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Abigail Luhn

## HOW TO AVOID ADDING INSULT TO INJURY UNDER THE MARITIME RESCUE DOCTRINE

### I. INTRODUCTION

A circuit split exists between the Second and Fourth Circuits regarding the correct standard of care to be applied under the maritime rescue doctrine.<sup>1</sup> This is an important issue because the rescue doctrine functions as a response to the defense of contributory negligence and the standards used under the doctrine thereby affect the rescuer's ability to recover damages for their injuries.<sup>2</sup> The federal judiciary has supplied much of admiralty's substantive law. Although portions of the admiralty common law have been provided by the Supreme Court, a consensus of lower federal court decisions constitutes nearly all of the prevailing law in this area.<sup>3</sup> Given the importance of the lower federal courts in admiralty law, the existence of a circuit split involving admiralty torts is both intriguing and troubling – intriguing because of the aforementioned, crucial role these courts play, and troubling because the circuits on either side of the split fail to consider the best possible solution born out of compromise.

In *Barlow v. Liberty Mar. Corp.*, the Second Circuit chose to apply a reasonableness standard in maritime injury cases, essentially retiring the rescue doctrine in the admiralty context.<sup>4</sup> In *Furka v. Great Lakes Dredge & Dock Co. (Furka I)*, the Fourth Circuit decided to apply a reckless and wanton standard to the rescuer's conduct<sup>5</sup>; and in *Furka v. Great Lakes*

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<sup>1</sup> *Barlow v. Liberty Mar. Corp.*, 746 F.3d 518, 526 (2d Cir. 2014); *Furka v. Great Lakes Dredge & Dock Co. (Furka I)*, 755 F.2d 1085, 1087 (4th Cir. 1985); *Furka v. Great Lakes Dredge & Dock Co. (Furka II)*, 824 F.2d 330, 331 (4th Cir. 1987).

<sup>2</sup> *Barlow*, 746 F.3d at 524.

<sup>3</sup> W. Eugene Davis, *The Role of Federal Courts in Admiralty: The Challenges Facing the Admiralty Judges of the Lower District Courts*, 75 TUL. L. REV. 1355, 1357-58 (2001).

<sup>4</sup> *Barlow*, 746 F.3d at 529.

<sup>5</sup> *Furka I*, 755 F.2d at 1088.

*Dredge & Dock Co. (Furka II)*, the Fourth Circuit chose to apply a reckless and wanton standard to the rescuer's perception of the emergency situation.<sup>6</sup>

This article, argues that the rescue doctrine should be modified to use a bifurcated standard: a reasonableness standard for the perception aspect of the rescue doctrine and a reckless and wanton standard for the conduct aspect of the rescue doctrine. Therefore, this article disagrees with both sides of the circuit split, discussed in detail below, and instead suggests that a hybrid solution is the best reform option.

Part II of this article explains the necessary background with regards to the principle cases and major concepts involved. Part III provides critical analysis, including justifications for borrowing from terrestrial torts to solve an admiralty tort issue. This portion of the article contains arguments in favor of a reckless conduct standard, as proposed in *Furka I*, as well as, arguments in favor of a reasonable perception standard, which was inherently accepted by the court in *Barlow*. Part III also provides a discussion of how Good Samaritan statutes adopted throughout the country appear to mirror the article's proposed bifurcated standard. Part IV concludes the article.

## II. BACKGROUND

### A. CONTRIBUTORY NEGLIGENCE OR FAULT

The accepted definition of contributory negligence is “[c]onduct on the part of the plaintiff which falls below the standard of conduct to which he should conform for his own protection, and which is a legally contributing cause cooperating with the negligence of the defendant in bringing about the plaintiff's harm.”<sup>7</sup> In general, the old rule was that “the plaintiff's contributory negligence bars recovery against a defendant whose negligent conduct

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<sup>6</sup> *Furka II*, 824 F.2d at 332.

<sup>7</sup> Restatement (Second) of Torts § 463 (Am. Law Inst. 1965).

would otherwise make him liable to the plaintiff for the harm sustained by [the plaintiff].”<sup>8</sup> Yet, comparative negligence has now generally replaced the use of contributory negligence as a total bar to recovery.<sup>9</sup>

#### B. COMPARATIVE NEGLIGENCE OR FAULT

Generally under a comparative negligence regime, when a plaintiff negligently causes their own injury, “the plaintiff’s recovery [reduces] in proportion to the share of responsibility the factfinder assigns to the plaintiff.”<sup>10</sup> Therefore, comparative negligence only functions as a partial bar to a negligent plaintiff’s recovery for their own injury, rather than as a complete limitation.

#### C. THE COMMON LAW RESCUE DOCTRINE

The maritime rescue doctrine functions as a response to a defendant’s assertion of contributory fault as a defense.<sup>11</sup> Under the doctrine, would-be rescuers can only be held contributorily accountable for injuries incurred during a rescue attempt resulting from their own reckless and wanton behavior.<sup>12</sup> Therefore, under the rescue doctrine, a defendant alleging contributory fault is required to show that the plaintiff rescuer acted not only negligently, but recklessly, thereby providing the plaintiff rescuer with additional leeway with regards to their recovery.<sup>13</sup>

Through application of the doctrine, a rescuer, who suffers injury while attempting to save an endangered party, may recover from a third party whose negligent behavior created the peril.<sup>14</sup> Additionally, if the endangered party negligently caused the peril, the rescuer can

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<sup>8</sup> Restatement (Second) of Torts § 467 (Am. Law Inst. 1965).

<sup>9</sup> Restatement (Third) of Torts § 7 (Am. Law Inst. 2000).

<sup>10</sup> *Id.*

<sup>11</sup> *Barlow v. Liberty Mar. Corp.*, 746 F.3d 518, 524 (2d Cir. 2014).

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Fulton v. St. Louis-San Francisco Ry.*, 675 F.2d 1130, 1133-34 (10th Cir. 1982).

potentially recover from the endangered party.<sup>15</sup> The rescue doctrine “is based upon the principle that it is commendable to save life, and, although the person attempting a rescue voluntarily exposes himself to danger, the law will not impute to him responsibility for being injured while attempting such rescue.”<sup>16</sup> Consequently, this policy also referred to as the “humanitarian doctrine,” “negate[s] the defense of assumption of risk.”<sup>17</sup>

Prior to the rescue doctrine’s application in maritime rescue cases, the doctrine was traditionally used in terrestrial rescue cases; in fact, the rescue doctrine first appeared in *Wagner v. International R. Co.*, a terrestrial tort case involving a rescue attempt on land.<sup>18</sup> This is one reason courts ought to feel comfortable using terrestrial tort cases to inform their choice of which standards to apply under the maritime rescue doctrine.

#### D. THE CIRCUIT SPLIT: CASES ON EITHER SIDE

##### 1. CREATION OF THE SPLIT: THE SECOND CIRCUIT’S *BARLOW V. LIBERTY MAR. CORP.*

George Barlow, the Plaintiff-Appellant in this case, had approximately thirty-three years of experience working at sea prior to this injury on the ship, the *Liberty Sun*.<sup>19</sup> He had worked as a deck hand, passed his merchant marine officer’s exam, licensing him “to serve as an officer aboard U.S. flagged cargo vessels,” later received his master’s license, the equivalent to a captain’s qualification, and spent his entire career at sea aboard assorted vessels.<sup>20</sup> Yet, at the time of the accident, Barlow had no experience actually commanding a ship.<sup>21</sup> In 2007, Barlow

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<sup>15</sup> *Id.* at 1134.

<sup>16</sup> *Wolff v. Light*, 169 N.W.2d 93, 98 (N.D. 1969).

<sup>17</sup> *Commonwealth v. Millsaps*, 352 S.E.2d 311, 311-12 (Va. 1987).

<sup>18</sup> 133 N.E. 437 (N.Y. 1921).

<sup>19</sup> *Barlow v. Liberty Mar. Corp.*, 746 F.3d 518, 520 (2d Cir. 2014).

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

took what would ultimately be his last job on a vessel, a position as third mate on the Motor Vessel Liberty Sun, a cargo ship.<sup>22</sup>

The incident instigating this law suit occurred two months after Barlow began employment on the Liberty Sun.<sup>23</sup> At the time of the incident, the Liberty Sun was tied-up alongside a floating grain elevator and moored alongside a loading terminal in a Brazilian port on the Amazon River.<sup>24</sup> To partially control the ship's movement, the Liberty Sun had in total six lines securing it to mooring buoys: three lines forward, two lines aft, and one line off the port quarter.<sup>25</sup> The ship also had two starboard breast lines, lines running perpendicular to the ship in order to control its distance from the pier, which were connected to lines from the shore.<sup>26</sup> Moreover, a tug boat was positioned on the starboard bow of the Liberty Sun at all times, in order "to fend the ship off the [loading] terminal."<sup>27</sup>

The accident resulting in Barlow's injury occurred three days after the mooring of the vessel alongside the terminal.<sup>28</sup> At that time, one of the forward breast lines parted.<sup>29</sup> The ship's second mate was serving as "the watch officer when the line parted."<sup>30</sup> Upon seeing the parted line, the second mate immediately notified the ship's Captain, who instructed him to assemble the crew and to re-attach the line.<sup>31</sup> The Captain also instructed the Chief Engineer to start the ship's engine.<sup>32</sup>

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<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 520-21.

