5-1-1986

Government Recovery of Emergency Service Expenditures: An Analysis of User Charges

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GOVERNMENT RECOVERY OF EMERGENCY SERVICE EXPENDITURES: AN ANALYSIS OF USER CHARGES

I. INTRODUCTION

Eighteen million automobile accidents occurred in the United States in 1981.[1] There were more than five thousand railroad accidents,[2] more than three thousand aviation accidents[3] and more than five thousand deaths by drowning.[4]

Thousands of emergencies occur in the United States every day. To abate emergencies, the government has formed emergency service organizations. Most common among these are fire and police departments. Private businesses also respond to the need for emergency services. Among the private services now offered are tow trucks and ambulances.

Private and public emergency service organizations differ primarily in their methods of collecting revenue.[5] A tow truck operator ordinarily charges an automobile owner or user for the tow. Similarly, a hospital operating an ambulance service will bill a patient for the price of emergency transportation. Public emergency services, however, are almost universally funded by tax revenues. A homeowner who calls the police in the middle of the night after hearing strange sounds in the backyard does not receive a bill for police investigation. Nor does a stranded hiker pay for rescue efforts.

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1. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, 1982-83 STATISTICAL ABSTRACT OF THE UNITED STATES 608 (Chart No. 1047) (103d ed. 1982).

2. *Id.*

3. *Id.*

4. *Id.* at 76 (Chart. No. 113).

5. There are a number of differences between the *types* of services that are publicly and privately funded. For example, only the federal government provides military protection. Conversely, only private organizations provide pool cleaning services. The reasons for public, rather than private, provision of services are numerous. In some areas, such as law enforcement, the decision to keep control of the service in the hands of the public is basically political. There is a fear that private organizations would abuse the power of the law. In other areas, the private sector might not provide a service, even if permitted, due to the presence of unfavorable economic factors such as large fixed expenditures.

This Comment does not address the question of *which* needs should be met by public or private organizations. Rather, the focus is on the funding of the service which society has decided to pay for from the public coffers. For a discussion of the reasons for public provision of services, see generally J. DUE & A. FRIEDLAENDER, GOVERNMENT FINANCE: ECONOMICS OF THE PUBLIC SECTOR (7th ed. 1981); R. HAVEMAN & J. MARGOLIS, PUBLIC EXPENDITURES AND POLICY ANALYSIS (1970); C. SHOUP, PUBLIC FINANCE (1969).

There is no legal requirement that taxpayers fund emergency services. For example, although the services of fire departments traditionally are provided free of charge, some states have enacted statutes imposing liability for firefighting costs on those who tortiously cause a fire.[6] Similarly, the costs of abating hazardous nuisances are sometimes assessed against the individual responsible for the threat to life or property.[7] In general, however, there is a long-standing tradition of public funding of emergency services.

This Comment presents an argument for direct charges against those who negligently cause the need for emergency services. These charges will be referred to as "user charges."[8] The primary rationale supporting the imposition of user charges is a practical one—deterrence. Charging tortfeasors for the cost of emergency services may reduce the frequency and severity of tortious behavior. A reduction in the number of emergencies will permit a reduction in service needs. Thus, the costs

6. Annot., 90 A.L.R.2d 873 (1963). Statutes imposing liability on those causing fires are recognized as valid exercises of a state's police power. *Id.* at 875.

7. *See infra* text accompanying notes 47-53.

8. A "user charge" is the dollar amount per unit of a good or service which is collected from the recipient of the good or service. R. BIRD, CHARGING FOR PUBLIC SERVICES: A NEW LOOK AT AN OLD IDEA 3 (1976). User charges are a form of benefit taxation, imposed on those who benefit from a publicly provided good or service, such as stamps for postal services or bills for publicly provided water. *See generally id.* at 1-22.

The California fire liability law provides an example of how the amount of a user charge can be calculated. CAL. HEALTH & SAFETY CODE § 13009 (West 1984) provides in pertinent part:

> (a) Any person who negligently . . . sets a fire, allows a fire to be set, or allows a fire kindled . . . to escape onto . . . property is liable for the fire suppression costs incurred in fighting the fire and for the cost of providing rescue or emergency medical services.

In People v. Southern Cal. Edison, 56 Cal. App. 3d 593, 128 Cal. Rptr. 697 (1976), the court held that the measure of expense under § 13009 requires that "(1) the expense claimed be incurred in fighting the fire, (2) that said expense be the proximate result of defendant's wrongful conduct, and (3) that said expense be reasonably incurred." *Id.* at 605, 128 Cal. Rptr. at 705. Under this formulation, the court approved the state's fire cost report which set expenses at $21,548.19. *Id.* The fire cost report was "a compilation of activity cards which were maintained by members of the fire crew on various vehicles and subpurchase orders used to pay for various services or materials and other documents listing goods or services used in fighting the fire." *Id.*

In 1984, the California Legislature enacted CAL. HEALTH & SAFETY CODE § 13009.1(a) (West Supp. 1985), which adds the following to recoverable expenses:

> (1) The cost of investigating and making any reports with respect to the fire.
> (2) The costs relating to accounting for that fire and the collection of any funds pursuant to Section 13009, including, but not limited to, the administrative costs of operating a fire suppression cost recovery program. The liability imposed . . . is limited to the actual amount expended which is attributable to the fire, but not to exceed 10 percent of the amount recoverable pursuant to Section 13009.

CAL. HEALTH & SAFETY CODE § 13009.1(b) (West Supp. 1985) subjects an award under § 13009.1(a) to the discretion of the court.

of accidents will fall if user charges are imposed directly on those people causing the emergencies. This "deterrent" effect achieved by the imposition of user charges does not result from the traditional system where tax revenues fund the emergency service.

Although the following analysis may serve as a foundation for legislation, it is primarily addressed to lawyers representing public entities. A public entity seeking to recover the cost of an excessive emergency service expenditure will rarely find legislation authorizing such a recovery. Consequently, any suit to recover these costs must be based on common law. The little precedent available indicates a hostile judicial attitude towards government recovery in such situations. However, precedent indicates that if the suit employs either a nuisance or quasi-contractual theory of recovery, the courts may be less resistant to awarding damages.

This Comment is organized into two sections. The first section examines three cases[9] where a government entity sought to recover expenses incurred in providing emergency services without statutory authority for the recovery. The first section also analyzes nuisance law to

9. Only three cases used common law principles to permit government recovery of user charges. City of Flagstaff v. Atchinson, T. & S.F. Ry., 719 F.2d 322 (9th Cir. 1983) (denying government recovery of user charges for evacuation costs after derailment of cars carrying liquified petroleum gas); Brandon Township v. Jerome Builders, Inc., 80 Mich. App. 180, 263 N.W.2d 326 (1977) (allowing imposition of user charges for Township repair of defendant's own dam); City of Bridgeton v. B. P. Oil, Inc., 146 N.J. Super. 169, 369 A.2d 49 (1976) (denying government recovery for cleanup of defendant's property after oil spill). As acknowledged in one of these cases, "precedent on the point is limited." *Flagstaff*, 719 F.2d at 323 (citing City of Bridgeton v. B. P. Oil, Inc., 146 N.J. Super. 169, 369 A.2d 49 (1976), where the court cited the Declaration of Independence as its only authority).

