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Negligence and Responsibility in Rescue Cases

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Section 45 provides: "In any case of two or more organizations, trades, or businesses (whether or not incorporated, whether or not organized in the United States, and whether or not affiliated) owned or controlled directly or indirectly by the same interests, the Commissioner is authorized to distribute, apportion, or allocate gross income, deductions, credits, or allowances between or among such organizations, trades, or businesses, if he determines that such distribution, apportionment, or allocation is necessary in order to prevent evasion of taxes or clearly to reflect the income of any of such organization, trades, or businesses."

Even though the regulations under Section 45 state that the purpose of the Section is not to effect a result equivalent to a computation of consolidated net income under Section 141, the Commissioner has contended that Section 45 should apply where several organizations are under common control. In the case of *Grenada Industries, Inc.*, 17 T. C. No. 28, four organizations were owned or controlled directly or indirectly by the same interests, but the Court holds that the allocation of the income of one to another was arbitrary and not authorized under Section 45 (except in one instance). The Court held that despite the intertwining relationships, one company paid and received fair market prices as though its transactions had been carried on with strangers and, the Court stated, "No more could be expected of it".

The Court further stated: "The purpose of Section 45 is not to punish the mere existence of common control or ownership but to assist in preventing distortion of income and evasion of taxes through the exercise of that control or ownership. It is where there is a shift or deflection of income from one controlled unit to another that the Commissioner is authorized under Section 45 to act to right the balance and to keep tax collections unimpaired".

The proposed Revenue Act of 1951, passed by the House and now in the Senate, provides among other things that there shall be only one excess profit tax credit allotted to a group of corporations having a designated common ownership. The details of this act have not been resolved and it is not determined what percentage of ownership will apply.

NEGLIGENCE AND RESPONSIBILITY IN RESCUE CASES[1]

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"As a consequence of the high regard for human life which is prevalent in all civilized societies, it has become a well settled principle of our law that the rigor of the rules incident to the doctrine of contributory negligence will be relaxed in favor of one who sacrifices himself in the rescue of a fellow man in distress."[2]

[1] This article deals only with rescue of persons.

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[2] 9 Va. Law R. 376 (1922).

By 1910 it was clearly established that a volunteer who acted *instinctively* in an attempt to save a human life endangered by the negligence of another could recover for injuries.[3] The *Wagner* case [4] extended this doctrine to cases of volitional and even deliberate conduct, so long as that conduct be not rash or reckless. In that case, Justice Cordozo set forth the new and startling theory that *danger invites rescue.* He further stated, "the wrong that imperils life is a wrong to the imperiled victim; it is a wrong also to his rescuer." The *Wagner* case [5] has been followed in many jurisdictions,[6] and seems to be good law today, where the attempted rescue is of a person and not property.

The situation in which this doctrine is applicable arises when one, by his negligence, puts another in danger of being injured or losing his life, and some third party attempts to rescue the imperiled party. The recent case of *Brugh v. Bigelow* [7] has even applied the rescue doctrine where the defendant placed *himself* in peril and a passerby stopped and attempted to aid him. The passerby, as plaintiff, recovered from the defendant for injuries suffered in the attempted rescue. The court held for the plaintiff even though the act of the defendant had to be held as negligence toward himself. Thus it seems evident that there need be no duty toward a known party; indeed, if the holding of the *Brugh* case be followed, there need to *no duty* at all! This seems to be the furthest extent to which the danger invites rescue doctrine could be applied. Applying the reasoning of the above case, it would appear that in any situation where a human life is in a perilous position due to the negligence of the defendant, the party who is injured while attempting to rescue the one imperiled may recover for his injuries.

"LIMITATIONS"

The rescue doctrine, however, has its qualifications. *First,* the danger must appear imminent and real, and not merely imaginary or speculative. The appearance of reality and imminence must exist at the time the rescuer takes action. This is a matter to be determined by the jury. It has been held [8] that the apparent imminence of danger sufficient to induce a belief that action is necessary and to impel an attempt to rescue the one supposedly in peril is to be measured by the standard of reasonable care under the circumstances, or the manner in which an ordinarily prudent person would act in the same or similar circumstances.

[3] Dixon v. N. Y., N. Haven & Hartford R. R., 207 Mass. 126, 92 N. E. 1030 (1910); Ridley v. Mobile and Ohio R. R., 114 Tenn. 727, 86 S. W. 606 (1905); Eckert v. L. I. R. R., 43 N. Y. 502, 3 Am. Rep. 721 (1871); Corbin v. Philadelphia, 195 Pa. 461, 45 A. 1070 (1900).

[4] Wagner v. Inter'l R. R. Co., 232 N. Y. 176, 133 N. E. 437 (1921).

[5] Supra, n. 4.

[6] See cases collected in 158 A. L. R. 189.

[7] 310 Mich. 74, 16 N. W. 2d 668 (1944).

[8] Highland v. Wilsonian Inv. Co., 171 Wash. 34, 17 P. 2d 631 (1932); Wolfinger v. Shaw, 138 Neb. 229, 292 N. W. 731 (1940); Arnold v. Northern States Power Co., 209 Minn. 551, 297 N. W. 182 (1941).

