101, 1104 (10th Cir. 1977); *United States v. Morehart*, 449 F.2d 1283, 1283-84 (9th Cir. 1971); *United States v. Andrews*, 206 F. Supp. 50, 52 (D. Idaho 1961); see also *United States v. Chesapeake & O. Ry.*, 130 F.2d 308, 310 (4th Cir. 1942) (holding defendant liable pursuant to both state statutory authority and common law for expenses reasonably incurred to protect government property). The principle also has been recognized in dicta in numerous cases. See *District of Columbia v. Air Fla., Inc.*, 750 F.2d 1077, 1080 (D.C. Cir. 1984); *City of Flagstaff v. Atchison, T. & Santa Fe Ry.*, 719 F.2d 322, 324 (9th Cir. 1983); *In re TMI Litig. Gov't Entities Claims*, 544 F. Supp. 853, 855 (M.D. Pa. 1982), *aff'd in part, vacated, and remanded in part sub nom. Pennsylvania v. General Pub. Utils. Corp.*, 710 F.2d 117 (3d Cir. 1983); *People v. Wilson*, 240 Cal. App. 2d 574, 576, 49 Cal. Rptr. 792, 794 (1966).

138. See *United States v. Denver and R. G. W. R.R.*, 547 F.2d 1101, 1104 (10th Cir. 1977); *United States v. Boone*, 476 F.2d 276, 278 (10th Cir. 1973); *Department of Transp. v. PSC Resources, Inc.*, 175 N.J. Super. 447, 461, 419 A.2d 1151, 1159 (Law Div. 1980); see also *Prosser & Keeton, supra* note 40, § 2, at 7 (state as the owner of property "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); cf. *State v. Long Island Lighting Co.*, 129 Misc. 2d 371, 373-74, 493 N.Y.S.2d 255, 257 (Nassau County Ct. 1985) (rejecting plaintiff's contention that it was acting as a landowner and thus was entitled to recovery of emergency response costs in diverting traffic from parkway in vicinity of fallen power lines).

139. 130 F.2d 308 (4th Cir. 1942).

140. See *id.* at 309. The fire had burned over 560 acres of privately owned land and had come within 2,500 feet of the national forest. See *id.*

141. See *id.* at 309-10. The statute provided that one who negligently sets a fire is liable for all expenses incurred in fighting the fire. See *id.* at 310.

142. See *id.* at 310.

143. *Id.* The court stated:

Aside from the question of recovery under the statute we are of the opinion that the plaintiff was entitled to relief in tort.

'A person whose legally protected interests have been endangered by the tor-

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 states¹⁴⁷ and typically involve the protection of certain public uses such as navigation, commerce and

tious conduct of another is entitled to recover for expenditures reasonably made or harm suffered in a reasonable effort to avert the harm threatened.'

Id. (citations omitted) (quoting the Restatement of Torts § 919 (1939)) (adopted in substantially the same form in the Restatement (Second) of Torts § 919 (1979)). The legally protected interest in *Chesapeake* was the government's own real property. *See id.* at 310.

The court in *Chesapeake* also held:

Damages for personal injuries received in an attempt to save property menaced by the negligence of another are recoverable from the wrongdoer. The principle of liability for foreseeable consequences, upon which this rule is based, certainly permits the recovery of damages in the form of expenditures incurred in attempting to save property.

Id. (citations omitted).

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 air crash, 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").

It also can be argued that the government is entitled to recover response costs incurred not only in protecting its own property but also in protecting its "quasi-sovereign" interest that is "independent of and behind the titles of its citizens, in all the earth and air within its domain." *Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 237 (1907). The reasoning behind allowing recovery when response costs are incurred to protect the government's own property is analogous to that used with the public trust theory of recovery, discussed *infra* notes 145-64 and accompanying text.

