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# Torts -- North Carolina's "Good Samaritan" Statute

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the objectives of the association and not a " 'detached and disinterested generosity' which is the requisite of a gift under § 102."<sup>42</sup>

The last case dealing with strike benefit payments is that of *Mabel Phillips*.<sup>43</sup> The facts in *Phillips* are almost identical to those in *Hagar*, and the tax court relied heavily on *Hagar* in holding the benefits taxable. In *Phillips*, the taxpayer was a journeyman stereotyper and a member of a local of the Stereotypers' and Electrotypers' International Union that struck the newspaper where he was employed. To receive his benefit payments, taxpayer had to be a member of the union in good standing and had to "sign-in" daily at the strike headquarters. The amount of his payments, which were substantial in comparison with his salary, was not dependent upon his marital status, number of dependents or financial need, but was dependent solely upon his classification as a journeyman. The court concluded that these factors, plus a finding that the union was morally obligated under its constitution to make the payments once the taxpayer went on strike, prevented them from being considered as a gift.

While other areas of the gift *vs.* income dispute may remain "unclear and uncertain," it would seem that the decisions in *Godwin*, *Hagar*, *Halsor*, and *Phillips* have removed some of the confusion as to the income tax consequences of union strike benefit payments. Although the question whether a strike benefit payment in a given case is a gift or taxable income still remains a factual one, it seems certain that the benefits received in any case in which the facts are not very nearly on all fours with *Kaiser* cannot be classified as a gift.

THOMAS E. CAPPS

#### Torts—North Carolina's "Good Samaritan" Statute

The 1965 North Carolina General Assembly passed a "Good Samaritan" statute which provides that:

Any person who renders first aid or emergency assistance at the scene of a motor vehicle accident on any street or highway to any person injured as a result of such accident, shall not be

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<sup>42</sup> *Id.* at 740.

<sup>43</sup> P-H TAX CT. REP. & MEM. DEC. ¶ 65, 268 (1965).

liable in civil damages for any acts or omissions relating to such services rendered, unless such acts or omissions amount to wanton conduct or intentional wrongdoing.<sup>1</sup>

Apparently the purpose of the act is to encourage aid to persons injured in automobile accidents. The underlying rationale seems to be that the legislation will encourage aid at the scene of accidents by removing the possibility of liability for negligence.<sup>2</sup>

Although similar statutes have been passed by many other states,<sup>3</sup> there remain questions as to the constitutionality, the necessity, and the effectiveness of such statutes.

The statutes have been attacked as unconstitutional on the ground that they abolish common-law remedies in violation of state constitutional guarantees of civil remedies.<sup>4</sup> The North Carolina Constitution provides that "every person for an injury done him in his lands, goods, person, or reputation, shall have remedy by due course of law. . . ."<sup>5</sup>

Statutes which have eliminated liability for injuries caused by negligent conduct, but have left unaltered liability for injuries caused by higher degrees of misconduct, have been held constitutional as mere restrictions of remedies, not a complete removal of them.<sup>6</sup> Other states have upheld the abolition of the common-law remedy for breach of promise to marry.<sup>7</sup> However, in Illinois under a constitutional provision similar to North Carolina's,<sup>8</sup> the abrogation of the remedy for alienation of affections was held unconstitutional.<sup>9</sup> In Texas, also under a constitutional provision similar to North Carolina's,<sup>10</sup> statutory abolition of municipal liability for injuries

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<sup>1</sup> N.C. GEN. STAT. § 20-166(d) (Supp. 1965).

<sup>2</sup> For the view that emergency aid is often withheld for fear of liability see Kearney, *Why Doctors Are Bad Samaritans*, READER'S DIGEST, May, 1963, p. 87; Survey, NEW MEDICAL MATERIA, April, 1961, p. 30.

<sup>3</sup> For a comparison of various "Good Samaritan" statutes see 13 DE PAUL L. REV. 297 (1964).

<sup>4</sup> See 43 B.U.L. REV. 140 (1963); 41 NEB. L. REV. 609 (1962).

<sup>5</sup> N.C. CONST. art. I, § 35.

<sup>6</sup> *Emberson v. Buffington*, 228 Ark. 120, 306 S.W.2d 326 (1957). The dissenting opinion expresses the opposing view that a person injured as the result of a negligence of another has a remedy only for that negligence, and a statute that withdraws liability for negligence completely withdraws the remedy. *Id.* at 130, 306 S.W.2d at 332.

