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Recognizing the Importance of Remoteness to the Duty to Rescue

Peter F. Lake

RECOGNIZING THE IMPORTANCE OF REMOTENESS TO THE DUTY TO RESCUE

*Peter F. Lake**

INTRODUCTION 316
I. DUTY TO RESCUE: TRADITIONAL AND RESTATEMENT (SECOND) OF TORTS APPROACHES 318
A. Historical Common Law "No Duty" To Aid: Misfeasance, Nonfeasance, or Something Else? 319
B. No "Duty" To Aid? Complexity and Indeterminacy in the Restatement (Second) of Torts 329
II. CASES WHICH SUPPORT LIABILITY IN THE REMOTENESS-AND-RESCUE FACT PATTERN 333
A. Depue*: Humanitarianism on Land* 334
B. Hutchinson*: Humanitarianism at Sea* 341
C. Some Cases Involving Cars and Trains 347
D. Unusual Instances of Isolation and the Power of Humanitarian Concepts 352
III. RECOGNIZING A REMOTENESS-AND-RESCUE RULE 359
A. A Broader Conception of Affirmative Duty and the Duty To Rescue 364
CONCLUSION 365

* Professor of Law, Stetson University College of Law; J.D. 1984, Harvard Law School; A.B. 1981, Harvard University. Special thanks to Lynn Holdsworth and Drake Buckman, my two fine research assistants.

INTRODUCTION

In the face of continuous academic attacks,[1] one body of tort law has survived this century, at least superficially, intact[2]—the duty (or lack thereof) to rescue.[3] Today, it is commonly understood that there is no general, nonstatutory duty to rescue another in peril,[4] not even a minimal duty that could be discharged by a riskless warning,[5] absent a special relationship.[6] Apart from some notable decisions which overtly challenge the concept of "no duty to rescue,"[7] rescue doctrine

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1. *See* John M. Adler, *Relying upon the Reasonableness of Strangers: Some Observations About the Current State of Common Law Affirmative Duties To Aid or Protect Others*, 1991 WIS. L. REV. 867; James B. Ames, *Law and Morals*, 22 HARV. L. REV. 97 (1908); Francis H. Bohlen, *The Moral Duty To Aid Others as a Basis of Tort Liability*, 56 U. PA. L. REV. 217 (1908); William M. Landes & Richard A. Posner, *Salvors, Finders, Good Samaritans, and Other Rescuers: An Economic Study of Law and Altruism*, 7 J. LEGAL STUD. 83 (1978); James P. Murphy, *Evolution of the Duty of Care: Some Thoughts*, 30 DEPAUL L. REV. 147 (1980); Martin B. Rosenberg, *The Alternative of Reward and Praise: The Case Against a Duty To Rescue*, 19 COLUM. J.L. & SOC. PROBS. 1 (1985); Wallace M. Rudolph, *The Duty To Act: A Proposed Rule*, 44 NEB. L. REV. 499 (1965); Warren A. Seavey, *I Am Not My Guest's Keeper*, 13 VAND. L. REV. 699 (1960); Ernest J. Weinrib, *The Case for a Duty To Rescue*, 90 YALE L.J. 247 (1980).

2. One commentator has written about its "seeming immutability." Adler, *supra* note 1, at 869.

3. The duty to rescue, if more broadly considered as the duty to protect or aid, involves problems of affirmative duties, *see* RESTATEMENT (SECOND) OF TORTS ch. 12, Topic 7 (1965) [hereinafter RESTATEMENT (SECOND)], and also certain negative duties as well, *see, e.g.*, *id.* Topic 8 (discussing prevention of assistance by third persons).

4. *See, e.g.*, Jackson v. City of Joliet, 715 F.2d 1200, 1202 (7th Cir. 1983) (noting that there is no general common law duty to rescue a stranger in distress, even in the absence of any cost to the rescuer).

5. The now classic example is set forth in the RESTATEMENT (SECOND), *supra* note 3, § 314 illus. 1. According to that example, no duty is owed to give a warning to a blind man about to cross the street in front of an oncoming vehicle.

6. *See* Rosenberg, *supra* note 1, at 1 (noting that the traditional rule of a duty is one that conditions liability on either causation or a special relationship); Weinrib, *supra* note 1, at 247 (stating that unless a special relationship exists between an endangered person and a rescuer, there is no duty to rescue); *see also* Grimes v. Hettinger, 566 S.W.2d 769, 775 (Ky. Ct. App. 1978) ("Under the traditional common law rule, a person is under no duty to attempt to rescue another person who he knows to be in danger of drowning . . . . Without regard to the merits of the general rule, a duty to aid one in peril has been imposed when a special relationship exists between the parties.") (citation omitted).

This statement of the law is neither complete nor technically correct, unless perhaps if one defines "special relationships" in a broader way than the RESTATEMENT (SECOND), *supra* note 3, § 314 cmt a. *See, e.g.*, People v. Oliver, 258 Cal. Rptr. 138, 142-43 (Ct. App. 1989) (discussing special relationships giving rise to affirmative duties to act).

7. *See* Soldano v. O'Daniels, 190 Cal. Rptr. 310 (Ct. App. 1983) (noting that the refusal of the law to recognize moral obligation in some situations is morally objectionable); Griffith v. Southland Corp., 617 A.2d 598 (Md. Ct. Spec. App. 1992), *aff'd*, 633 A.2d 84 (Md. 1993) (refusing to summon police assistance when requested may be proximate cause of officer's injuries); Schuster v. Altenburg, 424 N.W.2d 159 (Wis. 1988) (failing to act to protect a patient from himself/herself, or a third party from the patient, is not negligence by a psychiatrist unless it is established that by so acting the doctor failed to conform to the accepted standard of care); *see also* Pridgen v.

remains tied to common law concepts and tough-talk rhetoric extant at the turn of the century and to the *Restatement (Second) of Torts* which chose to emphasize those concepts and that rhetoric over countervailing humanitarian concerns.[8]

Nevertheless, the pressure on courts to reach reasonable and humanitarian results has challenged traditional and *Restatement (Second) of Torts* dogmas regarding the duty to rescue. In this article, I focus upon one fact pattern where traditional notions about the common law and the *Restatement (Second) of Torts* do not accurately describe judicial reality. I call this fact pattern the remoteness-and-rescue pattern: When a helpless individual in danger of serious injury in a remote location[9] is in need of immediate rescue, aid, or protection, or when an individual requires the mere summoning of assistance from dire peril, courts often impose a duty of reasonable care upon a discrete defendant (or very limited set of defendants) who controls the only existing[10] means of effective rescue, aid, etcetera, and who can discharge this duty in a riskless or low cost way.[11] In this type of fact pattern, courts typically, but not always,[12] impose a duty of rea-

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Boston Hous. Auth., 308 N.E.2d 467, 467-77 (Mass. 1974) (announcing a duty to aid a known, trapped trespasser).

8. Thus, this rule is consonant with the stiff language of early cases like *Buch v. Amory Manufacturing, Co.*, 44 A. 809, 810 (N.H. 1898), which states:

> Suppose A, standing close by a railroad, sees a two year old baby 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 . . . .

9. The paradigm instance of "remote location" occurs when an individual is stranded or helpless in a physical location where only one or very few individuals will come upon that person in time to take reasonable action to avert serious peril. Examples are when one is left for dead in a vehicle in a remote lot, when an individual becomes trapped in a service elevator shaft, or when a person falls overboard at sea and requires aid from the vessel from which that person went overboard. These are paradigm cases; however, in an information society there is a close analogy. When an individual knows (or should know) of manifest peril of physical danger to a readily identifiable individual or to a very large number of individuals arising from an act of mass destruction, the people put in danger are in a remote place from information that might save their lives.

10. Courts will not typically require that one construct a means of rescue or a rescue system nor will courts impose a duty to find people to rescue. *See, e.g., Boyce v. U.S. Steel Corp.*, 285 A.2d 459 (Pa. 1971) (stating that there is no duty to check on individual's whereabouts and to discover his peril.)

11. I should note at the outset that this fact pattern is particularly prominent in boat cases which are sometimes decided under maritime law. I suppose that the strongest argument could be referred to as a boat-remote-rescue pattern; yet, apart from the typical absence of any jury questions in admiralty cases (an important point), there is little to distinguish the boat-remote-rescue cases from other analogous fact patterns involving something akin to being lost at sea.

12. Where the courts do not impose a duty of care, they often wish to reach a no-liability result without allowing the jury to consider the matter. There may be reasons to do this. *See*

sonable, or at least minimal, care and, if necessary, either manipulate[13] or ignore common law notions and/or *Restatement (Second) of Torts* dogmas with respect to affirmative duties and duties to rescue, protect, aid, or summon help.

As John Adler has correctly pointed out, courts typically reach results in the rescue context generally based upon considerations that masquerade behind manipulable doctrines, such as the existence *vel non* of a special relationship.[14] One critical motivating consideration is the fear of unlimited liability or unfocused liability. This fear is typically much less powerful in a remote-rescue scenario. Another major set of considerations is humanitarian concerns; such concerns are very powerfully focused in a remote-rescue context, although, as I develop infra, these concerns are not always decisive.

The focus of the article is on how humanitarian concerns in the remoteness-and-rescue fact pattern push courts away from no-duty-to-rescue rules. By way of foundation, Part I of the article describes and critiques the traditional common law and *Restatement (Second) of Torts* approaches to affirmative duties. Part II of the article focuses upon decisions that support a duty to aid in the remote-rescue context. In Part III, the article examines how the weakness of the argument to limit liability makes remote-rescue cases more appealing cases to courts than some other rescue cases in which the fear of unlimited liability is greater.

I. DUTY TO RESCUE: TRADITIONAL AND RESTATEMENT (SECOND) OF TORTS APPROACHES

In modern times, the problem of the duty to rescue, a subspecies of affirmative duty issues,[15] has been considered primarily a question of

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discussion *infra* Part I.A. One particularly strong set of reasons may arise from autonomy and personal accountability rationales. *See infra* Part I.A.

13. Some courts stretch the concept of "special" relationships to impose duties to aid. *See, e.g.*, Farwell v. Keaton, 240 N.W.2d 217 (Mich. 1976).

14. In this regard, I agree completely with Adler's conclusion:

> [I]n spite of the seeming immutability of the no-duty-to-rescue rules, the law has not been static in this area. Although [the courts] may pay lip service to [the] traditional common law rules, courts often distort the rules (intentionally or otherwise) to reach decisions more directly, and honestly, justified by the same policies that inform their decisions in "ordinary" negligence cases.

Adler, *supra* note 1, at 869 (footnotes omitted).

15. There is a deep traditional kinship between the duty to rescue and affirmative duty generally, and often the notions are used almost interchangeably. Tradition also tells us that affirmative duty has a certain singularity (and insularity) to it. Tort law is principally concerned with negative duties and duties to avoid harm caused by unreasonable conduct. Nonetheless, in modern times, affirmative duty problems have begun to manifest in ways that challenge the notion that affirmative duties are essentially similar to duties to rescue and are essentially dissimilar to

the most basic prima facie element in a plaintiff's case—duty.[16] Nonetheless, the term "duty" (and "negligence," for that matter) has suffered serious equivocation. "Duty" in the rescue context has often been used synonymously with liability,[17] despite the fact that liability attaches only upon a showing of a duty owed, breach thereof, causation, and compensable damage and then only in the absence of any affirmative defense.[18] One prominent impact of the *Restatement (Second) of Torts* has been to push modern courts to focus in the rescue context upon the question of "duty" in the first and narrower sense of the first element of a plaintiff's prima facie case[19] and to cast no-liability results in terms of no duty.[20]

A. Historical Common Law "No Duty" To Aid: Misfeasance, Nonfeasance, or Something Else?

It is common to begin the analysis of any proposed duty to rescue with reference to the "distinction" between misfeasance and nonfea-

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negative duty problems. For example, the expansion of affirmative duties to warn and protect stretch the traditional rescue rules. *See, e.g.*, Tarasoff v. Regents of the Univ. of Cal., 551 P.2d 334 (Cal. 1976) (requiring psychotherapists to warn and protect, or use reasonable care for, certain potential victims of their patient's dangerous tendencies). Increasingly, affirmative duties are proactive. The question is not whether one should throw a rope to a drowning child but, rather, what must one do to avoid such circumstances in the first place. *See* RESTATEMENT (SECOND), *supra* note 3, § 324 illus. 1.

16. *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 30, at 164-65 (5th ed. 1984) (discussing the elements of a cause of action for negligence).

17. As Justice Tobriner asserted in *Tarasoff*, one must "bear in mind that legal duties are not discoverable facts of nature, but merely conclusory expressions that, in cases of a particular type, liability should be imposed for damage done." 551 P.2d at 342; *see* Robert L. Rabin, *The Historical Development of the Fault Principle: A Reinterpretation*, 15 GA. L. REV. 925, 947-49 (1981) (noting the influence of relational contexts in the early development of tort law).

18. *See* KEETON ET AL., *supra* note 16, at 164-65.

19. Chapter 12, Topic 7 of the *Restatement (Second) of Torts* is a *duty* topic. The decision to approach problems involving affirmative duty through special sections that touch only the "duty" issues baits courts to unlink affirmative "duty" questions from typical negligence analysis. Thus, section 314 illustration 1 tells the reader that no duty to warn is owed to a blind man crossing the street in front of an oncoming vehicle. The no-duty, no-liability result of section 314 illustration 1 could be expressed in terms of proximate causation or justified on contributory negligence grounds (i.e., why is a blind man crossing a street without adequate precautions? This is not a case where a blind man is rendered helpless in the middle of the street). It is curious that the *Restatement* chose that example in lieu of, say, a two-year-old child, who would be incapable of negligence and of being a proximate cause.

20. Following chapter 12 of the *Restatement (Second) of Torts*, the courts now almost always treat problems of affirmative duty with respect to the duty element in the prima facie case. *See* Adler, *supra* note 1, at 872-73. No duty means no liability; the opposite assertion is not necessarily true. Historical cases have often been read to be no-duty cases in the narrow sense. Yet, with so many no-liability rationales present in many of the cases (i.e., no breach, affirmative defenses and causation), there may have been nothing particularly compelling to be overly precise in the stated rationales for no-liability results.

sance.[21] The *Restatement (Second) of Torts* rests its analysis of affirmative duty on this distinction,[22] and modern courts frequently cite to this distinction as the historical underpinning of many of the tough-talk, no-duty-to-rescue, common law cases.[23] Whatever one has to say about the "distinction" between misfeasance and nonfeasance,[24] it is interesting that several of the most notorious[25] and widely noted and cited decisions, including *Osterlind v. Hill*,[26] *Union Pacific Railway v. Cappier*,[27] and *Yania v. Bigan*,[28] decided prior to the *Restatement (Second) of Torts* make little or no reference to this distinction.[29] There is powerful evidence that even in the tough-talk common law period, no-liability results were more important than that distinction.[30]

Osterlind v. Hill, which is one of the most widely cited no-duty-to-rescue cases, does not refer to any distinction between misfeasance and nonfeasance,[31] although later decisions take it for granted that

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21. *See* RESTATEMENT (SECOND), *supra* note 3, § 314 cmt. c (discussing the duty to act for the protection of others); *see also* Adler, *supra* note 1, at 872 ("The common law's reluctance to require one to render aid to a stranger, rests upon the distinction between misfeasance and nonfeasance.") (footnote omitted).

22. RESTATEMENT (SECOND), *supra* note 3, § 314 cmt. c.

23. *See, e.g.*, University of Denver v. Whitlock, 744 P.2d 54, 57 (Colo. 1987) ("In determining whether a defendant owes a duty to a particular plaintiff, the law has long recognized a distinction between action and a failure to act—'that is to say, between active misconduct working positive injury to others [misfeasance] and passive inaction or a failure to take steps to protect them from harm [nonfeasance].' Liability for nonfeasance was slow to receive recognition in the law.") (citation omitted).

24. The "distinction" has been roundly criticized as a false distinction by many commentators. *See, e.g.*, Adler, *supra* note 1, at 872-86, 900-01; *see also* Jean E. Rowe & Theodore Silver, *The Jurisprudence of Action and Inaction in the Law of Tort: Solving the Puzzle of Nonfeasance and Misfeasance from the Fifteenth Through the Twentieth Centuries*, 33 DUQ. L. REV. 807 (1995).

25. RESTATEMENT (SECOND), *supra* note 3, § 314 cmt. c.

> The result of the rule [section 314] has been a series of older decisions to the effect that one human being, seeing a fellow man in dire peril, is under no legal obligation to aid him, but may sit on the dock, smoke his cigar, and watch the other drown. Such decisions have been condemned by legal writers as revolting to any moral sense, but thus far they remain the law.

Id.

26. 160 N.E. 301 (Mass. 1928).

27. 72 P. 281 (Kan. 1903).

28. 155 A.2d 343 (Pa. 1959).

29. Certainly some did. *See* Buch v. Amory Mfg. Co., 44 A. 809, 811 (N.H. 1898), *overruled in part by* Ouelette v. Blanchard, 364 A.2d 631 (N.H. 1976) (describing an incident involving injuries to a child trespasser where heavy emphasis was placed on the difference between causing and preventing injury).

30. *See* Rabin, *supra* note 17, at 928. Rabin argues correctly that the heyday of the so-called Fault Regime, circa 1850 to 1910-1920, was in reality an era dominated by no-liability results arising largely from dominant notions of property and contract. *Id.* at 926-28.

