Restitutionary Recovery: The Appropriate Standard of Care for Emergency Rescue Reimbursement by Hikers

"'When someone calls and says, "Hey, I'm stuck on the side of Mount Washington," and they're not prepared to do anything except call for help, I personally would rather leave them to die.'"[1]

I. INTRODUCTION

During the fiscal year ending in June 2009, there were 131 emergency rescues in New Hampshire at a total cost of about $175,000.[2] Traditionally, in New Hampshire and elsewhere in the United States, the cost of these rescues would be borne by the government.[3] The reasoning behind not charging individuals for rescue services was based on common-law principles such as the free-public-services doctrine, as well as general public policy.[4] Recently, however, states have been trending toward enacting legislation requiring reimbursement for the cost of being rescued.[5] Most of these statutes target hikers, allowing the state to recover from the rescuee, or the rescuee's guardian or estate.[6] As of March 2012, eight states have enacted such laws.[7]

The states that have enacted rescue-reimbursement laws have done so

1. Ellen Barry, *Careless N.H. Hikers Will Be Billed for Rescues*, BOS. GLOBE, Dec. 28, 1999, at A1, *available at* 1999 WLNR 2443958 (quoting Bill Aughton, director of New Hampshire Outdoor Council).

2. *See* Holly Ramer, *N.H. Fines Teen Hiker for Rescue—'Negligence' Led to Costly Predicament*, MEMPHIS COMMERCIAL APPEAL, July 18, 2009, at A8, *available at* 2009 WLNR 13849212 (citing significant cost to New Hampshire Fish and Game Department).

3. *See* Koch v. Consol. Edison Co., 468 N.E.2d 1, 7-8 (N.Y. 1984).

4. See Timothy D. Lytton, *Should Government Be Allowed to Recover the Costs of Public Services from Tortfeasors?: Tort Subsidies, the Limits of Loss Spreading, and the Free Public Services Doctrine*, 76 TUL. L. REV. 727, 728-29, 731-32 (2002).

5. *See Teen Fined $25,000 for Cost of Mountain Rescue*, THE TIMES-PICAYNE (Greater New Orleans), July 18, 2009, http://www.nola.com/news/index.ssf/2009/07/teen_fined_25000_for_cost_ [hereinafter *Teen Fined*] (noting recent trend of holding those in need of rescue liable for cost).

6. *See, e.g.*, HAW. REV. STAT. ANN. § 137-2 (LexisNexis 2012) (allowing recovery from rescuee, rescuee's guardian or estate, and other benefited parties); ME. REV. STAT. tit. 12, § 10105 (2012) (allowing recovery from rescuee or individual providing false information leading to rescue attempt); N.H. REV. STAT. ANN. § 153-A:24 (2013) (allowing recovery from rescuee, guardian of rescuee or estate of rescuee).

7. *See* Norma Love, *Rescue Groups Say State Penalties for Getting Help in Wilderness Will Increase the Danger*, CLEVELAND.COM, Oct. 29, 2009, http://www.cleveland.com/nation/index.ssf/2009/10/rescue_groups_say_state_penalt.html (listing states with reimbursement laws). The eight states are California, Colorado, Hawaii, Idaho, Maine, New Hampshire, Oregon, and Vermont. *Id.*

primarily to combat budgetary constraints and deter reckless behavior.[8] The statutes are further justified because hikers represent the vast majority of individuals requiring rescue.[9] Some states therefore argue that hikers should bear the brunt of costs associated with these undertakings.[10] Moreover, the increase in hiker rescues is due, in part, to the popularity of the sport, and in part to the growing use of global positioning systems (GPS) and cell phones.[11] This increased reliance on technology causes hikers to become complacent, thus often requiring rescue when an otherwise prepared hiker would not.[12]

Although enacted for similar purposes, the legal standards to which hikers are held before incurring liability vary from state to state.[13] The spectrum ranges from negligence to strict liability.[14] The determination of which standard to apply seems loosely based on the perceived severity of each state's problem and its interpretation of existing common-law principles.[15]

Of all the states that allow hikers and outdoor enthusiasts to be billed for

8. *See* Lorna Colquhoun, *Funding Overhaul Sought for Search, Rescue*, N.H. UNION LEADER (Manchester, N.H.), Sept. 13, 2010, at 7, *available at* 2010 WLNR 19793597 (discussing Fish and Game Department budget issues and increasing number of unprepared hikers in New Hampshire); Robert M. Cook, *Negligent Hikers Face Tougher Penalties*, FOSTERS.COM, Jan. 4, 2009, http://www.fosters.com/apps/pbcs.dll/article?AID=/20090104/GJNEWS_01/701049920 (outlining budgetary difficulties and desired deterrent effect of billing-for-rescue policy); Editorial, *Reckless Trekkers: New Hampshire Policy Is an Appropriate Deterrent*, WORCESTER TELEGRAM & GAZETTE, Jan. 13, 2000, at A10, *available at* 2000 WLNR 9178114 (describing problem of reckless hikers in New Hampshire); *see also Safe Hiking in New Hampshire*, N.H. FISH & GAME DEP'T, http://www.wildlife.state.nh.us/Outdoor_Recreation/hiking_safety.htm (last visited Feb. 6, 2013) [hereinafter *HikeSafe*] (outlining "hikeSafe" guidelines imposed by state to encourage preparedness).

9. *See* Gretchen K. Ela, *Epidemiology of Wilderness Search and Rescue in New Hampshire, 1999-2001*, 15 WILDERNESS & ENVTL. MED. 11, 13 (2004) (stating hikers represent 57.3% of all search-and-rescue incidents).

10. *See* Barry, *supra* note 1 (noting many White Mountain volunteer rescuers support charging unprepared hikers for rescue).

11. *See* Colquhoun, *supra* note 8 (commenting on difference in number of rescue missions since technology advancements); *see also* Barry, *supra* note 1 (noting increasing use of cell phones corresponds with increase in number of rescues). This relationship is likely due to increased complacency of hikers with cell phones not preparing properly due to the "safety net" the device seemingly provides. *See* Barry, *supra* note 1.

12. *See* Barry, *supra* note 1; *supra* text accompanying note 1 (commenting use of technology increases number of unprepared hikers). Barry goes on to quote a White Mountains rescue volunteer as saying "'Some of them are really bloody foolish people that are ill-prepared and inappropriately dressed and not emotionally ready or experienced, carrying a damn cell phone, and I think they wouldn't have been there without a cell phone.'" *See* Barry, *supra* note 1 (quoting Bill Aughton, director of New Hampshire Outdoor Council).

13. *See* COLO. REV. STAT. § 33-1-112.5 (2012) (setting strict liability standard); HAW. REV. STAT. ANN. § 137-2 (LexisNexis 2012) (providing reckless standard); IDAHO CODE ANN. § 6-2401 (2012) (indicating "hybrid" strict liability standard); ME. REV. STAT. tit. 12, § 10105 (2011) (setting strict liability standard); N.H. REV STAT. ANN. § 206:26-bb (2013) (indicating negligence standard); OR. REV. STAT. ANN. § 404.270 (West 2012) (indicating negligence standard).

14. *See supra* note 13 (listing state statutes providing standards of care required of rescuee).

15. *See* Bagley v. Controlled Env't Corp., 503 A.2d 823, 826 (N.H. 1986) (stating negligence as favored standard of liability in New Hampshire). *See generally* Colquhoun, *supra* note 8 (highlighting New Hampshire's rescue funding problem and need for legislative alternative); Love, *supra* note 7 (implying lowered negligence standard due to New Hampshire facing many rescues).

their rescue, New Hampshire has done so most frequently.[16] Together with Oregon, which caps recovery at $500 per person, New Hampshire has established a negligence standard, requiring individuals to use "reasonable care" when hiking—the lowest of the standards.[17] The "reasonable care" requirement is consistent with New Hampshire's long history of imposing individual liability for rescue and emergency services via statute.[18] The choice of such a low standard allows the state to more easily recover from hikers who require rescue.[19]

In 1999, the New Hampshire legislature directly addressed the issue of hiker liability for rescue costs, by requiring hikers to adhere to a standard of recklessness.[20] A recent legislative amendment, however, has sparked controversy by lowering the standard to negligence and designating the Fish and Game Department as the governmental body that determines whether to seek reimbursement.[21] This change has made it easier for the Fish and Game Department to bill rescuees who now need only act negligently, not recklessly.[22] Many believe that this recent decrease in the standard of care is unjustified, dangerous, and inconsistent with traditional legal principles.[23] The issue is further complicated because no court to date has addressed whether outdoor enthusiasts should be held personally liable for the cost of their rescues, not to mention the appropriate standard to which they should be held.[24]

This Note will explore whether hikers should be held liable for the cost of their rescue against the backdrop of the current New Hampshire standard of negligence.[25] Part II.A discusses the origin and traditional application of rescue reimbursement, focusing on the common-law principle of rescue liability and

16. *See* David Brooks, *Teen off the Hook for $25K Rescue Bill*, NASHUA TELEGRAPH, Apr. 10, 2010, http://www.nashuatelegraph.com/news/699918-196/state-wont-charge-teen-25000-for-white.html (noting only New Hampshire regularly enforces rescue liability statute); Love, *supra* note 7 (describing New Hampshire and other states' enforcement records).

17. *See supra* note 13 (identifying state statutes providing standards of care for various states' rescue laws).

18. *See infra* Part II.A.3 (discussing history of states' efforts to recover rescue costs). *See generally* State v. Bos. & Me. R.R., 105 A.2d 751 (N.H. 1954) (upholding railroad liability for cost of emergency fire services imposed via statute); Hooksett v. Concord R.R., 38 N.H. 242 (1859).

19. *See* Cook, *supra* note 8 (explaining lowering standard to negligence). "Instead of having to prove a more difficult legal standard of recklessness, the change allows the agency to establish negligence instead." *Id.*

20. *See* N.H. REV. STAT. ANN. § 153-A:24 (2013) (requiring hikers to reimburse for rescue if reckless).

21. *Id.* § 206:26-bb (lowering standard of care to negligence and delegating decisions on liability to Fish and Game Department); *see also* Cook, *supra* note 8 (highlighting negatives of lowering standard of care); Katie Zezima, *Those Lost in Wilderness May Find Bill for a Rescue*, N.Y. TIMES, Dec. 28, 2008, http://www.nytimes.com/2008/12/29/us/29rescue.html (discussing possible negative impact of legislation).

22. *See* Cook, *supra* note 8 (commenting on effects of lowering standard to negligence).

23. *See* Zezima, *supra* note 21 (discussing controversy over decreasing standard of care).

