

AFFIRMATIVE DUTIES IN TORT

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FORTY years ago Bohlen expressed the view that "There is no distinction more deeply rooted in the common law and more fundamental than that between misfeasance and non-feasance, between active misconduct working positive injury to others and passive inaction, a failure to take positive steps to benefit others, or to protect them from harm not created by any wrongful act of the defendant." ¹

The line between "active misconduct" and "passive inaction" is not easily drawn. The range of human conduct theoretically susceptible of tort consequence runs from the zenith of clearly affirmative misconduct (misfeasance) to the nadir of clear inaction (nonfeasance), but there exists an area of shadow-land where misfeasance and non-feasance coalesce. The existence of this shadow-land is well illustrated by Bohlen's famous example.² For one to use a chattel known to be defective in such a way as to create a serious risk of harm to others is palpably a misfeasance. On the other hand a failure to take steps to provide protection for people who come on one's premises without invitation and without permission is patently passive inaction, a non-feasance. But between those extreme cases consider a median situation where one uses a chattel for a particular purpose without having ascertained by inspection or otherwise whether it is fit for that purpose, with knowledge that the article, if defective, will create a serious risk of harm to others. Here there exists an admixture of nonfeasance and misfeasance. There is action—the utilization of the chattel—and there is nonfeasance—the failure to perform an inspection to ascertain whether or not the chattel was defective.

Many tort problems fall into the so-called pseudo-nonfeasance category.³ For example, a plaintiff is run down by an automobile driven by defendant by reason of the fact that defendant fails to sound his horn and fails to apply his brakes. Superficial analysis may suggest that this is a nonfeasance—that is, that the plaintiff is complaining of the defendant's omission to sound the horn and apply the brakes. In truth, however, the plaintiff is complaining of nothing of the sort. The gravamen of his cause of action is the anti-social *act* of the defendant in propelling the vehicle forward so as to run the plaintiff down,

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1. Bohlen, *The Moral Duty to Aid Others as a Basis of Tort Liability*, 56 U. OF PA. L. REV. 217, 219 (1908) (reprinted in BOHLEN, *STUDIES IN THE LAW OF TORTS* 291, 293 (1926)).

2. *Id.* at 220 n.6.

3. ELDREDGE, *MODERN TORT PROBLEMS* 14 (1941).

and the failure to use brakes and horn is merely the reason why the act is anti-social in character. This is the typical automobile negligence misfeasance. An item of omission is involved, it is true—omission to use ordinary care. But this nonfeasance of a duty of care is simply the reason why the *act* of physical contact is anti-social or delinquent. There is no pure nonfeasance because the defendant has acted.

Another difference is noticeable between action and inaction, and it is this difference which accounts in part for the divergent legal consequences often applied to misfeasance and nonfeasance. In an instance where the defendant has harmed the plaintiff by his action, he has been guilty of positively making the plaintiff's status worse: by affirmative measures he has created a new risk of harm. But where the defendant's alleged delinquency lies only in his passivity, he has merely failed to benefit the plaintiff by interfering in the latter's affairs.⁴

PRESENT STATUS OF THE LAW OF AFFIRMATIVE TORT DUTIES

A convenient way to comprehend the concept of nonfeasance is to classify the most familiar situations in which affirmative duties to act are held to exist. The present categorization does not purport to be exhaustive, but it does give a generalized picture of the range of affirmative duty in tort.

Duties Arising Out of the Occupancy of Land

Duties incident to the tenure of real property are imposed upon the owners and occupiers of such property, and the failure to perform such duties, technically a nonfeasance, results in liability towards certain categories of persons on the land or in areas adjacent to the land. The general proposition is that a land occupier is under a duty to make reasonable use of his property so as to cause no unreasonable harm to those in the vicinity of the property.⁵ The liability is predicated mainly

4. PROSSER, *TORTS* 191 (1941). Bohlen uses the analogy of mathematics. "In the one case the defendant, by interfering with plaintiff or his affairs, has brought a new harm upon and created a minus quantity, a positive loss. In the other, by failing to interfere in the plaintiff's affairs, the defendant has left him just as he was before; no better off, it is true, but still in no worse position; he has failed to benefit him, but he has not caused him any new injury nor created any new injurious situation. There is here a loss only in the sense of an absence of a plus quantity. It is this latter difference which in fact lies at the root of the marked difference in liability at common law for the consequences of misfeasance and non-feasance." Bohlen, *supra* note 1, at 220. Eldredge takes the same view. "There is a fundamental difference, I believe, between a misfeasance and a nonfeasance. . . . The man who is guilty of a misfeasance makes the other's condition worse than it was before, while the man who is guilty of a nonfeasance does not worsen the other's condition." ELDRIDGE, *op. cit. supra* note 3, at 13.

5. For an analysis of land duties in terms of reasonable and unreasonable user, see Smith, *Reasonable Use of One's Own Property as a Justification for Damage to a Neighbor*, 17 *COL. L. REV.* 383 (1917).

on possession of the realty rather than on ownership, the theory being that the possessor is in control and can more easily perform duties of protection.⁶

No effort is made here to delimit the full scope of a land occupier's liability for nonfeasance; it is sufficient to point out the broad outlines of responsibility. There exists, first of all, the traditional Anglo-American rule that the possessor of land does not have the affirmative obligation to protect persons outside the premises against risks incident to the natural condition of the land, such as the falling of a decayed tree upon a public highway.⁷ This rule grew up in an agricultural economy when land was largely in a natural state and when the burden of inspection would have been a heavy one. There are indications, however, that a rule imposing liability in respect to natural conditions may be arising in the urban centers of our society.⁸

With reference to persons who have actually entered the premises, liability for nonfeasance is dependent upon the legal tag which the court attaches to the plaintiff. If he be a "mere trespasser," that is, one on the land without permission and without business invitation, there is no affirmative duty to make the premises safe.⁹ This rule has been qualified by the "attractive nuisance" doctrine, under which many courts allow recovery for failure to put land in a safe condition for children whose trespasses could be reasonably anticipated.¹⁰

If the entrant be denominated a "licensee", *i.e.*, on land with permission but without business invitation,¹¹ no duty of care is owed to

6. A lessor out of possession is in general under no obligation to keep the premises in repair. *Phelan v. Fitzpatrick*, 188 Mass. 237, 74 N.E. 326 (1905); *Newman v. Golden*, 108 Conn. 676, 144 Atl. 467 (1928); *Wolf v. Kilpatrick*, 101 N.Y. 146, 4 N.E. 188 (1886). See *Harkrider, Tort Liability of a Landlord*, 26 MICH. L. REV. 260 (1928).

7. *Chambers v. Whelan*, 44 F.2d 340 (4th Cir. 1930) (no duty to inspect trees growing naturally on the premises to determine dangerous state of decay). *But cf.* *Brandywine Hundred Realty Co. v. Cofillo*, 55 F.2d 231 (3d Cir. 1931).

