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I. Admiralty & Maritime Law

I. ADMIRALTY & MARITIME LAW

The Rescue Doctrine in Maritime Law after Furka v. Great Lakes Dredge and Dock Co.

"Danger invites rescue. The cry of distress is the summons to relief. . .The wrong that imperils life is a wrong to the imperiled victim; it is a wrong also to his rescuer."[1]

The law encourages courageous responses to life threatening situations.[2] The law also recognizes that the human impulse to rescue others in peril may cause a rescuer to engage in behavior that normally would be unduly dangerous.[3] Ordinarily, a tortfeasor's allegation that a plaintiff contributed to his injuries by virtue of the plaintiff's own negligence is an affirmative defense to the plaintiff's claim of negligence.[4] The rescue

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1. Wagner v. Int'l Ry. Co., 232 N.Y. 176, 180, 133 N.E. 437, 437 (1921)(Cardozo, J.) (introducing principle of rescue doctrine).

2. *See* Berg v. Chevron U.S.A., Inc., 759 F.2d 1425, 1429 (9th Cir. 1985) (noting that maritime rescue doctrine encourages rescue attempts); Grigsby v. Coastal Marine Serv. Inc., 412 F.2d 1011, 1021 (5th Cir. 1969) (same); Maryland Steel Co. v. Marney, 88 Md. 482, ____, 42 A. 60, 66 (1898) (noting that law encourages rescues and will not impute negligence to rescuer unless rescuer acts rashly); Corbin v. City of Philadelphia, 195 Pa. 461, 468-69, 45 A. 1070, 1074 (1900) (same).

3. *See* Wagner v. Int'l Ry. Co., 232 N.Y. 176, 180, 133 N.E. 437, 438 (1921) (noting that law will not impute negligence to rescuer). Courts have held that errors of judgment will not count against a rescuer if the errors result from the excitement and confusion of the moment. *Id.* (citing Corbin v. Philadelphia, 195 Pa. 461, 472, 45 A. 1070, 1073-74 (1900)); *see* Trott v. Dean Witter & Co., 438 F. Supp. 842, 846 (S.D.N.Y. 1977) (noting that rescue doctrine exists for benefit of persons instinctively reacting to danger), *aff'd*, 578 F.2d 1370 (2d Cir. 1978); Maryland Steel Co. v. Marney, 88 Md. 48, ____, 42 A. 60, 66 (1898) (noting that rescuer's negligence will not defeat recovery by rescuer).

4. *See generally* Prosser & Keeton on the Law of Torts § 65, at 451-62 (W. Keeton 5th ed. 1984)[hereinafter PROSSER & KEETON] (discussing contributory negligence). In some states contributory negligence is a complete bar to recovery. *Id.* at 461. A plaintiff is contributorily negligent when he fails to exercise the degree of care for his own safety that a reasonable or prudent man would have exercised in the same circumstances. *Id.* at 453; *see* Shanklin v. Allis-Chalmers Mfg. Co., 254 F. Supp. 223, 233 (S.D. W. Va. 1966) (defining contributory negligence as failure of plaintiff to exercise care for own safety), *aff'd* 383 F.2d 819 (4th Cir. 1967).

An affirmative defense to negligence that is similar to contributory negligence is the doctrine of assumption of the risk. *See generally* PROSSER & KEETON, *supra*, § 68, at 480-98 (discussing doctrine of assumption of risk). Under the doctrine of assumption of the risk, a plaintiff cannot recover damages from the defendant if the plaintiff voluntarily submitted himself to a known danger. *Id.*; *see* Arndt v. Russillo, 231 Va. 328, 332, 343 S.E.2d 84, 87 (1986) (defining assumption of risk).

Courts distinguish between the doctrines of assumption of the risk and contributory negligence. *See* PROSSER & KEETON, *supra*, § 68, at 481. In an assumption of the risk case, the plaintiff knowingly and voluntarily enters a dangerous situation. *Id.* In assumption of the risk situations, therefore, the courts have concluded that the defendant owed no duty of care to the plaintiff. *Id.* Because the defendant owed no duty of care to the plaintiff, the defendant could not have acted negligently toward the plaintiff. *Id.* In contributory negligence cases, however, both the defendant and the plaintiff are negligent. *Id.* § 65, at 452; *see* Va. Elec. & Power Co. v. Winesett, 225 Va. 459, 470, 303 S.E.2d 868, 875 (1983) (distinguishing between

doctrine, however, can operate as an exception to the rule of contributory negligence when a person responds to a "cry of distress" that the negligence of a tortfeasor made necessary.[5] When a rescuer invokes the rescue doctrine, the rescuer may recover damages from the tortfeasor for any injuries that the rescuer sustained during his rescue attempt, despite proof that the rescuer acted negligently in his rescue attempt.[6] Thus, the rescue doctrine has developed as a complete defense to an allegation that the rescuer was contributorily negligent.[7]

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doctrines of assumption of risk and contributory negligence).

Many states have reduced the severity of the contributory negligence rule by adopting a comparative negligence standard. *See* PROSSER & KEETON, *supra*, § 67, at 471-79 (discussing comparative negligence). Under the simplest version of the comparative negligence doctrine, the trier of fact determines the degree to which the defendant and the plaintiff each were negligent and then apportions damages accordingly. *Id.* at 471-73. For instance, if a jury determines that a plaintiff was 35% responsible for his own injuries, the jury will decrease the plaintiff's final award by 35%. *See, e.g.*, Li v. Yellow Cab Co., 13 Cal. 3d 804, 829, 119 Cal. Rptr. 858, 875, 532 P.2d 1226, 1243 (1975)(en banc)(adopting comparative negligence to decrease plaintiff's award); Hoffman v. Jones, 280 So. 2d 431, 434 (Fla. 1973) (same); Placek v. City of Sterling Heights, 405 Mich. 638, 660-61, 275 N.W. 2d 511, 515 (1979) (same).

5. *See, e.g.*, Stevens v. Baggett, 154 Ga. App. 317, 318, 268 S.E.2d 370, 372 (1980) (generally discussing rescue doctrine); Henneman v. McCalla, 260 Iowa 60, ____, 148 N.W.2d 447, 454 (1967) (same); Marks v. Wagner, 52 Ohio App. 2d 320, 323-24, 370 N.E.2d 480, 483 (1977) (same). *See generally* 1 J. DOOLEY, MODERN TORT LAW, § 3.08.50, at 28-30 (1982 & Supp. 1987)[hereinafter J. DOOLEY](discussing rescue doctrine, which provides that a person who attempts to rescue another person who is in imminent peril is not contributorily negligent as matter of law); PROSSER & KEETON, *supra* note 4, § 44, at 307-08 (same); 57 AM. JUR. 2D *Negligence* §§ 227, 418 (1971)(same); 65A C.J.S. *Negligence* § 124 (1966 & Supp. 1987)(same).

6. *See* Wagner v. Int'l Ry. Co., 232 N.Y. 176, 180, 133 N.E. 437, 438 (1921) (describing rescue doctrine as bar to defense of contributory negligence); Corbin v. Philadelphia, 195 Pa. 461, 469-70, 45 A. 1070, 1074 (1900) (discussing application of rescue doctrine to avoid contributory negligence as bar to recovery).