<sup>7</sup> *Fearon v. Treanor*, 272 N.Y. 268, 5 N.E.2d 815 (1936).

<sup>8</sup> ILL. CONST. art. II, § 19.

<sup>9</sup> *Heck v. Schupp*, 394 Ill. 296, 68 N.E.2d 464 (1946).

<sup>10</sup> TEX. CONST. art. I, § 13.

sustained on the streets and sidewalks was declared unconstitutional.<sup>11</sup>

In *Osborn v. Leach* the North Carolina court stated by way of dictum that statutory impairment of the right to recover for an injury would be unconstitutional.<sup>12</sup> The court has, however, held the Workman's Compensation Act,<sup>13</sup> which in some instances substitutes statutory remedies for common-law remedies, to be a reasonable exercise of the police power.<sup>14</sup> *Quaere*, whether the court will view the Good Samaritan statute as a constitutional restriction of the remedy, rely on *Osborn* and hold it unconstitutional, or uphold it as a reasonable exercise of the police power.

If the statute proves constitutional, its necessity may still be questioned. The act adds no additional inducement to persons already under a duty to aid the injured. In North Carolina these include persons legally responsible for the original injury<sup>15</sup> and the driver, regardless of fault, of any automobile involved in the accident.<sup>16</sup>

Even where there is no such antecedent duty, the act seems unnecessary since it does not appear that under common-law rules liability has been unjustly imposed in the Good Samaritan situation.<sup>17</sup> The general rule is that one who voluntarily undertakes to

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<sup>11</sup> *Lebohm v. City of Galveston*, 154 Tex. 192, 275 S.W.2d 951 (1955). On rehearing the court stated two instances in which the abolition of remedies had been sustained:

Thus it may be seen that legislative action withdrawing common-law remedies for well established common-law causes of action for injuries to one's "lands, goods, person, or reputation" is sustained only when it is reasonable in substituting other remedies, or when it is a reasonable exercise of the police power in the interest of the general welfare.

*Id.* at 199, 275 S.W.2d at 955.

<sup>12</sup> 135 N.C. 628, 631, 47 S.E. 811, 812 (1904).

<sup>13</sup> N.C. GEN. STAT. §§ 97-101 to -122 (1965).

<sup>14</sup> *Lee v. American Enka Corp.*, 212 N.C. 455, 193 S.E. 809 (1937); *Heavner v. Town of Lincolnton*, 202 N.C. 400, 162 (S.E. 909 (1932)).

<sup>15</sup> *Parish v. Atlantic Coast Line R.R.*, 221 N.C. 292, 20 S.E.2d 299 (1942). See generally PROSSER, TORTS 338 (3d ed. 1964); RESTATEMENT (SECOND), TORTS § 322 (1965).

<sup>16</sup> N.C. GEN. STAT. § 20-166(c) (1953), as amended, N.C. GEN. STAT. § 20-166(c) (Supp. 1965).

<sup>17</sup> When liability has been imposed on a volunteer, there has usually been some substantial departure from the accepted standard of conduct. The most common departure seems to be a long delay in obtaining medical assistance for the injured person after he has been taken into the exclusive care and control of the volunteer. See, *e.g.*, *Gates v. Chesapeake & O. Ry.*, 185 Ky. 24, 213 S.W. 564 (1919); *But see* *Steckman v. Silver Moon, Inc.*, 77 S.D. 206, 90 N.W.2d 170 (1958).

aid another is held to the exercise of reasonable care under the circumstances to protect the safety of the person he aids.<sup>18</sup> However, the care that is reasonable in the emergency situation is only that degree of care that would be exercised by a reasonable man *in a like emergency*.<sup>19</sup>

Generally Good Samaritan statutes have been deemed necessary to encourage aid of physicians and other professionally trained persons who fear malpractice claims.<sup>20</sup> In fact, many states have limited the immunity to this class of persons.<sup>21</sup> Among the reasons given for the fear of liability are reported estimates that from six to nine thousand claims for medical negligence or malpractice are filed each year,<sup>22</sup> and that one out of seven physicians has been subjected to such a claim.<sup>23</sup>

The view has been taken that the "plight" of physicians has been exaggerated.<sup>24</sup> From a survey of physicians in Connecticut, it was concluded that the effect of a malpractice suit upon the practice of a physician is much less than is generally believed.<sup>25</sup> Another report indicated that such suits do not have a "serious or extended effect" on the physician's practice.<sup>26</sup> More specifically, an American Medical Association search found no appellate cases involving physicians at roadside emergencies.<sup>27</sup> Furthermore, an investigation of professional liability insurance claims indicated that few mal-

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<sup>18</sup> PROSSER, TORTS 339 (3d ed. 1964).

