Protecting first responders from abuse of the firefighter's rule

To prevent the defense attorney from playing fast and loose with the firefighter's rule, know the exceptions

By Eustace de Saint Phalle and Joseph R. Lucia

Defense attorneys often misunderstand or intentionally misapply the firefighter's rule. It is important to know that the exceptions to the legal principle in this instance have greater application than the rule itself.

Have you ever heard when representing a first responder, whether it be a firefighter, peace officer, or emergency medical personnel, the defense state, "If only your client was not a first responder, then they would have the same protections under the law like the rest of us. Too bad for you, the firefighter's rule is a complete defense to your client's claim." Usually, the defense attorney is snickering under their breath.

Understanding the exceptions in the law allows you to take control of this discourse. Although a first responder may assume some risks associated with the dangers of a specific emergency situation, they do not assume the risk of someone's tortious act unrelated to the specific task at hand.

History of the firefighter's rule

An early application of the firefighter's rule in California occurred in *Giorgi v. Pacific Gas & Elec. Co.* (1968) 266 Cal.App.2d 355. In *Giorgi*, the court barred claims of firefighters for injuries they suffered during a firefight caused by a defendant's negligence. In that instance, the court applied the firefighter's rule based on public policy precluding recovery for those who are injured by the very hazard they have been employed to confront. (*Id.* at pp. 359-360.) Later cases involving firefighter's injuries

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caused by the explosion of a gas main, further explained the context of the firefighter rule that the public policy basis behind the rule was "fairness." A firefighter's occupation requires them to confront the hazard of fire, and thus, a firefighter can't complain of the reason for his or her employment, whether it be fire or explosion that causes the injury. (*Scott v. E.L. Yeager Const. Co.* (1970) 12 Cal.App.3d 1190, 1191, 1195.)

The firefighter's rule has been superseded in application by its numerous exceptions

A defense attorney or an insurance adjuster will often assert that in a simple motor vehicle accident involving a first responder (firefighter, police officer, or emergency medical personnel) your client assumes the risk of an occupational hazard, and therefore can't recover damages for injuries suffered. While this is generally true, most defense representatives disregard a number of limitations and exceptions to the application of the firefighter's rule," acting as if all first responders have lost all protections under the law to any injury that occurs on the job. There are many exceptions under California law:

- Subsequent tortious acts committed after a first responder's presence
- Intentional acts causing injury
- Violation of statute that is independent of an incident that necessitates plaintiff's presence
- Arson that causes injury
- An independent negligent act that did not necessitate the first responder's presence (Independent Cause Exception)
- Risks that are not inherent to the particular employment task or emergency situation

The firefighter's rule generally

The firefighter's rule is not a separate concept from the assumption of the risk doctrine, but a special rule that limits the duty of care that members of the public would otherwise owe to firefighters, police officers and emergency medical personnel. It is "an example of the proper application of the doctrine of the assumption of risk, that is, an illustration of when it is appropriate to find the defendant owes no duty of care… [A] member of the public whose conduct precipitates the intervention of a police officer [does not] owe a duty of care to the officer with respect to the original negligence that caused the officer's intervention." (*Neighbarger v. Irwin Industries, Inc.* (1994) 8 Cal.4th 532, 538.)

Your classic example of the firefighter rule is when a firefighter responds to a burning building call and suffers an injury during the firefight, such as a collapsing support beam. That firefighter is barred from bringing a civil negligence claim against that building owner to recover for those injuries.

The rule also applies to firefighters and chemical spills. In *Rowland v. Shell Oil Co.* (1986) 179 Cal.App.3d 399, firefighters were dispatched to a chemical spill call where a tanker overturned. The firefighters were aware that the chemicals were toxic and that was the risk they were confronting. As a result of the exposure to these chemicals, plaintiffs were diagnosed as having diffuse histiocytic lymphoma, which led to deaths. The court concluded that the plaintiffs were precluded from proceeding by virtue of the firefighter's rule. (*Id.* at 407.)

The firefighter rule has also been applied to cases involving on-duty peace officers and peace officers engaged in training. (*Saville v. Sierra College* (2005) 133 Cal.App.4th 857; *Hamilton v. Martinelli & Assocs. Justice Consultants, Inc.* (2003) 110 Cal.App.4th 1012; *Seibert Security Services, Inc. v. Super.Ct. (Migailo)* (1993) 18 Cal.App.4th 394.)