8. Indicative of this tendency may be *Brown v. Milwaukee Terminal Ry.*, 199 Wis. 575, 227 N.W. 385 (1929) (liability imposed for allowing tree to decay and collapse in city street). See also *Weller v. McCormick*, 52 N.J.L. 470, 19 Atl. 1101 (Sup. Ct. 1890).

9. RESTATEMENT, TORTS § 333 (1934); *Lary v. Cleveland, C., C. & I. R.R.*, 78 Ind. 323 (1881); *Augusta Ry. v. Andrews*, 89 Ga. 653, 16 S.E. 203 (1892).

10. *Railroad Co. v. Stout*, 17 Wall. 657 (U.S. 1873) and *Keffe v. Milwaukee & St. P. Ry.*, 21 Minn. 207 (1875) were the early American cases; the doctrine has sometimes been called the "turntable doctrine" by reason of the fact that those cases involved railroad turntables. See generally on the attractive nuisance doctrine *Hudson, The Turntable Cases in the Federal Courts*, 36 HARV. L. REV. 826 (1923); *Wilson, Limitations on the Attractive Nuisance Doctrine*, 1 N. C. L. REV. 162 (1923); *Aderman, The Attractive Nuisance Doctrine with Emphasis Upon its Application in Wisconsin*, 21 MARQ. L. REV. 116 (1937); RESTATEMENT, TORTS § 339 (1934).

11. RESTATEMENT, TORTS § 330 (1934). Occasionally the qualifying epithets "naked," "bare" or "mere" are used in referring to the licensee. The adjectival qualification seems largely meaningless, except perhaps to indicate a predilection in the court towards denial of liability.

make the premises reasonably safe for his arrival unless the attractive nuisance doctrine intervenes.¹² Yet, while the licensee is not entitled to demand of the land occupier that he make the premises safe, the modern rule appears to place upon the occupier an affirmative duty to warn of concealed dangerous conditions, and to that extent liability attaches for injury resulting from omission.¹³

Another category of persons on land is that of the "invitee" or "business visitor," customarily defined as one on land upon business which concerns the occupier of the land and upon invitation, actual or constructive.¹⁴ The occupier must exercise reasonable care to warn the business visitor or to make the premises safe for him in respect to dangerous activities or conditions of which the land occupier knows or which he could discover by reasonable inspection.¹⁵ Apparently this duty is exacted as a price for the economic benefit conferred or expected to be conferred by the visitor.¹⁶ It is a definite affirmative obligation, and liability will attach for nonfeasance.

Possibilities of liability for nonfeasance also exist on the part of vendors and lessors of land. Although a vendor's liability for nonfeasance after he has parted with possession is extremely restricted,¹⁷ he may be liable for failure to disclose to the vendee concealed dangers of which he knew and of which the vendee neither knew nor could be expected to discover by reasonable inspection.¹⁸ There is no obligation on the

12. *Louisville & N. R.R. v. Page*, 203 Ky. 755, 263 S.W. 20 (1924); *Holmgren v. Red Lake Falls Milling Co.*, 169 Minn. 268, 210 N.W. 1000 (1925).

13. RESTATEMENT, TORTS § 342 (1934). *Lawson v. Shreveport Waterworks Co.*, 111 La. 73, 35 So. 390 (1903); *Smith v. Southwest Missouri R.R.*, 333 Mo. 314, 62 S.W.2d 761 (1933); *Recreation Centre Corp. v. Zimmerman*, 172 Md. 309, 191 Atl. 233 (1937). A few courts still announce the rule that the only duty owed to a licensee is to refrain from wilful or wanton injury, but the increasing regard for human rights as opposed to property rights has caused this strict position rapidly to deteriorate. Representative of the rigidity of the strict rule are *O'Brien v. Union Freight R.R.*, 209 Mass. 449, 95 N.E. 861 (1911) and *Sohn v. Katz*, 112 N.J.L. 106, 169 Atl. 838 (1934).

14. Typical of invitees are customers in a store and patrons of restaurants, banks, and amusement places. The invitee category includes a large and amorphous group difficult of synthesis even around the broad principles of business purpose.

15. *Royer v. Najarian*, 60 R.I. 368, 198 Atl. 562 (1938); *Schraeder v. Great Atlantic & Pacific Tea Co.*, 220 Wis. 642, 265 N.W. 559 (1936). See Griffith, *Duty of Invitors*, 32 L. Q. REV. 255 (1916), and cf. Griffith, *Licensors and "Traps,"* 41 L. Q. REV. 255 (1925).

16. Bohlen, *The Basis of Affirmative Obligations in the Law of Tort*, 44 AM. L. REG. (N.S.) 209, 227 (1905) (reprinted in BOHLEN, *STUDIES IN THE LAW OF TORTS* 33 (1926)); SALMOND, *THE LAW OF TORTS* 476 (10th ed. 1945). There is an alternative theory that the basis of liability to invitees is an implied representation on the part of the land owner that he has made the premises safe for those persons entering for a purpose valuable in some way to the land occupier. PROSSER, *op. cit. supra* note 4, at 638.

17. *E. g.*, a vendor is not ordinarily responsible to persons outside the premises for risks incident to disrepair. *Palmore v. Morris*, 182 Pa. 82, 37 Atl. 995 (1897).

18. *Kilmer v. White*, 254 N.Y. 64, 171 N.E. 908, 10 B. U. L. REV. 567 (1930).

vendor to disclose defects which a reasonable inspection by the vendee would disclose.

The affirmative duty of a lessor is more extensive than that of a vendor, presumably because a lessor continues to derive economic benefit from ownership of the premises and therefore should not be permitted to escape liability entirely. While the lessor is not ordinarily responsible for conditions which develop subsequent to the transfer of possession,¹⁹ he may be liable, like the vendor, for concealed dangerous conditions existing at the time of the transfer of which he knew and of which the lessee could not be expected to learn by reasonable inspection.²⁰ Then again, if the land be leased for a public purpose, the lessor is held to an affirmative duty to inspect and repair the premises before transferring possession.²¹ And, of course, if the lessor retains control of part of the premises, such as common passageways, he has the ordinary duty of an occupier as to such portions.²² If the lessor covenants with the lessee to keep the premises in repair, he is liable in contract to the lessee for breach of the covenant²³ but is not, under the prevailing rule, liable to the tenant²⁴ or to third parties for tort damages by reason of his nonfeasance.²⁵

Duties Arising Out of the Manufacture and Supply of Chattels

The effect of economic and social developments on the course of the common law is seen in the growth pattern of the rules applicable to manufacturers and suppliers of chattels towards persons sustaining personal injury or property damage because of some defect in the make-up of the chattel.²⁶ These developments have necessitated many qual-

19. *Ward v. Fagin*, 101 Mo. 669, 14 S.W. 738 (1890); *Fisher v. Thirkell*, 21 Mich. 1 (1870). See also cases cited in note 6 *supra*, and *Harkrider*, *supra* note 6, at 260.