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.¹⁴⁸

Originally, the public trust doctrine was used to restrain a state's power to alienate public trust lands¹⁴⁹ and operated as a limitation on uses interfering with trust purposes.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.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.¹⁵² The public interests protected

146 U.S. 387, 435 (1892); *District of Columbia v. Air Fla., Inc.*, 750 F.2d 1077, 1081 (D.C. Cir. 1984).

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.

149. *See Illinois Central R.R. v. Illinois*, 146 U.S. 387, 453 (1892); *District of Columbia v. Air Fla., Inc.*, 750 F.2d 1077, 1082-83 & n. 26 (D.C. Cir. 1984); *People ex rel. Webb v. California Fish Co.*, 166 Cal. 576, 584, 138 P. 79, 82-83 (1913).

150. *See District of Columbia v. Air Fla., Inc.*, 750 F.2d 1077, 1082-83 & n.27 (D.C. Cir. 1984); *Marks v. Whitney*, 6 Cal. 3d 251, 260, 491 P.2d 374, 380, 98 Cal. Rptr. 790, 796 (1971); *Flisrand v. Madsen*, 35 S.D. 457, 470-71, 152 N.W. 796, 801 (1915).

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, *cert. denied*, 464 U.S. 977 (1983). In *National Audubon*, suit was brought to enjoin the diversion of water from a unique natural lake in California. *Id.* at 424-25, 658 P.2d at 711-12, 189 Cal. Rptr. at 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 doctrine¹⁵⁶ 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

tional Audubon Soc'y v. Superior Ct., 33 Cal. 3d 419, 434, 658 P.2d 709, 719, 189 Cal. Rptr. 346, 356 (observing that "the objective[s] of the public trust doctrine [have] evolved in tandem" with changes in public values), *cert. denied*, 464 U.S. 977 (1983).

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").

For further reading on the public trust doctrine see Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 Mich. L. Rev. 471 (1970); Sax, *Liberating the Public Trust Doctrine from its Historical Shackles*, 14 U.C. Davis L. Rev. 185 (1980); Steven, *The Public Trust: A Sovereign's Ancient Prerogative Becomes the People's Environmental Right*, 14 U.C. Davis L. Rev. 195 (1980); Wilkinson, *The Public Trust Doctrine in Public Land Law*, 14 U.C. Davis L. Rev. 269 (1980); Note, *National Audubon Society v. Superior Court: The Expanding Public Trust Doctrine*, 14 *Env'tl. L.* 617 (1984).

154. 750 F.2d 1077 (D.C. Cir. 1984). The Court of Appeals for the First Circuit also has considered the application of the doctrine in this area. *See Puerto Rico v. SS Zoe Colocotroni*, 628 F.2d 652, 670-71 & n.20 (1st Cir. 1980), *cert. denied*, 450 U.S. 912 (1981).

155. *District of Columbia v. Air Fla. Inc.*, 750 F.2d 1077, 1078 (D.C. Cir. 1984). For further details regarding the Air Florida disaster *see supra* notes 1-5 and accompanying text.

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 at 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.¹⁶² Rather, the court reserved judgment on the viability of the theory as a means of recovery.¹⁶³ 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.¹⁶⁴

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.

164. Closely related to the public trust doctrine is the concept of *parens patriae*. The concept is generally considered one of standing used to protect quasi-sovereign interests such as health, safety and welfare of the people, interstate water rights and the general economy of a state. See *Gibbs v. Titelman*, 369 F. Supp. 38, 54 (E.D. Pa. 1973), *rev'd on other grounds*, 502 F.2d 1107 (3d Cir.), *cert. denied*, 419 U.S. 1039 (1974). Literally, the term means "parent of the country." Black's Law Dictionary 1003 (5th ed. 1979). A *parens patriae* action is appropriate when the state acts to protect a quasi-sovereign interest where no individual cause of action would lie. See *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); *In re Steuart Transp. Co.*, 495 F. Supp. 38, 40 (E.D. Va. 1980); *Hawaii v. Standard Oil Co.*, 301 F. Supp. 982, 986-97 (D. Haw. 1969), *rev'd on other grounds*, 431 F.2d 1282 (9th Cir. 1970), *aff'd*, 405 U.S. 251 (1972).

