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THE RESCUE DOCTRINE IN MEDICAL MALPRACTICE AND PRODUCT LIABILITY ACTIONS: SO MUCH FOR HEROES

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Some things stick in your craw. You can't swallow them and you can't spit them out. I'm going to try to get rid of a couple of fishbones that have been choking me for a long time.

Remember *Wagner v. International Railway. Co.*?[1] Of course you do; everyone does. Arthur Wagner, the plaintiff, and Herbert Wagner, his cousin, were passengers on the defendant's electric railway.[2] Because other passengers blocked the aisle to the car, the two cousins stood among passengers on the car's platform.[3] "The platform was provided with doors, but the conductor did not close them."[4] As the car was passing from a trestle to a bridge, "[t]here was a violent lurch, and Herbert Wagner was thrown out."[5] The car crossed the bridge and stopped at the bottom of the descending trestle.[6] "Night and darkness had come on."[7] "Another car was due, and [the] body, if not removed, might be ground beneath the wheels."[8] To save his cousin, the plaintiff walked along the trestle some 445 feet until he reached the bridge.[9] There the plaintiff found Herbert's hat, and then, "miss[ing] his footing," the plaintiff fell to the ground below.[10] Cousin Herbert had already fallen to the ground. To recover for his injuries, Arthur sued the railway company.[11]

At trial, the plaintiff testified that he was asked to climb the trestle by the conductor, who followed with a lantern. The conductor denied both prongs of the plaintiff's assertion.[12] The trial judge, concluding that defendant's negligence toward Herbert "would not charge the defendant with liability for injuries suffered by the plaintiff unless . . . the plaintiff had been invited by the conductor to go upon the bridge . . . and . . . that the conductor had followed with a light,"[13] instructed the jury that the plaintiff could recover only if the jury found those two facts. So instructed, the jury returned a verdict for the defendant.[14] The Appellate Division affirmed.[15] But the Court of Appeals of New York reversed.[16]

Judge Cardozo, in what has probably become one of the most familiar, and remains one of the most lucid, paragraphs in judicial writing, concluded that

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1. Wagner v. International Ry. Co., 133 N.E. 437 (N.Y. 1921).
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.* at 438.
9. *Id.* at 437.
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.* at 438.
16. *Id.*

> [d]anger invites rescue. The cry of distress is the summons to relief. The law does not ignore these reactions of the mind in tracing conduct to its consequences. It recognizes them as normal. It places their effects within the range of the natural and probable. The wrong that imperils life is a wrong to the imperiled victim; it is a wrong also to his rescuer. The state that leaves an opening in a bridge is liable to the child that falls into the stream, but liable also to the parent who plunges to its aid. The railroad company whose train approaches without signal is a wrongdoer toward the traveler surprised between the rails, but a wrongdoer also to the bystander who drags him from the path. The risk of rescue, if only it be not wanton, is born of the occasion. The emergency begets the man. The wrongdoer may not have foreseen a deliverer. He is accountable as if he had.[17]

The first three words of that paragraph are potent in a number of different ways, each elaborated on in the paragraph. Because danger invites rescue, a reasonable jury could find that the rescuer was within the orbit of risk created by the defendant's negligence, that is, that the rescuer was a reasonably foreseeable victim of that negligence. And because danger invites rescue, a reasonable jury could find that the rescuer had not been contributorily negligent, even if the rescue attempt exposed him to peril. After all, a reasonable person in the rescuer's circumstances might have acted in the same manner responding to the same invitation. Finally, because danger invites rescue, a reasonable jury could find that the rescuer had not assumed the risk of the peril; rather, his conduct was impelled by the danger to the imperiled victim, consequently, not a wholly voluntary acquiescence in a known danger.

The defendant argued that "rescue is at the peril of the rescuer, unless spontaneous and immediate. If there has been time to deliberate, if impulse has given way to judgment, one cause, it is said, has spent its force, and another has intervened."[18] Because the plaintiff had traversed 445 feet up the trestle to the bridge, "[h]e had time to reflect and weigh; impulse had been followed by choice; and choice, in the defendant's view, intercepts and breaks the sequence."[19]

Judge Cardozo wasn't having any. "Continuity in such circumstances is not broken by the exercise of volition . . . . The law does not discriminate between the rescuer oblivious of peril and the one who counts the cost. It is enough that the act, whether impulsive or deliberate, is the child of the occasion."[20]

The defendant also argued that the plaintiff's rescue attempt had been "futil[e]."[21] Had he gone with the others below the trestle, he would have found his cousin's body. Consequently, the defendant argued, the plaintiff's "conduct was not responsive to the call of the emergency; it was a wanton exposure to a danger that was useless."[22] Judge Cardozo saw the situation differently. He

