Supreme Court of Louisiana

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FROM: CLERK OF SUPREME COURT OF LOUISIANA

The Opinions handed down on the **25th day of March, 2022** are as follows:

BY Hughes, J.:

2021-CQ-00929 OFFICER JOHN DOE, POLICE OFFICER VS. DERAY MCKESSON; BLACK LIVES MATTER; BLACK LIVES MATTER NETWORK, INCORPORATED

CERTIFIED QUESTION ANSWERED. SEE OPINION.

Weimer, C.J., concurs and assigns reasons.

Crichton, J., concurs for the reasons assigned by Chief Justice Weimer.

Genovese, J., additionally concurs in the result and assigns reasons.

Crain, J., concurs in part and assigns reasons.

Griffin, J., dissents and assigns reasons.

SUPREME COURT OF LOUISIANA

NO. 2021-CQ-00929

OFFICER JOHN DOE, POLICE OFFICER

VERSUS

DERAY MCKESSON, ET AL.

ON CERTIFIED QUESTION FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

HUGHES, J.

We accepted the certified questions presented to this court by the United States Court of Appeals, Fifth Circuit, in **Doe v. Mckesson**, 2 F.4th 502 (5th Cir. 2021) (per curiam). The questions posed by the Fifth Circuit are: (1) Whether Louisiana law recognizes a duty, under the facts alleged in the complaint, or otherwise, not to negligently precipitate the crime of a third party? (2) Assuming Mckesson could otherwise be held liable for a breach of duty owed to Officer Doe, whether Louisiana's Professional Rescuer's Doctrine bars recovery under the facts alleged in the complaint? **Id.**, 2 F.4th at 504. We answer the former, under the facts alleged in the complaint, in the affirmative and the latter in the negative, for the following reasons.

FACTS AND PROCEDURAL HISTORY

The plaintiff in this personal injury case named as defendants the Black Lives Matter ("BLM") organization[1] and DeRay Mckesson (alleged to be a leader and co-founder of BLM). The plaintiff alleges that he was a duly commissioned police officer for the City of Baton Rouge on July 9, 2016, when he was ordered to respond to a protest "staged and organized by" BLM and DeRay Mckesson, which was in

[1] BLM was dismissed in the federal district court proceedings, and that dismissal is not at issue in the questions certified to this court by the Fifth Circuit Court of Appeals and will not be discussed herein.

response to the July 5, 2016 death of Alton Sterling, who was shot by a Baton Rouge police officer when Mr. Sterling resisted arrest.

The plaintiff alleged that Mr. Mckesson, at all material times during the July 9th protest, led "the protest and violence that accompanied the protest," which took place outside the Baton Rouge Police Department located on Airline Highway, a heavily traveled public highway. The plaintiff further alleged that BLM and Mr. Mckesson "staged" the July 9th protest and, during the protest, their followers engaged in the "blocking of a public highway, looting of a Circle K, throwing of items stolen and violence towards police." It was further claimed that the defendants were in Baton Rouge "for the purpose of demonstrating, protesting and rioting to incite others to violence against police and other law enforcement officers," that the defendants "conspired to violate the law by planning to block a public highway," and that they "knew police would be called to clear the public highway of protestors."

As stated in the petition, when the highway in front of the police department was blocked, the Baton Rouge police department "arranged for a front line of officers in riot gear that formed a shield around officers who were to effectuate arrests and removal of Defendants from the public highway," and the plaintiff was one of the officers designated to make arrests. The plaintiff also asserted that "the protest was peaceful until activist[s] began pumping up the crowd," that Mr. Mckesson was "in charge of the protests," and that he was "seen and heard giving orders throughout the day and night of the protests." The plaintiff claimed in his petition that the protest turned into a riot, with protestors hurling full plastic water bottles at the police officers. The plaintiff further alleged that Mr. Mckesson was present during the protest, and "he did nothing to calm the crowd and, instead, he incited the violence on behalf of [BLM]." When the defendants ran out of water bottles to throw, the plaintiff claimed that a BLM protestor "picked up a piece of

concrete or similar rock like substance and hurled [it] into the police that were making arrests," striking the plaintiff in the face and causing him injuries to his teeth, jaw, brain, and head, along with other compensable losses.

In addition, the plaintiff sets forth in his petition that Alton Sterling's July 5, 2016 death "started a flurry of activity" by the defendants, who had staged protests in other cities that "resulted in violence and property damage." The plaintiff cited as examples of these other activities, that: on July 7, 2016, Lakeem Keon Scott "shot at passing car[s] along a Tennessee highway, killing one woman and wounding three others, including a police officer, while yelling, '[P]olice suck! Black lives matter!'"; and, on July 7, 2016, at a BLM protest in Dallas, Texas, at least one sniper shot twelve police officers (killing five), who had been on duty to keep the peace during the protest. The plaintiff alleged other similar attacks occurred during protests and rioting in other locations across the country, and the defendants had taken credit for the protests and riots, citing Mr. Mckesson's statement to the New York Times, following the attack on the plaintiff, that "[t]he police want protesters to be too afraid to protest," in addition to indicating that he intended to plan more protests.

In an amended petition, which the plaintiff later sought to file in the federal district court,[2] he detailed further incidents of violent protests by BLM leading up to the July 2016 incident in Baton Rouge, including: the April 2015 "Baltimore unrest and rioting"; the June 2015 "McKinney, Texas unrest"; the August 2015 "Earth City, Missouri, blocking rush-hour traffic" incident; the August 2015 "Ferguson unrest";

[2] We note that, although the federal district court denied the plaintiff's motion to amend, it did so in conjunction with its judgment granting motions to dismiss filed by the defendants, for the failure to state plausible claims for relief, therefore, the court in essence deemed the amended petition futile. We summarize the additional allegations presented in the plaintiff's amended petition since they were implicitly considered by the certifying court herein, in **Doe v. Mckesson**, 945 F.3d 818, 828 (5th Cir. 2019), cert. granted, judgment vacated, ___ U.S. ___, 141 S.Ct. 48, 208 L.Ed.2d 158 (2020), discussed hereinafter (wherein the Fifth Circuit reversed the dismissal of Mr. Mckesson and further concluded that the district court erred in refusing to allow the amendment of the plaintiff's petition; in discussing the plaintiff's amended complaint, the court began with, "The amended complaint only bolsters these conclusions….").

the July 7-8, 2016 BLM marches "through midtown Manhattan and up into Harlem blocking public highways"; the July 8, 2016 "protest in Nashville, Memphis, Knoxville and Chattanooga, Tennessee, blocking traffic on a public highway"; the July 9, 2016 protests on the "1-94 freeway in St. Paul, Minnesota" (during which police were attacked by protestors with "chunks of concrete, rebar, rocks, bottles, fireworks and Molotov Cocktails"); and a July 9, 2016 Phoeniz, Arizona rally (during which "rocks and other objects" were thrown at police, and protestors shouted to police officers: "We should shoot you!"). It was also alleged that during the July 9, 2016 Baton Rouge BLM protest, Mr. Mckesson "lead [sic] protestors down Airline Hwy in an attempt to reach 1-12 to block the interstate" but "OFFICER JOHN DOE's squad managed to block the effort of DeRay Mckesson to lead the protestors to I-12. DeRay Mckesson knew he was in violation of the law and actually live streamed his arrest."

Plaintiff also gave further details, in his amended petition, about public statements made by Mr. Mckesson, in which he represented himself as a BLM leader and protest organizer, including: with CNN's Wolfe Blitzer; with FOX's Sean Hannity; on Stephen Colbert's The Late Show; in a Forbes Magazine article titled "Black Lives Matter Activist DeRay Mckesson Talks Colin Kaepernick, Progress and the Future"; at the Voice of San Diego Politifest; on UPROXX.com; and at the White House with President Obama; along with the hacking of Mr. Mckesson's Twitter account and the public disclosure of Twitter statements between Mr. Mckesson and other BLM leaders that "specifically showed an intent to use protests to have 'martial law' declared nationwide."

Based on these allegations in the federal district court, the plaintiff sought damages for the injuries he sustained at the hands of the BLM protestors, citing La. C.C. art. 2315 and claiming that the defendants knew or should have known that the demonstration and riot they staged would become violent and result in serious

personal injuries, as other similar protests had become violent and police officers were assaulted. Also, the plaintiff cited La. C.C. art. 2317, claiming the defendants are liable for the actions of the BLM protestor who directly caused the injuries at issue; he also cited La. C.C. art. 2324 in claiming the defendants are liable in solido for the plaintiff's injuries, for their intentional actions, and for conspiring to incite a protest/riot.