The rescue doctrine provides for a rescuer's recovery of damages from whoever is responsible for the perilous situation, be it a third party tortfeasor or the imperiled party himself. *See* Provenzo v. Sam, 23 N.Y.2d 256, 260, 296 N.Y.S.2d 322, 325, 244 N.E.2d 26, 28 (1968) (allowing rescuer to recover from rescued party who was solely responsible for peril). Additionally, most courts have extended the rescue doctrine to allow for recovery by plaintiffs injured during attempts to rescue property and persons from danger. *See* Rovinski v. Rowe, 131 F.2d 687, 692 (6th Cir. 1942)(same); George A. Fuller Constr. Co. v. Elliot, 92 Ga. App. 309, 317, 88 S.E.2d 413, 419 (1955) (applying rescue doctrine to rescuers of property). *See generally* PROSSER & KEETON, *supra* note 4, § 44, at 308-09 (discussing application of rescue doctrine to individuals rescuing property as well as persons); 65A C.J.S. *Negligence* § 125 (1966 & Supp. 1987)(applying rescue doctrine to rescuers of property).

7. *See* RESTATEMENT (SECOND) OF TORTS, § 472 (1965) (delineating rescue exception to contributory negligence doctrine).

The rescue doctrine is related to, but separate from, the affirmative duty to rescue an imperiled party that courts impose on persons in some situations. *See* PROSSER & KEETON, *supra* note 4, § 56, at 373-85 (discussing affirmative duty to rescue). Based on the relationship between the parties, as well as the circumstances of the peril, courts occasionally will impose on an onlooker an affirmative duty to rescue an imperiled party. *See* Anderson v. Atchison, T. & S.F. Ry., 333 U.S. 821, 823 (1948) (imposing on employer duty to rescue employee); Abbott v. United States Lines, Inc., 512 F.2d 118, 121 (4th Cir. 1975) (imposing on ship's crew duty to save seaman who fell overboard). The rescue doctrine is also related to the

The theoretical basis of the rescue doctrine is the presumption that the negligence of a tortfeasor foreseeably would have invited a rescue attempt.[8] Under the rescue doctrine, therefore, when a tortfeasor is negligent, a third party rescuer is a foreseeable plaintiff.[9] Accordingly, the tortfeasor owes the rescuer a duty of care independent of the duty of care that the tortfeasor owes to the imperiled party.[10] To invoke the rescue doctrine, the rescuer must demonstrate that a person or property was in imminent danger, or that the rescuer reasonably believed that a person or property was in danger.[11] Once the rescuer has perceived the emergency

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"good samaritan" doctrine, which imposes liability on a rescuer for a negligent rescue that increases the injuries of the rescued party. *See* PROSSER & KEETON, *supra* note 4, § 56, at 373-85 (discussing liability of rescuer to rescued party for injury due to negligent rescue); 65 C.J.S. *Negligence* § 63(107)(1966 & Supp. 1987)(same). Under the "good samaritan" doctrine, a court will impose liability for injuries to the rescued party upon a rescuer who acts so wantonly during the rescue that he increases the injuries of the rescued party. *See* McDonough v. Buckeye S.S. Co., 103 F. Supp. 473, 475-76 (N.D. Ohio 1951)(recognizing rescuer's liability for injuries due to negligent rescue), *aff'd*, 200 F.2d 558 (6th Cir. 1952), *cert. denied*, 345 U.S. 926 (1953); Roberson v. U.S., 382 F.2d 714, 718-720 (9th Cir. 1967) (same).

8. *See* Bonney v. Canadian Nat'l Ry. Co., 613 F. Supp. 997, 1007 (D. Me. 1985) (noting that tortfeasor is liable for injury to rescuer if intervening act of rescuer was foreseeable); Wagner v. Int'l Ry. Co., 232 N.Y. 176, 180, 133 N.E. 437, 438 (1921) (discussing theory that, even when tortfeasor did not foresee rescue attempt, tortfeasor is accountable to rescuer as if he had foreseen attempt); 57 AM. JUR. 2D *Negligence* § 227 (1971)(stating that defendant's negligence is proximate cause of rescuer's injury).

9. *See supra* note 8 and accompanying text (noting that rescuer is foreseeable plaintiff); *see also* Palsgraf v. Long Island R.R., 248 N.Y. 339, 343-47, 162 N.E. 99, 100-101 (1928) (holding that tortfeasor has duty to prevent injury to foreseeable plaintiffs).

10. *See* PROSSER & KEETON, *supra* note 4, § 44, at 307-08 (discussing rescuer as foreseeable plaintiff); *supra* notes 8-9 and accompanying text (same).

11. *See, e.g.*, Lambert v. Parrish, 467 N.E.2d 791, 798-99 (Ind. Ct. App. 1984) (noting that rescuer must have reasonable belief of need for rescue); Ellmaker v. Goodyear Tire & Rubber Co., 372 S.W.2d 650, 657 (Mo. Ct. App. 1963) (same); Marks v. Wagner, 52 Ohio App. 2d 320, 324, 370 N.E.2d 480, 484 (1977) (same). *See generally* 5a L. FRUMER AND M. FRIEDMAN, Personal Injury— Actions, Defenses, Damages, Rescuers § I.03 (1987) (noting that rescuer must have reasonable belief of need for rescue); Annotation, *Liability for Death of, or Injury to, One Seeking to Rescue Another*, 158 A.L.R. 189 (1945) (same); 57 AM. JUR. 2D *Negligence* § 420 (1971 & Supp. 1987) (same); 65A C.J.S. *Negligence* § 124 (1966 & Supp. 1987) (same).

In *Lambert v. Parrish* the Indiana Court of Appeals listed several factors that the jury might consider in determining whether the rescuer had a reasonable belief in the need for a rescue. Lambert v. Parrish, 467 N.E.2d 791, 799 n. 5 (Ind. Ct. App. 1984). The court noted that factors relevant to the reasonableness of the rescuer's belief include the rescuer's source of knowledge of the situation inviting rescue, the lapse of time between the creation of the danger to the imperiled party and the rescuer's awareness of the situation, and the probability that other people already have rescued the imperiled party. *Id.* To recover under the rescue doctrine, a plaintiff must prove that a person or property was in imminent peril of severe harm, either real or reasonably perceived, rather than merely in need of assistance. *See* FRUMER AND FREIDMAN, *supra*, § 102(2) (noting requirement of peril for rescue doctrine); Annotation, *supra*, at 193-94 (same); 57 AM. JUR. 2D *Negligence* § 418 (1971 & Supp. 1987) (same); 65A C.J.S. *Negligence* § 124 (1966 & Supp. 1987) (same). Courts define "imminent peril" as a situation that calls for immediate action. *See, e.g.*, Connelly v. Redman Dev. Corp., 533 P.2d

situation and begun to act, the rescuer must execute the rescue with the care that a reasonably prudent person would exercise under similar circumstances.[12] The rescue doctrine recognizes that actions which would be negligent under normal circumstances may be reasonable in an emergency situation.[13] Thus, the tortfeasor may not raise the defenses of contributory negligence or assumption of the risk when the rescuer reasonably believed that someone was in danger, and the rescuer acted in a reasonable manner under the circumstances.[14]

The rescue doctrine has frequent application in maritime law.[15] Seamen commonly are exposed to severe danger in the normal course of business

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53, 55 (Colo. Ct. App. 1975) (describing peril as requiring immediate action); Arnold v. Northern States Power Co., 209 Minn. 551, , 297 N.W. 182, 187 (1941) (same); Wolfinger v. Shaw, 138 Neb. 229, , 292 N.W. 731, 735 (1940) (same).