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17. *Id.* at 437-38 (citations omitted).
18. *Id.* at 438.
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.*

determined that a reasonable jury could conclude that the plaintiff's conduct was reasonable in the circumstances:

> There was little time for delay . . . . Another car was due, and the body, if not removed, might be ground beneath the wheels. The plaintiff had to choose at once, in agitation and with imperfect knowledge. He had seen his kinsman and companion thrown out into the darkness. Rescue could not charge the company with liability if rescue was condemned by reason. "Errors of judgment," however, would not count against him if they resulted "from the excitement and confusion of the moment . . . ." The reason that was exacted of him was not the reason of the morrow. It was reason fitted and proportioned to the time and the event.[23]

Thus did Judge Cardozo conclude that the plaintiff's case was legally sufficient, even absent any invitation from the conductor to ascend the trestle and without the conductor's following with a light.[24] The opinion considered negligence, proximate cause, contributory negligence, and assumption of the risk and described each element with a lucidity and persuasiveness common to Cardozo.

But forty-six years later, along came *Sirianni v. Anna*.[25] The plaintiff, Katherine Sirianni, alleged that the defendants, physicians and surgeons,

> negligently removed all of the kidney tissue of . . . Carl Sirianni [the plaintiff's adult son] during the course of a surgical procedure . . . . It [was] medically certain that Carl Sirianni could not long live without human kidney tissue. For several weeks his life was preserved by the use of a mechanical device designed as a substitute for natural kidneys. This was a temporary measure. He began to fail and death seemed certain. A human kidney transplant was needed if Carl Sirianni was to live. After tests and examinations of several persons, it was medically determined that the plaintiff possessed healthy, compatible kidneys, and that with reasonable medical certainty, if a transplant succeeded, Carl Sirianni would live. The plaintiff volunteered to surrender one of her kidneys. The surgical procedure performed by other doctors was successful. Carl

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23. *Id.* (quoting Corbin v. Philadelphia, 45 A. 1070, 1074 (Pa. 1900) (citations omitted)).

24. *Id.* at 438.

25. 285 N.Y.S.2d 709 (N.Y. Sup. Ct. 1967). *Sirianni* received very little contemporaneous scholarly attention. There is a critical case note, and a one-paragraph reference in the Torts section of Developments in New York Law. Note, *Torts-Rescue Doctrine-Vital Organ Donee Has [sic] No Cause of Action Against Doctors Whose Negligence Caused Need for Transplant*, 37 FORDHAM L. REV. 133 (1968); George J. Alexander, *Torts*, 20 SYRACUSE L. REV. 434 (1968). In addition, the following appears in the Medical Liability Reporter: "Courts have . . . been unreceptive to claims brought by organ donors against physicians whose negligence made a transplant necessary. *Citing* Peterson [sic] v. Farberman, 736 S.W.2d 441 (Mo. Ct. App. 1987); Moore v. Shah, 458 N.Y.S.2d 33 (App. Div. 1982); Sirianni v. Anna 285 N.Y.S.2d 709 (N.Y. Sup. Ct. 1967). 10 MED. LIAB. REP. 228 (1988). There is a footnote reference to *Sirianni* in American Law Reporter at 76 A.L.R.3D 895 n.20 (1977).

> Sirianni lives, now nearly four years since the implantation of the kidney of the plaintiff.[26]

Plaintiff claimed that "her health ha[d] been impaired by the loss of one of her kidneys"[27] and sued the defendants "on the theory that their negligent conduct in removing the kidneys of her son . . . [was] now available to her in order to maintain this action and constitute[d] a cause of action on her behalf."[28] The defendants filed motions to dismiss, and the motions were granted, the court believing that "it [was] called upon . . . to invent a 'brand new cause of action' presently outside our legal concepts of suable tortious conduct."[29]

But what of the rescue doctrine so clearly and persuasively delineated and applied in *Wagner*? To the *Sirianni* court, *Wagner* was inapposite. In *Wagner*,

> the rescuer acted without knowing his fate. Here, with full knowledge of the consequences of her voluntary action, this plaintiff mercifully surrendered up one of her kidneys and preserved the life of her son. Judge Cardozo, as part of the magnificent language, a trademark of his writings, wrote . . . "[t]he risk of rescue, *if only it be not wanton*, is born of the occasion." It seems to this Court that Judge Cardozo used the word "wanton" synonymously with the word "wilful," and not in the oft-used sense of reckless disregard. [See Ballentine Law Dictionary with pronunciation, Second Edition.] "The word ordinarily means intentional, as distinguished from accidental or involuntary . . . ." Thus, it appears that Judge Cardozo excluded from the rescue doctrine a "wanton" (wilful) act on the part of the rescuer. The act of the plaintiff here is wilful, intentional, voluntary, free from accident and with full knowledge of its consequence.[30]