One other case addressed the possibility of a common law action for recovery of emergency service expenses. After finding that a Virginia statute permitted the United States to recover costs it incurred to save the George Washington National Forest from a forest fire set by the defendant, the court in United States v. Chesapeake & O. Ry., 130 F.2d 308 (4th Cir. 1942), stated:

> Aside from the question of recovery under the statute we are of the opinion that the plaintiff was entitled to relief in tort.
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> "A person whose legally protected interests have been endangered by the tortious conduct of another is entitled to recover for expenditures reasonably made or harm suffered in a reasonable effort to avert the harm threatened."

Id. at 310 (quoting RESTATEMENT OF TORTS § 919 (1939) (adopted in substantially the same form in RESTATEMENT (SECOND) OF TORTS § 919 (1979))) (other citations omitted). *Chesapeake* is the only decision to cite § 919 of the second Restatement for the proposition that the government may collect expenses in tort for efforts to save government property. *See* RESTATEMENT (SECOND) OF TORTS app. § 919 (1982). The cases citing § 919 involve recovery by *private* individuals for expenses incurred to avert harm. *Id.* The court in *Chesapeake* found the government to possess a legally protected interest in *its own real property*. 130 F.2d at 309-10 (emphasis added). Whether the court would find the government similarly possesses a legally protected interest in the lives, safety and property of its citizens is not clear. Since the court's treatment of the tort action was cursory, *Chesapeake* was not included in the text of this Comment.

illustrate that a "single event" may generate a cause of action under a nuisance theory.[10] The second section discusses the deterrent impact of user charges if they were applied against negligent conduct.

II. THE JUDICIAL LEGAL CONTEXT

As mentioned in the introduction, a lawyer representing the government will rarely find statutory authorization for the imposition of user charges. Nor is there much judicial precedent available.[11]

A. The Case Law

1. *City of Bridgeton v. B. P. Oil, Inc.*

In *City of Bridgeton v. B. P. Oil, Inc.*,[12] the defendants were the owner and lessee of real estate in the City of Bridgeton, New Jersey. Leaks in a gasoline tank located on the property prompted the City to take precautionary measures to prevent the spread of the resulting oil spill. The City's fire department was present at the site for a week. Equipment and chemicals were specially purchased to abate the damage. In addition, extensive overtime pay was required to keep emergency personnel on the job.[13]

The City filed suit against B. P. Oil, Inc., asserting that "when one's actions cause *excessive use* of its fire department, that person should pay for its services."[14] In essence, the City attempted to impose a user charge on the defendants. The City restricted user charges to "excessive" users[15] and to situations where tortious conduct caused the need for the service.[16] The court held that the City was *not* entitled to recover the

10. *See infra* text accompanying notes 70-83.

11. *See supra* note 9.

12. 146 N.J. Super. 169, 369 A.2d 49 (1976).

13. *Id.* at 171, 369 A.2d at 50.

14. *Id.* at 178, 369 A.2d at 54 (emphasis added). Apparently, the City created the excessive use theory on its own. No case law was cited for the common law proposition. *Id.*

15. Excessive use might be required before a court would feel comfortable imposing a user charge, as it can easily be argued that the defendant's previous tax payments must surely have entitled the defendant to "some" use. However, if a city's fire department is present on the defendant's land for one week cleaning up an oil spill with new chemicals and equipment it acquired specially for that purpose, this argument would clearly seem weaker. Note, however, that the defendants in *Bridgeton* argued this point successfully. 146 N.J. Super. 179-80, 369 A.2d at 54-55.

16. The amount of use is not in question unless the underlying behavior was tortious. Although not stated in the *Bridgeton* opinion, the requirement of tortious conduct was implicit in the first issue that the court addressed—specifically, whether a negligence or strict liability standard should govern liability for oil spills on land. The court resolved that issue in favor of the strict liability standard. 146 N.J. Super. at 171-78, 369 A.2d at 50-54. One reason for the requirement of tortious conduct is that it avoids deterrence of socially beneficial conduct.

costs of the services provided by its fire department and granted summary judgment in favor of the defendants.[17]

a. the subsidy rationale

Cities typically structure the funding for their emergency services in a way that subsidizes those who use them. For example, fire departments are usually publicly funded and their services provided for free. Every person receives as much service as needed with no charge beyond the property, sales or income tax paid. Those who do not use the service receive whatever benefit there is in knowing that the service will be available if needed. Those using the service do not pay the city's full cost for providing it.

Subsidies are beneficial because each individual's tax payment is negligible, whereas the actual cost of the service may total thousands of dollars. Disabling costs are eliminated as the losses are spread among a large class of taxpayers who suffer comparably little.

Although not explicit in the opinion, the *Bridgeton* court essentially adopted a subsidy rationale in denying recovery. The court stated:

> Governments, to paraphrase the Declaration of Independence, have been instituted among men to do for the public good those things which the people agree are best left to the public sector. . . . True, certain activities have developed in areas from which revenue has been derived, such as turnpikes, water or power supply, or postal services. Nevertheless, there remains an area where the people as a whole absorb the cost of such services—for example, the prevention and detection of crime. . . . The services of fire fighters are within this ambit and may not be billed as a public utility.[18]

The court never explained *why* the services of the fire department were to be absorbed by the people as a whole, stating only that "[c]ost accounting must have a limiting factor somewhere"[19] because providing protective services is "the very purpose of government for which it was created."[20]

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17. 146 N.J. Super. at 179, 369 A.2d at 54-55.

18. *Id.* at 178, 369 A.2d at 54.

19. The court did not define the term "cost accounting." *Id.* at 178, 369 A.2d at 55. Presumably, the term refers to the practice of imposing direct charges on the user of a service. Thus, the terms "cost accounting" and "user charge" would be synonymous. *See supra* note 8.

20. 146 N.J. Super. at 179, 369 A.2d at 55. At the time of the decision, both New Jersey and federal legislation authorized government recovery of abatement costs for cleaning up oil spills on water. *Id.* at 178, 369 A.2d at 54. The court noted both the legislation and the growing "cost accounting" trend where cities charge for their services. *Id.* Neither the obvi-

b. hidden disincentives

Although subsidies protect individuals from bearing extreme losses, they may also lessen incentives to use greater care. For example, in *Bridgeton*, the oil spill might have been avoided had the owner and lessee of the property known that they would be responsible for cleanup costs. Had it been cheaper for them to repair or replace the tank than to pay the City to clean up the spill, the defendants presumably would have done so.