20. *Cowen v. Sunderland*, 145 Mass. 363, 14 N.E. 117 (1887); *Keegan v. G. Heileman Brewing Co.*, 129 Minn. 496, 152 N.W. 877 (1915). The same rule, of course, applies to a vendor of realty. See *Kilmer v. White*, *supra* note 18.

21. *Junkermann v. Tilyou Realty Co.*, 213 N.Y. 404, 108 N.E. 190 (1915) (amusement park); *Colorado Mortgage & Inv. Co. v. Giacomini*, 55 Colo. 540, 136 Pac. 1039 (1913) (hotel); *Folkman v. Lauer*, 244 Pa. 605, 91 Atl. 218 (1914) (grandstand).

22. *Sawyer v. McGillicuddy*, 81 Me. 318, 17 Atl. 124 (1889); *Inglehardt v. Mueller*, 156 Wis. 609, 146 N.W. 808 (1914).

23. *Schick v. Flesichhauer*, 26 App.Div. 210, 49 N.Y.Supp. 962 (1st Dep't 1898); *Davis v. Smith*, 26 R.I. 129, 58 Atl. 630 (1904).

24. *Hanson v. Cruse*, 155 Ind. 176, 57 N.E. 904 (1900); *Williams v. Fenster*, 103 N.J.L. 566, 137 Atl. 406 (1927).

25. *Cullings v. Goetz*, 256 N.Y. 287, 176 N.E. 397 (1931); *Harris v. Lewiston Trust Co.*, 326 Pa. 145, 191 Atl. 34 (1937); *Noble v. Marx*, 298 N.Y. 106, 81 N.E.2d 40 (1948). A growing minority rule would, however, create a tort duty growing out of the contract and extending to the tenant, the tenant's family, and to others on the land in the tenant's right. See *Ashmun v. Nichols*, 92 Ore. 223, 178 Pac. 234 (1919); *Dean v. Hershowitz*, 119 Conn. 398, 177 Atl. 262 (1935).

26. See *Clark*, *Let the Maker Beware*, 19 ST. JOHN'S L. REV. 85 (1945).

ifications of the rule originally laid down in *Winterbottom v. Wright*²⁷ that there is no duty to anyone other than the immediate vendee to employ reasonable care to discover defects.

The first exception was in permitting liability for an act of negligence in the preparation or sale of an imminently dangerous article which was intended to preserve, destroy or affect human life. In such a case the seller was held liable to third persons who suffered from his negligence.²⁸ In *MacPherson v. Buick Motor Co.*²⁹ Judge Cardozo further qualified the *Winterbottom v. Wright* holding. The modern rule seems to be as follows: A manufacturer owes the affirmative obligation to employ reasonable care in the manufacture or assembling of chattels which, while not necessarily dangerous if properly constructed, constitute a menace to life and limb if not properly made;³⁰ and this duty is owed not only to his immediate vendee, but to anyone likely to be harmed by the defective article while such a chattel is being lawfully used for the purpose intended.³¹ The *MacPherson* rule also applies to property damage,³² and has been extended to cover even the manufacturer of a defective part of a chattel.³³

Therefore, regardless of "privity of contract," the manufacturer is liable to the remote vendee when the article is known to be inherently dangerous;³⁴ when the article sold, while not dangerous if properly constructed, would be a menace if not carefully made;³⁵ and when there is negligence in manufacturing the article even if there is a duty on the part of some other person to inspect.³⁶ There may also be liability without fault—applied in food cases—on the theory of implied warranty of fitness for use.³⁷

27. 10 M. & W. 109, 152 Eng. Rep. 402 (1842). Plaintiff, driver of a coach, sought to recover from a contractor who had agreed with a third party to keep the coach in repair for injuries sustained when the coach broke down. No recovery was allowed because of plaintiff's failure to show "privity of contract."

28. *Thomas v. Winchester*, 6 N.Y. 397 (1852). See *Norton v. Sewall*, 106 Mass. 143 (1870) (sale of laudanum for rhubarb); *Peters v. Johnson*, 50 W.Va. 644, 41 S.E. 190 (1902) (sale of saltpeter for epsom salts).

29. 217 N.Y. 382, 111 N.E. 1050 (1916).

30. *Ibid.*

31. *Ibid.* *Berg v. Otis Elev. Co.*, 64 Utah 518, 231 Pac. 832 (1924); *Rosebrock v. General Elec. Co.*, 236 N. Y. 227, 140 N.E. 571 (1923).

32. *G.C.P. Fire Relief Ass'n v. Sonnenborn*, 263 N.Y. 463, 189 N.E. 551 (1934).

33. *Smith v. Peerless Glass Co.*, 259 N.Y. 292, 181 N.E. 576 (1932).

34. Cases cited note 28 *supra*.

35. *Noone v. Perlberg, Inc.*, 294 N.Y. 680, 60 N.E.2d 839 (1945); *Huset v. J. I. Case Threshing Machine Co.*, 120 Fed. 865 (8th Cir. 1903).

36. *Rosebrock v. General Elec. Co.*, 236 N.Y. 227, 140 N.E. 571 (1923).

37. *Boyd v. Coca Cola Bottling Works*, 132 Tenn. 23, 177 S.W. 80 (1915); *Culbertson v. Coca-Cola Bottling Co.*, 157 S.C. 352, 154 S.E. 424 (1930). *Contra: Chysly v. Drake*, 235 N.Y. 468, 139 N.E. 576 (1923).

Duties Arising Out of the Master-Servant Relation

A host of affirmative duties spring from the master-servant relation. The master is under a duty to provide a safe place of work,³⁸ satisfactory tools,³⁹ and competent fellow servants.⁴⁰ The master must also give warning of dangers which are not readily apparent,⁴¹ and must make reasonable rules for regulating the activities of the shop.⁴² As a practical matter the common-law action for breach of these duties has virtually disappeared with the adoption of the Workmen's Compensation statutes, but the obligations still exist as a basic minimum of employer duty.⁴³

Where the nature of the employment is such that the servant is quite dependent on his master for protection, and where the probability of help from other sources is minimal, it is not uncommon to hold the master for a failure to provide proper or prompt aid to an injured servant.⁴⁴ The principle is well exemplified by *Harris v. Pennsylvania R. R.*⁴⁵ which, though tinged with elements of maritime law, indicates the basic philosophy of the duty. There a seaman, without any negligence on the part of the officers or crew of the defendant's vessel, fell overboard through his own negligence, and the owners of the ship were held liable for a failure of the officers and crew to make a reasonable effort to save him.