Is that what Cardozo meant by "wanton?" I think not. He insisted that "[t]he law does not discriminate between the rescuer oblivious of peril and the one who counts the cost. It is enough that the act, whether impulsive or deliberate, is the child of the occasion."[31] Thus, even if Arthur Wagner, like Mrs. Sirianni, had acted intentionally, voluntarily, free from accident and with full knowledge of the

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26. *Sirianni*, 285 N.Y.S.2d at 710. Carl Sirianni sued the doctors whose conduct had cost him his kidneys. That action was settled out of court for $280,000. *Kidney Donor Sues MD's For the Loss*, MED. WORLD NEWS, Mar. 8, 1968, at 58.

"[Thirty-three]-year-old Carl Sirianni underwent surgery at Lockport Memorial Hospital. Doctors there removed a kidney and what they thought was a tumor attached to it. Too late, they discovered that the 'tumor' was really Sirianni's other kidney, fused to its mate." *Id.* The Court's description of the transplant may have been too optimistic.

> When the dialysis became ineffective, [Carl's] mother . . . donated one of her kidneys to save her son's life. The new kidney functioned well for nearly three years, then began to fail . . . . [A] cadaver kidney was substituted. But the second graft also had to be removed because of bleeding and infection in the area. Sirianni is currently being maintained on dialysis and is awaiting a third organ transplant. *Id.*

27. *Sirianni*, 285 N.Y.S.2d at 710.

28. *Id.* at 711.

29. *Id.* at 712.

30. *Id.* (quoting from Wagner v. International Ry. Co., 133 N.E. 437 (N.Y. 1921)). The opinion in *Sirianni* was written by Justice Hamilton Ward. 285 N.Y.S.2d at 710. In the course of the opinion the court refers to "Hamilton Ward, the plaintiff Wagner's attorney." *Id.* at 712. The Hamilton Ward who represented Wagner was the father of Justice Hamilton Ward, author of the opinion in *Sirianni*. Telephone interview with Hamilton Ward, Jr., son of Justice Ward (Oct. 31, 1995). I wish to express my thanks to Attorney Ward for explaining the familial relationship.

31. *Wagner*, 133 N.E. at 438.

consequences, he would have remained within the rescue doctrine spelled out by Cardozo. Indeed, that seems to be precisely how Arthur did act. His effort to reach the bridge by ascending the trestle was hardly accidental, and he certainly must have recognized the consequences of falling to the ground. Yet, even if he "counted the cost," as Mrs. Sirianni is said to have done, Arthur's case would have been legally sufficient. Cardozo must have used the word wanton in the sense of reckless disregard; the word as defined in *Sirianni* simply could not coexist with the last quoted excerpt from *Wagner*. And one could hardly describe Mrs. Sirianni's decision to donate a kidney to save her son's life as an act of reckless disregard. *Sirianni* also attempted to distinguish *Wagner* on the ground that the "negligence of [the] defendants [in *Sirianni*] came to rest on the body of Carl Sirianni. The premeditated, knowledgeable and purposeful act of this plaintiff in donating one of her kidneys to preserve the life of her son did not extend or reactivate the consummated negligence of these defendants."[32]

To a large extent, that language seems to be hardly more than duplicative of the court's not very persuasive effort to define wanton as intentional. To the extent that it was intended to go further — to insist independently that the negligence of the defendants came to rest on the body of the imperiled victim and did not extend to the rescuer — the language flies in the face of the basic holding of *Wagner* that "[t]he wrong that imperils life is a wrong to the imperiled victim" and "also to his rescuer."[33] It also belies one of the cases whose facts were recited by Cardozo: "The state that leaves an opening in a bridge is liable to the child that falls into the stream, but liable also to the parent who plunges to its aid."[34] In addition, *Sirianni* attempted to distinguish *Wagner* by asserting that in the latter,

> [t]he rescuer may have considered the nature of his act without contemplating its consequence. This is not the case here. However merciful and natural the act of this mother in preserving the life of her son, [the court] holds that under the circumstances of this case, "the rescue doctrine" has no application.[35]

But, as we have already noted, "[t]he law does not discriminate between the rescuer oblivious of peril and the one who counts the cost."[36] One can hardly count the cost without contemplating the consequences.

Finally, *Sirianni* presented its ultimate "public policy"[37] rationale:

> The miracle of modern medicine seems now on the threshold of successfully transferring many organs from one human body to another. The issue raised here may in the future frequently find its way into the courts. This issue should be settled. If public policy requires that a donor is permitted to maintain a cause

32. Sirianni v. Anna, 285 N.Y.S.2d 709, 712 (N.Y. Sup. Ct. 1967).
33. *Wagner*, 133 N.E. at 437.
34. *Id.* at 437-38 (citing Gibney v. State, 33 N.E. 142 (N.Y. 1893)).
35. *Sirianni*, 285 N.Y.S.2d at 712.
36. *Wagner*, 133 N.E. at 438.
37. *Sirianni*, 285 N.Y.S.2d at 713.

