

Moral Luck and the Good Samaritan:
Law, Morality, and the Duty/Protection of
Volunteer Rescuers

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Declaration

It is hereby declared that this Thesis is the Candidate's (Gary Maydon's) own work, and is the Thesis on which he expects to be examined upon

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Date

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The Good Samaritan¹

25 A teacher of the Law came up and tried to trap Jesus. “Teacher,” he asked, “what must I do to receive eternal life?”

26 Jesus answered him, “What do the Scriptures say? How do you interpret them?”

27 The man answered, “‘Love the Lord your God with all your heart, with all your soul, with all your strength, and with all your mind’; and ‘Love your neighbour as you love yourself.’”

28 “You are right,” Jesus replied; “do this and you will live.”

29 But the teacher of the Law wanted to justify himself, so he asked Jesus, “Who is my neighbour?”

30 Jesus answered, “There was once a man who was going down from Jerusalem to Jericho when robbers attacked him, stripped him, and beat him up, leaving him half dead. **31** It so happened that a priest was going down that road; but when he saw the man, he walked on by, on the other side. **32** In the same way a Levite also came along, went over and looked at the man, and then walked on by, on the other side. **33** But a Samaritan who was travelling that way came upon the man, and when he saw him, his heart was filled with pity.

34 He went over to him, poured oil and wine on his wounds and bandaged them; then he put the man on his own animal and took him to an inn, where he took care of him. **35** The next day he took out two silver coins and gave them to the innkeeper. ‘Take care of him,’ he told the innkeeper, ‘and when I come back this way, I will pay you whatever else you spend on him.’”

36 And Jesus concluded, “In your opinion, which one of these three acted like a neighbour towards the man attacked by the robbers?”

37 The teacher of the Law answered, “The one who was kind to him.”

Jesus replied, “You go, then, and do the same.”²

¹ The Good Samaritan, Hogarth, (1737) St Bartholomew’s Hospital, London

² The Bible, The New Testament, Luke 10: 25-37

ABSTRACT

This Thesis has been prompted by a concern for the position of First Aid volunteers (as Good Samaritans) who, when responding to emergencies act as Rescuers. The project essentially considers the concept of Rescue and particularly the Failure to Rescue as a very important sub-set of the jurisprudence of Omissions. It explores the unusual factors at play in relation to Rescues and uses these as a means to re-examine some of the elements in the persistent confrontation of Law and Morality. It asks especially whether there is a fundamental Duty to Rescue? and if so, the nature of that Duty?. Is it a legal duty (Criminal and/or Civil) or is it simply a moral duty? or is there no duty at all? The question of how Moral Luck impinges in this area is specifically examined given the wide ranging factors that come together to create a Rescue situation (most, or many, of which are entirely matters of luck - and ill luck at that). From a review of previous literature, the concept of Rescue does not appear to have featured to any significant degree in the debates about Law and Morality, and, in particular, the question of whether and to what extent Moral Luck should influence the Duty to Rescue appears to be an original line of enquiry. The project also reviews the current position in relation to English Law and compares this in outline to the position in some other leading Western jurisdictions. It also looks at various initiatives relating to the law of negligence in England & Wales and considers the degree to which volunteer rescuers are/ should be protected under English Law. The project hypothesises that a specific 'Good Samaritan Law' is required to protect volunteer rescuers, despite the very recent enactment of the 'Social Action, Responsibility and Heroism Act 2015'.

KEY WORDS

Good Samaritan, Omission, Rescue, Law, Morality, Emergency, Moral Luck,
Volunteer, First Aid

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DEDICATION

In memoriam, Leonard Arthur Maydon, and Alan Maydon

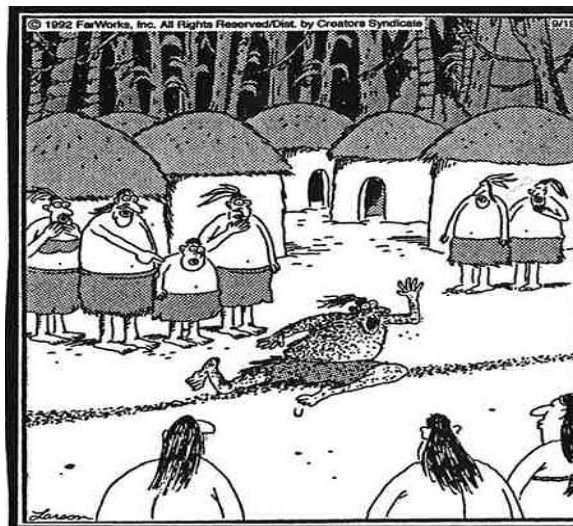
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THE FAR SIDE BY GARY LARSON



Crossing the village, Mowaka is overpowered by an army of ants. (Later bystanders were all quoted as saying they were horrified, but "didn't want to get involved") © 1992

LIST OF STATUTES CONSULTED

<u>OVERSEAS STATUTES CONSULTED</u>
Alberta Emergency Medical Aid Act 2000 (Canada - Alberta)
Australian Capital Territory Civil Law (Wrongs) Act 2002 (Australia - ACT)
British Columbia Good Samaritan Act 1996 (RSBC) (Canada - British Columbia)
Code Napoleon 1804 (France)
Corpus Juris Civilis, 529, Justinian I (Ancient Rome)
French Civil Code (France)
French Criminal Code (France)
French Penal (France)
Delaware 16 Del C Section 6801(a) (USA - Delaware)
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Manitoba Good Samaritan Act 2003 C.C.S.M. c. G65 (Canada - Manitoba)
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New South Wales Civil Liability Act 2002 (Australia - New South Wales)
Northern Territory Criminal Code Act (Australia – Northern Territory)
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Nova Scotia Volunteer Services Act 1987 (Canada - Nova Scotia)
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Queensland The Law Reform Act 1995 (Australia - Queensland)
Rhode Island Statutes Ss 11-56-1 (USA - Rhode Island)
Saskatchewan Emergency Medical Act 1978 (Canada - Saskatchewan)
Southern Australia The Civil Liability Act 1936 (Australia - Southern Australia)
Vermont Statutes Ann Tit 12 Ss 519 (USA - Vermont)
Victoria Compensation Act 2006 (Australia - Victoria)
Victoria The Wrongs Act 1958 (Australia - Victoria)
Washington DC Code 1981, Section 2-1344 4.24.3000 (USA - Washington DC)
Wyoming 1-1-120 (USA - Wyoming)
Table of USA Good Samaritan Statutes www.cprinstructor.com/legal.htm - acc 24/05/11
<u>ENGLISH AND WELSH STATUTES CONSULTED</u>
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Children and Young Persons Act 1933
Civil Contingencies Act 2004
Compensation Act 2006
Income and Corporation Taxes Act 1988
Road Traffic Act 1988
Social Action, Responsibility and Heroism Act 2015