31. 160 N.E. at 302. The court did cite *Griswold v. Boston & Maine Railroad*, 67 N.E. 354 (Mass. 1903) (establishing no liability for a company whose servant's poor judgment resulted in a failure to rescue) and *Taft v. Bridenton Worsted Co.*, 130 N.E. 48 (Mass. 1921) (establishing

Osterlind supports that distinction.[32] At the very least, *Osterlind* is a difficult nonfeasance case. The case involved the defendant letting a canoe on the fourth of July to two intoxicated men, one of whom drowned.[33] The decedent and the defendant stood in a relationship arising from a transaction, and the defendant presumably, and allegedly, took numerous positive acts in putting the canoe in the hands of the decedent,[34] although the defendant apparently, and allegedly, took no affirmative steps once the canoe tipped in the lake.[35] There was "action" in letting the canoe, even if after that point the defendant took no positive steps.[36]

Osterlind determined that there was no "duty to refrain from renting a canoe" to a non-helpless, intoxicated person[37] and, as such, the conduct was not actionable.[38] Moreover, *Osterlind* did not resolve whether the failure to respond to cries for help was a misfeasance or nonfeasance. As to "duty," the court only stated, "The failure of the defendant to respond to intestate's outcries is immaterial. No legal right of the intestate was infringed."[39] Whether the "omission" was in the context of the actions of letting the canoe, or whether it was "pure" nonfeasance as if a stranger had heard the cries for help, was not determined or considered by the court.

There is a distinct lack of clarity, in modern terms, as to the basis of the decision in *Osterlind*. *Osterlind* could be a limited no-duty case, simply holding that a lessor of canoes owed no duty to non-helpless adults to provide suitable equipment or procedures to rescue individuals from tipped canoes. *Osterlind* could be seen as a no-breach-of-duty case, given the obvious danger posed to anyone trying to rescue

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liability for an owner of shared property who deliberately interfered with the other owner's property rights).

32. For example, *Pridgen v. Boston Housing Authority*, 308 N.E.2d 467, 475-76 (Mass. 1974), which questioned *Osterlind*, associated *Osterlind* with the misfeasance/nonfeasance distinction.

33. *Osterlind*, 160 N.E. at 302.

34. *Id.*

35. *Id.*

36. *Osterlind* does not fit neatly within section 314 precisely because the defendant was not a stranger or a bystander, as in section 314 illustration 1. RESTATEMENT (SECOND), *supra* note 3, § 314 illus. 1.

37. 160 N.E. at 302. The court gave significant attention to the problem of whether the decedent was helpless and unable to protect himself. After considering authorities from other jurisdictions, *Osterlind* indicated that a different rule might apply if the decedent had not been "able to take steps to protect himself." *Id.* The court relied upon the allegations that the decedent was able to make "loud calls for assistance" and to hang onto the tipped canoe for about thirty minutes in reaching its conclusion that at the time of putting the canoe into the water, the decedent was not helpless. *Id.*

38. *Id.* As there was no "duty" (or no negligence), the matter of contributory negligence was moot.

39. *Id.*

drowning, drunken men in, or from, a canoe. Or *Osterlind* could be an assumed-risk case, given the inherent risk of canoes (particularly when its operators are drunk). Was *Osterlind* based, perhaps as Professor Rabin might say, upon no-liability contractual or property paradigms?[40]

Consider the factually similar case of *Moore v. City of Ardmore*,[41] which relied prominently upon *Osterlind*. In *Moore*, the decedent met his watery end after he rented an allegedly unsafe boat from the municipality and a sudden storm capsized the boat and cast him into a lake.[42] One principal argument for liability was that the municipality lacked the means to rescue the decedent[43] and should have made someone available with suitable equipment at hand to provide a rescue in case of emergency.[44] Following *City of Tulsa v. Harman*,[45] *Moore* premised its "no duty" determination upon assumption-of-risk grounds.[46] Not only did the decedent/invitee assume the risk of ordinary dangers and "the risks attendant upon the venture into which he enter[ed],"[47] *Moore* also asserted: "It would be illogical to say that the inviter owed the invitee the duty to provide means of rescue from extraordinary risks that came from unusual or uncontrollable sources."[48] *Moore* specifically linked an assumption-of-risk explanation of its no-duty rule to *Osterlind*: "An adult person who enters into a boat and ventures upon water undoubtedly has enough discretion to realize the elements of danger involved . . . ."[49]

Moore's use of *Osterlind* is both instructive and a bit confusing. First, *Moore* is laden with property-like relationship language, such as invitor/invitee or bailor for hire/bailee,[50] and with contractual-type discussions of warranty[51] and notions such as assumed risks.[52] *Moore*, like so many cases of its generation (albeit a rather late example of its generation), focused upon liability-limiting property and contract no-

40. Rabin, *supra* note 17, at 928.

41. 106 P.2d 515, 515-16 (Okla. 1940). One very important distinction in *Moore* was that, unlike *Osterlind*, no one was allegedly watching the tragedy; the plaintiff's argument was that someone should have been provided the means to effect a rescue. *Id.* at 515.

42. *Id.* at 515.

43. *Id.* at 516.

44. *Id.* at 515.

45. 299 P. 462 (Okla. 1931).

46. *Moore*, 106 P.2d at 516.

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.* at 516-17.

51. *Id.* at 517.

52. *Id.* at 516.

tions.[53] Second, *Moore*, interpreting *Osterlind*, viewed the rescue problem through an assumption-of-risk lens and linked this problem to a no-duty determination.[54]

Thus, *Osterlind* is hardly a "classic" example of the "critical" importance of a misfeasance/nonfeasance distinction. Such a distinction is potentially compatible with the *ratio decidendi*; yet, given the reasoning and in the light of the attitudes of its generation, *Osterlind* is perhaps better understood in light of property/contractual no-liability rules or, in modern terms, as an assumption-of-risk case. The central analysis of *Osterlind* did not turn upon characterizing explicitly the defendant's conduct as a misfeasance or nonfeasance.

Union Pacific Railway v. Cappier, which openly ignored "the humane side of the question,"[55] determined that no duty[56] was owed to a negligent trespasser injured by a defendant's non-negligent conduct or use of an instrumentality, even after the defendant had taken some post-injury actions to aid the injured party and to get medical assistance.[57] *Cappier* has been superseded by the *Restatement (Second) of Torts*[58] and represents one of the callous precedents of the traditional common law. Nonetheless, for all its tough no-duty language,[59] *Cappier* is somewhat ambiguous, in a modern sense, as to its *ratio decidendi* and, similar to *Osterlind*, does not rely explicitly upon a misfeasance/nonfeasance distinction.

One reason why the court in *Cappier* may have avoided referencing any distinction between misfeasance and nonfeasance was that the facts as reported would be tough to characterize. Certain positive actions of the railway company were allegedly linked to the harm caused to the decedent.[60] Although the decedent trespasser was negligent,[61] the defendant railway company's servants non-negligently ran down the trespasser, causing the grievous injuries.[62] A positive set of actions in fact caused harm. Yet the court avoided the misfeasance/nonfeasance problem by asserting that because there was no negligence in causing the injury: "The railway company was no more responsible

53. *See* Rabin, *supra* note 17, at 928.
54. *Moore*, 106 P.2d at 516.
55. 72 P. 281, 282 (Kan. 1903).
56. *Id.* at 283.
57. *Id.* at 282.
58. *See* Restatement (Second), *supra* note 3, §§ 322, 324 (discussing the duty to aid another who is harmed by the actor's conduct and the duty of one who takes charge of another who is helpless).
59. *Cappier*, 72 P. at 282-83.
60. *Id.* at 282.
61. *Id.*
62. *Id.*

than it would have been had the deceased been run down by the cars of another railroad company on a track parallel with that of [the defendant railway company]."[63] Moreover, the railway company's servants took significant post-injury actions,[64] short of exercising custody and control.[65] *Cappier* turned not to a distinction between misfeasance and nonfeasance, but to the decedent's own wrongful conduct to deny any liability:

> We are unable, however, to approve the doctrine that when the acts of a trespasser himself result 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 [liable] in law if they neglect to administer to the sufferings of him whose wounds we might say were self-imposed.[66]

Although *Cappier* speaks directly to the point that it is a "no duty" case, in the narrow sense,[67] its rationale suggests that it was based upon notions of breach of duty, causation and plaintiff's fault.[68] First, *Cappier* is a plausible no-breach-of-duty case—one where the court saw the jury's decision on breach to be in error.[69] Thus, the jury found that a call for help was made immediately, that it took half an hour for an ambulance to arrive, and that the decedent later died in the hospital.[70] Additionally, the railway company servants were not entirely indifferent to the victim; rather, they provided some aid at the scene.[71] Nonetheless, the jury gave recovery under the averment "that the servants of the railway company failed to call a surgeon, or to render him any assistance after the accident, but permitted him to remain by the

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63. *Id.* at 283.

64. *Id.* at 282. Among those other actions, the defendant's servants allegedly tried to stop the bleeding. *Id.*

65. *Id.* The court pointed out that some authorities on similar facts had gone the other way. When a defendant takes charge of an injured person, some courts have said: "After the trespasser on the tracks of a railway company has been injured in collision with a train, and the servants of the company have assumed to take charge of him, the duty, no doubt, arises to exercise such care in his treatment as the circumstances will allow." *Id.* (citations omitted).

The court declined to follow that approach, however, and distinguished the instant case on the grounds of the decedent's own fault. *Id.* The *Restatement (Second) of Torts* expressly rejected the position taken by *Cappier*. *See* RESTATEMENT (SECOND), *supra* note 3, §§ 322, 324. American courts now typically decline to follow *Cappier*. *See, e.g.*, Maldonado v. Southern Pac. Transp. Co., 629 P.2d 1001 (Ariz. Ct. App. 1981) (noting that a separate duty to render aid exists regardless of whether a person's original misconduct was intentional or innocent, or whether it was the legal cause of any further harm suffered).

66. *Cappier*, 72 P. at 282.

67. *Id.* at 282-83.

68. *Id.* at 282.

69. *Id.* at 282-83.

70. *Id.* at 282.

71. *Id.*

side of the tracks and bleed to death."[72] In addition, the jury responded "no" to the following question apparently on the theory that some servants of the railway company did nothing to assist: "Did not defendant's employés bind up [victim's] wounds, and try to stop the flow of blood, as soon as they could after the accident happened?"[73] The jury was perhaps swayed by a desire to provide compensation to the victim, or by a feeling that some of the defendant's servants did not act properly, or by a belief that more care was owed under the circumstances. This is speculation, but *Cappier* might be nothing more than a case averting perceived jury prejudice; it might be a case holding that, as a matter of law, no more care than promptly summoning assistance and providing some first aid is required for the benefit of one who unexpectedly suffers serious injuries in a train accident not caused by the defendant's fault.[74]

Second, and moreover, *Cappier* may be nothing more than a no-causation and a plaintiff's fault case. The court made much of the fact that it was the victim's own wrongful acts that caused his injuries[75] and suggested that the victim's own contributory negligence was the sole proximate cause of death. That sort of attitude towards adult trespassers, which is harsh by most modern courts' reckonings, was not particularly unusual in that era. It is tempting, although inaccurate by modern standards, to assert equivocations such as "no duty is owed to a trespasser who negligently and proximately causes his own injuries on the premises of another."

Cappier, like *Osterlind*, is heavily oriented towards the no-liability, property/contract paradigms of its era. *Cappier* characterized the situation as one with property overtones, which explains its repeated references to the fact that the victim was a trespasser.[76] *Cappier* also made a point of noting that "[i]n the law of contracts it is now well understood that a promise founded on a moral obligation will not be enforced in the courts"[77] in asserting that whatever moral duties may have been owed, no legal, i.e., tort, duties were owed.[78] The property/contract notions supported a no-liability result in a fledgling "fault" system which most often stressed that liability should be imposed only

72. *Id.* at 281.

73. *Id.* at 282.

74. It is a bit unclear what the jury expected of the railway company, save for more demonstrated compassion from some of its servants or the treatment and care of injured persons at the scene.

75. *Cappier*, 72 P. at 282.

76. *Id. passim.*

77. *Id.* at 282-83.

78. *Id.*

when a faultless plaintiff sought redress from a faulty defendant, certainly not the case here. *Cappier*, like *Osterlind*, is decidedly nonmodern in its rationales: It is a no-duty case in an antiquated sense and does not emphasize the so-called critical distinction between misfeasance and nonfeasance.

Yania v. Bigan,[79] the most notorious post-World War II no-duty-to-rescue case, likewise made no direct[80] reference to a misfeasance/nonfeasance distinction and, like *Osterlind* and *Cappier*, gave imprecise, in modern terms, rationales for its no-liability holding. In *Yania*, an adult "in full possession of his mental facilities"[81] jumped into a trench[82] filled with water and drowned.[83] The widow sued the landowner for negligence, alleging that the defendant "urged, enticed, taunted, and inveigled" the decedent to jump into the ditch and that the decedent, as a business invitee on the land of the defendant, was owed both a warning of the dangerous condition (the trench filled with water) and a rescue (once he had jumped in the trench).[84] The Supreme Court of Pennsylvania ruled that the trial court's granting of demurrers to the complaint was appropriate and, hence, ended the widow's action at the outset as a matter of law.[85] The result seems shocking because the defendant/landowner allegedly urged decedent Yania to jump into the trench[86] and Yania enjoyed the status of a business[87] invitee. This ruling today would be anomalous to the extent *Yania* supports the notion that no duty to rescue is owed *even* when a special relationship exists between the two parties.

Although the Supreme Court of Pennsylvania handily disposed of the claims of negligence, the rationales of *Yania* are not easy to pin down. In determining that there was no duty to warn, the court in *Yania* stated, "If this [trench] possessed any potentiality of danger,

79. 155 A.2d 343 (Pa. 1959).

80. One way to read *Yania* is that defendant Bigan did not cause decedent Yania's death because Bigan did not take affirmative steps to place Yania in peril or which could have been construed as the "cause" of Yania's death. *See id.* at 346. Nonetheless, this is only one way to read *Yania*, which otherwise makes no direct reference whatsoever to "misfeasance" or "nonfeasance." *Id.*

81. *Id.* at 345 n.1.

82. *Id.* at 344. Technically, Yania jumped into a cut created by strip mining that was filled with eight to ten feet of water and had embankments of up to eighteen feet in height. *Id.*

83. *Id.*

84. *Id.* at 349.

85. *Id.* at 344, 346.

86. *Id.* at 345.

87. *Id.* Today, it is increasingly common for courts to recognize that business invitees are entitled to reasonable care from an invitor should they require assistance (even from injuries not created by the conditions upon the land or by the actions of the invitor or his or her servants). *See* RESTATEMENT (SECOND), *supra* note 3, § 314A.

such a condition was as obvious and apparent to Yania as to Bigan . . . ."[88] *Yania* thus dispensed with that argument as many modern courts would.[89] However, the *Yania* court's rationales with respect to the two remaining issues—whether enticement to jump created legal liability and whether the invitor/defendant must rescue—are more difficult analytically.

As to the former, the court characterized the "impact," such as it was, as "*mental*,"[90] as opposed to "*physical*,"[91] and focused upon Yania's freedom of choice to decide to jump: He was not "deprived of his volition and freedom of choice and placed under a compulsion to jump into the water."[92] In a tantalizing avoidance of making a specific determination in modern prima facie case terms, the court ruled: "[T]o contend that such conduct directed to an adult in full possession of all his mental faculties constitutes *actionable negligence* is not only without precedent but completely without merit."[93] The court did not make clear whether enticement directed to an adult of full capacity is not an *act* at all (hence nonfeasance, no duty); whether there is no duty, or a breach thereof, to refrain from attempting to persuade such an adult to take unreasonable actions; or whether the defendant was not a cause, either factually or proximately, of Yania's jump. Instead, the court ambiguously referred to the absence of *actionable negligence*, without further elaboration.[94]

As to the latter argument—a proposed duty to rescue invitees—the court took an unusual posture. First, *Yania* asserted a variation of the section 314 homily: "The mere fact that Bigan saw Yania in a position of peril in the water imposed upon him no legal, although a moral, obligation or duty to go to his rescue unless Bigan was legally responsible, in whole or in part, for placing Yania in the perilous position."[95]

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88. *Yania*, 155 A.2d at 346.

89. *See, e.g.*, Herr v. Booten, 580 A.2d 1115, 1121 (Pa. 1990).

90. *Yania*, 155 A.2d at 345.

91. *Id.*

92. *Id.*

93. *Id.* (emphasis added).

94. *Id.* at 346. In the concluding paragraph of the opinion—ambiguously placed, thereby leaving open the inference that it might refer to *all* of the claims of negligence and not just the duty-to-rescue claim—the court seemed to eliminate the notion that Yania breached a duty of reasonable care for his own safety. *Id.* at 345. The court also placed emphasis on a *causal* plaintiff's fault rationale in that paragraph as well:

> Yania, a reasonable and prudent adult in full possession of all his mental faculties, undertook to perform an act which he knew or should have known was attended with more or less peril and it was the performance of that act and not any conduct upon Bigan's part which caused his unfortunate death.

Id. at 346.

95. *Id.*

The court ducked the tricky problem of whether a section 314, no-duty rule was applicable when a special relationship was present. Instead, the court quoted at length from *Brown v. French*[96] in concluding that Bigan had no "legal responsibility for placing Yania in the dangerous position in the water and, absent such legal responsibility, the law imposes on Bigan no duty of rescue."[97] Given the extensive quotation of assumption-of-risk-style language[98] from *Brown v. French*, the *Yania* conclusion on this issue is subtly confusing: Did *Yania* rule that there is no duty to aid a person in peril, absent legal responsibility for placing that person in peril, whether or not the person in peril knowingly and voluntarily assumed the risk of danger? Or did *Yania* rule that there is no duty to rescue a person who knowingly places herself in peril?[99] Or did *Yania* rule that if one is not the "cause," legal or factual, of the death of a person who so knowingly acts, there is no liability to such a person? Or is *Yania* all or some combination of the above?