Similarly, a railroad is under the duty of giving aid to an injured employee, at least where the situation is emergency in character so as

38. *Burns v. Delaware & A. Telegraph & Telephone Co.*, 70 N.J.L. 745, 59 Atl. 220 (1904); *Simone v. Kirk*, 173 N.Y. 7, 65 N.E. 739 (1902).

39. *Chicago Union Traction Co. v. Sawusch*, 218 Ill. 130, 75 N.E. 797 (1905); *Welle v. Celluloid Co.*, 175 N.Y. 401, 67 N.E. 609 (1903).

40. *Louisville & N. R.R. v. Davis*, 91 Ala. 487, 8 So. 552 (1890); *Coppins v. New York Cent. & H. R.R.*, 122 N.Y. 557, 25 N.E. 915 (1890).

41. *Brennan v. Gordon*, 118 N.Y. 489, 23 N.E. 810 (1890); *Daly v. Kiel*, 106 La. 170, 30 So. 254 (1901). No warning of obvious dangers is necessary. *Chicago & A. Ry. v. Bell*, 209 Ill. 25, 70 N.E. 754 (1904).

42. *Doing v. New York, O. & W. Ry.*, 151 N.Y. 579, 45 N.E. 1028 (1897); *Merrill v. Oregon Short Line R.R.*, 29 Utah 264, 81 Pac. 85 (1905).

43. On the theory and effect of the Workmen's Compensation statutes, see Bohlen, *A Problem in the Drafting of Workmen's Compensation Acts*, 25 HARV. L. REV. 328 (1912); Wambaugh, *Workmen's Compensation Acts; Their Theory and Their Constitutionality*, 25 HARV. L. REV. 129 (1911); Mechem, *Employer's Liability*, 44 AM. L. REV. 221 (1910).

44. *Hunicke v. Meramec Quarry Co.*, 262 Mo. 560, 172 S.W. 43 (1914); *Troutman's Adm'x v. Louisville & N. R.R.*, 179 Ky. 145, 200 S.W. 488 (1918); *Bessemer Land & Imp. Co. v. Campbell*, 121 Ala. 50, 25 So. 793 (1899). The duty does not exist to an employee outside the scope of the employment. *Matthews v. Carolina & N. W. Ry.*, 175 N.C. 35, 94 S.E. 714 (1917).

45. 50 F.2d 866 (4th Cir. 1931), 30 MICH. L. REV. 479 (1931), 17 CORN. L. Q. 505 (1932); see *The Iroquois*, 194 U.S. 240 (1904); *Cortes v. Baltimore Insular Line, Inc.*, 287 U.S. 367 (1932); *Scarff v. Metcalf*, 107 N.Y. 211, 13 N.E. 796 (1887).

to preclude the probability of aid from other quarters.⁴⁶ And it must provide protection against the weather for an employee working a great distance from any place of food and shelter.⁴⁷ The rule seems to be predicated upon the notion that railroad employment is frequently hazardous and migratory so as to place the employee in unusual and dangerous places.

Duties of Carriers to Passengers and Trespassers

It seems clear that a carrier is liable for failure to take reasonable steps to aid a passenger imperiled through no fault of its own. In *Yazoo & M. V. R.R. v. Byrd*⁴⁸ a passenger fell off a train through his own negligence, and the railroad employees left him lying near the track for more than three hours when they could easily have taken him to a physician at the next station. The railroad was held liable for failure to perform the duty of proper attention after an accident.⁴⁹ The imposition of such a duty seems in line with the policy of the law of imposing upon carriers a heavy burden of care towards their passengers.⁵⁰

46. *Troutman's Adm'x v. Louisville & N. R.R.*, 179 Ky. 145, 200 S.W. 483 (1918); *Ohio & M. Ry. v. Early*, 141 Ind. 73, 40 N.E. 257 (1895); *Schumaker v. St. Paul & D. R.R.*, 46 Minn. 39, 48 N.W. 559 (1891).

47. *Schumaker v. St. Paul & D. R.R.*, 46 Minn. 39, 48 N.W. 559 (1891). *But cf.* *Matthews v. Carolina & N. W. Ry.*, 175 N.C. 35, 94 S.E. 714 (1917). Plaintiff, an employee of defendant company, lived with the company's permission in one of its cars. When the car was threatened by flood waters plaintiff requested defendant to remove it to a safe area. Defendant declined the request, and plaintiff's goods were destroyed. The court held the defendant was under no duty to rescue the servant's goods from the consequences of a calamity for which defendant was not responsible.

48. 89 Miss. 308, 42 So. 286 (1906).

49. For a general discussion of this problem see Warner, *Duty of a Railway Company to Care for a Person It Has Without Fault Rendered Helpless*, 7 CALIF. L. REV. 312 (1919).

50. The carrier's duty of care is variously described by verbal formulae such as "great care," "highest care," "extreme caution." Perhaps the most prevalent formula, for what it may be worth, is "the utmost caution characteristic of very careful, prudent men." *Pennsylvania Co. v. Roy*, 102 U.S. 451, 456 (1880). In *Middleton v. Whitridge*, 213 N.Y. 499, 510, 108 N.E. 192, 197 (1915) the court defined the carrier's duty as follows: "If a passenger becomes sick and unable to care for himself during his journey, it seems plain that the carrier owes him an added duty resulting from the change of situation. That duty springs from the contract to carry safely. Of course, the carrier is not bound, unless it has notice of the fact, to observe that its passenger is ill, but if the defendant's servants knew, or had notice of facts requiring them, in the exercise of reasonable prudence, to know that the deceased was sick and in need of attention, it was their duty to give him such reasonable attention as the circumstances and their obligations to other passengers permitted . . ." See also *Hughes v. Gregory Bus Lines, Inc.*, 157 Miss. 374, 128 So. 96 (1930); *Central of Georgia Ry. v. Madden*, 135 Ga. 205, 69 S.E. 165 (1910); *Searcy v. Interurban Transp. Co.*, 189 La. 183, 179 So. 75 (1933).

