RECENT CASES

TORT LAW — PROFESSIONAL RESCUE DOCTRINE — WASHINGTON SUPREME COURT DECLINES TO APPLY PROFESSIONAL RESCUE DOCTRINE IN SUIT BY POLICEMAN AGAINST FELLOW OFFICER. — *Beaupre v. Pierce County*, 166 P.3d 712 (Wash. 2007).

The fireman's rule, or professional rescue doctrine,[1] has been a well-recognized part of the common law for over one hundred years.[2] This rule precludes a professional rescuer from recovering for injuries "inherently within the ambit of those dangers which are unique to and generally associated with the particular rescue activity."[3] In recent years, however, exceptions have muddied the professional rescue doctrine,[4] making its application on a case-by-case basis difficult, and calling into question its viability more generally.[5] Recently, in *Beaupre v. Pierce County*,[6] the Washington Supreme Court held that the professional rescue doctrine did not bar the suit of Curtis Beaupre, a police officer, against his employer, the police department, for injuries sustained when he was hit by another officer's car in pursuit of a suspect.[7] Because the court defined the professional rescue doctrine in terms of assumption of risk but held that it did not apply because of the identity of the defendant rather than the risks assumed by the

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[1] The distinction between these two terms, to the extent that it once existed, was that the fireman's rule was based on premises liability, whereas the professional rescue doctrine was based on assumption of risk. Ballou v. Nelson, 834 P.2d 97, 99 (Wash. Ct. App. 1992). As the effects of the rules are the same and the premises liability rationale is no longer used, courts now use the terms interchangeably. *See, e.g.*, Ouachita Wilderness Inst., Inc. v. Mergen, 947 S.W.2d 780, 784 (Ark. 1997) (referring to "[t]he Fireman's Rule (also known as the professional-rescuer doctrine)"). The court in *Beaupre v. Pierce County*, 166 P.3d 712 (Wash. 2007), consistently referred to the rule as the professional rescue doctrine, and therefore this comment will do the same.

[2] *See* Gibson v. Leonard, 32 N.E. 182, 184 (Ill. 1892) (holding, on the basis of the firefighter's status as a "naked licensee," that the owner of a building was not liable to a fireman for injuries sustained while fighting a fire).

[3] Maltman v. Sauer, 530 P.2d 254, 257 (Wash. 1975).

[4] *See, e.g.*, State Farm Mut. Auto. Ins. Co. v. Hill, 775 A.2d 476, 484–85 (Md. Ct. Spec. App. 2001) (listing cases barring application of the fireman's rule in instances of intentional misconduct).

[5] *See, e.g.*, Ruiz v. Mero, 917 A.2d 239, 247 (N.J. 2007) (holding that N.J. STAT. ANN. §§ 2A:62A-21 to -22 (West 2007) "abrogate[d] the firefighters' rule in its entirety"); Christensen v. Murphy, 678 P.2d 1210, 1218 (Or. 1984) ("[W]e hold that the 'fireman's rule' is abolished in Oregon as a rule of law . . . ."). *But see generally* Robert H. Heidt, *When Plaintiffs Are Premium Planners for Their Injuries: A Fresh Look at the Fireman's Rule*, 82 IND. L.J. 745 (2007) (discussing modern concerns with the professional rescue doctrine but presenting a defense of its continued viability). For the classic criticism of the professional rescue doctrine from the bench, see *Walters v. Sloan*, 571 P.2d 609, 614–20 (Cal. 1977) (Tobriner, Acting C.J., dissenting).

[6] 166 P.3d 712.

[7] *Id.* at 716.

plaintiff,[8] its reasoning was internally inconsistent. Moreover, as a policy matter, permitting police officers to sue their departments may well jeopardize public safety, override democratically established agreements regarding police compensation, and needlessly occupy judicial resources. Contrary to the court's finding, both police officers and the general public they protect would be far better served by the application of the professional rescue doctrine in these situations.