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96. 104 Pa. 604 (Pa. 1883).

97. *Yania*, 155 A.2d at 346.

98. *Id.* Describing it as "apt," the court quoted the plaintiff's fault/plaintiff-as-cause language of *Brown* as follows:

> If it appeared that the deceased, by his own carelessness, contributed in any degree to the accident which caused the loss of his life, the defendants ought not to have been held to answer for the consequences resulting from that accident . . . . He voluntarily placed himself in the way of danger, and his death was the result of his own act . . . . That his undertaking was an exceedingly reckless and dangerous one, the event proves, but there was no one to blame for it but himself. He had the right to try the experiment, obviously dangerous as it was, but then also upon him rested the consequences of that experiment, and upon no one else; he may have been, and probably was, ignorant of the risk which he was taking upon himself, or knowing it, and trusting to his own skill, he may have regarded it as easily superable. But in either case, the result of his ignorance, or of his mistake, must rest with himself—and cannot be charged to the defendants.

Id. (quoting *Brown*, 104 Pa. at 604, 607, 608).

99. Query whether the *Yania* court would have reached a different result (or employed significantly different reasoning) if a person unfamiliar with coal mining came upon Bigan's property for a business purpose and fell accidentally (even negligently) into such a trench and called out to Bigan to throw a rope to her to save her life (assuming, of course, that Bigan did nothing). The way in which we interpret *Yania* is crucial to answering this question, yet courts assume that *Yania* implies no duty. *See, e.g.*, Miller v. Arnal Corp., 632 P.2d 987, 990 (Ariz. Ct. App. 1981) (citing *Yania, inter alia*, the court noted that "[a]ppellant concedes that the law presently imposes no liability upon those who stand idly by and fail to rescue a stranger who is in danger"). Unfortunately, that is not clearly decided by the opinion, and the interpretation of *Yania* has fallen victim to a tough-talk image of the common law and has influenced the way courts read section 314 of the *Restatement (Second) of Torts*. *See* Vermont v. Joyce, 433 A.2d 271, 273 (Vt. 1981) (interpreting the state of Vermont's Duty to Aid the Endangered Act, 12 VT. STAT. ANN. tit. 12, § 519(a) (1980), so as not to require one to intervene at one's peril in a dangerous fight between others, the court cites *Yania* and section 314 for the proposition that "[a]s a general rule, there is no duty under the common law to aid a person who is in danger").

Yania, like *Cappier and Osterlind*, reflects the strong, no-liability posture of the common law. Amidst its imprecise rationales, there is little in *Yania* to suggest the importance of the misfeasance/nonfeasance distinction.

B. No "Duty" To Aid? Complexity and Indeterminacy in the Restatement (Second) of Torts

Although some of the most frequently referenced pre-1960's cases involving the "duty" to rescue are more accurately described as no-liability cases (cases falling in a milieu where no-liability rules were far more common and the analysis of liability hinged on superordinate concepts like property and contract or other considerations), the *Restatement (Second) of Torts* cemented a particular vision of affirmative duty and the duty to rescue in American jurisprudence based heavily on concepts of misfeasance and nonfeasance.[100] The *Restatement (Second) of Torts*, in choosing that path, elected to make several key doctrinal assumptions which conceded only some points to humanitarian considerations. Thus, the *Restatement (Second) of Torts*' approach to affirmative duties was a result of a combination of reliance on questionable historical interpretation and the underestimation of the power of humanitarian case law which became relegated to exceptions and prognostications in commentary.

The *Restatement (Second) of Torts* accomplished this in three major ways. First, the *Restatement (Second) of Torts*, following the *First Restatement*, cast the problem of rescue and affirmative duty in general as a problem of "duty" in the narrow sense of the duty element in the plaintiff's prima facie case.[101] Second, the topic of affirmative duty (Topic 7) was built upon a "no duty" rule, albeit a far narrower no-duty rule than colloquial understanding (i.e., that there is no general duty to rescue) acknowledges.[102] Third, that *Restatement*'s no-duty

100. Since adoption in the 1960's, the RESTATEMENT (SECOND), *supra* note 3, Topic 7, §§ 314-324, has become the dominant vehicle for addressing questions of affirmative duty; virtually all cases raising those issues cite and rely upon one or more sections in Topic 7. The sections are difficult and interlocking; they are easy to caricature, although often hard to characterize. *See* Peter F. Lake, *Revisiting* Tarasoff, 58 ALB. L. REV. 1, 97 (1994). In many instances, courts have seized upon one section and ignored the other related sections. *See, e.g.*, Nasser v. Parker, 455 S.E.2d 502 (Va. 1995) (rejecting *Tarasoff* without considering all the relevant sections of Topic 7 of the *Restatement (Second) of Torts*). Courts too often fall into the trap of using pseudo-*Restatement* reasoning—not justified by any fair reading of the *Restatement* as it was intended to be read.

101. *See* RESTATEMENT (SECOND), *supra* note 3, § 314.

102. *Id.*

rule is subject to a myriad of exceptions, special qualifications,[103] and Sarajevo-like sniping of the reporters in the comments.[104]

As to the first and second doctrinal assumptions, all sections in Topic 7 lead back to section 314,[105] which provides a limited "general rule"[106] of no duty[107] in the narrow sense of duty. Although courts often understand section 314 to state some broad proposition such as "there is no general duty to rescue,"[108] section 314 is actually a very slender no-duty rule. All that section 314 purports to state is that generally no duty to come to the aid or to protect another arises *simply* from the fact that an actor does or should "realize that action on his part is necessary."[109] That no-duty rule hardly states that there is no general nonstatutory affirmative duty to rescue another. Indeed, any broader no-duty proposition than that actually stated in section 314 would be hard to defend given the open-endedness of section 314: Section 314 itself implies that duty may exist when realization of risk is coupled with something else.[110] The *Restatement (Second) of Torts* sets out what that "something else" may be in the remainder of the

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103. *See id.* §§ 315-324. "The general rule stated in [section 314] should be read together with other sections which follow." *Id.* § 314 cmt. a.

104. Most notably, after setting out a no-duty rule in section 314, the reporters attack the rule in comment c. Distancing section 314 somewhat from the "older decisions" and the "older rule," comment c points to the change in attitudes towards a no-duty rule:

> The result of the rule has been a series of older decisions to the effect that one human being, seeing a fellow man in dire peril, is under no legal obligation to aid him, but may sit on the dock, smoke his cigar, and watch the other drown. Such decisions have been condemned by legal writers as revolting to any moral sense, but thus far they remain the law. It appears inevitable that, sooner or later, such extreme cases of morally outrageous . . . conduct [note the intriguing characterization of the failure to rescue as outrageous conduct—perhaps a hint that some such cases might fit with section 46 as cases of intentional infliction of emotional distress] will arise [and] that there will be further inroads on the older rule.

Id. § 314 cmt. c.

105. *Id.* § 314 cmt. a.

106. *Id.*

107. *Id.* § 314.

108. *See* Vermont v. Joyce, 433 A.2d 271 (Vt. 1981); Susan J. Hoffman, *Statutes Establishing a Duty To Report Crimes or Render Assistance to Strangers: Making Apathy Criminal*, 72 KY. L.J. 827, 832-33 & n.36 (1981).

109. *See* RESTATEMENT (SECOND), *supra* note 3, § 314. An illustration adds a wrinkle: Absent special circumstances, if one knows another's peril and realizes action is necessary, there is no liability even if one desires the one in peril to suffer. *See id.* § 314 cmt. e, illus. 4. This kind of "battery by omission" is not actionable. However, it is tantalizing to consider that one might trigger section 46 liability if one were to act out one's conscious desire for injury, even if the acts did not cause or aggravate the physical peril of the one in danger.

110. *See* Lake, *supra* note 100, at 126-27.

sections of Topic 7. Roughly speaking, conduct or special relationships create an affirmative duty.[111]

Third, although a limited no-duty rule is generally recognized, American law has acknowledged numerous liability-creating exceptions to a no-duty rule. Although there is a great deal of complexity lurking in Topic 7 of the *Restatement (Second) of Torts*, typically, courts generally understand that section 314 is excepted or does not apply when:

> (1) there exists a special relationship either between the defendant and the victim, or between the defendant and a dangerous person;[112]
>
> (2) the defendant's conduct or instrumentality causes (tortiously or innocently) harm;[113]
>
> (3) the defendant enters into an undertaking to protect a victim or begins a rescue and does it amiss;[114] or
>
> (4) the defendant interferes with or prevents the rescue of another.[115]

Whereas a very prominent and relatively small (yet growing) group of recent cases openly rejects the analytical gymnastics of the section 314 limited no-duty-*cum*-complex-exceptions approach to varying degrees, most cases involving affirmative duty at least attempt to track some or all of the *Restatement* approach.[116] Some of the cases use *Restatement*-type analysis to create new avenues of liability for failure to perform an affirmative duty[117]—a favorite technique being to expand upon the meaning of a "special" relationship.[118] Yet many cases[119] use *Restatement* analysis in liability-limiting ways, sometimes choosing to read the exceptions in a narrow, liability-limiting man-

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111. The structure of Topic 7 has become important to American law because American courts have often looked to the *Restatement (Second) of Torts* in the period since the 1960's for guidance in deciding cases of affirmative duty. *See* Adler, *supra* note 1, at 896-97. This is so even when it is common for cases to pick and choose what to emphasize or ignore in terms of *Restatement* analysis. *See* Nasser v. Parker, 455 S.E.2d 502 (Va. 1995).

112. RESTATEMENT (SECOND), *supra* note 3, §§ 314A, 315, 316-320.

113. *Id.* §§ 321, 322.

114. *Id.* §§ 327, 324, 324A.

115. *Id.* §§ 326, 327, 328. These sections appear in Topic 8, entitled "Prevention of Assistance by Third Persons."

116. Adler, *supra* note 1, at 896-97.

117. *See, e.g.*, Kline v. 1500 Massachusetts Ave. Apartment Corp., 439 F.2d 477 (D.C. Cir. 1970) (establishing affirmative duties of landlords to their tenants); Mostert v. CBL & Assocs., 741 P.2d 1090 (Wyo. 1987) (establishing affirmative duties of lessees to warn business invitees of foreseeable risks).

118. *See, e.g.*, Farwell v. Keaton, 240 N.W.2d 217 (Mich. 1976) (finding that a special relationship arises from a social venture).

119. *See* Adler, *supra* note 1, at 896-97 & n.129.

ner.[120] Nevertheless, there has been a notable overall expansion in potential liability for failure to discharge affirmative duties under the *Restatement (Second) of Torts* regime when one looks for comparison to the so-called traditional common law approach. Many of the leading no-duty cases of the past generation, notably *Osterlind*, *Buch*,[121] *Cappier*, and *Yania*, have either been overruled, discredited, superseded, or limited, and major pockets of potential liability have emerged in recent times such as landlord[122] and business invitor duties[123] to protect tenants and invitees and duties owed by professional therapists to protect or warn certain strangers of the dangers posed by their patients.[124] Thus, the limited duty-subject-to-complex-and-numerous-exceptions approach embodied in the *Restatement (Second) of Torts* has been dominant in the recent period of tort law where there has been expanded liability for the failure to use reasonable care in the discharge of affirmative duties. At the same time, a significant and growing body of case law rejects the *Restatement (Second) of Torts* approach altogether. Conceptually, rescue law has grown by becoming increasingly difficult to explain and more complex and contested; practically, potential liability has grown significantly (with exceptions, of course). This state of affairs has prompted a number of commentators to argue that the law of affirmative duties, or some subset thereof, is, or ought to be, subject to forces other than black letter doctrine, such as policy concerns,[125] concerns of efficiency,[126] concerns of principle,[127] or other abstract or general determinants of liability.[128]

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120. *See, e.g.*, Kaminski v. Town of Fairfield, 578 A.2d 1048 (Conn. 1990); Heigert v. Reidel, 565 N.E.2d 60 (Ill. App. Ct. 1990); McGee v. Chalfant, 806 P.2d 980 (Kan. 1991); Meyers v. Grubaugh, 750 P.2d 1031 (Kan. 1988); D'Amico v. Christie, 518 N.E.2d 896 (N.Y. 1987); Lane v. Messer, 689 P.2d 1333 (Utah 1984); Poplaski v. Lamphere, 565 A.2d 1326 (Vt. 1989); Nasser v. Parker, 455 S.E.2d 502 (Va. 1995).

121. Buch v. Amory Mfg. Co., 44 A. 809 (N.H. 1898), *overruled in part by* Ouelette v. Blanchard, 364 A.2d 631 (N.H. 1976).

122. *See, e.g.*, Kline v. 1500 Massachusetts Ave. Apartment Corp., 439 F.2d 477 (D.C. Cir. 1970).

123. *See, e.g.*, Nallan v. Helmsley-Spear, Inc., 407 N.E.2d 451 (N.Y. 1980); *cf.* Wright v. Webb, 362 S.E.2d 919 (Va. 1987) (holding that a business invitor has a duty to protect an invitee only if he knows that a criminal assault is occurring or will occur soon).

124. *See, e.g.*, Tarasoff v. Regents of the Univ. of Cal., 551 P.2d 333 (Cal. 1976); *cf. Nasser*, 455 S.E.2d 502 (holding that lack of control implies no duty).

125. *See* Adler, *supra* note 1, at 897-98. As John Adler has pointed out with respect to special relationships exceptions: "Increasingly . . . cases . . . seem to be governed primarily by policy concerns . . . . In a variety of cases, and irrespective of outcome, the significance of policies that are not related to special relationships is becoming more pronounced." *Id.*

126. RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW § 6.9 (3d ed. 1986).

127. Murphy, *supra* note 1, at 161-68.

128. Lake, *supra* note 100, at 119.

The increasing strength of the remoteness-and-rescue fact pattern, driven by powerful humanitarian arguments which were de-emphasized in the *Restatement (Second) of Torts*, supports the critical mass of academic calls for reform of the *Restatement* approach.

II. Cases Which Support Liability in the Remoteness-and-Rescue Fact Pattern

When a helpless individual in danger of serious peril in a remote location[129] requires immediate rescue from such peril, or requires aid, protection, or the mere summoning of assistance, American courts have often imposed a duty of reasonable, or minimal, care upon a discrete private[130] defendant, or a very limited set of defendants, who controls the only means of effective and immediate rescue, aid, protection, or summoning of assistance. A duty is imposed only if the defendant can discharge such duty either in a riskless and/or very low-cost way. Whether or not one wishes to call this a minimal duty,[131] courts depart from the imposition of liability in this situation only (but not always) when the person in need of rescue either has voluntarily and unreasonably assumed the risk of a known or obvious peril or where strong public policy or statutory arguments[132] counsel against the imposition of liability. The results which courts have reached in the remoteness-and-rescue fact pattern (1) seem to fly in the face of the tough-talk rhetoric of the "historical" common law approach, (2) often have no necessary connections to section 314 of the *Restatement*

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129. *See supra* note 9. Remoteness is a function of time, space and the number of people available to aid. Sudden emergencies in front of just a few people create a classic, paradigmatic fact pattern. Situations like the Kitty Genovese incident and the recent Deletha Word incident, *see* discussion *infra* note 237, are more likely to raise the paradox of rescue—the more people who watch, the less likely anyone will intervene. Our indignation over these incidents—particularly towards the apathy of those standing by—may not translate into legal liability for several reasons.

130. I consider only private defendants in this article. Governmental defendants raise tricky issues deserving separate treatment. *See* Deshaney v. Winnebago County Dept. of Soc. Servs., 489 U.S. 189 (1989) (raising difficult due process problems).

131. I prefer to view this as a duty of reasonable care, which under the circumstances typically calls for very little care. In this sense, the duty is similar to that recognized in many emergency situations. *See* Wilson v. Sibert, 535 P.2d 1034 (Alaska 1975). Unlike most of the "shocking" older cases, the older cases which impose liability in this fact pattern have survived criticism and rejection and remain good law today. *See, e.g.*, Hutchinson v. Dickie, 162 F.2d 103 (6th Cir. 1947); Depue v. Flateau, 111 N.W. 1 (Minn. 1907). These cases are rooted in notions of common decency and humanity, which, contrary to popular belief, were not absent from the traditional common law period or as absent as has often been argued. In Part III, I connect this point with the argument that many of the so-called "shocking" cases are not necessarily so "shocking."

132. *See, e.g.*, Miller v. Arnal Corp., 632 P.2d 987, 990 (Ariz. Ct. App. 1981) (finding that a statute limited liability to gross negligence for certain failed rescues).

(Second) of Torts or the exceptions thereto,[133] and (3) are very similar to, but different in important ways from, the rejected[134] position of Dean Ames, i.e., that a duty to effect a costless rescue of another should exist when that other person is in danger of death or serious injury.[135]

Remoteness—being in a physical location where one is stranded or helpless and where only one or very few individuals will come upon that stranded, helpless person in time to take reasonable, or even minimal, steps to avert immediate and serious peril—can arise in any number of fact patterns.[136]

Some of the case law predates the *Restatement (Second) of Torts*. At root, the remoteness cases acknowledge a "humanitarian" principle of liability that is not expressed well by either the tough talk of the traditional common law or the no-duty-various-exceptions approach set out in the *Restatement (Second) of Torts*.