In at least one jurisdiction, a rescuer must show that a person or property actually was in peril. *See* Commonwealth v. Millsaps, 232 Va. 502, 508, 352 S.E.2d 311, 314 (1987) (holding that rescue doctrine is not applicable to rescue of victims that the rescuer has not actually perceived, but that the rescuer believes might exist). A reasonable belief that someone or something might be in peril is insufficient to invoke the rescue doctrine in those jurisdictions. *Id.*

12. *See, e.g.*, Hlodan v. Ohio Barge Line, Inc., 611 F.2d 71, 73 (5th Cir. 1980) (holding that rescuer must act as reasonably prudent man would act); Stevens v. Baggett, 154 Ga.App. 317, 319, 268 S.E.2d 370, 372 (1980) (same); Wolff v. Light, 169 N.W.2d 93, 99 (N.D. 1969) (same); French v. Chase, 48 Wash. 2d 825, ____, 297 P.2d 235, 237 (1956) (same); Wagner v. Int'l Ry. Co., 232 N.Y. 176, 133 N.E. 437 (1921) (same).

Some courts express the standard to apply to a rescuer's conduct as a wanton or reckless standard. *See* Coulton v. Caruso, 195 So. 804, 806 (La. Ct. App. 1940) (noting that courts frequently express conduct of prudent man under similar circumstances as conduct that is not rash or reckless); Bell Cab Co. v. Vasquez, 434 S.W.2d 714, 718-19 (Tex. Civ. App. 1968) (noting that, if jury realizes that it must judge conduct in light of surrounding circumstances, whether judge states jury instruction in terms of reasonable man under circumstances or rash and reckless is unimportant). Technically, however, courts properly should state the standard for judging the negligence of a rescuer's conduct as the reasonable or prudent man under the same circumstances standard, rather than a rash or reckless standard. *See* Henjum v. Bok, 261 Minn. 74, ____, 110 N.W.2d 461, 463 (1961) (noting that application of rescue doctrine does not change standard of care by which trier of fact will judge person's actions); *infra* notes 59-106 and accompanying text (noting that reasonable man is proper standard for rescue doctrine).

13. *See* Grand Trunk R.R. v. Ives, 144 U.S. 408, 417 (1892) (noting that proper conduct which will protect individual from liability depends on circumstances). In *Coulton v. Caruso* the Louisiana Court of Appeals listed the factors that a jury should consider to determine whether a rescuer acted reasonably. Coulton v. Caruso, 195 So. 804, 806 (La. Ct. App. 1940). The *Coulton* court stated that, in judging whether a rescuer acted as a reasonable man would have acted, juries should consider the existence of an emergency, the excitement and confusion of the situation, the uncertainty of the rescuer about the best means of executing the rescue, and the necessity for immediate action. *Id.*; *see* 65A C.J.S. *Negligence* § 124 (1966 & Supp. 1987)(discussing reasonableness test of rescue doctrine).

14. *See supra* notes 2-13 and accompanying text (describing rescue exception to doctrine of contributory negligence).

15. *See* The Clarita, 90 U.S. (23 Wall) 1, 16 (1874) (noting that traditions of seamen demand that law honor rescue attempts); Grigsby v. Coastal Marine Serv. Inc., 412 F.2d 1011, 1021 (5th Cir.), *cert.denied* 396 U.S. 1033 (1969) (noting that admiralty law must encourage

and often must rely on themselves for rescue.[16] In response to the frequent dangers of maritime employment, the policy of the courts is to encourage daring rescue attempts at sea.[17] In considering application of the rescue doctrine, most courts previously have not distinguished between the operation of the rescue doctrine on land and at sea.[18] In *Furka v. Great Lakes Dredge and Dock Company*,[19] (*Furka II*) however, the United States Court of Appeals for the Fourth Circuit considered whether the threshold requirement of the rescue doctrine, that the rescuer be reasonable in perceiving the need for a rescue, should be applicable to admiralty rescues.[20]

On January 9, 1982, a storm and turbulent seas raged in the Chesapeake Bay near Baltimore.[21] The plaintiff's decedent, her husband, was chief-of-party of a surveying team on a Boston Whaler of the Great Lakes Dredge & Dock Company.[22] A tugboat with a scow attached lost its rudder and its power and went adrift in the bay.[23] The captain of the tug radioed

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rescue impulses of seamen); Furka v. Great Lakes Dredge & Dock Co., 755 F.2d 1085, 1089 (4th Cir. 1985) (same). *See generally* 3A M. NORRIS, BENEDICT ON ADMIRALTY §§ 233-34 (7th ed. 1987) (noting tradition of rescue and salvage at sea). In admiralty, the liberal policy of monetary awards for salvage of property and persons represents the desire of the admiralty courts to encourage seamen to aid persons and property in distress. *Id.*

16. *See* M. NORRIS, *supra* note 15, §§ 233-34 (discussing dangerousness of life at sea).

17. *See id.* (discussing policies and traditions of rescue and salvage at sea).

18. *See* Harris v. Pennsylvania R.R., 50 F.2d 866, 869 (4th Cir. 1931) (applying common law negligence standard to maritime rescue attempt). *But see* Berg v. Chevron U.S.A., Inc., 759 F.2d 1425, 1429 (9th Cir. 1985) (noting that although courts judging early maritime rescue cases applied traditional reasonable man negligence standard to rescues at sea, more recent cases have rejected reasonableness standard in favor of wanton or reckless standard). In *Berg* the United States Court of Appeals for the Ninth Circuit cited *Grigsby v. Coastal Marine Service of Texas, Inc.* in support of its conclusion that a wanton or reckless standard was correct for application of the rescue doctrine at sea. *Berg*, 759 F.2d at 1429 (citing Grigsby v. Coastal Marine Serv. Inc., 412 F.2d 1011, 1021 (5th Cir.), *cert. denied* 396 U.S. 1033 (1969)). In *Grigsby*, however, the United States Court of Appeals for the Fifth Circuit did not use a wanton or reckless standard in applying the rescue doctrine, but rather used a wanton or reckless standard in applying the good samaritan doctrine. *Grigsby*, 412 F.2d at 1021. Although the two doctrines are similar, the good samaritan doctrine and the rescue doctrine are not the same. *See supra* note 7 (distinguishing good samaritan doctrine from rescue doctrine). Therefore, the Ninth Circuit in *Berg* was incorrect in its conclusion that courts apply the rescue doctrine at sea using a wanton or reckless standard. *Berg*, 759 F.2d at 1429. *See supra* notes 11-12 and accompanying text (noting that correct standard of care for rescue doctrine is reasonable man standard).

19. 824 F.2d 330 (4th Cir. 1987) (*Furka II*).

20. Furka v. Great Lakes Dredge & Dock Company, 824 F.2d 330, 331-32 (4th Cir. 1987)(*Furka II*).

21. Furka v. Great Lakes Dredge and Dock Co., 755 F.2d 1085, 1087 (4th Cir. 1985) (*Furka I*).

22. *Id.* The Great Lakes Dredge and Dock Company was participating in a dike construction project in the area, and had numerous tugboats, scows and Boston Whalers in the bay. *Id.*

23. *Id.* In *Furka I*, the defendant, Great Lakes Dredge and Dock Company, owned all the boats involved in the accident. *Id.*

for assistance.[24] The decedent responded to the call for assistance by taking a Boston Whaler into the bay and attempting to remove the scowman from the scow.[25] The scowman refused to leave the scow, so the decedent turned back toward shore.[26] On the way back to shore, the Boston Whaler began to take on water and ultimately the decedent drowned.[27]

The wife of the decedent brought an action against Great Lakes Dredge and Dock Company in the United States District Court for the District of Maryland under the Jones Act for negligence and under general maritime law for unseaworthiness.[28] At trial the judge gave the jury an instruction on contributory negligence, but the judge did not instruct the jury on the rescue doctrine.[29] The jury awarded a verdict in favor of the plaintiff, but also determined that the plaintiff's decedent had been sixty-five percent comparatively negligent and, therefore, offset the plaintiff's award by sixty-five percent.[30] The plaintiff appealed the verdict to the

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24. *Id.*

25. *Id.* In *Furka I* the decedent chose to take a small Boston Whaler into the storm because no larger boats were available. *Id.*