<sup>19</sup> *Kataoka v. May Dep't Stores Co.*, 28 F. Supp. 3 (S.D. Cal. 1939); *Owl Drug Co. v. Crandall*, 52 Ariz. 322, 80 P.2d 952 (1938); *Shloss Poster Advertising Co. v. Hallman*, 255 N.C. 686, 122 S.E.2d 513 (1961).

<sup>20</sup> See Kearney, *supra* note 2; STETLER & MORITZ, DOCTOR AND PATIENT AND THE LAW 334 (4th ed. 1962); Survey, NEW MEDICAL MATERIA, *supra* note 2.

<sup>21</sup> See, e.g., CAL. BUS. & PROF. CODE § 2144; NEB. REV. STAT. § 25-1152 (Supp. 1963); WIS. STAT. ANNO. § 147.17(7) (1963).

<sup>22</sup> Silverman, *Medicine's Legal Nightmare*, SATURDAY EVENING POST, April 11, 1959, p. 13.

<sup>23</sup> Committee on Medicolegal Problems, *Professional Liability and the Physician*, 183 A.M.A.J. 695 (1963).

<sup>24</sup> Averbach, *Good Samaritan Laws, CASE AND COMMENT*, March-April, 1964, p. 13; Steincipher, *Survey of Medical Professional Liability in Washington*, 39 WASH. L. REV. 704, 707 (1964).

<sup>25</sup> See Wyckoff, *The Effects of a Malpractice Suit Upon Physicians in Connecticut*, 176 A.M.A.J. 1096 (1961).

<sup>26</sup> *How State Medical Society Executives Size Up Professional Liability*, 164 A.M.A.J. 580, 582 (1957).

<sup>27</sup> Steincipher, *supra* note 24, at 706 n.21 (citing DOCTOR & LAW, Nov. 3, 1963, p. 3).

practice claims have been based on the typical Good Samaritan situation.<sup>28</sup>

Even if a negligence action is brought against a physician, the plaintiff may have difficulty establishing that the physician failed to fulfill his legal duty under the circumstances surrounding the roadside treatment.<sup>29</sup> Since cases involving knowledge peculiar to the science of medicine require expert testimony,<sup>30</sup> the plaintiff must generally produce as expert witnesses other physicians, who are often reluctant to testify against fellow physicians.<sup>31</sup> Assuming such testimony is available, the plaintiff must show that the defendant physician failed to have the skill and learning possessed by other physicians similarly situated,<sup>32</sup> or that he failed to exercise the required care, which is only reasonable care and diligence *under the circumstances*.<sup>33</sup>

It has been suggested that it is not the fear of the ultimate liability, but the "involvement" resulting from the commencement of the action of malpractice or the mere allegation of negligence, that is harmful to the reputation of the physician.<sup>34</sup> If, as it has been indicated, allegations of negligence do not often arise as a result of roadside treatment,<sup>35</sup> it seems that the fear of liability in such situations has resulted from a carry-over from the increasing fear of malpractice claims generally. Perhaps some approach to this problem other than the Good Samaritan statute would have been more appropriate.

The fact that the North Carolina version has eliminated some of the problems of interpretation arising under other "Good Samaritan" statutes<sup>36</sup> does not seem sufficient to insure its effectiveness.

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<sup>28</sup> *Id.* at 706 n.21 (citing A.M.A. NEWS, Oct. 26, 1964, p. 14, col. 2).

<sup>29</sup> Devices have been employed in some jurisdictions to facilitate the plaintiff's recovery in malpractice actions. For a discussion of the application of some of these devices see 64 COLUM. L. REV. 1301, 1304 (1964). Despite such attempts it is suggested that physicians occupy a protected and favored position at law. Steincipher, *supra* note 24, at 732.