> of action under the circumstances here, such cause of action must be created, not by judicial fiat, but by legislation . . . .[38]

The implication of that language, if read quickly and without reflection, seems to be that recognizing the plaintiff's cause of action might deter future organ transplants "from one human body to another."[39] But the defendants in *Sirianni* were not the surgeons who performed the kidney transplantation; they were the surgeons whose alleged negligence necessitated the transplant.[40] To extend cognizance to the action asserted in those circumstances would hardly dissuade surgeons from performing such transplantation procedures.

Suppose a negligent motorist had struck Carl Sirianni and so severely and irreparably injured his kidneys that, to save his life, Mrs. Sirianni donated one of her kidneys. Suppose, too, that Mrs. Sirianni then sued the negligent motorist to recover damages for the impairment to her health occasioned by the loss of one of her kidneys. Would that generate a novel issue of public policy to be resolved by the legislature or simply another appropriate instance for judicial application of the rescue doctrine? I believe it would be the latter and I sense that the *Sirianni* court itself might concur. I think the real sticking point for the court was the application of the rescue doctrine in a medical malpractice action. Was that a legitimate concern?

I suppose that a court could assert that a physician owes a legal duty only to his patient and not to any third party, whatever the relationship between patient and third party. But surely the time for that kind of narrow judicial assertion has passed. Medical care providers have been found to owe a legal duty to reasonably foreseeable victims beyond the immediate patient.[41] And at the heart of the rescue doctrine is the legal fact that while "[t]he wrongdoer may not have foreseen the coming of a deliverer[,] [h]e is accountable as if he had."[42] Because danger invites rescue, the rescuer is within the orbit of risk created by the defendant's negligence, that is, the rescuer may be reasonably foreseeable from the perspective of the negligent defendant whose conduct imperils the original victim. There is nothing in that conclusion likely to deter physicians from performing organ transplantations from one human being to another. There may be something in that conclusion to deter negligent care of a patient, and that may not be all for the worse.

Yet *Sirianni*, while not binding on an appellate court, was found persuasive in *Moore v. Shah*.[43] The plaintiff's complaint alleged that, as a result of the defen-

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38. *Id.* There has been no legislation aimed at the issue in *Sirianni*. There has, however, been legislation dealing with organ transplants from cadavers. *See* Uniform Anatomical Gift Act, adopted in all 50 states and the District of Columbia albeit with some modifications. *See, e.g.*, 20 PA. CONS. STAT. ANN. §§ 8601-8608 (1975 and West Supp. 1994); N.Y. PUBLIC HEALTH LAW §§ 4300-4309 (McKinney 1995).

39. *Sirianni*, 285 N.Y.S.2d at 713.

40. *Id.* at 710.

41. *See, e.g.*, DiMarco v. Lynch Homes—Chester County, Inc., 583 A.2d 422 (Pa. 1990) (physician owes a duty to patient's sexual partner to give patient information to protect partner); *see* cases on both sides collected at 15 MED. LIAB. REP. 141 June, 1993.

42. Wagner v. International Ry Co., 133 N.E. 437 (1921).

43. 458 N.Y.S.2d 33 (App. Div. 1982).

dant physician's negligent care of the plaintiff's father, father-patient suffered kidney failure, necessitating the plaintiff-son's donation of one of his kidneys to save his father's life.[44] The defendant's motion to dismiss the complaint was granted,[45] and the dismissal was affirmed by the Appellate Division.[46] The court drew an analogy between cases denying recovery for shock suffered as a result of the defendant's negligent injury to another and the case before the court.[47] Those other cases led the court to conclude that "[t]here are serious policy considerations which militate against the recovery sought here."[48] What were those considerations?