On November 1, 2003, Sergeant Curtis Beaupre and other members of the Pierce County Sheriff's Department were in pursuit of a domestic violence suspect who was driving south on the northbound lanes of Interstate #5 in Washington.[9] During the pursuit, Beaupre exited his car and was struck from behind by a patrol car driven by Deputy Win Sargent.[10] Beaupre sued the county, alleging that it was vicariously liable for Sargent's negligent driving and that it had failed to provide Sargent with adequate training.[11]

Pierce County moved for summary judgment in the King County Superior Court, alleging that the "'professional rescuer/fireman's rule' precluded the existence of any duty to [Beaupre] as a matter of law."[12] Judge Erlick denied the motion for summary judgment, holding that the suit was permitted by statute,[13] and that the equal expertise of Beaupre and Sargent justified assigning liability in a way that would not be appropriate had the tortfeasor merely been a member of the general public.[14] In so ruling, Judge Erlick implicitly denied Beaupre's allegation that Pierce County had waived the professional rescue doctrine by not raising it earlier in the litigation.[15]

The Washington Supreme Court affirmed, holding that the professional rescue doctrine was inapplicable on its merits,[16] but that Pierce

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[8] *Id.* at 716–17.

[9] Brief of Respondent at 2, *Beaupre*, 166 P.3d 712 (Nos. 79976-8, 58515-1), 2007 WL 1685948.

[10] *Id.*

[11] *Id.* at 3. *See also* Brief of Appellant Pierce County at 3, *Beaupre*, 166 P.3d 712 (Nos. 79976-8, 58515-1), 2007 WL 4572755 (describing the two separate causes of action).

[12] Brief of Appellant Pierce County, *supra* note 11, at 3.

[13] WASH. REV. CODE ANN. § 41.26.281 (West 2007).

[14] *See* Beaupre v. Pierce County, No. 04-2-23610-0 SEA, slip op. at 6 (King County Super. Ct. June 15, 2006) (on file with the Harvard Law School Library). In analyzing the statute, Judge Erlick determined that since the language would allow recovery for an officer's being struck by a fellow officer's vehicle while leaving the station, it would be "absurd" for recovery to be denied when "an officer responding to a call [was] struck by the same officer's vehicle at the scene." *Id.* at 5. This analysis is questionable as it ignores precisely the assumption of risk inquiry upon which Judge Erlick determined the professional rescue doctrine was based. *See id.* at 2 ("The professional rescuer doctrine . . . is based on a broad policy of assumption of risk."). The difference in liability between an accident in a parking lot and one during an emergency rescue is hardly "absurd," but rather distinguishable on the basis of the significantly different risks assumed in each situation.

[15] *See* Brief of Respondent, *supra* note 9, at 5.

[16] *Beaupre*, 166 P.3d at 716.

County was not barred from raising it because the county had asserted the affirmative defense of assumption of risk.[17] The court began by differentiating between the rescue doctrine — allowing a *voluntary* rescuer to seek recovery for injuries incurred while rescuing someone who has negligently placed himself in a position of peril — and the *professional* rescue doctrine, which bars recovery "because a professional rescuer assumes certain hazards 'not assumed by a voluntary rescuer.'"[18] Noting that the issue of a fellow officer's negligence was one of first impression in Washington, the court approvingly adopted the court of appeals's "recogni[tion] that the professional rescue doctrine does not apply when an independent or intervening act causes the professional rescuer's injury."[19] Next, the court rejected Pierce County's argument that "fellow officers are not intervening parties"[20] by contrasting Washington law with that of other states[21] and noting that Washington "distinguish[es] between the individual responsible for bringing the rescuer to the scene and an intervenor."[22] The court concluded its argument on the merits by holding that the professional rescue doctrine did not apply "to negligent or intentional acts of intervening parties not responsible for bringing the rescuer to the scene."[23]