<sup>25</sup> *Barlow*, 746 F.3d at 521.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Barlow*, 746 F.3d at 521.

<sup>32</sup> *Id.* at 522.

The situation continued to progress from bad to worse when roughly five minutes after the breast line parted, “the starboard bow line parted.”<sup>33</sup> It appears that whenever an additional line parted, the remaining lines were placed under increased strain.<sup>34</sup> At this point, the second mate “noted that the remaining forward lines were also in danger of snapping,” so he “ordered the boatswain to slacken the lines.”<sup>35</sup> Based on the second mate’s description of the events, the court understood him to mean that the primary problem with the lines was that they were continuing to pay out slowly, despite the fact that the brakes controlling the lines were engaged.<sup>36</sup> As the second mate and boatswain were handling the issue, the rest of the crew assembled and “Barlow was the last crew member to arrive on the scene.”<sup>37</sup>

Despite being the last crew member on the ship to arrive, and although outranked by the second mate, Barlow attempted to take charge of the situation by first starting an argument with the second mate about the best manner in which to slacken the line.<sup>38</sup> In response to Barlow, the second mate stated that other members of the crew were dealing with the issue and ordered Barlow to refrain from getting involved.<sup>39</sup> Thereafter, Barlow tried to get the captain to intervene by unsuccessfully attempting to call him on the ship’s telephone system.<sup>40</sup> When this failed, Barlow took matters into his own hands and addressed “one of the winches that controlled the forward mooring lines.”<sup>41</sup>

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<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Barlow*, 746 F.3d at 522.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

The court noted that the standard protocol “for operating a winch is to first start the motor,” before putting it in gear, and to *only then* release the brake.<sup>42</sup> This method ensures that one either pays out or takes in the line using the motor as a means of controlling the speed at which the line pays out.<sup>43</sup> But, Barlow decided to use his own method, instead of following protocol, which he calls “bumping the brake.”<sup>44</sup> This method involved his “bump[ing]” the brake’s handle “to loosen the brake’s grip on the winch,” without engaging the motor.<sup>45</sup> He stated that in his mind, “bumping the brake” would be quicker and save him from having to reach underneath the winch, near the precariously taut line, to start the motor.<sup>46</sup> But in reality, Barlow’s actions resulted in the line paying out uncontrollably, whipping around the winch, and hitting him.<sup>47</sup> After sustaining this injury, Barlow remained on the Liberty Sun for a week and received treatment locally.<sup>48</sup> Nevertheless, his wound became infected, forcing him to return home to the United States.<sup>49</sup>

In 2008, in the Eastern District of New York, Barlow brought this action “against his employer, the Liberty Sun *in rem*, and the various entities associated with its ownership, management, and operation, *in personam*.”<sup>50</sup> He asserted claims for damages under a theory of negligence, as well as a claim of unseaworthiness against the owners of the vessel.<sup>51</sup> Before trial, as a response to Liberty’s claim that Barlow was contributorily negligent, Barlow submitted proposed jury instructions implementing the Fourth Circuit’s “maritime rescue doctrine.”<sup>52</sup> He

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<sup>42</sup> *Id.*

<sup>43</sup> *Barlow*, 746 F.3d at 522.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Barlow*, 746 F.3d at 522.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

argued that the rescue doctrine applied to him because in bumping the brake he was trying to rescue the ship and its crew from the danger of the parting lines.<sup>53</sup> Under Barlow's proposed instruction, before the jury could assign any fault to him for his own injuries, it would be required to find that his conduct rose to the level of "wanton and reckless" behavior.<sup>54</sup>

The district court rejected Barlow's suggested instructions and simply "gave an 'emergency' instruction" instead.<sup>55</sup> Under this instruction, the jury was told "to consider the fact that Barlow was in a position where he must act quickly without opportunity for reflection, and that it should hold him to the standard of a 'reasonably prudent [seaman] . . . faced with the same emergency.'"<sup>56</sup> The case went to trial in 2011, resulting in a jury verdict in favor of Defendants on the unseaworthiness claim, and a partial award of damages to Barlow on the negligence claim.<sup>57</sup> The jury found Defendants to be ten percent at fault, thereby allocating ninety percent of the fault to Barlow.<sup>58</sup> The jury totaled damages at \$446,000.<sup>59</sup> Therefore, Barlow was to recover only ten percent of the total damages, the portion of the damages allocable to Defendants -- \$44,600.<sup>60</sup>

In *Barlow*, the Second Circuit stated that if the Fourth Circuit's approach were the law in the Second Circuit, it would have appropriately given an instruction on the rescue doctrine.<sup>61</sup> The Second Circuit recognized that it has previously applied a regular negligence standard, while also noting that the existence of an emergency was a factor to be considered in determining

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<sup>53</sup> *Id.* at 522-23.

<sup>54</sup> *Id.*

<sup>55</sup> *Barlow*, 746 F.3d at 523.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *See Id.*

<sup>61</sup> *Barlow*, 746 F.3d at 525.

damages.<sup>62</sup> The court reasoned that because comparative negligence applied, rather than contributory negligence, the rescue doctrine's principal purpose – to encourage rescue – largely disappeared.<sup>63</sup> Moreover, it stated that the Second Circuit's precedent supported applying a reasonable person standard.<sup>64</sup> The court ultimately found “no reason to adopt Barlow's” recklessness standard and instead adopted a reasonable seaman standard, despite admitting that it is true that life on land is generally less dangerous than life at sea.<sup>65</sup>

## 2. THE *FURKA* CASES FROM THE FOURTH CIRCUIT

### a. *FURKA I*

Deborah Furka, plaintiff appellant and the administratrix of the estate of Paul Furka, deceased, brought an action under the Jones Act, 46 U.S.C.S. § 30104,<sup>66</sup> for negligence, and under general maritime law for the unseaworthiness of the vessel Paul Furka was operating when he perished.<sup>67</sup> The case involved an alleged rescue attempt of a fellow employee by the decedent on the Chesapeake Bay.<sup>68</sup> Deborah Furka is the widow of Paul Furka (hereafter “Furka”), who was employed as a surveyor “on a large marine dike construction project” near Baltimore at Hart and Miller Islands in Chesapeake Bay.<sup>69</sup> The defendant, Great Lakes Dredge & Dock Co. (hereafter “Great Lakes”), was Furka's employer.<sup>70</sup> Furka held the position of “chief-of-party on the surveying team operating on a Boston Whaler.”<sup>71</sup>

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<sup>62</sup> *Id.* at 526.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> The Jones Act allows a seaman, who is “injured in the course of employment,” or the personal representative of a seaman, who dies from such injuries, to bring a civil suit against the seaman's employer. 46 U.S.C.S. § 30104 (LexisNexis 2016).

<sup>67</sup> *Furka v. Great Lakes Dredge & Dock Co. (Furka I)*, 755 F.2d 1085, 1087 (4th Cir. 1985).

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

On a January day in 1982, a day of progressively rough weather and turbulent seas, one tug with a scow went adrift in the bay after losing its rudder and power.<sup>72</sup> Thereafter, the captain of the tug radioed the base.<sup>73</sup> What he exactly said over the radio is a matter of dispute.<sup>74</sup> According to plaintiff, the captain called requesting the removal of the scowman from his open boat, where he was “freezing to death,” due to being wet and cold.<sup>75</sup> Defendant’s evidence suggested that the captain did not hint at an emergency, but simply requested assistance with the scow.<sup>76</sup>

At the time of the captain’s call, no larger boats were available to rescue the disabled craft.<sup>77</sup> Therefore, Furka took his sixteen-foot Boston Whaler into the rough water to save the scowman from the cold.<sup>78</sup> But when Furka arrived at the scow, the stranded seaman refused to leave the boat.<sup>79</sup> Furka then turned toward shore, and shortly thereafter began taking on water.<sup>80</sup> He radioed for assistance, but drowned before rescuers arrived.<sup>81</sup> As mentioned above, Great Lakes denied the existence of any urgency to the tugboat captain’s call for help and claimed contributory negligence as a limitation against full recovery.<sup>82</sup>

Following trial, the jury found Furka to qualify as a seaman and returned a verdict in the plaintiff’s favor on the negligence claim.<sup>83</sup> The jury’s verdict favored the defendant on the unseaworthiness claim.<sup>84</sup> The jury awarded \$1,200,000 in damages for pecuniary loss, but

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<sup>72</sup> *Id.*

<sup>73</sup> *Furka I*, 755 F.2d at 1087.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Furka I*, 755 F.2d at 1087.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at 1087-88.

<sup>83</sup> *Id.* at 1088.