26. *Id.*

27. *Id.*

28. *Id.* The Jones Act governs personal injury cases in admiralty. 46 U.S.C. § 688(a) (1982 & Supp.III 1985). The United States Supreme Court has interpreted the Jones Act to incorporate the provisions of the Federal Employers' Liability Act (FELA). 45 U.S.C. §§ 51-60 (1982). *See* Cox v. Roth, 348 U.S. 207, 209 (1955) (interpreting the Jones Act to include the provisions of FELA). Thus, the Jones Act operates as a type of workmen's compensation provision for seamen. *See generally* G. GILMORE & C. BLACK, THE LAW OF ADMIRALTY § 6-20 to -27, 325-54 (2d ed. 1975) (discussing personal injury actions at admiralty). To recover under the Jones Act, a plaintiff must be a "seaman" who sustains injury "in the course of his employment". 46 U.S.C. § 688(a) (1982 & Supp.III 1985). A "seaman" is a person employed upon a floating structure that is a vessel. *See* GILMORE & BLACK, *supra*, § 6-21 at 328-34 (defining "seaman" in context of Jones Act). The Jones Act provision that a seaman sustain the injury "in the course of his employment," requires that the seaman be answerable to the call of duty at the time of his injury. *Id.*

The captain's duty to provide a seaworthy vessel to his employees is the basis for the unseaworthiness cause of action. Usner v. Luckenbach Overseas Corp., 400 U.S. 494, 497-98 (1971). The duty that the seaworthiness doctrine requires of a captain is absolute. Seas Shipping v. Sieracki, 328 U.S. 85, 104 (1946); *see generally* GILMORE & BLACK, *supra*, § 6-38 to -44, at 383-404. The doctrine does not base the duty on the knowledge of the captain or his crew. GILMORE & BLACK, *supra*, § 6-41 at 392-93. Courts have expanded considerably the unseaworthiness cause of action so that the cause of action now is practically indistinguishable from a cause of action under the Jones Act. *Id.* The common practice in framing a claim in admiralty is to name both unseaworthiness and Jones Act causes of action in the complaint. *Id.*, § 6-23 to -25 at 342-51. The major advantage of stating two causes of action is that the Jones Act secures the right to a jury trial for the plaintiff, while the unseaworthiness claim permits an award of both pecuniary and nonpecuniary losses to the plaintiff. *Id.* The Jones Act limits awards to pecuniary losses. *Id.*

29. Furka v. Great Lakes Dredge and Dock Co., 755 F.2d 1085, 1088 & n. 5(4th Cir. 1985) (*Furka I*).

30. *Id.* at 1088. Contributory negligence does not completely bar recovery at admiralty. Socony-Vacuum Oil Co. v. Smith, 305 U.S. 424, 431 (1939). Courts apply comparative negligence, however, to mitigate damages that the plaintiff's negligence caused. Johannessen v. Gulf Trading & Transp. Co., 633 F.2d 653, 655 (2d Cir. 1980); *see supra* note 4 and accompanying text (discussing contributory and comparative negligence).

United States Court of Appeals for the Fourth Circuit.[31]

On appeal, the plaintiff argued that the trial judge erroneously refused to instruct the jury on the rescue doctrine.[32] In considering the plaintiff's argument, the Fourth Circuit noted that the plaintiff had based her case on the premise of a rescue situation.[33] The Fourth Circuit also noted that, without the rescue instruction, the members of the jury may not have known that they could not assess comparative fault if they found that the plaintiff had been engaged in a bona fide rescue attempt at the time of his injury.[34] The Fourth Circuit held, therefore, that the trial judge's refusal to instruct the jury on the rescue doctrine was plain error.[35]

The Fourth Circuit also addressed the issue of the proper content of a rescue instruction for a maritime rescue.[36] The court first acknowledged that a comparative, rather than contributory, negligence standard operates in admiralty.[37] The court also acknowledged that, on land, courts which use a comparative negligence theory usually apply a reasonable man standard to the rescuer's conduct in rescue doctrine cases.[38] On the other hand, the Fourth Circuit noted that courts that recognize contributory negligence as a complete bar to a plaintiff's recovery often require proof that the defendant acted wantonly or recklessly in the execution of his rescue attempt.[39] The Fourth Circuit explained that the more liberal wanton or reckless standard had developed in contributory negligence jurisdictions largely to counteract the harsh results of the doctrine of contributory

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31. *Furka I*, 755 F.2d at 1088.

32. *Id.* In *Furka I*, in addition to appealing the district court judge's refusal to give a rescue instruction to the jury, the plaintiff cited several other errors in the rulings of the lower court judge. *Id.* at 1088-90. The plaintiff argued that the absence of an instruction on the unseaworthiness of the scow and the disabled tug was error. *Id.* at 1090. The plaintiff also claimed that the court's instructions to the jury on contributory negligence essentially were assumption of the risk instructions. *Id.* The plaintiff argued, therefore, that the court committed reversible error because assumption of the risk is not a recognized defense in admiralty. *Id.*; *see supra* note 30 and accompanying text (discussing nonrecognition of contributory negligence defense at admiralty). The plaintiff also argued that the instruction which the trial judge gave to the jury on the unseaworthiness of the Boston Whaler was unduly confusing and misleading. *Furka I*, 755 F.2d at 1090-91. Finally, the plaintiff argued that the trial court erred in directing a verdict for the defendant on the issue of punitive damages under the Jones Act claim. *Id.* at 1091.

33. *Furka I*, 755 F.2d at 1088.

34. *Id.*; *see supra* notes 5-7 and accompanying text (noting that rescue doctrine bars defense of comparative negligence).

35. *Furka I*, 755 F.2d at 1089. Because the trial judge's refusal to give the jury a rescue instruction in *Furka I* was a misstatement of law, the plaintiff's failure to object to the absent instruction was not a waiver of the defect. *Id.*

36. *Id.*

37. *Id.* at 1088-89; *see supra* note 30 (noting that contributory negligence is not a defense in admiralty); GILMORE & BLACK, *supra* note 28, § 6-26, at 351-52 (same).

38. Furka v. Great Lakes Dredge & Dock Co., 755 F.2d 1085, 1088-89 (4th Cir. 1985)(*Furka I*).

39. *Id.* at 1088.

negligence.[40] The Fourth Circuit decided, however, that even though contributory negligence does not exist as a bar to recovery in admiralty, the wanton or reckless standard was appropriate to apply to the rescuer's conduct in admiralty rescue cases.[41] The court felt that the more liberal wanton or reckless standard would further the courts' policy of encouraging daring rescues at sea.[42] Accordingly, the Fourth Circuit held that the proper standard for the jury to use in assessing the conduct of the plaintiff's decedent during the rescue attempt was a wanton or reckless standard.[43] The Fourth Circuit concluded that the trial judge's refusal to give the jury the appropriate rescue instruction was plain error that required a new trial and, thus, remanded the case to the district court.[44]

On remand, the parties agreed to a special verdict form that presented the jury with a two-part test concerning the rescue doctrine.[45] The special verdict form directed the jury to determine whether the decedent had perceived the need for a rescue attempt, and whether a reasonably prudent person under the same circumstances would have perceived the need for a rescue.[46] The jury determined that the decedent had been unreasonable

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40. *Id.* Contributory negligence operates as a complete bar to recovery by a plaintiff, while comparative negligence only decreases the amount of a plaintiff's recovery. *See supra* note 4 (discussing difference between contributory negligence and comparative negligence).

41. *Id.* at 1089.

42. *Id.*; *see supra* notes 15-17 and accompanying text (noting tradition of encouraging rescues at sea).