In *Bridgeton*, the defendants may have had incentives to replace or maintain their tanks other than avoiding clean up costs. For example, if the oil that they kept on the property had some value to them, they would lose that value if the oil spilled. Or, if the oil spilled onto neighboring property, the defendants may have been liable to other property owners for the damages. Conversely, there may have been no other incentives to replace or maintain the tanks. For example, suppose that the oil was of no or nominal value and that it would have cost the owner and lessee a considerable amount of money to have it removed. In such a situation the oil might have been left to stand until the tanks rusted out. The City would then rush in to clean the spill before damage resulted to neighboring land.

Regardless of the other incentives which may have existed in *Bridgeton*, imposing a user charge on the owner and lessee would have led to greater care in the future. Even if the oil had value and neighboring property was threatened by a spill, the additional costs imposed by a user charge would have increased the incentive to maintain the tanks properly. By permitting a subsidy to clean up the spill, the court in *Bridgeton* lessened that incentive.[21]

c. the possibility of express contracts

The court in *Bridgeton* noted that, at oral argument,

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ous analogy between land and water nor the recognized cost accounting trend diluted the court's devotion to the principles inherent in the Declaration of Independence.

A factor that might have played an underlying role in the decision was the court's analogy to the situation where Bridgeton sought to bill a victim of crime "if a policeman apprehends a thief." *Id.* at 179, 369 A.2d at 54. The City sought to charge the "criminal" for the apprehension, in effect seeking to recover its expenditures from the one who caused danger, not from the victim of such danger. Thus, the court misstated the analogy. The court's failure to properly align the parties in its analogy may have distorted the question presented for determination. An attorney presenting this argument to a court should take care to keep the parties properly aligned and thus avoid misapplication of the theory.

21. The deterrence section provides additional information on the effects of increased costs on behavior. *See infra* text accompanying notes 95-103.

> a fact issue developed as to whether the owner represented that it would, in fact, be responsible to the city for cleaning up the spill. . . . If the facts were to develop that the city's action was taken only because it was told by the owner that it would be reimbursed, an action for breach of contract would be appropriate.[22]

Not all emergency situations present the opportunity for contractual negotiations. Yet, even in situations where negotiation is possible, principles of contract law may prevent the formation of a binding contract. The Restatement (Second) of Contracts, section 73, states that "[p]erformance of a legal duty owed to a promisor which is neither doubtful nor the subject of honest dispute is not consideration."[23]

The first illustration to section 73 is similar to the situation where a city seeks to recover costs it already is obliged to expend:

> 1. A offers a reward to whoever produces evidence leading to the arrest and conviction of the murderer of B. C produces such evidence in the performance of his duty as a police officer. C's performance is not consideration for A's promise.[24]

In *Bridgeton*, the court found that the City had a statutory duty to provide fire suppression services.[25] The nature of that duty would be the point in issue if section 73 were raised as a defense to an express contract. The defendant might contend that the City's duty extends not only to the victims of accidents but to those who cause the accidents as well. To support the argument, the defendant could argue that the absence of legislation imposing charges on those who cause emergencies reflects the public policy of subsidizing all those associated with an accident.

In response to that argument, the city in such a case could argue that it owes a duty to render emergency assistance only to the victims of accidents and that the public policy of preventing accidents requires that the defendant bear the cost of emergency services.[26] Alternatively, the city might argue that those causing emergencies imposed on themselves a duty to aid their victims and that this duty is paramount to the city's duty.[27]

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22. 146 N.J. Super. at 179, 369 A.2d at 55. The City neither alleged a contract nor the breach thereof. For reasons not stated in the opinion, the court entered judgment without granting leave to amend. *Id.* at 180, 369 A.2d at 55.

23. RESTATEMENT (SECOND) OF CONTRACTS § 73 (1981).

24. *Id.* § 73, illustration 1.

25. 146 N.J. Super. at 178, 369 A.2d at 54.

26. *See infra* text accompanying notes 95-104.

27. In Brandon Township v. Jerome Builders, Inc., 80 Mich. App. 180, 263 N.W.2d 326 (1977), Township officials repaired the defendant's dam in fear that it would rupture and the

2. *City of Flagstaff v. Atchison, Topeka & Sante Fe Railway*

In *City of Flagstaff v. Atchinson, Topeka & Sante Fe Railway*,[28] the City evacuated residents who were threatened by leaks and explosions from four derailed railroad cars carrying liquified petroleum gas. The City fed the evacuees, paid emergency personnel overtime wages and purchased emergency medical equipment and personnel. The total cost to the City of Flagstaff was $41,954.81.[29]

The City sued the railroad for the costs of the evacuation. In an unpublished opinion, the district court held that Arizona law did not recognize the City as a proper plaintiff,[30] and that specific authorization for the recovery sought must come from the Arizona legislature rather than from the courts. Summary judgment was granted for the defendant and the order was affirmed on appeal.[31]

The Ninth Circuit relied on two grounds in affirming the district court opinion.[32] First, the court reasoned that settled expectations would be disturbed by allowing the City to recover.[33] Second, the court considered the matter to be *fiscal* and therefore reserved to the Arizona State Legislature.[34]

a. disturbing settled expectations

The court upheld the general rule that settled expectations should not be disturbed.[35] However, the Ninth Circuit also noted that

> [s]ettled expectations sometimes must be disregarded where new tort doctrines are required to cure an unjust allocation of risks and costs. The argument for the imposition of the new liability is not so compelling, however, where a fair and sensible system for spreading the costs of an accident is already in place, even if the alternate scheme proposed might be a more precise

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waters contained would devastate the township. *Id.* at 182, 263 N.W.2d at 327. Implicit in the court's finding of liability was that the defendant's duty to repair the dam transcended the duty of the Township to do so. *Id.* at 183, 263 N.W.2d at 328.

28. 719 F.2d 322 (9th Cir. 1983).

29. *Id.* at 323.

30. *Id.* The court was sitting in a diversity case, requiring the application of state law where the issue was one of first impression. The City sued on the theory that when someone's negligent or ultrahazardous activity causes the use of government services, that person is responsible for compensating the government for abatement costs. *Id.* The decision does not state whether it made a finding of liability.

31. *Id.*

32. *Id.* at 323-24.

33. *Id.* at 323.

34. *Id.* at 324.

35. *Id.* at 323.