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).

Although earlier *parens patriae* actions were limited to injunctions, see *New York v. New Jersey*, 256 U.S. 296, 313-14 (1921); *Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 238-39 (1907); *Missouri v. Illinois*, 180 U.S. 208, 248 (1901), more recently, courts have acknowledged that damages also may be recovered. See *Maine v. M/V Tamano*, 357 F. Supp. 1097, 1101-02 (D. Me. 1973); *Maryland Dep't of Natural Resources v. Amerada Hess Corp.*, 350 F. Supp. 1060, 1066-67 (D. Md. 1972); see also *Hawaii v. Standard Oil Co.*, 301 F. Supp. 982, 987 (D. Haw. 1969) (in antitrust action rejecting argument that damages cannot be recovered in a *parens patriae* suit), *rev'd on other grounds*, 431 F.2d 1282 (9th Cir. 1970), *aff'd*, 405 U.S. 251 (1972). For further discussion of *parens patriae* damages actions see Note, *State Protection of its Economy and Environment: Parens Patriae Suits for Damages*, 6 Colum. J.L. & Soc. Probs. 411, 419-21 (1970).

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.¹⁶⁵ In order for this theory to apply, a plaintiff first must demonstrate that the defendant's activity is properly classified as abnormally dangerous.¹⁶⁶ Activities such as operating airlines,¹⁶⁷ transporting hazardous materials or substances,¹⁶⁸ and storing hazardous chemicals,¹⁶⁹ 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.

For some examples of cases that mention the application of this theory in the disaster response context see *City of Flagstaff v. Atchison, T. & Santa Fe Ry.*, 719 F.2d 322, 323, 324 (9th Cir. 1983); *Pennsylvania v. General Pub. Utils. Corp.*, 710 F.2d 117, 120 & nn.3 & 4 (3d Cir. 1983); *City of Bridgeton v. B.P. Oil, Inc.*, 146 N.J. Super. 169, 172-78, 369 A.2d 49, 51-54 (Law Div. 1976).

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.*

168. See *National Steel Serv. Center v. Gibbons*, 693 F.2d 817, 819 (8th Cir. 1982), *cert. denied*, 464 U.S. 814 (1983); *Indiana Harbor Belt Ry. v. American Cyanamid Co.*, 517 F. Supp. 314, 319-20 (N.D. Ill. 1981); *Chavez v. Southern Pac. Transp. Co.*, 413 F. Supp. 1203, 1211 (E.D. Cal. 1976); *Siegler v. Kuhlman*, 81 Wash. 2d 448, 456, 502 P.2d 1181, 1186 (Wash. 1972), *cert. denied*, 411 U.S. 983 (1973). *But see* *EAC Timberlane v. Pisces, Ltd.*, 745 F.2d 715, 721-22 (1st Cir. 1984) (holding that doctrine of strict liability for the miscarriage of ultrahazardous goods does not apply to carrier of goods by sea due to need for uniformity in admiralty law).

169. See *City of Northglenn v. Chevron, U.S.A. Inc.*, 519 F. Supp. 515, 516 (D. Colo. 1981); *State v. Ventron Corp.*, 94 N.J. 473, 492-93, 468 A.2d 150, 159-60 (1983); *State v. Arlington Warehouse*, 203 N.J. Super. 9, 14-15, 495 A.2d 882, 885 (App. Div. 1985); *City of Bridgeton v. B.P. Oil, Inc.*, 146 N.J. Super. 169, 177, 369 A.2d 49, 53-54 (Law Div. 1976); see also *Prosser & Keeton, supra* note 40, § 78, at 549-50 (noting that the principle that "the hazardous enterprise, even though it be socially valuable, must pay its way, and make good the damage inflicted" has been applied to "explosives or inflammable liquids stored in quantity in the midst of a city").