43. *Furka I*, 755 F.2d at 1089. In *Furka I* the Fourth Circuit addressed only the proper negligence standard to apply to a rescuer's conduct during a rescue. *Id.* at 1088. The court did not address the proper negligence standard to apply to the perception component of the rescue doctrine. *Id.*

44. *Id.* The appellate court in *Furka I* ruled that excluding an instruction on the rescue doctrine was error and, therefore, granted the plaintiff a new trial even though the plaintiff had failed to object to the contributory negligence charge when the judge gave it. *Id.* at 1090. Additionally, the court held that the omission of an instruction on the seaworthiness of the tug and scow was not plain error. *Id.* Because the omission of an instruction on the rescue doctrine warranted a new trial, however, the appellate court held that the trial judge should include a seaworthiness instruction on the tug and scow at the second trial. *Id.* The court also held that the instruction on contributory negligence was sufficiently clear and understandable. *Id.* The appellate court recommended, however, that the trial judge at the second trial be careful when instructing the jury to distinguish between the concepts of contributory negligence and assumption of the risk. *Id.* at 1091. The court additionally ruled that the instruction on the seaworthiness of the Boston Whaler was sufficiently clear and understandable. *Id.* Finally, the court held that the question of punitive damages under the Jones Act was irrelevant because no evidence existed to indicate that the defendant had been negligent to the extreme extent necessary to warrant an award of punitive damages. *Id.*. *See supra* note 32 and accompanying text (enumerating plaintiff's arguments on appeal in *Furka I*).

45. *See* Furka v. Great Lakes Dredge & Dock Co., 824 F.2d 330, 331 (4th Cir. 1987) (*Furka II*) (describing two-part rescue instruction in second *Furka* district court trial). *Id.* In the second *Furka* district court trial, the parties had stipulated to the negligence of the defendants and the damage amounts that the first district court jury had assessed. *Id.* The only issue remaining for the jury to consider was whether a rescue situation had existed. *Id.*

46. *Id.* At the second *Furka* trial, the judge explained to the jury that if the decedent reasonably had perceived the need for a rescue, the jury must award the plaintiff the full

in perceiving the need for a rescue and, thus, had been comparatively negligent.[47] The plaintiff appealed the second verdict to the Fourth Circuit Court of Appeals.[48]

On appeal the plaintiff argued that after *Furka I*, the proper test for application of the rescue doctrine at sea was whether the decedent had been wanton or reckless in his perception of the need for a rescue, rather than whether the decedent had been reasonable in his perception of the need for a rescue.[49] The Fourth Circuit in *Furka I* had not addressed the issue of the proper standard of care for the jury to apply in judging the rescuer's perception of the need for a rescue, but rather had addressed the proper standard of care for the jury to apply to the rescuer's conduct during the rescue.[50] The *Furka II* court stated that in cases involving land rescues, the rescue doctrine operates with a bifurcated standard of care, consisting of a reasonable man standard for the perception component of the doctrine and a wanton or reckless standard for the action component.[51] The court explained that although a bifurcated standard of care may be proper in land rescues, maritime rescues present different considerations to the court.[52] The court noted that perception and action are inseparable in maritime rescue situations, and thus the court should apply the same standard of care to both elements of the rescue doctrine at sea.[53] The Fourth Circuit concluded, therefore, that the rescue doctrine at sea should contain only one standard of care, which the jury should apply to both the perception and action components of the doctrine.[54]

In considering whether the single standard for admiralty rescues should be a reasonableness standard or a recklessness standard, the *Furka II* court explained that the *Furka I* court had chosen to apply the wanton and reckless standard to the rescuer's conduct because of the unique dangers inherent in the seaman's profession.[55] The *Furka II* court reasoned

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amount of damages without offset for any percentage of comparative negligence. *Id.* The judge further explained that, if the jury found that the decedent unreasonably had perceived the need for a rescue, the defendant would have established a successful claim of comparative negligence, and the award of damages of the original district court jury would be correct. *Id.* *See supra* note 45 and accompanying text (noting that parties had stipulated to damages awards of trial jury).

47. *Furka II*, 824 F.2d 330, 331. On remand after the Fourth Circuit's ruling in *Furka I*, the jury found that the plaintiff was unreasonable in his belief in the need for a rescue, and therefore that the plaintiff was comparatively negligent. *Id.* Accordingly, the court re-established the award of damages by the district court in the first trial. *Id.*

48. *Id.*

49. *Id.*

50. *See* Furka v. Great Lakes Dredge & Dock, 755 F.2d 1085, 1088-89 (4th Cir. 1985)(*Furka I*)(addressing proper standard of care to apply to rescuer's conduct during rescue, but not addressing proper standard of care to apply to rescuer's perception of need for rescue).

51. *Furka II*, 824 F.2d at 331.

52. *Id.* at 332.

53. *Id.*

54. *Id.*

55. *Id.* at 332; *see Furka I*, 755 F.2d at 1089 (noting that proper standard of care to apply to rescuer's conduct is wanton or reckless standard).

that the same considerations about the dangerousness of life at sea which convinced the *Furka I* court to choose a recklessness standard for conduct also warrant a recklessness standard for perception.[56] Therefore, the court in *Furka II* held that the single standard which a jury uses to judge both perception and conduct in sea rescues should be a wanton or reckless standard, rather than a reasonableness standard.[57] Because the district court's instructions had failed to reflect the proper wanton or reckless perception standard, the Fourth Circuit reversed the judgment of the district court and remanded the case to the district court for determination of the rescue issue.[58]

In *Furka II* the United States Court of Appeals for the Fourth Circuit repeated the error of the court in *Furka I* by confusing and unnecessarily complicating the proper standards for applying the rescue doctrine to rescues at sea.[59] In rescue situations, as in non-rescue situations, negligence is behavior that is unreasonable under the circumstances.[60] Accordingly, whether a person is rescuing another, or merely walking down the street, the proper standard of care is always the care that a reasonably prudent person under similar circumstances would exercise.[61] The reasonable man standard is flexible because the standard requires different conduct depending on the circumstances.[62] Some circumstances justify a reasonable man in taking extreme risks, and other circumstances hold the reasonable man to the highest degree of caution.[63] Therefore, the proper jury instruc-

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56. *Furka II*, 824 F.2d at 332.

57. *Id.*

58. *Id.*

59. *See infra* notes 60-64 and accompanying text (discussing view that reasonable man standard is only correct standard of care).

60. *See* J. DOOLEY, *supra* note 5, §§ 3.06-.10, at 24-32 (observing that unreasonableness of thought or action in given situation is basis for all tort liability).

61. *See* PROSSER & KEETON, *supra* note 4, § 32, at 173-93 (noting that standard of care is that of reasonable man under same circumstances); J. DOOLEY, *supra* note 5, §§ 3.06-.08, at 24-30 (1982) (same); *see also* Massey v. Scripter, 401 Mich. 385, 390, 258 N.W.2d 44, 47 (1977) (holding that, although scholars often use language suggesting varying degrees of care, standard of care which law requires of rescuer is always that of reasonable man); Knapp v. Stanford, 392 So. 2d 196, 198 (Miss. 1980) (abolishing sudden emergency doctrine because instructions are misleading and confusing to jury); Calvert v. Ourum, 40 Or. App. 511, ____, 595 P.2d 1264, 1267 (1979) (holding that, under rescue doctrine, standard of care remains same as standard of care in everyday situations); *supra* notes 11-12 and accompanying text (discussing reasonableness under circumstances as proper standard of care for rescue doctrine).