LIST OF CASES REFERRED TO

<u>OVERSEAS CASES REFERRED TO</u>
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Cass. Civ. 8 Janvier 1894 (France)
Chapman v Hearse (1961) HCA 46 (Australia)
Civ 16 Nov 1955, JCP 1956.2.9087 (France)
Civ 26 Jan1988 D 1989 405 (France)
Horsley v. MacLaren [1970] 2 O.R. 487, 11 D.L.R. at 277 (Canada)
Horsley v Maclaren, The Ogopogo (1971) 2. Lloyds Rep 410 (Canada)
The Ogopogo [1970] 1 Lloyd's Rep 257 (Canada)
People v Moseley 43 Misc 2d 505 (N.Y.S. 1964) (USA)
Salmon v Shute and Dredge (1994) 4 N.T.L.R. 149, 151 (Australia)
Wagner v International Railway Company (1921) 232 N.Y. 176, 133 N.E. 437. (USA)
<u>ENGLISH AND WELSH CASES REFERRED TO</u>
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Airedale NHS Trust v Bland (1993) 1 All ER 821
Baker v T E Hopkins and Sons Ltd (1959) 1 WLR 966
Bolam v Frien Hospital Management Committee (1957) 1 WLR 582
Cattley v St John Ambulance (1988) QBD – Unreported, but see 87/NJ/1140/QBD
Cutler v United Dairies (London) Limited (1933) 2 KB 297
Daborn v Bath Tramways Motor Co Ltd (1946) 2 All ER 337
Day v High Performance Sports Limited (t/a Castle Climbing Centre) (2003) All ER
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Gautret v Egerton (1867) L R 2, C P 371
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R v Miler [1983] 2 AC 161
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Tomlin v Congleton Borough Council [2003] UKHL 47.
Videan v British Transport Commission (1963) 2 QB 650
Watt v Hertfordshire County Council (1954) 2 All ER 368
Winterbottom v. Wright (1842) 152 Eng. Rep. 402
Woodbridge School v Chittock (2002) EWCA Civ 915

1. Introduction to the Problem and a Potential Solution

1.1 General

1.1.1 Preliminary

My interest in carrying out this research stems from my position as the General Counsel for a large First Aid charity within England and Wales. Providing First Aid is a vital service to the Community and evidence indicates that up to 140,000 lives are lost each year where First Aid could have made the difference³. It is in this important sense that I describe the provision of First Aid in an emergency as a Rescue i.e. if a member of the public is confronted by a life-threatening accident or injury (perhaps they are choking), and they are not in or near a Hospital, or in the proximity of a Health Care Professional (e.g. a Doctor/Nurse) then unless someone with appropriate First Aid skills intervenes to Rescue them, they are likely to die.

Voluntary First Aiders are therefore a particular class of Rescuer. However, they are becoming increasingly concerned regarding potential liabilities arising from carrying out a rescue (as described in more detail below). It is this Problem, and possible solutions to it, which comprise this Thesis

There are significant Moral Issues present in the area of the Duty to Rescue, and Protecting Rescuers from Liability, and Chapter 2 of this work looks at the age old debate regarding the degree to which Law and Morality should, or should not, coincide on any particular topic, in any specific Social System. It importantly introduces the question of how a possible Duty to Rescue (Legal or Moral) may contribute to this discussion, and especially what part might be played by the concept of Moral Luck.

³ St John Ambulance Annual Review 2010 (quoting NHS A&E data)

A Literature Review has been carried out in the development of this thesis, and the relevant works were critiqued as the project proceeded and these criticisms appear within each of the respective Chapters/Sections below. Fundamentally, the Review indicated that the possibility of their being a Duty to Rescue has not been pursued to any great extent as a means of throwing light on the age-old debate as to what extent aspects of Morality should be enshrined in the Law of a given Jurisdiction. In particular, there does not appear to have been any specific consideration of how Moral Luck (first described by Bernard Williams⁴), and its effect on the Duty to Rescue, contributes to the debate. These aspects are therefore considered to be an original line of enquiry and provide an opportunity for this project to add a new element to the Literature in this area.

This research project therefore investigates the questions of whether there is a Duty to Rescue and how Rescuers might be protected. It does this generally in relation to the interaction of Law and Morality (including a detailed consideration of the influence of Moral luck, and also the so-called Acts and Omissions Doctrine) and in particular, it considers the current position in England and Wales, and also (in outline) in some other Western Jurisdictions. The project then seeks to make out a case for the Protection of Rescuers in English Law. The research proceeds under the following Headings:

- 1) Introduction to the problem and a Potential Solution
- 2) Law and Morality
- 3) Moral Luck and Rescuers/Good Samaritans
- 4) Causation, Responsibility and Omissions (and Failure to Rescue)
- 5) The Law of Rescue in England & Wales, and various 'Western' Jurisdictions
- 6) Recent Initiatives on Liability for Omissions/ an English Good Samaritan Law
- 7) Summary, Conclusions and Recommendation

⁴ Williams B, 'Moral Luck', *Proceedings of the Aristotolelian Society*: Supplement ,50 (1976)

1.1.2 The Problem

Unlike the position in a number of other common law jurisdictions (e.g. parts of the USA; Canada; and Australia –analysed in Chapter 5), the status of a Rescuer under English Law is ambiguous. Whilst there is no general legal duty to rescue⁵, specific obligations devolve upon certain categories of individuals e.g. parents, or bodies such as the Fire Service⁶. In addition, if a volunteer chooses to attempt a rescue then they are expected to meet a certain standard of care. If there is a possibility that this standard has not been met and the ‘victim’ suffers additional harm, then there is a real risk that the victim may sue the volunteer⁷. There is some protection for such volunteers, but historically this has generally been in terms of a right to recover, if they themselves are injured or suffer loss. There was previously little protection against them being sued for negligence (unlike in many jurisdictions overseas). However, during the course of producing this thesis the position has been changing, and in fact this work has contributed, albeit in some small part, to a limited form of Good Samaritan Act appearing on the Statute book in England & Wales: The Social Action, Responsibility and Heroism Act 2015, which received Royal Assent on 12 February 2015.