24. *See* Editorial, *Search and Rescue and Pay*, BANGOR DAILY NEWS (Me.), Aug. 12, 2009, at 4 [hereinafter *Search and Rescue and Pay*], *available at* 2009 WLNR 21451164 (noting lack of legal standard regarding reimbursement).

25. *See infra* Part IV (arguing negligence most appropriate standard).

its evolution.[26] Part II.B covers the early history of state attempts to recover the cost of rescues, followed by the history of the New Hampshire approach and efforts of other states.[27] Part III analyzes New Hampshire's current standard of liability and explores the benefits and drawbacks of the negligence standard.[28] This Note argues that in light of the state's history and general common law, the negligence standard is the most appropriate standard to impose upon hikers requiring rescue.[29]

II. HISTORY

A. Origin and Traditional Application of Rescue Reimbursement

1. Bars to Government Recovery of Rescue Costs

At common law, there were a number of potential bars to the recovery—by either the government or an individual—of costs for providing emergency services.[30] Either the free-public-services doctrine or the pure-economic-loss doctrine traditionally prevented the government from recovering.[31] The free-public-services doctrine states that public expenditures made during performance of a governmental function are not recoverable by the government.[32] The pure-economic-loss doctrine overlaps with the free-public-services doctrine in part, while also barring recovery from private individuals.[33] The doctrine provides that direct, incidental, or consequential pecuniary losses are not compensable unless the party has suffered other nonpecuniary injury.[34] Furthermore, individual rescuers are exposed to substantial liability for their actions and are otherwise barred through common-law tort or contract

26. *See infra* Part II.A (discussing evolution of rescue reimbursement).

27. *See infra* Part II.B.

28. *See infra* Part III (analyzing history of New Hampshire's rescue reimbursement).

29. *See infra* Part IV (concluding negligence appropriate because of history of New Hampshire, other states, and common law).

30. *See* Koch v. Consol. Edison Co., 468 N.E.2d 1, 7-8 (N.Y. 1984) (stating as general rule, public expenditures not recoverable if related to governmental functions); *see also* Hanoch Dagan, *In Defense of the Good Samaritan*, 97 MICH. L. REV. 1152, 1153 (1999) (indicating private-party recovery for rescue at common law often barred by contract defense); Lytton, *supra* note 4, at 728 (describing as "general rule," public expenditures not recoverable by government agency).

31. *See* Lytton, *supra* note 4, at 728, 749 (noting both public-services doctrine and pure-economic-loss doctrine prohibit governmental recovery).

32. *See id.* at 728 (defining public services doctrine); *see also, e.g.*, District of Columbia v. Air Fla., Inc., 750 F.2d 1077, 1080 (D.C. Cir. 1984) (noting appropriateness of free-public-services doctrine); *Koch*, 468 N.E.2d at 8 (defining public-services doctrine); City of Cincinnati v. Beretta U.S.A. Corp., 768 N.E.2d 1136, 1149 (Ohio 2002) (analyzing applicability of free-public-services doctrine).

33. *See* Lytton, *supra* note 4, at 749 (describing effect of pure-economic-loss doctrine).

34. *Id.* (defining pure-economic-loss doctrine); *see also City of Cincinnati*, 768 N.E.2d at 1146 n.6 (ruling claimant can recover economic loss only after establishing harm with recoverable compensatory damages).

defenses.[35]

Although examples of policies similar to the free-public-services doctrine can be analogized to as far back as the 1800s, the free-public-services doctrine as we see it today is not deeply rooted in the common law.[36] Today's free-public-services doctrine did not generally appear until the 1970s.[37] Although prior to the 1970s there were cases denying recovery to government entities for emergency services costs, the general bar to government recovery was established in Wisconsin in 1974.[38] Prior to 1974, some courts denied recovery on an ad hoc basis to various reimbursement attempts by the government in areas such as claims against criminals for their capture, medical costs for injured soldiers, and fire-suppression costs.[39] Post-1974, however, courts routinely and broadly began denying recovery to public entities for expenditures and services.[40]

Although similar to the free-public-services doctrine, the pure-economic-loss doctrine's existence as a common-law rule is not in doubt.[41] The rule is designed to restrain litigation that would otherwise accompany unlimited liability for negligence.[42] It has most recently been used to dismiss cases of negligence against the gun industry.[43] Courts use the doctrine to dismiss claims

35. *See* Christopher H. White, Note & Comment, *No Good Deed Goes Unpunished: The Case for Reform of the Rescue Doctrine*, 97 NW. U. L. REV. 507, 507 (2002) (describing individual rescuers exposing themselves to great personal liability during attempted rescue); *see also* Dagan, *supra* note 30, at 1154 (indicating common-law contract doctrine categorized many rescuers as "officious meddlers" preventing recovery). *See generally* Ross A. Albert, Comment, *Restitutionary Recovery for Rescuers of Human Life*, 74 CALIF. L. REV. 85 (1986) (discussing common-law bars to individual recovery for rescue costs).

36. *See* Lytton, *supra* note 4, at 731 (discussing history and misconceptions about free-public-services doctrine).

37. *See* Allenton Volunteer Fire Dep't v. Soo Line R.R. Co., 372 F. Supp. 422, 423 (E.D. Wis. 1974) (enunciating general rule of recovery for fire suppression by public agency as "creature of statute"). Lytton describes the court in *Allenton* as the first to extrapolate a general rule of nonrecovery from the sparse case law on the issue. *See* Lytton, *supra* note 4, at 740.

38. *See Allenton*, 372 F. Supp. at 423 (introducing modern free-public-services doctrine).

39. *See, e.g.*, United States v. Standard Oil Co., 332 U.S. 301, 314-15 (1947) (dismissing complaint by government seeking reimbursement of medical costs for negligently injured soldier), *superseded by statute*, Federal Medical Care Recovery Act, Pub. L. No. 87-693, § 1, 76 Stat. 593, *as recognized in* United States v. Trammel, 899 F.2d 1483 (6th Cir. 1990); Dep't of Mental Hygiene v. Hawley, 379 P.2d 22, 28 (Cal. 1963) (denying recovery of costs to incarcerate criminals); People v. Wilson, 49 Cal. Rptr. 792, 794 (Cal. Dist. Ct. App. 1966) (stating government's ability to recover fire-suppression costs as "creature of statute"); *see also* Lytton, *supra* note 4, at 731-32 (noting free-public-services doctrine emerged in mid-1970s).

40. *See* Lytton, *supra* note 4, at 731-32 (discussing emergence of free-public-services doctrine).

41. *See id.* at 749-50 (describing application and purpose of pure-economic-loss doctrine).

42. *See id.* at 750 (describing purpose of pure-economic-loss doctrine). The pure-economic-loss doctrine is distinct from the free-public-services doctrine because it is a limiting rule rather than a complete bar. *Id.* The purpose of the pure-economic-loss doctrine is not to forbid recovery entirely for economic harms, but to limit liability for negligent conduct. *Id.* Furthermore, courts will grant recovery for economic loss when doing so would not leave them without a bright line by which to limit liability. *Id.*

43. *See* City of Cincinnati v. Beretta U.S.A. Corp., 768 N.E.2d 1136, 1146 n.6 (Ohio 2002) (dismissing liability claim in part due to pure-economic-loss doctrine); *see also* Lytton, *supra* note 4, at 749 (discussing recent usage of pure-economic-loss doctrine in gun-industry cases).

when technical application of the law would allow a case to proceed, thereby opening defendants to unacceptably vast liability.[44] For example, in *City of Cincinnati v. Beretta*,[45] the Supreme Court of Ohio—facing the possibility of unlimited product liability related to emergency services for gun victims—used the doctrine to dismiss an otherwise valid claim.[46] The court reasoned that although the plaintiff's complaint withstood the standard for notice pleading, the appellant was "precluded from bringing its statutory product liability claims" because, under the state's product liability statute, "a claimant . . . cannot recover economic damages alone."[47]

Most importantly, when applying either the pure-economic-loss doctrine or the free-public-services doctrine, the courts find ways around traditional obstacles to rescue reimbursement when fairness factors weigh in favor of recovery.[48] For example, the pure-economic-loss doctrine does not apply when the loss is suffered by an individual whom the defendant knows, or has reason to know, is likely to sustain injury.[49] Additionally, judges routinely grant recovery for economic loss when they can reasonably relate the economic damage to physical injury or property damage.[50]

2. Common-Law Recovery for Rescue

Aside from the established doctrinal bars to rescue recovery, early common law did not look favorably on recovery for rescue costs.[51] Traditional contract law barred recovery by the rescuer under the "officious intermeddler" and gift-of-services principles.[52] Recovery under tort law was often prevented either because no duty was owed to the rescuer or because the rescuer assumed the risk of the rescue.[53] Theories such as the "firefighter's rule" embodied the

44. *See* Lytton, *supra* note 4, at 749-50 (detailing doctrine's applicability to gun-industry cases).

45. 768 N.E.2d 1136 (Ohio 2002).

46. *Id.* at 1145 (discussing grounds for upholding dismissal).

47. *Id.* at 1146 (analyzing pure-economic-loss doctrine).

48. *See* David C. McIntyre, Note, *Tortfeasor Liability for Disaster Response Costs: Accounting for the True Cost of Accidents*, 55 FORDHAM L. REV. 1001, 1019 (1987) (arguing courts create exceptions based on equity, under economic-loss and free-public-services doctrines). Exceptions to the traditional rules evolved when the rules became too strict in certain areas. *Id.* Two common exceptions exist when costs are incurred during the abatement of a public nuisance and when costs are incurred in the government's attempts to protect its own property. *Id.*

49. *See* People Express Airlines, Inc. v. Consol. Rail Corp., 495 A.2d 107, 118 (N.J. 1985) (noting recovery for pure economic loss allowed when proximately caused by defendant's breach of duty).

50. *See id.* at 113 (discussing history of pure-economic-loss doctrine).

51. *See generally* Albert, *supra* note 35 (outlining common-law rules against recovery by rescuer); McIntyre, *supra* note 48 (discussing traditional bars to common-law recovery for rescuers).