A. Depue*: Humanitarianism on Land*

Depue v. Flateau[137] is one of the two (*Hutchinson v. Dickie*[138] is the other) most notable, but underrated,[139] humanitarian cases of the pre-*Restatement (Second) of Torts* period. In *Depue*, the plaintiff was pursuing his business of "buying cattle, hides, and furs from the farmers"[140] in the snowy seas of winter Minnesota, when, on a January evening, he arrived at the defendant's home.[141] With business in

133. Courts have manipulated the *Restatement (Second) of Torts* to reach this result, hanging their decisions on *Restatement* pegs. *See, e.g.*, Farwell v. Keaton, 240 N.W.2d 217 (Mich. 1976).

134. *See* RESTATEMENT (SECOND), *supra* note 3, § 314 cmt. c.

135. *See* Ames, *supra* note 1, at 113.

136. Given the recognized duties of care owed by innkeepers to guests, common carriers to passengers, theatre owners to guests, custodians to those in custody, and employers to employees, there is little need to discuss cases involving remoteness in the context of doctrinal situations which have imposed duties to aid regardless of remoteness. *See* RESTATEMENT (SECOND), *supra* note 3, § 314A.

137. 111 N.W. 1 (Minn. 1907).

138. 162 F.2d 103 (6th Cir. 1947).

139. Whereas *Depue* and *Hutchinson* could both be conveniently packaged as "special relationship" cases, it is notable that the *Restatement (Second) of Torts* did not craft illustrations around them nor did it make it obvious by its comments what types of "special relationships" might have existed in those cases to support a duty to aid. This is troubling, given that *Depue* and *Hutchinson* remain in good standing, while *Osterlind*, *Buch*, *Cappier* (and the like) have been overtly discredited and even *Yania* has been subject to doctrinal limiting. In retrospect, one might argue that the *Restatement* chose to de-emphasize one line of authority and did not capture the spirit of the modern trend towards the consolidation of the paradigms of reasonableness and negligence. Also, the *Restatement (Second) of Torts* did not emphasize, for whatever reason, the humanitarian strength of the remoteness fact pattern.

140. 111 N.W. at 1.

141. *Id.*

mind, he requested to stay the night, but that request was refused.[142] However, he was invited for dinner;[143] after dinner, for whatever reason,[144] the plaintiff became "seriously ill and too weak to take care of himself."[145] There was some dispute about whether a second request to stay was made.[146] Nonetheless, the plaintiff was assisted in this condition to his horse-drawn mode of transportation by one of the defendants.[147] At this point, "[h]e was unable to hold the reins to guide his team, and [a defendant] threw them over his shoulder and started the team towards home."[148] The plaintiff made it about three-quarters of a mile where, beset by his illness, he tumbled into the cold night.[149] The next day, a passing farmer discovered and revived the plaintiff, but he suffered serious, disfiguring, and permanent injury from the cold.[150] The trial court dismissed the action at the close of the plaintiff's case, but the Supreme Court of Minnesota ordered a new trial, ruling that the defendants owed a duty to use reasonable care for the plaintiff's safety.[151] Although the supreme court stated that the plaintiff was not a trespasser[152] but a "guest"[153] by "express invitation,"[154] the court avoided classifying the status of the plaintiff who was probably a social guest[155] (licensee) during dinner, but who was a guest who did not have permission to stay beyond dinner and, thus, may have been, or may have been soon to become, a trespasser. In any event, the Supreme Court of Minnesota did not predicate its decision upon an entrant-status rationale.[156]

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142. *Id.*
143. *Id.*
144. *Id.* at 2.
145. *Id.*
146. *Id.*
147. *Id.*
148. *Id.*
149. *Id.*
150. *Id.*
151. *Id.* at 2, 3.
152. *Id.* at 3 (distinguishing him from the victim in Railway Co. v. Marrs, 85 S.W. 188 (Ky. 1905)).
153. *Id.*
154. *Id.*
155. There was a business purpose to the visit, although it could have been construed as unilateral to the plaintiff or to have been one incidental to the dinner invitation.
156. *Id.* at 3. The court emphasized that the plaintiff was not a trespasser but an "invited guest" and stated the defendants' potential liability in terms of "a violation of their duty in the premises." *Id.* Yet the court, by way of illustration of a broader principle of liability, rattled off a series of (not entirely consistent nor modern) entrant-status rules including:

> It extends to the licensee, and requires the exercise of reasonable care to avoid an unnecessary injury to him. It imposes upon the owner of premises, which he expressly or impliedly invites persons to visit, whether for the transaction of business or otherwise, the obligation to keep the same in reasonably safe condition for use, *though it*

Instead, acknowledging the uniqueness of the case at hand, the court cast the matter in terms of an overarching principle.[157] On the one hand, the defendants argued that the rationale used in *Cappier* applied: "Those duties which are dictated merely by good morals or by humane considerations are not within the domain of the law . . . ."[158] The court believed this to be "a correct statement of the general rule applicable to the Good Samaritan, but it by no means controls a case like that at bar."[159] Instead, the court turned to a "comprehensive principle"[160] of liability based apparently upon a famous proposition of general and universal duty[161] from *Heaven v. Pender*:[162]

> [W]henever a person is placed in such a position with regard to another that it is obvious that if he does not use due care in his own conduct, he will cause injury to that person, the duty at once arises to exercise care commensurate with the situation in which he thus finds himself, and with which he is confronted, to avoid such danger.[163]

Referring to the similar proposition contained in *Heaven*, *Depue* noted that such a principle "applies with greater strictness to conduct towards persons under disability, and imposes the obligation as a matter of law, not mere sentiment, at least to refrain from any affirmative action that might result in injury to them."[164]

In applying the comprehensive principle, the court stressed that there was no contractual duty to the plaintiff, but "humanity demanded" that the defendants "minister to plaintiff in his distress."[165] The court reiterated that "the law, as well as humanity, required that he not be exposed in his helpless condition to the merciless elements."[166] The court appeared to have focused upon the defendants' conduct in "compelling" the plaintiff to leave and "sending him

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does not embrace those sentimental or social duties often prompting human action . . . . Those entering on the premises of another by invitation are entitled to a higher decree [sic] of care than those who are present by mere sufferance.

Id. at 2 (citations omitted) (emphasis added). The court did not specifically relate its decision to any of these rules in particular, however. *Id.* at 2-3.

157. *Id.* at 2.

158. *Id.* (citing Pacific Ry. Co. v. Cappier, 72 P. 281, 282 (Kan. 1903)).

159. *Id.*

160. *Id.*

161. *Id.* *Depue* pointed out that: "This principle applies to varied situations arising from non-contract relations." *Id.*

162. 11 L.R.-Q.B. Div. 505 (1883).

163. 111 N.W. at 2, 3.

164. *Id.* at 3.

165. *Id.*

166. *Id.*

out"[167] and noted, with emphasis, the facts that the plaintiff was walked to his conveyance and effectively propped up when it appeared that the plaintiff was too ill to even hold the reins to establish that the defendants should or could be charged with knowledge of his condition.[168]

Depue is a teaser when one tries to place it into a *Restatement (Second) of Torts* frame of reference. It is tempting to view it as a misfeasance case; that is until one considers that the affirmative conduct identified by the court—compelling the plaintiff on his way—was wrongful in that it failed to confer a benefit upon the plaintiff that was required by humanitarian concerns. Or, what made the "conduct" wrongful was that it was in breach of an affirmative duty not to act so as to compel one into the cold. This is a very strange sort of "misfeasance": Lurking behind the "conduct" is really an affirmative duty to confer a benefit.[169]

Moreover, it is tempting to view *Depue* as a "special relationship" case, except that it is not to be found in section 314A's listed special relationships nor any illustration thereof, unless one places it within the caveat to section 314A[170] or comment (b) to section 314A.[171] The *Restatement (Second) of Torts*' nonrecognition of *Depue* is odd given that it is a 1907 decision that has not been overruled, superseded, or even seriously attacked directly by any other court.[172] Moreover, any basis for a special relationship would appear to be either (a) invitation or (b) recognition of the need of a helpless individual in a remote location. Given that the court specifically chose to clear any *contractual* implications from the decks and avoided a property-based analysis, basis (a) seems to have had little importance. Basis (b) challenges section 314 of the *Restatement (Second) of Torts*.

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167. *Id.*

168. *Id.*

169. This type of problem plagues the misfeasance/nonfeasance distinction. *Depue* was right in observing that the case was odd; the most factually similar case is perhaps *Ploof v. Putnam*, 71 A. 188 (Vt. 1908). In *Ploof*, an individual was entitled to sue the owner of a dock when that individual attempted to fasten his boat to the dock during a storm. *Id.* at 189. The owner's servant ejected him from the dock and into the storm. *Id.* No one thought to analyze the case as a "rescue" case or an interference with rescue case: It travels under the rubric of the nebulous defense of necessity.

170. RESTATEMENT (SECOND), *supra* note 3, § 314A caveat ("The institute expresses no opinion as to whether there may not be other relations which impose a similar duty.").

171. *Id.* § 314A cmt. a ("The law appears, however, to be working strong towards a recognition of the duty to aid and protect in any relation of dependence or of mutual dependence.").

172. The notion that a social guest is entitled to reasonable care from a landowner was not a vogue proposition in 1907. *See, e.g.*, DAN B. DOBBS, TORTS & COMPENSATION 333 (2d ed. 1993) (discussing the difference between a social guest and a business invitee and what care a landowner owes each).

Perhaps the simplest way to describe *Depue* is twofold. First, unlike many of its contemporaries, *Depue* is not a no-liability case based upon the property/contract paradigm; it champions reasonableness and the law of negligence. Second, it is a case where a helpless individual stranded on an icy evening amidst oceans of cold and snow in Minnesota comes to depend upon a very discrete group of individuals who control the only means of rescue from dire peril and who may be able to effect a rescue at low cost to themselves.[173] Notably, there is nothing to indicate that the plaintiff's illness was a result of some reckless conduct, as in *Yania*,[174] or was the product of some assumed risk and, because the defendants invited the plaintiff in for supper, the normally powerful policy of protecting one's privacy in one's home was much less powerful an obstacle to imposing liability.[175]

Although it is relatively easy to understand why an innocent or trapped business invitee (invitee is the traditional sense of landowner-entrant status classification) injured by a condition (or, in more recent times, an activity) upon land would be owed a reasonable amount of care under the circumstances,[176] *Depue* and a significant body of case law establish a broader proposition: All invited parties—in particular, social guests—are owed a duty of reasonable care to effect an appropriate rescue or to avoid aggravation of or further injury,[177] even if

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173. *Depue*, 111 N.W. at 3. *Depue* pointed out that the jury would have to decide what care was warranted: "We do not wish to be understood as holding that defendants were under absolute duty to entertain plaintiff during the night." *Id.*

174. Yania v. Bigan, 155 A.2d 343 (Pa. 1959).

175. *See* Soldano v. O'Daniels, 190 Cal. Rptr. 310 (Ct. App. 1983) (stating that although a court imposes duty to allow an individual to use a phone in a public portion of a bar, the rule would be different for a private portion of a business or a private residence). The law of tort, particularly certain privacy tort branches, have put a premium upon protecting one's private space, particularly in the home. Thus, *Depue* might have been a tricky case if the plaintiff had simply fallen down on the road in front of the defendant's home. The court gave some subtle indication that it would not have imposed liability in those circumstances; yet, its insistence on a master principle of liability linked to humanitarian impulses suggests otherwise. 111 N.W. at 2-3.

176. *See, e.g.*, L.S. Ayres & Co. v. Hicks, 40 N.E.2d 334 (Ind. 1942) (holding that a six-year-old child caught in department store escalator is entitled to reasonable care to assist him and to avoid aggravation of injury); *see also* Estate of Starling v. Fisherman's Pier, Inc., 401 So. 2d 1136 (Fla. Dist. Ct. App. 1981) (ruling that a commercial fishing pier has a duty to safeguard a passed-out, drunken customer from rolling into the water and drowning); Lindsey v. Miami Dev. Corp., 689 S.W.2d 856 (Tenn. 1985) (holding that a defendant/lessee has a duty to render aid to a social guest invited on the premises who injures himself); Hovermale v. Berkeley Springs Moose Lodge No. 1483, 271 S.E.2d 335 (W. Va. 1980) (holding that a fraternal organization has a duty to render aid once they discover a member of theirs is ill or injured).

177. *Lindsey*, 689 S.W.2d at 859. "Courts have determined that a social guest-host relationship creates a duty to render aid." *Id.; see L.S. Ayres & Co.*, 40 N.E.2d at 337 (holding that a defendant/lessee has a duty to render aid to a social guest who injures himself); Grimes v. Hettinger, 566 S.W.2d 769, 775 (Ky. Ct. App. 1978) (holding that an invitee to a swimming pool

they are "guests" in a non-landowner situation.[178] The case law flaunts traditional landowner-entrant status classifications by significantly broadening the notion of an invitee (and, thus, the duty owed) and goes beyond the limited number of enumerated special relationships set forth in section 314A.[179]

There is also significant support for the notion that a helpless trespasser is owed some duty of care.[180] Thus, harsh precedents like *Buch v. Amory*[181] are no longer dominant.[182] For example, if a trespasser is injured by an instrumentality within the control of the landowner, a section 322 duty to prevent further harm exists.[183] Moreover, many courts have determined that there is "a duty of reasonable care to avoid injuring the trespassing plaintiff whose trapped position is

party is owed a duty of care and that landowner has a duty to render aid); *Depue*, 111 N.W. at 2 (holding that a host has a duty to render aid to a guest).

178. *See* Hutchinson v. Dickie, 162 F.2d 103 (6th Cir. 1947) (discussing duty owed a social guest on the defendant's boat); *see also* Farwell v. Keaton, 240 N.W.2d 217 (Mich. 1976) (involving friends' responsibility for a duty to aid another friend while on a social outing); Tubbs v. Argus, 225 N.E.2d 841 (Ind. Ct. App. 1967) (finding that an automobile passenger is owed a duty to aid); RESTATEMENT (SECOND), *supra* note 3, § 314A(1) (stating that "guests" of inns, theatres, and common carriers traditionally are owed such duties).

179. RESTATEMENT (SECOND), *supra* note 3, § 314A. There is a powerful argument that, at the very least, a person present by express or implied invitation has a "special" relationship sufficient to impose a duty to aid. The only avenue to recognize such a rule under current *Restatement* analysis is through the caveat to section 314A and its comments. *See id.* § 314A cmt. (1). Yet, the case law clearly supports such a duty and does not necessarily turn upon whether or not one enjoys the proper entrant status as a paying or non-paying guest or is in a business or personal relationship.

180. *See, e.g.*, Pridgen v. Boston Hous. Auth., 308 N.E.2d 467 (Mass. 1974) (discussing how a boy injured by climbing through an escape hatch of an elevator is owed a duty of reasonable care by the housing project).

181. Buch v. Amory Mfg. Co., 44 A. 809 (N.H. 1898), *overruled in part by* Ouelette v. Blanchard, 364 A.2d 631 (N.H. 1976).

182. *See Ouelette*, 364 A.2d at 631 (holding that an occupier of land owes a duty of reasonable care under all circumstances when engaged in a dangerous activity such as burning rubbish and not supervising the fire).

183. *See* L.S. Ayres & Co. v. Hicks, 40 N.E.2d 334, 334 (Ind. 1942); RESTATEMENT (SECOND), *supra* note 3, § 322; *see also* Slater v. Illinois Cent. R.R., 209 F. 480 (C.C.D. Tenn. 1911) (holding that although the defendant railroad company was not liable for original injury, assuming control over the plaintiff and negligently treating him raises a duty of reasonable care); *cf.* Union Pac. Ry. Co. v. Cappier, 72 P. 281 (Kan. 1903) (holding that there is no duty to aid); Griswold v. Boston & Maine R.R., 67 N.E. 354 (Mass. 1903), *superseded by Pridgen*, 308 N.E. at 467. In addition, a landowner cannot actively treat an injured trespasser recklessly or wantonly. *See, e.g., Pridgen*, 308 N.E.2d at 474 (holding that a landowner owes an injured trespasser a duty of care once his presence is known). The case law and the *Restatement (Second) of Torts* are particularly clear that one can neither take charge of an injured party and make that party worse off nor move a party from an accident scene to some remote location where he cannot (or will not) receive aid. *See Slater*, 209 F. at 480 (finding that after the victim's leg is severed in train accident, the defendant is liable when the defendant's personnel move the victim, over his protest, and place him in a box car instead of using reasonable care to see to it that he receive prompt medical attention); RESTATEMENT (SECOND), *supra* note 3, § 324.

known,"[184] although some courts seem to have interpreted this approach narrowly to limit any duty owed to merely avoiding "active" injury or injury brought about by affirmative act or force (whatever that may mean[185]).[186] The balance tips in favor of a duty most clearly at the point at which a trespasser has become known to the landowner and known to be in an isolated and trapped or helpless position.[187] Thus, in *Pridgen*, the Massachusetts Supreme Judicial Court discredited and refused to follow *Griswold*[188] and *Osterlind*[189] and ruled:

> In the context of the relationship between an owner or occupier (owner) of the property and a trapped, imperiled and helpless trespasser thereon, we reject any rule which would exempt the owner from liability if he knowingly refrains from taking reasonable action which he is in a position to take and which would prevent injury or further injury to the trespasser. . . . It is unthinkable to have a rule which would hold the authority liable if one of its employees, acting in the course of his employment, pushed the "go" button knowing Joseph Pridgen was trapped in the elevator shaft, but would not hold him liable if, being reasonably able to do so, the employee knowingly failed or refused to turn off the switch to the electrical power for the same elevator.[190]

Pridgen represents a growing body of case law which, when confronted with harsh and shocking results that would be brought about by perceived historical no-duty rules, imposes the duty to behave in a reasonable way. Such duties do not arise from the distinction between

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184. *Pridgen*, 308 N.E.2d at 475; *see* Kuharski v. Somers Motor Links, Inc., 43 A.2d 777 (Conn. 1945) (holding that a duty of reasonable care extended to the defendant trucking company when one of its drivers invited a trespasser on board and knew of her presence); Briney v. Illinois Cent. R.R., 81 N.E.2d 866 (Ill. 1948) (holding that because the defendant railroad company's employees knew of children trespassing on their track, the company assumed a duty of reasonable care to these children); Mann v. Des Moines Ry., 7 N.W.2d 45 (Iowa 1942) (holding that once a trespasser's presence is known, the defendant railroad company has the duty of reasonable care); Frederick v. Philadelphia Rapid Transit, 10 A.2d 576 (Pa. 1940) (holding that even though the defendant subway company was notified of a trespasser's presence, even though they may not have seen him, a duty of reasonable care existed).