Public policy considerations as the purpose of the rule

In its efforts to avoid liability, the defense will attempt to rely heavily on the public policy considerations behind the firefighter's rule, which primarily stems from public employees' compensation and special benefits. (*Walters v. Sloan* (1977) 20 Cal.3d 199, 204-206.) The firefighter's rule is "based upon a public policy decision to meet the public's obligation to its officers collectively through tax-supported compensation rather than through individual tort recoveries. This spreads the costs of injuries to public officers among the whole community, making the public in essence a self-insurer against those wrongs that any of its members may commit." (*Calatayud v. State of California* (1998) 18 Cal.4th 1057, 1062.) "In effect, the public has purchased exoneration from the duty of care and should not have to pay twice, through taxation and through individual liability, for that service." (*Neighbarger v. Irwin Indus., Inc.* (1994) 8 Cal.4th 532, 542-543.)

First responders are public employees who receive special salary, disability, and retirement benefits to compensate them for confronting the dangers inherent in their occupation. (*Neighbarger, supra,* at 540, 543-544; *Walters, supra*, at 205-206.) "[A]s a matter of fairness, police officers and firefighters may not complain of the very negligence that makes their employment necessary." (*Neighbarger, supra*, at 542-543.) Allowing a public employee to seek recovery for on-duty injuries will "embroil the courts in relatively pointless litigation over rights of indemnification among the employer, the retirement system, and the defendants' insurer." (*Neighbarger, supra*, at 540.)

These arguments are red herrings and do not dictate whether a first responder is actually entitled to pursue a third party action. Although first responders are entitled to special public compensation for undertaking the hazards peculiar to their line of work, it is not the fact or amount of compensation that determines the applicability of the firefighter's rule in these circumstances. (*Neighbarger, supra,* at p. 540; *Hodges, supra,* at 983.)

Exceptions to the firefighter's rule

California Civil Code § 1714.9

Until 1982, the firefighter's rule was only addressed as part of the common law. However, in 1982 the California

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Legislature enacted California Civil Code section 1714.9, codifying certain exceptions to the firefighter's rule. (Stats.1982, ch. 258, § 1, p. 836.) Section 1714.9 provides a statutory basis for peace officers to bring causes of action for, among other things, negligent acts that result in injuries while they are on duty as law enforcement personnel.

This enactment was a product of the *Hubard v. Boelt* (1980) 28 Cal.3d 480 case. In *Hubard,* a police officer chased a speeding motorist who reached a speed of 100 miles per hour. While passing another car on a blind curve, the suspect collided with a third vehicle. The officer was injured as he swerved to avoid the debris from the collision. When the officer sued for his injuries, the motorist invoked the firefighter's rule, and the trial court granted summary judgment. (*Id.* at 483-484.) The California Supreme Court affirmed, concluding that the rule applied equally "whether defendant's conduct was reckless or merely negligent in nature." (*Id.* at 484.) Justice Matthew Tobriner dissented, criticizing the majority for "hav[ing] not applied the traditional fireman's rule at all but rather hav[ing] extended the reach of the rule beyond the limits of any previous authority." (*Id.* at 487 (dis. opn. of Tobriner, J.)) Justice Tobriner argued that the facts established that "after the defendant became aware of the police officer's presence on the scene, the defendant committed an additional and subsequent act of misconduct which foreseeably created a new and additional risk of danger to the officer and which ultimately caused the officer's serious injuries." (*Hubard, supra*, at 488 (dis. opn. of Tobriner, J.))

The Legislature responded to *Hubard* by amending Cal. Labor Code section 3852 to add the following provision:

> (b) Notwithstanding statutory or decisional law to the contrary, *any person who knows or should have known of the presence of a peace officer or firefighter* is responsible not only for the results of the person's willful acts, but also for any injury occasioned to the peace officer or firefighter by the person's want of ordinary care or skill in the management of the person's property or person**,** which occurs after the person knows or should have known of the presence of the peace officer or firefighter, except to the extent that the comparative fault of the peace officer or firefighter contributes to the injury. (Emphasis added.)