<sup>84</sup> *Id.*

limited Furka's recovery by finding him to have been 65% contributorily negligent.<sup>85</sup> Therefore, judgment was entered for the plaintiff in the amount of \$420,000.<sup>86</sup> Mrs. Furka appealed that verdict.<sup>87</sup>

On appeal, the Fourth Circuit stated that the trial court's jury instruction "failed to inform the jury that no contributory negligence may be inferred from a rescue attempt alone and further that no comparative fault may be assessed unless plaintiff's conduct was wanton or reckless."<sup>88</sup> The Fourth Circuit summarized the common law rescue doctrine stating, "The law has so high a regard for human life that it will not impute negligence to an effort to preserve it, unless made under such circumstances as to constitute rashness."<sup>89</sup> The court acknowledged that the rescue doctrine developed when contributory negligence was the rule, but nevertheless concluded that admiralty law must be very hospitable to a man's impulse to rescue.<sup>90</sup> The court additionally noted that in an emergency, a rescuer should not be punished for judgment errors, given the fact that confusion is a natural product of an urgent situation.<sup>91</sup> Furthermore, the Fourth Circuit highlighted how the law wants to encourage swift responses stating, "[i]n rescue, promptness may be prudence," and explained that using a reckless conduct standard importantly reflects the public policy purpose behind the rescue doctrine.<sup>92</sup>

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<sup>85</sup> *Furka I*, 755 F.2d at 1088.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* (citing *Scott v. John H. Hampshire, Inc.*, 246 Md. 171 (1967) (quoting *Maryland Steel Co. v. Marney*, 88 Md. 428 (1898)). *See also* *Altamuro v. Milner Hotel, Inc.*, 540 F. Supp. 870 (E.D. Pa. 1982); *Brown v. National Oil Co.*, 233 S.C. 345 (1958); *Andrews v. Appalachian Electric Power Co.*, 192 Va. 150 (1951) (noting that an elevated regard for human life led to the adoption of a rash or reckless conduct standard).

<sup>90</sup> *Furka I*, 755 F.2d at 1088-89.

<sup>91</sup> *Id.* at 1088 (citing *Corbin v. Philadelphia*, 195 Pa. 461 (1900)). *See also* *Rodgers v. Carter*, 266 N.C. 564 (1966); Restatement (Second) of Torts § 470(1) (Am. Law Inst. 1965) (recognizing the rapid decision making that results from an emergency).

<sup>92</sup> *Furka I*, 755 F.2d at 1088-89.

The Fourth Circuit reversed and remanded the case holding that the lower court's jury instruction regarding contributory negligence was plain error, since it did not reference the unique context of rescue.<sup>93</sup>

b. *FURKA II*

At the second trial, the court instructed the jury that “the decedent was not at fault if he believed that a rescue was required and if a reasonably prudent person would have perceived the need for a rescue.”<sup>94</sup> The parties agreed to a special verdict form placing two questions before the jury: (1) whether a rescue situation existed, and if so, (2) whether the plaintiff rescuer's behavior during the rescue was wanton or reckless.<sup>95</sup> The judge told the jury that in deciding whether a rescue situation manifested they should consider the following: (1) “did Mr. Furka perceive the need for a rescue?” and (2) “if so, was there cause based on all the surrounding circumstances for a reasonably prudent person to have perceived the call to rescue and thereby launch the effort of the attempt?”<sup>96</sup>

The jury answered the first special verdict query in the negative, finding that no rescue situation existed in this case.<sup>97</sup> Since the jury found that no rescue situation existed, the first jury's finding that the decedent negligently contributed to his injuries was adopted.<sup>98</sup> Therefore, following the second trial, Mrs. Furka was again awarded damages of \$420,000, reduced through the application of comparative negligence.<sup>99</sup>

Mrs. Furka then appealed to the Fourth Circuit once again, arguing that the trial court erred by instructing the jury to apply a reasonable person standard to the perception aspect of the

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<sup>93</sup> *Id.* at 1088.

<sup>94</sup> *Furka v. Great Lakes Dredge & Dock Co. (Furka II)*, 824 F.2d 330, 331 (4th Cir. 1987).

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

rescue, and that the reckless and wanton standard should have been applied to both facets of the rescue doctrine – the rescuer’s actions and the rescuer’s perception of the need for a rescue attempt.<sup>100</sup> On appeal in *Furka II*, Great Lakes conceded that Furka’s conduct must be evaluated under a reckless and wanton standard, however, the company contended that Furka’s “perception of the need for a rescue should be measured against that of a reasonably prudent person,” pointing to instances in the terrestrial tort context when a bifurcated standard has been applied.<sup>101</sup>

In response, the Fourth Circuit stated its belief that bifurcating the rescue doctrine would trivialize it.<sup>102</sup> Citing *Wagner*, the court asserted that in the context of rescue, perception and response are inseparable because both will be undertaken against the same backdrop of stress and imperfect knowledge.<sup>103</sup> The court declared that bifurcating the standard “is to have angels dancing . . . on the head of the proverbial pin.”<sup>104</sup> Consequently, the Fourth Circuit held that the wanton and reckless standard is the correct standard to be applied under the rescue doctrine, in admiralty, for both the perception of the need to rescue and the rescuer’s conduct.<sup>105</sup>

### 3. OTHER CIRCUITS INVOLVED IN THE SPLIT

In *Wharf v. Burlington N. R.R.*, the Ninth Circuit explicitly sided with the Fourth Circuit on the appropriate standard to be applied to a rescuer’s conduct.<sup>106</sup> After finding that the plaintiff rescuer suffered injury in connection with his rescue attempt, the court applied the wanton and reckless conduct standard under the rescue doctrine, citing *Furka I*.<sup>107</sup> The Ninth Circuit then further explained that the evidence merely showed that the plaintiff rescuer “tripped

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<sup>100</sup> *Furka II*, 824 F.2d at 331.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* at 332.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> 60 F.3d 631, 635 (9th Cir. 1995).

<sup>107</sup> *Id.*

while looking away from his direction of travel,” which “could constitute negligence,” but “does not amount to reckless or wanton” behavior.<sup>108</sup>

#### E. TERRESTRIAL TORT RESCUE CASES AND GOOD SAMARITAN STATUTES

In the context of rescue on dry land, some jurisdictions appear to follow the Second Circuit’s approach by applying reasonableness standards to both the perception and conduct aspects of the rescue doctrine.<sup>109</sup> For instance, the Appellate Court in Connecticut stated that since contributory negligence is no longer a total bar to recovery, it believed the rescue doctrine does nothing more to aid injured rescuers in their attempts to recover damages than to help establish the causal connection between the defendant’s negligence and the plaintiff’s injury.<sup>110</sup> However, other jurisdictions take another approach.

A bifurcated standard has been used under the rescue doctrine in a variety of cases involving torts which occurred on dry land.<sup>111</sup> A bifurcated standard refers to the idea that the rescue doctrine has two separate aspects: a perception aspect and a conduct aspect.<sup>112</sup> In these terrestrial tort cases utilizing such a split standard, a reasonableness standard is applied to the

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<sup>108</sup> *Id.*

<sup>109</sup> See *Ryder Truck Rental v. Korte*, 357 So. 2d 228 (Fla. Dist. Ct. App. 1978); *Sweetman v. State Highway Dep’t*, 357 N.W.2d 783 (Mich. Ct. App. 1984); *Beatty v. Davis*, 400 N.W.2d 850, 855 (Neb. 1987); *Hughes v. Murnane Bldg. Contrs., Inc.*, 932 N.Y.S.2d 782, 784 (N.Y. App. Div. 2011); *Calvert v. Ourum*, 595 P.2d 1264, 1267 (Or. Ct. App. 1979); *French v. Chase*, 297 P.2d 235, 239 (Wash. 1956).

<sup>110</sup> *Zimny v. Cooper-Jarrett, Inc.*, 513 A.2d 1235, 1243 (Conn. App. Ct. 1986).

<sup>111</sup> See *Dinsmoore v. Board of Trustees of Memorial Hosp.*, 936 F.2d 505, 507 (10th Cir. 1991); *Solgaard v. Guy F. Atkinson Co.*, 491 P.2d 821, 825 (Cal. 1971); *Walker Hauling Co. v. Johnson*, 139 S.E.2d 496, 499 (Ga. Ct. App. 1964); *Padilla v. Hooks Int’l, Inc.*, 654 P.2d 574, 578 (N.M. Ct. App. 1982); *Skaling v. Aetna Ins. Co.*, 799 A.2d 997 n.11 (R.I. 2002); *Ouellette v. Carde*, 612 A.2d 687, 690 (R.I. 1992); *Commonwealth v. Millsaps*, 352 S.E.2d 311,313 (Va. 1987); *Dubus v. Dresser Indus.*, 649 P.2d 198, 206 (Wyo. 1982).

<sup>112</sup> See *Furka v. Great Lakes Dredge & Dock Co. (Furka II)*, 824 F.2d 330, 331 (4th Cir. 1987).

perception aspect, while a recklessness standard is applied to the conduct aspect.<sup>113</sup> Such a bifurcated approach was taken at the second trial following *Furka I*.<sup>114</sup>

The terrestrial tort cases using the bifurcated standard encompass a wide array of emergencies, exemplifying its versatility. The factual situations under which it was applied include: when a car drove through the front window of a commercial structure,<sup>115</sup> when a boy on a bicycle was hit by a car,<sup>116</sup> when a car rolled down a driveway and into a ravine,<sup>117</sup> and following an incident where a state trooper endeavored to create a roadblock to stop a speeding motorist from evading the authorities,<sup>118</sup> just to name a few.