In response to the action, motions to dismiss were filed under Federal Rules of Civil Procedure, Rule 9(a) (asserting there is no authority for Mckesson to be sued as an agent of BLM) and Rule 12(b)(6) (asserting a failure to state a claim upon which relief can be granted), both of which the federal district court granted. See **Doe v. Mckesson**, 272 F.Supp.3d 841 (M.D. La. 2017). The federal appellate court ultimately reversed the district court in **Doe v. Mckesson**, 945 F.3d 818 (5th Cir. 2019), cert. granted, judgment vacated, ___ U.S. ___, 141 S.Ct. 48, 208 L.Ed.2d 158 (2020). Thereafter, the Supreme Court granted a petition for writ of certiorari, vacated the Fifth Circuit decision, and remanded to that court for further proceedings consistent with its opinion, reasoning:

> The question presented for our review is whether the theory of personal liability adopted by the Fifth Circuit violates the First Amendment. When violence occurs during activity protected by the First Amendment, that provision mandates "precision of regulation" with respect to "the grounds that may give rise to damages liability" as well as "the persons who may be held accountable for those damages." [**NAACP v.**] **Claiborne Hardware** [**Co.**], 458 U.S. [886,] at 916-917, 102 S.Ct. 3409[, 73 L.Ed.2d 1215 (1982)] (internal quotation marks omitted). Mckesson contends that his role in leading the protest onto the highway, even if negligent and punishable as a misdemeanor, cannot make him personally liable for the violent act of an individual whose only association with him was attendance at the protest.
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> We think that the Fifth Circuit's interpretation of state law is too uncertain a premise on which to address the question presented. The constitutional issue, though undeniably important, is implicated only if Louisiana law permits recovery under these circumstances in the first place. The dispute thus could be "greatly simplifie[d]" by guidance from the Louisiana Supreme Court on the meaning of Louisiana law. **Bellotti v. Baird**, 428 U.S. 132, 151, 96 S.Ct. 2857, 49 L.Ed.2d 844 (1976).
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> * * *

> In exceptional instances … certification is advisable before addressing a constitutional issue. See **Bellotti**, 428 U.S. at 151, 96 S.Ct. 2857; **Clay v. Sun Ins. Office Ltd.**, 363 U.S. 207, 212, 80 S.Ct. 1222, 4 L.Ed.2d 1170 (1960). Two aspects of this case, taken together, persuade us that the Court of Appeals should have certified to the Louisiana Supreme Court the questions (1) whether Mckesson could have breached a duty of care in organizing and leading the protest and (2) whether Officer Doe has alleged a particular risk within the scope of protection afforded by the duty, provided one exists. See 945 F.3d at 839 (opinion of Willett, J.).
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> First, the dispute presents novel issues of state law peculiarly calling for the exercise of judgment by the state courts. See **Lehman Brothers** [**v. Schein**], 416 U.S. [386,] at 391, 94 S.Ct. 1741[, 40 L.Ed.2d 215 (1974).] To impose a duty under Louisiana law, courts must consider "various moral, social, and economic factors," among them "the fairness of imposing liability," "the historical development of precedent," and "the direction in which society and its institutions are evolving." **Posecai** [**v. Wal-Mart Stores, Inc.**], 752 So.2d [762,] at 766 [(La. 1999)]. "Speculation by a federal court about" how a state court would weigh, for instance, the moral value of protest against the economic consequences of withholding liability "is particularly gratuitous when the state courts stand willing to address questions of state law on certification." **Arizonans for Official English v. Arizona**, 520 U.S. 43, 79, 117 S.Ct. 1055, 137 L.Ed.2d 170 (1997) (internal quotation marks and alteration omitted).
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> Second, certification would ensure that any conflict in this case between state law and the First Amendment is not purely hypothetical. The novelty of the claim at issue here only underscores that "[w]arnings against premature adjudication of constitutional questions bear heightened attention when a federal court is asked to invalidate a State's law." **Ibid**. The Louisiana Supreme Court, to be sure, may announce the same duty as the Fifth Circuit. But under the unusual circumstances we confront here, we conclude that the Fifth Circuit should not have ventured into so uncertain an area of tort law—one laden with value judgments and fraught with implications for First Amendment rights—without first seeking guidance on potentially controlling Louisiana law from the Louisiana Supreme Court. We express no opinion on the propriety of the Fifth Circuit certifying or resolving on its own any other issues of state law that the parties may raise on remand.

McKesson v. Doe, ___ U.S. ___, 141 S.Ct. 48, 50-51, 208 L.Ed.2d 158 (2020).

On remand, the Fifth Circuit Court of Appeals certified two questions to this court, stating in pertinent part as follows:

> [W]e hereby certify the following determinative questions of law to the Supreme Court of Louisiana, by which responses we will be bound for the purposes of this case:
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> 1) Whether Louisiana law recognizes a duty, under the facts alleged in the complaint, or otherwise, not to negligently precipitate the crime of a third party?

> 2) Assuming Mckesson could otherwise be held liable for a breach of duty owed to Officer Doe, whether Louisiana's Professional Rescuer's Doctrine bars recovery under the facts alleged in the complaint?
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> Should the Supreme Court of Louisiana accept our request for answers to these questions, we disclaim any intention or desire that it confine its reply to the precise form or scope of the questions certified. Along with our certification, we transfer this case's record, our previous opinion, and the briefs submitted by the parties. We will resolve this case in accordance with any opinion provided on these questions by the Supreme Court of Louisiana. Accordingly, the Clerk of this Court is directed to transmit this certification and request to the Supreme Court of Louisiana in conformity with the usual practice of this court.

Doe v. Mckesson, 2 F.4th 502, 504 (5th Cir. 2021).

This court accepted the Fifth Circuit's certification request. **Doe v. McKesson**, 21-00929, p. 1 (La. 7/8/21), 320 So.3d 416, 417.

CERTIFIED QUESTION NO. 1: Whether Louisiana law recognizes a duty, under the facts alleged in the complaint, or otherwise, not to negligently precipitate the crime of a third party?

Though later vacated by the Supreme Court, directing certification of the questions to this court, in **Doe v. Mckesson**, 945 F.3d at 826-32, the Fifth Circuit previously answered the first certified question it now poses to this court, stating in pertinent part:

> [W]e turn to Officer Doe's negligence theory. Officer Doe alleges that Mckesson was negligent for organizing and leading the Baton Rouge demonstration because he "knew or should have known" that the demonstration would turn violent. We agree as follows.
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> Louisiana Civil Code article 2315 provides that "[e]very act whatever of man that causes damage to another obliges him by whose fault it happened to repair it." The Louisiana Supreme Court has adopted a "duty-risk" analysis for assigning tort liability under a negligence theory. This theory requires a plaintiff to establish that (1) the plaintiff suffered an injury; (2) the defendant owed a duty of care to the plaintiff; (3) the duty was breached by the defendant; (4) the conduct in question was the cause-in-fact of the resulting harm; and (5) the risk of harm was within the scope of protection afforded by the duty breached. **Lazard v. Foti**, 859 So.2d 656, 659 (La. 2003). Whether a defendant owes a plaintiff a duty is a question of law. **Posecai v. Wal-Mart Stores, Inc.**, 752 So.2d 762, 766 (La. 1999); see **Bursztajn v. United States**, 367 F.3d 485, 489 (5th Cir. 2004) ("Under Louisiana law, the existence of a duty presents a question of law that 'varies depending on the facts, circumstances, and context of each case and is limited by the particular risk, harm, and plaintiff involved.'" (quoting

Dupre v. Chevron U.S.A., Inc., 20 F.3d 154, 157 (5th Cir. 1994))). There is a "universal duty on the part of the defendant in negligence cases to use reasonable care so as to avoid injury to another." **Boykin v. La. Transit Co.**, 707 So.2d 1225, 1231 (La. 1998). Louisiana courts elucidate specific duties of care based on consideration of

> various moral, social, and economic factors, including the fairness of imposing liability; the economic impact on the defendant and on similarly situated parties; the need for an incentive to prevent future harm; the nature of defendant's activity; the potential for an unmanageable flow of litigation; the historical development of precedent; and the direction in which society and its institutions are evolving.

Posecai, 752 So.2d at 766.

We first note that this case comes before us from a dismissal on the pleadings alone. In this context, we find that Officer Doe has plausibly alleged that Mckesson breached his duty of reasonable care in the course of organizing and leading the Baton Rouge demonstration. The complaint alleges that Mckesson planned to block a public highway as part of the protest. And the complaint specifically alleges that Mckesson was in charge of the protests and was seen and heard giving orders throughout the day and night of the protests. Blocking a public highway is a criminal act under Louisiana law. See La. Rev. Stat. Ann. § 14:97. Indeed, the complaint alleges that Mckesson himself was arrested during the demonstration. It was patently foreseeable that the Baton Rouge police would be required to respond to the demonstration by clearing the highway and, when necessary, making arrests. Given the intentional lawlessness of this aspect of the demonstration, Mckesson should have known that leading the demonstrators onto a busy highway was likely to provoke a confrontation between police and the mass of demonstrators, yet he ignored the foreseeable danger to officers, bystanders, and demonstrators, and notwithstanding, did so anyway.

By ignoring the foreseeable risk of violence that his actions created, Mckesson failed to exercise reasonable care in conducting his demonstration. This is not, as the dissenting opinion contends, a "duty to protect others from the criminal activities of third persons." See **Posecai**, 752 So.2d at 766. Louisiana does not recognize such a duty. It does, however, recognize a duty not to negligently cause a third party to commit a crime that is a foreseeable consequence of negligence. See **Brown v. Tesack**, 566 So.2d 955 (La. 1990). The former means a business owner has no duty to provide security guards in its parking lot if there is a very low risk of crime. See **Posecai**, 752 So.2d at 770. The latter means a school can be liable when it negligently disposes of flammable material in an unsecured dumpster and local children use the liquid to burn another child. See **Brown**, 566 So.2d at 957. That latter rule applies here too: Mckesson owed Doe a duty not to negligently precipitate the crime of a third party. And a jury could plausibly find that a violent confrontation with a police officer was a foreseeable effect of negligently directing a protest.