Second, the dangerous condition must not have been brought about by the rescuer. This qualification is, of course, obvious, for if one could recover for a rescue attempt in a perilous situation created by his own negligence, he would be, in effect, making another pay for his own wrong. It is essential, in order to permit a recovery upon the theory of rescue, to show that the negligence of the defendant and not the rescuer was the proximate cause of injury or death.[9] It must be pointed out that the proximate cause mentioned here is proximate cause of the injury or death, and, consequently, the perilous position of the party the rescuer, who is now plaintiff, sought to aid. This further illustrates that no duty was owing to the rescuer. The only legal duty owing at all was from the tortfeasor to the imperiled party not to injure him. Once that duty has been breached it is a breach as to anyone who becomes a rescuer.

Assuming a situation in which the rescue doctrine would apply and a rescuer acts pursuant to the above qualifications, the question now arises as to the manner of his acting. He must not act rashly, recklessly or with wanton disregard for his own safety.[10] Whether or not the attempt to rescue was so rash as to constitute contributory negligence was held in the *Wagner* case [11] to be a question for the jury.

Available Defenses

The next problem to be faced is probably the most difficult and lengthy in the rescue doctrine. This problem concerns the defenses available to the negligent defendant. If he has not been negligent, the answer is clear; there is no cause of action. If he has been negligent, and we assume here that he has, the defendant's most tenable defenses are: (1) contributory negligence of the rescuer; (2) assumption of the risk by the rescuer. The rule that one who sees a person in imminent and serious peril through the negligence of another cannot be charged with contributory negligence, as a matter of law, in risking his own life or serious injury in attempting to effect a rescue, provided the attempt is not rashly or recklessly made, is supported by many cases.[12] The risk of an attempted rescue may be so great or the chance of its success so slight as to make it unreasonable to attempt it even though a human life is at stake; the less the danger to the third party, the less the risk the plaintiff may reasonably encounter. This is the view taken by the American Law Institute [13] and was followed

[9] Bacon v. Payne, 220 Mich. 672, 190 N. W. 716 (1922).

[10] Wright v. Atlantic R. R. Co., 110 Va. 670, 66 S. E. 848 (1910); Da Rin v. Casualty Co. of Am., 41 Mont. 175, 108 P. 649 (1910).

[11] Supra, n. 4.

[12] Rovinski v. Rowe, 131 F. 2d 687 (C. C. C. 6th 1942); Roach v. L. A. and Salt Lake R. R. Co., 74 Utah 545, 280 P. 1053 (1929); Christiansen v. L. A. & Salt Lake R. R. Co., 77 Utah 85, 291 P. 926 (1930); Bernardine v. N. Y., 268 App. Div. 444, 51 N. Y. S. 2d 888 (1944); Walters v. Denver Cons. Elec. Light Co., 12 Colo. App. 14, 54 P. 960 (1898).

[13] Restatement of Torts, sec. 472.

in a 1940 Connecticut case.[14] The court therein stated that the mere presence of danger creating a desire to save a person from injury or death is not alone sufficient to justify application of the rescue doctrine, for to venture life where there is no possibility of saving or where the danger is not great or the possibility of loss serious may go beyond the limit of that which is legally permissible.

CONTRIBUTORY NEGLIGENCE

In order to invoke the rescue doctrine successfully and establish freedom from contributory negligence as a matter of law, it is only necessary for the rescuer to show that he acted as a reasonably prudent person [15] would have acted under the same or similar circumstances. It appears the law itself makes allowances, for the human instincts which prompt people to attempt to aid others in danger spurs the law to widen the permissible margin of error in judgment, requiring practically a certainty of death or injury in order to render a rescuer guilty of contributory negligence as a matter of law. The rescuer acting with due care is almost certain to get his case before a jury. The rescuer is looked on with favor by the courts. If he acts prudently and the situation he enters was not so obviously inconsequential as to require his being precluded from proceeding, he will surely get to the jury for consideration of his evidence. This appears to be an exception to the ordinary rule of contributory negligence, for this defense will avail a defendant nothing unless certain definite circumstances appear—namely, that the rescuer was rash or reckless. The law seems to offer a rescuer this protection due to his spirit of sacrifice. It must be remembered that this exception is one of social policy, and it applies only where the defendant's act brought about the situation, there was imminent peril to a life, and the plaintiff acted.

In *Brown v. Columbia Amusement Co.*,[16] the court stated the general rule to be that a person who is injured in the rescue or attempted rescue of another who has been placed in a perilous situation by the negligence of a third party may recover from that negligent person as though the negligence constituted a breach of duty directly toward him, and that the presumption exists that the rescuer was impelled by the dictates of humanity, which alone are sufficient to send the plaintiff's case to the jury, unless it should appear that the situation was so dangerous that he ought, as a prudent man, to have known that he could not escape injury or death.