62. *See* Meredith v. Reed, 26 Ind. 334, 336 (1866) (noting that law only requires ordinary care of people keeping horses, but that ordinary care means more care for people keeping stallions than for people keeping mares); J. DOOLEY, *supra* note 5, § 3.08.50, at 28-29 (noting flexibility of reasonable man standard in every situation); PROSSER & KEETON, *supra* note 4, § 33, at 193-208 (applying reasonable man standard to differing situations).

63. *See* PROSSER & KEETON, *supra* note 4, § 33, at 196, 203, 205 (describing varying degrees of conduct that court requires under differing circumstances). Courts generally recognize that in an emergency situation, the exigencies of the moment cause the reasonable man to exercise less care in his actions than he ordinarily would exercise. *See* Elmore v. Des Moines

tion for any situation, including rescue situations, is always a reasonable man instruction, rather than a wanton or reckless instruction.[64]

Several courts have recognized that the reasonable man standard is a flexible standard that is correct in both rescue and nonrescue situations.[65] For example, in *Calvert v. Ourum*[66] the Oregon Court of Appeals considered whether the trial judge erred when he refused to give a special rescue instruction to the jury because he decided that the usual "reasonable man" negligence instruction was sufficient to apply to an emergency situation.[67] In *Calvert* the defendant hit the plaintiff with the defendant's pickup truck while driving by the scene of the plaintiff's recent automobile accident.[68] The defendant claimed that the plaintiff had been contributorily negligent.[69] Because the plaintiff had been attempting a rescue when the defendant hit him, the plaintiff requested that the judge instruct the jury on the rescue doctrine.[70] The trial judge, however, refused to give the instruction to the jury, and the jury found that the plaintiff was contributorily negligent.[71] On appeal, the Oregon Court of Appeals noted that

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City Ry. Co., 207 Iowa 862, ____, 224 N.W. 28, 31 (1929) (noting that law does not require thoughtful care from individuals in emergencies). The law will require an enhanced level of care, however, when the risk of injury to self or others is great. *See* PROSSER & KEETON, *supra* note 4, § 34, at 198, 208. For example, individuals handling dangerous instrumentalities must exercise the highest degree of care. *See* Liber v. Flor, 160 Colo. 7, ____, 415 P.2d 332, 338 (1966) (holding that law requires individuals handling dynamite to exercise highest degree of care).

64. *See* Massey v. Scripter, 401 Mich. 385, 390, 258 N.W.2d 44, 47 (1977) (holding that, although scholars may use language which suggests the existence of differing degrees of care, judge must instruct jury to apply reasonable man under circumstances test).

65. *See supra* notes 61-64 and accompanying text (discussing reasonable man standard as proper standard for juries to apply in judging perception and conduct of rescuers).

The sudden emergency doctrine is the rescue doctrine applied to the situation when the plaintiff finds himself, rather than another, in a position of imminent peril. *See* PROSSER & KEETON, *supra* note 4, § 33, at 196 (describing sudden emergency doctrine). Because courts so frequently misstate the sudden emergency doctrine in jury instructions, the model jury instruction statutes in Illinois, Florida, Kansas, and Missouri recommend that a court not give a specific emergency instruction, but rather give to the jury only the traditional negligence instruction on the "reasonable man" standard. *See* PROSSER & KEETON, *supra* note 4, § 33, at 197. The Mississippi Supreme Court entirely abolished the emergency doctrine in 1980. Knapp v. Stanford, 392 So. 2d 196, 198 (Miss. 1980). *See generally* Annotation, *Sudden Emergency Instructions*, 80 A.L.R.2d 5 (1961) (discussing in detail problems associated with use of sudden emergency instructions).

66. 40 Or. App. 511, 595 P.2d 1264 (1979).

67. Calvert v. Ourum, 40 Or. App. 511, ____, 595 P.2d 1264, 1267 (1979).

68. *Id.* at ____, 595 P.2d at 1265.

69. *Id.* at ____, 595 P.2d at 1266.

70. *Id.* at ____, 595 P.2d at 1267.

71. *Id.* In *Calvert v. Ourum* the trial judge decided that the rescue instruction which the plaintiff requested was misleading and did not accurately reflect the law. *Id.* The plaintiff's requested instruction stated in part that

> [i]n the situation in which a Plaintiff is acting under the pressure of circumstances which impel him to attempt to save human life, he generally is not held to the same

the requested instruction implied incorrectly that the jury should not hold a rescuer to the same standard of care as a reasonable man.[72] The appellate court explained that the usual negligence instruction, which cited the reasonable man standard, was appropriate for an emergency situation because it instructed the jury to consider the circumstances.[73] The court held that the reasonable man test was appropriate for the rescue situation, and thus, a special rescue instruction was unnecessary.[74]

The reasonable man test theoretically should be correct in every situation, including rescue situations.[75] In the context of the rescue doctrine, however, some courts rephrase the reasonable man test as a wanton or reckless test and other courts differentiate between the reasonable man test and the wanton or reckless test.[76] The Fourth Circuit in *Furka I* and *Furka II* distinguished the two standards and suggested that the wanton

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standard of care for his own safety that he normally would be held to.

Id. at ____, 595 P.2d at 1266. The judge felt that the instruction erroneously suggested to the jury that a rescuer is held to a different standard of care, when the instruction should have stressed that the standard of care was the same in a rescue situation even if the jury might find that different conduct was reasonable under the circumstances. *Id.* at ____, 595 P.2d at 1267.

72. *Id.*

73. *Id.*

74. *Id.* In *Calvert v. Ourum* the Court of Appeals of Oregon cited an Oregon Supreme Court opinion in which the supreme court had stated that a court's failure to give a jury an emergency instruction rarely would be error because the reasonable man negligence instruction that the court gives to the jury in every tort case covers all circumstances, including emergencies. *Id.* (citing Evans v. Gen. Tel., 257 Or. 460, 467, 479 P.2d 747, 750 (1971)).

75. *See supra* notes 59-64 and accompanying text (discussing reasonable man test as proper standard for rescue doctrine).

76. *See* Hlodan v. Ohio Barge Line, Inc., 611 F.2d 71, 73 (5th Cir. 1980) (noting that proper standard of care for rescuer is whether rescuer's conduct was that of an ordinary prudent person under the circumstances, but trial court's use of term "extraordinary negligence" was not incorrect); Stevens v. Baggett, 154 Ga. App. 317, 318, 268 S.E.2d 370, 372-73 (1980) (noting that threshold test for application of rescue doctrine is whether plaintiff's conduct was reasonable under circumstances and not rash or reckless); *see also* Prior Aviation Serv. Inc. v. State, 100 Misc. 2d 237, 240, 418 N.Y.S.2d 872, 875 (N.Y. Ct. Cl. 1979) (noting that standard in applying rescue doctrine is whether rescuer's conduct "was not rash or reckless or wanton but, rather, reasonable" under the circumstances. *Id.*)

In *French v. Chase* the Supreme Court of Washington found negligible the distinction between a jury's finding that the conduct of rescuer in an emergency was short of being rash or reckless and a finding that the conduct was slightly more risky than that of a prudent man. French v. Chase, 48 Wash. 2d 825, ____, 297 P.2d 235, 240 (1956). The *French* court noted that courts should use the reasonably prudent man standard when submitting negligence or contributory negligence instructions to the jury. *Id.*

Even in the most famous of the rescue cases, *Wagner v. International Railway Co.*, Justice Cardozo used both wanton or reckless language and reasonable man language in describing the rescue doctrine. Wagner v. Int'l Ry. Co., 232 N.Y. 176, 180, 133 N.E. 437, 438 (1921). Initially, Justice Cardozo stated that "the risk of rescue, if only it be not wanton, is born of the occasion." *Id.* Later in the opinion, in discussing the reasonableness of a rescuer's belief, the Justice observed that "[t]he law cannot say of his belief that a reasonable man would have been unable to share it." *Id. Cf. supra* notes 11-12 and accompanying text (discussing reasonable man standard of care as correct under all circumstances).