A similar high affirmative duty might be expected of innkeepers to aid imperiled guests, according to the intimations of *Scholl v. Belcher*, 63 Ore. 310, 127 Pac. 968 (1912). *But cf.* *Plutner v. Silver Associates, Inc.*, 186 Misc. 1025 (N.Y.C.Mun.Ct. 1946),

On the question whether a railroad is liable for omitting to care for a trespasser who has been injured without fault on the part of the railroad the leading case is *Union Pacific Ry. v. Cappier*.⁵¹ There a trespasser was struck by a train without negligence by the railroad, and the railroad employees failed to care for him so that he died a few hours later. The court held there was no liability for this neglect,⁵² and the ruling, while impossible to sustain in point of morality, appears to be the law despite an isolated case to the contrary.⁵³

Duties Arising Out of the Gratuitous Undertaking

Where there is an undertaking to perform a gratuitous service, it is generally held that one is not liable for an absolute failure to act but may be liable if he has commenced performance.⁵⁴ Thus a railroad may be held liable to an injured traveller where it gratuitously undertakes to continue certain warning safeguards and fails to do so.⁵⁵ Similarly, liability was imposed where the owner of certain real estate was interested in purchasing adjoining property which was to be sold at auction, and another person gratuitously offered to represent him in bidding at

where plaintiff, while availing himself of the facilities provided in defendant's bathhouse at a seaside resort, fell and sustained injuries. The court held that defendant was under no legal duty to offer relief or assistance when a patron became sick or was injured on the theory that such a duty was not within the contemplation of the cost of admission to an enterprise held out to the general public.

51. 66 Kan. 649, 72 Pac. 281 (1903).

52. The court found itself "unable to approve the doctrine that when the acts of the trespasser himself results in his injury, where his own negligent conduct is alone the cause, those in charge of the instrument which inflicted the hurt, being innocent of wrongdoing, are nevertheless blameable in law if they neglect to administer to the sufferings of him whose wounds we might say were self imposed . . . For withholding relief from the suffering, for failure to respond to the calls of worthy charity, or for faltering in the bestowment of brotherly love on the unfortunate, penalties are found not in the laws of men, but in that higher law, the violation of which is condemned by the voice of conscience, whose sentence of punishment for the recreant act is swift and sure." *Union Pac. Ry. v. Cappier*, 66 Kan. 649, 653, 72 Pac. 281, 282 (1903). In commenting on this case Harper observes that "Such pious incantations are not very convincing for the notorious reason that the 'higher law' and 'the voice of conscience' frequently fail to move men to take the minimum action that a civilized society requires. It is to be hoped that some courageous court will hold that the situation just described creates a . . . legal duty to give such reasonable aid as the circumstances of the parties require and permit." HARPER, *TORTS* 199 (1933). To the same effect as the *Cappier* case see *Griswold v. Boston & Me. R.R.*, 183 Mass. 434, 67 N.E. 354 (1903).

53. *Whitesides v. Southern Ry.*, 128 N.C. 229, 38 S.E. 878 (1901). A trespasser was struck by a train and thrown off a trestle in a helpless condition. The court indicated that, while there was no evidence to show that the railroad was negligent in striking the trespasser initially, it would be negligence for the railroad employees not to stop and care for the trespasser if they had knowledge that the accident had occurred.

54. *Thorne v. Deas*, 4 Johns. 84 (N.Y. 1809).

55. *Bluhm v. Byram*, 193 Wis. 346, 214 N.W. 364 (1927); *Ray v. Hines*, 118 Wash. 530, 203 Pac. 929 (1922).

the sale. The failure of this latter individual to submit a bid on the owner's behalf, after he had commenced the undertaking by going to the auction, was held to result in liability.⁵⁶ This willingness to find a commencing of the undertaking—and hence a misfeasance—appears regularly in these cases.⁵⁷

The problem is perhaps best illustrated in the insurance application cases. A policy of insurance is of course a contract, with the additional requirement of insurable interest.⁵⁸ The legal relations between an applicant for insurance and the insurer, it is often said, are to be tested and governed by the principles applicable to contracts in general.⁵⁹ But there is conflict as to whether the analogy applies to the question of whether legal obligations arise only after a contract of insurance has been made, or whether in certain circumstances a legal duty exists to act promptly upon an application for insurance and to inform the applicant within a reasonable time whether his offer is accepted or rejected. On the theory that the legal relations between the applicant and the insurance company are purely contractual,⁶⁰ one view holds that delay, mere inaction by an insurance company in passing on an application, is not an acceptance, and that such delay does not constitute any breach of duty.⁶¹ The other view is that an insurance company upon receiving an application is under a legal duty to process the

56. Kirby v. Brown, Wheelock, Harris, Vought & Co., 229 App.Div. 155, 241 N.Y.Supp. 255 (1st Dep't 1930), *rev'd on other grounds*, 255 N.Y. 274, 174 N.E. 652 (1931).

57. An analogous problem exists in the question of tort liability for nonperformance of a contract. In Lichow v. Sowers, 334 Pa. 353, 6 A.2d 285 (1939) an attorney was instructed to file certain petitions on behalf of a client. He failed to do so and neglected to appear in court with the result that the client was adjudged in contempt. The attorney was held liable on the theory that since he had undertaken to do certain specific acts his failure to do so was a sufficient grounding for an action of tort. The court did seem to feel, however, that an action in assumpsit would have been more appropriate. Cf. Livingston v. Cox, 6 Pa. 360 (1847).

58. For a discussion of the requirement of insurable interest, see Harnett & Thornton, *Insurable Interest in Property, A Socio-Economic Reevaluation of a Legal Concept*, 48 COL. L. REV. 1162 (1948).

59. Zayc v. John Hancock Ins. Co., 338 Pa. 426, 13 A.2d 34 (1940). See Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COL. L. REV. 629 (1943).

60. "It is undisputed that there is a clear moral obligation upon the company to act without unreasonable delay; and it may very well be that there is a vague undefined understanding that it intends and is expected to do so. But a contract implied in fact must rest upon the intent of the parties; it requires an agreement, a meeting of the minds, an intent to promise and be bound." Prosser, *Delay in Acting on an Application for Insurance*, 3 U. OF CHI. L. REV. 39, 49 (1935).

61. Metropolitan Life Ins. Co. v. Brady, 95 Ind. App. 564, 573, 174 N.E. 99, 102 (1930). The court in the Brady case used this language: "This legal duty must arise by virtue of some express provision of the statute or from the contractual relation existing between the parties whereby a legal duty, not a moral duty, devolves upon the insurance company to act within a reasonable time upon an application submitted."

application within a reasonable time,⁶² and is liable for negligent delay in acting upon the application.⁶³

One reason given for imposing a tort duty upon the insurance company is the recognition that the business of insurance is quasi-public in character and that the nature of the risk is such that any appreciable delay in acting on the application is likely to result in the very loss against which the insurance is intended to indemnify.⁶⁴ Another possible reason for imposing the tort duty rather than taking the contract approach is rooted in the distinction between nonfeasance and misfeasance. It is the familiar rule that where there is nothing more than a voluntary promise, there is no obligation to carry it out, but once the defendant starts to act upon the promise he may be held liable in negligence where he fails to act as a reasonable man would under the circumstances.⁶⁵ Insurance agents accepting applications with the first premium attached may be said to have acted under this rule, so that their principals are liable in tort for unreasonable delay in acting on applications, even though liability in contract is foreclosed because of the lack of a binding promise.⁶⁶

ANALYSIS OF THE PRESENT LAW OF AFFIRMATIVE TORT DUTIES: THE BENEFIT PRINCIPLE

Is there any single consistent principle which can be found running through the apparently amorphous mass of affirmative duties in the law of torts? Is there anything in common which can serve to analogize the duties of land owners and occupiers, manufacturers and suppliers of chattels, employers, carriers, and those who have failed to perform gratuitous undertakings? The binding thread seems to be a *benefit principle*.⁶⁷ Affirmative duties are imposed only in situations where the one under a duty to act has voluntarily brought himself into a

62. The duty in tort seems to arise only in those cases where the application is accompanied by the first premium and is in every respect complete. *Thetford v. Hartford Fire Ins. Co.*, 27 Tenn. App. 600, 183 S.W.2d 314 (1943). It has been suggested that whether or not a premium has been paid should have no bearing on the question of the tort duty of prompt action so long as the applicant has performed all other requirements of the application. See Note, 40 YALE L. J. 121, 126 (1930).