The need for such a Statute is long-standing and it was not surprising that in the absence of any such Legislation, the number of volunteer leaders in the UK had been in decline over the first part of the 21st century. More specifically a leading spokesman in the Sector went on record as stating that 69% of his front line volunteers quote the ‘fear of being sued’ as the predominant reason for reducing numbers of voluntary

⁵ Halsbury S, *Halsbury's Laws of England*, (London, Butterworths, 1997) Vol 33

⁶ Roger W, *Winfield and Jolowicz on Torts* (London, Sweet & Maxwell 2002) pp 142-145

⁷ *Cattley v t John Ambulance*. In. (87/NJ/1140/QBD)

leaders⁸. In addition, the number of first aid volunteers in the UK's leading First Aid Charity fell by some 10% in the years 2000 to 2010⁹.

It is in this sense that the fear of liability, or the so called Compensation Culture, can be said to have had a chilling effect on the level of volunteering, with another leading spokesman having reported to Parliament that up to one million individuals may be considering giving up volunteering because of the fear that they may be litigated against¹⁰. This cannot be a good thing for volunteers, or for Society generally, especially in the light of the growing trend to rely more and more on the Charity Sector for delivering part of the provision of various public services¹¹ It is very much hoped that the new 2015 Statute will lead to a reversal of these trends.

1.1.3 Context

As referred to earlier I am especially concerned about the effect that the uncertainty in English Law has had on First Aid Volunteers, and particularly in relation to the St John Ambulance Charity¹². This organisation carries out a number of charitable activities including: providing First Aid training/education to some 800,000 individuals each year; attending public events and providing first aid cover (up to 5 million hours each year); operating a 'back-up' ambulance service to the NHS (involving 1100 vehicles); providing training and development to a large adult and youth membership (including nearly 20,000 young people aged between 5 and 18).

⁸ Derek Twine, Chief Executive, The Scout Association, in his evidence to the Parliamentary Constitutional Affairs Committee on the Compensation Culture, Third Report of Session 2005-06, Volume II, Ev 33.

⁹ St John Ambulance Annual Reports and Accounts 2000-2010

¹⁰ Justin Davis-Smith, Deputy Chief Executive, Volunteering England (Op Cit No.8 Ev 33)

¹¹ Charity Commission (June 2006) Policy Statement on Charities and Public Service Delivery

¹² A Company Limited by Guarantee, No. 3866129 / Registered Charity, No. 1077265/1

In total St John Ambulance utilises some 40,000¹³ volunteers in providing services to the community and in many cases these are delivered under emergency conditions (e.g. the 7/7 bombings in London in 2005). It is very worrying that these volunteers (and volunteers generally) feel a lack of confidence that they cannot perform a public service and provide assistance to victims, without worrying that they might then be sued.

1.1.4 A case for Protecting Volunteer Rescuers?

As can be seen, there are very compelling Public Policy reasons as to why Rescuers should benefit from some degree of protection under the Law. If they are not, then the deterrent effect both in terms of performing a rescue, and also in terms of maintaining membership with, or becoming a member of voluntary aid organisations will become evident. In the Charity Sector in particular, the Charity Commission oversees Regulation and ensures that charities not only exist to further Charitable Purposes, but also to provide a Public Benefit¹⁴. The tax concessions available to charities are predicated on these general principles. One of the prime charitable purposes under the Charities Act 2011 is “The Advancement of Health or the Saving of Lives”¹⁵. It is therefore illogical for the State to encourage the formation of charities to pursue this purpose, whilst at the same time leaving the position ambiguous as to whether such volunteers might be sued if they attempted a life-saving act (i.e. a rescue) which turned out to be unsuccessful.

There is another argument for Protecting Volunteer Rescuers and this is associated with the concept of Moral Luck. The peculiar nature of rescue scenarios, is that they are unexpected, they happen by chance and are generally a matter of ill-luck. It is

¹³ St John Ambulance Annual Report and Accounts 2010 - 2014

¹⁴ Charities Act 2011, Chapter 25, The Stationery Office S 4

¹⁵ Charities Act 2011, Chapter 25, The Stationery Office, S. 3 (1) (d)

particularly in this type of situation that the Paradox of Moral Luck¹⁶ comes into play.

In his work "Moral Luck", Thomas Nagel posits four categories of Moral Luck:

- (i) Constitutive Luck (the kind of person you are)
- (ii) Circumstantial Luck (the kind of problems you face)
- (iii) Causative Luck (determined by Antecedent Events (the Factual Matrix))
- (iv) Consequential Luck (in the way things turn out (the outcomes that result))

In the case of an emergency, which raises the prospect of rescue (say a drunkard falling into a river), all four elements of Moral Luck can arise: the potential rescuer might be a brave person and a strong swimmer; the river might be very shallow at the point the drunkard fell in; the potential Rescuer may be present at the scene simply because he/she walked home, rather than took a bus; and the rescue might be termed successful if the drunkard recovers consciousness'

Conversely: the potential rescuer might be timid and a non-swimmer; the river might be very deep and fast flowing; other (braver) rescuers might also be present; and the rescue might be considered unsuccessful if the victim is resuscitated but with catastrophic brain damage.

Consequently, the particular Moral Luck 'Matrix' which might impact on any particular situation, could of itself act as a significant deterrent to prevent a specific individual from deciding to attempt a rescue. However, if, regardless of this (and with no thought as to whether the victim, or the victim's family might sue if the rescue goes wrong), a Good Samaritan attempts a rescue, then it would seem that the least Society could do to reward the individual for their bravery would be to insulate him/her from any (unjustified) adverse repercussions.