Because the amendment to Labor Code section 3852 eliminated the bar to liability imposed by the firefighter's rule, the Legislature subsequently shifted its provisions to the Civil Code and incorporated the language of Labor Code section 3852, former subdivision (b) into section 1714.9(a)(1). (Stats.1982, ch. 258, §§ 1, 2, pp. 836-837.) As before, the avowed purpose was "specifically to reverse the effect of the Hubard case," which had "unduly broadened" the scope of the firefighter's rule with respect to third party tortfeasors. (Sen. Com. on Judiciary, Analysis of Assem. Bill No. 2351, at p. 1, 4.) In codifying other exceptions as well, the Legislature remained focused on civilian third-party tortfeasors.

This statute underwent various amendments, but most recently, a 2001 amendment was enacted, which was tombstoned the "Brett Alan Laws Act." On February 6, 1997, Brett Alan Laws was a Stockton Firefighter who responded to a call of a house on fire. While searching for an elderly woman trapped inside the burning house, a second level floor collapsed on him, killing him and another firefighter. It was subsequently determined that the second level floor was added onto the home and that it had not been built to code and collapsed because of a lack of support. The mother of Brett Alan Laws brought suit against the owner of the property for negligence prior to and independent of the cause of the fire. The mother lost her case, which she did not appeal. Proponents of the bill argued that she lost the suit as a result of the trial court's broad application of the firefighter's rule." (www.leginfo.ca.gov/pub/01-02/bill/sen/sb_04010450/sb_448_cfa_20010404_112723_sen_comm.html.) The Bret Alan Laws Act amendment codifies the common law independent cause exception.

In a further effort to rectify the court's past broad application of the firefighter's rule and certain common law exceptions, the 2001 amendment also included the addition of subsection (e) which makes clear that its statutory scheme is "not intended to change or modify the common law independent cause exception to the firefighter's rule as set forth in *Donohue v. San Francisco Housing Authority* (1993) 16 Cal.App.4th 658." (Civ. Code, §1714.9(e).)

Donohue involved a firefighter who was conducting an unannounced fire safety inspection of a building. While he was conducting the inspection, he slipped and fell on a set of wet stairs. He subsequently brought a personal injury action against the building owner.

The negligent conduct at issue was the building owner's failure to install non-slip adhesive treads on the stairs coupled with the improper maintenance practice of hosing down the stairs. The Court of Appeal found that the firefighter's rule could not operate to bar the firefighter's lawsuit against the building's owner because the firefighter was in the building to inspect for Fire Code violations, not to inspect the slipperiness of the stairs, and it was their slipperiness that caused his injury. (*Donohue, supra,* 16 Cal.App.4th at p. 663.)

The Court "found that the firefighter's rule did not apply because it does not bar recovery for independent acts of misconduct which were *not the cause of the plaintiff's presence on the scene.* In order for defendant to invoke the defense, the negligence must create an obvious risk *and* be the cause of the fireman's presence. " (*Donohue, supra,* at 663.)

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Cases that explain the application of common law and statutory independent cause exceptions

As in *Donohue*, there are a number of cases where the independent cause exception has been routinely applied and it makes clear that the firefighter's rule applies only to injuries caused by the very misconduct that created the risk that necessitated the first responder's presence. (*Lipson v. Superior Court* (1982) 31 Cal.3d 362, 376.) Under the independent cause exception, the firefighter's rule does not apply where acts of misconduct are independent of those that necessitated summoning the plaintiff. (*Id. at* 369; *Krueger v. Anaheim* (1982) 130 Cal.App.3d 166.) *Yamaguchi v. Harnsmut* (2003) 106 Cal.App.4th 472 involved an officer who responded to a call where a restaurant employee stabbed another employee in the back with a kitchen knife. The officer arrived on scene and was able to break up the altercation between the suspect and the victim. The suspect then decided to show his appreciation to the officer by dousing the officer with hot oil from a fryer, causing severe burns all over the officer's body. The court found that the officer could recover against the suspect because the suspect knew of the presence of the police officer and intended to injure him. (*Id. at* 480-481; Civ.Code, § 1714.19.)