Turning to the second question, which was technically unnecessary given the ruling on the merits, the court stated that the professional rescue doctrine was not procedurally barred as Pierce County had raised the affirmative defense of assumption of risk.[24] Expounding on its view, the court asserted that "the professional rescue doctrine is essentially a type of implied primary assumption of the risk."[25]

The court's ruling in *Beaupre* is troubling both on its own terms and for its broader public policy and judicial economy implications. The court defined the professional rescue doctrine in terms of assumption of risk, but then ruled based on the identity of the tortfeasor as an "intervenor" rather than based on whether the injury was within the risk that Beaupre assumed. In so doing, it defined the rule in one way but applied it in another. Further, the court failed to account for three

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[17] *Id.* at 717.

[18] *Id.* at 715 (quoting Maltman v. Sauer, 530 P.2d 254, 257 (Wash. 1975)).

[19] *Id.* (citing Ballou v. Nelson, 834 P.2d 97 (Wash. Ct. App. 1992) (recovery allowed for intentional assault); Ward v. Torjussen, 758 P.2d 1012 (Wash. Ct. App. 1988) (recovery allowed for intervening negligence); Sutton v. Shufelberger, 643 P.2d 920 (Wash. Ct. App. 1982) (same)).

[20] *Id.*

[21] *Id.* at 716 (contrasting Calatayud v. State, 959 P.2d 360 (Cal. 1998), and Cooper v. City of New York, 619 N.E.2d 369, 372 (N.Y. 1993), with Washington law, which "specifically grants officers the 'right to sue' their employers for negligence *in addition to recovering* workers' compensation").

[22] *Id.* at 715.

[23] *Id.* at 716.

[24] *Id.* at 717.

[25] *Id.*

important policy considerations that undergird the professional rescue doctrine and apply with particular force in the case of internal suits between police officers. First, by introducing the fear of tort liability, the court injected a dangerous and inappropriate factor into police decisionmaking that could have serious ramifications for public safety. Second, the additional compensation that arises from tort recovery could well lead to a reduction in police salaries, a solution that appears to have been rejected democratically and should not be imposed judicially. Finally, such suits raise judicial economy concerns, as they make factfinding unmanageable and could well flood the courts.

The inconsistency in the court's opinion arises from a conflict between its resolution of Beaupre's claim in the first part of the opinion and its justification for the professional rescue doctrine in the second. From the outset of the opinion, the court made clear that its basis for the doctrine was assumption of risk, one of three legal mechanisms courts have used as a rationale for the rule. Originally, the professional rescue doctrine was an outgrowth of the distinction between an invitee and a licensee, with firemen falling in the latter category.[26] As this rationale faded,[27] some courts used a nebulous "public policy" justification, considering it "unjust and unfair to compensate firefighters and police for injuries sustained when facing dangers they [have] been hired to confront."[28] A third rationale, and the one used by the Washington Supreme Court, defined the professional rescue doctrine in terms of assumption of risk.[29] Using this formulation, the *Beaupre* court relied on *Maltman v. Sauer*[30] to establish that "the proper test for determining a professional rescuer's right to recovery under the 'rescue doctrine' is whether the hazard ultimately responsible for causing the injury is inherently within the ambit of those dangers which

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[26] Gibson v. Leonard, 32 N.E. 182, 184 (Ill. 1892).

[27] Eight years before *Rowland v. Christian*, 443 P.2d 561, 568 (Cal. 1968), formally abrogated the invitee-licensee distinction, the New Jersey Supreme Court had already moved beyond the premises liability framework, noting that "[the fireman's] situation does not fit comfortably within the traditional concepts [of duties to invitees or licensees] . . . . [J]ustice is not aided by appending an inappropriate label and then visiting consequences which flow from a status artificially imputed." Krauth v. Geller, 157 A.2d 129, 130 (N.J. 1960).