¹⁶ Nagel T 'Moral Luck' in *Mortal Questions*, (Cambridge, Cambridge University Press, 1979)

1.1.5 Recent Developments in English Law

On the 25th July 2006 the Compensation Act 2006 received Royal Assent after a particularly difficult passage through each of the Houses of Parliament. The key part of the Act in relation to this Research is Part 1 dealing with the Standard of Care which individuals owe their neighbours. The wording of Section 1 is as below:

1. Deterrent effect of potential liability

A court considering a claim in negligence or breach of statutory duty may, in determining whether the defendant should have taken particular steps to meet a standard of care (whether by taking precautions against a risk or otherwise), have regard to whether a requirement to take those steps might-

(a) prevent a desirable activity from being undertaken at all, to a particular extent or in a particular way, or

(b) discourage persons from undertaking functions in connection with a desirable activity.

The section introduced the concept of “desirable activity” into English Law, and the thrust of the Legislation is that if a court is faced with a negligence claim it should be mindful in reaching a decision on liability, as to whether (and to what extent) the defendant was carrying out a desirable activity. If in order to completely avoid the risk of injury, the defendant would need to entirely withdraw from providing that activity, then this is unlikely (generally) to be in the wider public interest. Any decision on negligence needs to weigh the desirability of the defendant’s activity fully into account.

The term “Desirable Activity” had not been previously defined in English Law (as confirmed by the Minister promoting the Legislation, during the various debates recorded in Hansard¹⁷). In fact, the term was deliberately chosen for this very reason so as to provide the courts with a clean slate upon which to work. As a consequence there was considerable expectation as to how the courts would apply the term, and what type of activity they might consider to be “desirable activity”.

¹⁷ Hansard, House of Lords, 15 Dec 2005 (51215-43) Col GC 213

I maintain that the action of an individual providing First Aid to a victim is simply one example of a person carrying out a Rescue, which activity itself is clearly a 'desirable activity'. It may have been expected that over time the courts might have defined categories of activity which meet the standard of being desirable activities.

However, by 2014 no such categories of Desirable Activities had emerged from the Courts, and further efforts were made with the UK Government (including by the writer and St John Ambulance) to have a more specific piece of Legislation introduced to make the position clearer. This had some success in 2015 when the Social Action, Responsibility and Heroism Act received Royal Assent on 12 February 2015. I and a colleague from St John Ambulance had a number of meetings with the Minister for Justice, and Statutory draughtsmen at the Justice Ministry, and were able to successfully persuade the Government that the Section of the Legislation relating to Heroism needed to be more far reaching than initially drafted.

This success is evidenced by the comments made by Mr Chris Grayling MP, the then Lord Chancellor, and Justice Secretary, during the Third Reading of the Bill in the House of Commons on 2 February 2015: "*We debated a proposed amendment that emanated from St John Ambulance ... I did as I undertook to do and went away and thought carefully about the measure. I listened to debates in the Lords and decided there was no reason not to accept the St John Ambulance recommendation*"¹⁸

The Act received Royal Assent on 12 February 2015, and turning to the wording of the Act itself, Sections 1 and 4 are the pertinent ones for my thesis:

"1 *When this Act applies*

¹⁸ House of Commons, Hansard, 2 Feb 2015 (Cm150202-0002) Col 78

This Act applies when a court, in considering a claim that a person was negligent or in breach of statutory duty, is determining the steps that the person was required to take to meet a standard of care.

...

4 *Heroism*

The Court must have regard to whether the negligence or breach of statutory duty occurred when the person was acting heroically by intervening in an emergency to assist another individual in danger”.

This provided an encouraging outcome to this Thesis, and it is very much hoped that the reference in this Act to “heroism” in connection with a person intervening in an “emergency to assist another individual in danger” (see my definitions of various of these terms in the Glossary forming Appendix 1) will be more effective than the more obscure reference to “desirable activity” in the earlier Compensation Act.

However, based on previous experience a more explicit Good Samaritan Act would still be more beneficial in dealing with the unfortunate perception which has hitherto acted to dissuade volunteers to act as rescuers (the perception that if something goes wrong they will be sued for negligence!).

1.16 Conclusion

As this thesis progressed it became increasingly clear to me that English Law might continue to leave matters of Rescue very much in the Moral sphere, rather than enshrine them in Law. There emerged various reasons for this and these are discussed in the subsequent Chapters/Sections of my work: In Chapter 2, I concentrate on the traditional Jurisprudential approach of maintaining a separation of Law and Morality and use this as a theoretical Framework to assist my work. The, albeit, synoptic review of various writers has been carried out to indicate how the longstanding Law and Morality debate may influence, and be influenced by, a discussion concerning a Good Samaritan Act for England & Wales.

I continue to track this tendency to separate Moral and Legal approaches throughout the thesis and in Chapter 3, I consider how the paradox of Moral Luck contributes to that separation; and in Chapter 4, I look at how the so-called Acts and Omissions Doctrine reinforces the separation.

Chapter 5 includes a somewhat cursory review as to how some other 'Western' jurisdictions approach the matter, and given their greater willingness to provide Legal protections to Rescuers (and sometimes, Legal obligations to attempt Rescues), I move in Chapter 6, to look at how potential changes in English Law are being brought forward and at the various developments that have been arising.

This caused me to consider a draft Good Samaritan Act for England and I did this because, as I mention later, I was not satisfied that innovations such as the Social Action, Responsibility and Heroism Act 2015 (whilst welcome) were likely to provide a sufficient response to negate the chilling effect that the Compensation Culture was having on Volunteer Rescuers (and in particular, First Aid Volunteers).

My final draft for such a Good Samaritan Act appears as the closing page of this thesis. However, I reproduce it now, at this point, by way of a hypothesis as to how the Problem posited in the first part of this Chapter might be resolved. The draft initially contained three operative Sections (covering 1) A Duty to Attempt an Easy Rescue, 2) An Immunity for Rescuers from Suit, and 3) Compensation for losses.

This three-section approach is an ideal, and it will be seen following Chapters 3-6 that the eventual draft Statute that I recommend only has two operative Sections, (for reasons which will emerge)

Hypothetical Good Samaritan Act

Section 1. Duty to Attempt an Easy Rescue

Subject to no unreasonable risk to themselves, anyone who fails to attempt the Rescue of another person in an Emergency, shall be guilty of an offence punishable by a fine not exceeding level [2]* on the Standard Scale.

Section 2. Protection of Volunteer Rescuers

Any Volunteer who attempts to Rescue another person in an Emergency, shall not be liable for any loss or harm so arising provided they have acted reasonably and without Gross Negligence.

Section 3. Compensation for Volunteer Rescuers

Any Volunteer who, acting reasonably, attempts to Rescue another person in an Emergency, and who suffers harm or loss, shall be entitled to Compensation.