Officer Doe has also plausibly alleged that Mckesson's breach of duty was the cause-in-fact of Officer Doe's injury and that the injury was within the scope of the duty breached by Mckesson. It may have been an unknown demonstrator who threw the hard object at Officer

> Doe, but by leading the demonstrators onto the public highway and provoking a violent confrontation with the police, Mckesson's negligent actions were the "but for" causes of Officer Doe's injuries. See **Roberts v. Benoit**, 605 So.2d 1032, 1052 (La. 1992) ("To meet the cause-in-fact element, a plaintiff must prove only that the conduct was a necessary antecedent of the accident, that is, but for the defendant's conduct, the incident probably would not have occurred."). Furthermore, as the purpose of imposing a duty on Mckesson in this situation is to prevent foreseeable violence to the police and bystanders, Officer Doe's injury, as alleged in the pleadings, was within the scope of the duty of care allegedly breached by Mckesson.
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> The amended complaint only bolsters these conclusions. It specifically alleges that Mckesson led protestors down a public highway in an attempt to block the interstate. The protestors followed. During this unlawful act, Mckesson knew he was in violation of law and livestreamed his arrest. Finally, the plaintiff's injury was suffered during this unlawful action. The amended complaint alleges that it was during this struggle of the protestors to reach the interstate that Officer Doe was struck by a piece of concrete or rock-like object. It is an uncontroversial proposition of tort law that intentionally breaking, and encouraging others to break, the law is relevant to the reasonableness of one's actions.
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> We iterate what we have previously noted: Our ruling at this point is not to say that a finding of liability will ultimately be appropriate. At the motion to dismiss stage, however, we are simply required to decide whether Officer Doe's claim for relief is sufficiently plausible to allow him to proceed to discovery. We find that it is.
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> …The district court erred by dismissing Officer Doe's complaint—at the pleading stage—as barred by the First Amendment. We emphasize that this means only that, given the facts that Doe alleges, he could plausibly succeed on this claim. We make no statement (and we cannot know) whether he will.

(Footnotes omitted.)

We find this recitation of the law by the Fifth Circuit both relevant to the first certified question posed to this court and an accurate summary of the pertinent Louisiana law on this issue. Under the allegations of fact set forth in the plaintiff's federal district court petition, it could be found that Mr. Mckesson's actions, in provoking a confrontation with Baton Rouge police officers through the commission of a crime (the blocking of a heavily traveled highway, thereby posing a hazard to public safety), directly in front of police headquarters, with full knowledge that the result of similar actions taken by BLM in other parts of the country resulted in violence and injury not only to citizens but to police, would render Mr. Mckesson

liable for damages for injuries, resulting from these activities, to a police officer compelled to attempt to clear the highway of the obstruction. Louisiana's Civil Code Article 2315 requires that "[***e***]***very act whatever*** of man that causes damage to another obliges him by whose fault it happened to repair it." (Emphasis added.) Louisiana law would give the plaintiff an opportunity to prove the allegations made at trial, since "[i]n ruling on an exception raising the objection of no cause of action, the court must determine whether the law affords any relief to the claimant if he proves the factual allegations in the petition at trial" and "[a]ny reasonable doubt concerning the sufficiency of the petition must be resolved in favor of finding that a cause of action has been stated." See **United Teachers of New Orleans v. State Board of Elementary & Secondary Education**, 07-0031, p. 9 (La. App. 1 Cir. 3/26/08), 985 So.2d 184, 193.

CERTIFIED QUESTION NO. 2: Assuming Mckesson could otherwise be held liable for a breach of duty owed to Officer Doe, whether Louisiana's Professional Rescuer's Doctrine bars recovery under the facts alleged in the complaint?

"The professional rescuers rule … essentially states that a professional rescuer, such as a fireman or a policeman, who is injured in the performance of his duties, 'assumes the risk' of such an injury and is not entitled to damages." **Worley v. Winston**, 550 So.2d 694, 696 (La. App. 2 Cir.), writ denied, 551 So.2d 1342 (La. 1989). Prior to the enactment of pure comparative fault in Louisiana,[3] via the amendments to La. C.C. art. 2323 by 1996 La. Acts, 1st Ex. Sess, No. 3, a rudimentary form of the common-law Professional Rescuer's Doctrine[4] (though not

[3] By means of 1996 La. Acts, 1st Ex. Sess., No. 3, "the legislature … amended La. C.C. arts. 2323 and 2324(B) … to abolish solidary liability among non-intentional tortfeasors and to place Louisiana in a pure comparative fault system." **Dumas v. State ex rel. Department of Culture, Recreation & Tourism**, 02-0563, p. 9 (La. 10/15/02), 828 So.2d 530, 535. See also **Hall v. Brookshire Brothers**, 02-2404, p. 16 (La. 6/27/03), 848 So.2d 559, 569 ("In 1996 … the legislature enacted a system of pure comparative fault in Louisiana."). "[T]he 1996 legislation … extended the comparative fault principles to virtually all at-fault actors." Frank L. Maraist et al., Answering A Fool According to His Folly: Ruminations on Comparative Fault Thirty Years on, 70 La. L. Rev. 1105, 1132 (2010).

[4] "Louisiana courts appear simply to have borrowed the assumption of risk doctrine from the

so-called) was considered by this court in **Briley v. Mitchell**, 238 La. 551, 115 So.2d 851 (1959), and **Langlois v. Allied Chemical Corporation**, 258 La. 1067, 1070, 249 So.2d 133 (1971). Similar results were reached in the plaintiff's favor in both the **Briley** and the **Langlois** cases, which held that the plaintiff/professional rescuers were not precluded from recovering damages for injuries against a tortfeasor, who was strictly liable, under the law existing at the time of the tort, for a hazard in his custody (in the former, a wild animal and, in the latter, a hazardous chemical).

In **Langlois**, this court recognized that "[u]sually, the ***assumption of risk*** doctrine will apply where the nature of the relationship of the parties appears to exact consent from the one injured to be exposed to possible harm. In such situations the plaintiff understands the risk involved and accepts the risk as well as the inherent possibility of damage because of the risk. … A plaintiff who with full knowledge and appreciation of the danger voluntarily exposes himself to the risks and embraces the danger cannot recover damages for injury which may occur." **Langlois**, 258 La. at 1086, 249 So.2d at 140 (emphasis added). This court further held: "We must examine the plaintiff's appreciation and knowledge of the risks, his ability to avoid or minimize the risks, and ***whether he has consented to encounter the risk***. The interests of the parties must be balanced. Plaintiff is not required to surrender valuable rights and privileges because defendant's conduct threatens him. Yet if the plaintiff could readily avoid or mitigate the damage caused by defendant's conduct and he knows how to do so, he cannot act in such a manner as to invite injury." **Id.**, 258 La. at 1086-87, 249 So.2d at 141 (emphasis added). In **Langlois**, this court specifically pointed out that the defendant/tortfeasor was not the party being rescued. The **Langlois** court recognized that "[a]ny voluntariness on the part of [the

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common law." **Murray v. Ramada Inns, Inc.**, 521 So.2d 1123, 1130 (La. 1988). The Professional Rescue's Doctrine is a type of assumption of the risk. **Beaupre v. Pierce County**, 161 Wash.2d 568, 576, 166 P.3d 712, 717 (2007).

plaintiff/firefighter] could only be found if we ***assume a waiver*** because he became a fireman," it also recognized that "[f]iremen, police officers, and others who in their professions of protecting life and property necessarily endanger their safety ***do not assume the risk of all injury without recourse against others***." **Langlois**, 258 La. at 1087-88, 249 So.2d at 141 (citing **Briley v. Mitchell**, 238 La. 551, 115 So.2d 851 (1959)) (emphasis added). The court found that the plaintiff had "acted in response to duty, and his exposure to the risk in line with that duty was minimal," however, he "did not embrace a known danger with that consent required by law to bar his recovery for defendant's fault."[5] **Id.**, 258 La. at 1088-89, 249 So.2d at 141.

Notwithstanding, it has been posited that the Professional Rescuer's Doctrine is no longer viable in Louisiana in light of this court's decision in **Murray v. Ramada Inns, Inc.**, and the amendments to La. C.C. art. 2323(A) by 1996 La. Acts, 1st Ex. Sess, No. 3, enacting pure comparative fault in Louisiana and resulting in its current provisions, directing:

> In ***any*** action for damages where a person suffers injury, death, or loss, the degree or percentage of fault of ***all*** persons ***causing or contributing*** to the injury, death, or loss ***shall*** be determined, regardless of whether the person is a party to the action or a nonparty, and regardless of the person's insolvency, ability to pay, immunity by statute, including but not limited to the provisions of R.S. 23:1032, or that the other person's identity is not known or reasonably ascertainable. If a person suffers injury, death, or loss as the result partly of his own negligence and partly as a result of the fault of another person or persons, the amount of damages recoverable shall be reduced in proportion to the degree or percentage of negligence attributable to the person suffering the injury, death, or loss.

(Emphasis added.) In addition, as amended by Act No. 3, Paragraph (B) of 2323 now states: "The provisions of Paragraph A shall apply to ***any*** claim for recovery of damages for injury, death, or loss asserted under ***any*** law or legal doctrine or theory of liability, regardless of the basis of liability." (Emphasis added.)