[28] Ruiz v. Mero, 917 A.2d 239, 242 (N.J. 2007). The justification for the rule was not that policemen personally assess the risks and decide to confront them, but rather that as part of their professional responsibilities, they "face hazards that the reasonable individual would avoid." Benjamin K. Riley, Comment, *The Fireman's Rule: Defining Its Scope Using the Cost-Spreading Rationale*, 71 CAL. L. REV. 218, 233 (1983).

[29] Although assumption of risk has fallen out of favor as a defense against liability in many jurisdictions and areas of tort law, the professional rescue doctrine remains "[o]ne context in which the defense of assumption of risk refuses to die." RICHARD A. EPSTEIN, CASES AND MATERIALS ON TORTS 329 (8th ed. 2004).

[30] 530 P.2d 254 (Wash. 1975).

are unique to and generally associated with the particular rescue activity."[31]

The assumption of risk rationale, however, does not fit with the court's formalistic reliance on the fact that Beaupre was injured not by "the individual responsible for bringing the rescuer to the scene," but rather by "an intervenor."[32] The only way the court's holding can be squared with *Maltman*'s "within the ambit" test is if the court meant to imply that being hit by a fellow officer was a hazard outside of the foreseeable risks inherent in the pursuit of a suspect. However, the court neither asked this question nor provided an answer.

In the second part of its opinion, the court defined the professional rescue doctrine as "a type of implied primary assumption of risk," presumably indicating that the injured party was aware of the risks he faced and hence that the defendant breached no duty to him.[33] If the *Beaupre* court was making the argument that Sargent's identity as a police officer meant that any harm he caused should be considered outside the foreseeable risks assumed by Beaupre, this identity-based analysis could conceivably coexist with an assumption of risk framework. However, not only did the court not elucidate this connection, but it also failed to address whether being harmed by a fellow police officer is a danger "generally associated" with a highway pursuit. Although this may be a very difficult question to answer, if the court was not going to accept the professional rescue doctrine as a blanket prohibition on all such suits, it should have engaged in the analysis required by the assumption of risk framework it purported to use.

Beyond the problematic means through which the court reached its conclusion, the outcome itself is prone to three broader dangers. First, the prospect of tort liability creates an unnecessary and potentially dangerous consideration for police officers during rescue missions. Because the principal duty of police officers is to protect the public, officers should analyze the risks inherent in pursuit and rescue situations primarily from the perspective of public safety. Although professional rescuers cannot be expected to assume *every* risk they face,[34] one con-

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[31] *Id.* at 257.

[32] *Beaupre*, 166 P.3d at 716. In the court's reasoning, this distinction was dispositive because Washington law allows policemen to sue their employers for negligence, and the non-application of the professional rescue doctrine made the alleged negligence of Deputy Sargent actionable.

[33] *Id.* at 717. In contrast to primary assumption of risk, secondary assumption of risk assigns liability in the case of extrahazardous and unforeseeable risks. *See* Knight v. Jewett, 834 P.2d 696, 710 (Cal. 1992) (discussing secondary assumption of risk in the context of sports injuries and concluding that liability should only be assigned when a participant "intentionally injures another player or engages in reckless conduct that is totally outside the range of the ordinary activity involved in the sport"); Meistrich v. Casino Arena Attractions, Inc., 155 A.2d 90, 93 (N.J. 1959).

[34] Brandon K. Dreiman, Comment, *Extending the Fireman's Rule to Great Britain: Protecting British Citizens from Tort Liability for Firefighters' Line-of-Duty Injuries*, 8 IND. INT'L & COMP. L. REV. 381, 402 (1998) ("[F]irefighters *are* allowed some latitude when deciding whether or not to

sideration they ought to ignore completely when deciding how to act is the fear of tort liability to their fellow rescuers. Although police departments might well indemnify officers for the actual damages assessed against them,[35] attorney's fees as well as the time and personal stress associated with litigation add a substantial burden to any existing internal disciplinary proceedings. The professional rescue doctrine, on the other hand, avoids such considerations.