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

170. See Restatement (Second) of Torts § 519(2) (1977); Prosser & Keeton, *supra* note 40, § 79, at 560; see also *Gronn v. Rogers Constr., Inc.*, 221 Or. 226, 230, 350 P.2d 1086, 1088 (1960) (denying recovery for milk farm economic loss allegedly caused by defendant's blasting operations because harm sustained not found to be within general risk presented by defendant's activities).

An important advantage to a plaintiff of the use of the strict liability theory is that it avoids the sometimes insurmountable burden of proving by a preponderance of the evidence that defendant was at fault when the accident obliterates all of the evidence. See, e.g., *Siegler v. Kuhlman*, 81 Wash. 2d 448, 455, 502 P.2d 1181, 1185 (1972) (using this problem of proof in a wrongful death action to justify the imposition of strict liability on defendant gasoline transporter), *cert. denied*, 411 U.S. 983 (1973); see also *National Steel Serv. Center, Inc. v. Gibbons*, 319 N.W.2d 269, 272 (Iowa 1982) (liability imposed for property damages arising from explosion of common carrier's railroad tank car; court observed that "[t]he carrier was in a better position to investigate and identify the cause of the accident. When an accident destroys the evidence of causation, it is fairer for the carrier to bear the cost of that fortuity."). Another alternative to the imposition of strict liability when such problems of proof are presented is the use of *res ipsa loquitur*. See *Reynolds Metals Co. v. Yturbide*, 258 F.2d 321, 329 (9th Cir.) (applying *res ipsa loquitur* in action seeking damages for the deposition of flouride gas on plaintiff's property), *cert. denied*, 358 U.S. 840 (1958); see also *California Dep't of Fish & Game v. S.S. Bourne-mouth*, 318 F. Supp. 839, 841-42 (C.D. Cal. 1970) (cleanup costs for oil spill awarded in admiralty action on basis of *res ipsa loquitur* theory).

171. See *State v. Ventron Corp.*, 94 N.J. 473, 488, 468 A.2d 150, 157 (1983) (mercury pollution); *Department of Transp. v. PSC Resources, Inc.*, 175 N.J. Super. 447, 462-63, 419 A.2d 1151, 1159 (Law Div. 1980) (pollution from waste oil reprocessing and canning facility); *State v. Arlington Warehouse*, 203 N.J. Super. 9, 14-15, 495 A.2d 882, 885 (App. Div. 1985) (toxic chemicals discharged in fire at defendant's warehouse); cf. *Pennsylvania v. General Pub. Utils. Corp.*, 710 F.2d 117, 120 nn.3 & 4 (3d Cir. 1983) (declining to rule on volatile issue of whether operation of a nuclear power plant constitutes an abnormally dangerous activity creating liability for emergency response costs); *Union Oil Co. v. Oppen*, 501 F.2d 558, 563 n.3 (9th Cir. 1974) (declining to reach issue whether defendant's oil drilling activities constituted an ultra-hazardous activity for purposes of liability for oil spill response costs).

172. See, e.g., *In re TMI Litig. Gov't Entities Claims*, 544 F. Supp. 853, 857-58 (M.D. Pa. 1982) (holding that "purely economic losses" are not recoverable on a strict liability theory without a showing that the losses flowed from harm to persons, land or chattel), *aff'd in part, vacated, and remanded in part sub nom. Pennsylvania v. General Pub. Utils. Corp.*, 710 F.2d 117 (3d Cir. 1983).