> Our decision may best be summarized in the words of then Associate Judge Breitel in Tobin v. Grossman . . . : "Every injury has ramifying consequences, like the ripplings of the waters, without end. The problem for the law is to limit the legal consequences of wrongs to a controllable degree. . . ." We decline here to extend the common law to create a remedy for [this plaintiff].[49]

But *Tobin*[50] was distinguishable from *Moore* in two significant ways. First, the plaintiff-mother in *Tobin* sought damages for *emotional distress* and consequent physical harm resulting from seeing her two-year-old child shortly after the child had been struck by the defendant's car.[51] Second, the plaintiff-mother had not been a rescuer.[52] Obviously, the second distinction makes *Wagner* and the rescue doctrine inapplicable. As to the first distinction, the *Tobin* court was primarily concerned about the inability to limit the class of persons who might assert similar claims for emotional distress: "[r]elatives, other than the mother, such as fathers or grandparents, or even other caretakers, equally sensitive and as easily harmed, may be just as foreseeably affected."[53] In circumstances such as those in *Moore*, there is hardly likely to be a long line of successive organ donors. Thus, *Tobin* seems less than persuasive in denying recovery in *Moore*. Yet the court in *Moore* wrote, "[i]t is difficult to charge a physician with the responsibility to foresee each and every person other than his patient who might conceivably be affected by his negligence."[54] Is it really so difficult to foresee that an immediate family member is a likely kidney donor when the defendant's negligence requires such a donation to save the primary victim's life? If so, why does the search for a living donor invariably begin (and usually end) with the immediate family of the primary victim?

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44. *Id.*
45. *Id.* at 34.
46. *Id.* at 35.
47. *Id.*
48. *Id.* at 35.
49. *Id.*
50. Tobin v. Grossman, 249 N.E.2d 419 (N.Y. 1969).
51. *Id.* at 420.
52. *Id.*
53. *Id.* at 422. The concern expressed in *Tobin* was abated somewhat in Bovsun v. Sanperi, 461 N.E.2d 843 (N.Y. 1984), where the court, adopting the zone of danger rule, permitted a cause of action for emotional distress on behalf of immediate family member who witnessed injury to victim occasioned by defendant's negligence. In Trombetta v. Conkling, 626 N.E.2d 653 (N.Y. 1993), the court construed the phrase "immediate family member" so as to exclude niece of primary victim.
54. Moore v. Shah, 458 N.Y.S.2d 33 (App. Div. 1982).

Suppose a negligent motorist had struck the father and so severely and irreparably injured his kidneys that, to save his life, his son donated one of his kidneys. Suppose, too, that the negligent motorist had been a physician. If the donor-son then sued the negligent motorist-physician to recover damages for the impairment to the son's health occasioned by the loss of one of his kidneys, would that action have generated "serious policy considerations which militate against the recovery?"[55] I suspect that the court would have treated the action as simply another appropriate instance for judicial application of the rescue doctrine. The real sticking point, I think, remains the application of the rescue doctrine in a medical malpractice action. And I don't understand why. It is the rescuer who has long been considered a member of a favored class in the law's view,[56] not medical care providers, noble and necessary as their vocation is. It is the rescuer who may put his own life or well-being in jeopardy to save a fellow human. And it is the rescuer who, if successful, may mitigate the damages of the primary victim to the economic advantage of the negligent actor. Consequently, I believe that *Sirianni* and *Moore* improperly excluded the rescue doctrine in the context of a medical malpractice action.

In *Petersen v. Farberman*,[57] the plaintiff-mother alleged that negligence on the part of the medical care provider-defendants resulted in the necessity on the part of the mother to donate a kidney to save her son's life.[58] "Asserting she acted to rescue son, mother sought relief under the rescue doctrine for her pain, shortened life expectancy, expenses resulting from the transplant procedure as well as the loss of a kidney."[59] As in New York, the rescue doctrine was no stranger to Missouri jurisprudence. "The rescue doctrine has been accepted in Missouri for a long time, and was recently expanded to include the situation where the object of the rescue was responsible for putting himself in the situation necessitating his rescue."[60] But, apparently, this was the first time a plaintiff had sought to have the doctrine applied in the context of a medical malpractice action. "This . . . is the first time a Missouri court has been faced with an organ transplant as a rescue. In fact it appears only the New York State Courts have been confronted with this issue, and in both cases the courts denied relief."[61]

Perhaps not surprisingly, the only two judicial opinions available proved dispositive. "The *Sirianni* court reasoned the mother's donation of her kidney was 'wilful, intentional, voluntary, free from accident and with full knowledge of its consequences,' and the rescue doctrine excludes recovery for a wilful act."[62] As to *Moore*,

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55. *Id.* at 35.
56. "[T]he rescue doctrine . . . holds the rescuer in a favored position in the eyes of the law." Note, *Torts: Proximate Cause: Rescue Doctrine* 3 OKLA. L. REV. 476 (1950).
57. 736 S.W.2d 441 (Mo. Ct. App. 1987).
58. *Id.* at 442.
59. *Id.*
60. *Id.*
61. *Id.*
62. *Id.* at 442-43 (quoting Sirianni v. Anna, 285 N.Y.S.2d 709 (N.Y. Sup. Ct. 1921)).