Good Samaritan statutes protect people who choose to aid others who are injured.<sup>119</sup> Historically, such laws have been intended to decrease the hesitation of bystanders to help an injured party.<sup>120</sup> Bystander hesitation often results from fear of suit or prosecution for unintentional injury or wrongful death.<sup>121</sup> Good Samaritan statutes vary from state to state. Although certain states impose an affirmative obligation on people to provide assistance to injured parties, if they can do so without placing anyone in peril, the majority of states do not impose such an obligation.<sup>122</sup> Instead, most states provide protection from civil and/or criminal

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<sup>113</sup> See *Dinsmoore v. Board of Trustees of Memorial Hosp.*, 936 F.2d 505, 507 (10th Cir. 1991); *Solgaard v. Guy F. Atkinson Co.*, 491 P.2d 821, 825 (Cal. 1971); *Walker Hauling Co. v. Johnson*, 139 S.E.2d 496, 499 (Ga. Ct. App. 1964); *Padilla v. Hooks Int'l, Inc.*, 654 P.2d 574, 578 (N.M. Ct. App. 1982); *Skaling v. Aetna Ins. Co.*, 799 A.2d 997 n.11 (R.I. 2002); *Ouellette v. Carde*, 612 A.2d 687, 690 (R.I. 1992); *Commonwealth v. Millsaps*, 352 S.E.2d 311,313 (Va. 1987); *Dubus v. Dresser Indus.*, 649 P.2d 198, 206 (Wyo. 1982).

<sup>114</sup> *Furka II*, 824 F.2d at 331.

<sup>115</sup> *Wolff v. Light*, 169 N.W.2d 93, 98 (N.D. 1969).

<sup>116</sup> *Marks v. Wagner*, 370 N.E.2d 480 (Ohio Ct. App. 1977).

<sup>117</sup> *Simmons v. Carwell*, 10 So. 3d 576 (Ala. Civ. App. 2008).

<sup>118</sup> *Commonwealth v. Millsaps*, 352 S.E.2d 311 (Va. 1987).

<sup>119</sup> See David Weldon, Comment, *Forgotten Namesake: The Illinois Good Samaritan Act's Inexcusable Failure to Provide Immunity to Non-Medical Rescuers*, 43 J. MARSHALL L. REV. 1097, 1105 (2010).

<sup>120</sup> See *Id.*

<sup>121</sup> See Weldon, *supra* note 119, at 1103-05.

<sup>122</sup> See, e.g., VT. STAT. ANN. tit. 12, § 519 (2016) (imposing affirmative duty to aid endangered person if capable of doing so safely); DEL. CODE ANN. tit. 16, § 6801 (2016) (no imposition of duty to aid); NEB. REV. STAT. ANN. § 25-21, 186 (LexisNexis 2016) (no imposition of duty to aid); N.D. CENT. CODE § 39-08-04.1 (2016) (no imposition of duty to aid).

liability to anyone who provides assistance to injured parties, provided that all the statutory requirements are met.<sup>123</sup>

Despite the variations in Good Samaritan laws, such statutes typically contain three basic requirements: (1) the rendering of emergency aid; (2) in good faith; and (3) rendered gratuitously.<sup>124</sup> The standard of care for those voluntarily providing emergency assistance may vary by jurisdiction. Despite some variation among jurisdictions, the applicable standards of care are relatively lenient in accordance with the altruistic purpose of Good Samaritan laws.<sup>125</sup>

#### F. MARITIME LAW'S HISTORICALLY GENEROUS PROVISION OF SEAMAN'S REMEDIES

Historically, seamen have been provided with a variety of remedies for their worker injury claims. They consequently fared better than their land-based counterparts, whose claims against their employers for work-related injuries often failed.<sup>126</sup> In large part, these claims failed because of the doctrine of contributory negligence, which acted as a complete bar to the plaintiff employee's recovery if the plaintiff was found even slightly negligent.<sup>127</sup> However, even while contributory negligence functioned as a total bar to recovery, seamen had the remedies of maintenance and cure and unseaworthiness available to them.<sup>128</sup>

In 1903, the Supreme Court noted that if a seaman falls ill or is wounded while serving a ship, the vessel and its owners are liable for the seaman's maintenance and cure (akin to worker compensation) and for the seaman's wages, at least until the end of the voyage.<sup>129</sup> The Court also stated that the vessel and its owners are additionally liable to a seaman for injuries the

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<sup>123</sup> See, e.g., ALASKA STAT. § 09.65.090 (2016); HAW. REV. STAT. ANN. § 663-1.5 (LexisNexis 2016); IND. CODE ANN. § 34-30-12-1 (LexisNexis 2016); S.D. CODIFIED LAWS § 20-9-4.1 (2016).

<sup>124</sup> See, e.g., HAW. REV. STAT. ANN. § 663-1.5 (LexisNexis 2016); IND. CODE ANN. § 34-30-12-1 (LexisNexis 2016); MASS. ANN. LAWS ch. 112, § 12V (LexisNexis 2016); TEX. CIV. PRAC. & REM. CODE § 74.151 (West 2016).

<sup>125</sup> See Weldon, *supra* note 119, at 1105.

<sup>126</sup> See *The Osceola*, 189 U.S. 158 (1903).

<sup>127</sup> Restatement (Second) of Torts § 467 (Am. Law Inst. 1965).

<sup>128</sup> *Osceola*, 189 U.S. at 175.

<sup>129</sup> *Id.*

seaman sustains because of the unseaworthiness of the ship or because of a failure to properly maintain the ship's appurtenances.<sup>130</sup> Therefore, even before Congress provided seamen the ability to bring a negligence action against their employers, based on the fault of co-employees or the employer's own failures, seaman had other valuable remedies.

#### G. THE JONES ACT

This article pays special attention to the Jones Act, since both of the principal cases on either side of the circuit split involve fact patterns ripe for Jones Act claims. The Jones Act allows one qualified as a "seaman," who is injured in the course of employment, or the personal representative of a "seaman" killed as a result of such injury, to launch a civil action at law against their employer.<sup>131</sup> Congress enacted the Jones Act leaving it up to the courts, in large part, to fashion remedies for injured employees in a manner analogous to tort remedies developed at common law.<sup>132</sup> Moreover, although admiralty law generally denies a litigant the right to a jury trial, Jones Act claims explicitly provide injured seamen "with the right of trial by jury."<sup>133</sup>

By extending the provisions of the Federal Employers' Liability Act (FELA) to apply to negligence claims brought by seamen against their employers under the Jones Act, the Jones Act further states that any of our country's laws regulating a railway employee's recovery for personal injury or death apply to seamen.<sup>134</sup> Congress had previously adopted FELA, which granted interstate railroad workers the ability to bring negligence claims against their employers.<sup>135</sup> FELA essentially held railroad employers liable, through *respondeat superior*, for

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<sup>130</sup> *Id.*

<sup>131</sup> 46 U.S.C.S. § 30104 (LexisNexis 2016).

<sup>132</sup> *Kernan v. American Dredging Co.*, 355 U.S. 426 (1958).

<sup>133</sup> 46 U.S.C.S. § 30104.

<sup>134</sup> *Id.*

<sup>135</sup> 45 U.S.C.S. § 51 (LexisNexis 2016).

a co-employee's negligence causing injury to a fellow employee.<sup>136</sup> Furthermore, it abolished the defenses of assumption of risk and the fellow servant rules, and stated that contributory negligence merely reduced recovery.<sup>137</sup>

### III. ANALYSIS

#### A. JUSTIFICATIONS FOR BORROWING FROM TERRESTRIAL TORTS

This article's proposed solution to this circuit split is admittedly novel, especially because it is founded upon the idea that one attempting to resolve an admiralty tort issue can look outside the law of admiralty for ideas and suggestions. Nevertheless, the idea of borrowing from terrestrial tort law to develop a solution to this particular admiralty tort issue may not appear unusual after one familiarizes themselves with the following considerations, including the aforementioned Jones Act and its incorporation of FELA's provisions.<sup>138</sup>

Outside of the Jones Act context, there exist a few other general similarities between admiralty tort law and terrestrial tort law. For example, it appears that maritime law will generally follow the common law governing intentional torts.<sup>139</sup> Furthermore, many general maritime tort cases involve theories of strict liability and negligence; and general maritime law has both borrowed from and supplied the general common law for torts with regards to negligence. For instance, the famous "Learned Hand" formula, which defines negligence, first appeared in a maritime case.<sup>140</sup> Additionally, in both maritime tort cases and terrestrial tort cases, the element of duty principally turns on the foreseeability of the risk.<sup>141</sup> And with regards

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<sup>136</sup> *See Id.*

<sup>137</sup> *See* Beeber v. Norfolk Southern Corp., 754 F. Supp. 1364, 1373 (N.D. Ind. 1990) (noting how contributory negligence does not act as a total bar to recovery under FELA).