185. To the extent that such cases have resurrected a distinction between misfeasance and nonfeasance, they have come under attack by courts and commentators. *See Pridgen*, 308 N.E.2d at 475; WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS 338-39, 340-41 (4th ed. 1971).

186. *See* Averch v. Johnson, 9 P.2d 291 (Colo. 1932) (limiting a property owner's duty of care to a trespasser not to injure him by affirmative acts or events set in motion by the property owner); Day v. Mayberry, 421 S.W.2d 34 (Mo. Ct. App. 1967) (limiting the duty of care owed to trespassers to instances when the property owner knew of the trespasser's presence yet still set in motion events which led to the trespasser's injury).

187. *See Pridgen*, 308 N.E.2d at 477.

188. Griswold v. Boston & Maine R.R., 67 N.E. 354 (Mass. 1903).

189. Osterlind v. Hill, 160 N.E. 301 (Mass. 1928).

190. *Pridgen*, 308 N.E.2d at 476-77.

misfeasance and nonfeasance[191] or from once dominant property/contract paradigms.[192]

Pridgen also shows the force of the remoteness-and-rescue fact pattern.[193] *Pridgen* involved an eleven-year-old trespasser who became entrapped on metal brackets in a elevator shaft, "looking up toward the elevator."[194] In Stephen King fashion, the elevator "moved down and struck him, crushing him and injuring him severely."[195] The situation was especially macabre because of the conscious indifference displayed by an attendant, who lied to the eleven-year-old child's mother about his ability to act and his status in the building and who, in the face of the eleven-year-old child's mother's plea for assistance, turned away and allowed the elevator to crush the boy in the mother's presence.[196] It appears from the report of the case that if anyone had a chance to avoid the crushing injury to the trapped boy, it was the attendant who had the knowledge of danger and the ability to shut off the elevator before it was too late.[197] Thus, *Pridgen* is a fairly typical remoteness-and-rescue case. Although not blameless, the minor was trapped and helpless in a situation where only one individual had a reasonable chance to provide aid, and that person, who controlled the only effective means of rescue, could have averted a tragic injury to a boy (and his mother) at no cost or risk to himself. Indeed, *Pridgen* itself recognized a salient feature of the remoteness-and-rescue fact pattern: This was not a case where many individuals were equally able to rescue or aid, but a case where circumstances made it possible to identify a single party as the wrongful party[198] with respect to a duty to aid.

B. Hutchinson*: Humanitarianism at Sea*

The duty of "the amphibious good samaritan"[199] was curiously sidestepped by the *Restatement (Second) of Torts* in Topic 7, although some of the strongest currents in the law of affirmative duty relate to duties owed by boat masters, their personnel, and persons on boats.

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191. *Id.* at 477. "We reject any notion that this is a duty which can never be violated [by] nonfeasance." *Id.*

192. *See* Rabin, *supra* note 17, at 947.

193. The case could have also been decided under the *Restatement (Second) of Torts* as a section 322 case, but the court did not consider this avenue of analysis.

194. 308 N.E.2d at 470.

195. *Id.*

196. *Id.* at 478.

197. *Id.*

198. *Id.* at 476 n.6.

199. Grigsby v. Coastal Marine Serv. of Tex., 412 F.2d 1011, 1021 (5th Cir. 1969).

One might explain the lack of emphasis in Topic 7 on boat cases on a number of grounds: (1) the cases typically sound in the law of admiralty with its own rules, jurisprudence, and procedures, notably the prominent role of the judge in fact finding;[200] (2) if the boat itself causes injury, or some other instrumentality within the control of the master of the vessel causes injury, the duty to rescue or prevent further harm can arise under section 322;[201] (3) if the person on the boat is an appropriate passenger, a number of theories, depending on the circumstances, might give rise to a duty to rescue or provide aid, including a section 314A duty;[202] and (4) if the person in peril on the boat is an employee of the master or boat owner, the *Restatement (Second) of Torts* would apparently trigger section 314B and impose a duty to provide aid to such a seaman in peril.[203] Given these explanations, most, but not all, boat cases could be pigeonholed;[204] however,

200. Berg v. Chevron USA, Inc., 759 F.2d 1425, 1429 (9th Cir. 1985). "The law of admiralty has always sought to 'encourage and induce men of the sea to go to the aid of life and property in distress.'" *Id.* (quoting 3A M. NORRIS, BENEDICT ON ADMIRALTY § 234 (7th ed. 1980)). As such, "[t]he maritime rescue doctrine has developed as an encouragement to life saving attempts." *Id.* Admiralty often prefers the carrot of encouragement over the stick of duty, which seems to work because the reported decisions spill over with attempted rescue cases where the courts liberally shield those who attempt to save from liability. *See Grigsby*, 412 F.2d at 1022 (holding that a good faith effort to rescue someone bars that person from liability unless he knowingly did not use due care); Frank v. United States, 250 F.2d 178 (3d Cir. 1957) (holding that the Coast Guard's reasonable attempt to rescue a passenger relieved it from liability in his drowning).

201. RESTATEMENT (SECOND), *supra* note 3, § 322 cmts. a, b.

202. *Id.* § 314A(1)(a)-(b). Section 314A states:

> A common carrier is under a duty to its passengers to take reasonable actions . . . to protect them against unreasonable risk of physical harm, and . . . to give them first aid after it knows that they are ill or injured, and to care for them until they can be cared for by others.

Id.

203. *Id.* § 314B(1)-(2).

204. Most persons on boats who are not masters or owners are either paying passengers, employees, or social guests (most American pirates today dwell in amusement parks and in Jimmy Buffett fantasies). Social guests present unusual duty-to-rescue problems under the *Restatement (Second) of Torts*. In addition, if injury occurs, it may also occur to a social guest from some instrumentality under the control of the master, from the master's conduct, or from an improper action during rescue attempt. *See id.* § 321 (stating that once a person realizes his act may cause a dangerous condition, he is under a duty to exercise reasonable care to prevent risk). So it is the unusual case of the social guest not so injured that causes the most troubling *Restatement* problems because of a lack of a pigeonhole into which the case may be put (unless of course, one recognizes the social guest on a boat as having a special relationship sufficient to impose a duty, which the *Restatement (Second) of Torts* does not). Moreover, it is typically the employees' master who has a duty to aid employees because of the proximity of their relationship, and this militates against a duty to aid another master's employees. *See Grigsby*, 412 F.2d at 1022 (holding that a good faith attempt to rescue someone bars the rescuer from liability unless he knowingly did not use due care). Further, there is generally no duty to search for individuals to rescue at sea. *See Frank*, 250 F.2d at 180 (holding that the Coast Guard is under no duty to render

the *Restatement* rhetoric does not dovetail with judicial rhetoric or, in some cases, judicial reality.

Perhaps the most notable case in this regard is *Hutchinson v. Dickie*,[205] which involved the drowning of a social guest[206] who went overboard during a pleasure cruise on Lake Erie.[207] Hutchinson, who owned a "pleasure cabin cruiser,"[208] invited Dickie for a cruise.[209] As is unfortunately true of so many marine accidents, quite a bit of drinking was involved prior to Dickie's descent into Davy Jones' locker.[210] It was daylight; however, sea conditions caused the boat to roll at the time when Dickie went overboard.[211] The Sixth Circuit eliminated any predicate wrongdoing on the part of Hutchinson[212] and limited the question presented to whether Hutchinson "failed to use that degree of care required of him by law to effect his rescue" after the plaintiff had fallen into the lake.[213]

The case arose in admiralty (and, thus, was heard before a judge without a jury) and resulted in a trial judgment in favor of the estate of Dickie.[214] On appeal, the Sixth Circuit reversed the judgment of the lower court and dismissed the action specifically on the ground that no "actionable negligence" was shown.[215] The major issues of fact and law were whether the principal instrument of rescue—the

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assistance but does so voluntarily when it encounters vessels in distress). Duties that arise when ships go down so that only stranger vessels can give aid present complex issues. In spite of general principles favoring aid, some cases suggest that there is no duty to aid. *See, e.g., id.* at 178; *see also* United States v. Gavagan, 280 F.2d 319 (5th Cir. 1960) (holding the Coast Guard liable when its shore staff directs a rescue operation negligently); Mississippi Valley Barge Line Co. v. Indian Towing Co., 232 F.2d 750 (5th Cir. 1956) (ruling that a towing company has no duty to render aid to a vessel but, if it does, the towing company may receive compensation for its effort).

205. 162 F.2d 103 (6th Cir. 1947).

206. *Id.* at 106.

207. *Id.* at 104-05.

208. *Id.* at 104.

209. *Id.* at 105.

210. *Id.* The court determined that there was no evidence that alcohol factored into the failed rescue. *Id.* at 107.

211. *Id.* at 105.

212. *Id.* at 106.

> [T]here is no evidence that he was caused to disappear from the cruiser by any act of negligence or misconduct of appellant who was steering the cruiser at the time, or by any misconduct or negligence of one Rhoda, the sole member of the crew, or by any defect in the construction of the cruiser.

Id.

213. *Id.*

214. *Id.* at 104.

215. *Id.* at 107-08. In essence, the court determined that there was a lack of showing of breach of duty and of causation. *Id.* at 108. The court, therefore, did not treat any issue of the decedent's fault. *Id.*

boat under the control of Hutchinson—was used properly to effect a rescue and, if it had been used more effectively, whether "Dickie would or should have been saved."[216] The Sixth Circuit critiqued the trial judge's conclusion that Hutchinson failed to make a "reasonable effort to rescue Dickie."[217] "The [trial] court did not point out what it had in mind by the term 'reasonable effort' and the record does not disclose any particular thing or things that appellant did or failed to do which proximately caused the death of Dickie."[218]

Although the Sixth Circuit saw no actionable negligence, it was careful to emphasize that no actionable negligence does not mean no duty.[219] In a model of precise analysis[220] (in contrast to *Yania*), the court rejected the notion that no duty was owed:

> We take no stock in [Hutchinson's] contention that he was under no legal obligation to rescue decedent. Dickie was an invited guest upon appellant's cruiser. When appellant heard the cry "Man Overboard!" (an undisputed and relevant fact not referred to either in the findings or in the [trial] court's opinion) we think it was his duty to use reasonable care to rescue him.[221]

In determining that a duty was owed (but not breached, or if breached, not the cause of Dickie's death), the court threw several rationales for its delineation of duty on the table. In avoiding the *Restatement of Torts*, the most pronounced rationale for a duty seems to have been that "Dickie was drowning and appellant's cruiser [under the control of appellant] was the only instrumentality by which he might be rescued."[222] *Hutchinson* is compatible with a rule requiring rescue at sea whenever one knows of danger and of another's imminent peril and controls the only means of rescue. In addition, the court emphasized that Dickie was an "invited guest" and that duty attached at the moment the cry "Man Overboard!" was heard, which suggests that duty attaches upon recognition of risk, contrary to section 314.[223]

Indeed, in its rationales for its analysis of duty, *Hutchinson* proceeded upon a very different premise than that of section 314: To determine duty, *Hutchinson* turned to a line of decisions restating the basic (but marginalized by the *Restatement (Second) of Torts*) notion

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216. *Id.*
217. *Id.*
218. *Id.*
219. *Id.* at 106.
220. *Id.* at 103. *Hutchinson* is a more modern case because, unlike many early common law cases, it carefully separates a no-liability result from an overbroad statement of "no duty."
221. *Id.* at 106.
222. *Id.*
223. RESTATEMENT OF TORTS § 314 (1946); RESTATEMENT (SECOND), *supra* note 3, § 314.

of a general duty of reasonable care set forth in *Heaven v. Pender*[224] and upon "humanitarian considerations."[225] As to the latter point, *Hutchinson* drew upon its assessment that a duty to make reasonable rescue efforts "was certainly a moral duty, universally recognized and acted upon."[226] *Hutchinson* recognized that accepted social duties, "if of a magnitude and importance sufficient to be within the law's cognizance"[227] can become legal duties. Thus, *Hutchinson* had little difficulty determining that "[t]o ask of appellant anything less than ordinary care under the circumstances is so shocking to humanitarian considerations and the commonly accepted code of social conduct that the courts in similar situations have had no difficulty in pronouncing it to be a legal obligation."[228]

Hutchinson is a prime example of a case that neither finds an easy pigeonhole in the *Restatement (Second) of Torts* nor adopts the no-duty-with-exceptions approach of that *Restatement.* It is powerful ammunition for the argument that a duty to use at least minimal, if not reasonable,[229] care arises whenever one who can act at minimal or no risk to himself controls the only instrument of rescue for another who is helpless and in dire and immediate peril in a remote location. That rule rests upon humanitarian considerations typically eliminated from analysis by the *Restatement (Second) of Torts*' approach. Indeed, the analysis is so non-*Restatement* like that one would be forced to argue that "it is an admiralty case," a point which is contradicted by the non-admiralty grounds of analysis used in the case. Or, one might be forced to admit that *Hutchinson* supports a social guest rule[230] of res-

224. 11 L.R.-Q.B. Div. 503 (1883). *Hutchinson* quoted language from *Carey v. Davis*, 180 N.W. 889, 891 (Iowa 1921), itself quoting from *Adams v. Chicago*, 135 N.W. 21 (Iowa 1912), which mirrored the *Heaven* court's general statement of a duty of reasonable care.

225. *Hutchinson*, 162 F.2d at 106.

226. *Id.*

227. *Id.* (quoting JOEL P. BISHOP, COMMENTARIES ON THE NON-CONTRACT LAW § 124 (1889)). The notion that morally recognized duties can become tort duties, or can at least influence tort duties today, is commonly recognized by modern American courts. *See, e.g.*, Tarasoff v. Regents of the Univ. of Cal., 551 P.2d 334 (Cal. 1976). This feature of modern tort law is not prominent in Topic 7 of the *Restatement (Second) of Torts.*

228. *Hutchinson,* 162 F.2d at 106.

229. *Id.* at 108. In *Hutchinson,* the court stated the duty in terms of reasonable care, although it did note that if Hutchinson did err, it was an error in judgment, not of negligence, leaving open the possibility that a duty to rescue does not require unassailable judgment, but perhaps a good faith effort under the circumstances. *Id.* This is similar to what many courts say in emergency cases. *See, e.g.*, Wilson v. Sibert, 535 P.2d 1034 (Alaska 1975).

230. *See* Grimes v. Hettinger, 566 S.W.2d 769 (Ky. Ct. App. 1978).

cue which finds no specific support in the *Restatement (Second) of Torts*.[231]

Hutchinson-like duties would appear to have been so prominent in boat-rescue situations that the typical fact pattern among the boat-rescue cases relates to botched or ineffective, but attempted, rescues, not to the failure to offer any assistance whatsoever. This is *Hutchinson*; it is also the central problem presented in cases like *Frank v. United States*[232] and *Berg v. Chevron USA, Inc.*[233] which dealt with the standard of care to be imposed upon the salvor or rescuer. As in *Berg*, a number of courts, in the spirit of encouraging would-be maritime rescuers,[234] have adopted standards of care which require the aggrieved rescuee, or the appropriate party in interest, to show more than the simple negligence[235] of the failed rescuer.[236] This feature of the boat-rescue cases is instructive to other, non-boat cases. It suggests that a more humanitarian system[237] encourages rescue with duty

231. *See* Jackson v. City of Joliet, 715 F.2d 1200, 1202 (7th Cir. 1985) (discussing the lack of a common law duty to rescue a stranger in distress).

232. 250 F.2d 178 (3d Cir. 1957); *see supra* note 204 (discussing the unique complications that botched rescue attempts and social guests present to the no-duty-to-rescue rule).

233. 759 F.2d 1425 (9th Cir. 1985) (involving a suit against a private vessel that attempted a rescue).

234. *Id.* at 1429.

235. *Id.* at 1429-30; *see* Furka v. Great Lakes Dredge & Dock Co., 755 F.2d 1085, 1088 (4th Cir. 1985) (holding that a plaintiff who attempts a rescue aboard a scow will not be found contributorily negligent unless his conduct was wanton or reckless); Patentas v. United States, 687 F.2d 707, 714-15 (3d Cir. 1982) (holding that the Coast Guard is not liable to injured parties when it has gratuitously acted to protect those parties, so long as the Coast Guard exercises reasonable care, do not increase the risk of harm, and the other parties do not detrimentally rely on their actions); Grigsby v. Coastal Marine Serv. of Tex., Inc., 412 F.2d 1011, 1021-22 (5th Cir. 1969) (holding that a plant guard who attempts a rescue aboard a docked barge is liable for contributory negligence only if he fails to exercise due care).

236. For instance in *Furka*, the Fourth Circuit stated that for a blown rescue to constitute negligence, "there must be evidence of wanton or reckless behavior . . . before any fault may be assigned. This is the standard traditionally applied to the conduct of plaintiffs in rescue situations." 755 F.2d at 1088.