> one. Here the city spreads the expense of emergency services to its taxpayers, an allocation which is neither irrational nor unfair.[36]

Even assuming that it is fair and sensible to spread evacuation costs among taxpayers, the court ignored an important element of the risk allocation formula. The wisdom of a legal rule also depends on the rule's effect on human behavior. Ideally, the costs of an accident should be borne by the party best able to avoid future accidents. In *Flagstaff*, the railroad used the tracks and operated the train that derailed. Presumably, it was in a better position than the City to monitor and control the probability of a derailment. The City could only *respond* to the derailment *after* it occurred. Although settled expectations may promote certainty in personal and business decisions, they may also nurture careless conduct.[37] Especially in a case like *Flagstaff*, where the evacuation costs could have been allocated through the railroad's prices or insurance, the additional deterrent value of a new rule *should* disturb settled expectations.[38]

b. the legislative prerogative

In *Flagstaff*, the Ninth Circuit also established a legislative prerogative over the realm of decisions implicating fiscal policy.

> Here governmental entities themselves currently bear the cost in question, and they have taken no action to shift it elsewhere. If the government has chosen to bear the cost for reasons of economic efficiency, or even as a subsidy to the citizens and their business, the decision implicates fiscal policy; the legislature and its public deliberative processes, rather than the court, is the appropriate forum to address such fiscal concerns.[39]

Two important observations are contained in the language quoted above. First, it assumes that legislative inaction represents a negative intent. Second, the court held that decisions implicating fiscal policy are to be determined by the Arizona legislature.[40]

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36. *Id.*

37. *See infra* text accompanying notes 103-04.

38. The ability to spread costs might impair the deterrent effect of a user charge. However, the railroad cannot spread these costs at will. First, it is restrained by the prices that passengers and carriers are willing to pay before turning to alternative modes of transportation. Second, insurance companies will not insure bad risks, or will only insure them on strict terms and for higher prices.

39. 719 F.2d at 324.

40. *Id.* To establish the legislative prerogative, the Ninth Circuit relied on United States v. Standard Oil Co., 332 U.S. 301 (1947), a United States Supreme Court case deciding an issue

Legislative inaction may support many suppositions. For example, the legislature may have assumed that this issue would be resolved by the courts since the courts often make decisions allocating risks and costs.[41] Alternatively, the legislature may not have been aware of the problem[42] or, if aware of the problem, individual legislators may have been unable to agree on the wording of a bill in committee thereby defeating a position with which all agreed.

Admittedly, the legislature is the branch of government responsible for making fiscal decisions. It is better equipped than the judiciary to balance the competing interests of a diverse citizenry. Yet, simply because a decision "implicates" fiscal policy, it does not follow that the decision is swallowed by it. Imposing evacuation costs on a railroad can be viewed as a deterrent measure or as a means of implementing traditional concepts of fairness. Courts have traditionally made rules to effec-

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of federal law. In *Standard Oil*, a negligent truck driver injured a soldier in the United States Army. The United States brought suit against the truck driver to recover medical expenses and his pay during the time of disability. The Supreme Court denied recovery on the ground that Congress "is the primary and most often the exclusive arbiter of *federal* fiscal affairs." *Id.* at 314 (emphasis added). Why the court in *Flagstaff* felt itself bound by the decision in *Standard Oil* is not readily discernible. *Flagstaff* involved a suit by a *city* government against a *private* corporation on a claim based on state law. 719 F.2d at 323. Federal separation of powers was not an issue.

41. This is particularly true in the tort area. A good example of risk and cost allocation can be found in the California duty analysis in negligence cases. In California, all individuals are required to use reasonable care to avoid injury to others:

> A departure from this fundamental principle involves the balancing of a number of considerations; the major ones are the foreseeabilty of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved.

Rowland v. Christian, 60 Cal. 2d 108, 112-13, 443 P.2d 561, 564, 70 Cal. Rptr. 97, 100 (1968) (citations omitted) (abrogating common law duty limitation of occupiers of land to social guests).

Thus, in every case where the defendant disputes the existence of a duty, the courts must engage in a new balancing of risks and costs.

42. In United States v. Standard Oil Co., 332 U.S. 301 (1947), the Court noted that the Army had long been aware of the expenditures on medical care for soldiers injured by tortfeasors. *Id.* at 315. *See supra* note 40. It stated:

> "[U]pwards of 450 instances of negligently inflicted injuries upon soldiers of the United States, requiring hospitalization at Government expense, . . . have been reported by the War Department to the Department of Justice in the past three years," and . . . additional instances [are] being reported to the War Department at the rate of approximately 40 a month.

Id. at 302-03 n.2 (quoting Government's petition for certiorari). Where it is clear that the problem is known, there is a stronger inference that inaction means legislative consent.

tuate these concerns.[43]

The Ninth Circuit's abdication of its decision-making power to the legislature may have been influenced by two factors. First, the court may have felt itself limited by the legal position in which it found itself—specifically, sitting in a diversity case based on state law where the case was one of first impression.[44] Second, the court may have wished to avoid an economic analysis that it acknowledged was difficult to apply.[45] Faced with the task of deciding whether the City or the railroad was the best cost avoider,[46] the Ninth Circuit invoked the legislative prerogative over fiscal matters, thus dodging the issue.

3. *Brandon Township v. Jerome Builders*

In *Brandon Township v. Jerome Builders*,[47] fear that the defendant's dam might rupture prompted Brandon, Michigan town officials to repair

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43. *See, e.g., supra* note 41. Two of the factors in the *Rowland* duty analysis are "the moral blame attached to the defendant's conduct, [and] the policy of preventing future harm." 60 Cal. 2d at 113, 70 Cal. Rptr. at 100, 443 P.2d at 564. Thus, as a routine matter in negligence cases, California courts can implement deterrent measures and traditional concepts of fairness.

44. 719 F.2d at 323. At the time of the decision, there was no procedure by which the Ninth Circuit could certify questions to the Arizona Supreme Court. Moreover, the appellants did not request a stay of proceedings pending a declaratory action in the Arizona courts. *Id.* at 324.

45. The Ninth Circuit acknowledged "the practical difficulties of the approach." 719 F.2d at 323.

46. *Id.* at 323-24. The court cited Union Oil Co. v. Oppen, 501 F.2d 558 (9th Cir. 1974), in which the court recognized an injury to commercial fishermen's economic expectancy in marine life resulting from the Santa Barbara oil spills. The court found the economic expectancy compensable using a market analysis of the efficient liability rule. *Id.* at 569. Judge Sneed wrote:

> Recently a number of scholars have suggested that liability for losses occasioned by torts should be apportioned in a manner that will best contribute to the achievement of an optimum allocation of resources . . . . This optimum, in theory would be that which would be achieved by a perfect market system. In determining whether the cost of an accident should be borne by the injured party or be shifted, in whole or in part, this approach requires the court to fix the identity of the party who can avoid the costs more cheaply. Once fixed, this determination then controls liability.

Id. (citations omitted).