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[5] Prior to this court's decision in **Murray v. Ramada Inns, Inc.**, 521 So.2d at 1133, assumption of risk was a defense that, if proven, totally barred a plaintiff's recovery of damages.

Even prior to the enactment of 1996 La. Act (1st Ex. Sess.) No. 3, this court in **Murray v. Ramada Inns, Inc.**, interpreting the previous version of Article 2323, held that in view of the legislative adoption of comparative fault the jurisprudentially-borrowed common law doctrine of assumption of risk no longer had a place in Louisiana tort law. **Murray v. Ramada Inns, Inc.**, 521 So.2d at 1132. In so holding, this court reasoned that if the Legislature had intended to preserve the defense as a total bar to recovery, it could have easily and expressly stated that intention in Article 2323; however, there is no doubt that the Legislature intended by its amendment of Article 2323 to eliminate contributory negligence as a complete bar to recovery and to make comparative fault applicable to those cases in which the plaintiff's conduct may result in a reduction of recovery. **Murray**, 521 So.2d at 1133. Beyond that clearly expressed intention, this court further observed that the Legislature left the "tough details," regarding the scope and application of Article 2323, "for the courts to decide." **Id.** The **Murray** court concluded that "the survival of assumption of risk as a total bar to recovery would be inconsistent with [A]rticle 2323's mandate that contributory negligence should no longer operate as such a bar to recovery." **Id.**

Despite **Murray**'s general abrogation of the application of assumption of risk in Louisiana tort cases, this court therein excepted from its ruling those cases "where the plaintiff, by oral or written agreement, expressly waives or releases a future right to recover damages from the defendant," if "no public policy concerns would invalidate such a waiver (see also La. Civil Code art. 2004), the plaintiff's right to recover damages may be barred on a release theory," and "in the sports spectator or amusement park cases (common law's "implied primary" assumption of risk cases)." **Murray**, 521 So.2d at 1134. However, **Murray** expressed the view that in each of these two exceptions, the better analysis would, in the former, to have been by "[a]pplying duty/risk analysis to this situation, it can be concluded that the

defendant has been relieved by contract of the duty that he otherwise may have owed to the plaintiff," and in the latter to "rather than relying on the fiction that the plaintiffs in such cases implicitly consented to their injuries, the sounder reasoning is that the defendants were not liable because they did not breach any duty owed to the plaintiffs."[6] **Id**. Even in stating the exceptions to its abrogation of assumption of risk, **Murray** instructs that the better analysis is under the duty/risk analysis of comparative fault.

We note that **Murray** made no express exception relative to the Professional Rescuer's Doctrine, which is based on an implied (not express) assumption of risk. Also, though the Louisiana Legislature has enacted statutes to bar some plaintiffs' recovery, which may be said to modify the pure comparative fault now set forth in La. C.C. 2323 and to statutorily deny recovery to such plaintiffs based on their own "specified risky or blameworthy conduct or activities" (see Frank L. Maraist et al., supra at 1132-35), no such statute has been cited to this court codifying the Professional Rescuer's Doctrine.[7] Thus, neither this court, nor this state's

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[6] **Murray**, 521 So.2d at 1134-35, further explained:

> For example, in the classical baseball spectator setting, the case for negligence may often fall short on the question of whether the defendant breached a duty owed to the plaintiff. While a stadium operator may owe a duty to spectators to provide them with a reasonably safe area from which they can watch the game, it is generally not considered reasonable to require the stadium operator to screen all spectator areas from flying baseballs. Even while applying assumption of risk terminology to these types of cases, courts have simultaneously recognized that the defendant was not negligent because his conduct vis-a-vis the plaintiff was not unreasonable. See **Lorino v. New Orleans Baseball & Amusement Co.**, 16 La. App. [95,] at 96, 133 So. [408,] at 408 [(La. App. Orl. 1931)] ("It is well known ... that it is not possible ... for the ball to be kept at all times within the confines of the playing field.") On the other hand, the failure to protect spectator areas into which balls are frequently hit, such as the area behind home plate, might well constitute a breach of duty. These types of cases will turn on their particular facts and may be analyzed in terms of duty/risk. The same analysis applies in other cases where it may not be reasonable to require the defendant to protect the plaintiff from all of the risks associated with a particular activity. ...

[7] See, e.g., La. R.S. 9:2798.4 (denying tort recovery to one injured while "operating a motor vehicle, aircraft, watercraft, or vessel" with a "blood alcohol concentration of 0.08 percent or more by weight based on grams of alcohol per one hundred cubic centimeters of blood" or "while he was under the influence of any controlled dangerous substance described in R.S. 14:98(A)(1)(c) or R.S. 40:964"); La. R.S. 9:2800.10 (denying tort recovery to one injured while perpetrating "a felony offense during the commission of the offense or while fleeing the scene of the offense");

legislature, has deemed it appropriate to recognize an express exception for the Professional Rescuer's Doctrine to **Murray**'s abrogation of assumption of risk or La. C.C. 2323's mandate of pure comparative fault in this state.

Accordingly, we answer the Fifth Circuit Court of Appeals' second certified question: In view of the current directive of La. C.C. art. 2323 that "[i]n ***any*** action for damages where a person suffers injury, death, or loss, the degree or percentage of fault of ***all*** persons ***causing or contributing*** to the injury, death, or loss ***shall*** be determined…" (emphasis added) and this court's holding in **Murray v. Ramada Inns, Inc.**, 521 So.2d 1123, 1132 (La. 1988), abrogating assumption of risk, we conclude that the Professional Rescuer's Doctrine has likewise been abrogated in Louisiana both legislatively and jurisprudentially.

DECREE

We have answered the certified questions as set forth in this opinion. Pursuant to Rule XII, Supreme Court of Louisiana, the judgment rendered by this court upon the questions certified shall be sent by the clerk of this court under its seal to the United States Court of Appeals for the Fifth Circuit and to the parties.

La. R.S. 14:19 (denying tort recovery against a person to one injured while committing "a forcible offense against the person or a forcible offense or trespass against property in a person's lawful possession, provided that the force or violence used must be reasonable and apparently necessary to prevent such offense"); La. R.S. 14:63(H) (denying tort recovery to one injured while entering a "structure, watercraft, movable or immovable property without express, legal or implied authorization, or who without legal authorization, remains upon the structure, watercraft, movable or immovable property after being forbidden by the owner, or other person with authority to do so" unless resulting from "the intentional acts or gross negligence of the owner, lessee or custodian").

SUPREME COURT OF LOUISIANA

NO. 2021-CQ-00929

OFFICER JOHN DOE, POLICE OFFICER

VS.

DERAY MCKESSON; BLACK LIVES MATTER; BLACK LIVES MATTER NETWORK, INCORPORATED

ON CERTIFIED QUESTION FROM THE
UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT

WEIMER, C.J., concurring.

I respectfully concur, adopting a slightly different analytical approach to the questions posed. In doing so, I recognize and emphasize that this court's role in addressing a certified question is to respond to the question posed by the federal court and not to decide the underlying case. The fact-intensive analysis to ultimately decide this case is left for the federal court where this matter is pending. That being said, with respect to the certified questions presented, I offer the following.

Certified Question No. 1: Whether Louisiana law recognizes a duty, under the facts alleged in the complaint, or otherwise, not to negligently precipitate the crime of a third party?

In Louisiana, the foundation of any delictual action lies in Louisiana Civil Code article 2315, which provides: "Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it." Louisiana Civil Code article 2316 similarly provides: "Every person is responsible for the damage he occasions not merely by his action, but by his negligence, his imprudence, or his want of skill." This foundational basis for tort liability in Louisiana creates a broad obligation on everyone to act with reasonable care to avoid injury to another. **Boykin v. La. Transit Co., Inc.**, 96-1932, p. 10 (La. 3/4/98), 707 So.2d 1225, 1231.

In applying La. C.C. art. 2315 to a specific factual situation, Louisiana courts utilize the duty-risk analysis which requires a plaintiff to prove five elements: (1) defendant had a duty to conform his conduct to a specific standard (the duty element); (2) defendant's conduct failed to conform to the applicable standard (the breach element); (3) defendant's substandard conduct was a cause-in-fact of plaintiff's injuries (the cause-in-fact element); (4) defendant's substandard conduct was a legal cause of plaintiff's injuries (the scope of the duty element); and (5) actual damages. **Boykin**, 96-1932 at 8, 707 So.2d at 1230. If a plaintiff fails to prove any one of the five elements, a defendant is not liable. ***Id.***

While Article 2315 creates broad accountability for fault, the "duty" inquiry can narrow the scope of potential liability and financial responsibility. Thus, the threshold inquiry in a negligence action is whether the defendant owed the plaintiff a duty. **Posecai v. Wal-Mart Stores, Inc.**, 99-1222, p. 4 (La. 11/30/99), 752 So.2d 762, 766.[1] This is a policy-driven decision that considers various moral, social, and economic factors. ***Id.*** Relevant factors in determining the existence of a duty include "the fairness of imposing liability; the economic impact on the defendant and on similarly situated parties; the need for an incentive to prevent future harm; the nature of defendant's activity; the potential for a unmanageable flow of litigation; the historical development of precedent; and the direction in which society and its institutions are evolving." ***Id.***

The factors outlined by this court in **Posecai** and other cases weigh in favor of finding a general duty exists "not to negligently precipitate the crime of a third party."