237. Social customs and mores clearly support the humanitarian spirit of rescue. Public outrage over situations like the Kitty Genovese incident and the recent Deletha Word incident, in which a young woman was savagely beaten in Detroit in front of a crowd of onlookers, *see* Myron Stokes, *The Shame of the City, Detroit: Is Apathy To Blame for a Brutal Death*, NEWSWEEK, Sept. 4, 1995, at 26, demonstrate our praise of the heroes (if any) that assist and our concerns over those who simply stand by idly. Situations like the Word incident typically involve factors which deter rescue, such as confusion, legitimate fear of the forces causing injury, the belief that other watchers may or will act first, and also the rescue paradox that the more people who are available for rescue, the less likely anyone will step forward to assist. *See id.* Even so, in that incident, many people did try to help (cellular phones seem to have done more for the law of rescue than courts). *Id.*

Another recent example bears on this as well. Recently, a doctor wrote a piece in *Newsweek* along the lines of the notorious case of *Hurley v. Eddingfield*, 59 N.E. 1058 (Ind. 1901). *See* James N. Dillard, *A Doctor's Dilemma: Helping an Accident Victim on the Road Could Land*

and forgives many failed rescues attempts through immunity. Although Topic 7 of the *Restatement (Second) of Torts* does not even hint at such an approach, a number of states have started down the type of path suggested by the humanitarian law of admiralty by encouraging rescue through good-samaritan-type statutes which reduce the exposure of private rescuers.[238]

C. *Some Cases Involving Cars and Trains*

Another common remoteness fact pattern can occur when a sudden accident[239] occurs involving mechanized transportation. Certain of these types of accidents can put the driver or operator of a car[240] or train (or its personnel)[241] in a position where an isolated victim requires immediate attention: Accidents occurring on less populated roads or on sections of tracks which few frequent put the operator/driver in the position of being the best, if not the only, possible rescuer.

For the most part, these types of cases can be, and have been, swallowed up under *Restatement (Second) of Torts*' rubrics, especially section 322.[242] Thus, for example, in *Tubbs v. Argus*[243] a passenger was

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You in Court, NEWSWEEK, June 12, 1995, at 12. Dr. Dillard takes the position that he "would drive on" were he now to see a person in an emergency situation in need of his services. *Id.* Many individuals sent the "bulk of the week's mail" in response. *Id.* at 18. The editors related that Dillard's article "drew scores of fiery responses." *Id.*

238. *See, e.g.*, ALA. CODE § 6-5-332 (1975); CONN. GEN. STAT. § 52-557B (1991); FLA. STAT. ch. 768.13 (1986). At the very least, Topic 7 of the *Restatement (Second) of Torts* is not current in its failure to recognize this feature of many American jurisdictions' rescue law. Moreover, since the time of the *Wagner* case, which illustrated the concept of "danger invites rescue," American courts have encouraged rescue, if obliquely, by bringing those who attempt rescue within the orbit of the duty owed by the original tortfeasor. *See* Wagner v. International Ry. Co., 133 N.E. 437 (N.Y. 1921).

239. The typical accident is not a mass accident—unless we include commercial plane accidents which present special problems not profitably discussed here—and does not occur in front of an emergency medical technician.

240. *See* Tubbs v. Argus, 225 N.E.2d 841, 843 (Ind. Ct. App. 1967) (holding that a defendant who is in control of an automobile has an affirmative duty to render reasonable aid to passengers who are injured as a result of riding in the car).

241. *See* Tippecanoe Loan v. Cleveland, 106 N.E. 739 (Ind. Ct. App. 1915) (finding a railroad company liable for failing to take affirmative steps to effect the rescue of an employee who was injured by the defendant's train); Slater v. Illinois R.R. Co., 209 F. 480 (C.C.D. Tenn. 1911) (finding a railroad company liable for failing to prevent an aggravation of the original injury suffered by a passenger as a result of riding on the train).

242. The *Restatement (Second) of Torts* provides:

> § 322. Duty to Aid Another Harmed by Actor's Conduct
>
> If the actor knows or has reason to know that by his conduct, whether tortious or innocent, he has caused such bodily harm to another as to make him helpless and in danger of further harm, the actor is under a duty to exercise reasonable care to prevent such further harm.

injured in an automobile mishap with a tree.[244] The driver abandoned the automobile and passenger and did not offer aid or assistance to the injured passenger.[245] The court determined that a duty exists to aid a passenger in need of post-accident assistance.[246]

Doctrinally, the *Tubbs* holding came in spite of the common law's "no general duty to aid."[247] First, the court quoted generally from *L.S. Ayres & Co. v. Hicks*:[248] "Under some circumstances, moral and humanitarian considerations may require one to render assistance to another who has been injured, even though the injury was not due to negligence on his part and may have been caused by the negligence of the injured person."[249] Second, and more specifically, *Tubbs* relied upon *Tippecanoe Loan v. Cleveland Railroad*,[250] *Depue v. Flateau*,[251] *L.S. Ayres & Co. v. Hicks*,[252] and section 322 of the *Restatement (Second) of Torts* for the proposition that affirmative steps are required to rescue a helpless person in peril when the person against whom a duty is asserted is a master/inviter or when the injury resulted from that person's conduct or an instrumentality under his control.[253] Thus, the *Tubbs* court determined that because the passenger received injuries from an instrumentality under the control of the driver, there was a sufficient relationship to impose a duty to aid the passenger.[254]

Whereas *Tubbs* would be easy to pigeonhole as just another section 322 case, its broad general language and reference to several lines of authority imposing duty suggest that even a neatly folded case may not fit into so small a space as a single allotted *Restatement (Second) of Torts* category. *Tubbs* is also equally consistent with a special relationship analysis (driver/passenger) and a humanitarian aid principle (*Depue*, *Hutchinson*). It also illustrates, as similar other railroad acci-

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RESTATEMENT (SECOND), *supra* note 3, § 322. The section applies even to innocent conduct, *see id.* cmt. a, and to "an instrumentality within [the actor's] control." *Id.* In some instances, vehicular mishap cases can involve special relationships or even the attempted, but botched, rescue. *See id.* §§ 323, 324.

243. 225 N.E. at 841.

244. *Id.*

245. *Id.*

246. *Id.* at 843.

247. *Id.* at 842.

248. L.S. Ayres & Co. v. Hicks, 40 N.E.2d 334, 337 (Ind. 1942).

249. *Tubbs*, 225 N.E.2d at 842 (quoting *L.S. Ayres*, 40 N.E.2d at 337.)

250. 106 N.E. 739 (Ind. Ct. App. 1915).

251. 111 N.W. 1 (Minn. 1907).

252. 40 N.E.2d at 334.

253. *Tubbs*, 225 N.E.2d at 842-43. The court pointed out that there need not be a relationship between the driver and the passenger "involving the flow of an economic advantage" to the driver. *Id.* at 843.

254. *Id.*

dent cases might,[255] the remoteness-and-rescue pattern. Even though the accident occurred in the city limits of Indianapolis,[256] the suddenness of an automobile accident with a stationary object, and the fact that no other vehicles were involved, left the driver in a proximate location to a helpless individual. The location put the most likely and immediate source of aid in the hands of the driver because the driver was the first to know of the accident and danger to the helpless passenger, and other drivers, witnesses, or passerbys may have appeared later, or too late, or may have naturally assumed, as many do when they drive by disabled vehicles, that help is on the way or that they should not get involved.[257]

The strength of the remoteness-and-rescue fact pattern flexes in the rare instance[258] when a non-owner passenger is called upon to rescue a driver or another person in the vehicle from imminent harm and does not do so. Although tort law basically allows, and in some cases requires, the passenger to leave control of the operation of the vehicle in motion with the driver,[259] there is authority for the proposition that passengers have duties to use reasonable care to avert imminent peril to a driver, or fellow passenger, where the driver is in an impaired state.

A principal case on this point is *Lombardo v. Hoag*.[260] Although it is not a typical remoteness-and-rescue fact pattern, it is analogous.[261]

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255. *See, e.g.*, Tippecanoe Loan v. Cleveland, 106 N.E. 739 (Ind. Ct. App. 1915) (discussing how certain factual circumstances affect the duty to exercise care in favor of the plaintiff).

256. Many of the train cases have occurred in places where the only reasonable source of initial assistance could come from train personnel. *See, e.g., Tippecanoe Loan*, 106 N.E. at 739; Slater v. Illinois R.R. Co., 209 F. 480 (C.C.D. Tenn. 1911).

257. Indeed, the law as it stands and is perceived by many may work a perverse disincentive to rescue. Rescuers fear that they will be sued by rescuees. *See* Dillard, *supra* note 237, at 12.

258. It is rare for a driver to fail to assist and end up in a reported decision; it is also rare in the reverse. This suggests that drivers and passengers often do aid one another when they are reasonably able to do so. There is very little authority on this point of passenger duties, although there are many cases which discuss the affirmative duties a passenger may have during a drive to protect the driver or third parties. Often such cases, which are typically readily distinguishable for many reasons (including the dangers the intervening passenger might create), hold that there is no duty to control the conduct of a driver and state that there is no special relationship between a driver and a passenger. *See* Olson v. Ische, 343 N.W.2d 284, 287 (Minn. 1984); Adams v. Morris, 584 S.W.2d 712, 716 (Tex. Civ. App. 1979); Hale v. Allstate, 639 P.2d 203, 205 (Utah 1981).

259. *See infra* note 300 (explaining the difficulty of defining the meaning and legal significance of the word "control").

260. 566 A.2d 1185 (N.J. Super. Ct. Law Div. 1989).

261. *Lombardo* was not a case where an accident had already happened and a passenger refused to do anything. Instead, it involved a passenger who did not assist in preventing a serious accident which was just about to happen. Generally, I have not suggested that the remoteness-and-rescue pattern *paradigmatically* includes this temporal sequence, and I have limited my argument principally to fact patterns where the person is truly rendered helpless (a difficulty in

In *Lombardo*, an intoxicated driver-owner of a vehicle was involved in an accident which injured a non-owner passenger.[262] The injured passenger sued another non-owner passenger, who had temporary use of the vehicle but who turned the vehicle back over to the owner-driver, whom the other non-owner passenger knew or reasonably should have known to be intoxicated immediately prior to the accident.[263] In imposing such a duty to protect others in a stationary vehicle, the court considered, but rejected, a variety of typical *Restatement (Second) of Torts*' rationales, including special relationship, section 322, gratuitous undertaking and section 323 and section 324-type rationales.[264] The court even recognized that fitting the case within the *Restatement (Second) of Torts*' negligent entrustment provisions[265] would be a stretch because the defendant-passenger was not "in control of the vehicle at the time he turned it over to [the owner-driver] at least not in the sense envisioned by the *Restatement*."[266]

Lombardo instead premised its duty holding upon careful exegesis of the nature and source of duty and liability in tort law. The court began with the assertion, supported by Prosser,[267] that "[p]ublic policy is a legitimate consideration in the determination of whether a duty of care exists towards another person."[268] After a lengthy consideration of duty imposing authorities in New Jersey and elsewhere, the court turned to an extensive reliance upon the earlier New Jersey supreme court decision in *Wytupek v. Camden*[269] and amplified its analysis of duty:

> But, the imposition of duty is not merely a matter of public policy. It is more than that. It is a bundle of considerations having its premise in concepts of fundamental fairness . . . . Duty then is an obligation grounded in the "natural responsibilities of social living and human relations, such as having the recognition of reasonable men."[270]

Lombardo is that the others might have acted as well) *after* injury. Nonetheless, *Lombardo* has very broad language imposing duty—surely it would recognize a duty in the easier case—and, given the paucity of decisional law on point, it is good evidence of what some courts would do in the unusual passenger-who-can-but-fails-to-aid scenario.

262. *Lombardo*, 566 A.2d at 1186.

263. *Id.* The rationales of *Lombardo* strongly suggest that, at least for the question of duty, no significance attached to the fact that the passenger, as opposed to the driver, brought suit.

264. *Id.* at 1186-87. The court also rejected a statutory rationale. *See id.* at 1187.

265. *See* RESTATEMENT (SECOND), *supra* note 3, § 308.

266. *Lombardo*, 566 A.2d at 1186.

267. *Id.* at 1188; *see* KEETON ET AL., *supra* note 16, § 53.

268. *Lombardo*, 566 A.2d at 1186.

269. 136 A.2d 887 (N.J. 1957).

270. *Lombardo*, 566 A.2d at 1189 (quoting *Wytupeck*, 136 A.2d at 887). *Lombardo* also quoted extensively from *Wytupeck* on the matter of duty. The court stated:

Lombardo then chose to expound at great length upon the connection between duty and morality and simple social mores and expressly rooted its decision in the non-positivistic[271] imposition of a responsibility to use reasonable care.[272] *Lombardo*, while not a classic remote-

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"Duty" is not an abstract conception; and the standard of conduct is not an absolute. Duty arises out of a relation between the particular parties that in *right reason and essential justice enjoins* the protection of the one by the other against what the law by common consent deems an unreasonable risk of harm, such as it reasonably foreseeable. . . . Duty is largely grounded in the natural responsibilities of social living and human relations, such as have the recognition of reasonable men; and fulfillment is had by a correlative standard of conduct.

"Duty" is not rigid formalism according to the standards of a simpler society, immune to the equally compelling needs of the present order; duty must of necessity adjust to the changing social relations and exigencies and man's relation to his fellows; and accordingly the standard of conduct is care commensurate with the reasonably foreseeable danger, such as would be reasonable in the light of the recognizable risk, for negligence is essentially "a matter of risk . . . that is to say, of recognizable danger of injury."

Lombardo, 566 A.2d at 1189 (quoting *Wytupeck*, 136 A.2d at 893-94) (emphasis added).

271. *See* H.L.A. HART, THE CONCEPT OF LAW ch. ix (1961).

272. *Lombardo*, 566 A.2d at 1189. The court in *Lombardo* discussed its position at great length: Duty then is an obligation grounded in the "natural responsibilities of social living and human relations, such as having the recognition of reasonable men." *Id.* The court continued:

Ask a "reasonable man," a lay person, whether a duty should be imposed upon a person to act reasonably in order to insure that an intoxicated person does not drive an automobile, and the odds are that the lay person would respond that a duty should be imposed. But, ask a lawyer whether the duty should be imposed, and the odds are that the lawyer will respond that no such duty is owed. The difference in their thinking is that the lay person perceives law as a reflection of morality, and therefore, concludes that a breach of morality is a breach of the law. The lawyer, however, thinks of the law in a different fashion. He thinks in terms of categories, established by legislative enactments and court opinions. He separates the law from morality, thinking of the former in terms of rules made by a political sovereignty, the breach of which result in sanctions, and the latter in terms of what society believes is right and just, the breach of which will result in considerations by a higher authority sometime in the very distant future.

An enlightened society should no longer excuse the immoral and outrageous conduct of a person who allows another to drown, simply because he doesn't wish to get his feet wet. Society demands more than that of its citizens. It demands that a person exercise a duty of care towards another person in order to insure that the other person remains free from harm, if he can do so without peril to himself. And it demands an atmosphere in which all persons will expect that others will conduct themselves in such a manner. Defendant Niemeyer had an obligation in the law to do what he could to see that Hoag did not drive his vehicle while intoxicated. And, it is of no particular moment whether we express that obligation in terms of duty, or in terms of proximate cause or foreseeable risk, or whether we premise it on some legal rule such as negligent entrustment, or assistance and encouragement, or negligently permitting improper persons to use certain chattels, or entrustment of a chattel by a person known to be incompetent, or anything else for that matter.

Id. at 1189-90 (footnotes omitted).

ness-and-rescue case,[273] demonstrates that some courts are willing to sidestep the *Restatement (Second) of Torts*[274] and even reach to some meta-doctrinal level of analysis[275] to impose the responsibility to use reasonable care, whether viewed negatively or affirmatively. Danger had become isolated to just a few individuals, and the defendant controlled ways to prevent immediate injury. Moreover, although not "helpless," the driver-owner and the passenger-plaintiff in *Lombardo* were impaired enough to require the assistance of the defendant passenger: The fact that the accident occurred immediately after the driver-owner resumed driving the vehicle, upon the defendant's turning over of the keys, provided an immediate link to the defendant's failure to use reasonable care (or his callousness).[276] In addition, the court stressed that there were low-cost, alternative ways to discharge a duty of reasonable care available to the defendant.[277]

D. Unusual Instances of Isolation and the Power of Humanitarian Concepts

It is the odd case where an individual in need of rescue becomes imperiled from danger and no longer able to help himself while not on someone's premises and not as a direct result of some transportation accident (train, boat, or automobile), and is also isolated in some way from the general public and the normal channels of public rescue. Yet when such a case arises, reported American decisions typically impose a duty, at least a minimal or low-risk duty, on the person who controls the means of assistance to act. *Restatement (Second) of Torts*' rationales factor into two principal cases—*Farwell v. Keaton*[278] and *Mostert v. CBL & Associates*[279]—yet those *Restatement* rationales seem forced or greatly expand upon the common notions of how those *Restatement* sections should be utilized.[280]

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273. *See supra* note 261 (discussing the difference between classic remote-and-rescue cases and a case in which the defendant was one of many who could have helped the injured party).

274. *See* McCain v. Florida Power, 593 So. 2d 500, 503-04 (Fla. 1992) (analyzing proximate causation and foreseeability zones of risk in an attempt to broaden the scope of the traditional liability test).

275. *See* Lake, *supra* note 100, at 136-39 (discussing a heightened liability standard that requires less in terms of foreseeability on the part of the defendant). The *Lombardo* court avoided doctrinal pigeonholing when it pointed out that its decision could rest upon several doctrinal bases, including duty and proximate causation. 566 A.2d at 1189.