63. *Boyer v. State Farmers' Mutual Hail Ins. Co.*, 86 Kan. 442, 121 Pac. 329 (1912); *Duffy v. Banker's Life Ass'n*, 160 Iowa 19, 139 N.W. 1087 (1913); *Dyer v. Missouri State Life Ins. Co.*, 132 Wash. 378, 232 Pac. 346 (1925); *DeFord v. New York Life Ins. Co.*, 75 Colo. 146, 244 Pac. 1049 (1924). See also the discussion in Funk, *The Duty of an Insurer to Act Promptly on Applications*, 75 U. OF PA. L. REV. 207 (1927).

64. *Bekken v. Equitable Life Assur. Soc. of the United States*, 70 N.D. 122, 138-9, 293 N.W. 200, 210-11 (1940).

65. *Siegel v. Spear & Co.*, 234 N.Y. 479, 138 N.E. 414 (1923).

66. Prosser, *supra* note 60, at 55.

67. The theory of benefit as the basis of positive duty is expounded by Bohlen, *supra* note 16.

certain relationship with others from which he obtains or expects benefit. There is in a sense a "consideration" moving to the person under the affirmative duty, although that "consideration" need not move from the one asserting the right correlative to the duty.⁶⁸ The unexpressed assumption seems to be that the compensatory nature of the relationship between the person sought to be held liable and the person injured is such an element of advantage as to justify the imposition of duties more exacting than those which society normally requires of its members.

Origins of the Benefit Principle

The earliest concept of tort was the direct invasion of another's rights by affirmative misconduct. The primitive courts were concerned primarily with violations of the King's peace, and the action of trespass was criminal in its origin, with a fine being levied upon conviction.⁶⁹ Trespass was the remedy for forcible and direct injuries to persons and property, no effort being made to exact retribution for failures to act. In a primitive society the prime aim was the prevention of forcible actions resulting in breaches of law and order; non-action was too remote and ethereal to warrant the imposition of liability.

Liability for failure to act was a later development. It arose in the circumstance where a consideration had been given and a duty assumed. Where there was an alleged affirmative duty to protect others, it was necessary that there be an *assumpsit* founded on a consideration.⁷⁰ In the case of certain public trades, such as innkeepers, carriers, barbers, and physicians, the notion grew up that the persons plying these trades were under a duty to accept any member of the public as a customer, and hence as to them no *assumpsit* had to be alleged. Yet,

68. Harper states the rationale of affirmative duties in these terms: "On the other hand, an affirmative duty may be imposed upon persons who are in no sense creating risks by their activities. The duty here goes further and comprehends protection against additional risks which are not brought into existence by the defendant. This duty is not general, but is confined only to persons occupying certain relations to others which are of such a character that the decencies of society require the affirmative duty for its orderly regulation. The law fastens upon certain social relationships certain corresponding responsibilities, and when the relationship is important enough to require its safeguarding by legal rights and liabilities, legal duties are attached thereto. Perhaps one of the most significant factors which has affected the development of the law here is the element of advantage in the relationship for the person upon whom affirmative obligations are imposed. *No such duty is imposed except in cases wherein the relationship is presumably of an advantageous or beneficial nature.*" HARPER, *TORTS* 197 (1933) (Emphasis added).

69. For a history of the action of trespass see Woodbine, *The Origins of the Action of Trespass*, 33 *YALE L. J.* 799 (1924), 34 *YALE L. J.* 343 (1925).

70. *Y. B. 3 Hen. VI, f. 36, pl. 33*: "If I bring deceit against one for this that he was my attorney and by his negligence and default I lost my land, in this case it is necessary that I declare how he was retained by me and took his fee."

while the necessity for a formal *assumpsit* supported by a consideration disappeared, the duty still rested on the firm base of an economic benefit flowing to the tradesman by reason of his regular business activities.

Apparently then the germ of the duty to take precautions to safeguard the safety of others was but an incident of the carrying on of a business for gain. Thus it is that Bohlen, speaking of the origin of affirmative obligations, expresses the view that "while everyone is bound to refrain from action probably injurious to others, no duty to take affirmative precautions for the protection of those voluntarily placing themselves in contact with him is cast upon anyone save as the price of some benefit to him. The duty is in fact founded on a consideration moving to the obligor, though not necessarily from the obligee."⁷¹ The same idea ran through the early English cases concerning real property obligations.⁷² Any duty imposed for nonfeasance was a duty growing out of a beneficial use of the property for a certain purpose and not out of ownership alone.⁷³

The Benefit Principle in the Modern Law of Affirmative Duties

By study of the situations in which an affirmative duty is imposed it is possible to see the steady operation of the benefit principle throughout the labyrinth of modern tort relationships. Taking the duties of owners and occupiers of land as a specimen, it is found that a justification for the heavy burden of duties surrounding possessors of land is found in the potential or actual benefit derived from the use or rental of such land. The land possessor has voluntarily performed the act of acquiring the land⁷⁴ and occupies the land, presumably with the purpose of reaping some form of benefit for himself, be it economic, social or psychological. A "consideration" therefore flows to the land possessor, and as a "price" for that consideration certain affirmative duties are imposed. The greater the benefit likely to accrue, the more extensive is the duty. As has been indicated, duties to business visitors are considerable in their affirmative aspect, while those to licensees are less in scope, and those to trespassers nonexistent until the frontier of actual misfeasance is crossed. The lines of duty and benefit follow

71. Bohlen, *supra* note 16, at 220.

72. Today liability of a possessor of land for nonfeasance may exist based on mere ownership without beneficial use, the old rule having been altered to that extent, but the idea of benefit is still paramount as indicated by the higher duty demanded towards business visitors who presumably confer greater benefits on the possessor of the land.