<sup>138</sup> 46 U.S.C.S. § 34104.

<sup>139</sup> *See, e.g.*, Wallis v. Princess Cruises, Inc., 306 F.3d 827, 841 (9th Cir. 2002) (holding that general maritime law recognizes the tort of intentional infliction of emotional distress).

<sup>140</sup> *United States v. Carroll Towing Co.*, 159 F.2d 169 (2d Cir. 1947).

<sup>141</sup> *See, e.g.*, Consolidated Aluminum Corp. v. C.F. Bean Corp., 833 F.2d 65 (5th Cir. 1987).

to the question of “breach,” which asks whether a defendant failed to act reasonably, the maritime and common law approaches generally coincide.<sup>142</sup> Therefore, admiralty law’s historic borrowing from terrestrial torts supports the notion of borrowing the bifurcated standard from the common law of rescue and applying it to the maritime rescue doctrine.

B. IN SUPPORT OF A RECKLESSNESS CONDUCT STANDARD: AGREEMENT WITH *FURKA*

1. DIFFERENCES IN DUTY – BETWEEN JONES ACT EMPLOYER & RESCUE DOCTRINE PLAINTIFF

Maritime law rejects the distinctions often drawn in common law jurisdictions between “trespassers,” “licensees,” and “invitees,” and instead imposes a duty of reasonable care to everyone lawfully aboard a vessel, and upon the owner or operator of said vessel.<sup>143</sup> This is indistinguishable from the duty an employer owes his seamen, according to at least one federal court that has addressed the matter.<sup>144</sup> In *Gautreux v. Scurlock Marine, Inc.*, the Fifth Circuit found that employer negligence is the essence of a Jones Act claim, that such negligence is the failure to exercise reasonable care under the circumstances, and that the employer thereby owes a duty of reasonable care to their employees.<sup>145</sup> Therefore, Jones Act employers are held to a reasonable person standard. But with this point in mind, the logical conclusion is that a seaman rescuer ought to be held to a different conduct standard – a standard other than reasonableness – in part because of the lack of a duty.

As previously stated, Jones Act employers have an affirmative duty to act with a certain level of care towards their employees.<sup>146</sup> The Jones Act holds employers liable for the

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<sup>142</sup> See *In re Complaint of Paducah Towing Co.*, 692 F.2d 412 (6th Cir. 1982) (on the issue of negligence, custom may be considered, although it is not conclusive).

<sup>143</sup> *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625, 630-31 (1959).

<sup>144</sup> 107 F.3d 331, 335 (5th Cir. 1997) (finding that a duty of ordinary prudence or care is owed by employer to his employee-seaman).

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

negligence of any of its employees through its incorporation of FELA.<sup>147</sup> But, in order for this negligence to be imputed to the employer, the negligence must be within the scope and course of the offending party's employment.<sup>148</sup> Building on the idea of control inherent in this conception of duty, the Supreme Court has previously ruled that a Jones Act employer cannot delegate to a third party, and thus escape liability for, any act which is "a vital part of the ship's total operations."<sup>149</sup> Therefore, it appears that the relevant inquiry when determining whether a Jones Act employer owes a duty to a particular party is the same inquiry that is used at common law generally, i.e., did the defendant/employer maintain control over the way in which the work was completed by the tortfeasor? If so, the employer is deemed to have been in sufficient control of the tortfeasor and liability is imputed to the employer.<sup>150</sup>

In contrast, even at sea, as in *Barlow* and the *Furka* cases, no independent duty existed for the plaintiff employees to attempt rescues.<sup>151</sup> Indeed, the voluntary nature of an attempted rescue is a key element of the rescue doctrine's application. The significance of the selflessness of the rescue is illustrated in *Ouellette v. Carde*, where the Rhode Island Supreme Court explained that the rescue doctrine was developed for two reasons: (1) to encourage rescue (by those necessarily under no pre-existing duty to help), and (2) to correct the inequity of barring relief under contributory negligence "to a person who is injured in a rescue attempt which the injured person was under no duty to undertake."<sup>152</sup> This lack of a duty makes perfect sense because one employee typically exercises far less control, if any, over a co-worker, as compared

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<sup>147</sup> 46 U.S.C.S. § 30104 (LexisNexis 2016).

<sup>148</sup> See *Hopson v. Texaco*, 383 U.S. 262, 263-64 (1966).

<sup>149</sup> *Id.*

<sup>150</sup> See Restatement (Third) of Agency § 7.07 (Am. Law Inst. 2006) (discussing employer's vicarious liability when employee engages in a course of conduct subject to the employer's control).

<sup>151</sup> *Barlow v. Liberty Mar. Corp.*, 746 F.3d 518, 524 (explaining how the rescue doctrine developed in part because courts were hesitant to punish volunteer rescuers). There was no argument in either *Barlow*, or either of the *Furka* cases, that these employee/plaintiffs had an affirmative duty to rescue.

<sup>152</sup> *Ouellette v. Carde*, 612 A.2d 687, 689 (R.I. 1992).

to an employer. Thus, given the lack of a duty under the rescue doctrine, an injured rescuer employee's conduct should be held to a lower standard of care than that applied to an employer's conduct.

Nevertheless, it has been held that a Jones Act plaintiff *does* owe a duty of reasonable care to someone – himself. In *Gautreaux v. Scurlock Marine, Inc.*, the Fifth Circuit held that the employee has a duty to utilize reasonable care under the circumstances with regards to his own safety.<sup>153</sup> Even if an employee is characterized as owing himself a duty, it remains true that some rescuers, such as those plaintiffs involved on either side of the split, did not have an affirmative duty to rescue the victims.<sup>154</sup> Using different standards of care for oneself and for others makes sense if one considers the application of a lower standard of care to rescuer conduct a sort of device used to incentivize the *voluntary* rescue of *others*.<sup>155</sup>

If a lower standard of care with regards to one's conduct, such as a recklessness standard, is employed in order to spur would-be-rescuers to freely and selflessly undertake rescues<sup>156</sup>, it would make little sense to apply this lower standard to self-preservation. Self-preservation is arguably the most natural, and universally held, human instinct. Almost anyone in their right mind will generally strive to save themselves within reason. Therefore, the duty of care owed to oneself is a duty that does not need to be promoted or incentivized in the same way that the law needs to encourage people to voluntarily come to the aid of others. Therefore, it is logical to apply different standards of care to the saving of others and the saving of oneself, given the inherent differences between selfless and selfish behavior.

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<sup>153</sup> 107 F.3d at 336.

<sup>154</sup> *Barlow*, 746 F.3d at 524-25 (stating how the rescue doctrine was created to protect those who would voluntarily expose themselves to danger, in order to rescue others from it and citing *Furka I* for the proposition that the law must encourage people to respond to the plight of another in peril).

<sup>155</sup> *Furka v. Great Lakes Dredge & Dock Co. (Furka I)*, 755 F.2d 1085, 1089 (4th Cir. 1985).

<sup>156</sup> *Id.*

## 2. BARLOW’S APPROACH: THEMATICALLY INCONSISTENT WITH THE JONES ACT

Additionally, a plaintiff’s burden of proof with regards to causation under the Jones Act reflects the statute’s apparent purpose – to place increased responsibility on the employer and to allow the plaintiff employee to recover with greater ease. In the First Circuit, it was held that the Jones Act plaintiff’s burden of proof on causation is “featherweight.”<sup>157</sup> As a result, liability will be found to exist under this statute so long as the employer’s negligence contributed to the seaman’s injury in the slightest way.<sup>158</sup> This burden of proof seems quite easy to carry.

The placement of this lower burden of proof on the Jones Act plaintiff seems to comport with the statute’s purpose since it was enacted “to enlarge, not to narrow, protection afforded to seamen by maritime law” and for the protection and benefit of seamen, who are considered the peculiar wards of admiralty.<sup>159</sup> The remedies afforded to seamen and their dependents under this statute were designed to protect those who perform services onboard vessels and are subsequently exposed to the unique hazards of the sea.<sup>160</sup> The Supreme Court has stated that this is a remedial statute intended to be liberally construed, in order to further its purpose of protecting its wards.<sup>161</sup> Consequently, a hybrid solution to the circuit split, which increases the likelihood of full recovery of damages for an injured rescuer plaintiff in the maritime context, reflects the purpose and construction of the Jones Act, while Barlow’s full adoption of the reasonableness standard conflicts with the Act.

## 3. CRITICISM OF BARLOW: IGNORING THE RESCUE DOCTRINE’S PUBLIC POLICY PURPOSE

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<sup>157</sup> *Poulis-Minott v. Smith*, 388 F.3d 354, 366 (1st Cir. 2004).

<sup>158</sup> *Id.*

<sup>159</sup> *The Arizona v. Anelich*, 298 U.S. 110 (1936). *See also Cox v. Roth*, 348 U.S. 207 (1955).

<sup>160</sup> *See Mahramas v. American Export Isbrandtsen Lines, Inc.*, 475 F.2d 165 (2d Cir. 1973).