173. See Restatement (Second) of Torts § 519 comment d at 35 (1977) explaining the strict liability rule as follows:

The liability arises out of the abnormal danger of the activity itself, and the risk that it creates, of harm to those in the vicinity. It is founded upon a policy of the law that imposes upon anyone who for his own purposes creates an abnor-

"person, land or chattels"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.¹⁷⁵ Finally, the Restatement (Second) of Torts distinguishes between the terms "harm" and "physical harm"¹⁷⁶ and applies the strict liability rule only to "harm."¹⁷⁷ Liability for economic loss therefore is not explicitly excluded under the rule.¹⁷⁸

F. *Quasi-contract Theory of Recovery*

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

mal risk of harm to his neighbors, the responsibility of relieving against that harm when it does in fact occur. *The defendant's enterprise, in other words, is required to pay its way by compensating for the harm it causes, because of its special, abnormal and dangerous character.*

Id. (emphasis added).

174. Restatement (Second) of Torts § 519(1) (1977).

175. For example, in *Pennsylvania v. General Pub. Utils. 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 air crash. *See id.* at 1079.

176. Restatement (Second) of Torts § 7 (1965).

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").

178. *See* Brief of Appellant at 24 & n.20, *Pennsylvania v. General Pub. Utils. 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); *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).

179. *See* *Wyandotte Transp. Co. v. United States*, 389 U.S. 191, 204-06 (1967); *United States v. P/B STCO 213*, 756 F.2d 364, 370-76 (5th Cir. 1985); *United States v. Boyd*, 520 F.2d 642, 644-45 (6th Cir. 1975), *cert. denied*, 423 U.S. 1050 (1976); *Brandon Township v. Jerome Builders, Inc.*, 80 Mich. App. 180, 183, 263 N.W.2d 326, 328 (1977); *State v. Schenectady Chems., Inc.*, 103 A.D.2d 33, 38-39, 479 N.Y.S.2d 1010, 1014 (3d Dep't 1984); *see also* *United States v. Chesapeake & O. Ry.*, 130 F.2d 308, 311 (4th Cir. 1942) (declining to rule on quasi-contract theory but ruling for plaintiff on other grounds); *Allenton Vol. Fire Dep't v. Soo Line R.R.*, 372 F. Supp. 422, 423 (E.D. Wis. 1974) (rejecting quasi-contract theory of recovery for fire suppression costs); *cf.* *United States v. Consolidated Edison Co.*, 580 F.2d 1122, 1126-29 (2d Cir. 1978) (allowing recovery of costs incurred by the Atomic Energy Commission in supplying electric power to defendant utility company during serious power shortage on theory of quasi-contract).

180. 80 Mich. App. 180, 263 N.W.2d 326 (1977).

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 collapse¹⁸³ 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.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 *United States v. Morehart*.¹⁸⁸ In *Morehart*, defendant had an agreement to perform certain work for plaintiff¹⁸⁹ and, during performance, negligently started a fire.¹⁹⁰ The court held that the agreement created an "implied-in-law covenant" to perform the work in a "workmanlike manner"¹⁹¹ and that defendant's breach of the covenant through his failure to exercise due care created liability for fire suppression costs.¹⁹²

actor is under a duty to take such action even though he may not have been originally at fault.

Id.

187. 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 necessities 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.*, *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), *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:

A person may be unjustly enriched by receiving a benefit, although not requested by him, through another's action to satisfy a need, either public or private, in circumstances of exigency. He may be so enriched by money, credit, goods, or services provided to him or for his account.

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

188. 449 F.2d 1283 (9th Cir. 1971).

189. *See id.* at 1283-84. 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. *See id.* at 1283.

190. *See id.* at 1283 & n.1.

191. *Id.* at 1284.

192. *See id.* at 1283. 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 unchecked." *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. *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), *cert. denied*, 396 U.S. 957 (1969); *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.¹⁹³ 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,"¹⁹⁴ the legislature, not the court, was the proper forum in which to address the issue.¹⁹⁵

Countering the statutory deference argument is the observation that tort theories often implicate legislative concerns without a court declining to rule on the issue.¹⁹⁶ 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.¹⁹⁷ In addition, there are settled principles of law already in place such as foreseeability that can easily be applied by

that the city's action was taken only because it was told by the owner that it would be reimbursed, an action for breach of contract would be appropriate.").