73. See *Giles v. Walker*, 24 Q. B. D. 656 (1890).

74. Bohlen seems doubtful of the voluntary character of the act of acquiring land in the case of inheritance. "The occupancy of real estate is, save perhaps when it comes into one's possession by inheritance, a conscious voluntary act." Bohlen, *supra* note 1, at 243. But even in the case of inheritance there must be an express or implied acceptance of the property, and to that extent the occupancy is voluntary.

each other in rough correlation on the graph of social obligations in respect to real property, and as benefit increases so does duty.

The same substratum of benefit which operates in the land occupier cases may be unearthed in the area of the obligation of vendors and lessors of realty. The liability of the vendor is substantially less than that of the lessor. The vendor has parted with possession, and his economic or other benefit derived from the land has ceased to exist as a continuing factor. The lessor on the other hand, though he has parted with possession, retains still a residuum of economic benefit, and, so long as that benefit continues, potentialities of liability remain in Damoclean fashion suspended over him. This is not to say that the sole operative principle here is that of benefit; patently it is not. Other factors are of broad import, for example, ability to control the premises and to effectuate repairs. The vendor's control is ended whereas the lessor's may sometimes remain, and this is one of the important elements in imposing upon the lessor a greater duty. That control is an important consideration is evidenced by the reluctance of the courts to enforce liability even against a lessor where he has parted with control. However, the presence of the control element, while a complicating factor in the analysis, does not seem to detract from the strength of the argument relative to the operation of the benefit principle in the land cases.

The benefit principle also appears as an explanation for the common carrier cases. The carrier obtains economic benefit from the carriage of its passengers and also from the labor of its employees. Hence the duty to protect them even in situations where they have become imperiled through no fault of the carrier, may be regarded as the "price" for the benefit conferred. The carrier has voluntarily entered into a relationship with such persons, and it cannot complain when disadvantageous results attach to that relationship rather than the expected advantageous ones. Postulating the existence of the benefit principle serves also to explain why the carrier is not held to a similar affirmative duty towards trespassers whom it has without legal fault injured. The carrier has not voluntarily entered into jural relations with the trespasser. It derives no benefit either actual or potential from the forced association with him, and is therefore held to no duty to aid the trespasser when perils befall him. To analogize to the law of contracts, there is here no consideration and hence no duty. This is not to assert that there should be no duty; the unwisdom of such judicial callousness towards basic humanitarian principles is manifest. The only point here made is that analytic distinction between the trespasser and the passenger or employee cases is possible on the level of the benefit principle.

The affirmative duties of manufacturers and suppliers of chattels also fit well within the framework of the benefit principle. These

persons have voluntarily placed themselves in relationships with their immediate vendees and in less direct fashion with those members of the consuming public who purchase and use the chattels. The whole aim of the manufacturer or supplier is to obtain economic benefit through the operation of the chain reaction represented by the manufacturer, wholesaler, retailer, and consumer. Since benefit accrues to the manufacturer or supplier through this chain, it is not an illogical corollary to require affirmative action, such as inspection, in order to safeguard the members of the chain. Admittedly the corollary of duty and benefit is not a necessary one; it does not follow that the most tenuous benefit justifies the most onerous duty. The extent of the duty is a matter of extrinsic policies. The attempt at this point is merely to show the presence of the benefit as a common influential factor in all the affirmative duty situations.

In the case of the master-servant relationship the master's affirmative duties can be related to the benefit received by virtue of the relationship. The economic well-being of the master is presumably enhanced by the employing of a servant, and certain duties towards the servant arise out of this employment. Again the benefit principle cannot be regarded as explaining the entire ambit of the master's duties because other factors also enter. There is the element of the master's control over the conditions of work and the place of work which seems an important consideration in casting upon him the duty to provide both a safe place of work and safe conditions. Then too the cases which have placed the heaviest burden on the master have involved fact situations wherein the peculiar nature of the employment made the servant unusually dependent upon the master as his sole means of aid.⁷⁵ As in the case of the sailor at sea, where the maritime law has always imposed high duties on the master, there are employments on land involving comparative isolation of the servant from others and consequent inability of the servant to provide for himself, and in such employments higher affirmative duties are likely to be demanded of the master. This indicates that, while the benefit principle operates in the master-servant relationship, it is not the total criterion of the extent of the master's duty. As in most affirmative duty situations, benefit is a *sine qua non* for the existence of duty, but other policy considerations dictate the orbit of duty.

In the developing area of tort liability for failure to perform gratuitous undertakings it is difficult to generalize with accuracy because of the particularly fluid nature of the subject matter. It may, however, be noted that here too is the same pattern of a relationship voluntarily assumed. The factor which is customarily absent from the pattern is

75. As in *Schumaker v. St. Paul & D. R.R.*, 46 Minn. 39, 48 N.W. 559 (1891) (railroad required to provide shelter against extremely inclement weather for worker employed miles away from food and shelter).

the benefit to the actor sought to be held liable. In many of these cases there is no benefit to the gratuitous actor, but only detriment to the person injured by the actor's failure to perform. The lack of the benefit factor in these situations, in addition to the "contract" rationale, may well account for the reluctance of the courts to move forward in imposing liability in this field unless the case can be turned into a misfeasance situation.

Liability, then, seems to be imposed as a "price" for the benefit conferred; where there is no benefit, actual or potential, there is no duty to act. Herein lies the basic distinction between moral and legal duty.

AFFIRMATIVE TORT DUTIES AND MORAL DUTIES

In analyzing the present law of affirmative obligations it has been seen that the basic consistent principle, insofar as consistency can be found, is the principle of benefit. Application of this principle, however, results in serious discrepancies between duties at law and the duties which moral consciousness would seem to dictate. "No action will lie against a spiteful man, who seeing another running into a position of danger, merely omits to warn him."⁷⁶ Nor will a physician be liable for a failure to attend a man who is in dire danger of death.⁷⁷ Similarly, one may stand idly by and watch another drown⁷⁸ or bleed to death.⁷⁹ A railroad may ignore a trespasser injured by operation of the train but without negligence of the railroad,⁸⁰ and a master need not rescue his servant's goods from the ravages of a flood though the master might easily do so.⁸¹ A particularly shocking decision refused to allow recovery for injuries to a child resulting from failure of those in charge of certain dangerous machinery to remove him from harm's ay.⁸²

76. *Gautret v. Egerton*, L. R. 2 C. P. 371, 375 (1867). See also *Buch v. Amory Mfg. Co.*, 69 N.H. 257, 260, 44 Atl. 809, 810 (1898): "With purely moral obligations, the law does not deal. For example, the priest and Levite who passed by on the other side were not, it is supposed, liable at law for the continued suffering of the man who fell among thieves, which they might and morally ought to have prevented or relieved. Suppose A, standing close by a railroad, sees a two-year-old babe on the track and a car approaching. He can easily rescue the child with entire safety to himself, and the instincts of humanity require him to do so. If he does not, he may, perhaps, justly be styled a ruthless savage and a moral monster; but he is not liable in damages for the child's injury, or indictable under the statute for its death."