or reckless standard is more liberal than the reasonable man standard.[77] The Fourth Circuit concluded that because under the liberal wanton or reckless standard a rescuer recovers against a tortfeasor in a greater number of cases than under the reasonable man standard, the wanton or reckless standard is more appropriate to further the policy of encouraging rescues at sea.[78] Although in theory a court should phrase the correct standard as what a reasonable man under the same circumstances would do, the Fourth Circuit may have based its wanton or reckless jury instruction on the notion that juries perceive the wanton or reckless test to be a more relaxed standard than the reasonable man standard.[79] Thus, more plaintiffs will be able to recover for injuries that they sustained during rescue attempts and, therefore, more persons will be likely to attempt maritime rescues.[80]

Regardless of whether the Fourth Circuit's wanton or reckless standard allows recovery in a greater number of situations, substantial precedent exists for retaining a stricter reasonable man test to apply to the perception component of the rescue doctrine.[81] The rescue doctrine always has required

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77. Furka v. Great Lakes Dredge & Dock Co., 824 F.2d 330, 332 (4th Cir. 1987)(*Furka II*); Furka v. Great Lakes Dredge & Dock Co., 755 F.2d 1085, 1088 (4th Cir. 1985)(*Furka I*). The court in *Furka I* cited several cases in which courts in other jurisdictions applied a recklessness standard to the conduct of plaintiffs in rescue situations. *Furka I*, 755 F.2d at 1088 (citing Scott v. John H. Hampshire, Inc., 246 Md. 171, ____, 227 A.2d 751, 753 (1967); Maryland Steel Co. v. Marney, 88 Md. 482, ____, 42 A. 60, 66 (1898); Brown v. Nat'l Oil Co., 233 S.C. 345, ____, 105 S.E.2d 81, 87 (1958); *see* Bell Cab Co. v. Vasquez, 434 S.W.2d 714, 719 (Tex. Civ. App. 1968) (Cadena, J., dissenting) (discussing recklessness, as opposed to reasonableness, as proper instruction to submit to jury for rescue situations). Many courts, however, have phrased the standard in reasonable man terms. *See, e.g.*, Massey v. Scripter, 401 Mich. 385, 390, 258 N.W.2d 44, 47 (1977) (noting that standard of care for rescuers is one of reasonableness under circumstances); Calvert v. Ourum, 40 Or. App. 511, ____, 595 P.2d 1264, 1267 (1979) (noting that standard of care is always what reasonable man under circumstances would do); French v. Chase, 48 Wash. 2d 825, ____, 297 P.2d 235, 238 (1956) (noting that in conducting rescue, rescuer must act as would reasonable man under circumstances).

78. Furka v. Great Lakes Dredge and Dock Co., 824 F.2d 330, 332 (4th Cir. 1987)(*Furka II*). The court in *Furka II* cited *Wagner v. International Railway Co.* in support of its conclusion that using two different standards to judge a rescuer's belief and conduct would be anomalous. *Id.* at 332. The court in *Wagner*, however, while emphasizing the intimate relationship between belief and action in rescue situations, presumed that both the rescuer's belief and the rescuer's action were reasonable in light of the circumstances. *Wagner v. Int'l Ry. Co.*, 232 N.Y. 176, 180, 133 N.E. 437, 438 (1921).

79. *See* PROSSER & KEETON, *supra* note 4, § 34, at 209-10 (noting that although many courts use language in negligence instructions that suggests existence of differing degrees of care, error is rarely fatal). Some commentators argue that instructions delineating differing degrees of care confuse the jury and are vague and impractical. *Id.*

80. *See supra* note 17 and accompanying text (discussing judicial policy of encouraging rescues at sea).

81. *See, e.g.*, Stevens v. Baggett, 154 Ga. App. 317, 318, 268 S.E.2d 370, 372-73 (1980) (noting that rescuer must base his rescue on reasonable belief that rescue is necessary); Holle v. Lake, 194 Kan. 200, ____, 398 P.2d 300, 304 (1965) (same); Ellmaker v. Goodyear Tire & Rubber Co., 372 S.W.2d 650, 658 (Mo. Ct. App. 1963) (same); Wolfinger v. Shaw, 138 Neb. 229, ____, 292 N.W. 731, 735 (1940) (same); Superior Oil Co. v. Griffin, 357 P.2d 987, 993

that a rescuer have at least a reasonable belief that someone or something is in peril.[82] In one of the earliest cases in which a court applied the rescue doctrine, *Wagner v. International Railway Company*,[83] the New York Court of Appeals assumed a reasonable belief element of the doctrine.[84] In *Wagner* the plaintiff sustained serious injuries while walking along a railroad trestle looking for his cousin, who had fallen from a train.[85] The plaintiff sought to recover damages from the railroad company.[86] The court noted that the railroad owed a duty of due care not only to the

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(Okla. 1960) (same); Kelley v. Alexander, 392 S.W.2d 790, 792 (Tex. Civ. App. 1965) (same); French v. Chase, 48 Wash. 2d 825, ____, 297 P.2d 235, 239 (1956) (same); Highland v. Wilsonian Inv. Corp., 171 Wash. 34, 42, 17 P.2d 631, 635 (1932) (same).

The court in *Furka II* rested its decision not on precedent, but on the difference between maritime situations and land situations. *Furka II*, 824 F.2d at 331. The court in *Furka II* noted three cases which held that the proper standard for evaluating a rescuer's belief that a rescue is necessary is the reasonable man standard. *Id.* For example, in *Marks v. Wagner* the Ohio Court of Appeals held that a rescuer must base his actions on a reasonable belief that a victim is in continued peril. Marks v. Wagner, 52 Ohio App. 2d 320, ____, 370 N.E.2d 480, 484 (1977); *see* Ellmaker v. Goodyear Tire & Rubber Co., 372 S.W.2d 650, 658 (Mo. Ct. App. 1963) (holding that rescuer must base rescue on reasonable belief that rescue is necessary); Wolff v. Light, 169 N.W.2d 93, 97 (N.D. 1969) (same). The *Furka II* court decided, however, that land rescue cases are inapposite to sea rescue cases. *Furka II*, 824 F.2d at 332.

Precedent exists, however, for applying different standards of law in admiralty cases then in common law cases. For example, in *Moragne v. States Marine Lines* the United States Supreme Court considered whether a wrongful death cause of action should exist in admiralty. Moragne v. States Marine Lines, Inc., 398 U.S. 375, 386-90 (1970). Prior to *Moragne*, in *The Harrisburg*, another admiralty case, the United States Supreme Court had followed common law precedent set in *Mobile Life Insurance Company v. Brame*, in which the United States Supreme Court held that common law recognized no wrongful death cause of action. The Harrisburg, 119 U.S. 199, 208 (1886)(overruled by *Moragne*). *See* GILMORE & BLACK, *supra* note 29, at 359 (discussing the development of wrongful death cause of action at admiralty). In explaining its decision to recognize a wrongful death cause of action in admiralty, the Court in *Moragne* noted that historically, different courts had administered maritime and common law. *Moragne*, 398 U.S. at 387. The *Moragne* Court further noted that because the maritime courts had a special concern for the welfare of men who undertook hazardous and unpredictable sea voyages, the separate admiralty courts had developed legal principles that were foreign to the common law. *Id.* The Court pointed out that no anomaly existed in adopting different rules under maritime law and common law, and that because common law placed greater restrictions on recovery for personal injury and death than did maritime law, the common-law rule might be incompatible with the law of the sea. *Id.*; *see* Grigsby v. Coastal Marine Serv., 412 F.2d 1011, 1021 (5th Cir. 1969) (noting that, because life at sea presents to individuals who choose it greater risks than life on land, admiralty should be liberal in matching law to needs of men).