Interpretation

“Emergency” means an unexpected and/or uncontrolled situation which involves danger or serious harm to human life.

“Rescue” means a response to an immediate emergency, whereby a human being is saved (or might be saved) from the danger of loss of life or serious harm. Such response includes, as a minimum, the summoning of the Statutory Emergency Services, where the Rescuer has a reasonable opportunity to do so.

“Volunteer” means an individual who acts without expectation of payment or other remuneration.

* Level 2 on the date of drafting this specimen Act was £500.

1.2. Limitation of this Thesis in terms of Emergencies and Rescues

As referred to above this thesis is concerned with the question of whether there is a Duty to Rescue in this Country, and if so whether this (and the Protection of such Rescuers) should be a matter of Morality, Law, or both. However, before the detailed analysis of this, and the impact of Moral Luck, it is necessary to define the parameters of my work. In particular I need to specify which types of Emergency I was concerned with, and also which types of Rescue I have investigated.

This is dealt with in considerable detail in the general Appendix to the Thesis, which represents a Glossary in relation to “Emergencies” and “Rescues”. With the assistance of this Glossary I can set out the limited definitions of these two concepts which have been used throughout this Work:

Emergency:

“An unexpected and/or uncontrolled situation which involves danger to human life or the danger of serious harm to human beings”.

Rescue:

“A direct response to an immediate emergency whereby a human being is saved (or might be saved) from the danger of loss of life or serious harm, by a Volunteer”.

In terms of Emergencies I have limited my research in the manner described above, and have done this to exclude situations involving events that do not threaten human life/ serious injury (e.g. threats to Animals or Property etc.) and to exclude situations which are foreseeable, or recurring (e.g. cyclical famines etc.). As explained further in the Appendix, I am not being callous in excluding such eventualities, but do this to ensure an appropriate focus to my project.

Turning to Rescues, I have also limited my thesis to exclude situations which do not apply to Human Beings (e.g. Animals, and Property again); and to exclude situations where the danger to the individual is neither life-threatening, nor likely to cause serious harm; and also to exclude situations where there is a pre-existing duty to provide assistance e.g. by the State Rescue Services (such as the Fire Service), or by individuals in Special relationships to those in danger e.g. Employers; Parents; Doctors etc. Each of these situations is described in more detail in the Appendix, but they do not form the focus of my project, which is concerned with Volunteer Rescuers.

2. Law and Morality

This Chapter is in two parts: the First discusses the general debate on the Relationship between Law and Morality, the second indicates how the following Chapters of this work, are influenced by, and contribute to that debate. There is a long history to the discussion about the separation of Law and Morality, and in developing this thesis I not only wanted to investigate how this separation might influence Good Samaritan Laws, but I also wanted my work on Good Samaritan Laws (and my review of Moral Luck) to inform the wider Law and Morality debate.

Part 1 The relationship between Law and Morality

2.1 General

The question of the relationship between Law and Morality comprises a monumental Literature and can be traced back to classical philosophers such as Socrates, Plato and Aristotle, and no doubt to the earliest point when human beings first thought about their relationship with their peers in their Society. This thesis does not set out to review this literature in any great detail, but does touch on the works of a number of the most well-known commentators and particularly refers to the work of Herbert Hart, who I consider to have established the most satisfactory description of a legal system to date. Hart espoused that there is no necessary connection between Law and Morality¹⁹, and it is this separation of Law and Morality which I identify as one of the main reasons why I believe there is currently no specific Good Samaritan Act in England and Wales. It is at the heart of the theoretical framework that I used to guide my work and I refer to this in more detail in the following pages.

Interestingly when Hart wrote just before the posthumous publication of the second edition of his “The Concept of Law” he particularly addressed a number of criticisms of his work and demonstrated how a number of these could be accommodated in his theory. This accommodation became the postscript to that second edition. I personally consider that in doing this Hart remains as the Philosopher who has provided the most complete and effective Concept of (Morality and) Law, and one which maintains that these are fundamentally separate concepts with no necessary connection of any predominant kind.

¹⁹ Hart H, *The Concept of Law*, (Oxford, Clarendon Law Series, Oxford University Press 1961, 3rd Edition 2012)

I maintain this despite the challenges of the later Jurisprudential Movements, and particularly the Post-Modernists whose deconstructionalist ideas nonetheless throw light on the need for a flexibility of approach when considering Law and Morality at the margins. In my view the primacy of Hart's Positivist theory tempered with the recognition that flexibility is required both in terms of Interpretation and Approach (when novel or unusual situations arise), was cemented further when the third edition of his "Concept of Law" was published in 2012.

Having stated this, it is important that I track the chronology of the Law and Morality debate in a little more detail and in doing so I wish to emphasise some of the differences between Morality and Law, and most importantly I wish to indicate that there are many things which Society may consider immoral, but which do not result in Laws being passed to address them. One of the archetypal examples often quoted in this regard is the act of lying: it is generally considered to be immoral to lie, but this is not generally unlawful (although in extreme circumstances, such as perjury, it is both unlawful and a crime).

I will assert by the end of this thesis that the Failure to Rescue is generally another area where moral disapproval is not necessarily translated into legal disapproval. In contrast I will make the argument that Protecting a Rescuer from liability towards the Rescuer (or his/her family) is both a Moral and Legal imperative.

In developing these assertions in relation to Rescues I will rely heavily on the concept of Moral Luck to reinforce my conclusions. My review of Moral Luck forms Chapter 3 below.

In the following sub-sections I have included one or two extracts from the writings of the Philosophers mentioned earlier, to indicate the principle which exemplifies their views in this area. It is not the intention to review their philosophy in any further detail as this not the subject of this particular thesis.

2.2 St. Thomas Aquinas

At his simplest, and concentrating on this aspect of his writings, Thomas Aquinas asserts that human beings discover law by applying Practical Reason drawing on Eternal Law (i.e. the moral precepts of the Divine Law of God). Hence he states:

“Wherefore the very idea of the government of things in God the ruler of the universe, has the nature of a law. And since the divine reason’s conception of things is not subject to time but is eternal, according to proverbs viii 23, therefore it is that this kind of law must be called eternal”²⁰ “...since all things subjected to divine providence are ruled and measured by the eternal law, it is evident that all things partake somewhat of the eternal law ... and this participation of the eternal law in the rational creature is called natural law”²¹ ...“As Augustine says ‘that which is not Just seems to be no law at all’ ... Now in human affairs a thing is said to be just from being right according to the rule of reason. But the first rule of reason is the law of nature ... if it in any point it [Law] deflects from the law of nature it is no longer a law but a perversion of law”²².