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[1] Specific duties can arise from codal, statutory, administrative and local laws, as well as private contracts and custom. See **Ardoin v. Hartford Acc. & Indem. Co.**, 360 So.2d 1331, 1334 (La. 1978); see also **Reynolds v. Bordelon**, 14-2362, pp. 7-8 (La. 6/30/15), 172 So.3d 589, 595-596. The parties have not cited, nor have we found, any specific codal, statutory, administrative or local law that addresses the duty at issue here.

An analysis of these factors leads to the conclusion: (1) the imposition of a duty is a matter of fundamental fairness, as the potential for civil liability for a "negligent precipitator" may deter future negligent conduct; (2) the imposition of a duty places the economic loss on the "negligent precipitator" rather than on the injured victim; (3) the imposition of a duty on a "negligent precipitator" of the crime of a third party may prevent future harm; and (4) the "negligent precipitator" is better positioned to analyze the risks involved in the conduct at issue and, thus, take precautions to avoid them or to insure against them. These policy considerations, independently and collectively, support recognition of a broad duty not to "negligently precipitate the crime of a third party."

Certified Question No. 2: Assuming Mckesson could otherwise be held liable for a breach of duty owed to Officer Doe, whether Louisiana's Professional Rescuer's Doctrine bars recovery under the facts alleged in the complaint.

The Professional Rescuer's Doctrine is a jurisprudential rule which provides that "a professional rescuer, such as a fireman or a policeman, who is injured in the performance of his duties, 'assumes the risk' of such an injury and is not entitled to damages." **Gann v. Matthews**, 03-640, pp. 5-6 (La.App. 1 Cir. 2/23/04), 873 So.2d 701, 705. However, there are exceptions to this rule, as explained in **Gann**:

> A professional rescuer may recover for an injury caused by a risk that is independent of the emergency or problem he has assumed the risk to remedy. A risk is independent of the task, and the assumption of the risk rationale does not bar recovery, if the risk-generating object could pose the risk to the rescuer in the absence of the emergency or specific problem undertaken. On the other hand, "dependent" risks arise from the very emergency that the professional rescuer was hired to remedy. The assumption rationale bars recovery from most dependent risks except when (1) the dependent risks encountered by the professional rescuer are so extraordinary that it cannot be said that the parties intended rescuers to assume them, or (2) the conduct of the defendant may be so blameworthy that tort recovery should be imposed for the purposes of punishment or deterrence.

Gann, 03-640 at 6, 873 So.2d at 705.

While historically discussed in terms of assumption of the risk, the Professional Rescuer's Doctrine is more appropriately understood in terms of comparative fault and duty-risk. See La. C.C. art. 2323.[2] See also **Worley v. Winston**, 550 So.2d 694, 697 (La.App. 2 Cir. 1989) (citing **Murray v. Ramada Inns, Inc.**, 521 So.2d 1123 (La. 1988)).

> More precisely, the rule comes in to play in determining the risks included within the scope of the defendant's duty and to whom the duty is owed. It might be said that a defendant's ordinary negligence or breach of duty does not encompass the risk of injury to a police officer or fireman responding in the line of duty to a situation created by such negligence or breach of duty. A defendant's particularly blameworthy conduct, especially intentional criminal conduct, does encompass the risk of injury to a policeman or fireman responding in the line of duty.

Worley, 550 So.2d at 697.

The Professional Rescuer's Doctrine has not been abrogated. Its parameters, and the considerations inherent in the doctrine as outlined above, may be applied by the federal court to the specific facts of this case to determine Mckesson's liability, or lack thereof, under those facts.

Finally, I wish to point out that this court is deferring to the federal court the determination of whether Mckesson benefits from protections afforded by the First Amendment. See **NAACP v. Claiborne Hardware Co.**, 458 U.S. 888 (1982). I

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[2] La. C.C. art. 2323(A) provides:

> In any action for damages where a person suffers injury, death, or loss, the degree or percentage of fault of all persons causing or contributing to the injury, death, or loss shall be determined, regardless of whether the person is a party to the action or a nonparty, and regardless of the person's insolvency, ability to pay, immunity by statute, including but not limited to the provisions of R.S. 23:1032, or that the other person's identity is not known or reasonably ascertainable. If a person suffers injury, death, or loss as the result partly of his own negligence and partly as a result of the fault of another person or persons, the amount of damages recoverable shall be reduced in proportion to the degree or percentage of negligence attributable to the person suffering the injury, death, or loss.

would note, incidentally, that Louisiana's protection of First Amendment rights is at least co-extensive with federal rights. See La. Const. art. 1, § 7; **State v. Franzone**, 384 So.2d 409, 411 (La. 1980).

SUPREME COURT OF LOUISIANA

NO. 2021-CQ-00929

OFFICER JOHN DOE, POLICE OFFICER

VERSUS

DERAY MCKESSON, ET AL.

On Certified Question from the United States Court of Appeals for the Fifth Circuit

Genovese, J., additionally concurs in the result and assigns reasons:

While I agree with the result in this Court's decision, I write separately to express my response to these two certified questions.

Answer to Question No. 1:

Louisiana tort law is governed by La. C.C. art. 2315[1] and a duty/risk analysis.[2] If the facts alleged in the complaint are proven at trial and the requirements of the duty/risk analysis are met, then yes, there can be a duty owed.

Answer to Question No. 2:

No. The Professional Rescuer Doctrine does not bar recovery under Louisiana law.[3]

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[1] La. C.C. art. 2315(A) provides that "[e]very act whatever of man that causes damage to another obliges him by whose fault it happened to repair it."

[2] The standard negligence analysis Louisiana courts employ in determining whether to impose liability under La. C.C. art. 2315 is the duty/risk analysis, which consists of the following four-prong inquiry: (1) was the conduct in question a substantial factor in bringing about the harm to the plaintiff, i.e., was it a cause-in-fact of the harm which occurred? (2) did the defendant(s) owe a duty to the plaintiff? (3) was the duty breached? and, (4) was the risk, and harm caused, within the scope of protection afforded by the duty breached? *Rando v. Anco Insulations Inc.*, 08-1163, p. 26 (La. 5/22/09), 16 So.3d 1065, 1085-86 (citing *Mathieu v. Imperial Toy Corp.,* 94-0952 (La. 11/30/94), 646 So.2d 318, 321-22). All four inquiries must be affirmatively answered for a plaintiff to recover. *Id*., 08-1163, p. 26, 16 So.3d at 1086.

[3] Notably, in *Murray v. Ramada Inns, Inc.*, 521 So.2d 1123, 1124 (La. 1988), discussed extensively in the majority opinion, the United States Court of Appeals for the Fifth Circuit certified a question to this Court: "Does assumption of risk serve as a total bar to recovery by a plaintiff in a negligence case, or does it only result in a reduction of recovery under the Louisiana comparative negligence statute [La. C.C. art. 2323]?" This Court responded that "the common law doctrine of assumption of risk no longer has a place in Louisiana tort law." *Id*. at 1132; *see also*, *Worley v. Winston*, 550 So.2d 694, 697 (La. App. 2nd Cir. 1989)(citing *Murray,* 521 So.2d 1123)("While the professional rescuers rule . . . has traditionally been discussed in terms of assumption of risk, under current Louisiana tort theory the rule should, perhaps, be couched in terms of comparative fault or duty/risk.").

SUPREME COURT OF LOUISIANA

No. 2021-CQ-00929

OFFICER JOHN DOE, POLICE OFFICER

VS.

DERAY MCKESSON; BLACK LIVES MATTER; BLACK LIVES MATTER NETWORK, INCORPORATED

On Certified Question from the United States

CRAIN, J. concurs in part and assigns reasons.

I agree with the result reached by the majority regarding "duty." I write separately to clarify why I believe Louisiana law recognizes potential liability for the negligent precipitation of a crime of a third party. This certified question requires scrutiny of two elements of a tort claim: 1) duty, a purely legal question based on broad policy considerations; and 2) scope of the duty, a mixed question of law and fact that depends on the circumstances of each case.[1] The line between these distinct elements is often blurred.

Applicable Law

Under the traditional duty-risk analysis applicable to negligence claims, a plaintiff must prove five elements: (1) the defendant had a duty to conform his conduct to a specific standard (**the duty element**); (2) the defendant's conduct failed to conform to the applicable standard (the breach element); (3) the defendant's substandard conduct was a cause-in-fact of the plaintiff's injuries (the cause-in-fact element); (4) the defendant's substandard conduct was a legal cause of the plaintiff's injuries (**the scope of the duty element)**; and (5) actual damages (the

[1] The scope of the duty element has also been referred to in terms of "scope of liability," "scope of the risk," "breach of the legal cause," "legal cause," and "proximate cause."

damages element). *See Lemann v. Essen Lane Daiquiris, Inc.*, 05–1095, p. 7 (La. 3/10/06), 923 So.2d 627, 633. If a plaintiff fails to prove any one of the five elements, a defendant is not liable. *Id.* Answering the certified question before us requires that we analyze the first and fourth elements.