> [t]he court reasoned a physician does not have "the responsibility to foresee each and every person other than his patient who might conceivably be affected by his negligence." The *Sirianni* and *Moore* courts gave public policy rationales for their holdings. We agree with the reasoning in the New York cases .... The rescue doctrine protects a plaintiff, who sees an emergency situation and, out of humanitarian motives, acts to rescue the person who is in danger.[63]

Thus saying, the intermediate appellate court affirmed the dismissal of the plaintiff-mother's complaint, without for a moment reconsidering *Sirianni's* conclusion that Judge Cardozo had used "wanton" as a synonym for "intentional" — thus, presumably leaving the rescue doctrine available only to the accidental rescuer — and without examining the relative ease of foreseeing an immediate family member as the donor of a kidney necessary to save the primary victim's life.[64] The court further failed to recognize that the plaintiff-mother fell precisely within the court's own definition of the class of plaintiffs who may invoke the rescue doctrine: "The rescue doctrine protects a plaintiff, who sees an emergency situation and, out of humanitarian motives, acts to rescue the person who is in danger."[65]

The second area in which the treatment or non-treatment of the rescue doctrine disturbs me is that of product liability actions or, more precisely, one particular product liability action. In *Bobka v. Cook County Hospital*,[66] Robert Bobka, a fireman, participated in a drill instruction.[67] "During the course of this instruction, an oil storage tank exploded, inflicting injuries to Robert. Robert was wearing 'protective fire clothing' manufactured by defendant Morning Pride [Manufacturing Co.]. Robert suffered severe burns allegedly due to the defective condition of the protective fire clothing."[68] Suzanne Bobka, the plaintiff and Robert's only sibling, "was requested by the doctors to donate large segments of her skin for Robert's grafts. She consented. Skin grafts, of the type accomplished here, usually result in permanent discoloration and scarring of the donor site."[69] To recover for her injuries, Suzanne brought a product liability action against Morning Pride, alleging that its protective fire clothing was defective and unreasonably dangerous and was the cause of her injuries. Morning Pride's motion to dismiss the complaint against it was granted,[70] and the intermediate appellate court affirmed.[71]

The court recognized that the highest appellate court of the state had not limited product liability actions to users and consumers of the product; rather, it permitted such actions to reasonably foreseeable victims.[72] Such victims included occupants of other vehicles and pedestrians injured by a defective motor vehi-

63. *Id.* at 443 (quoting from Moore v. Shah, 458 N.Y.S.2d 33, 34-35 (App. Div. 1982)).
64. *Sirianni*, 285 N.Y.S.2d at 712.
65. Peterson v. Farberman, 736 S.W.2d 441, 443 (Mo. Ct. App. 1987).
66. 422 N.E.2d 999 (Ill. App. 1981).
67. *Id.* at 1000.
68. *Id.*
69. *Id.*
70. *Id.*
71. *Id.* at 1002.
72. *Id.* at 1001 (citing Winnett v. Winnett, 310 N.E.2d 1, 11 (Ill. 1974)).

cle[73] and bystanders injured by a shotgun barrel explosion occasioned by a defective shell.[74] Nonetheless, the court concluded, as a matter of law, that the plaintiff in *Bobka* was not a reasonably foreseeable victim:

> It cannot, in our judgment, fairly be said that a manufacturer should reasonably foresee that he would be liable to a third party who voluntarily submitted to skin graft surgery to aid the person injured by his product. It is not objectively reasonable to expect such an event to occur and, importantly, there was no injury to plaintiff caused by the defective product itself.[75]

The court's opinion made no mention of the rescue doctrine. But wasn't the plaintiff a rescuer of the primary victim of the allegedly defective product manufactured by the defendant? And isn't the rescue doctrine generally recognized in product liability actions?

In *Buehler v. Whalen*,[76] the court affirmed a judgment for the plaintiffs who were injured as a result of a design defect which caused the quick spread of fire when the car in which all but one of the plaintiffs had been riding was rear-ended by another vehicle.[77] "The other plaintiff [for whom judgment was affirmed], Gerrell Forth, was burned while helping the occupants leave the car."[78] Forth had been the occupant of another vehicle.[79]

In *Hood v. Roadtec, Inc.*,[80] the supervisor of a paving crew, seeing a road paving machine, manufactured by defendant, rolling toward two members of the crew, mounted the moving machine and attempted to engage the emergency brakes, without success.[81] The supervisor jumped from the machine as it rolled off an embankment.[82] "However, the machine landed on top of him, severely injuring his legs."[83] The case was submitted to the jury on the theory of strict liability.[84] Judgment was entered for the plaintiff.[85] Because of an erroneous ruling on the admissibility of the testimony of a witness whose identity had not been revealed to the defendant in a timely manner, the appellate court vacated and remanded.[86] The appellate court, however, ruled specifically on the applicability of the rescue doctrine in product liability actions.[87]