Terry v. Garcia (2003) 109 Cal.App.4th 245 – A CHP officer was responding to a domestic disturbance call and was struck by a person operating a truck pulling an empty cattle trailer. As the CHP officer, responding Code 3 with lights and sirens, neared the location of the truck on the highway, the truck made a left turn into the CHP officer, flipping his vehicle. "The alleged negligence of defendants was independent of the misconduct that summoned Terry to a high-speed response. Since this case falls within the independent cause exception to the firefighter's rule, and no public policy supports application of the firefighter's rule." (*Id.* at 253.)

Vasquez v. North County Transit (2002) 292 F.3d 1049 – A police officer was injured when a railroad crossing-gate arm collapsed and struck the officer in the head. The court found that the firefighter's rule did not bar recovery because the negligence that allegedly caused the officer's injury (the faulty lifting mechanism that caused the arm to become stuck in the down position) was not the same as the one that prompted his presence at the scene.

Boon v. Rivera (2000) 80 Cal.App.4th 1322 – A police officer responded to a call where a husband barricaded himself in the home. The officer was told by the wife that her husband was not violent and was not armed with a weapon. The officer confronted the husband and was shot and killed. The court allowed the officer to bring a claim against the wife for her failure to disclose that the man had a rifle in the house, had threatened to kill first officer on scene, had been declared a danger to himself and others, and had recently held a gun to wife's head. "[T]he risk that someone at the scene will deceive the officer as to the nature of the violent tendencies of the person inside is not an inherent risk of a police officer's job. An officer cannot reasonably be expected to anticipate such misconduct." (*Id.* at 1330; Civ.Code, § 1714.19.)

Stapper v. GMI Holdings, Inc. (1999) 73 Cal.App.4th 787 – Firefighters responded to a house fire and were trapped in a garage when the door failed to open. One of the firefighters sued the garage door manufacturer and the court found no policy considerations supporting application of the firefighter's rule. (*Id.* at p. 796.)

Shaw v. Plunkett (1982) 135 Cal.App.3d 756 – A police officer was called to a parking lot to deal with a prostitute. While the officer was in the parking lot dealing with the prostitute, the prostitute's customer struck and injured the officer.

The court found that the firefighter's rule did not apply because "the police officer's injuries were not proximately caused by conduct which necessitated his presence in the parking lot of the motel." (*Id.,* at 760.) "The liability of the third person who does not create the original hazard or who does not cause the officer to be present or called to the scene but whose independent tort act injures has not been judicially eliminated by the fireman's rule.

To the contrary, the third person has in fact been held to still be liable." (*Id.,* at 760, citing *Spargur v. Park* (1982) 128 Cal.App.3d 469, 474-475 – Plaintiff motorcycle officer stopped defendant driver for speeding, and then stopped his own motorcycle in front of defendant's car. Defendant did not come to a full stop, but continued on, striking the motorcycle and injuring plaintiff. The court reversed summary judgment for defendant, holding that there was a question of fact whether the officer was injured because of a continuation of the speeding that brought him to the scene, or because of a separate independent act.

Malo v. Willis (1981) 126 Cal.App.3d 543 – An officer pulled over the defendant for speeding, but the defendant then negligently operated his clutch, instead of his brake and caused a collision with the officer. The court held that the firefighter's rule did not preclude a claim of the officer against the driver because the officer's injury was caused by an independent act of negligence not normally associated with the job of apprehending speeding motorists.

Kocan v. Garino (1980) 107 Cal.App.3d 291, 296 – A police officer pursuing a felony suspect into the backyard of defendant's property was injured when fence gave way.

Walters v. Sloan (1977) 20 Cal.3d 199 – This case involves a police officer who was struck and injured while placing a ticket on a vehicle. "Thus a police officer who while placing a ticket on an illegally parked car is struck by a speeding vehicle

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may maintain [an] action against the speeder but the rule bars recovery against the owner of the parked car for negligent parking." (*Id.* at p. 202.)

Conclusion

When a first responder responds to a call, there may well be a scenario that will fit into one of the exceptions discussed above. Having an understanding of those exceptions will eliminate the "snicker" and protect those that protect our lives on a daily basis. No one should get a free pass when they injure a first responder when their tortious act is unrelated to the emergency that necessitates a first responder's presence.


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