193. See *District of Columbia v. Air Fla., Inc.*, 750 F.2d 1077, 1080 (D.C. Cir. 1984); *City of Flagstaff v. Atchison, T. & Santa Fe Ry.*, 719 F.2d 322, 323-24 (9th Cir. 1983); *People v. Wilson*, 240 Cal. App. 2d 574, 576-77, 49 Cal. Rptr. 792, 794 (1966); *Mayor of Morgan City v. Jesse J. Fontenot, Inc.*, 460 So. 2d 685, 688 (La. Ct. App. 1984); *Town of Howard v. Soo Line R.R.*, 63 Wis. 2d 500, 503, 217 N.W.2d 329, 330 (1974).

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

[t]he Court has not been 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 seek to attain the same result as that which legislation would seek to accomplish?

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").

197. See, e.g., *Town of East Troy v. Soo Line R.R.*, 653 F.2d 1123, 1133-34 (7th Cir. 1980) (holding that expert testimony as to the reasonableness of itemized expenses, bills and cancelled checks to be sufficient evidence of costs incurred in remedying toxic chemical spill), *cert. denied*, 450 U.S. 922 (1981); *Mayor of Morgan City v. Jesse J. Fontenot, Inc.*, 460 So. 2d 685, 686-87 (La. Ct. App. 1984) (simple itemization of costs incurred by

the courts in common law cost recovery actions.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.¹⁹⁹ A related exception provides that liability can be imposed in order to "effect the intent of federal legislation."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,²⁰¹ nuclear power generation²⁰² and petroleum product transportation²⁰³ fall within this heavily regulated category.

The exception²⁰⁴ also applies to state statutes. In addition to state hazardous substance²⁰⁵ and oil spill cleanup liability statutes,²⁰⁶ state stat-

plaintiff during emergency response activities). For examples of the dollar amounts sought in various disaster response cost recovery actions see *supra* note 25.

Even if there were difficult issues of fact to resolve, such difficulties would be a poor excuse for a court to avoid the issue. See *Dillon v. Legg*, 68 Cal. 2d 728, 739, 441 P.2d 912, 919, 69 Cal. Rptr. 72, 79 (1968) ("[T]he difficulties of adjudication [should not] frustrate the principle that there be a remedy for every substantial wrong.") (*quoted in* *People Express Airlines v. Consolidated Rail Corp.*, 100 N.J. 246, 259-60 n.2, 495 A.2d 107, 114 n.2 (1985)).

198. *Cf.* *People Express Airlines v. Consolidated Rail Corp.*, 100 N.J. 246, 263-64, 495 A.2d 107, 116 (1985) (applying foreseeability principles to allow recovery of economic loss sustained as a result of a negligently caused disaster).

199. See *City of Flagstaff v. Atchison, T. & Santa Fe Ry.*, 719 F.2d 322, 324 (9th Cir. 1983).

200. See *id.*

201. See 42 U.S.C. §§ 9601-31 (1982 & Supp. III 1985) ("Superfund" legislation imposing liability for cost of cleanup of hazardous wastes on responsible parties). See *generally* Note, *Federal and State Remedies to Cleanup Hazardous Waste Sites*, 20 U. Rich. L. Rev. 379 (1986) (discussion of federal and state statutory remedies).

202. See Price-Anderson Act, 42 U.S.C. § 2210 (1982 & Supp. III 1985) (imposing limited liability on nuclear power plant owners and operators for damages incurred during a nuclear incident or ENO (Extraordinary Nuclear Occurrence)). Past use of the Price-Anderson Act as a vehicle for recovery of emergency response costs, however, has not proven successful. See *In re TMI Litig. Gov't Entities Claims*, 544 F. Supp. 853, 855-56 (M.D. Pa. 1982), *aff'd in part, vacated, and remanded in part sub nom.* *Pennsylvania v. General Pub. Utils. Corp.*, 710 F.2d 117 (3d Cir. 1983).