Judge Sneed then proceeded to apply Professor Guido Calabresi's guidelines for locating the best cost avoider. The Judge determined that the oil companies responsible for the spill could best avoid the costs. *Id.* at 569-70 (citing G. CALABRESI, THE COSTS OF ACCIDENTS (1970)). For an analysis of Judge Sneed's reasoning, see Posner, *Some Uses and Abuses of Economics in Law*, 46 U. CHI. L. REV. 281, 297-301 (1979).

In *Flagstaff*, the Ninth Circuit recognized "the force of the suggestion that risks should be imposed on the party who can avoid them most economically or pass the costs on most efficiently." 719 F.2d at 323. Yet, the court avoided determining which party was in the best position to do so. *Id.* at 324.

47. 80 Mich. App. 180, 263 N.W.2d 326 (1977).

the dam. The total cost of repairs to the Township was $19,230.96, part of which was paid for by the state disaster fund. The Township brought suit for the balance of $15,431.96, pleading theories of nuisance and unjust enrichment. The trial court entered summary judgment against the Township for failing to state a claim upon which relief could be granted.[48]

On appeal, the order for summary judgment was reversed and the case remanded with instructions in effect recognizing that user charges could be imposed on the defendant.[49] Summary judgment had been entered on the nuisance cause of action because of a defect in the prayer.[50] The Township sought a recovery in the form of damages,[51] while a state statute provided that such costs " 'shall be collected and treated in the same manner as are taxes assessed [against property] under the general laws of the state.' "[52] The Township was granted leave to amend its prayer.[53]

Summary judgment was also reversed on the unjust enrichment cause of action.[54] Citing section 115 of the Restatement of Restitution, the court summarily concluded that the "[d]efendants were enriched . . . and the enrichment was unjust because it was defendants' duty to repair the dam."[55]

Section 115 states:

> A person who has performed the duty of another by supplying things or services, although acting without the other's knowledge or consent is entitled to restitution from the other if
>
> (a) he acted unofficiously and with intent to charge therefore, and
>
> (b) the things or services supplied were immediately necessary to satisfy the requirements of public decency, health, or safety.[56]

Because the court found that the defendant had a duty to repair the

48. *Id.* at 181-82, 263 N.W.2d at 327.
49. *Id.* at 184, 263 N.W.2d at 328.
50. *Id.* at 183-84, 263 N.W.2d at 328.
51. *Id.*
52. *Id.* at 184, 263 N.W.2d at 328 (quoting MICH. COMP. LAWS ANN. § 327.10 (1970)).
53. *Id.*
54. *Id.* at 183, 263 N.W.2d at 328.
55. *Id.* (emphasis added) (citing RESTATEMENT OF RESTITUTION § 115 (1937)).
56. RESTATEMENT OF RESTITUTION § 115 (1937); *see also id.* §§ 112 (No restitution unless benefit conferred when necessary for protection of beneficiary or third party), 113 ("Performance of Another's Noncontractual Duty to Supply Necessaries to a Third Person"), 114 ("Performance of Another's Duty to a Third Person in an Emergency"), 116 (Restitution permitted where things or services provided for preservation of health or life of beneficiary).

dam,[57] the next question to be decided was whether the Township acted unofficiously and with an intent to charge for the service. The "officiousness" requirement may be avoided when (1) the defendant is informed of the hazard and refuses to act or (2) when time limitations preclude consultation.[58] In *Brandon*, the defendants had been warned repeatedly of the danger. Indeed, the threat of the dam rupturing was imminent when the Township conducted the repairs. Yet, the defendants refused to act.[59] "Intent to charge" requires that the person rendering aid not act solely out of humane motives.[60] Although altruism may have comprised part of the motivation in *Brandon*, there also may have been a concern for the resulting financial costs had the dam burst.

The last requirement of section 115 requires that the materials or services supplied are "immediately necessary" to ensure public health or safety.[61] That requirement also seems to have been met in *Brandon*:

> Plaintiff advised defendants on numerous occasions that the dam was in need of repair, and that it feared a catastrophic

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57. 80 Mich. App. at 183, 263 N.W.2d at 328.

58. RESTATEMENT OF RESTITUTION § 115(a) (1937). Comment c of § 115 incorporates comment b of § 114 by reference. *Id.* § 115 comment c. Comment b of § 114 notes that recovery is limited to the value of "necessary" relief. *Id.* § 114 comment b. Comment b further states that:

> any person who has the things or who is qualified to render the services which are required can perform the duty and obtain restitution therefor, provided that there is no reasonable opportunity to communicate with those who because of natural ties or official position or otherwise would ordinarily perform the services . . . .

Id.

Comment b might be construed to deny recovery to government entities because of their official duty to provide such services. However, the next sentence of comment b provides an example that negates such an interpretation. "[A]ny qualified physician rendering aid to a child . . . is entitled to compensation from the absent parent . . . unless the family physician was available . . . ." *Id.* Comment b would allow the family physician restitution if placed in the same position as the rescuing physician. Consistency requires that Brandon Township, like the family physician, should be able to recover.

The court in *Brandon* did not address the officiousness element of § 115. However, any objection to the Township's status as a government would have appeared frivolous under the facts of the case. In *Brandon*, a state statute permitted government recovery for the costs of abating a nuisance. 80 Mich. App. at 184, 263 N.W.2d at 328.

59. 80 Mich. App. at 182, 263 N.W.2d at 327.

60. RESTATEMENT OF RESTITUTION § 115(a) (1937). Comment c of § 115 incorporates comment c of § 114 by reference. *Id.* § 115 comment c. The intent to charge requirement is an anomaly given § 115's factual context. Only when immediate necessity exists may restitution be provided under § 115. In emergencies, an intent to charge for services may be the furthest thing from the human mind. In retrospect, however, a person might be very disgruntled to learn that "a person who acts entirely from motives of humanity is not entitled to restitution." RESTATEMENT OF RESTITUTION § 114 comment c (1937). The intent to charge requirement may have an adverse effect on the giving of aid. The court in *Brandon* did not address this aspect of § 115.

61. RESTATEMENT OF RESTITUTION § 115(b) (1937).

> rupture and flood in the event of heavy rainfull. . . . Because of the heavy spring rainfall and runoff plaintiff determined that there was an imminent threat to the health, safety and welfare of the township residents, and therefore repaired the dam and made it safe.[62]

Flagstaff and *Bridgeton* differ very little from *Brandon*. Both of those cases can meet the requirement of section 115, which illustrates the flexibility of the restitutionary remedy. In *Flagstaff*, the City evacuated residents threatened by leaks and explosions from four derailed railroad cars containing liquified petroleum gas.[63] Since the railroad had imperiled the residents, it had a duty to assist them.[64] The City performed this duty on behalf of the railroad. The services were rendered unofficiously in that time limits precluded consultation.[65] The City intended to charge because the value of the services was not *de minimus*, and its motivation was not entirely altruistic.[66]

In *Bridgeton*,[67] the landowner had a duty to safely maintain the tanks on its land.[68] The City, in essence, performed the duty by cleaning up the spill. Apparently, the City had an oral contract with the landowner to clean the spill which satisfies both the unofficiousness and intent to charge requirements of section 115.[69] The oral agreement admitted that the materials and services supplied were necessary to satisfy the needs of public decency. The agreement also implied the existence of a large oil spill.