As courts have noted, this public safety rationale has even more force when the doctrine is applied to acts by one policeman against another. In *Calatayud v. State*,[36] a case involving a police officer hurt by a highway patrolman, the court refused to apply a statutory exception to the professional rescue doctrine because it would "generate conflicting duties on the part of peace officers and firefighters [by] undermin[ing] their primary commitment to the public's essential safety and protection for fear of personal liability for injury to fellow officers."[37] Indeed, the facts in *Beaupre* perfectly elucidate why considerations of tort liability to fellow officers should not play a role in the actions of policemen in emergency situations. Although the appellant and respondent disagreed over precisely what maneuver Sargent was performing when he hit Beaupre, both agreed that he was attempting to apprehend the fleeing suspect who was driving the wrong way on an interstate highway.[38] By introducing the prospect of tort recovery, the court is asking policemen to balance financial liability with public safety and potential for injury, while at the same time greatly increasing the consequences for making the wrong calculation. Forcing an officer in the heat of the moment to perform such a cost-benefit analysis is not merely futile but would also likely slow his or her actions to the point where the opportunity to act passes and public safety is thereby compromised.

In addition to ignoring the practical impossibility of expecting officers to make such choices in the first place, the argument that tort liability will increase care on the part of policemen for their fellow officers also overlooks the fact that the substantial personal and

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confront a particular hazard. . . . It therefore runs contrary to standard firefighting principles to argue that firefighters are required to dash into a raging inferno regardless of the circumstances.").

[35] As police departments regularly indemnify officers held liable for § 1983 violations involving "gross negligence," it is likely they would often do the same when negligence alone is the relevant wrongdoing. *See* Richard Emery & Ilann Margalit Maazel, *Why Civil Rights Lawsuits Do Not Deter Police Misconduct: The Conundrum of Indemnification and a Proposed Solution*, 28 FORDHAM URB. L.J. 587 (2000).

[36] 959 P.2d 360 (Cal. 1998).

[37] *Id.* at 368.

[38] *Compare* Brief of Appellant Pierce County, *supra* note 11, at 2 (stating that Sargent was "repositioning [his car] to stop the felon's car before it collided head-on with on-coming I-5 traffic"), *with* Brief of Respondent, *supra* note 9, at 2 (describing Sargent's aim as "either to ram the suspect's vehicle, or to turn around and pursue the suspect's vehicle").

professional connections officers share are far more likely to induce caution and deter injury than any financial penalties.[39] Indeed, it is somewhat ironic that the court seemed so concerned about protecting policemen from each other when, in fact, both tort and criminal law have repeatedly recognized the problems posed by policemen's overwhelming tendency to protect each other, often at the expense of suspects and defendants.[40]

In addition to the likely deleterious effects on public safety, the *Beaupre* court never addressed the democratically settled police compensation schemes its ruling disrupts. In setting emergency service personnel's salaries, legislators include a "risk premium," an enhanced wage rate to compensate for the risks those personnel bear in their jobs.[41] If policemen start recovering in tort for injuries, especially those caused by fellow officers (and therefore paid for by the public), legislatures may well decide to reduce salaries in an effort to avoid this kind of "double recovery." Although the question of whether to compensate ex ante (through risk premiums) or ex post (through tort compensation) has valid arguments on both sides, perhaps the more fundamental point is that this choice is best made through the legislative bargaining process rather than through imposition by the judiciary. The court demonstrates nothing that calls into question the adequacy of this political process or suggests the need for judicial intervention.[42] In fact, the police are a classic example of a "repeat player," with better knowledge than the public or the courts of the foreseeable risks they face and significant bargaining power through their strong unions.[43] Although it is true that the court's decision may force a renewed discussion of the benefits of the doctrine, the absence of any indication that either side is unhappy with the status quo, and the

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[39] *See* Gabriel J. Chin & Scott C. Wells, *The "Blue Wall of Silence" as Evidence of Bias and Motive to Lie: A New Approach to Police Perjury*, 59 U. PITT. L. REV. 233, 251 (1998) ("Such a close-knit camaraderie [between police officers] becomes the foundation for personal security in a hazardous, and even life-threatening day-to-day line of work, where officers rely upon their companions for protection.").