The starting point for determining whether a duty exists is Louisiana Civil Code article 2315, which provides, "Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it." Similarly, Louisiana Civil Code article 2316 provides, "Every person is responsible for the damage he occasions not merely by his act, but by his negligence, his imprudence, or his want of skill." This foundational basis for tort liability in Louisiana creates a broad obligation on everyone to act with reasonable care to avoid injury to another. *Boykin v. Louisiana Transit Co., Inc.*, 96-1932 (La. 3/4/98), 707 So.2d1225, 1231.

More specific duties can also arise from other codal, statutory, administrative and local laws, as well as private contracts. *See Ardoin v. Hartford Acc. & Indem. Co.*, 360 So. 2d 1331, 1334 (La. 1978). When a duty arises from a public source of law, the enacting body has recognized, as a matter of public policy, a duty to act or not act in a certain manner. See *Boyer v. Johnson*, 360 So. 2d 1164, 1169 (La. 1978) (because statute satisfied the duty element, analysis of the statutory violation was at the scope of the duty stage to determine whether the statute was designed to protect particular plaintiff from particular type of harm); *See Lazard v. Foti*, 02-2888 (La. 10/21/03), 859 So. 2d 656, 660-61, quoting *Hill v. Lundin & Assoc.*, 260 La. 542, 256 So. 2d 620, 622 (1972) ("Where the rule of law upon which a plaintiff relies for imposing a duty is based on a statute, the court attempts to interpret legislative intent as to the risk contemplated by the legal duty, which is often a resort to the court's own judgment of the scope of protection intended by the legislature.")

Absent a duty from a public source of law, there are limits to liability where the courts will not recognize certain torts. *Reynolds v. Bordelon*, 14-2362 (La.

6/30/15), 172 So. 3d 589, 595. While Article 2315 creates broad accountability for fault, the "duty" inquiry can narrow the scope of potential liability and financial responsibility. It contemplates whether an entire category of defendants should be excluded from liability. *Reynolds*, 172 So.3d 589. This is a policy-driven decision that considers various moral, social, and economic factors. *Posecai v. Wal-Mart Stores, Inc.*, 752 So. 2d 762, 766 (La. 1999). These policy considerations can compel a court to make a categorical "no duty" rule regarding certain acts or actors. *Id.* Structuring the duty inquiry broadly allows a court to determine whether Louisiana will exclude liability as to "whole categories of claimants" or "of claims under any circumstances."[2] Frank L. Maraist & Thomas C. Galligan, Jr., 1 Louisiana Tort Law § 5.02[5] (2020), citing *Pitre v. La. Tech Univ.*, 673 So. 2d 585, 596 (La. 1996) (Lemmon, J., concurring). Examples where Louisiana courts have found no duty at this broad categorical level are: *Reynolds*, 172 So.3d 589 (no duty to prevent negligent spoliation of evidence); and *Carrier v. City of Amite*, 10-0007 (La. 10/19/10), 50 So. 3d 1247, 1249 (no duty for retailer to fit a helmet to customer at point of sale). Categorical rejection of civil tort liability for classes of acts or actors by finding no duty is rare.

In contrast, when the question presented is whether a stated duty will be extended to support liability for a particular circumstance, analysis of the defendant's conduct should be in terms of the scope of the duty. *See* Louisiana Tort Law at § 5.02[7]. The question is, "should this plaintiff recover from this defendant for these particular damages that arose in this particular manner?" *Id.* at § 3.05. This inquiry is fact-specific. *Id.* The scope of the duty is generally not a policy question; it is a matter of common sense, justice and fairness. *Id.* at 5.02[7]. At this stage of the analysis, foreseeability and ease of association of the injury are relevant

[2] The context for the use of "claimants" in this quote is to claimants of the no-duty defense; *i.e.*, defendants argued no duty existed in defense against a plaintiff's claim.

considerations. *Hill*, 256 So. 2d at 622, citing Prosser, Law of Torts (3rd ed. 1964), 282. The concept of "ease of association" asks how easily the risk of injury to the plaintiff can be associated with the duty sought to be enforced. *Hill, supra.* "Restated, the ease of association inquiry is simply: 'How easily does one associate the plaintiff's complained-of harm with the defendant's conduct? ... Although ease of association encompasses the idea of foreseeability, it is not based on foreseeability alone.'" *Roberts v. Benoit*, 605 So. 2d 1032, 1045 (La. 1991), *on reh'g* (May 28, 1992).

It is important to separate the duty and scope of the duty questions because each has considerations unique to itself.[3, 4] Whether a duty exists is a question of law. *Faucheaux v. Terrebonne Consolidated Government*, 92-0930 (La.3/25/93), 615 So.2d 289, 292. The scope of the duty presents a mixed question of fact and law. *Parents of Minor Child v. Charlet,* 13-2879, p. 6 (La. 4/4/14), 135 So.3d 1177, 1181.

The Certified Question

We accepted the following certified question from the Fifth Circuit: "1) Whether Louisiana law recognizes a duty, under the facts alleged in the complaint, or otherwise, not to negligently precipitate the crime of a third party?" Because the threshold element of "duty" is analyzed at the categorical level, I believe the certified question should be framed more broadly to both respond to the federal court and to be consistent with Louisiana law.[5] The more pertinent question is: "Does a protest

[3] Notably, in *Mckesson v. Doe*, 141 S. Ct. 48, 51, 208 L. Ed. 2d 158 (2020), the United States Supreme Court framed the question as a two-part inquiry, with the broader duty distinct from the narrower scope of that duty. In remanding to the Fifth Circuit, the Supreme Court stated the following questions should be certified, "(1) Whether Mckesson could have breached a duty of care in organizing and leading the protest and (2) whether Officer Doe has alleged a particular risk within the scope of protection afforded by the duty, provided one exists."

[4] *See Lazard*, 859 So. 2d at 660, where elements were well defined and analyzed separately. *See also Morris v. Orleans Par. Sch. Bd*., 553 So. 2d 427, 429 (La. 1989).

[5] The certified question expressly contemplates reframing, stating, "Should the Supreme Court of Louisiana accept our request for answers to these questions, we disclaim any intention or desire that it confine its reply to the precise form or scope of the questions certified."

organizer have a duty to use reasonable care so that the protest is conducted in a lawful manner?"[6]

Duty

The parties have not cited, nor have we found, any specific codal, statutory, administrative or local law that addresses the duty applicable to this case. Consequently, starting with the foundational basis for tort liability in Louisiana, Article 2315, we must determine whether moral, social and economic considerations support our recognition of such a duty or the categorical exclusion of it. *Posecai*, 752 So.2d 762. To answer this question, relevant policy factors must be considered: (1) deterrence of unreasonable conduct, or encouraging reasonable conduct; (2) economic considerations; (3) justice and fairness of potentially imposing liability; (4) allocation of judicial resources; and (5) predictability.[7]

Deterrence

Finding the existence of a duty will make an actor potentially civilly liable. The potential for civil liability may deter future conduct. So, exposing a protest organizer to civil liability for failing to exercise reasonable care so that the protest is carried out in a lawful manner should deter undesirable conduct (*i.e.* unlawful protests) and encourage desirable conduct (*i.e.* lawful protests). This factor weighs in favor of recognizing a duty.

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[6] The use of "organizer" throughout this opinion includes a "leader" who may or may not have been involved in organizing the protest, but actively led the protest.

[7] This court in *Reynolds* listed the following policy considerations: deterrence of undesirable conduct, avoiding the deterrence of desirable conduct, compensation of victims, satisfaction of the community's sense of justice, proper allocation of resources (including judicial resources), predictability, and deference to the legislative will. *Reynolds*, 172 So. 3d at 596-597.

In *Posecai*, this court listed the elements with a slight variation: "fairness of imposing liability; the economic impact on the defendant and on similarly situated parties; the need for an incentive to prevent future harm; the nature of defendant's activity; the potential for an unmanageable flow of litigation; the historical development of precedent; and the direction in which society and institutions are evolving." *Posecai*, 752 So.2d at 766.

Economic Considerations

This factor considers who will bear the financial loss for the alleged injury. Finding a duty potentially places that loss on the defendant. Finding no duty will result in the victim bearing the financial loss associated with his injury. Thus, this factor balances the need for compensating victims against a protest organizer's responsibility to pay. The purpose of tort damages is to make the victim whole. *Bellard v. Am. Cent. Ins. Co.*, 2007-1335 (La. 4/18/08), 980 So. 2d 654, 668. Recognizing a duty that results in compensating victims injured when a protest is conducted unlawfully furthers the purpose of making the victim whole. An innocent victim in these circumstances should not be categorically denied recovery.

Further, while a protest organizer cannot be deemed to know of or condone every action that may cause an injury during the protest, the critical part of the proposed duty is whether the organizer used reasonable care so that the protest was conducted *in a lawful manner*. If the protest is organized, led, and effectuated in a lawful manner, a plaintiff generally will be unable to show a breach of the stated duty and the defendant will not bear the cost of injury. If, however, the organizer does not use reasonable care so that the protest occurs in a lawful manner, the expectation that he will absorb the financial loss instead of a victim is reasonable.

This factor is bolstered by Louisiana's recognition of comparative fault, which results in the fault of a victim who contributes to his own injury, or of a third party who acts particularly egregiously, proportionately reducing any fault allocated to the organizer. The proposed duty requires lawful actions by the organizer. The financial burden associated with the failure to conform to that duty should be borne by him. This factor weighs in favor of finding a duty.