B. Nuisance Law

This section addresses two aspects of nuisance law that may raise obstacles to the recovery of user charges for emergency service expenditures. First, the issue of whether a single event constitutes a nuisance often arises when trying to establish a nuisance cause of action. Second,

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62. 80 Mich. App. at 182, 263 N.W.2d at 327.

63. 719 F.2d 322.

64. RESTATEMENT (SECOND) OF TORTS § 321(1) (1965) provides in pertinent part: "If the actor does an act, and subsequently realizes or should realize that it has created an unreasonable risk of causing physical harm to another, he is under a duty to exercise reasonable care to prevent the risk from taking effect."

65. *See supra* note 58 and accompanying text.

66. *See supra* note 60 and accompanying text.

67. 146 N.J. Super. 169, 369 A.2d 49.

68. In fact, the court in *Bridgeton* had concluded earlier in the opinion that one who stores pollutants on land in New Jersey is strictly liable for damages caused by such substances to adjoining land. *Id.* at 177, 369 A.2d at 53-54.

69. *Id.* at 179-80, 369 A.2d at 55. *See supra* notes 58 & 60 and accompanying text.

the method of assessing damages is a problem that may arise when establishing the means of recovery.

1. Single events as nuisances

Regarding the law of nuisance, Professor William Prosser wrote "[t]here is perhaps no more impenetrable jungle in the entire law than that which surrounds the word 'nuisance.' It has meant all things to all men, and has been applied indiscriminately to everything from an alarming advertisement to a cockroach baked in a pie."[70]

Nuisance law encompasses a wide variety of conduct and protects a similarly wide range of interests.[71] However, regardless of whether the nuisance is public[72] or private,[73] nuisance liability only exists "to those to whom it causes significant harm."[74]

Seemingly, if someone's conduct creates an emergency and significant harm results, a cause of action under a nuisance theory would be successful. However, two aspects of a typical emergency seem antithetical to recovery under a nuisance theory. The typical emergency is a one-time event of limited duration. In contrast, two common characteristics of nuisances are their recurrence and continuity.[75]

Some courts have denied recovery to plaintiffs alleging that a single injurious event constituted a nuisance. For instance, in *Nussbaum v. Lacopo*,[76] the plaintiff was denied recovery on a nuisance theory when he was struck by a golf ball from a neighboring golf course while on his patio. Yet, for other courts, the duration or frequency of an activity presents no obstacle to recovery under a nuisance theory. For example, a

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70. W. PROSSER, HANDBOOK OF THE LAW OF TORTS 571 (4th ed. 1971) (footnotes omitted).

71. *Id.* at 571-72. *See, e.g., infra* text accompanying notes 76-78.

72. RESTATEMENT (SECOND) OF TORTS § 821B (1979) provides:

> (1) A public nuisance is an unreasonable interference with a right common to the general public.
>
> (2) Circumstances that may sustain a holding that an interference with a public right is unreasonable include the following:
>
> (a) Whether the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience, or
>
> (b) whether the conduct is proscribed by a statute, ordinance or administrative regulation, or
>
> (c) whether the conduct is of a continuing nature or has produced a permanent or long-lasting effect, and, as the actor knows or has reason to know, has a significant effect upon the public right.

73. "A private nuisance is a nontrespassory invasion of another's interest in the private use and enjoyment of land." *Id.* § 821D.

74. *Id.* § 821F.

75. *See* F. HARPER & F. JAMES, THE LAW OF TORTS § 1.23 at 67 (1956).

76. 27 N.Y.2d 311, 317 N.Y.S.2d 347, 265 N.E.2d 762 (1970).

single instance of indecent exposure was held to be a public nuisance in *Truet v. State*.[77] And, in *E. Rauh & Sons Fertilizer Co. v. Shreffler*,[78] the plaintiff recovered damages to its crops on a nuisance theory when gasses generated by the defendant's fertilizer plant escaped due to a single breakdown of the plant's safety apparatus.

Generally, the decisions denying recovery in nuisance for a single or limited act may be explained on other grounds.[79] For example, continuity or recurrence may be necessary as a ground for injunctive relief.[80] Furthermore, as noted above, a showing of significant harm is necessary to establish a nuisance, and such harm may require a showing of repetition or duration.[81] Thus, so long as the activity creating an emergency satisfies the elements of a nuisance cause of action,[82] the brief or solitary nature of the activity should not be an issue.

However, the limited nature of an emergency may create a conceptual barrier that a defendant may attempt to exploit. A plaintiff alleging that a single accident constituted a nuisance should emphasize the significance of the harm caused by the defendant's conduct. There is no established rule that the duration or frequency of an activity exclusively determines whether or not it is a nuisance.[83]

2. Recovery of abatement costs

Although a nuisance action may entitle the government to the recovery of user charges, state legislation may limit the means of recovery. For example, in *Brandon Township v. Jerome Builders, Inc.*,[84] the Township sought to recover costs it incurred in repairing the defendants' dam. Summary judgment was granted against the Township because a state statute permitted the recovery of abatement costs only in the form of property tax assessments. On appeal, *Brandon* was granted leave to amend its prayer.[85]

In addition to limiting the means of recovery, state legislation like

77. 3 Ala. App. 114, 57 So. 512 (1912).

78. 139 F.2d 38 (6th Cir. 1943).

79. *See* RESTATEMENT (SECOND) OF TORTS § 821F comment g (1979); W. PROSSER, HANDBOOK OF THE LAW OF TORTS 579-80 (4th ed. 1971). For a compilation of cases on the subject, see RESTATEMENT (SECOND) OF TORTS app. § 821F comment g (1982).

80. RESTATEMENT (SECOND) OF TORTS § 821F comment g (1979).

81. *Id.*

82. *See supra* notes 72-73.

83. See RESTATEMENT (SECOND) OF TORTS § 821F comment g (1979); W. PROSSER, HANDBOOK OF THE LAW OF TORTS 579-60 (4th ed. 1971). For a compilation of cases on the subject, *see* RESTATEMENT (SECOND) OF TORTS app. § 821F comment g at 505-06 (1982).

84. 80 Mich. App. 180, 263 N.W.2d 326; *see supra* notes 47-62 and accompanying text.

85. *Id.* at 184, 263 N.W.2d at 328.

that involved in *Brandon* may defeat recovery entirely if a nuisance is not land related. If, for instance, a nuisance is created by the operation of a vehicle, the government cannot assess the abatement costs against real property.