[40] *See id.* at 250–56 (discussing the "blue wall of silence" and its pervasive influence on police perjury).

[41] *See* Steve P. Calandrillo, *Cash for Kidneys? Utilizing Incentives To End America's Organ Shortage*, 13 GEO. MASON L. REV. 69, 103 (2004) ("Firemen, policemen, and members of the military all take significant risks to their health on a daily basis, and are compensated for it with enhanced wages that reflect the 'risk premium' they are voluntarily bearing in the interests of saving other people's lives.").

[42] *Cf.* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) (suggesting that certain "discrete and insular minorities" may not be sufficiently protected through the regular political process).

[43] The strong negotiation power of the police has "long been a matter of concern," leading to contracts that have "regularly increased at rates above the cost of living." William G. Dressel Jr., *The 10 Most Important Legal Issues Facing New Jersey Local Governments*, N.J. LAW. MAG., Dec. 2006, at 8, 8–9.

uncertainty that will reign in the interim, suggest that this would be a costly and likely unnecessary debate.

A final problem presented by suits such as this one is their implications for judicial economy. As exemplified by the dispute between Pierce County and Beaupre over precisely what Sargent was trying to do with his patrol car, establishing the facts in fast-paced rescue situations is often nearly impossible.[44] Indeed, even if the facts can be properly established,[45] it is still very difficult for courts, ex post, to determine which risks were assumed and what constitutes "reasonable" police behavior in what is, virtually by definition, an unreasonable situation.[46] As *Calatayud* noted, such disputes can degenerate into analyzing "a judgment call on the part of the officer who inadvertently inflicts injury," ultimately decided by the testimonies of "dueling experts"[47] — hardly an accurate or efficient means of remedy. Furthermore, allowing such litigation between officers raises the specter of courts being flooded by myriad, unmanageable suits[48] that not only drain the public fisc through litigation expenses and damage payments, but also waste vital police resources.[49]

The police perform an important task in enforcing the rule of law and safeguarding society from its more base and violent instincts. In performing this task, they should be free to concentrate on their primary responsibilities without having the ominous cloud of litigation and liability hanging over their every move. Given the important benefits provided by the professional rescue doctrine, the *Beaupre* court should have given more clear and careful attention not only to its legal rationale in this instance, but also to the harmful consequences its decision could have on police behavior more broadly.

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[44] For a good example of the difficulty of identifying the precise facts in an emergency situation, see Bruce Lambert, *Man, 18, Is Fatally Shot by Police in Brooklyn*, N.Y. TIMES, Nov. 13, 2007, at B1.

[45] The process of discovering the facts could be harmful and disruptive, as the official investigation is likely to be colored by the "traditionally strong sense of solidarity" among policemen, thereby "raising new doubts about the impartiality of the official investigation." *See* Heidt, *supra* note 5, at 765.

[46] *Cf.* Galapo v. City of New York, 744 N.E.2d 685, 689 (N.Y. 2000) (criticizing the use of an internal police manual to allow "a trier of fact . . . to second-guess line-of-duty decisions on matters affecting public safety").

[47] Calatayud v. State, 959 P.2d 360, 369 (Cal. 1998).

[48] Courts have noted that without the rule, "a proliferation of law suits for injuries sustained by civil servants in inherently risky undertakings for the public safety" is likely. Lee v. Luigi, Inc., 696 A.2d 1371, 1374 (D.C. 1997).

[49] See Heidt, *supra* note 5, at 767–69, for a general discussion of the resource drain associated with such suits in the traditional fireman's rule scenario.