<sup>161</sup> *Warner v. Goltra*, 293 U.S. 155, 156 (1934). *See also Chisholm v. Cherokee-Seminole S.S. Corp.*, 36 F. Supp. 967 (S.D.N.Y. 1940).

It proves problematic that in *Barlow*, the Second Circuit centers its discussion on contributory negligence. In *Barlow*, the court focuses too much on the fact that contributory negligence is no longer a total bar to recovery. It states that “[u]nder the district court’s jury charge, a rescuer may be held liable for actions that were merely unreasonable under the circumstances.”<sup>162</sup> The Second Circuit chose to adopt the district court’s standard of care.<sup>163</sup> Through the court’s adoption of reasonableness as the standard of care to be applied to all aspects of the rescue doctrine, the court in effect retired the rescue doctrine (at least in the maritime context). This characterization of the court’s decision in *Barlow* as essentially retiring the rescue doctrine is supported by the fact that the court focuses in large part on only one of the two purposes underlying the formation of this common law doctrine. The purpose it chose to center on was contributory negligence’s function as a complete bar to recovery when the rescue doctrine initially developed.<sup>164</sup>

After the Second Circuit announced its choice to adopt a reasonable person standard, the next paragraph of the court’s opinion discussed how Nineteenth and early Twentieth Century courts generally assumed, with regards to contributory negligence, that courts should “let losses lie where they fell” in instances “where both parties were blameworthy.”<sup>165</sup> The court then continued to center its attention on the fact that the rescue doctrine was developed by courts as a method to mitigate the harshness of contributory negligence as a total bar to recovery.<sup>166</sup> It is true that the doctrine helped avoid contributory negligence’s severe consequences by carving out an exception to the rule. Yet, given all this attention to contributory negligence, it appears that

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<sup>162</sup> *Barlow v. Liberty Mar. Corp.*, 746 F.3d 518, 524 (2d Cir. 2014).

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

the Second Circuit primarily focused on the historical atmosphere under which the rescue doctrine grew, without fully recognizing that the doctrine has a second, even greater purpose behind it – the public policy purpose that prompted the creation of the rescue doctrine in the first place.

In the Second Circuit’s defense, the court does appear to acknowledge this underlying policy purpose as it does briefly mention that “[a]lthough courts applying the doctrine of contributory negligence may have been willing to deny recovery to a person whose negligence precipitated an emergency, they hesitated before applying it to someone who voluntarily exposed himself to danger in order to rescue others . . . to protect would-be rescuers, courts created the rescue doctrine.”<sup>167</sup> But despite this acknowledgement, the Second Circuit fails to adequately emphasize how general considerations of fairness compelled the creation of the rescue doctrine.

The court does acknowledge, however, that the clearest articulation of the rescue doctrine in the maritime context was provided by the Fourth Circuit in *Furka I* and *Furka II*.<sup>168</sup> Additionally, *Barlow* quotes the most important passage of *Furka I*, which clearly establishes policy considerations, such as the promotion of societal values, as the primary reason for its adoption of the wanton and reckless conduct standard under the rescue doctrine.<sup>169</sup> In *Furka I*, the court held that the rescuer-decedent “could not be found contributorily liable unless his rescue attempt was wanton or reckless.”<sup>170</sup> The Fourth Circuit reasoned that, “The wanton and reckless standard reflects the value society places upon rescues *as much as* any desire to avoid a total defeat of recovery under common law. Law must *encourage* an environment where human

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<sup>167</sup> *Id.*

<sup>168</sup> *Barlow*, 746 F.3d at 524.

<sup>169</sup> *Id.* at 525.

<sup>170</sup> *Id.* (internal quotation marks omitted).

instinct is not insular but responds to the plight of another in peril.”<sup>171</sup> Nonetheless, the Second Circuit chose to ignore *Furka I*'s emphasis on the underlying public policy purpose, in favor of concentrating its attention on the fact that times have changed since the creation of the rescue doctrine.

Yet, encouraging voluntary rescues remains an extremely important objective. The public policy goal of encouraging voluntary rescues when life is endangered pervades American law. In *Gardner v. Loomis Armored*, the court addressed the issue of “whether an employer contravenes public policy when it terminates an at-will employee” for violating a company regulation in order to assist a citizen in danger of serious injury or death.<sup>172</sup> There, the court reasoned that terminating even an at-will employee for such a violation contradicted public policy because the plaintiff-employee’s conduct unmistakably served the policy of encouraging citizens to rescue others from death or serious injury.<sup>173</sup> The court also reasoned that if our society has previously placed the rescue of human life above the criminal code and constitutional rights, then this employee’s conduct obviously trumps a company’s work rule.<sup>174</sup> For example, what would typically be an illegal use of force is lawful when used to protect others or oneself from injury.<sup>175</sup> Moreover, Fourth Amendment protection from warrantless searches is waived under certain exigent circumstances, such as when the search is essential to avoid physical harm to officers or others.<sup>176</sup> Thus, the court held that this rule contravened public policy.<sup>177</sup>

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<sup>171</sup> *Id.* (emphasis added) (internal quotation marks omitted).

<sup>172</sup> 913 P.2d 377, 378 (Wash. 1996).

<sup>173</sup> *Id.* at 386.

<sup>174</sup> *Id.*

<sup>175</sup> *Id.* at 384 (citing *State v. Penn*, 568 P.2d 797 (Wash. 1977)).

<sup>176</sup> *Id.*

<sup>177</sup> *Id.* at 386.

Our law has also pursued the related public policy goal of protecting Good Samaritans.<sup>178</sup> In *State v. Hillman*, the Washington Court of Appeals held that the victim's status as a 'Good Samaritan,' who came to his murderer's aid, was a valid aggravating factor to consider during sentencing.<sup>179</sup> Reaching this conclusion, the court reflected that it "has long been the policy of our law to protect the 'Good Samaritan.'"<sup>180</sup> Therefore, it is highly problematic that the Second Circuit chose to emphasize the rescue doctrine's ties to contributory negligence at the expense of the public policy concerns underlying the doctrine.

#### 4. BARLOW'S MISTAKE REGARDING COMPARATIVE NEGLIGENCE

Moreover, *Barlow* mistakenly believes that comparative negligence abrogates the rescue doctrine. The court praises the use of comparative fault given that its application allows "even a negligent rescuer" to recover something, as George Barlow did.<sup>181</sup> Subsequently, because a rescuer will still have a chance at partial recovery for her injuries, the Second Circuit states, "the principle justification for the rescue doctrine – encouraging rescue – has largely disappeared."<sup>182</sup> But, just because a reasonable person standard combined with a comparative negligence regime will not automatically preclude a partially negligent rescuer from any recovery whatsoever, does not mean that the need to encourage selfless behavior during life's most dangerous moments has diminished, more-less disappeared. As *Furka I* illustrates, encouraging voluntary assistance in the face of great risk is a primary purpose behind the creation of the rescue doctrine; otherwise courts would not have felt the need to form an exception to the original contributory negligence rule in the first place.<sup>183</sup> Courts would not have "hesitated before applying [contributory

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<sup>178</sup> *State v. Hillman*, 832 P.2d 1369, 1372 (Wash. Ct. App. 1992).

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

<sup>181</sup> *Id.* at 526.

<sup>182</sup> *Id.*

<sup>183</sup> *Furka v. Great Lakes Dredge & Dock Co. (Furka I)*, 755 F.2d 1085, 1089 (4th Cir. 1985).

negligence as a total bar to recovery] to someone who voluntarily exposed himself to danger in order to rescue others from it,” if they did not view would-be rescuers as a special class deserving such a break.<sup>184</sup>

*Barlow* fails to adequately emphasize the fact that *Furka I* acknowledged the change in law, the adoption of a comparative negligence regime. The Second Circuit ends its discussion of *Barlow*'s negligence claim by highlighting that “*Furka* admits, the rescue doctrine came from a time when the rescuer's slightest misstep could cost him any recovery whatsoever. That is no longer the case.”<sup>185</sup> Yet, the court does not point out that the court in *Furka I* consciously adopted the wanton and reckless conduct standard, regardless of this change, for a more important reason.

Tradition supports the Fourth Circuit's reasoning in favor of the wanton and reckless conduct standard in *Furka I*. There, the court noted that “[t]his is the standard [that has been] traditionally applied to the conduct of plaintiffs in rescue situations.”<sup>186</sup> Yet despite the persuasiveness of a long-standing tradition of using a lower standard of care in the rescue context, the Fourth Circuit does not blindly follow tradition without recognizing relevant changes that have been made in the arena of apportioning fault. Rather, the court in *Furka I* considers the fact that the reckless and wanton standard “developed under common law, where contributory negligence was a complete bar to recovery,” and the fact that “[i]n some comparative negligence jurisdictions, not in admiralty, the wanton and reckless standard has thus

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<sup>184</sup> *Barlow v. Liberty Mar. Corp.*, 746 F.3d 518, 524 (2d Cir. 2014).

<sup>185</sup> *Id.* at 528.