It can thus be seen how far courts will go to give aid to the rescuer. In effect, these cases almost wipe out contributory negligence as a defense, for rashness or recklessness must be shown to avoid a recovery by the plaintiff. This is something more than

[14] Cote v. Palmer, 127 Conn. 321, 16 A. 2d 595 (1940).
[15] Again it must be remembered that this is a jury question.
[16] 91 Mont. 174, 6 P. 2d 874 (1931).

negligence, and is apparently an exception to the usual rules of contributory negligence. The case of *Lolli v. Market St. Railway Co.*[17] points this up very well. This case held specifically that though the general rule is that one who is aware of danger and neglects to take reasonable precautions to avoid injury is not permitted to recover, there is a limitation, for example, where one seeks to rescue another person from imminent peril.

"ASSUMPTION OF RISK"

The second defense is that of voluntary assumption of risk by the plaintiff rescuer. The *Wagner* case [18] seems to have been the first to set up the principle that opportunity for deliberation before the rescuer acts will not, as a matter of law, preclude recovery on the theory of assumption of risk. This case has been followed and cited by many courts, and the proposition involved is good law today. Before this case, it had been held [19] that the rescuer should act spontaneously and without chance to deliberate as to a course of action. This departure from the past thus disposed of what had formerly been an important consideration (spontaneity) and went further than any previous case had gone. A 1904 Texas case,[20] discussing the problems of contributory negligence and assumption of risk together declared,

> While it is true that one assumes the risk of injuries that might result from a voluntary exposure to known dangers, the same rule that would excuse him from the charge of contributory negligence in the effort to save life would relieve him from an application of the doctrine of assumed risk. Of course he assumes the risk in the sense that he voluntarily encounters peril, but if there is any force or logic in the rule that would excuse one from contributory negligence in the attempt to save life, we see no reason why the same rule would not apply in denying an application of the doctrine of assumed risk. Neither contributory negligence nor assumption of risk will defeat a recovery where the party injured or killed risks his life to save the life of another, under circumstances showing that his conduct was not rash or reckless.

This case was decided even before the departure from the spontaneity test. If true then, surely it would be doubly true when, as now, even deliberation will not set up assumption of risk as a preclusion of recovery as a matter of law.

It appears that if the rescuer is in apprehension of real danger to the third party and acts not rashly or recklessly, in other words, does not enter a hopeless situation, the chances of a successful

[17] 43 Calif. App. 2d 166, 110 P. 2d 436 (1941).

[18] Supra, n. 4.

[19] Eckert v. L. I. R. R. Co., 43 N. Y. 502, 3 Am. Rep. 721 (1871); Central R. R. v. Crosby, 74 Ga. 737 (1885); Linnehan v. Sampson, 126 Mass. 506 (1879).

[20] International & Gr. Northern R. R. Co. v. McVey, Tex. Civ. App., 81 S. W. 991 (1904). This case seems to be good law today. It was, however, reversed on the question of excessive damages.

defense are almost nil. This rule is founded on social policy and tends to encourage persons to aid others in danger. True, no encouragement is needed where the act is spontaneous, for one doesn't stop to think over the pros and cons of acting. It does, however, practically abrogate the assumption of risk defense where one thinks over his act and then enters the situation to aid another. The law there offers aid to those who seek to effect a rescue.

Though this doctrine of danger inviting rescue was much discussed immediately after the *Wagner* case,[21] it has become a well settled principle and is universally followed. It is the child of this society, and exists to promote harmony and cooperation among persons. The writers submit that it is a healthy rule, and one which may lead into more and more law based on social policy, law made by courts and not legislatures. The law that danger invites rescue, "made" by Justice Cardozo in the *Wagner* case,[22] has effected a great change in the legal view of negligence and breaches of duty. This doctrine has extended the duty of due care in one's actions. If one places another in peril, his duty to the world has not ceased. He is liable to anyone who is injured in attempting to effect a rescue, while, of course, not acting rashly or recklessly. As an example, if X by his negligence in operation of his automobile injures another and places him in peril, X's negligence continues until rescue is effected. He is liable to any rescuer who acts with reason, that is, in apprehension of real and imminent danger to the imperiled party, and whose conduct is not rash, reckless or in wanton disregard for his own safety. The writers submit that the rescue doctrine places responsibility for the consequences of a choice made by the plaintiff upon the one (the defendant) who put him (the plaintiff) in the dilemma of choosing between safety for himself or aid to a fellow man.

The implications of *Brugh v. Bigelow* [23] are tremendous in scope, for that case makes a party responsible to any rescuer, *even where that party places only himself in peril.* In that case the driver of an automobile, through his own careless or negligent driving, placed himself in peril. The plaintiff attempted to aid upon hearing the driver's plea for help. In effecting the rescue, the plaintiff was injured. The defendant's contention, that there could be no negligence since he owed himself no duty not to injure himself, was rejected. The court, in rejecting this argument, stated, "We can make no such distinction of duty in defining the duties of drivers of automobiles on the highways of this state . . . Defendant's claim that he owed himself and his rescuer no duty is without merit. His cries for help belied his claimed freedom from duty.[24]" This case, decided as recently as 1944, is the furthest the rescue doctrine has been extended.

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[21] Supra, n. 4.
[22] Supra, n. 4.
[23] Supra, n. 7.
[24] Supra, n. 7.