Justice

This factor addresses society's sense of fairness in determining whether a reasonable person should act or not act in a certain manner. *Reynolds*, 172 So.3d at.

598. The reasonable person standard asks "whether reasonable persons would expect certain behavior in certain situations and, conversely, whether reasonable persons can be expected to be exposed to liability in certain situations." *Id.* It is reasonable for citizens to expect that a protest be conducted in a lawful manner. Doing so protects everyone's right to assemble, speak, and protest, while also protecting their safety. While protests, both lawful and unlawful, are part of our nation's history and identity, we are also a country of laws. Attaching civil liability to unlawful protests furthers the rule of law. Thus, imposing a duty to use reasonable care when organizing and conducting a protest is supported by a societal sense of fairness, justice, and order.

Allocation of Judicial Resources

This factor addresses judicial economy and the potential for an unmanageable flow of litigation if a duty is recognized. Anecdotally, it is reasonable to expect relatively low occurrences of planned, unlawful protests, making the likelihood of injury from one improbable. The infrequency of such events supports the conclusion that judicial resources will not be unduly burdened by imposing the proposed duty. Further, the First Amendment protects lawful protests. Placing lawful protests beyond the reach of civil liability, while recognizing potential civil liability for unlawful protests, will make overloaded dockets unlikely. This factor weighs in favor of finding a duty.

Predictability

This factor looks at whether the alleged tortfeasor or the victim is better positioned to analyze the risks involved in an unlawful protest and, thus, take precautions to avoid them or to insure against them. A protest organizer who plans or leads an unlawful protest is best positioned to predict and, therefore protect against, the risks of that conduct. The act of organizing and leading a protest in a reasonable and lawful fashion should require precautions to counter the risks

associated with unlawful protests. Those risks are best calculated and avoided by the organizer. The predictability factor favors the recognition of a duty.

These policy considerations, independently and collectively, support our recognition of a protest organizer's duty to use reasonable care so that a protest is conducted in a lawful manner. Recognizing such a duty negates any contention that a protest organizer, as a matter of law, is categorically excluded in all instances from liability for harm occurring during a protest.

Scope of the Duty

To fully respond to the certified question, the analysis also requires a determination of whether that duty extends to cover the injury in this case, which is the "scope of the duty" element. The extent of protection owed a particular plaintiff depends on the particular facts and circumstances of the case and is determined on a case-by-case basis to avoid making a defendant the insurer of all persons against all harms. *Todd v. State Through Dep't of Soc. Servs., Off. of Cmty. Servs.*, 96-3090 (La. 9/9/97), 699 So. 2d 35, 39. Here, the specific facts must be scrutinized to determine whether the risk of a third party criminal act harming a responding police officer is within the scope of the organizer's duty to exercise reasonable care so that the protest is conducted lawfully.[8] That is, will a reasonable person associate the injury suffered by Officer Doe with the risks posed by Mckesson's conduct?

Foreseeability and ease of association are factors in deciding whether a duty extends to cover a particular risk of harm. *Id.* Therefore, it is necessary to address whether the defendant's alleged conduct foreseeably resulted in the plaintiff being

[8] At this point, it bears emphasizing that this issue is before us at a preliminary stage where we must accept all allegations in the petition or complaint as true. *Indus. Companies, Inc. v. Durbin*, 02-0665 (La. 1/28/03), 837 So. 2d 1207, 1212. These allegations may ultimately not be proven at trial. Thus, while the scope of the duty question requires us to make certain determinations based on the facts as alleged, these facts must still be established before the trier of fact. We offer no opinion on the merits. Instead, we only resolve whether Louisiana law allows for tort recovery under these alleged facts.

injured by the criminal act of a third party and whether such injury is easily associated with the articulated duty, namely, a protest organizer's duty to use reasonable care so that a protest is conducted in a lawful manner.[9]

The plaintiff alleges Mckesson knew of previous protests sponsored by or identified with Black Lives Matter turning violent. The petition cites prior protests across the country associated with this movement where police officers were injured or killed. Because previous protests provoked a police response, a police response to the subject protest was certainly foreseeable, if not desired. Given the alleged prior incidents and the alleged intent to incite violence against police, the violence committed against a responding police officer at this protest was foreseeable.

It is also alleged that Mckesson organized the protest on a main, highly trafficked highway in front of the Baton Rouge Police headquarters and in violation of traffic laws. (*See* La. R.S. 14:97, penalizing intentional or criminally negligent obstruction of highways.) Again, a police response to confront potentially riotous protestors and to manage a likely dangerous traffic situation was foreseeable. In fact, while the traffic law that prevents obstructing a highway does not provide the basis for the duty recognized here, organizing the protest to violate that statute is alleged to have been either calculated, or at least expected, to provoke a police response and, thus, a confrontation with the protestors.[10] Having allegedly organized

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[9] The primary allegations set forth in the plaintiff's petition are more particularly summarized as: (1) Mckesson "staged and organized" a protest on behalf of Black Lives Matter; (2) Mckesson knew of the violence that resulted in other previous Black Lives Matter protests; (3) Mckesson was in "Baton Rouge for the purpose of demonstrating, protesting and rioting to incite others to violence against police and other law enforcement officers;" (4) Mckesson staged "a protest/demonstration at the intersections of Airline and Goodwood Boulevard, which is the location of the Baton Rouge Police Department and which is a known public highway;" (5) Mckesson "knew police would be called to clear the public highway of protestors;" (6) Mckesson "was in charge of the protest and he was seen and heard giving orders throughout the day and night of the protests;" and (7) Mckesson "did nothing to calm the crowd and, instead, he incited the violence."

[10] For statutory violations, Louisiana has rejected a negligence per se theory, favoring, instead, analysis at the scope of the duty stage. The court in *Weber v. Phoenix Assur. Co. of New York*, 273 So. 2d 30, 33 (La. 1973) stated, "Moreover, violation of a criminal statute in combination with some resultant harm does not, in and of itself, impose civil liability. We must determine whether

the protest to provoke that confrontation, it was easily foreseeable that the resulting injury could occur.

The facts alleged require the conclusion that the protest was organized to provoke a police response. It is alleged that Mckesson "incited" the protesters and did nothing to stop them when the protest turned violent. It was foreseeable that a police officer would suffer injury when responding to a situation that occurred, at least in part, because Mckesson did not use care to conduct the protest in a lawful manner. Based on the facts alleged in the petition, it was foreseeable that a police officer may get hurt by the criminal actions of a third party during this protest. The facts alleged are sufficient to establish an ease of association between Mckesson's duty and the plaintiff's injury. Because it is alleged that Mckesson, with knowledge that such protests could turn violent, staged a protest in direct contravention of law, thereby provoking the police to respond, a person can easily associate the injury to the police officer with the alleged conduct. Once a confrontation is provoked, it is reasonable that the provocateur be potentially responsible for the foreseeable consequences which result from the confrontation.

"Special Relationship"

This court has generally refrained from finding a duty to protect persons from the criminal acts of third parties. *See Harris v. Pizza Hut of Louisiana, Inc.*, 455 So.2d 1364, 1371 (La. 1984). Generally, there is no duty to protect against or control the criminal acts of third parties unless a "special relationship exists [between the victim and the non-criminal defendant] to give rise to such a duty." *Beck v. Schrum*, 41,647 (La. App. 2 Cir. 11/1/06), 942 So. 2d 669, 672. While there is no jurisprudential definition of a "special relationship," cases finding such a relationship impose some higher degree of care solely because the relationship

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the prohibition in the statute is designed to protect from the harm or damage which ensues from its violation."

affords the victim a reasonable expectation of protection or safety. Restatement (Second) of Torts, § 315.[11]

Here, the defendants assert, and the plaintiff does not refute, that no special relationship existed between Mckesson and the injured police officer. Generally, that would end the inquiry and no liability or financial responsibility would attach to Mckesson for the criminal acts of the unknown criminal. However, close review of the "special relationship" cases reveal that these cases involve defendants held liable not for their own involvement in the criminal acts, but because their failure to act allowed for the criminal act. That rule of law does not apply when the defendant is alleged to have affirmatively acted to create the circumstance that facilitated the violent act. As noted by Dean Prosser, circumstances beyond those arising from a special relationship may give rise to responsibility for intentional torts of third parties. In his treatise, he writes, "There are other situations in which the defendant will be held liable because his *affirmative conduct* has greatly increased the risk or