Aquinas thereby introduced the long recurring idea that: if a law is not just, it is not law (*lex injusta non est lex*). In other words if a law is not moral it is not law - thereby propounding an essential connection between Morality and Law.

2.3 Niccolo Machiavelli

Whilst Aquinas was writing around 1270, Niccolo (‘Prince’) Machiavelli writing c.1510 is credited as being one of the first philosophers to insist on the differentiation of human reason from divine will, and thereby establishing political thought as a branch of science, or the advent of Secularism. In particular, Machiavelli advised that a State should be built on how things are (i.e. as evidenced by fact/science) rather than as things should be (i.e. as may have been divined as morally or naturally good):

²⁰ Aquinas T (1274) ‘Summa Theologica Q91 A1’ in *Jurisprudence Texts and Commentary* ed. By Davies H & Holdcroft D, (London, Butterworths 1991)

²¹ Ibid Q91 A2

²² Ibid Q95 A2

“How we live is so different from how we ought to live”²³

It can therefore be seen that Machiavelli was one of the first thinkers to differentiate the “is” from the “ought”, and this underpins the later Positivist approach that there is no necessary connection between the law as it is, and morality i.e. the law as it perhaps ought to be.

Machiavelli was also adamant that human beings could not be left to habitually order their affairs in line with what was considered morally Right or Natural, because human beings are not innately good:

“Whoever desires to found a State and give it law, must start with assuming that all men are bad and ever ready to display their vicious nature, whenever they may find occasion for it”²⁴.

2.4 Thomas Hobbes

Thomas Hobbes picked up Machiavelli’s theme about the innate immorality of man in his pivotal work “Leviathan” published in 1561. He believed the Natural state of human beings was not one based on the principle of the ‘greatest good’ (summm bonum) but one of *“Continual fear and danger of violent death ... (with) ... the life of man, solitary, poor, nasty, brutish, and short”²⁵*

Hobbes’ solution to this state of affairs was to assert that if men were to be able to live together then they needed to subsume their personal drives and appetites, and accept an imposed system of ‘control’ which would lead to the better good of all i.e. a ‘Social Contract Theory’. In Hobbes’ words, the creation of a “Commonwealth”:

²³ Machiavelli N (1513) *The Prince*, (London, Penguin, 2001) Chapter 15

²⁴ Machiavelli N (1517) ‘Discourse upon the First Ten Books of Livy’ in *The Discourses* (London, Penguin, 1998)

²⁵ Hobbes T (1651) *Leviathan*,(Oxford, World Classics, Oxford Univ Press, 2008) Part I

“The design of men (who naturally love liberty, and dominion over others), in the introduction of that restraint upon themselves, in which we see them live in Commonwealth, is the foresight of their own preservation and of a more contented life thereby”²⁶

Hence Hobbes established the approach of creating a Social (or Legal) system whereby men and women would sign up to a system of conscious rules to govern them in a Society and thereby ‘Posit’ a legal system based on ‘Reason; rather than Moral Pronouncement, i.e. a legal system based on “is” statements rather than divined “ought” statements.

The question remained as to who imposes this system for the benefit of the greater good, or Commonwealth, and Hobbes was quite clear that in his view the system was imposed by a Sovereign, being either a single Ruler, or an assembly of individuals exercising powers as the Ruler (what Hobbes termed his ‘Leviathan’):

“I authorise and give up my right of governing myself to this man, or to this assembly of men, on the condition that thou give up thy right to him, and authorise his actions in like manner”²⁷.

2.5 Jeremy Bentham

Whilst Hobbes laid the foundation of the Social Contract theory, and established that this should be imposed by a Sovereign, this did not guarantee that the Sovereign’s system of Rules would necessarily be benign. In Machiavelli’s eyes a State system would be more likely of success if it was authoritarian and imposed by force, with the Ruler’s (the Prince’s) will ensuring that his ends were achieved. Machiavelli is often held as originating the idea that *“The End Justifies the Means”²⁸*

²⁶ Ibid Part II

²⁷ Ibid

²⁸ Op Cit Note 23

This precept has been widely misinterpreted as suggesting that any course of action (however immoral) is justified if it achieves the desired outcome or consequence. Consequentialism, related to Determinism, features significantly in my Thesis (not least in the discussion on the idea of Moral Luck). However, at this point I wish to concentrate on the work of Jeremy Bentham who espoused a more balanced (and Moral) version of Consequentialism when introducing his, well known, theory of Utilitarianism.

Bentham did not especially propound a form of legal system per se, rather he was suggesting a method of deciding whether a particular proposition should form part of a legal system and also how the Rules in that legal system should be applied i.e. that if there was a choice in application of a specific law, then that choice should be the one which produces the greatest benefit for the greatest number. Bentham specifically described this Utilitarian approach as the Happiness Principle, and defined Happiness as the surfeit of Pleasure over Pain:

“Mankind is under the Governance of the Sovereign masters, pain and pleasure. It is for them alone to point out what we ought to do”²⁹

This is therefore an essentially Moral proposition in that Bentham was not suggesting that Law and Morality should be the same, but that Law was what the state had defined as Law, but the question of whether that Law was Morally Good (or Morally Bad) was a separate enquiry, and one which in his eyes could be established using Utilitarianism as the relevant tool for the job. This approach also left open the idea that what might (or might not) be a moral position, need not necessarily result in (or find itself within) the prevailing Legal System.

²⁹ Bentham J (1789) ‘Introduction to the Principles of Morals and Legislation’ (Mineola New York, Dover Philosophical Classics, 2007) Section 1

I will look at Utilitarianism in more detail later in this project, but suffice it to say at present that I will argue both that the Duty to attempt certain Rescues is a Moral Imperative (using a Utilitarian argument), but also that to attempt some Rescues would involve too much risk and leave too much to Luck (Moral Luck) such that it would not be appropriate to translate it into a Legal Duty.