203. See 33 U.S.C. § 1321 (1982 & Supp. III 1985) (authorizing reimbursement from responsible parties for the cost of oil spill cleanup efforts); see also *United States v. Dixie Carriers, Inc.*, 627 F.2d 736, 737 (5th Cir. 1980) (33 U.S.C. § 1321 is exclusive remedy for recovery of oil spill cleanup costs). See *generally* Note, *Statutes of Limitations in United States Suits to Recover Oil Spill Cleanup Costs Under the Federal Water Pollution Control Act*, 53 Fordham L. Rev. 903, 910-18 (1985) (arguing that a six-year statute of limitation should apply in oil spill response cost recovery action based on the Federal Water Pollution Control Act 33 U.S.C. § 1321 (1982)).

204. See *supra* note 199 and accompanying text.

205. See, e.g., Ark. Stat. Ann. § 82-4707 (1985 Supp.) (liability for hazardous substance emergency cleanup expenses); Cal. Health & Safety Code § 13009.6 (West Supp.

utes 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 fire-fighting 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

1987) (liability of responsible parties for expenses of emergency response to hazardous substance release or threat); Cal. Health & Safety Code §§ 25352, 25360 (West Supp. 1987) (recovery of hazardous substance cleanup costs from responsible parties).

206. See, e.g., Alaska Stat. §§ 46.04.010 & 46.04.080 (1980 & 1986 Supp.) (reimbursement for oil spill cleanup expenses); Cal. Harb. & Nav. Code § 151 (West 1978), Cal. Gov't Code § 8574.4 (West 1980) (liability for oil spill cleanup costs).

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).

209. See R. Posner, *supra* note 83, at 343-46 (comparing common law with regulations). A major disadvantage to plaintiffs of a statutory basis for recovery is that courts often strictly construe the reimbursement statute provisions, thereby defeating recovery. See, e.g., *United States v. California*, 655 F.2d 914, 916-17, 920 (9th Cir. 1980) (suit to recover costs of suppressing fire in a national forest dismissed for failure to properly comply with statute's claim filing provisions); *United States v. Burlington N., Inc.*, 500 F.2d 637, 639 (9th Cir. 1974) (claim for fire suppression costs denied: "[W]hen a statute creates a cause of action not recognized at common law . . . a plaintiff must bring itself within the terms of the statute"); *Portsmouth v. Campanella & Cardi Constr. Co.*, 100 N.H. 249, 253-54, 123 A.2d 827, 830-31 (1956) (no recovery under New Hampshire fire suppression cost recovery statute due to fact that plaintiff acted pursuant to statutory duties as fire chief); *State v. California Or. Power Co.*, 225 Or. 604, 612-13, 358 P.2d 524, 528 (1961) (no recovery under Oregon forest fire suppression cost reimbursement statute due to finding that defendant did not fall within class of persons liable under the statute), *superseded by statute* as stated in *State v. Columbia Basin Elec. Co-op, Inc.*, 294 Or. 284, 290, 655 P.2d 1053, 1056 (1982) (Or. Rev. Stat. §§ 477.001(17), 477.066-.069 (1985)). *But see* *People v. Southern Cal. Edison, Co.*, 56 Cal. App. 3d 593, 605-07, 128 Cal. Rptr. 697, 705-06 (1976) (\$21,548.19 in fire suppression costs awarded pursuant to state reimbursement statute); *State v. Boston & Me. R.R.*, 99 N.H. 66, 72, 105 A.2d 751, 755 (1954) (allowing recovery of fire suppression costs under state statute imposing absolute liability on those causing fires).

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.").