<sup>186</sup> *Furka I*, 755 F.2d at 1088. *See, e.g.*, *Scott v. John J. Hampshire, Inc.*, 246 Md. 171 (1967) (applying standard of “dangerous but not reckless” behavior); *Brown v. National Oil Co.*, 233 S.C. 345 (1958) (applying “wanton or foolhardy” standard); *Andrews v. Appalachian Electric Power Co.*, 192 Va. 150 (1951).

been diluted.”<sup>187</sup> Yet, it is equally true that some jurisdictions adopting comparative negligence have not diluted the rescue doctrine’s use of the reckless and wanton conduct standard.<sup>188</sup>

Several states, in a terrestrial tort context, have chosen to apply a reckless and wanton conduct standard under the rescue doctrine, while also adhering to comparative negligence systems.<sup>189</sup> The Supreme Court in Kansas reasoned that the rescue doctrine’s reckless conduct standard and comparative negligence could co-exist since it remained sound policy to promote rescue efforts.<sup>190</sup> The court noted that using a heightened conduct standard under the rescue doctrine, such as a reasonableness standard, would “tend to operate as a deterrent to potential rescuers and penalize acts which would constitute ordinary negligence, but would not rise to the level of rash conduct.”<sup>191</sup> The court wisely feared that such a holding “would be one more weapon in the arsenal of the ‘don’t-get-involved’ creed of citizenship,” which the court found to be “already too prevalent.”<sup>192</sup> The court further reasoned that despite the state legislature’s adoption of comparative negligence, it has continued to utilize a standard of care lower than reasonableness in other statutes governing the handling of emergencies, namely its Good Samaritan statutes, which result in less liability for rescuers.<sup>193</sup> The court also noted that the state’s Good Samaritan statute has been frequently amended since comparative negligence was implemented, so it is clear that the statute continues to exist intentionally, and not as the result of

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<sup>187</sup> *Furka I*, 755 F.2d at 1088-89.

<sup>188</sup> *See* *Solgaard v. Guy F. Atkinson Co.*, 491 P.2d 821, 825 (Cal. 1971); *Ouellette v. Carde*, 612 A.2d 687, 690 (R.I. 1992); *Commonwealth v. Millsaps*, 352 S.E.2d 311, 313 (Va. 1987); *Dubus v. Dresser Indus.*, 649 P.2d 198, 206 (Wyo. 1982).

<sup>189</sup> *See* *Solgaard v. Guy F. Atkinson Co.*, 491 P.2d 821, 825 (Cal. 1971); *Ouellette v. Carde*, 612 A.2d 687, 690 (R.I. 1992); *Commonwealth v. Millsaps*, 352 S.E.2d 311, 313 (Va. 1987); *Dubus v. Dresser Indus.*, 649 P.2d 198, 206 (Wyo. 1982).

<sup>190</sup> *Bridges v. Bentley*, 769 P.2d 635, 640 (Kan. 1989).

<sup>191</sup> *Id.*

<sup>192</sup> *Id.*

<sup>193</sup> *Id.* at 639-40.

oversight.<sup>194</sup> Therefore, a comparative negligence system does not prevent the use of limited liability as an incentive for would-be rescuers faced with a crisis. *Barlow* incorrectly concludes that the advent of comparative negligence necessarily abrogated the rescue doctrine.

#### 5. THE ADDITIONAL HURDLES RESCUER PLAINTIFFS MUST FACE

Kansas is not alone in its dual adoption of comparative negligence and a reckless conduct standard. Missouri has also shown that these two concepts can co-exist.<sup>195</sup> In Missouri, comparative negligence has supplanted the rule of contributory negligence.<sup>196</sup> The intention behind this change was to eliminate the inherent inequality of a doctrine that forced one party to take total responsibility for the conduct of both parties involved.<sup>197</sup> It could be argued that this is essentially what would occur through the use of the bifurcated standard if an injured rescuer plaintiff's conduct *does not* rise to the level of recklessness, thereby cutting them a break and allowing their full recovery of damages. Yet, that result would still be fair, although involving one party's bearing the full responsibility for the conduct of both parties, because the suggested standard only applies in a narrow category of circumstances to a limited class of rescuers. Thus, under the bifurcated standard, this seemingly inequitable result remains fair because the defendant's negligence *must* have caused the peril that invites the rescue attempt.<sup>198</sup> It is equitable to force the defendant to bear more of the burden with regards to damages when it was the defendant's negligence that necessitated the injured rescuer's involvement in the first place.

In Missouri, the court noted how a defendant's negligence remains a prerequisite to a plaintiff's recovery in this situation stating, "[t]o maintain an action premised on the rescue

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<sup>194</sup> *Id.*

<sup>195</sup> *Allison v. Sverdup & Parcel & Associates, Inc.*, 783 S.W.2d 440, 451 (Mo. Ct. App. 1987).

<sup>196</sup> *Id.*

<sup>197</sup> *Id.*

<sup>198</sup> *Id.* at 454.

doctrine, the plaintiff must allege that the negligence of the defendant endangered the safety of another, and that the plaintiff sustained injuries in an attempt to save the other from injury.”<sup>199</sup>

This statement not only demonstrates that a defendant’s negligence is one of the initial hurdles a plaintiff must clear to avail themselves of the rescue doctrine, but a *particular sort of negligence* must be committed by the defendant, in order for a plaintiff to use the rescue doctrine.

Additionally, the court stated that two different standards can potentially apply to rescuer conduct: an ordinary negligence standard if the rescuer created the situation of peril prompting the rescue attempt, and a rash or reckless standard if the rescuer was aiding another, without having any involvement in the creation of the initial danger.<sup>200</sup> This distinction further demonstrates the importance of differentiating between rescuers who create the emergency and those that do not. The Alabama Supreme Court also emphasized how important it is for a plaintiff to provide evidence of a defendant’s negligence.<sup>201</sup> This is a basic prerequisite to a plaintiff’s recovery on a negligence theory, however, as a practical matter it functions as yet another hurdle that the plaintiff must clear. The existence of multiple hurdles on the road to an injured rescuer’s recovery further justifies carving out a narrow category where rescuers are held to a lower conduct standard.

Furthermore, application of a recklessness standard to the conduct aspect of the rescue doctrine would minimize confusion. While choosing to employ a reckless conduct standard under the rescue doctrine, despite its acceptance of comparative negligence, the Court of Appeals in Georgia noted how a reasonableness standard could promote confusion.<sup>202</sup> The court emphasized how the commonplace understanding of the phrase “ordinary care” seems

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<sup>199</sup> *Id.*

<sup>200</sup> *Id.* at 451.

<sup>201</sup> *Trapp v. Vess*, 847 So. 2d 304, 306 (Ala. 2002).

<sup>202</sup> *Lorie v. Std. Oil Co.*, 368 S.E.2d 765, 768 (Ga. Ct. App. 1988).

incongruent with a person's voluntary placement of themselves in harm's way.<sup>203</sup> The court also considered jury confusion a possible byproduct of a reasonableness standard's use in a rescue context, since a jury would necessarily be told that "the rescue doctrine inherently considers an assumption of risk as ingrained in the hazard created by the defendant's negligence," eliminating assumption of risk as a defense under the rescue doctrine.<sup>204</sup> Consequently, a recklessness standard of care seems the most natural and least confusing standard to apply to conduct in the rescue context.

#### C. IN SUPPORT OF A REASONABLE PERCEPTION STANDARD: AGREEMENT WITH *BARLOW*

In *Barlow*, the Second Circuit perceptively states that "unreasonable rescues injure people just as surely as the emergency that begets them. . . . Indeed, under [Barlow's proposed] rule, defendant would be liable even if no reasonable mariner would have even thought there was an emergency, let alone taken the actions Barlow did."<sup>205</sup> Barlow proposed applying the rescue doctrine as it is described by the Fourth Circuit in *Furka II*. This article agrees with the Second Circuit that the Fourth Circuit's application of a recklessness standard to the perception aspect of the rescue doctrine would pose a problem. As the Second Circuit clearly stated above, application of the recklessness standard to one's perception of a situation would lead to easier recovery for even those plaintiffs who involve themselves in what no reasonable seaman would possibly consider an emergency situation. Such a standard would allow an injured rescuer to

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<sup>203</sup> *Id.*

<sup>204</sup> *Id.*

<sup>205</sup> *Barlow v. Liberty Mar. Corp.*, 746 F.3d 518, 527 (2d Cir. 2014).

recover full damages though they were unreasonable in assessing the situation as an emergency from the start. This result ought to be avoided.

*Furka II* explicitly rejects the idea that the rescue doctrine could be bifurcated so that different standards are applied to perception and conduct.<sup>206</sup> In its discussion of the standard to be applied to the perception aspect of the rescue doctrine, the court in *Furka II* cited to the earliest application of the rescue doctrine, *Wagner v. International R. Co.*<sup>207</sup> The Fourth Circuit cites *Wagner*'s statement that "[t]he law does not ignore these reactions of the mind in tracing conduct to its consequences. It recognizes them as normal."<sup>208</sup> It appears that *Furka II* noted this in an effort to demonstrate how the perception of an emergency and the subsequent handling of that emergency are closely linked.