2.6 John Locke

Alongside Bentham's development of Utilitarianism, John Locke is credited with the birth of Liberalism and he developed this as a corollary of the Social Contract theory, mentioned earlier when introducing the ideas of Thomas Hobbes. In particular, Locke qualified the Social Contract theory by emphasising that in subjugating total authority to the creation of a Society structured by the Sovereign, each individual should retain the right to defend his "*Life, Health, Liberty, and Possessions*"³⁰

2.7 John Austin

I will refer further to the impact of Liberal thought, via the Social Contract theory in the next sub-section, but chronologically it is now the time to consider John Austin, one of the major proponents of Legal Positivism, who firmly rejected the Natural Law position, whilst also adopting a particular variant of Thomas Hobbes' Sovereign theory.

The critical question to be answered by any Positivist is, if the law is Posited rather than simply discoverable from Nature, then who is it that Posits the law. Hobbes indicated that in his view his 'Leviathan' posited the law. Austin's variation on this was his "Command Theory", which essentially has a Commander positing the law:

³⁰ Locke J, (1689) 'Two Treatises of Government' in *Cambridge Texts in the History of Philosophical Thought*, (Cambridge, Cambridge University Press 1988)

“Every positive law, or every law so called, is a direct or circuitous command of a Monarch or Sovereign number in the character of a political superior: that is to say a direct or circuitous command of a Monarch or Sovereign number to a person or persons in a State of subjection to its author”³¹.

Austin further defines a Command as different to other ‘wish’ statements by insisting that there are Sanctions to uphold commands:

“If you express or intimate a wish that I shall do, or forbear from some act, and if you will visit me with an evil in case I comply not with your wish, the expression or intimation of your wish is a command”³²

Various writers paraphrased Austin as describing law as a set of ‘Orders backed by Threats’, and this led subsequently to considerable criticism of Austin, especially from Herbert Hart (see later Sub-Section). However, one of the other strong criticisms of Austin was that his definition of law could be extremely penal, indeed the most despotic Dictatorship would fit his definition of a Command based Legal System. Such a Legal System would meet the definition of a valid system even if it was totally immoral. This point was taken up by John Stuart Mill.

2.8 John Stuart Mill

John Stuart Mill brought together a number of the inter-related threads referred to in earlier sub-sections and combined a Positivist approach, with Utilitarianism, with Social Contract theory, with Liberalism, and with recognition of parts of Austin’s Command theory. However, Mill tempered the extreme interpretation of Austin’s legal theory: the so-called ‘Orders backed by Threats’, by the introduction of his “Prevention of Harm” principle:

“the only purpose for which power can be rightfully exercised over any member of a civilised community against his will, is to prevent harm to others”³³.

³¹ Austin J (1832) ‘The Province of Jurisprudence Determined’, in *Cambridge Texts in the History of Philosophical Thought*, (Cambridge, Cambridge University Press 1995)

³² Ibid

³³ Mill JS (1859) ‘On Liberty’, in *Oxford World Classics* (Oxford, Oxford Univ’ Press 1991)

Hence it can be seen that Mill brought a degree of a moral 'back-drop' to Austin's Command Theory. His principle concerning Harm also impacts heavily on my line of enquiry regarding the Jurisprudence around Rescue, e.g. does the failure to attempt a straightforward rescue amount to 'harm to others' which the law should address?; and does the need to protect Rescuers from being pursued come within the definition of 'preventing harm to' such that the law should intervene? These are the key questions for later in this thesis.

2.9 Hans Kelsen

Hans Kelsen is the next philosopher whose work I wish to consider (albeit in outline). I do this because he introduced the idea that a Positive Law approach can be anchored by a Basis Norm, rather than via some more dictatorial form of Command. Kelsen described this purer form of origin in his "Pure Theory of Law", in which he developed the idea of a Hierarchy of Norms (Rules) culminating in a Basic Norm (the "Grundnorm"). All the subsidiary Norms were stated as drawing their legitimacy from the Basic Norm.

Kelsen used the term "Pure" in his theory to re-emphasise the Positivist approach i.e. that he was describing Law as it "is", not how it "ought" to be – in other words without including morality in the formulation (which would detract from its objective purity):

"The Pure theory of law is a theory of positive law ... the theory attempts to answer the question what and how the law is, not how it ought to be. It is a science of law..."³⁴

Kelsen developed his theory of a hierarchy of Norms which individuals must obey, as the 'price' of belonging to any given society, but confirms that the Norms themselves obtain their validity from a Basic Norm:

³⁴ Kelsen H (1934) *The Pure Theory of Law* (New Jersey, The Law Book Exchange 2009)

“The Basic Norm is the presupposed starting point of a procedure, the procedure of positive law creation. It is itself not a norm created ... by the act of a legal norm, it is not a positive but a presupposed norm so far as the Constitution-establishing authority is looked upon as the highest authority and can therefore not be regarded as authorised by the norm of a higher authority”³⁵

As to the character of his ‘presupposed’ basic norm, Kelsen goes on to state:

“coercive acts ought to be performed under the conditions and in the manner which the historically first constitution, and the norms created in accordance to it, prescribe (in short: one ought to behave as the Constitution prescribes)”³⁶.

These are points picked up by and expanded upon by Herbert Hart

2.10 Herbert Hart

Herbert Hart published his “Concept of Law” in 1961, and for me established the most coherent theory of Law to date i.e. that Law is as posited, rather than arising naturally, and that generally there is no necessary Connection between Law (as so posited) and Morality (as flowing from ‘Nature’). Hart’s theory or concept of law has been challenged by a number of subsequent philosophers, and most notably by Ronald Dworkin, and by the Legal Realists, the Critical Legal Studies movement, and the Post-Modernists. Hart defended his Concept from Dworkin’s challenge reasonably successfully, and others have demonstrated that Hart’s Positivism survives the more modern challenges, especially when considering Law in its everyday sense, rather than at the theoretical margins. It is this sense that I suggest that Hart established a high water mark for Positivism, and the most helpful concept to guide my enquiries into what an analysis of Rescue can tell us about Law and Morality.

Hart himself begins by challenging the work of John Austin, and it is he who categorised Austin’s work as Orders backed by Threats. Hart asks the question:

³⁵ Ibid

³⁶ Ibid

“How then do law and legal obligations differ from and how are they related to Orders backed by Threats”³⁷.