52. *See* Albert, *supra* note 35, at 88 (analyzing common rescuer as intermeddler or volunteer). Courts have traditionally viewed allowing "liability for unsolicited benefits as dangerous." *Id.* Therefore, courts have upheld the individual's right to be free from such private causes of action and denied imposing liability for rescue costs or services. *Id.*

53. *See* Christopher M. Hohn, Note, *The Missouri Firefighter's Rule:* Gray v. Russell, 59 MO. L. REV. 479, 483-84 (1994) (addressing basis in common law for denying rescuers recovery from rescuees). The

general rule of nonrecovery under tort law.[54] These principles combined to "create[] a 'no-win' situation for a plaintiff rescuer seeking restitution."[55]

However, the traditional strict principles were difficult to justify, and exceptions began to evolve.[56] Under tort law, the principle of danger-invites-rescue was established.[57] It allows for a rescuer to recover for injuries and costs sustained during a rescue when the rescue is necessitated by the negligence of any party.[58] By applying the danger-invites-rescue rule to situations where negligence is a contributing factor to rescue, much of the harshness of traditional tort doctrine is mitigated.[59]

Additionally, the presumption that rescuers with no duty to aid intended to charge for services arose under a restitution theory.[60] This presumption allows certain professional rescuers, like doctors, to render services without worrying about not being compensated due to the rescuee's inability to consent.[61] The court essentially finds an implied-in-law contract between the rescuee and rescuer.[62]

Similarly, in certain nonprofessional situations, rescuers may recover under a theory of unjust enrichment.[63] This is analogous to the implied-in-law

"firefighter's rule" is a common-law rule that disallows recovery by firemen for injury or costs of a rescue based on either public policy or assumption of risk. *Id.* at 479-84. Although specifically discussing firemen, the basis behind the rule is "applicable to our entire system of justice." *Id.* at 484. It is especially applicable to the assumption-of-risk justification seen in many other circumstances. *See* Gwyn v. Loon Mountain Corp., No. 01-00214-B, 2002 WL 1012929, at *4 (D.N.H. May 15, 2002).

54. *See* Hohn, *supra* note 53, at 481-84 (discussing firefighter's rule).

55. Albert, *supra* note 35, at 88 (analyzing common-law theories denying rescuer restitution).

56. *See id.* at 90 (discussing manner in which each major theory of obligation evolved to encompass exceptions).

57. *See* Wagner v. Int'l Ry. Co., 133 N.E. 437, 437 (N.Y. 1921) (establishing rule of danger-invites-rescue).

58. *See id.* (explaining rule of danger-invites-rescue). This expansion of traditional tort law was first enunciated by Justice Cardozo and exemplified in his often quoted passage: "The wrong that imperils life is a wrong to the imperiled victim; it is a wrong also to his rescuer." *Id.*

59. *See* Albert, *supra* note 35, at 90 (explaining primary effect of exceptions to mitigate harshness of traditional rule).

60. *See* Cotnam v. Wisdom, 104 S.W. 164, 165-66 (Ark. 1907) (explaining significance of presumption to charge and quasi-contractual recovery); *see also* Albert, *supra* note 35, at 98-99. The exception enunciated in *Cotnam* allows doctors and hospitals to recover normal fees, even when the rescue attempt fails. *See* Albert, *supra* note 35, at 98-99.

61. *See* Albert, *supra* note 35, at 99-100 (evaluating application of rule in *Cotnam*). The presumption that a professional will charge for services is grounded in the public policy of encouraging preservation of life and health. *See id.* Despite restricting the rule to professional rescuers, these goals are substantially furthered by the rule. *Id.*

62. *See Cotnam*, 104 S.W. at 165 (enunciating pure-restitution doctrine's exception at common law).

63. *See* 26 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 68:1 (4th ed. 1993) [hereinafter WILLISTON ON CONTRACTS] (commenting on quasi-contractual recovery); McIntyre, *supra* note 48, at 1032-33 (noting intricacies of unjust-enrichment theory of recovery); *see also* Brandon Twp. v. Jerome Builders, Inc., 263 N.W.2d 326, 328 (Mich. Ct. App. 1977) (describing elements and application of unjust-enrichment exception to nonrecovery by rescuers). The court in *Brandon Township* stated the elements of unjust enrichment as performing the duty of someone else without his consent, with the intention to charge, and with the duty undertaken being immediately necessary. *See* 263 N.W.2d at 328. This enables one who

contract found between professional rescuers and rescuees, because the court imposes a quasi-contract on the parties in both instances.[64] However, it differs in that recovery under an unjust-enrichment theory only requires the plaintiff to have undertaken a duty owed by the defendant.[65]

Moreover, under contract theory, a subsequent promise to pay combined with partial performance was held sufficient to compel recovery.[66] Under traditional contract doctrine, an agreement to pay for a benefit previously received is unenforceable.[67] But, when the previous benefit is the saving of life or preserving of property, such a benefit is sufficient consideration to make a subsequent promise binding.[68]

Finally, the "hidden dangers" exception to the firefighter's rule was established.[69] Since the firefighter's rule first appeared well over a century ago, it has functioned to bar firefighters and police officers from recovering for rescues even when the rescuees are negligent or reckless.[70] Despite the clear foreseeability that a firefighter may suffer death or injury while in the course of a rescue, most states have refused to allow recovery for public-policy reasons.[71] The hidden-dangers exception mitigates the harshness of this rule and allows

undertakes another's duty out of necessity, incurring expense, to recover this expense from the one who owed a duty. *See id.* *See generally* Alex Builders & Sons, Inc. v. Danley, 7 A.3d 1219 (N.H. 2010); Singer Asset Fin. Co. v. Wyner, 937 A.2d 303 (N.H. 2007) (involving contractor completing work without compensation). In *Brandon Township*, the court granted recovery to the town, after the town repaired defendant's bridge prior to collapse. 263 N.W.2d at 327-28.

64. *Compare Brandon Township*, 263 N.W.2d at 328 (applying unjust-enrichment theory), *with Cotnam*, 104 S.W. at 166 (applying presumption-to-charge requirement for emergency professional services). The main similarity between an unjust-enrichment situation and an implied-in-law contract is that reimbursement is required so as to prevent one party from unjustly gaining at the other's expense.

65. *See supra* note 64 (illustrating similarities and differences between recovery through unjust enrichment and quasi-contract).

66. *See* Webb v. McGowin, 168 So. 196, 198 (Ala. Ct. App. 1935) (discussing binding nature of promise to pay following material benefit); *see also* Albert, *supra* note 35, at 94-96 (analyzing post-rescue ratification scenarios). The court in *Webb* discussed the traditional application of contract law to postbenefit promises. 168 So. at 198. "Where the promisee cares for, improves, and preserves the property of the promisor, though done without his request, it is sufficient consideration for the promisor's subsequent agreement to pay for the service, because of the material benefit received." *Id.* at 197.

67. *See* Albert, *supra* note 35, at 94 (noting traditional unenforceability of such agreements due to lack of consideration).

68. *See supra* note 66 and accompanying text (discussing justifications for exception to nonrecovery stated in *Webb*).

69. *See* Bartels v. Cont'l Oil Co., 384 S.W.2d 667, 669-70 (Mo. 1964) (outlining hidden-danger exception to firefighter's rule); Hohn, *supra* note 53, at 486 (discussing hidden-danger exception as analyzed in *Bartels*). The *Bartels* court ruled that although firefighters and other professional rescuers assume some risk during a rescue, they are not without protection under the law. 384 S.W.2d at 669-70. When a hidden danger above what is normally seen in similar rescues exists and the defendant has the ability to warn of the hidden danger, the rescuer does not assume the risk of such danger. *See id.* Therefore, the court in *Bartels* allowed recovery by the estate of a deceased firefighter for his death caused by a fuel tank explosion. *See id.* at 671-72.

70. *See* Hohn, *supra* note 53, at 490 (analyzing history of firefighter's rule).

71. *See supra* note 69 and accompanying text (further discussing history and application of firefighter's rule).

professional rescuers, like firemen and police officers, to recover for rescues when expenses are incurred due to a hidden danger.[72] The exception covers acts involving recklessness, negligence, and intentional torts, as well as separate independent acts.[73] This exception sidesteps the primary justifications of the rule, allowing it to fit within traditional tort doctrine.[74]

Despite the many exceptions and arguable justifications, professional rescuers with a duty to act are still barred from recovery in most circumstances.[75] This often leads to what many argue are inequitable results, inconsistent with both basic restitutionary principles, as well as social policies.[76] Therefore, due to the inherent unfairness of many rules barring recovery, it became universally accepted that statutory or contract provisions would preempt any traditional bars to recovery of rescue costs.[77]

3. Statutory Exceptions and the Start of a Standard of Care

Legislative enactments have become a common and effective way to give a rescuer or rescuing agency the right to recover costs associated with rescue services.[78] Many of these statutes involve recovering the cost of fighting fires, specifically those caused by railroads.[79] Often, statutes allowing for recovery of fire-suppression costs are based on a theory of strict liability.[80] More

72. *See supra* note 69 and accompanying text (outlining implications and intricacies of hidden-danger exception).

73. *See* Hohn, *supra* note 53, at 490 (noting applicable circumstances when hidden-danger exception applies).

74. *See Bartels*, 384 S.W.2d at 670 (describing rationale for hidden-danger exception). The court stated, "Although firemen assume the usual risks . . . there is no valid reason why they should be required to assume the extraordinary risk of hidden perils . . . ." *Id.*

75. *See* Albert, *supra* note 35, at 86 (noting general rule in U.S. disallowing liability of non-negligent rescuee). The typical rationale supporting this is that one who benefits another at his own expense is generally entitled to at least restitution for his expenses. *See id.*

76. *See id.* (discussing inequities of traditional bars to rescue cost recovery).

77. *See* District of Columbia v. Air Fla., Inc., 750 F.2d 1077, 1080 (D.C. Cir. 1984) (stating "absent authorizing legislation," government cannot recover rescue costs); Town of Freetown v. New Bedford Wholesale Tire, Inc., 423 N.E.2d 997, 998 (Mass. 1981) (holding right of town to recover rescue expenses "depends on statute"). *Compare* State v. Bos. & Me. R.R., 105 A.2d 751, 755 (N.H. 1954) (holding railroad liable for fire-suppression costs when authorizing statute present), *with* Mayor of Morgan City v. Jesse J. Fontenot, Inc., 460 So. 2d 685, 687-88 (La. Ct. App. 1984) (applying traditional tort law in absence of authorizing statute, denying full recovery for rescue).

78. *See supra* note 77 and accompanying text (illustrating use and effectiveness of statutory means of imposing rescue liability).

79. *See* Hurd v. Bos. & Me. R.R., 129 A.2d 196, 199-200 (N.H. 1957) (debating liability of railroad for fire-suppression costs under New Hampshire statute); Beard v. Bos. & Me. R.R., 115 A.2d 314, 316 (N.H. 1955) (affirming validity of holding railroad liable); *Bos. & Me. R.R.*, 105 A.2d at 754 (noting liability of railroad depends on statute).