It is true that conduct often quickly follows perception; however, when this quote from *Wagner* is considered in the context of the entire paragraph, rather than in isolation, it is clear that this statement was made during a discussion of proximate causation and was intended to mean that it is natural for the plight of another to cause a rescuer to respond. The sentences directly following the above quote state, "It places [the rescuers'] effects within the range of the natural and probable. The wrong that imperils life is a wrong to the imperiled victim; it is a wrong also to his rescuer. The state that leaves an opening in a bridge is liable to the child that falls into the stream, but liable also to the parent who plunges to its aid."<sup>209</sup> The paragraph ends with the statement, "The wrongdoer may not have foreseen the coming of a deliverer. He is accountable as if he had."<sup>210</sup> Moreover, possibly the most oft quoted line from *Wagner* supports

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<sup>206</sup> *Furka v. Great Lakes Dredge & Dock Co. (Furka II)*, 824 F.2d 330, 331 (4th Cir. 1987).

<sup>207</sup> *Id.* at 331-32 (citing *Wagner v. Int'l Ry. Co.*, 133 N.E. 437 (N.Y. 1921)).

<sup>208</sup> *Id.* (internal quotation marks omitted).

<sup>209</sup> *Wagner v. Int'l Ry. Co.*, 133 N.E. 437, 437-38 (N.Y. 1921).

<sup>210</sup> *Id.* at 438.

the conclusion that the court focuses its discussion on causation issues. The famous words, “Danger invites rescue. The cry of distress is the summons of relief,” highlight a causal link in the chain of events.<sup>211</sup> The court’s statements in *Wagner* highlight the inextricable *causal* link, and do not indicate that it is impossible to separately analyze a rescuer’s perception and a rescuer’s conduct.

While rejecting the possibility of using a bifurcated standard under the rescue doctrine, the Fourth Circuit in *Furka II* also notes that rescue results, “more from the impulse to aid than from any process of thought or measure of reflection.”<sup>212</sup> That is true, and that is why this article’s proposed standard does not call for deep reflection or certain verification that an emergency exists, but rather a rescuer’s reasonable belief under the circumstances that there is an emergency. If the rescue doctrine’s ultimate policy goal is to facilitate the saving of lives, the law ought to temper the desire to endorse a wide-variety of rescue techniques, in the hopes of saving imperiled persons more often, with the desire to also protect rescuers from suffering injuries for naught.

Courts have recognized a difference between requiring a reasonable belief that an emergency exists and actual proof of an emergency. For example, the Missouri Court of Appeals stated that a certain individual must face actual danger before another person can justifiably act at his own risk to avert a casualty.<sup>213</sup> The court explained that “[i]t is sufficient if the situation presented is such as to induce a reasonable belief that some person is in imminent peril. The intending rescuer may act, with danger to himself if he reasonably had the right to assume or believe that the life or limb of another person is in peril.”<sup>214</sup> Recognizing this

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<sup>211</sup> *Id.* at 437.

<sup>212</sup> *Furka II*, 824 F.2d at 331.

<sup>213</sup> *Ellmaker v. Goodyear Tire & Rubber Co.*, 372 S.W.2d 650, 657 (Mo. Ct. App. 1963).

<sup>214</sup> *Id.* (internal quotation marks omitted).

distinction makes it easier to clear the rescue doctrine's first hurdle – reasonable perception – by accounting for a point *Wagner* makes, which is that a rescuer is usually under a great deal of stress and armed with imperfect knowledge when judging the need for a rescue. Wyoming and Alabama also consider reasonable belief to sufficiently satisfy the reasonableness standard as applied to perception.<sup>215</sup>

Additionally, a reasonable perception standard promotes the just functioning of the rescue doctrine.<sup>216</sup> The rescue doctrine can only work fairly if it works in a way consistent with proximate causation, which typically centers on a determination of what is reasonably foreseeable.<sup>217</sup> The rescue doctrine is premised on the idea that when a defendant acts negligently, the defendant can anticipate a rescue attempt.<sup>218</sup> This idea mirrors the preceding discussion of proximate cause in *Wagner*.<sup>219</sup> The Fourth Circuit in *Furka II* seriously erred by adopting a reckless or wanton standard to assess a rescuer's belief that a rescue attempt is necessary because that implies that even unreasonable rescue attempts are foreseeable to a defendant.<sup>220</sup> The idea that one must expect people to intervene and attempt a rescue in a situation that no reasonable person would consider an emergency is patently unfair and conflicts with general conceptions of proximate causation. Therefore, reasonableness needs to be applied to the perception aspect of the rescue doctrine.

#### D. GOOD SAMARITAN STATUTES AKIN TO A BIFURCATED STANDARD

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<sup>215</sup> See *Cales v. Halliburton Energy Servs.*, 949 F. Supp. 2d 1114 (D. Wyo. 2013); see also *Trapp v. Vess*, 847 So. 2d 304, 306 (Ala. 2002).

<sup>216</sup> K. D. Kirmayer, *The Rescue Doctrine in Maritime Law After Furka v. Great Lakes Dredge and Dock Co.*, 45 WASH. & LEE L. REV. 661, 675 (1988).

<sup>217</sup> See *Id.* at 676; see also *Wagner v. Int'l Ry. Co.*, 133 N.E. 437, 438 (N.Y. 1921) (discussing theory that, even if tortfeasor failed to foresee rescue attempt, tortfeasor remains accountable to rescuer as if tortfeasor foresaw attempt).

<sup>218</sup> *Id.*

<sup>219</sup> *Wagner*, 133 N.E. at 437-38.

<sup>220</sup> Kirmayer, *supra* note 216, at 676.

Additionally, numerous states' Good Samaritan statutes utilize standards which essentially function the same way that a bifurcated standard would under the rescue doctrine. For example, Iowa utilizes a reckless, wanton, or willful conduct standard in its Good Samaritan statute, while also limiting the extent to which the statute applies through its inclusion of a handful of other requirements.<sup>221</sup> These additional limitations act similarly to the way in which a reasonable perception standard would, since they restrict the statute's protection based on time, place, and the type of assistance offered.<sup>222</sup> The statute states that in order for a person to be shielded from liability for any civil damages resulting from that person's omissions or acts, the person must render "emergency care or assistance without compensation," "in good faith," at the scene of the emergency, while the victim is being transferred from the scene of the emergency, or while the victim is at or being transported to an emergency shelter.<sup>223</sup> These requirements all have a reasonableness flavor, confining a rescuer's liability protection to the time and place when care is most urgently needed, directly following an accident of some sort and at the scene of the crisis. Other states also employ similar restrictions and a reckless conduct standard.<sup>224</sup> Most other states employ comparable restrictions and a gross negligence conduct standard.<sup>225</sup> Certain other states, such as Texas and Nebraska, appear to apply even more forgiving conduct standards in their Good Samaritan statutes, when examined from the rescuer's point of view.<sup>226</sup>

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<sup>221</sup> IOWA CODE § 613.17 (2016).

<sup>222</sup> *See Id.*

<sup>223</sup> *Id.*

<sup>224</sup> *See* N.H. REV. STAT. ANN. § 508:12 (2016); S.D. CODIFIED LAWS § 20-9-4.1 (2016).

<sup>225</sup> *See* ALASKA STAT. § 09.65.090 (2016); DEL. CODE ANN. tit. 16, § 6801 (2016); HAW. REV. STAT. ANN. § 663-1.5 (LexisNexis 2016); IND. CODE ANN. § 34-30-12-1 (LexisNexis 2016); ME. REV. STAT. ANN. tit. 14, § 164 (2016); MASS. ANN. LAWS ch. 112, § 12V (LexisNexis 2016); MONT. CODE ANN. § 27-1-714 (2016); N.C. GEN. STAT. § 90-21.14 (2016); N.D. CENT. CODE § 39-08-04.1 (2016).

<sup>226</sup> *See* NEB. REV. STAT. ANN. § 25-21, 186 (LexisNexis 2016); TEX. CIV. PRAC. & REM. CODE § 74.151 (West 2016).

These statutes further demonstrate the prevalence of the public policy protecting potential rescuers throughout the country, and support the idea of a bifurcated standard.

#### IV. CONCLUSION

At one end of the standard spectrum, *Barlow* essentially retired the maritime rescue doctrine by adopting a reasonable seaman standard. At the other end of the standard spectrum, *Furka II* applied a reckless and wanton standard to all aspects of the maritime rescue doctrine; thereby allowing rescuer plaintiffs the chance to recover for injuries sustained during the course of what no reasonable seaman would consider an emergency. Neither extreme approach offers the best solution – a compromise. The maritime rescue doctrine should use a bifurcated standard: applying a reasonableness standard to the rescuer’s perception of the situation and a recklessness standard to the rescuer’s conduct. A bifurcated standard ought to apply to the maritime rescue doctrine because: it is thematically consistent with the purposes of the Jones Act; the employees at issue have no independent duty to rescue; and, such a standard simultaneously comports with the rescue doctrine’s underlying public policy purpose, and the doctrine’s strong ties to proximate causation and the reasonably foreseeable. Following any other standard would simply add insult to a rescuer plaintiff’s previously sustained injuries.