> We reject outright the Defendants' assertion that the rescue doctrine is limited to negligence actions. In *Caldwell v. Ford Motor Co*, . . . this Court specifically applied the rescue doctrine to a case in which liability was predicated upon strict

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73. *Id.* (citing *Winnett*, 310 N.E.2d at 1).
74. *Id.* at 1001, (citing *Winnett*, 310 N.E.2d at 1).
75. *Id.* at 1002.
76. 374 N.E.2d 460 (Ill. 1978).
77. *Id.* at 462.
78. *Id.* at 461.
79. *Id.* at 462.
80. 785 S.W.2d 359 (Tenn. Ct. App. 1989).
81. *Id.* at 361.
82. *Id.*
83. *Id.*
84. *Id.*
85. *Id.*
86. *Id.* at 363, 364.
87. *Id.* at 364.

> products liability . . . . We hold that the Trial Court correctly charged the jury with respect to the rescue doctrine.[88]

In *Barger v. Charles Machine Works, Inc.*,[89] plaintiff, a construction foreman for a telephone company, was injured in attempting to rescue a crew member imperiled by "a combination trenching, backhoe, and cable plow machine," manufactured by the defendant.[90] The case was a products liability action.[91] The appellate court reversed a judgment for defendant and remanded for a new trial because the trial court's instructions erroneously permitted the jury to consider contributory negligence on the part of the plaintiff.[92]

> We are not required to decide broadly the questions whether and in what circumstances an assumption of risk instruction may be given in a rescue situation because we find that the assumption of risk instruction in this case, coupled with the rescue instruction, presented a substantial risk that in reaching its verdict the jury was permitted to consider and did consider evidence of [plaintiff's] prior contributory negligence.[93]

In *Hurt v. Coyne Cylinder Co.*,[94] the plaintiff's son, Trey, was using a mobile acetylene unit while working at the family business.[95] Seeing the acetylene unit was on fire,

> Trey . . . ran inside to get a fire extinguisher and returned with another employee but failed to put out the fire. They then ran back inside to get more extinguishers. Meanwhile, [the plaintiff, Trey's father, David] Hurt, seeing flames shooting from the back of the truck [holding the acetylene unit], came running out of his office with another fire extinguisher, thinking that his son might be on fire. When he realized that Trey was not in danger, Hurt nonetheless still tried to put out the fire. He quickly realized that the fire was inside the acetylene cylinder and started to run away. However, it was then too late and he was engulfed in flame as the acetylene cylinder exploded.[96]

To recover for his injuries, Hurt sued the defendant, which had "designed, manufactured, tested, and sold"[97] the acetylene cylinder; plaintiff alleged that "the fire was caused by design defects in the . . . cylinder."[98]

The acetylene cylinder, which had been transported in commerce, complied with Department of Transportation (DOT) Regulations on Hazardous Materials.[99] The trial court instructed the jury that such compliance created "a rebuttable pre-

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88. *Id.*
89. 658 F.2d 582 (8th Cir. 1981).
90. *Id.* at 583.
91. *Id.*
92. *Id.* at 587.
93. *Id.*
94. 956 F.2d 1319 (6th Cir. 1992).
95. *Id.* at 1322.
96. *Id.*
97. *Id.*
98. *Id.*
99. *Id.* at 1323.

sumption" that the cylinder was not unreasonably unsafe for consumer use.[100] So instructed, the jury returned a verdict for the defendant.[101] The Court of Appeals for the Sixth Circuit reversed and remanded.[102] It concluded that the DOT Regulations were applicable "to matters of transport and not consumer use."[103]

As to the rescue doctrine, the Sixth Circuit wrote:

> [W]hile ordinary negligence is not a defense in strict liability, assumption of risk, or "voluntarily and unreasonably proceeding to encounter a known danger," is a defense. The specific elements that must exist for there to be assumption of risk are 1) knowledge of the danger; 2) appreciation of the danger; and 3) voluntary exposure to that danger. Assumption of risk also requires the element of nonforeseeability . . . [for] if an action is a foreseeable, normal, intervening cause, it does not relieve a defendant of its responsibility . . . . In holding that it is foreseeable that one will make a rational attempt to rescue personal property in peril, [the precedent] establishes that foreseeability is an element of the rescue doctrine. "If the attempt to rescue is rational in light of the facts and circumstances existing at the time, it is a foreseeable risk . . . ." *Certainly, if it is deemed foreseeable and rational for one to try to rescue one's own personal property, it is even more foreseeable that a man will try to rescue his son*, initially placing him in the zone of danger, and thereafter stay to save his property.[104]

If the rescue doctrine is recognized in product liability actions, why was it ignored in *Bobka*? Was *Bobka* correct in holding that, as a matter of law, it was not reasonably foreseeable that the original victim of the defendant's allegedly defective protective fire clothing would be aided by a rescuer who "voluntarily submitted to skin graft surgery?"[105] Certainly severe burning is a reasonably foreseeable consequence of protective fire clothing that is defective. And severe burn victims frequently require major skin grafts. Surely a reasonable jury could find it reasonably foreseeable that the original victim's only sibling would submit to skin graft surgery to save her brother. The reasonable foreseeability obstacle that *Bobka* found insurmountable would seem easily and naturally overcome by the rescue doctrine.