[11] Courts have found "special relationships" between: (1) **parent and child**, *see Turner v. Bucher*, 308 So. 2d 270 (La. 1975) (where actions of child are tortious by normal standards, the child's parents are liable whether or not they could have prevented the act of the child; *see also* La. Civ. Code art. 2318; (2) **employer and employee** (*see LeBrane v. Lewis*, 292 So.2d 216 (La. 1974) (employer was liable for employee supervisor stabbing discharged employee in an employment related suit; *see also* La. Civ. Code art. 2320; (3) **carrier and passenger** (*see generally Gross v. Teche Lines*, 21 So. 378 (La. 1945) (carrier of passengers are required to exercise the highest degree of care, vigilance, and precaution for the safety of those it transports and is liable for the slightest negligence. *See also Luckette v. Bart's on the Lake, Ltd.* 602 So.2d 108, 112, (La. App. 4 Cir. 1992) (private transport company assumed a duty to protect third parties from the deviant behavior of those in its custody, particularly, "predictable risks of assaults;") (4) **innkeeper and guest** (*see Kraaz v. La Quinta Motor Inns, Inc.*, 410 So.2d 1048, 1053 (La.1982) (hotel liable for damages suffered by guests who were robbed and assaulted inside their hotel room when the desk clerk gave the robber the master key); *see also Banks v. Hyatt Corp.*, 722 F.2d 214 (5th Cir. 1984) (applying Louisiana law, a negligent innkeeper was liable for a third-party assault on the premises; (5) **shopkeeper and business visitor**, *see generally Posecai, supra*; *see also Green v. Infinity Intern., Inc.*, 95-2356 (La. App. 1 Cir. 6/28/96), 676 So.2d 234) (liability can be owed when the proprietor knows, or should know of the potential danger caused by criminal activity; (6) **restaurateur and patron**, (*see Harris v. Pizza Hut*, 455 So.2d 1364 (La. 1984) (any business which invites the public must take "reasonably necessary acts to guard against the predictable risk of assaults"; (7) **jailer and prisoner** (*see Wilson v. State*, 576, So.2d 490 (La. 1991) (victims of robbery committed by an escaped prisoner two weeks after his escape were entitled to recover from the State corrections department; and (8) **teacher and pupil** (*see D.C. v. St. Landry Par. Sch. Bd.*, 00-01304 (La. App. 3 Cir. 3/7/01), 802 So. 2d 19, 23, *writ denied*, 01-0981 (La. 5/25/01), 793 So. 2d 169) (school had a duty to supervise, which encompassed the foreseeable risk that a twelve-year-old female who leaves campus might be raped on her walk home.)

harm to the plaintiff through the criminal acts of others." (Emphasis added). *Prosser and Keeton on Torts,* Sec. 33, p. 201-203 (West 1984) (Footnotes omitted).

The allegations in this case put Mckesson outside the limiting scope of the "special relationship" line of cases. Here, it is not alleged that Mckesson, merely because he organized a protest, must act with a higher degree of care and afford all those who encounter the protest a certain degree of protection. Rather, it is alleged that his conduct was designed to *provoke* a violent encounter with the police; *i.e.*, "his affirmative conduct has greatly increased the risk or [sic] harm to the plaintiff through the criminal acts of others." *Id.* No special relationship is needed. If proven, Mckesson's actions provide the link between the criminal actor and the victim sufficient to attach financial responsibility to him.

Thus, while a "special relationship" typically is required to impose liability for third party conduct, here, the absence of a "special relationship" does not exclude liability. I find no merit to the proposition that a lack of a special relationship acts to bar this claim.

Conclusion

I find that Louisiana law recognizes a duty to use reasonable care so that a protest is conducted in a lawful manner. Further, based on the facts alleged in the petition, the risk of an officer being harmed by third party criminal activity is within the scope of that duty, thereby satisfying the "scope of the duty" element. To succeed on his claim, the plaintiff must also prove a breach of duty, causation-in-fact, and damages. This court was not tasked with completing that analysis, nor would it be appropriate to do so at this stage of the litigation, which asks simply whether the plaintiff has stated a cause of action. Additionally, I am also cognizant that under *NAACP v. Claiborne Hardware Co.*, 458 U.S. 888, 925-27 (1982), the imposition of civil liability on a defendant for a violent act committed by a third party is prohibited if it arises "in the context of constitutionally-protected activity"

and is appropriate only if the defendant himself "authorized, directed, or ratified" or otherwise manifested "a specific intent to further" those wrongs." I would expressly defer to the federal court to make any determinations about any protection afforded by the First Amendment in this case and whether Mckesson falls with the scope of liability authorized by *Claiborne*.

I respectfully concur.

SUPREME COURT OF LOUISIANA

No. 2021-CQ-00929

OFFICER JOHN DOE, POLICE OFFICER

VS.

DERAY MCKESSON; BLACK LIVES MATTER; BLACK LIVES MATTER NETWORK, INCORPORATED

On Certified Question from the United States Court of Appeals for the Fifth Circuit

GRIFFIN, J., dissents and assigns reasons.

The primary issue presented is whether, under the facts as alleged, Mr. Mckesson owes a duty to Officer Doe and whether the risk of the resulting harm was within the scope of that duty.[1] Justice Crain, in his well-written concurrence, correctly observes these are two distinct inquiries with unique considerations. The Fifth Circuit conflates these two inquiries without conducting the requisite policy analysis to determine whether a duty should exist.[2] *See Posecai v. Wal-Mart Stores,*

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[1] In certifying the questions to this Court, it was observed that we are "not limited to the text of the certified questions but may consider the complaint in its totality." *Doe v. Mckesson*, 2 F.4th 502, 505 (5th Cir. 2021) (Elrod, J., concurring). Prior to remanding the matter, the United States Supreme Court posed the relevant questions as "(1) whether Mckesson could have breached a duty of care in organizing and leading the protest and (2) whether Officer Doe has alleged a particular risk within the scope of protection afforded by the duty, provided one exists." *Mckesson v. Doe*, --- U.S. ---, 141 S.Ct. 48, 51, 208 L.Ed.2d 158.

[2] The Fifth Circuit relied heavily on La. R.S. 14:97 in that Mr. Mckesson's leading a protest down a public highway would foreseeably result in a confrontation with police. However, "a criminal statute does not automatically create liability in a particular civil case, because the statute may have been designed to protect someone other than the plaintiff, or to protect the plaintiff from some evil other than the injury for which recovery is sought." *Boyer v. Johnson*, 360 So.2d 1164, 1169 (La. 1978).

An assault on a police officer by a third party is not the risk addressed by the statute. *Doe v. Mckesson*, 947 F.3d 874, 879 (5th Cir. 2020) (Higginson, J., dissenting from denial of rehearing en banc); *State v. Winnon*, 28,654, p. 4 (La.App. 2 Cir. 9/25/96), 681 So.2d 463, 466 (observing La. R.S. 14:97 contemplates the "absence of foreseeable danger to human life" and is focused on "the protection of other motorists" from being impeded by obstructions). Under the section titled "Scope," the comment to La. R.S. 14:97 states:

> The division into two sections, one known as "aggravated obstruction of a highway of commerce" and the other, "simple obstruction of a highway of commerce," is to maintain consistency of form and to make the penalty fit the seriousness of the

Inc., 99-1222, p. 4 (La. 11/30/99), 707 So.2d 762, 766; *Mckesson*, --- U.S. ---, 141 S.Ct. at 51, 208 L.Ed.2d 158 (offering the example of "the moral value of protest [weighed] against the economic consequences of withholding liability"). Although Justice Crain's concurrence presents an excellent analytical framework, I respectfully disagree with the result reached in both his analysis and the opinion of this Court.

It is beyond citation that political protest carries a high moral value in our society. It is also true that protests which turn violent may not only result in injuries to police and bystanders but also damage to businesses and property – deterring such outcomes is sound policy. However, the finding of a duty in this case will have a chilling effect on political protests in general as nothing prevents a bad actor from attending an otherwise peaceful protest and committing acts of violence. While in such instances the organizers of a protest may ultimately be cleared of liability by the trier of fact, the costs of defending a lawsuit at the pre-trial phase are significant. Courts would see increased litigation from all sides of the political spectrum and the flow of political speech could hinge on which viewpoints had patrons with deeper pockets. Further, presenting such factual determinations to a jury risks the imposition of liability based on a juror's political views. *See Snyder v. Phelps*, 562 U.S. 443, 458, 131 S.Ct. 1207, 1219, 179 L.Ed.2d 172 (2011). Existing laws hold the perpetrators of wrongful acts criminally and civilly accountable. *See*, *e.g.*, La. R.S. 14:34.2 (criminal penalties for battery of a police officer); *Bell v. Whitten*, 97-2359, p. 12 (La.App. 1 Cir. 11/6/98), 722 So.2d 1057, 1064 ("a defendant's

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> crime. The first [La. R.S. 14:96] is based on the danger to human life, and the second [La. R.S. 14:97] on traffic obstruction.

Reliance on this statute is arguably questionable as Officer Doe's injuries do not appear to fall within "the scope of protection intended by the legislature." *Lazard v. Foti*, 02-2888, p. 6, (La. 10/21/03), 859 So.2d 656, 660-61. Nevertheless, I acknowledge the allegations as to Mr. Mckesson's past participation in protests accompanied by violence aid in bridging the foreseeability gap apparent from reliance on the statute alone.

particularly blameworthy conduct, such as intentional conduct or gross negligence, could be said to encompass the risk of injury to a policeman responding in the line of duty").

The assault on Officer Doe is unacceptable. Violence denigrates our political process and must be unequivocally repudiated. A balance must be struck between the freedom to express a political opinion in a peaceful manner and a respect for the rule of law. *See Doe*, 2 F.4th at 505 (Elrod, J., concurring) (citing *Cox v. Louisiana*, 379 U.S. 536, 554, 85 S.Ct. 453, 13 L.Ed.2d 471 (1965)). Reasonable jurists can disagree on the weighing of the moral, economic, and social factors articulated in Louisiana jurisprudence. However, for the concerns outlined above, I respectfully dissent and would refrain from imposing a duty in this matter.