80. *See Hurd*, 129 A.2d at 199-200 (affirming in absence of statute railroad liable in negligence; however, statute imposes strict liability); *Bos. & Me. R.R.*, 105 A.2d at 754 (stating statute requires strict liability). The New Hampshire court stated in *Boston & Maine Railroad*, "If the fire was started by the railroad company or its employees, its liability for the resulting fire fighting expenses is coextensive with the spread of the fire thus caused." 105 A.2d at 754. The New Hampshire court—three years later—clarified its previous

recently, however, strict liability has been slightly curtailed, with courts interpreting a strict proximate-cause requirement into rescue-recovery statutes.[81] By carefully analyzing the proximate cause of a fire, courts are able to limit liability of a tortfeasor.[82]

Using similar statutory means, towns, cities, and states have also sought to impose liability for costs associated with emergency services.[83] Arizona, for example, imposes liability on homeowners needing emergency services if they live outside the providing town's boundaries.[84] Additionally, Arizona requires reimbursement for rescue and clean-up costs by individuals whose negligent use of hazardous materials necessitates services.[85] Similarly, the town of Golden, Colorado, until recently, required reimbursement by hikers of the costs of their rescue when they ventured outside city limits.[86] Until its repeal, the ordinance imposed strict liability.[87]

The federal government also uses statutory means to provide for liability where none traditionally exists.[88] The government requires reimbursement from the owner of hazardous waste for the cost of any rescue or clean-up operations resulting from the release of waste.[89] The government requires the owner to abide by a hybrid standard of care between strict liability and negligence.[90] It provides an affirmative defense similar to negligence;

holding, noting that in the absence of a statute, the railroad would be liable in negligence. *See Hurd*, 129 A.2d at 199-200. The statute, however, does create strict liability. *See id.*

81. *See Beard*, 115 A.2d at 316 (noting strict liability nature of statute subject to proximate-cause requirement). This allowed the court to find the defendant not liable for the damage caused to most of the plaintiffs' land because fire damage was not foreseeable. *Id.*

82. *See id.* (noting proximate-cause requirement will limit possible liability of railroad); *see also* Lytton, *supra* note 4, at 749-50 (contending policy consideration in not allowing recovery for pure-economic-loss possibility of unlimited liability).

83. *See* ARIZ. REV. STAT. ANN. § 9-500.20 (2012) (allowing reimbursement for providing emergency services otherwise unavailable to out-of-boundary residents); *id.* § 12-972 (providing liability for reimbursement when negligence causes spill of hazardous waste); HAW. REV. STAT. ANN. § 137-2 (LexisNexis 2012) (requiring persons to reimburse governmental entity in certain circumstances); *see also* Love, *supra* note 7 (noting former policy of Golden, Colorado).

84. *See* ARIZ. REV. STAT. ANN. § 9-500.20 (allowing reimbursement for providing emergency services otherwise unavailable to out-of-boundary residents). The statute imposes strict liability, providing that the person receiving services is liable for reimbursement regardless of his fault or part in events necessitating the services. *Id.* The statute does not require the town or city to seek reimbursement. *Id.*

85. *See id.* § 12-972 (providing liability for reimbursement when negligence causes spill of hazardous waste). The statute holds a violator strictly liable, requiring the owner of waste to reimburse the city or town for the cleanup under all circumstances. *Id.*

86. *See* GOLDEN, COLO., ORDINANCE § 16.08.090 (1991), *available at* http://cog.o2dev.net/government/municipal-code/ (outlining city's rescue-reimbursement policy); *see also* Love, *supra* note 7 (noting former policy of Golden, Colorado).

87. *See* GOLDEN, COLO., ORDINANCE § 16.08.090 (1991) (outlining city's policy of rescue reimbursement).

88. *See* 42 U.S.C. § 9607 (2006) (imposing liability on owners for governmental cleanup of hazardous waste).

89. *Id.* § 9607(a) (describing circumstances under which rescuee incurs liability).

90. *See id.* § 9607(b) (providing "defenses" section significantly limiting statute's scope). Among other

however, it imposes full liability in the absence of such a defense.[91]

Whether imposed by federal, state, or local government, the standard of care most often required by these statutes is either negligence or a type of modified strict liability.[92] The modified strict liability standard essentially opens the potential defendant to the same level of risk as a negligence standard.[93] In most cases, the statute's construction attempts to mitigate inequities of the common-law rule barring recovery.[94]

B. History of New Hampshire Statutory Reimbursement

1. Early Statutory Imposition of Liability and the Required Standard of Care

New Hampshire has a long history of requiring reimbursement where the application of tort and common-law principles, such as the free-public-services doctrine, would not impose liability.[95] The state has typically imposed liability through statutory or regulatory means.[96] The statutes have ranged from compulsory reimbursement for dog bites to imposition of liability on railroads for damage caused by fires.[97]

For example, in 1863, the town of East Kingston passed a law requiring the owner of a dog to reimburse the town for expenses it paid to persons whom the dog bit.[98] The owner of the dog was held strictly liable for the damage.[99]

affirmative defenses, section (b) provides no liability will be incurred if the spill was an act of God, an act of war, or attributable to a third party. *See id.*

91. *See id.*

92. *See supra* Part II.A.3 (discussing standards of care and statutory exceptions to rule against recovery).

93. *Compare* IDAHO CODE ANN. § 6-2401 (West 2011) (indicating "hybrid" strict liability standard), *with* N.H. REV. STAT. ANN. § 206:26-bb (2013) (enunciating "negligence" standard of liability). "Hybrid" strict liability is created either by heavily focusing on the proximate-cause element of an alleged offense, significantly restricting liability, or by providing a broad affirmative defense. *See* 42 U.S.C. § 9607; IDAHO CODE ANN. § 6-2401. As seen in the Idaho statute, by limiting the circumstances in which liability is applicable, the standard more closely resembles negligence than strict liability. *See* IDAHO CODE ANN. § 6-2401. Absent any restricting circumstances, however, liability will be imposed regardless of fault or level of care taken. *See id.* In at least one instance, a New Hampshire court has recognized that many cases decided on the basis of strict liability could have been decided using a negligence standard. *See* King v. Blue Mountain Forest Ass'n, 123 A.2d 151, 154 (N.H. 1956).

94. *See* Albert, *supra* note 35, at 90 (noting exceptions to rule of nonrecovery mitigate harshness).

95. *See King*, 123 A.2d at 156 (upholding statute imposing liability for damage by wild boar); Beard v. Bos. & Me. R.R., 115 A.2d 314, 316 (N.H. 1955) (affirming statute holding railroad strictly liable for fire damage); State v. Bos. & Me. R.R., 105 A.2d 751, 755 (N.H. 1954) (holding railroad liable under statute for fire damage); E. Kingston v. Towle, 48 N.H. 57, 57 (1868) (holding unconstitutional statute making owner strictly liable for costs associated with dog bite); *see also* Gwyn v. Loon Mountain Corp., No. 01-00214-B, 2002 WL 1012929, at *4 (D.N.H. May 15, 2002) (affirming statute shifting liability to skier for accident at ski area); Rowell v. R.R., 57 N.H. 132, 135-37 (1876) (affirming statute requiring reimbursement of fire-suppression cost by railroad).

96. *See supra* note 95 and accompanying text (listing various cases where statutory imposition of liability upheld); *supra* note 13 (discussing statutes imposing liability).

97. *See supra* note 95 and accompanying text (citing areas where liability imposed through statute); *supra* note 13 (illustrating statutes imposing liability).

98. *See E. Kingston*, 48 N.H. at 57 (describing "an act in relation to damages occasioned by dogs").

Although the 1863 statute was eventually declared unconstitutional on unrelated grounds, today New Hampshire retains a similar statute imposing strict liability for damage occasioned by one's dog.[100]

Similarly, a New Hampshire state law enacted in 1949 held the owner of a wild boar strictly liable in trespass for damage caused to another's property.[101] Analyzing the statute, the court in *King v. Blue Mountain Forest Ass'n*[102] noted that New Hampshire does not adopt the view that owners of wild animals are always held strictly liable for damage the animals cause.[103] However, because the statute was unambiguous as to whether strict liability applied, the court held that the plaintiff need not prove negligence.[104]

The New Hampshire legislature also frequently enacts statutes expressly providing negligence as the standard of care.[105] For example, a 1959 statute, still in effect today, imposes liability on the proprietor of any pole or wire located upon a highway that causes injury to a motorist.[106] The statute's broad definition of "proprietor" does not exclude state or local governments, and designates negligence as the standard of liability.[107]

The standard of care required by the usual reimbursement statute varies but is most commonly either negligence or strict liability.[108] When the standard is strict liability, the courts tend to interpret it loosely.[109] This, in effect, creates a

99. *See id.* (describing liability of dog's owner to those who suffered damage).

100. N.H. REV. STAT. ANN. § 466:19 (2013) (asserting strict liability for damage by dog).

101. *See* King v. Blue Mountain Forest Ass'n, 123 A.2d 151, 154-55 (N.H. 1956) (noting possessor of wild animal not held strictly liable for damage absent statute).

102. 123 A.2d 151 (N.H. 1956).

103. *See id.* at 156 (noting New Hampshire's general policy for wild-animal damage).

104. *See id.* (holding legislature free to adopt strict liability standard where appropriate). The court noted that the statute clearly indicated the owner be strictly liable through an action of trespass. *See id.* Therefore, a finding of liability without a showing of negligence is appropriate. *See id.*

105. *See, e.g.*, N.H. REV. STAT. ANN. § 225-A:25 (limiting ski tram operators' liability but providing liability for negligent operation); *id.* § 231:176 (making proprietor of telephone, cable, or other pole near road liable in negligence for damage caused to motorist); *id.* § 169-C:29 (creating liability in negligent-hiring action for doctor's failure to report child abuse).

106. *See* N.H. REV. STAT. ANN. § 231:176 (2013) (setting liability for proprietor of pole or other structure near highway).

107. *See id.*

108. *See* Bagley v. Controlled Env't Corp., 503 A.2d 823, 826 (N.H. 1986) (noting negligence standard preferred in absence of clear legislative intent); King v. Blue Mountain Forest Ass'n, 123 A.2d 151, 154-55 (N.H. 1956) (analyzing statute imposing strict liability for damage by wild boar); Beard v. Bos. & Me. R.R., 115 A.2d 314, 315-16 (N.H. 1955) (affirming statute holding railroad strictly liable for fire damage yet limiting application); State v. Bos. & Me. R.R., 105 A.2d 751, 755 (N.H. 1954) (discussing railroad's strict liability under statute for fire damage); Rowell v. R.R., 57 N.H. 132, 135 (1876) (upholding statute requiring railroad reimbursement of fire-suppression cost); E. Kingston v. Towle, 48 N.H. 57, 63-64 (1868) (debating statute holding owner strictly liable for costs resulting from dog bite).