276. *Lombardo*, 566 A.2d at 1190.

277. *Id.*

278. 240 N.W.2d 217 (Mich. 1976).

279. 741 P.2d 1090 (Wyo. 1987).

280. In *Jackson v. City of Joliet*, 715 F.2d 1200 (7th Cir. 1983), Judge Posner, in discussing *Farwell* and section 323 of the *Restatement (Second) of Torts*, asserted that "if you do begin to rescue someone, you must complete the rescue in a non-negligent fashion even though you had

One of the most celebrated affirmative duty cases, *Farwell v. Keeton*,[281] illustrates the remoteness-and-rescue pattern and evidences the manipulation of *Restatement (Second) of Torts*' rules to justify a duty-to-aid result. In *Farwell*, two boys "were companions on a social venture,"[282] which involved the consumption of beer and girl chasing.[283] Some girls that the two boys followed complained to their friends; those friends chased the two other boys to a trailer rental lot where one of those two boys was severely beaten and left under an automobile.[284] The boy who escaped a beating from the misguided (but chivalrous?) miscreants applied ice to the wounded boy's head and drove the injured boy around for a couple of hours, stopping at several drive-in restaurants.[285] The injured boy "went to sleep in the back seat."[286] The other boy attempted to rouse him, to no avail, and then left the car, with the "sleeping," wounded boy in it, in the injured boy's grandparents' driveway.[287] No attempt was made to alert the grandparents or anyone else.[288] The grandparents first discovered the car and the injured boy the next day.[289] The grandparents took the injured boy to the hospital, but he died three days later.[290] A doctor later testified that if prompt medical attention had been sought, the injured boy would have had a very high chance of survival.[291] There was evidence that the uninjured boy knew that the other boy's injuries were bad and that he knew "he should have done something."[292] A

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no duty of rescue in the first place." *Id.* at 1202. His opinion points out that "[t]he rationale is that other potential rescuers (if any) will be less likely to assist if they see that someone is already at the scene giving aid." *Id.* at 1203. Posner specifically noted that "[t]his rationale is strained in some cases." *Id.*

281. 240 N.W.2d 217. *Farwell*, which appears in several torts casebooks, *see, e.g.*, DOBBS, *supra* note 172, has been heavily discussed in law review literature and is widely recognized as a highly significant case. *See* Thomas C. Galligan, *Aiding and Altruism: A Mythopsycholegal Analysis*, 27 U. MICH. J.L. REFORM 439, 454 (1994); Mary K. Kearney, *Breaking the Silence: Tort Liability for Failing To Protect Children from Abuse*, 42 BUFF. L. REV. 405, 415 (1994); Gretchen A. Kraft, *The Persistence of Dread in Law and Literature*, 102 YALE L.J. 521, 533-34 (1992); Robert J. Lipkin, *Beyond Good Samaritans and Moral Monsters: An Individualistic Justification of the General Legal Duty To Rescue*, 31 UCLA L. REV. 252, 266 (1983); Jean E. Rowe, *The Jurisprudence of Action and Inaction in the Law of Tort: Solving the Puzzle of Nonfeasance and Misfeasance from the 15th-20th Centuries*, 33 DUQ. L. REV. 807, 831 (1995).

282. 240 N.W.2d at 222.

283. *Id.* at 219.

284. *Id.*

285. *Id.*

286. *Id.*

287. *Id.*

288. *Id.*

289. *Id.*

290. *Id.*

291. *Id.*

292. *Id.*

jury delivered a verdict against the uninjured boy, the intermediate court of appeals reversed, but the Supreme Court of Michigan (over dissent) reinstated the jury's verdict and reversed the intermediate court of appeals.[293]

The Supreme Court of Michigan considered two rationales for imposing duty and liability upon the uninjured boy: a "charge and control" rationale and a special relationship rationale.[294] Both rationales significantly stretched those doctrinal categories in the *Restatement (Second) of Torts*.[295] One might view the result in *Farwell* as the synergy of two penumbral *Restatement (Second) of Torts*' arguments; one might also view it as an instance of the power of the remoteness-and-rescue fact pattern.

In considering the charge-and-control rationale, the *Farwell* court began by acknowledging that "there is a clearly recognized legal duty of every person to avoid any affirmative acts which may make a situation worse."[296] Citing and quoting Prosser,[297] the court then ruled that when one attempts to aid and take charge and control of another person, a duty to use reasonable care will be imposed.[298] After consideration of the evidence in the case, the court distilled the matter to the question of whether reasonable care was used under the circumstances.[299] Tricky issues of whether the uninjured boy took sufficient charge and control, whatever that may mean,[300] and whether the injured boy was, in any sense, left in a worse position were not addressed by the court directly.[301]

Although *Farwell* does not cite to or refer to section 324 of the *Restatement (Second) of Torts*, the *Farwell* court's statement of the applicable rules with respect to aid given to a helpless person significantly mirrored that section and its indeterminacies.[302] In particular, section 324 is a brainteaser in that the section at once suggests two independ-

293. *Id.* at 222.

294. *Id.* at 220-22.

295. RESTATEMENT (SECOND), *supra* note 3, §§ 314, 314A, 324.

296. 240 N.W.2d at 220.

297. KEETON ET AL., *supra* note 16, § 56.

298. 240 N.W.2d at 220.

299. *Id.* at 221.

300. A seriously nagging complex of questions swirls in the *Restatement (Second) of Torts* (and in *Farwell*) regarding the meaning and legal significance of control, taking charge, charge and control, and custody and control. The *Restatement* solution is to give an example, not a definition, and this has proven to be confounding. *See, e.g.*, RESTATEMENT (SECOND), *supra* note 3, §§ 315-320; *see also* Lake, *supra* note 100, at 125-34 (explaining *Tarasoff*'s analysis of charge and control).

301. *Farwell*, 240 N.W.2d at 220-21.

302. Section 324 is an application of section 323. *See* RESTATEMENT (SECOND), *supra* note 3, § 324 cmt. a.

ent bases for liability and a caveat. Section 324(a) states that liability arises when the rescuer fails "to exercise reasonable care to secure the safety of the [helpless individual] while within the [rescuer's] charge."[303] Section 324(b) also states that liability arises from a rescuer's "discontinu[ance] . . . [of] aid or protection, if by so doing . . . the other [is left] in a *worse* position than when the [rescuer] took charge of him."[304] In addition, section 324 expresses a caveat to the effect that the section takes no opinion whether liability attaches unless the helpless person is made worse off.[305] Certainly, in *Farwell* it is difficult to argue that the injured boy, left for dead under a car where no one would find him[306] until it was much too late, was made worse off by the excursion. At the very least, he was fed, iced down, comforted, and returned to the place of family members, which, at the risk of sounding macabre, if one is going to die seems a bit more pleasant way to die than under a car, alone and abandoned.

If the injured boy was left in a worse position, it was in an odd sense—he was worse off because he was in a *potentially* better position[307] after being taken from under the car and then was effectively returned to a position, in front of the grandparents' house, which was not functionally worse than being under a car in a lot, but which was worse than the *potentially* better situation immediately prior to the drop-off. To the extent that *Farwell* can be reconciled with section 324, it is a stretch, or a stretch of section 324: *Farwell* says, and also at least seems to say other things, that when one takes charge, reason-

303. *Id.* § 324(a).

304. *Id.* § 324(b) (emphasis added).

305. *See id.* § 324 caveat. The problem is compounded in the various comments on and illustrations of the section which refer to actions making a helpless person worse off. *See, e.g., id.* § 324 cmt. d. A rather odd sense of worse off is illustrated in comment g of section 324. That comment reads: "[W]hile A, who has taken B from a trench filled with poisonous gas, does not thereby obligate himself to pay for B's treatment in a hospital, he cannot throw B back into the same trench, or leave him lying in the street where he may be run over." This example has always reminded me of a scene from the Monty Python film, LIFE OF BRIAN (Handmade Films 1979), where an old man is about to be stoned and, with little left to lose, utters blasphemous remarks. The old man is admonished to cease the remarks as "you're only making it worse for yourself." His response—"how could it be worse?" Although I agree that liability should attach in the situations discussed in comment g of section 324, it is a bit odd that the best argument of the man in the poisonous ditch who was otherwise doomed to die a hideous death is that the would-be rescuer made him worse off. It seems that at worst, the victim is worse off because, having taken him from danger, the rescuer failed to use reasonable care to secure his safety or to keep or to put him in a safe position.

306. I assume arguendo that the injured boy had little or no chance of receiving aid from others if left under the car.

307. The situation was potentially better because the rescuer could have done just a little bit more to put the injured party into the hands of competent assistance. Or, the injured party was worse off because the rescuer did not use even minimal care to summon needed assistance.

able care is required, simpliciter. The court's analysis, and its lack of analysis of other matters, supports that interpretation, and a consideration of what "worse off" would have to mean also supports that rule. Nevertheless, that rule is not the rule of section 324 except *perhaps* that it might be a rather extreme construction of section 324.

The other rationale of *Farwell*—special relationship—is a clearer expansion of what was otherwise contemplated in the *Restatement (Second) of Torts*.[308] After considering the general no-duty-to-rescue rule[309] and the special relationship exception thereto,[310] the court did not hesitate to conclude that "companions on a social venture" implicitly bring with them "the understanding that one will render assistance to the other when he is in peril if he can do so without endangering himself"[311] and, thus, enjoy a special relationship sufficient to impose a duty to aid.[312] A special relationship based upon a social venture is not recognized as such by the *Restatement (Second) of Torts*.[313] At most, it is permitted by the caveat to section 314 wherein no opinion is expressed "as to whether there may not be other relations which impose"[314] a duty to aid. *Farwell* is a significant expansion of the *Restatement* approach to special relationships.

Farwell is intriguing because it is neither a classic section 324 nor a standard section 314A case, but represents the outer limits of interpretation of both sections. Perhaps it represents the power that humanitarian[315] notions, often relegated to secondary concerns in the tough talk of the common law, have over cases that do not fit neatly into *Restatement* categories. *Farwell* also represents the power of the remote-rescue fact pattern. Here, a virtually helpless individual in severe and immediate peril is discovered in a remote location by a single rescuer. The knowledge of the imperilled's need and location, coupled with the fact that the rescuer controls whether this information would ever reach the appropriate authorities, put the rescuer in virtually the same position as in *Depue*[316] and *Hutchinson*.[317] Moreover, the rescuer in *Farwell* could have acted without endangering himself

308. It is interesting that *Farwell* did not cite or refer to section 314 or 314A of the *Restatement (Second) of Torts*.

309. Farwell v. Keaton, 240 N.W.2d 217, 221 & n.3 (Mich. 1976).

310. *Id.* at 221 & n.4; *see* RESTATEMENT (SECOND), *supra* note 3, § 314A.

311. *Id.* at 222.

312. *Id.* (drawing upon Depue v. Flateau, 111 N.W. 1 (Minn. 1907) and Hutchinson v. Dickie, 162 F.2d 103 (6th Cir. 1947)).

313. *See* RESTATEMENT (SECOND), *supra* note 3, § 314A.

314. *Id.* § 314A caveat; *see id.* § 314A cmt. b.

315. *See Farwell*, 240 N.W.2d at 222.

316. *See supra* notes 137-56 and accompanying text (describing how the defendant forced the ill plaintiff to leave the defendant's remotely situated home during a ferocious blizzard).

and without exposing his private sphere of activities to a stranger.[318] Humanitarian principles have powerful implications in the no-risk, remote-rescue situation.[319]

Another unusual but important case is *Mostert v. CBL & Associates*.[320] *Mostert* involved the tragic drowning of Kumi Maria Mostert, who had been a patron at a movie theatre shortly before flood waters engulfed the vehicle in which she was riding.[321] While she was in the theatre, a terrific storm blew in, prompting the authorities to issue a series of warnings culminating in "local emergency management officials demand[ing] that citizens stay indoors in a safe area and off the streets to avoid being injured or killed."[322] While the theatre operators were aware of the storm and the warnings, Mostert was not because she was in the theatre, and neither she nor the other patrons were warned.[323] The theatre operators made no attempt to warn her as she exited the theatre; after exiting the theatre, the vehicle in which she was riding was hit by flood waters, and she drowned in an attempt to escape from the vehicle.[324]

The Supreme Court of Wyoming was presented with a rather unusual problem involving the duty of care owed by a business invitor to an invitee: "Historically, landowners owed no duty to warn or take action to prevent harm to invitees where the risks involved were outside their premises."[325] Given that there was little precedent for anything other than limited, off-premises duty,[326] the court engaged in an intense examination of the nature and source of duty.[327]

The court made several observations about duty, several deriving directly or indirectly from Prosser:

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317. *See supra* notes 205-18 and accompanying text (describing how the plaintiff fell off the defendant's boat on Lake Erie and drowned).

318. *Farwell*, 240 N.W.2d at 222.

319. *Farwell* may have gone a bit overboard in insisting that the uninjured boy (sixteen years old) behaved in a shocking way. *See id.* at 222. He was the younger of the two boys and he was likely very afraid and confused. He did help the injured boy and may simply have been attempting to find a way out of the trouble he and his friend were in. The truly shocking cases occur when deliberate, conscious, and complete indifference occurs and/or when an individual revels, relishes, or flourishes in the context of such deliberate indifference. Such cases are rare, however, and, as such, are not the core concern of humanitarian principles in the rescue context.

320. 741 P.2d 1090 (Wyo. 1987).

321. *Id.* at 1091-92.

322. *Id.* at 1091.

323. *Id.* at 1092.

324. *Id.*

325. *Id.* at 1092-93.

326. *See id.* at 1095-96. Interestingly, the court grouped *Tarasoff v. Regents of the University of California*, 551 P.2d 334 (Cal. 1976), into the category of off-premises risk cases. *Id.* at 1095.

327. *Id.* at 1093-95.

(1) "'[d]uty' has no single definition that is applicable in all circumstances";[328]

(2) "'[t]he problem of duty is as broad as the whole law of negligence, and . . . no universal test for it ever has been formulated'";[329]

(3) duty is a "conclusion"[330] and is "not sacrosanct in itself";[331]

(4) duty is the "sum total of those considerations of policy which leads the law to say that the plaintiff is entitled to protection";[332] and

(5) duty is not static, but dynamic; no catalog of "duties" or duty rules could capture the ever-changing matching of rules to social needs.[333]

Following its observations about the nature and source of duty, *Mostert* announced that it would depart from the traditional no-duty-off-premises rule.[334] Upon a balancing of considerations, the court determined that the theatre operators had a duty to reveal what they knew and were aware that Mostert did not know, so as to warn her of the off-premises danger.[335] The court did not impose any greater duty, such as one to advise or control, and the court did not rule upon whether or not the theatre had its patrons under its charge, control, custody, or any combination thereof.[336] Instead, it appears that having had information which could have been disseminated at a low cost and at no risk to themselves was sufficient to impose a duty on the operators.[337]

Mostert did not place any significant reliance upon any *Restatement (Second) of Torts*' analysis and would be difficult to reconcile with the

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328. *Id.* at 1093.

329. *Id.* (quoting KEETON ET AL., *supra* note 16, § 53).

330. *Id.*

331. *Id.* at 1093 (quoting Gates v. Richardson, 719 P.2d 193, 196 (Wyo. 1986)).

332. *Id.* Relying upon *Gates*, the *Mostert* court chose to rely upon eight factors of this sort: (1) [t]he foreseeability of harm to the plaintiff, (2) the closeness of the connection between the defendant's conduct and the injury suffered, (3) the degree of certainty that the plaintiff suffered injury, (4) the moral blame attached to the defendant's conduct, (5) the policy of preventing future harm, (6) the extent of the burden upon the defendant, (7) the consequences to the community and the court system, and (8) the availability, cost and prevalence of insurance for the risk involved.

Id. at 1094. The same eight factors can be enumerated as only seven by using identical language but combining numbers seven and eight. *See* Lake, *supra* note 100, at 119 & n.116.

333. *Mostert*, 741 P.2d at 1093; *see* McCain v. Florida Power, 593 So. 2d 500, 503 (Fla. 1992).

334. *Mostert*, 741 P.2d at 1094.

335. *Id.* at 1096.

336. *Id.*

337. Given the balancing of factors that occurred in *Mostert*, it would have been intriguing for the court to have considered section 314 of the *Restatement (Second) of Torts* (which would appear to be in conflict) or section 314A (which would appear to be at least stretched). *Mostert* is most consistent with section 314 comment b, which acknowledges that the law is slowly recognizing duty in relations of dependence.

Restatement. *Mostert* represents a *Lombardo*-like[338] variation upon the remoteness-and-rescue fact pattern in that it involves the question of the duty to warn of or avert imminent danger. Nevertheless, in spite of its "conscious indifference" before injury variation, it supports the pattern. The individuals in need of protection had become isolated and, in effect, helpless without the information they needed to survive. Their need was immediate and urgent, and the theatre operators controlled the needed information because the patrons were isolated in the theatre. The information could have been provided in a low-cost, no-risk way. The plaintiff was blameless and was under no duty to be constantly vigilant against the remote possibility of the storm of storms, especially when it would be natural to assume that a theatre operator in control of such urgent information would share it.

Because *Mostert* is a conscious-indifference, information-known/information-withheld case, it represents perhaps the clearest attack upon section 314's limited no-duty rule that a remoteness-and-rescue pattern has to offer. *Mostert* strongly suggests that what section 314 implies by omission may not be true: the mere recognition of risk by a defendant, when considered in light of humanitarian notions or policy factors not recognized explicitly in the *Restatement (Second) of Torts*, may be enough to impose liability.[339] Section 314 implies that there is nothing special in itself about the mere recognition of risk to another; the humanitarian notions dormant in the *Restatement* suggest otherwise. Conscious and deliberate disregard of the risk of another is very significant and should result in liability unless strong factors counsel against such liability.