C. Summary

Only three cases have been reported in which a government entity sought to recover excessive service expenditures from the tortfeasor responsible for the underlying emergency.[86] In two instances, the defendants prevailed.[87] Three arguments have succeeded in defeating recovery: (1) the subsidy rationale,[88] (2) the settled expectations doctrine[89] and (3) the legislative prerogative.[90] Additionally, a hidden danger lurked in the City of Bridgeton's assertion that the defendant promised to reimburse the City for abatement expenditures.[91]

The one case in which the government successfully recovered its costs[92] is instructive for future attempts at recovery. In *Brandon*, the Township survived summary judgment motions on both quasi-contract[93] and nuisance[94] theories.

III. DETERRENCE

A basic theorem of economics is that increasing the price of an activity will result in a shift away from that activity, although the magnitude of the shift may be unknown.[95] For example, if the price of lift tickets at Mt. Sheerface rises from $25.00 to $50.00, skiers may decide to quit skiing entirely, to ski less, to ski elsewhere or select a different sport. If the price of the tickets rose to $100, the magnitude of the shift away from skiing at Mt. Sheerface would be even greater.

User charges represent an increase in the price of engaging in an

86. City of Flagstaff v. Atchinson, T. & S.F. Ry., 719 F.2d 322 (9th Cir. 1983); City of Bridgeton v. B. P. Oil, Inc., 146 N.J. Super. 169, 369 A.2d 49 (1976); Brandon Township v. Jerome Builders, Inc., 80 Mich. App. 180, 263 N.W.2d 326 (1977).

87. City of Flagstaff v. Atchinson, T. & S.F. Ry., 719 F.2d 322 (9th Cir. 1983); City of Bridgeton v. B. P. Oil, Inc., 146 N.J. Super. 169, 369 A.2d 49 (1976).

88. *See supra* text accompanying notes 17-20.

89. *See supra* text accompanying notes 35-38.

90. *See supra* text accompanying notes 39-46.

91. *See supra* text accompanying notes 22-27.

92. Brandon Township v. Jerome Builders, Inc., 80 Mich. App. 180, 263 N.W.2d 326 (1977).

93. *See supra* text accompanying notes 54-62.

94. *See supra* text accompanying notes 49-53.

95. Ehrlich, *The Deterrent Effect of Criminal Law Enforcement*, 1 J. LEGAL STUD. 259, 261 (1972).

activity carelessly, or in engaging in an activity at all.[96] Consequently, the imposition of user charges should be followed by either a reduction of dangerous activities or by an increase in carefulness when engaging in activities that might cause emergencies.[97] Moreover, a reduction in emergencies would reduce the need for emergency services. If there were less need for such services, public revenue could be directed back to the taxpayers, either through a tax reduction or through the provisions of other goods and services. Additional savings would result from the decrease in injuries, property damage and litigation.[98]

The materials that follow are largely derived from law and economics literature. In part A, below, an economic model of deterrence is set out as a framework for the discussion in parts B and C. Part B illustrates how the model constructed in part A would operate on rock climbers if they were billed for rescue services. Finally, part C discusses the deterrence environment of *City of Flagstaff v. Atchinson, Topeka & Sante Fe Railway.*

A. Expected Values and Harm Reduction

People cannot see into the future and know the outcome of an act. They can only estimate probabilities. By multiplying the probability of an outcome (the chances of its occurrence or nonoccurrence) by its value (whether negative or positive), a weighted value for that outcome may be established. By totaling the weighted values, an expected value for the act (or for acting with a given level of care) is derived. If the expected value is positive, a person will perform the contemplated act.[99] In order to deter the act, the expected costs associated with the act must be increased. This may be accomplished either by increasing the probability that a penalty will be enforced, by increasing the value of the penalty or by increasing both.

B. Rock Climbers and User Charges

An application of the framework outlined above displays how the

96. The impositions of user charges is an increase in that price because emergency services are presently funded by general tax revenues.

97. Of course, when the cost of care is greater than the cost of an accident (tort liability plus user charges), a rational profit maximizing enterprise (or individual) will opt to cause the accident. Posner, *A Theory of Negligence,* 1 J. LEGAL STUD. 29, 33 (1972).

98. However, at least one qualification is necessary. A user charge should only be imposed when the behavior involved is the type of behavior society wishes to deter. Otherwise, beneficial conduct will be deterred.

99. *See generally* C. GOETZ, CASES AND MATERIALS ON LAW AND ECONOMICS 75-82 (1982); Erlich, *supra* note 95, at 261-65.

imposition of user charges will increase the amount of care that a hypothetical rock climber uses to scale Mt. Sheerface. Due to the danger involved, only ten climbers have attempted to scale the mountain. Four succeeded, three descended the face on their own after failing to scale the mountain, one fell and was crippled, and two fell and were killed. Climber 11 is now considering an assault on the face.

There are four possible outcomes from the climb: success, falling, self-help and rescue. By exercising various levels of care, Climber 11 lessens the hazard of death or serious injury by a certain percentage. Each additional unit of care has four further effects: (1) it increases the cost of the climb; (2) it increases the probability that the climb will be successful; (3) it increases the probability that Climber 11 can get off Mt. Sheerface on her own if the climb is not successful; and, (4) it decreases the probability that rescue will be needed. However, the effect of each *additional* unit of care on the various probabilities is less than the effect of the preceding unit.[100]

Before settling on a level of care, Climber 11 is faced with two decisions. First, she must decide whether or not the expected value of the climb is positive. Mathematically, this requirement is expressed as follows: $(p1 \bullet B) - [(p2 \bullet c1) + (p3 \bullet c2) + (p4 \bullet c3) + C]\ 0$

The four outcomes (success, fall, self-help and rescue) are represented by the symbols p1, p2, p3 and p4, respectively. B is the benefit derived from success; c1, c2 and c3 are the costs associated with the probabilities of falling, having to get down alone and being rescued. C is the cost of using a particular level of care.

Second, Climber 11 must also decide the level of care she uses that is the most profitable. Among her care options, Climber 11 will choose the one which promises the greatest return. Table 1 presents a set of *hypothetical* probabilities that might correspond to her assessments.[101]

100. The associated increases and decreases are assumed to have the quality of diminishing marginal returns. As more and more care is employed, further care has less of an effect on the various probabilities. *See* C. GOETZ, *supra* note 99 at 104-07.

101. Note that the probabilities in Table 1 assume diminishing marginal returns from every $500 expenditure on care. *See* C. GOETZ, *supra* note 99, at 104-07.