109. *See Beard*, 115 A.2d at 316 (noting strict liability statute not intended to apply to all damages traceable to fire). The court held that although the statute holds railroads strictly liable, it was only intended to apply to those for whom the railroad operation could pose an extra fire hazard. *Id.* Essentially, the court strictly applied the proximate-cause element, thus limiting the scope of the statute. *See id.*

hybrid standard.[110] Although technically more stringent than a pure negligence analysis, the two provide essentially equivalent protections.[111]

Regardless of the frequency with which strict liability is imposed through statutes, the preferred standard of care in New Hampshire is negligence.[112] In *Bagley v. Controlled Environment Corp.*,[113] the Supreme Court of New Hampshire reaffirmed the state's long history of disfavoring strict liability.[114] The court noted that negligence had been favored as far back as 1873.[115] Additionally, absent explicit legislative intent, strict liability has been consistently rejected.[116]

2. History of the Current New Hampshire Rescue-Reimbursement Statute

Although New Hampshire has a long history of imposing statutory liability for various rescue services, the state has only recently begun to impose liability on *hikers* requiring emergency rescue.[117] New Hampshire levied its first fine on a hiker for the cost of his rescue in 1988.[118] At that time the state lacked a formal statute allowing the rescue to be billed to the rescuee.[119] However, in an interesting foreshadowing of the official statute's birth, New Hampshire used a then-existing reckless endangerment statute to impose a $500 fine on the hiker.[120]

In 1999, the New Hampshire legislature passed the first version of the official rescue-reimbursement statute.[121] This statute allowed the state to require reckless hikers and other outdoor enthusiasts to reimburse New Hampshire for costs of their rescue.[122] The court decided whether or not the

110. *See supra* note 93 and accompanying text (discussing hybrid strict liability); *see also* IDAHO CODE ANN. § 6-2401 (2012) (illustrating similar hybrid strict liability standard).

111. *See supra* note 93 and accompanying text (comparing hybrid strict liability to negligence).

112. *See Bagley*, 503 A.2d at 825 (noting preference for negligence standard in absence of clear legislative intent).

113. 503 A.2d 823 (N.H. 1986).

114. *See id.* at 825 (affirming strict liability not imposed unless legislative intent clear).

115. *Id.* (stating strict liability disfavored as early as 1873).

116. *Id.* (stating strict liability frequently struck down absent legislative intent).

117. *See supra* Part II.B.1 (outlining New Hampshire's history of imposing statutory reimbursement); *see also* N.H. REV. STAT. ANN. § 206:26-bb (2013) (requiring rescue reimbursement by hikers if negligent); *id.* § 153-A:24 (requiring rescue reimbursement by hikers if reckless). These two statutes were passed in 1999 and 2008 respectively. *See* § 153-A:24.

118. *See N.H. Charges Hiker with Reckless Conduct*, BOS. GLOBE, Oct. 15, 1988, at 18 [hereinafter *Reckless Conduct*], *available at* 1988 WLNR 625447 (describing circumstances of hiker's fine for rescue while intoxicated and unprepared).

119. *See id.* (noting reckless-endangerment fine from 1988); § 153-A:24 (establishing New Hampshire's first official rescue-reimbursement statute in 1999).

120. *See Reckless Conduct*, *supra* note 118 (noting circumstances of New Hampshire's first attempt to recover costs of hiker's rescue).

121. *See* § 153-A:24 (codifying New Hampshire's first rescue-reimbursement statute).

122. *See id.* (requiring reimbursement of rescue costs by hiker if reckless).

rescuee acted recklessly.[123] The public agency that expended the funds to effectuate the rescue received the reimbursement.[124]

In 2008, the standard was changed from recklessness to negligence with the passage of a new statute.[125] The goal of the legislature in passing this statute was to impose an easier-to-prove standard in order to facilitate recovery.[126] The impetus for the new statute was to offset some of the expanding costs of the Fish and Game Department, the organization conducting most of the rescues, and to deter reckless and negligent behavior.[127]

The statute effectively shifts the determination of whether the hiker was negligent to the Fish and Game Department.[128] The statute additionally provides the Department with legal avenues to enforce payment of fines.[129] For example, in some circumstances, the Department can suspend a hiker's driver's license or other state-issued license.[130]

The Fish and Game Department hoped the change in the standard of liability would allow them to collect recovery costs in up to forty cases per year.[131] The department, however, has recovered for only thirteen rescues since the standard was lowered in 2008.[132] The average cost of a rescuee's bill is approximately $203.[133]

The most prominent attempt to bill a negligent hiker under the new statute involved a Massachusetts Eagle Scout who became stranded on Mount Washington.[134] Scott Mason was trapped on the mountain after twisting his

123. *See* N.H. REV. STAT. ANN. § 153-A:24 (2013) (stating person liable if deemed reckless by court).

124. *See id.* (referring multiple times to "public agency" throughout statutory language).

125. *See id.* § 206:26-bb (changing required minimum standard of care from recklessness to negligence); *see also* Cook, *supra* note 8 (commenting on recent change in standard of liability through new statute).

126. *See* Cook, *supra* note 8; Love, *supra* note 7 (stating reasons behind change in statute implemented to facilitate recovery); Martha T. Moore, *Warning: Don't Get Lost in New Hampshire*, USA TODAY, Sept. 24, 2009, http://usatoday30.usatoday.com/travel/news/2009-09-23-rescuefee_N.htm (opining new standard implemented for easier recovery).

127. *See* Moore, *supra* note 126 (describing reason behind statute to offset growing Fish and Game Department costs). Moreover, the Department statistics show that the current funding options only cover eighty-four percent of annual search-and-rescue costs. *Id.*

128. *See* § 206:26-bb (appointing Fish and Game Department responsible for recovery); Love, *supra* note 7 (indicating Fish and Game personnel determine if hiker negligent). Department staff members consider whether the hiker knew the terrain and conditions, took proper gear, or left an itinerary in determining if the hiker acted negligently. *See* Love, *supra* note 7. The Attorney General has the final say regarding the negligence of the hiker. *Id.*

129. *See* N.H. REV. STAT. ANN. § 206:26-bb (2013); Cook, *supra* note 8 (detailing avenues for Fish and Game Department to recover costs from hikers).

130. *See* § 206:26-bb (allowing revocation of "any license, permit, or tag" issued by department); Cook, *supra* note 8 (enunciating statute allows suspension of license for failure to pay).

131. *See Teen Fined*, *supra* note 5 (describing goal under new standard for recovery of rescue costs).

132. Moore, *supra* note 126 (outlining current statistics for recovering cost of rescues since June 2008). Under the previous standard of recklessness, New Hampshire recovered on about 10 of 140 or so operations per year. *See* Cook, *supra* note 8.

133. *See supra* note 126 and accompanying text (suggesting low rate of recovery).

134. *See* Moore, *supra* note 126; Ramer, *supra* note 2; *Teen Fined*, *supra* note 5.

ankle in late 2009.[135] His rescue included the rental of a helicopter, which cost more than $24,000.[136] He received a bill from the New Hampshire Fish and Game Department for over $25,000.[137] The Department eventually chose not to pursue payment; however, it maintained that Scott was negligent and reserved the right to bring an action in the future.[138]

3. History of Other States' Efforts to Recover Rescue Costs and the Required Standard of Care

Many states have enacted various local and statewide laws dealing with rescue reimbursement.[139] Even in states that do not have comprehensive regulations dealing with emergency rescue-reimbursement costs, specialized regulations have been enacted to accomplish a similar goal.[140] These specialized regulations frequently deal with fire-suppression or wilderness-rescue costs that pose only a local problem.[141] Additionally, in most instances, the statute imposes a strict liability standard of care.[142]

In Maine, despite the existence of a law allowing the Department of Inland Fisheries and Wildlife to recover rescue costs, there have been a number of instances where local organizations have attempted to recover under localized regulations or rules.[143] For example, fire departments within Piscataquis County are allowed to bill for rescues that occur in the Unincorporated Territory.[144] The rule was implemented after the Piscataquis County

135. *See Teen Fined*, *supra* note 5 (discussing Scott Mason's rescue and bill).

136. Love, *supra* note 7 (outlining costs associated with Scott Mason's rescue bill).

137. *See id.*; *Teen Fined*, *supra* note 5.

138. *See* Brooks, *supra* note 16 (noting New Hampshire Fish and Game Department chose not to collect on bill). The State retained the right to bring suit in the future, but gave Scott Mason's personal circumstances as the reason behind not pursuing payment. *See id.* The State, however, stands behind the determination that Scott was negligent. *See id.*

139. *See* Love, *supra* note 7 (noting eight states currently have statutes dealing with rescue reimbursement).

140. *See Search and Rescue and Pay*, *supra* note 24 (indicating Piscataquis County Fire Department charges for rescues in unincorporated territory); Clint Talbott, Editorial, *Rescued and Billed: A Bad Combination*, BOULDER DAILY CAMERA (Colo.), June 24, 2007, at A27, *available at* 2007 WLNR 12149640 (highlighting Golden Fire Department's regulation allowing billing for rescue if outside town boundary).

141. *See supra* note 140 (describing instances of localized rescue issues dealt with through specialized regulation).

142. *See* COLO. REV. STAT. ANN. § 33-1-112.5 (West 2012) (setting strict liability standard); ME. REV. STAT. tit. 12, § 10105 (2012) (setting strict liability standard). Another striking example of local regulations adopting strict liability is the County of South Fulton, Tennessee's policy regarding out-of-bounds property owners. *See No Pay, No Spray: Firefighters Let Home Burn*, MSNBC, Oct. 6, 2010, http://www.msnbc.msn.com/id/39516346/ns/us_news-life/. The Department requires any homeowner living outside the county boundaries to pay an annual fee for firefighting services. *See id.* In one recent instance, the fire department refused to respond while a house burned to the ground because the owner had forgotten to pay for the service. *See id.*

143. *Search and Rescue and Pay*, *supra* note 24 (noting Milo Fire Department charged bee-sting victim for rescue in unincorporated territory).

144. *See id.* (asserting Piscataquis County allows departments to require reimbursement upon demand for

Commissioner refused to reimburse the fire departments.[145] Although the rule imposes strict liability, the departments are not required to seek reimbursement.[146]

Maine has also used its official rescue-reimbursement statute to bill for at least two rescues.[147] On one occasion, the group that organized a large hike was billed for a rescue when one of its members became separated, requiring a large search effort.[148] Additionally, a rescuee was billed when he drove his vehicle down a snow-covered park road during the spring and became stuck.[149] Although the standard under the Maine statute is strict liability, the park rangers maintain their decisions are based on the egregiousness of the actions of the rescuee.[150]

Similarly, in Colorado, pursuant to a city rule, the Golden Fire Department was allowed to bill for rescues that occurred outside the boundaries of the City of Golden.[151] Recently, the city attempted to bill a hiker $5000 for its part in his rescue after he sprained an ankle while hiking in 2007.[152] The hiker's fault was irrelevant to the department's ability to recover; thus, the policy was considered strict liability.[153] The outcry from the hiking community was so great that the city soon changed its policy.[154]

In New Mexico, the legislature recently passed a law allowing a ski area to seek reimbursement from skiers requiring rescue.[155] Reimbursement is only allowed if skiers travel out of bounds or violate other various provisions set

unincorporated territory rescue).