III. Recognizing a Remoteness-and-Rescue Rule

A major conceptual obstacle to improving upon the approach of the *Restatement (Second) of Torts* to affirmative duties to rescue has been the mistaken belief that the problem of affirmative duties to rescue is unique. Duty-to-rescue cases do not raise peculiar problems and should be viewed in the normal context of negligence law and its paradigm of reasonableness.[340]

338. Lombardo v. Hoag, 566 A.2d 1185 (N.J. Super. Ct. Law Div. 1989); *see supra* notes 260-77 and accompanying text (describing a defendant who knew that the owner of a vehicle was intoxicated but, nevertheless, relinquished contol of the vehicle to the owner).

339. *See Mostert*, 741 P.2d at 1096.

340. *See* Rabin, *supra* note 17, at 929-30; Gary T. Schwartz, *The Beginning and the Possible End of the Rise of Modern American Tort Law*, 26 GA. L. REV. 601, 699 (1992) ("As a matter of doctrine, the expansion of liability in modern tort law took place within the framework of the concept of negligence/unreasonableness. As a matter of judicial purpose that expansion occurred in large part because of the inherent appeal of the negligence standard . . . .").

The belief in the uniqueness of affirmative-duty cases has led courts away from recognizing that the misfeasance/nonfeasance "distinction" is a chimera (that distinction both fails as a distinction and as being relevant to the ultimate determination of liability). It has also led such courts away from recognizing that duty-to-rescue cases raise, just like any other negligence cases, "the specter of widespread tort liability, or unfocused liability."[341] Hence, one core concern is that among a crowd of onlookers or possible rescuers, why one party should be held liable.[342] A similar concern is that with so many people in constant need, a duty to aid could not effectively work to require everyone to dedicate all of their time and resources to save others.

Much of the *Restatement (Second) of Torts*' approach to recognizing affirmative duties to aid or protect sleepwalks to a set of rules designed to meet these concerns. Typically, the exceptions to the limited no-duty rule of section 314 have the effect of limiting widespread liability.[343] A special relationship makes the concept of one's neighbor more discrete.[344] Section 322 limits the class of defendants narrowly to those whose instruments or conduct differentiates them from the crowd. Sections 323 and 324 also close the circle upon a discrete set of individuals who chose to act; in such cases, actors may box out potential rescuers.[345] The rejection of an "easy rescue" rule as such is understandable; there would be no necessary liability-limiting tool if such a rule were adopted.[346]

The problem of widespread liability, which is a burden on the community as well as on defendants, is mirrored in the actual causation,[347] comparative fault, and joint and several liability problems in a multi-

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Schwartz also predicted further expansion: "[O]ne can confidently predict that courts, at least at times, will continue to innovate in imposing liability on institutions whose conduct can be acceptably characterized as unreasonable." *Id.* at 701-02 (footnote omitted).

341. Robert L. Rabin, *Tort Recovery for Negligently Inflicted Economic Loss: A Reassessment*, 37 STAN. L. REV. 1513, 1514 (1985) (emphasis omitted). Rabin's focus in that article is upon economic loss, but his observation works in this context as well.

342. *See* KEETON ET AL., *supra* note 16, at 307-08.

343. *See, e.g.*, RESTATEMENT (SECOND), *supra* note 3, §§ 314A, 324.

344. This type of logic pervades another conundrum of duty—the economic loss rule. *See* Rabin, *supra* note 341, at 1514-17.

345. *See* Jackson v. City of Joliet, 715 F.2d 1200, 1203 (7th Cir. 1985).

346. There would be great difficulty in cases like the Kitty Genovese or Deletha Word incidents in limiting liability; indeed it would be hard to distinguish a proposed duty to provide assistance to the homeless, for instance, without some liability limiting principle.

347. Adler has pointed out, correctly, that causation problems often receive little attention in rescue cases. *See* Adler, *supra* note 1, at 912-14.

party, non-rescue situation, like the Kitty Genovese[348] or Deletha Word[349] incidents. It is difficult to argue that anyone in a group is the "but for" cause of further injury in a rescue scenario: Any other party could have intervened. It is even difficult to argue the substantial-factor test[350] because in a large group of onlookers each has the power to aid and, thus, the "substantiality" of any individual in the group as a cause of injury wanes. This problem is compounded if there is any appreciable plaintiff fault. Moreover, modifications of rules of joint and several liability would often make many cases practically unwinnable or unattractive lawsuits.[351]

Nonetheless, instances where there is no specter of widespread liability remain unrecognized as such by the *Restatement (Second) of Torts*.[352] The remoteness-and-rescue fact pattern is such an example. The crucial feature of the fact pattern is that by virtue of the remoteness of the injury and the exclusive control of the instrument of rescue, there is typically no concern about widespread or unfocused tort liability. By definition, potential Genovese defendants are not within, or are at the outside boundary of, the fact pattern because the helpless person is no longer remotely situated as the injured persons were in *Depue*,[353] *Hutchinson*,[354] or *Farwell*.[355] Not surprisingly, in the rare

348. Joe Sexton, *Reviving the Kitty Genovese Case and Its Passions*, N.Y. TIMES, July 25, 1995, at B1 (describing a case where thirty-eight witnesses saw or heard the victim being sexually assaulted and stabbed for half an hour and, yet, none of the witnesses called the police).

349. *See supra* note 237.

350. *See* Landers v. East Tex. Salt Water Disposal Co., 248 S.W.2d 731, 734 (Tex. 1952); KEETON ET AL., *supra* note 16, § 41.

351. Consider what might happen in a state like Florida, which has adopted pure comparative fault but has modified the doctrine of joint and several liability by statute. *See* FLA. STAT. ANN. §§ 627.727, 768.81 (West 1996). Assuming arguendo that a blameworthy plaintiff sues a less blameworthy defendant for failure to rescue under some recognized basis of liability, that plaintiff will likely receive very little. Under Florida law, such a defendant will be responsible only for his percentage share of total damages, to be offset by taking into account the fault of parties that were not even joined in the action. Assuming one million dollars in compensatory damages, 20% plaintiff's fault and eighty equally faulty parties including the defendant, none of whom could be brought to trial or located, except this defendant, the plaintiff would be *at most* entitled to $10,000 from that defendant. *See id.*; Fabre v. Marin, 623 So. 2d 1182, 1185-87 (Fla. 1993) (illustrating the use of these statutes). Add a significantly more blameworthy party into the mix, (often those in need of rescue have been put there, as in *Farwell*, by bad people) and the remaining non-rescuers share an ever-decreasing liability for a lower percentage of total fault. Assume, for example, that a drunk driver injures a friend in an accident where the driver is 60% at fault for the original accident. Now assume that eighty people including the defendant fail to rescue the plaintiff passenger. Assuming that the passenger (still 20% at fault) just sues one non-rescuer onlooker, that onlooker, at most, would be responsible only for $2,500.

352. *See, e.g.*, Mostert v. CBL & Assoc., 741 P.2d 1090 (Wyo. 1987).

353. Depue v. Flateau, 111 N.W. 1 (Minn. 1907).

354. Hutchinson v. Dickie, 162 F.2d 103 (6th Cir. 1947).

355. Farwell v. Keaton, 240 N.W.2d 217 (Mich. 1976).

instances where a remote-rescue-type case exists and cannot be forced into expanding *Restatement (Second) of Torts* sections, courts express a strong tendency to impose a duty to aid, if not liability outright. Courts intuitively recognize that a common problem for all tort cases—the celebrated widespread or unfocused liability problems of *Palsgraf v. Long Island Railroad*[356]—becomes less of a problem in the remote-rescue context. Humanitarian notions then become more dominant. Philosophically, there is something very basic about the way that human beings in remote situations tend to relate to one another.[357] On a crowded avenue in New York City, people pass each other with little recognition. In remote sections of Southwest Texas along the Rio Grande, however, people typically wave on the roadways as they pass and speak to strangers in supermarkets. When someone is stranded or needs help, many people offer assistance. If one is new to the area, the simple spirit of humanitarianism and community is infectious.

What commentators like Bohlen, Ames, and Bentham who advocated duties to effect easy rescues overlooked was that although the ease of rescue is a necessary criterion for the imposition of liability in these circumstances, it is not a sufficient condition. The *Restatement (Second) of Torts* mistakenly suggests[358] that because "easy rescue" is not a sufficient condition to impose liability, it is not relevant.

Another trick to recognizing the remoteness-and-rescue rule is acknowledging that the specter of widespread tort liability is not the only factor that might counsel against the imposition of liability. Again, there is nothing singular about "affirmative duty" or the "duty to rescue," etcetera, in this regard. For example, (at times) one critical factor is what I refer to here as the autonomy factor.[359] The most prominent reasons not to impose a duty in the remote-rescue situation, apart from risk to the rescuer already included in the rule, are: (1) where the duty to rescue encroaches into some protected, private space free from the burden of taking care of others one has not chosen to harm or to put at risk of harm[360] or (2) where the person in need of

356. 162 N.E. 99 (N.Y. 1928).

357. The appeal of books like *The Celestine Prophecy* by James Redfield lies in part in a notion that people who enter our immediate sphere of influence come not by accident.

358. Technically, the *Restatement (Second) of Torts* rejects the easy rescue rule in a very narrow way. *See* RESTATEMENT (SECOND), *supra* note 3, § 314 cmt. c. It merely states that section 314 is unchanged by the low risk of rescue or giving aid. The subtleties in making that assertion are lost on the courts.

359. I use the term autonomy here in a far less ambitious sense than might appear in the writings of Kant or Rawls. Whatever connections may exist, I leave them off here.

360. *See, e.g.*, Soldano v. O'Daniels, 190 Cal. Rptr. 310 (Ct. App. 1983) (recognizing that a duty to allow a person to use a phone in a public portion of a bar does not mean that citizens

rescue must be held responsible for the consequences of his or her own actions.[361] The "privacy" and "responsibility" branches of the autonomy factor are potentially powerful reasons not to impose a duty to rescue because of the burden that such a duty might have upon a given defendant or upon the community at large.[362] However, the humanitarian argument is very powerful and would, for all but the most tough-talk-oriented courts, override the autonomy arguments, except when very serious intrusions on privacy or very egregious forms of non-socially useful risk-taking behavior are involved.[363] Thus, while most courts recognize a duty in the remote-rescue context, not every court will or should embrace a duty to aid unqualifiedly.[364]

Courts do and should recognize the remoteness-and-rescue rule, and courts do and should depart from that rule when strong autonomy factors outweigh humanitarian principles. That rule is perfectly consistent with many of the older no-duty cases which may have involved: significant risk to the rescuer;[365] some perceived invasion of one's private space[366] (for instance, a doctor refusing to treat an injured person may be entitled[367] to walk on by[368]); and/or a dogmatic insistence

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must open their homes up for rescue calls). Every society in modern conditions will carve some space for deliberate indifference to others.

361. *See, e.g.*, Yania v. Bigan, 155 A.2d 343 (Pa. 1959).

362. For example, certain high-risk behavior has become the rage, such as bungee jumping, sea kayaking in icy waters, and grizzly bear photography. Individuals often put themselves at risk (with little social utility) and expect that public rescue systems will pull them to safety. These rescues are often costly and risky so it is no surprise that courts often balk at imposing duties to rescue, even upon the police and the Coast Guard. *See, e.g.*, Mostert v. CBL & Assoc., 741 P.2d 1090 (Wyo. 1987). Moreover, if such a rescue is made, the "victim" should foot the bill of the cost of rescue. This is somewhat like the rule adopted in *Vincent v. Lake Erie Transportation Co.*, 124 N.W. 221 (Minn. 1910), holding that in time of need, a boat owner may look to a dock for safety but must pay for any damage caused.

363. Even if some idiot jumps headlong into a pit of vipers, the medical costs to society may be so great that a rescue would be cost justified. Economically minded courts, who may also credit a tougher ethic, may think twice even on the responsibility branch of the autonomy factor.

364. *See* Miller v. Arnal Corp., 632 P.2d 987, 992 (Ariz. Ct. App. 1981) (refusing to overturn denial of new trial motion following jury verdict against deep winter hiker/primitive camper who "claimed that his injuries were exacerbated by a termination of the initial plans and arrangements being made by the ski patrol to attempt his rescue" in circumstances where severe winter weather interfered with rescue attempts of him and another who perished).

365. *See* Osterlind v. Hill, 160 N.E. 301 (Mass. 1928). *But see* Pridgen v. Boston Hous. Auth., 308 N.E. 467 (Mass. 1974).

366. *See* Buch v. Amory Mfg. Co., 44 A. 809 (N.H. 1898) (holding that there is a duty to warn an eight-year-old trespasser of hidden dangers, even when his presence is known to the overseer of a textile mill). *But see* Oulette v. Blanchard, 364 A.2d 631 (N.H. 1976) (holding that foreseeability of risk and reasonableness, not the status of the plaintiff, determines duty).

367. Doctor and hospital indifference is no longer legally accepted without qualification. This very complicated area of law is beyond the scope of this article. *See, e.g.*, Broderson v. Sioux Valley Mem'l Hosp., 902 F. Supp. 931 (N.D. Iowa 1995).

upon personal responsibility at all costs.[369] From that perspective, the result in those cases may not be so shocking or morally outrageous as is so often supposed. If anything is missing in the *Yania*-type case, it may be rationale and rhetoric.

A. A Broader Conception of Affirmative Duty and the Duty To Rescue

Increasingly, American courts in cases like *Mostert*, *Lombardo*, and *Schuster* recognize that the imposition of liability is the function of the calculus of numerous factors.[370] That type of analysis is not unique to any particular class of duty or no-duty cases.[371] The "duty to rescue," like duty in general, is not "sacrosanct" but is a conclusion which is often the result of balancing various factors.[372] The choice between "generally there is no duty to rescue" and "generally there is a duty to rescue" is a faux choice. Largely for fear of excessive widespread liability, of excessive burdens upon the community and defendants, and of negating personal accountability, courts seem to feel forced to choose a no-duty rule subject to exceptions, but they abandon that analysis almost entirely when humanitarian principles cry out for liability or duty and there are no overriding policy concerns which counsel against liability. That state of the law is very unsatisfactory because result and rhetoric so often mismatch. This has led to much overtly critical commentary on older cases which were decided when the dominant paradigms of private law were not what they are today. Many of the older cases may have been correctly decided, even on "moral"[373] grounds.

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368. *See* Hurley v. Eddingfield, 59 N.E. 1058, 1058 (Ind. 1901) (holding that the doctor who without good reason failed to assist a very ill person who later died was not liable for the injury). *But see* Palace Bar, Inc. v. Fearnot, 381 N.E.2d 858, 864 (Ind. 1978) (holding that there is no liability for failure to render assistance if such failure is not the proximate cause of further injury); L.S. Ayres & Co. v. Hicks, 40 N.E.2d 334, 337 (Ind. 1942) (finding there may be a duty to rescue where the potential rescuer is an invitor or the injury resulted from an "instrumentality under the control of the defendant").

369. *See, e.g.*, Yania v. Bigan, 155 A.2d 343 (Pa. 1959).

370. Adler, *supra* note 1, at 901-03, nn.148, 149.

371. I have described this type of approach as a type of decisionmaking involving "meta-analysis" in the context of describing its impact upon *Tarasoff*. *See* Lake, *supra* note 100, at 157-71.

372. *See id.* at 114.

373. One attack upon the older decisions is that they espouse the separation of law and morals. *See* Lombardo v. Hoag, 566 A.2d 1185, 1189-90 (N.J. Super. Ct. Law Div. 1989). This may be so, but the older cases are equally consistent with a different moral vision and a different balancing of competing factors.

CONCLUSION

A major step forward in reconceptualizing affirmative duties will occur when courts and commentators recognize the dominance of humanitarian principles in the remoteness-and-rescue fact pattern. First, such a recognition will undercut the tough-talk images of no-duty-to-rescue rules: For all the rhetoric, many courts throughout the period of the growth of the law of negligence have deferred to rules based upon humanitarian principles in appropriate circumstances. It makes no sense to ignore or trivialize cases like *Depue*, *Hutchinson*, *Mostert*, *Schuster*, *Farwell*, and *Lombardo*, particularly when those cases continue to rise in significance while the importance of cases like *Osterlind*, *Buch*, and *Yania* has waned. Second, courts and commentators should reexamine their reliance upon the *Restatement (Second) of Torts*, which does not (and did not) capture all of the case law accurately and misses the spirit of much of it. That *Restatement* is now overly solicitous to an era that may not even have existed in the form it takes under the rules of the current *Restatement*. Much of that *Restatement*'s Topic 7 is based upon the assumption that many of "the older cases were shocking," which may be an unfair characterization of the results in those cases. Third, the recognition of the remoteness-and-rescue pattern will suggest the recognition of a far broader reconceptualizaton of questions of duty and liability generally: Courts like *Mostert* and *Schuster* indicate that certain principal jurisprudential assumptions of the *Restatement (Second) of Torts* with respect to duty—among them, the disregard of policy factors balancing in the calculation of duty—have already been superseded by existing case law.

Rescue rules have themselves been seen as a remote, almost theoretical, problem. As far from day-to-day experience as they are, they are central to problems of the nature and source of duty. The law of rescue needs our attention to reconcile it with a system of tort liability otherwise dominated by the paradigm of reasonableness, the law of negligence, and modern concepts of duty. There is nothing particularly difficult about reconceptualizing the law of rescue now, particularly in light of ample decisional case law, including the remote-rescue cases, which cries out for such doctrinal reform.