Table 1 (Hypothetical Probabilities)

T	C	p1	p2	p3	p4	P
T1	$1500	.50	.16	.11	.23	1.00
T2	2000	.54	.13	.14	.19	1.00
T3	2500	.56	.11	.17	.16	1.00
T4	3000	.57	.10	.19	.14	1.00

The symbols in the table represent the same probabilities outlined in the equation above. For example, in the first row of Table 1, the probability that the climb will be successful is fifty percent, that Climber 11 will fall is sixteen percent, that she will be stranded and get down on her own is eleven percent and that she will need to be rescued is twenty-three percent.

The values for Climber 11's benefit and various costs are *arbitrarily*[102] set so that B = $10,000; c1 = $10,000; c2 = $200; and c3 equals either $200 or $5000. The different values for c3 represent the $200 cost of being stranded but rescued for free, and the *contrived* $5000 cost to Climber 11 if she is made to pay the price for emergency services. Table 2 presents Climber 11's expected value assessments for the various levels of care (T) that she is considering (T1, T2, T3 and T4) absent user charges. Table 2 is derived from the level of care equation outlined above.

Table 2 (Care Level Without User Charges)

T =	(p1 • B)	− [(p2 • c1)	+ (p3 • c2)	+ (p4 • c3)	+ C]	= X
T1	$5000	$1600	$22.00	$46.00	$1500	$1786
T2	5400	1300	28.00	38.00	2000	1996
T3	5600	1100	34.00	32.00	2500	1902
T4	5700	1000	38.00	28.00	3000	1608

If Climber 11 is not charged for the cost of a rescue, she will choose care level T2, where her net expected gain from the climb is $1996. At

102. A central problem with deterrence is that we do not know what punishments will deter which people. Individual value assessments vary throughout the spectrum of possible human and environmental characteristics. Factors including age, sex, race, wealth, education, employment, personality and peer influences are among those that make one person's deterrent another's incentive. *See generally* C. TITTLE, SANCTIONS AND SOCIAL DEVIANCE: THE QUESTION OF DETERRENCE (1980).

T2, she derives the most possible benefit from the climb. Note that further levels of care would increase the safety of her climb, but the increases in safety would cost her more than they are worth.

Table 3 represents Climber 11's same value assessments when user charges are imposed for the use of a rescue service.

Table 3 (Care Level With User Charges)

T = (p1 • B)	−	[(p2 • c1)	+	(p3 • c2)	+	(p4 • c3)	+	C]	= X
T1		$5000		$1600		$22.00		$1150	$1500	$ 723
T2		5400		1300		28.00		950	2000	1122
T3		5600		1100		34.00		800	2500	1166
T4		5700		1000		38.00		700	3000	962

If Climber 11 must pay the price for the rescue (Y), she will select care level T3, where her benefit is $1166. This represents an increase in care from the situation where user charges were not imposed.

The rock climber hypothetical illustrates that the imposition of user charges on the one causing the need for emergency service may either deter a climb (when 0 > T) or may influence a climber to use additional care. This is particularly true when the climber actually considers rescue to be a benefit, in which case even less care may be exercised.

By compelling Climber 11 to pay the cost of rescue operations, we may be able to reduce both the probability of death or serious injury and the probability that rescue operations will be necessary. Additional gains possibly include an increase in the number of successful climbs, and a greater incidence of self-help by stranded climbers.

C. *A Note on the Deterrence Environment in* Flagstaff

In the last example, Climber 11 posed danger only to herself. In the case of emergencies, danger will often be imposed on others. If a victim is injured or property is damaged, and the conduct is tortious, the person causing the accident will also pay damages.

Potential liability to others increases the expected costs of an activity. In the rock climber example, Climber 11 wanted to avoid a fall and thus took enough care to protect herself. When tort liability exists, a person will exercise self-precautions and will use additional care to protect others.

Occasionally, the potential liability to others may be very great, either because the probability of injury is high or because injuries will be

extensive if an accident occurs. In such situations, the threat of an additional expected cost, that of a user charge, may seem slight by comparison. The primary deterrent will be the liability for personal injury rather than the payment of user charges. The question then becomes one of marginal effects.

An example of the situation just described existed in *City of Flagstaff v. Atchinson, Topeka & Sante Fe Railway*,[103] where four railroad cars carrying liquified petroleum gas derailed within the City limits. Fearing leaks and explosions, Flagstaff City officials evacuated and fed nearby residents, paid emergency personnel overtime wages, and paid for emergency medical equipment and personnel. The total cost to the City of the expenditure was more than $40,000.[104] Would the imposition of abatement costs cause the railroad to take greater measures of care to prevent future accidents than the railroad took when it merely expected liability to Flagstaff residents?

Assuming that the railroad took sufficient care to reduce the probability of derailment to twenty percent, and that abatement costs at that level of care were expected to average $40,000, the railroad's expected cost would have been $8000. If another unit of care cost more than $8000 and would not significantly affect the probability of derailment, the railroad would not use additional care, opting instead to accept the additional expected loss.

Where the potential for high liability exists, a person may exercise the levels of care necessary to reduce the probability of injury to a very low level. Reducing the probability below that level requires increasingly large safety expenditures. In *Flagstaff*, the railroad might well have chosen to assume an expected cost of $8000 rather than to take any additional care. A conclusion that the railroad would use more care in the future would be warranted where the railroad could significantly affect the probability of derailment, and where the cost of doing so would be less than the expected cost of the services provided. The only certainty, however, is that the railroad will not take additional care if immune from charges for government services.

IV. CONCLUSION—A PROPOSED CAUSE OF ACTION

This Comment has been directed at practicing lawyers. Ordinances or statutes might be written which would impose user charges on those using emergency services. However, in the absence of such legislation,

103. 719 F.2d 322 (9th Cir. 1983). *See supra* text accompanying notes 28-46.
104. 719 F.2d at 323.

lawyers must turn to the common law for the theory to recover user charges.

Nuisance and restitution actions may provide some protection for cities forced to subsidize emergencies created by particular individuals or businesses. However, the best approach for recovery of emergency service expenditures would be to establish a cause of action similar to the one suggested by the City of Bridgeton.

The cause of action would require that negligent conduct created the emergency and that there was excessive use of the government service. Excessive use would include not only the cost of one large emergency, but also the cost of responding to numerous emergencies.

The damage formula would consist of three parts. First, the expense claimed must be incurred in abating the emergency. Second, the expense must be the proximate result of the defendant's wrongful conduct. And, third, the expense must be reasonably incurred.[105] The elements of damages would include the cost of labor and expenses incured to abate the emergency.

Requiring negligent conduct prevents deterrence of innocent or beneficial conduct. Requiring excessive use serves two purposes. First, it permits some subsidy or cost spreading. Second, it eliminates the government's costs of litigation by limiting the right of action.

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105. This is the damage formula adopted in People v. Southern Cal. Edison Co., 56 Cal. App. 3d 593, 605, 128 Cal. Rptr. 697, 705 (1976), in construing the California fire liability law. *See supra* note 8.