145. *See id.* (describing why girl charged for rescue by Milo Fire Department). The Piscataquis County Commissioner stated that search and rescue is the responsibility of the Department of Inland Fisheries and Wildlife and thus the agency should cover the costs. *See id.*

146. *See id.* (reiterating department not required to charge victim).

147. *See* Nick Sambides Jr., *Rescued Hiker Not Liable for Search Costs*, BANGOR DAILY NEWS (Me.), June 7, 2010, at 2, *available at* 2010 WLNR 11683634 (examining two instances requiring rescuee to pay for rescue in Baxter State Park).

148. *See id.* (detailing instance where negligent hiking group required to pay for rescue of member).

149. *See id.* (describing instance where rescuee required to pay when clearly reckless).

150. *See id.* (noting park officials look for certain level of "egregiousness" in actions of rescuee).

151. Talbott, *supra* note 140 (describing Golden Fire Department's rule of billing for rescues occurring outside city limits).

152. *See id.* (explaining Golden Fire Department charged man for rescue when he sprained ankle while hiking). The article goes on to say that the department can apply to be reimbursed from a state search-and-rescue fund that is funded by a surcharge on hunting and fishing licenses. *See id.*

153. *See id.* (stressing department has ability to require reimbursement for rescue out of its boundary).

154. *See N.H. Bills Lost Hikers for Cost of Rescue*, CBS NEWS, Oct. 29, 2009, http://www.cbsnews.com/stories/2009/10/29/national/main5451330.shtml (noting outcry from public pressured Colorado department to change policy and settle with rescuee). The City of Golden, Colorado then completely abolished the rule. *See id.*

155. *See* N.M. STAT. ANN. § 24-15-9 (West 2012) (listing provision of skiing code prohibiting negligent actions); *id.* § 24-15-12 (imposing liability on skiers for violation of skiing code); *see also* Gabe Toth, *Out-of-Bounds Dangers out of Ski Areas' Hands*, SANTA FE NEW MEXICAN, Feb. 9, 2009, at D1, *available at* 2009 WLNR 2616412 (describing boy charged because required rescue occurred out of bounds). Although the ski resort can bill for the rescue, there is no sure way to force payment. *See* Toth, *supra*.

forth in the statute.[156] One of the provisions prohibits acting negligently or otherwise not acting carefully.[157] The standard of liability is essentially, negligence; however, some specific acts are by default deemed negligent.[158]

The Oregon law allowing for rescue reimbursement is also based on a negligence standard.[159] The rarely used law was passed in 1996 after an effort to rescue three college students—who, in fact, were in no danger—cost in excess of $10,000.[160] The state has used the statute only one time: In 1996, Oregon billed two of five men rescued from the rapids of a notoriously dangerous river after they were warned repeatedly not to raft the river.[161] The bill totaled $1560 between the two men.[162]

III. ANALYSIS

A. Why Traditional Bars to Recovery Do Not Apply to the New Hampshire Approach

Traditional bars such as the free-public-services doctrine and pure-economic-loss doctrine do not apply to the New Hampshire approach to restitutionary recovery because they are preempted by state law.[163] Courts have universally held that both statutory and contract provisions preempt the common-law approaches of denying recovery to rescuers.[164] Even if New Hampshire attempted to recover without a statute, there is sufficient case law and scholarly commentary to conclude doing so may be consistent with the state's common law.[165]

156. *See* § 24-15-9; *id.* § 24-15-12.

157. *Id.* § 24-15-9.

158. *See id.* (listing several specific prohibited acts). Among the acts presumed negligent are: boarding or disembarking a ski lift outside the designated area; dropping or throwing an object from a ski lift; or using a ski lift while intoxicated. *Id.*

159. *See* OR. REV. STAT. ANN. § 404.270 (West 2012) (stating liability incurred when reasonable care not exercised).

160. *See* Jason Eck & Deanne Darr, *Paying the Price for Rescue: Agencies Can Charge Reckless Adventurers, But Usually Don't*, TRADITIONAL MOUNTAINEERING (2002), http://www.traditional mountaineering.org/News_Rescue_Charges.htm (describing history and application of law).

161. *See id.* (describing circumstances of rescue).

162. *See id.* (citing cost of rescue).

163. *See* N.H. REV. STAT. ANN. § 206:26-bb (2013); District of Columbia v. Air Fla., Inc., 750 F.2d 1077, 1080 (D.C. Cir. 1984) (noting within power of government to protect itself by passing statutes permitting recovery); City of Flagstaff v. Atchinson, Topeka & Santa Fe Ry. Co., 719 F.2d 322, 323 (9th Cir. 1983) (holding specific authorization for recovery must come from legislative authority); Town of Howard v. Soo Line R.R. Co., 217 N.W.2d 329, 330-31 (Wis. 1974) (refusing to hold railroad liable for fire-suppression costs absent statute); *see also* Lytton, *supra* note 4, at 741 (discussing limitations of free-public-services doctrine and other bars to recovery of rescue costs). The statutory means preempt any common-law bars to recovering the costs of an emergency rescue. *See* Lytton, *supra* note 4, at 741.

164. *See supra* note 163 (discussing statutory preemption of common-law bar to rescue-recovery costs).

165. *See generally* Lytton, *supra* note 4 (criticizing common-law bars to rescue recovery); Albert, *supra* note 35 (discussing exceptions to common-law rule of nonrecovery). Aside from statutory provisions, many exceptions to the common-law rules against recovery have been developed by courts. *See* Lytton, *supra* note 4,

For example, a frequent means of traditionally denying recovery was using the pure-economic-loss doctrine.[166] However, this doctrine has questionable applicability to governmental recovery of rescue costs.[167] The doctrine's long-accepted justifications and practical history make it inapplicable to situations where the government seeks reimbursement for rescue costs.[168] In fact, many courts have held recovery for pure economic loss is acceptable if the loss is foreseeable by the rescued individuals.[169]

One major justification behind the pure-economic-loss doctrine is to restrain the possibility of unlimited liability.[170] In a typical negligence dispute, allowing for recovery of pure economic loss has the possibility to spur endless litigation only remotely linked to the negligent act.[171] This concern is not present in an emergency rescue situation because the economic expenditure is directly and causally related to the actions of the rescuee.[172]

Additionally, a frequently cited method of denying recovery for rescue costs at common law was the free-public-services doctrine.[173] Yet, numerous commentators have criticized the application of this doctrine to the recovery of emergency rescue costs.[174] Although there is indeed some basis for the application of the free-public-services doctrine, courts have been disingenuous in its application.[175] The cases supporting the doctrine, especially those prior to

at 741-42. *See generally* Albert, *supra* note 35. These exceptions include standing, proximate cause, nuisance abatement, and public-land damage, among others, allowing for the recovery of rescue costs. *See* Lytton, *supra* note 4, at 741-45. Additionally unjust enrichment, quasi-contract, danger-invites-rescue, and post-rescue ratification are frequently cited as exceptions to nonrecovery. *See* Albert, *supra* note 35, at 87-107.

166. *See* Lytton, *supra* note 4, at 749 (stating free-public-services doctrine used to deny recovery for rescue costs).

167. *See* People Express Airlines, Inc. v. Consol. Rail Corp., 495 A.2d 107, 118 (N.J. 1985) (noting recovery for pure economic loss allowed when proximately caused by defendant's breach of duty). *See generally* Lytton, *supra* note 4 (discussing difference between free-public-services doctrine and pure-economic-loss doctrine). The true application of the pure-economic-loss doctrine will allow recovery where doing so "does not threaten to leave courts without a bright line by which to limit liability." *See* Lytton, *supra* note 4, at 750.

168. *See* Lytton, *supra* note 4, at 750 (analyzing proper application of pure-economic-loss doctrine).

169. *See People Express*, 495 A.2d at 118 (holding pure economic losses recoverable if foreseeable by defendant).

170. *See* Lytton, *supra* note 4, at 749-50 (discussing why and how pure-economic-loss doctrine bars recovery of rescue costs). The purpose of the pure-economic-loss doctrine is to "prevent the flood of litigation that would accompany unlimited liability." *Id.* at 750.

171. *See id.* (debating purpose of pure-economic-loss doctrine).

172. *See id.* (stressing pure-economic-loss doctrine not applicable to recovery of rescue costs). Lytton argues that "Public service expenditures are a determinate, limited category of economic loss, and allowing recovery for them would not open the door to unlimited liability." *Id.*

173. *See id.* at 730 (discussing free-public-services doctrine as bar to rescue-cost recovery); *see also* Albert, *supra* note 35, at 86 (noting general rule in United States of rescuee not liable to nonprofessional rescuer); McIntyre, *supra* note 48, at 1008-10 (discussing traditional common-law rule of nonliability including free-public-services doctrine).

174. *See supra* note 173 and accompanying text (noting two critics of traditional rule barring recovery of rescue costs).

175. Lytton, *supra* note 4, at 732 ("[C]ourts have been disingenuous in attempting to [apply the

the 1970s, do not provide a sufficient basis for it.[176] In fact, it appears the free-public-services doctrine might simply be an improper extrapolation of traditional doctrinal elements, such as standing and proximate cause.[177] More often than not, courts have found a way around the bar when equity demands it.[178] These methods include statutes, contracts, nuisance abatement, damage to public property, the danger-invites-rescue rule, or unjust enrichment.[179] Additionally, courts often simply fail to apply the doctrine and instead focus on standing, remoteness, and proximate-cause analyses.[180]

Moreover, it is widely accepted that the common law has developed in such a way as to justify reimbursement to professional and nonprofessional rescuers.[181] For example, in New Hampshire and elsewhere, the oft-cited principle of danger-invites-rescue is used to justify reimbursement of rescuers.[182] The principle states the wrong that imperils a life is a wrong to both the imperiled and the rescuer.[183] Logically speaking, the theory applies when the wrongdoer is the imperiled, as well as when the two parties are distinct.[184]

The courts have also developed justification for reimbursement through an

doctrine].").