But *Bobka* found another fatal flaw in the plaintiff's case: "[I]mportantly, there was no injury to plaintiff caused by the defective product itself."[106] We know that Robert Bobka, "a fireman, [was] participat[ing] in a drill instruction . . . [when] an oil storage tank exploded."[107] Because of the defendant's defective product, Robert was set ablaze.[108] Let's assume that a third party passerby, seeing Robert ablaze, dragged him from the fire. Let's assume, too, that the rescuer was burned

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100. *Id.*
101. *Id.* at 1322.
102. *Id.* at 1329.
103. *Id.* at 1323.
104. *Id.* at 1325-26 (quoting Caldwell v. Ford Motor Co., 619 S.W.2d 534, 540 (Tenn. Ct. App. 1981)) (emphasis added).
105. Bobka v. Cook County Hospital, 422 N.E.2d 999, 1002 (Ill. App. 1981).
106. *Id.*
107. *Id.* at 1000.
108. *Id.* at 1001.

by the fire. Would the rescuer's case against Morning Pride fail as a matter of law because his injuries were inflicted by the fire rather than defendant's defective product? I think not. There would certainly be a cause and effect relationship between the defective fire clothing and the rescuer's injuries. And the rescue doctrine would provide reasonable foreseeability. Aren't these two requisites equally satisfied in *Bobka*? But for the defective fire clothing, it is alleged, Robert would not have been seriously burned; because he was seriously burned, his sister, the plaintiff, submitted to skin graft surgery to save her brother. It seems clear that Suzanne Bobka's "attempt to rescue [was] rational in light of the facts and circumstances existing at the time [and thus] a foreseeable risk."[109]

Sirianni, *Moore*, and *Petersen* had the following element in common: the plaintiffs sought to invoke the rescue doctrine in medical malpractice actions. All three courts balked, *Sirianni* and *Petersen* because they defined "wanton" as used by Judge Cardozo in *Wagner* to mean "intentional," a definition that hardly can stand in light of Cardozo's language that "[t]he law does not discriminate between the rescuer oblivious of peril and the one who counts the cost. It is enough that the act, whether impulsive or deliberate, is the child of the occasion."[110] *Sirianni* and *Moore* threw in differing "public policy"[111] considerations. *Sirianni*'s policy implies that recovery might thwart future organ donations by living donors and the novel issue should be left to the legislature.[112] But surely it is *Sirianni's* dismissal of the plaintiff's complaint that is more likely (if anything) to dissuade a family member from donating an organ to save another member of the family. *Moore's* policy concern, based on emotional distress cases, was where to draw the line. In cases like *Sirianni* and *Moore*, a determination of those family members possessing "healthy, compatible kidneys"[113] and willing to donate one to save the original victim will pretty much draw the line around a very limited group, and, of course, only an actual donor could sue as rescuer. *Petersen*, in addition, acquiesced indiscriminately in the "public policy rationales"[114] of both *Sirianni* and *Moore*. *Bobka* simply ignored the rescue doctrine when that legal concept would have gone directly to the foreseeability issue that the court found critical and ultimately fatal to the plaintiff's case. There simply is no persuasive reason for excluding the rescue doctrine in medical malpractice cases or for ignoring its existence in a product liability action simply because the defective product does not come in contact with the rescuer. It is in those cases that the rescuer is most likely to recognize the consequences of his decision to act. It is that rescuer who "counts the cost" who is the greater hero; surely his heroism should not be the basis for precluding recovery. I think it's time for courts to recognize that truism and eject the fishbones that are gagging justice.

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109. Hurt v. Coyne Cylinder Co., 956 F.2d 1319, 1325-26 (6th Cir. 1992).
110. Wagner v. International Ry. Co., 133 N.E. 437, 438 (1921).
111. Sirianni v. Anna, 285 N.Y.S.2d 709, 713 (N.Y. Sup. Ct. 1967); Moore v. Shah, 458 N.Y.S.2d 33, 35 (App. Div. 1982).
112. *Sirianni*, 285 N.Y.S.2d at 713.
113. *Id.* at 710.
114. Peterson v. Farberman, 736 S.W.2d 441, 443 (Mo. Ct. App. 1987).