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TORTS-LIABILITY OF NEGLIGENT DRIVER TO ONE WHO GOES TO HIS RESCUE

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TORTS—LIABILITY OF NEGLIGENT DRIVER TO ONE WHO GOES TO HIS RESCUE—Where plaintiff went to the aid of defendant who lay pinned beneath the wheel of his car after a collision caused by his own negligent driving, the Michigan Supreme Court *held* that plaintiff could recover for injuries sustained when the car rolled back upon her as she was attempting to remove defendant. *Brugh v. Bigelow*, (Mich. 1944) 16 N.W. (2d) 668.

Courts have quite generally found a liability on the part of defendant toward a plaintiff who is injured in rescuing a third person from a situation of danger

which defendant negligently created. There are few decisions, however, involving recovery against the person rescued where he has been the negligent party. The problem of tort liability would seem to be the same in both instances, and there are numerous cases holding the defendant liable for his negligence in placing third persons in a position of peril when plaintiff is injured in attempting a rescue. If the tests for duty, breach, and cause are met in one instance, it is difficult to see why they are not fulfilled in the other situation also. The primary difficulty in either case seems to lie in the elements of duty and causation. The generally accepted criterion for determining whether defendant owes a duty to plaintiff has been set forth by Justice Cardozo in the famed Palsgraf case,[1] in the rule that a person has a duty to use due care toward all those who might foreseeably be subjected to danger from his negligent acts. Applying this test, is it forseeable that a rescuer like the plaintiff may come upon the scene and be subjected to danger when the defendant drives negligently? It is arguable that a rescue cannot be foreseen, that it is the extraordinary occurrence rather than the ordinary event. But on the other hand, defendant has created a dangerous situation and it may be expected that passers-by, acting from humanitarian instincts, will attempt to help those in trouble. As the court in the principal case remarked, "Defendant's claim that he owed himself and his rescuers no duty is without merit. His cries for help belied his claimed freedom from duty." [2] Assuming the hurdle of duty is surmounted,[3] there remains the problem of whether the defendant's negligence was the proximate cause of plaintiff's injury? The court in the case at bar considered plaintiff's injury a foreseeable consequence of defendant's negligence and therefore held the latter liable. The court said, "This was a roadside where passers-by would be expected to stop and render needful assistance. . . . Defendant further argues that rescue is unusual and that it is an unusual thing and therefore not to be anticipated that passers-by would respond to relieve known dire necessity resulting from an automobile accident. We understand the contrary to be the case." [4] The fact that the rescue was voluntary and deliberate, and not an impulsive act has not generally been held to break the causal chain.[5] Likewise, the consensus of judicial opinion seems to be that it is not contributory negligence to rush to the rescue of another unless plaintiff was acting with positive necklessness.[6] The English courts have taken a somewhat

[1] Palsgraf v. Long Island Railroad Company, 248 N.Y. 339 162 N.E. 99 (1928).

[2] 16 N.W. (2d) 668 at 671. Furthermore the fact that plaintiff has no duty to rescue defendant should not affect defendant's duty toward him.

[3] Many courts are inclined to ignore it altogether, simply assuming that such duty exists. The court apparently took this position in the principal case.

[4] 16 N.W. (2d) 668 at 671. A note in 58 L. Q. REV. 299 at 300 (1942) declares, "The defendant is liable because he has been negligent in creating a dangerous situation which he should have foreseen might induce plaintiff to act in a particular way. . . ."

[5] This is well brought out by Justice Cardozo in Wagner v. International Railway Co., 232 N.Y. 176, 133 N.E. 437 (1921). 19 A.L.R. 13 (1922) states, "The proximate cause of injury to one who voluntarily interposes to save the lives of persons imperiled by the negligence of another is the negligence which caused the peril."

[6] "The law has so high a regard for human life that it will not impute negligence to an effort to preserve it, unless made under such circumstances as to constitute rashness. . . ." Eckert v. Long Island Railway, 43 N.Y. 502 at 506 (1871). And a note in

narrower view in the "rescue" cases, finding liability only under special circumstances such as in *Haynes v. Harwood*[7] where a policeman stopped a runaway horse. The court held the driver of the horse liable because plaintiff as a police officer had a special duty to protect the public safety. The decision seemed to imply that a mere passer-by, having no such duty, might not recover. However, in a more recent case, *Morgan v. Aylen*,[8] plaintiff was permitted to sue for injuries sustained when he leaped in front of defendant's motorcycle to rescue a child. The court rejected the distinction that in *Haynes v. Harwood* plaintiff was acting under a positive legal duty in stopping the runaway horse, whereas he was a mere volunteer in *Morgan v. Aylen*. Thus the English decisions would seem to be tending toward the American view.[9] A few jurisdictions in this country have been reluctant, however, to find liability where plaintiff is hurt in effecting the rescue of a defendant who has put himself in a position of peril. Confusion arises perhaps because of the theory that the defendant owes no legal duty to himself. Ergo, some courts reason that he owes no duty to the person who rescues him. The Iowa court in *Saylor v. Parsons*[10] appeared to be thinking along these lines when it held that plaintiff could not recover from a careless workman for injuries sustained in rescuing him from a falling wall. The court said, "Undoubtedly Parsons owed the moral duty of protecting his own person from harm. But the love of life is regarded as a sufficient inducement to self-preservation. . . . Where no one else is concerned, the individual may incur dangers and risks as he may choose, and in doing so he violates no legal duty."[11] Admitted that "where no one else is concerned" the defendant may take risks with impunity, can it be argued that someone else—a possible rescuer—is concerned? In all fairness it would seem that defendant's negligence should not constitute a bar to plaintiff's recovery. The report in the instant case states "that defendant called for assistance and that plaintiff after removing the passenger, Swan aided in removing defendant from underneath the car . . . that in lifting the car and in the act of removing defendant the defendant's automobile righted itself, rolled backwards, and struck plaintiff, throwing her to the ground and seriously injuring her. . . ."[12] The decision reached in the *Brugh* case would seem to be a desirable one both in point of law and on the facts.

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58 L. Q. REV. 299 suggests that contributory negligence on the part of the person rescued should make no difference as to plaintiff's rights.

[7] 1 K.B. 146 (1935).

[8] 1 All E. R. 489 (1942).

[9] Discussions of the cases appear in 58 L. Q. REV. 299 (1942); 75 IRISH LAW TIMES 113 (1941).

[10] 122 Iowa 679, 98 N.W. 500 (1904).

[11] Id. at 683.

[12] 16 N.W. (2d) 668 at 669.