176. *See, e.g.*, United States v. Standard Oil Co., 332 U.S. 301, 314-16 (1947) (dismissing government complaint for reimbursement of medical costs for negligently injured soldier); Dep't of Mental Hygiene v. Hawley, 379 P.2d 22, 28 (Cal. 1963) (denying recovery of costs of incarcerating criminals); People v. Wilson, 49 Cal. Rptr. 792, 794 (Cal. Dist. Ct. App. 1966) (describing government ability to recover fire-suppression costs as "creature of statute"); *see also* Lytton, *supra* note 4, at 731-32 (noting three above cases do not provide sufficient basis for doctrine). Furthermore, none of the justifications stated by the courts "provides support for a general rule barring recovery of public service expenditures." Lytton, *supra* note 4, at 732.

177. *See* Lytton, *supra* note 4, at 745-46 (distinguishing free-public-services doctrine from remoteness doctrine).

178. *See* Brandon Twp. v. Jerome Builders, Inc., 263 N.W.2d 326, 328 (Mich. Ct. App. 1977) (declining to apply free-public-services doctrine); McIntyre, *supra* note 48, at 1019-34 (outlining courts' exceptions to avoid application of rule of nonrecovery). In *Brandon Township*, the town repaired a bridge owned by the defendant because it was in imminent danger of collapse. *See* 263 N.W.2d at 327. The court ruled that the town could recover those costs even though it could have reasonably barred the expense under free-public-services analysis. *See id.* at 328.

179. *See* McIntyre, *supra* note 48, at 1019-34 (enumerating exceptions to avoid application of rule of nonrecovery).

180. *See* Lytton, *supra* note 4, at 745-50 (discussing similarities and differences among standing, proximate cause, and free-public-services doctrine); *see also Brandon Twp.*, 263 N.W.2d at 328 (declining to apply free-public-services doctrine).

181. *See generally* Lytton, *supra* note 4 (noting limitations and scope of traditional rule of nonrecovery); Albert, *supra* note 35 (noting exceptions to traditional rule of nonrecovery for professional and nonprofessional rescuers).

182. *See* Albert, *supra* note 35, at 91-92 (noting widely accepted principle of danger-invites-rescue allows for recovery). It is a rare instance where a rescuer plaintiff cannot establish a colorable negligence claim against the rescuee. *See id.*

183. *See* Wagner v. Int'l Ry. Co., 133 N.E. 437, 437 (N.Y. 1921) (holding one who imperils rescuee liable to rescuee and rescuer).

184. *See* Albert, *supra* note 35, at 92 (stating third-party defendant's negligence need not create danger inviting rescue).

implied fee for services by professional rescuers.[185] Although originally intended to protect doctors from indigent patients' failure to pay, the principle also would apply to any rescuer whom the rescuee acknowledges typically charges for services.[186] In New Hampshire, it is widely known that the Fish and Game Department charges for rescues, and many trailheads contain warning signs notifying hikers of this.[187] Most importantly, the justifications behind allowing recovery by private rescuers apply equally well to allowing recovery by the government.[188]

The New Hampshire approach can be further justified when analyzed against the rule of unjust enrichment, often used to allow for rescue reimbursement.[189] Unjust enrichment allows for recovery by a party who undertakes the duty of another party and incurs expenses.[190] When embarking on a hike, a hiker has a duty, at a minimum, not to act in a negligent manner that would cause a third party to incur pecuniary or physical harm.[191] When the hiker negligently fails in this duty, thereby requiring rescuers to escort him to safety, the rescuers incur expenses directly related to that failure.[192]

On the other hand, it can also be argued that a rescuee/rescuer dichotomy is not the intended application of unjust enrichment.[193] The traditional

185. *See* Cotnam v. Wisdom, 104 S.W. 164, 166 (Ark. 1907) (holding in absence of express agreement, professional rescuer earns what he would normally charge).

186. *See id.* at 165 (stating generally, one unable to agree to accept help due to circumstances held liable nonetheless); *see also* Albert, *supra* note 35, at 99 (describing *Cotnam* rule as creating implied-in-law contract when recipient unable to give assent).

187. *See* Love, *supra* note 7 (noting prevalence of trailhead warnings).

188. *See* Albert, *supra* note 35, at 100-01 (describing rationale behind allowing recovery by professional rescuers). Albert states this type of recovery is allowed because the opportunity cost of a professional is higher than a nonprofessional, and the risk that altruism alone spurred the rescue attempt is mitigated, therefore easing the legal determination of an appropriate award. *See id.* The New Hampshire approach satisfies these rationales because the state notifies hikers of its intent to charge; the scarce time and resources of the Fish and Game Department indicate that its opportunity cost is substantial; and there is a calculable cost associated with a rescue. *Compare id.* (listing rationales for allowing professional rescuer to recover), *with* Love, *supra* note 7 (noting prevalence of trailhead warnings), *and* Colquhoun, *supra* note 8 (discussing Fish and Game Department budget issues and increasing number of unprepared hikers in New Hampshire).

189. *Compare* Brandon Twp. v. Jerome Builders, Inc., 263 N.W.2d 326, 328 (Mich. Ct. App. 1977) (describing elements and application of unjust-enrichment exception to nonrecovery by rescuers), *and* McIntyre, *supra* note 48, at 1032-33 (noting intricacies of unjust-enrichment theory of recovery), *with* N.H. REV. STAT. ANN. § 206:26-bb (2013) (allowing recovery when hiker negligent), *and* § 153-A:24 (allowing recovery when hiker reckless).

190. *See* McIntyre, *supra* note 48, at 1032-33 (discussing applicability of unjust-enrichment theory of recovery).

191. *See* § 206:26-bb (imposing duty on hikers not to act negligently); *id.* § 153-A:24 (imposing duty on hikers not to act recklessly); *see also HikeSafe*, *supra* note 8 (outlining "hikeSafe" guidelines imposed by state of New Hampshire).

192. *See, e.g.*, Cook, *supra* note 8 (outlining expenses incurred from emergency rescues); Love, *supra* note 7 (describing expenses incurred in rescue of Massachusetts Eagle Scout); Moore, *supra* note 126 (noting expenses incurred during rescues of hikers in New Hampshire).

193. *Compare Brandon Twp.*, 163 N.W.2d at 328 (illustrating unjust enrichment when town repaired defendants' bridge), *with* Moore, *supra* note 126 (discussing manner and type of expenses incurred during

application of unjust enrichment typically involves two individuals, one of whom sustains substantial financial loss due to the actions of the other.[194] Often the benefitting party has acted fraudulently or otherwise wrongly caused a less knowledgeable party to rely on his expertise.[195] Nevertheless, the overarching principle of the doctrine of unjust enrichment can be reliably applied to justify rescue reimbursement for states like New Hampshire.[196]

It is widely accepted that reimbursement to rescuers by rescuees in some regard is appropriate.[197] Whether the theory behind reimbursement is statutory or developed by the courts on an equity basis, the principle behind it remains consistent.[198] New Hampshire's policy of allowing rescuers to seek reimbursement from hikers is directly in line with this reasoning.[199]

B. Why the Standard of Negligence Used by New Hampshire Is Both Appropriate and Consistent with Precedent

Historically, liability in New Hampshire has been imposed through various statutory schemes for emergency rescue scenarios ranging from fire-suppression costs to outdoor enthusiasts' rescues and telephone-pole placement.[200] A significant number of these statutes hold individuals to a standard of negligence.[201] Moreover, across the country, many rescue liability statutes also favor a standard of negligence.[202] New Mexico ski areas hold

emergency rescue).

194. *See generally* WILLISTON ON CONTRACTS, *supra* note 63 (commenting on quasi-contractual recovery).

195. *See generally* Alex Builders & Sons, Inc. v. Danley, 7 A.3d 1219 (N.H. 2010) (involving unjust enrichment of structured settlement firm and life insurance company); Singer Asset Fin. Co. v. Wyner, 937 A.2d 303 (N.H. 2007) (involving homeowner's failure to pay for work completed).

196. *See generally* Lytton, *supra* note 4 (claiming loss best shouldered by party with duty to avoid); McIntyre, *supra* note 48 (noting recovery appropriate when breach of duty leads to third-party suffering).

197. *See generally* Webb v. McGowin, 168 So. 196 (Ala. Ct. App. 1936) (acknowledging well-settled moral obligation sufficient consideration for recovery); Cotnam v. Wisdom, 104 S.W. 164 (Ark. 1907) (noting implied-in-law contract allows recovery under certain circumstances); Wagner v. Int'l Ry. Co., 133 N.E. 437 (N.Y. 1921) (holding danger invites rescue, which allows for recovery); Lytton, *supra* note 4 (discussing many exceptions to common-law rule of nonrecovery); McIntyre, *supra* note 48 (noting history of reimbursement for emergency services).

198. *Compare* McIntyre, *supra* note 48 (noting common-law "equity-based" theories of recovery), *with* N.H. REV. STAT. ANN. § 206:26-bb (2013), *and* OR. REV. STAT. ANN. § 404.270 (West 2012).

199. *See supra* note 198 (illustrating consistency of New Hampshire statute with other theories of recovery).

200. *See, e.g.*, N.H. REV. STAT. ANN. § 380:1 (requiring reimbursement to town for fire-suppression cost when railroad caused fire); *id.* § 231:176 (stating owner liable for injury on highway caused by negligent placement of phone or cable pole, wire, or other structure); *id.* § 466:19 (making owner strictly liable for damage caused by dog).

201. *See, e.g.*, *id.* § 231:176; *id.* § 225-A:25 (limiting ski-tram operators' liability, but allowing liability for negligent operation); *id.* § 169-C:29 (providing doctor must report child abuse and failure can result in negligent-hiring action).

202. *See, e.g.*, ARIZ. REV. STAT. ANN. § 12-972 (2012) (creating liability for negligent transportation or storage of hazardous waste requiring rescue); N.M. STAT. ANN. § 24-15-9 (West 2012) (imposing liability for

skiers to a negligence standard.[203] Oregon requires hikers to refrain from acting negligently or face liability for the cost of their rescue.[204] Arizona similarly imposes liability on any individual who negligently uses or stores hazardous waste and requires rescue.[205] When viewing New Hampshire's rescue liability requirement in light of these and other statutes across the country, it is apparent New Hampshire's standard is consistent with the prevailing standard nationwide.[206]

In most instances, if the standard imposed through an emergency-services statute is not negligence, it is either strict liability or a hybrid strict liability.[207] More often than not, when strict liability is involved, the legislature or courts mitigate the rule's harshness by creating the hybrid standard.[208] Upon comparing the hybrid standard with the negligence standard it becomes apparent that the two provide comparable protections.[209]

The California rescue-reimbursement statute allows for reimbursement from a person who knowingly enters a closed park area.[210] Significantly, the legislature added, "or an area that a reasonable person under the circumstances should have known was closed."[211] This addition effectively turns the standard from one of strict liability to a hybrid that provides protection similar to a negligence standard.[212] The hybrid standard is created because the inclusion of

negligence on ski slope requiring rescue); OR. REV. STAT. ANN. § 404.270 (codifying liability for negligent outdoor enthusiasts requiring rescue).