<sup>30</sup> *Hawkins v. McCain*, 239 N.C. 160, 79 S.E.2d 493 (1954).

<sup>31</sup> See Curran, *Professional Negligence—Some General Comments*, 12 VAND. L. REV. 535, 539 (1959).

<sup>32</sup> *Hawkins v. McCain*, 239 N.C. 160, 79 S.E.2d 493 (1954).

<sup>33</sup> *Id.* at 168, 79 S.E.2d at 499.

<sup>34</sup> See Curran, *supra* note 31, at 542.

<sup>35</sup> See Steincipher, *supra* note 27, at 706.

<sup>36</sup> Problems of interpretation arise from the use of such uncertain terms as "gross negligence," "emergency situation," "emergency care," and "good faith." For criticism of such language in other statutes see 64 COLUM. L. REV. 1301, 1308 (1964); 13 DE PAUL L. REV. 297, 300 (1964); 75 HARV. L. REV. 641 (1962).

In order to encourage the aid of volunteers, the statute must first be widely publicized, and it must give adequate assurance that the threat of liability for negligence has been eliminated.

The statute will probably be publicized through professional journals as well as through ordinary news media. Nevertheless, persons who have allegedly failed to offer aid for fear of involvement may not be completely assured that the threat has been removed. Though the statute bars an action for negligence, the injured person might still allege wanton conduct.<sup>37</sup> There seems to be no assurance that physicians will be protected against common-law liability for abandonment by the statute.<sup>38</sup> Furthermore, the fact that the statutes vary from state to state as to persons and conduct protected<sup>39</sup> seems sufficient to defeat their effectiveness as to interstate travelers.<sup>40</sup>

In light of this discussion it is concluded that the enactment of the statute will be of little value. In the first place it may be unconstitutional. Secondly it seems to be directed at an evil that may not exist at all. Finally the statute may not be effective in encouraging aid from those to whom it is properly directed.<sup>41</sup>

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<sup>37</sup> Wanton conduct is conduct which is in "conscious and intentional disregard of and indifference to the rights and safety of others." *Hinson v. Dawson*, 244 N.C. 23, 28, 92 S.E. 2d 393, 397 (1956). However, in an action for injuries resulting from operation of an automobile the evidence showed a failure to keep a proper lookout and a failure to maintain control of the automobile. It was held that there was a question for the jury whether such conduct constituted wanton conduct. *Harper v. Harper*, 225 N.C. 260, 34 S.E.2d 185 (1945) (construing South Carolina "guest statute").

<sup>38</sup> Once a physician has undertaken to render services, he must continue such services, unless there is a limitation by contract, until the treatment is no longer necessary, or until the relationship is dissolved by the parties, or until reasonable notice has been given so that the patient may have an opportunity to engage the services of another. *Groce v. Myers*, 224 N.C. 165, 29 S.E.2d 553 (1944). The statute protects acts or omissions *relating to such services rendered*. It is possible, at least, that the act of leaving an injured person after having undertaken to aid him will not be found sufficiently related to the services to be protected, or that it will be found to be wanton conduct that is not protected by the statute.

<sup>39</sup> For a comparative treatment of the various statutes see 13 DE PAUL L. REV. 297, 301 (1964).

<sup>40</sup> It seems highly unlikely that such persons would be aware of the particular provisions of each statute, if they knew a statute existed.

<sup>41</sup> On its face the statute applies to any person who renders aid under the designated circumstances. By literal interpretation it seems that one who has been responsible for an original injury would be relieved of liability for negligence in rendering aid to the injured person. Perhaps the court will avoid this undesirable result by interpreting the statute as relieving the tort-feasor of liability for negligence in his capacity as rescuer but not relieving him of his liability for aggravation as original tort-feasor. Normal-

It seems that a possible result of the statute is that emergency aid will not be encouraged in fact, yet a person injured as a result of conduct that is a substantial departure from the accepted conduct in like situations, but less than wanton conduct, would be denied relief on the questionable belief that such denial has been necessary to achieve a broader public service.

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ly such tort-feasor is liable for the natural and probable consequences of his tort, including aggravation. *Bell v. Hankins*, 249 N.C. 199, 105 S.E.2d 642 (1958).