77. *Hurley v. Eddingfield*, 156 Ind. 416, 59 N.E. 1058 (1901).

78. *Osterlind v. Hill*, 263 Mass. 73, 160 N.E. 301 (1928).

79. *Riley v. Gulf, C. & S. F. Ry.*, 160 S.W. 595 (Tex. Civ. App. 1913); *Allen v. Hixson*, 111 Ga. 460, 36 S.E. 810 (1900).

80. *Union Pac. Ry. v. Cappier*, 66 Kan. 649, 72 Pac. 231 (1903); *Griswold v. Boston & Me. R.R.*, 183 Mass. 434, 67 N.E. 354 (1903); cf. *Whitesides v. Southern Ry.*, 128 N.C. 229, 38 S.E. 878 (1901).

81. *Matthews v. Carolina & N.W. Ry.*, 175 N.C. 35, 94 S.E. 714 (1917).

82. *Buch v. Amory Mfg. Co.*, 69 N.H. 257, 44 Atl. 809 (1898).

While the absence of benefit to the person sought to be held liable is the primary distinction between these so-called "moral obligation" cases and the traditionally recognized situations in which liability for nonfeasance is imposed, there are additional reasons for judicial reluctance to ignore that distinction. The "rugged individualism" of the common law, historically viewed, tends to regard men as independent and self-reliant. The laissez-faire approach of the common law restrained men from committing acts of affirmative harm but did not make the government an agency for forcing men to help each other. Another unexpressed judicial premise has been the feeling that it is a more serious restraint on personal freedom to require a person to act than it is to place limits on his liberty to act.⁸³

Also militating against the recognition of moral duties is the oft-encountered difficulty of determining upon whom the responsibility for action should rest and under what circumstances they should be imposed. Everyone must refrain from committing affirmative wrongs. But the problem is more intricate in the case of negative wrongs. Suppose *A* is in danger and fifty men are at hand to rescue him. Must all attempt the rescue under pain of liability? To what extent must a man go in attempting to rescue or to give aid? Presumably he need not risk his own life, but still the problem exists of drawing the line at some point short of actual risk of life.⁸⁴ These are the kinds of problems which have created judicial doubts as to the propriety of seeking to equate law and morality in tort, and which courts will have to work out step by step in demarcating the scope of any new liability.⁸⁵

83. But as has been pointed out, "Neither of these assumptions [the notions of individual self-reliance and freedom from compulsion to act] is universally true. . . . No matter how rugged the owner of the burning building, [in *Louisville & N. R.R. v. Scruggs & Echols*, 161 Ala. 97, 49 So. 399 (1909)] his property depended for its preservation on the affirmative acts of the railroad employees—acts which they were evidently not disposed to render out of kindness, and which he was in no position to induce them to perform by bargaining. Nor would a legal duty to move the train have subjected either the employees or the railroad company itself to anything having the slightest resemblance to slavery." Hale, *Prima Facie Torts, Combination and Non-Feasance*, 46 Col. L. Rev. 196, 214 (1946).

84. See Allen, *Legal Duties*, 40 YALE L. J. 331, 369 (1931).

85. Analogous problems in respect to the creation of affirmative duties arise in the criminal law. Livingston in *Code of Crimes and Punishments*, in 2 COMPLETE WORKS 126, 127 (1873) proposed that one should be considered guilty of homicide who neglects to save life when he could do so "without personal danger, or pecuniary loss." *But cf.* MACAULAY, A PENAL CODE PREPARED BY THE INDIAN LAW COMMISSION 103-6, n.M., criticizing Livingston's proposal and adding: "What we propose is this, that where acts are made punishable on the ground that they have caused, or have been intended to cause, or have been known to be likely to cause a certain evil effect, omissions which have caused, which have been intended to cause, or which have been known to be likely to cause the same effect shall be punishable in the same manner; provided that such omissions were, on other grounds illegal. An omission is illegal . . . if it be an offence, if it be a breach of some direction of law, or if it be such a wrong as would be a good ground for a civil action. . . ." This latter proposal was adopted. See INDIAN PENAL CODE Art. 593 (1930). *Cf.* the rule proposed by Prof. Ames: "One who fails to

SUMMARY AND CONCLUSIONS

The early history of the common law evinces a tendency to grant redress only for active misfeasances. Liability for omissions to act belonged to a later period. It first worked its way into the law in situations where there was an actual *assumpsit* supported by a consideration. As tort and contract law diverged, the doctrine of consideration remained as an overt factor in breach of contract suits for omissions to act, but in tort the notion of consideration became less formalized and unnecessary as a procedural allegation. Yet even in tort the notion of benefit to the obligor remained, and the situations in which liability was imposed for nonfeasance were situations wherein a beneficial relationship existed on the part of the obligor towards the obligee. The liability of owners and occupiers of land, manufacturers and suppliers of chattels, employers, and carriers all illustrate this principle; since such parties are in a beneficial relationship with certain classes of persons they are held liable to such classes for nonfeasance. Liability is rarely imposed upon persons who fail to perform gratuitous undertakings because by and large no beneficial relationship there exists.

The great disparity between legal and moral obligations lies in the area where the person under a moral duty is not in such a relationship towards the obligee as involves benefit, as in the case of a failure of a person to rescue a stranger. In such cases there is no antecedent beneficial relation between the parties and hence no duty to act.

Liability for nonfeasance, despite its fearsome and radical connotations in the minds of some courts, is nothing novel in tort law. Such liability has existed for centuries in the areas involving benefit to the obligor; it is but a short extension to impose this liability for breach of clear moral obligations even if there be no relationship of antecedent benefit. At least in the situation where one can readily aid another in saving life, limb or property, without danger and without serious inconvenience, it seems that the law should add to the roster of present affirmative duties the duty of humanitarianism. Some may object that it will be unduly burdensome to draw the line in this new area of liability. But to argue against the enforcement of obvious moral duties on the ground of administrative inconvenience is simply to reiterate the ancient argument against all growth in the law and to forget that the common law proceeds on the assumption that a "just line drawn with difficulty exceeds in value a simple line which works disproportionate injustice."⁸⁶

interfere to save another from impending death or great bodily harm, when he might do so with little or no inconvenience to himself, and the death or great bodily harm follows as a consequence of such inaction, shall be punished criminally and shall make compensation to the party injured or to his widow and children in case of death." Ames, *Law and Morals*, 22 HARV. L. REV. 97, 113 (1908).

86. Harnett & Thornton, *Insurable Interest in Property: A Socio-Economic Re-evaluation of a Legal Concept*, 48 COL. L. REV. 1162, 1183 (1948).

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