203. *See* N.M. STAT. ANN. § 24-15-9 (imposing liability for negligence on ski slope requiring rescue).

204. *See* OR. REV. STAT. ANN. § 404.270 (West 2012) (allowing liability for negligent outdoor enthusiasts requiring rescue).

205. *See* ARIZ. REV. STAT. ANN. § 12-972 (prescribing liability for negligent transportation/storage of hazardous waste requiring rescue).

206. *Compare* N.H. REV. STAT. ANN. § 206:26-bb (2013) (setting negligence standard of liability), *with* ARIZ. REV. STAT. ANN. § 12-972 (imposing standard of negligence), CAL. GOV'T CODE § 53159 (West 2012) (outlining "hybrid" standard comparable to negligence), *and* OR. REV. STAT. ANN. § 404.270 (imposing negligence standard for rescuee). When compared, the New Hampshire statute's requirement of negligence is consistent with other rescue-reimbursement statutes, even those strict liability statutes that can be grouped as hybrid standards. *See, e.g.*, ARIZ. REV. STAT. ANN. § 12-972; CAL. GOV'T CODE § 53159; OR. REV. STAT. ANN. § 404.270.

207. *See, e.g.*, CAL. GOV'T CODE § 53159 (illustrating hybrid standard of strict liability); COLO. REV. STAT. ANN. § 33-1-112.5 (West 2012) (setting actual strict liability standard); IDAHO CODE ANN. § 6-2401 (2012) (indicating hybrid standard of strict liability).

208. *See* 42 U.S.C. § 9607 (2006) (providing affirmative defense of "due care" creating hybrid standard); CAL. GOV'T CODE § 53159 (adding language to statute creating hybrid standard); *see also* Bagley v. Controlled Env't Corp., 503 A.2d 823, 825 (1986) (refusing to apply strict liability when legislative intent unclear). *But see* Hooksett v. Concord R.R., 38 N.H. 242, 242 (1859) (indicating strict liability means no proximate-cause analysis required).

209. *See supra* note 93 and accompanying text (comparing similarities between hybrid strict liability standard and pure negligence). The two standards often substantially overlap, creating similar outcomes. *See supra* note 94 and accompanying text.

210. *See* CAL. GOV'T CODE § 53159 (creating liability for those who hike closed trails).

211. *Id.* (adding mitigating language to strict liability statute creating hybrid standard).

212. *See* CAL. GOV'T CODE § 53159 (West 2012) (creating hybrid standard); King v. Blue Mountain Forest Ass'n., 123 A.2d 151, 154 (N.H. 1956) (noting many cases decided under strict liability could have been

limiting language allows the default standard to be whether a "reasonable person" knew the trail was closed, a very similar standard to the "reasonable care" required by negligence.[213]

Additionally, the United States statute dealing with liability for owners of hazardous waste initially set a strict liability standard.[214] However, Congress subsequently provided an extensive series of affirmative defenses, including one of "reasonable care."[215] By providing a reasonable care defense to a strict liability statute, the standard is significantly mitigated, and more closely resembles the negligence standard set forth by New Hampshire.[216]

Furthermore, even when the legislature does not provide mitigating language, state officials in charge of enforcing the statutes often partake in extrajudicial activities that mitigate the harshness of a strict liability standard.[217] This is particularly apparent in Maine, where the park rangers in charge of billing rescuees will not bill them unless their actions were especially egregious.[218] This self-imposed restraint can be likened to New Hampshire's legislatively imposed negligence standard.[219]

Whether an official negligence standard or a standard with substantially the same effect is applied, the result is an outcome fair for the hiker and efficient for the rescuing agency.[220] The goal of the New Hampshire Fish and Game Department in changing the standard to negligence was to increase the state's ability to charge individuals.[221] This change was intended to increase awareness of safe-hiking practices and encourage preparedness and responsibility.[222] Since the 2008 change, the number of charged individuals

decided under negligence). *Compare* CAL. GOV'T CODE § 53159 (providing qualifications that mitigate strict liability standard), *with* N.H. REV. STAT. ANN. § 206:26-bb (2013) (indicating similar level of care required of hiker).

213. *See supra* note 212 and accompanying text (discussing creation of hybrid standard).

214. 42 U.S.C. § 9607 (2006) (providing strict liability standard subject to codified defenses).

215. *See id.* § 9607(b) (setting forth defenses including one of "reasonable care").

216. *Compare* 42 U.S.C. § 9607 (illustrating hybrid standard), *with* N.H. REV. STAT. ANN. § 206:26-bb (illustrating New Hampshire's negligence standard). In effect, both standards require an individual to act with reasonable care or face liability. *See* § 9607; § 206:26-bb.

217. *See* Sambides Jr., *supra* note 147 (noting Maine park rangers decline to bill unless actions of hiker "egregious").

218. *See id.*

219. *Compare id.* (noting Maine park rangers claim they decline to bill unless actions of hiker "egregious"), *with* N.H. REV. STAT. ANN. § 206:26-bb (2013) (setting New Hampshire standard of negligence for rescue reimbursement). The similarities between the de facto "egregious" standard applied by Maine park rangers and the reasonable prepared hiker standard used in New Hampshire indicate they are nearly identical. *See* § 206:26-bb; Sambides Jr., *supra* note 147.

220. *Compare* § 206:26-bb (setting standard of negligence for rescue reimbursement), *and* Sambides Jr., *supra* note 147 (noting park rangers claim they will not bill unless actions of hiker "egregious"), *with supra* notes 132, 133 and accompanying text (noting reimbursements stayed same or declined, despite revised standard of negligence).

221. *See supra* note 132 and accompanying text (suggesting modified standard would increase recoveries).

222. *See supra* note 132 and accompanying text (hypothesizing modified standard would encourage prepared hikers); *HikeSafe*, *supra* note 8 (outlining how hikers ideally should prepare).

has remained consistent, yet substantial publicity has been generated regarding hiker rescues and safe hiking.[223] This balance suggests that although the standard allows for easier collection, the benefits more than outweigh the possibility of either overcharging or discouraging calls for help.[224]

Moreover, and perhaps most importantly, New Hampshire case law has expressly stated that a negligence standard is preferred over strict liability.[225] Courts have consistently held that, absent clear legislative intent, a standard of negligence should be imposed.[226] Having expressly chosen the negligence standard, the legislature's decision should be viewed as the most appropriate standard.[227] Where both the courts and the legislature are clearly supportive of a particular course of action, the decision should withstand the harshest scrutiny.[228] The history of other rescue-reimbursement statutes, and their required standards of care, further strengthens New Hampshire's decision to impose a negligence standard.[229]

IV. CONCLUSION

When the New Hampshire statute's required standard of care is considered in conjunction with the state's history, its preference for negligence, and many other states' de facto standards, a negligence standard is clearly the most appropriate choice. Because the New Hampshire approach to rescue reimbursement is statutory, most traditional bars to recovery are preempted. The free-public-services doctrine does not apply because contract and statutory provisions have been held to invalidate its application. Even assuming the New Hampshire approach is not statutory, the free-public-services doctrine has been applied so infrequently and inconsistently that its existence should not have any substantial impact on New Hampshire's efforts to recover rescue costs.

Similarly, the pure-economic-loss doctrine does not apply. Courts have held that the pure-economic-loss doctrine will not apply when the loss is suffered by

223. *See supra* note 132 and accompanying text (noting recovery since 2008 at least consistent with pre-change recovery); *see also, e.g.*, Cook, *supra* note 8; Love, *supra* note 7 (showing publicity regarding rescued Eagle Scout); *Teen Fined*, *supra* note 5 (exemplifying typical media coverage).

224. *Compare supra* note 132 (indicating, at most, no change in number of recovered on cases per year under negligence standard), *with* Zezima, *supra* note 21 (arguing danger of changing standard because change could discourage calls for help or cause overcharging).

225. *See, e.g.*, Pub. Serv. Co. v. Westinghouse Elec. Corp., 685 F. Supp. 1281, 1285 (N.H. 1988) (noting New Hampshire prefers to avoid strict liability and instead leans towards negligence); Bagley v. Controlled Env't Corp., 503 A.2d 823, 825 (N.H. 1986) (discussing New Hampshire's reluctance to impose strict liability); King v. Blue Mountain Forest Ass'n, 123 A.2d 151, 154 (N.H. 1956) (noting New Hampshire's preference for negligence standard).

226. *See supra* note 225 (recognizing New Hampshire courts will not impose strict liability unless expressly called for by legislature).

227. *See supra* note 225 and accompanying text (indicating legislature and courts agree on negligence).

228. *See* N.H. REV. STAT. ANN. § 206:26-bb (2013); *Westinghouse*, 685 F. Supp. at 1285.

229. *See* § 206:26-bb; *Westinghouse*, 685 F. Supp. at 1285.

an individual whom the defendant knows, or has reason to know, is likely to sustain injury. New Hampshire has widely publicized its efforts to hold hikers liable, and warns hikers at most trailheads that if the hiker acts negligently, the Fish and Game Department can charge them for their rescue. In the case of a rescue, this warning is sufficient to make a loss by the Department foreseeable. Moreover, the policy behind the doctrine is to limit liability. When courts can reasonably relate the economic damage to a particularly concrete event, they are more willing to impose liability. The economic loss in the case of a rescue is causally related to the actions of the hiker, and thus does not pose any substantial risk of unlimited liability.

As far back as the 1800s, New Hampshire courts and the legislature expressed a preference for the standard of negligence. Negligence was frequently used to provide for liability in situations similar to modern-day hiker rescues. The courts opined that negligence should be applied when the legislature failed to expressly provide otherwise. Even in circumstances where the legislature provided for strict liability—a more stringent standard—courts often partook in judicial activism and applied a standard more similar to negligence. Thus, it is not unreasonable to give substantial weight to a calculated decision by the legislature to apply a standard that is both officially and unofficially most often used.

This type of malleable standard can also be seen in the application of other states' rescue-reimbursement statutes. Many states' legislatures provide for strict liability, yet either through lax application or specific statutory clauses, a hybrid strict liability standard is created that, in effect, is more similar to negligence. The frequency of this type of application indicates that, practically speaking, negligence is the most prudent and consistent choice for a rescue-reimbursement statute.

Therefore, historically, practically, and comparatively speaking, a standard of negligence is the best choice for the New Hampshire statute. There are no substantial bars to the Fish and Game Department recovering rescue costs from hikers. The New Hampshire courts approve and, in fact, have advocated for a negligence standard. Furthermore, significant deference should be accorded to the legislature's choice of negligence because, through experience, it is clear the standard is unlikely to increase the number of rescuees liable for their own rescue.

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