82. *See supra* notes 11-12, 81 and accompanying text (describing reasonable belief component of rescue doctrine).

83. 232 N.Y. 176, 133 N.E. 437 (1921).

84. Wagner v. Int'l. Ry. Co., 232 N.Y. 176, 177, 133 N.E. 437, 438. In the language of the *Wagner v. International Railway Company* opinion, the New York Court of Appeals implied that the correct standard of care for the rescue doctrine is the reasonable man standard. *Id.* The New York court wrote that "[t]he law cannot say of [the rescuer's] belief that a reasonable man would have been unable to share it." *Id.*

85. *Id.* at 437.

86. *Id.*

injured cousin, but also to the plaintiff while he attempted to rescue his cousin.[87] The court determined that the plaintiff's belief in the need for a rescue was reasonable under the circumstances.[88] The plaintiff believed that he might find his cousin hanging from the bridge and had to make an instantaneous decision, based on the facts as he perceived them, whether to undertake a rescue.[89] The court in *Wagner* decided that the law should not assess blame to a plaintiff who had acted as a reasonable man in the same circumstances would have acted.[90] The *Wagner* court allowed the plaintiff to recover from the railroad because of the reasonableness of the plaintiff's belief that a rescue was needed.[91]

The reasonableness of a plaintiff's belief that a rescue is needed is crucial to the just operation of the rescue doctrine.[92] Under the reckless or wanton standard for perception that the Fourth Circuit adopted in *Furka II*, a rescuer may recover from a tortfeasor for injuries that the rescuer sustained while engaged in a rescue that no reasonable man would have thought necessary.[93] For example, in *Wolff v. Light*[94] the defendant negligently drove his automobile through the plate glass window of a service station restaurant.[95] After the car had stopped, the plaintiff reached into the store window to remove some broken glass and injured his hand on the glass.[96] In response to the plaintiff's suit for damages, the defendant claimed that the plaintiff was contributorily negligent in reaching into the broken window.[97] The plaintiff claimed that he had been engaged in a rescue attempt to protect the patrons of the restaurant from the danger of falling glass.[98] Very few people were in the restaurant, however, and no one was near the broken window.[99] The court noted that the plaintiff had no reasonable basis for believing that the patrons in the restaurant were in imminent peril from the broken glass.[100] Therefore, the court in *Wolff* held that the plaintiff could not raise the rescue doctrine as a

87. *Id.* In *Wagner* the court explained that a tortfeasor's wrong not only places the direct victim of the wrong in danger, but also places the victim's potential rescuer in danger. *Id.*

88. *Id.* at 438.

89. *Id.*

90. *Id.*

91. *Id.*

92. *See infra* notes 93-107 (discussing importance of reasonableness component of rescue doctrine to principles of fairness).

93. *See* Furka v. Great Lakes Dredge and Dock Co., 824 F.2d 330, 331-32 (4th Cir. 1987)(*Furka II*) (adopting wanton or reckless standard of care for perception component of rescue doctrine at sea).

94. 169 N.W.2d 93 (N.D. 1969).

95. Wolff v. Light, 169 N.W.2d 93, 96 (N.D. 1969).

96. *Id.* at 97.

97. *Id.* at 96-97.

98. *Id.* at 97.

99. *Id.* at 96-97.

100. *Id.*

defense to the defendant's claim of contributory negligence.[101] Although the accident in *Wolff* occurred on land, an analogous situation could occur at sea. Under the new standard that the *Furka II* court proposed, the plaintiff in *Wolff* could argue that although he unreasonably may have believed that the restaurant patrons were in danger, his belief was not wanton or reckless.[102] Thus, under the wanton or reckless standard, the plaintiff in *Wolff* potentially could have recovered damages for his own negligent conduct.[103] Recovery by the plaintiff in *Wolff* would have been contrary to the theoretical basis of the rescue doctrine.[104] The premise of the rescue doctrine is that when a defendant is negligent, the defendant can foresee a rescue attempt.[105] By adopting a wanton or reckless standard to evaluate the rescuer's belief that a rescue is necessary, the Fourth Circuit in *Furka II* has determined that even an unreasonable rescue attempt, like the attempt of the plaintiff in *Wolff*, is foreseeable to a defendant.[106]

In the *Furka v. Great Lakes Dredge and Dock Company* cases, the United States Court of Appeals for the Fourth Circuit has expanded the scope of the rescue doctrine at sea to allow full recovery from tortfeasors by rescuers who unreasonably perceive the need for a rescue or unreasonably execute the rescue attempt.[107] A rescuer may believe unreasonably that a rescue is necessary and still recover damages for his injuries, provided his belief is not wanton or reckless.[108] By broadening the scope of the rescue doctrine, the Fourth Circuit has eliminated entirely the traditional reasonable man standard from the operation of the rescue doctrine.[109] The Fourth Circuit based the new standard on judicial compassion for the plight of seamen.[110] The standard, however, has no basis in precedent and ultimately may confuse juries and adversely effect the

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101. *Id.* at 100. In *Wolff v. Light* the Supreme Court of North Dakota concluded that the plaintiff's own careless, negligent, foolish, reckless, and rash conduct had caused his injury, and that the plaintiff's failure to exercise due care for his own safety was contributory negligence as a matter of law. *Id.*

102. *See* Furka v. Great Lakes Dredge & Dock Co., 824 F.2d 330, 332 (4th Cir. 1987) (*Furka II*)(adopting wanton or reckless standard for perception component of rescue doctrine).

103. *Id.*

104. *See* J. DOOLEY, *supra* note 5, § 3.10 (noting that foreseeability of injury is basis of tort liability); *see also supra* notes 8-9 and accompanying text (discussing the rescue doctrine and its theoretical foundations of foreseeability and chain of causation).

105. *See supra* note 104 and accompanying text (discussing theoretical basis of rescue doctrine).

106. *See supra* notes 92-105 and accompanying text (noting that reasonableness is crucial to just application of rescue doctrine).

107. Furka v. Great Lakes Dredge and Dock Co., 824 F.2d 330, 330-31 (4th Cir. 1987)(*Furka II*); *see supra* notes 11-13, 78 and accompanying text (discussing traditional requirement under rescue doctrine that rescuer act reasonably in perceiving need for rescue).

108. *Furka II*, 824 F.2d at 332.

109. *See supra* notes 77-79 and accompanying text (discussing Fourth Circuit's adoption of wanton or reckless standard for rescue doctrine in *Furka II*).

110. *Furka I*, 755 F.2d at 1089; *Furka II*, 824 F.2d at 332.

ability of maritime corporations to secure liability insurance.[111] The operation, under the Jones Act, of comparative negligence rather than contributory negligence, the existence of unseaworthiness as a cause of action that provides for strict liability of ship owners, and the policy of awarding monetary rewards for salvage attempts render the Fourth Circuit's concern for would-be rescuers at sea unwarranted.[112]

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111. *See supra* notes 15-17 and accompanying text (noting tradition of encouraging rescues at sea); *supra* note 65 and accompanying text (noting that instructions on rescue and sudden emergency doctrines often confuse juries); *supra* notes 81-91 and accompanying text (discussing precedent which dictates that proper standard of care to apply to rescuer's perception of need for rescue is reasonable man standard, not wanton or reckless standard).

112. *See generally* GILMORE & BLACK, *supra* note 28, at 272-485 (discussing personal injury actions of seamen, including operation of comparative negligence and strict liability of unseaworthiness cause of action); M. NORRIS, *supra* note 15, §§ 233-34 (discussing principle of salvage awards at admiralty).