He asks this question because, as he asserts, Austin’s formulation does not distinguish from the situation of *“the gunman who says to the bank clerk ‘hand over the money or I will shoot’”³⁸* i.e. this is also an order backed by threats, but it is by no means Law. Hart recognises that Austin attempted to overcome this issue by referring to his Commands (and Sanctions) as being legitimised by reference to the Sovereign. But this raises the next problem for Hart i.e. why does a legal system need a Sovereign? Hart indicates that it does not, and states further that the presence of a Sovereign (as an individual, or as a group of individuals habitually obeyed) cannot be an essential for a legal system, since this would not provide continuity of the system, when the Sovereign ceases to exist (in Hart’s terms the transition from Rex I to Rex II):

“Let us now suppose that, after a successful reign Rex dies leaving a son Rex II who then starts to issue general orders. The mere fact that there was a general obedience to Rex I in his lifetime does not by itself even render possible that Rex II will be habitually obeyed ... There is as yet no established habit of obedience to Rex II”³⁹.

What Hart suggests is that rather than a Sovereign, what is needed is a system of Rules in a Society, habitually obeyed by the majority of the members of that Society. He actually describes two different types of Rule: “Primary Rules”, which describe the obligations (and rights) of citizens within the legal system – which are habitually obeyed and followed, and “Secondary Rules” which provide for the establishment, maintenance, and continuity of the Primary Rules:

“... Law may most illuminatingly be characterised as a Union of primary rules of obligation, with ... secondary rules”⁴⁰

³⁷ Op Cit Note 19

³⁸ Ibid

³⁹ Ibid, Page 53

⁴⁰ Ibid, Page 94

The vital component of Hart's Secondary Rules is what he calls his "Rule of Recognition", being the rule which validates the Primary Rules which Society is to live by. In Hart's Concept of Law this Rule of Recognition replaces the Basic Norm described by Kelsen in his theory of law. Hart states that a Rule of recognition will:

*"Specify some feature or features possession by which by a suggested rule is taken as a conclusive affirmative indication that it is a rule of the group to be supported by the Social pressure it exerts"*⁴¹.

Hart continues to describe the characteristics of such a Rule of Recognition and indicates that it can validate Primary Rules by virtue of *"the fact of their having been enacted by a specific Body, or their long Customary practice, or their relation to Judicial decisions"*⁴².

2.11 Criticisms of Hart

Before looking further at some of the more specific parts of Hart's philosophy as it touches on my thesis it seems sensible to mention some of his main critics:

Hart's major critic was Ronald Dworkin, who posed a challenge which could be said to have a Natural Law character. He suggested that Hart's concepts failed to explain how Judges reach decisions in novel cases i.e. if the law is posited by reference to a Rule of Recognition, then how is a solution found when a case arises (a 'Hard Case') which does not fit the posited formula. In such cases Judges tend to interpret the law and as such go beyond that which is posited. Dworkin suggests that this creates a fundamental problem for Positivism and Hart in particular, but also creates unfairness in that 'certainty' within the law is lost, and the citizen under review suffers because

⁴¹ Ibid,

⁴² Ibid, Page 95

he is eventually penalised by a law which did not exist at the time when he originally acted.

Dworkin set out his criticisms of Hart in his work "Taking Rights Seriously"⁴³. He ascribes three traits to Positivism: (i) *The Law of a Community is a set of Rules "distinguished by specific criteria, by tests having to do not with their content but with their pedigree (Dworkin's emphasis)"⁴⁴*, (ii) *"The set of these valid rules is exhaustive of the Law"⁴⁵*, and (iii) *"To say that someone has a legal obligation is to say that his case falls under a valid legal rule that requires him to do or forbear from doing something"⁴⁶*.

The crux of Dworkin's argument really emerges from point (ii) above, and he elaborates it as follows:

"If someone's case is not clearly covered by such a rule (because there is none that seems appropriate, or those that seem appropriate are vague, or for some other reason) then the case cannot be decided by 'applying the law'. It must be decided by some official, like a Judge, 'exercising his discretion', which means reaching beyond the law for some other sort of Standard to guide him in manufacturing a fresh legal rule or supplementing an old one"⁴⁷.

The introduction of the idea of 'discretion' is at the heart of Dworkin's criticism and he uses this to explain that, as well as established legal rules, it has to be recognised that Judges (like his archetypal Judge, 'Hercules') have to interpret the law with the help of other tools such as *"Principles, Policies and other sorts of Standards"⁴⁸*.

⁴³ Dworkin R (1977), *Taking Rights Seriously*, (London, Duckworth 1991)

⁴⁴ Ibid, Page 17

⁴⁵ Ibid

⁴⁶ Ibid

⁴⁷ Ibid

⁴⁸ Ibid, Page 22

This is expanded in Dworkin's "Law's Empire"⁴⁹, where he applies a general Interpretive method to the law i.e. *"First, there must be a 'pre-interpretive stage in which the rules and standards taken to provide the tentative content of the practice are identified. ... Second, there must be an interpretive stage at which the interpreter settles on some general justification for the main elements of the practice identified at the pre-interpretive stage. ... Finally there must be a post-interpretive or reforming stage, at which he adjusts his sense of what the practice "really" requires so as better to serve the justification he accepts at the interpretive stage"*⁵⁰.

Dworkin explains how hard cases are dealt with in this manner and applies the idea of 'Law as Integrity'⁵¹, to indicate that Judges in dealing with hard cases in the post interpretive stage should apply Principles of Justice and Fairness.

Dworkin then uses his 'Interpretive' approach as the core weapon to attack Hart's Positivism by stating that as Judges in Hard Cases have to use tools like Principles, which are not fixed, posited rules, then they sit outside Hart's Rule of Recognition.

This is a strong criticism, and it could be suggested that if these 'tools' are not formally posited in a legal system, then the only other explanation must be that these 'discretionary' factors must simply be pre-existent, or perhaps Natural, and to this extent it could be argued that Dworkin is using a Natural Law argument.

Hart responded to Dworkin's various criticisms in the second edition of his "Concept of Law" published (after his death) in 1991, and in the Postscript to the same he

⁴⁹ Dworkin R (1986) *Law's Empire*, (Oxford, Hart Publishing 2008)

⁵⁰ Ibid, Page 65-66

⁵¹ Ibid, Page 164

particularly addressed the suggestion that his theory of Law did not allow for the role on Interpretation as part of its 'explanation'.

Hart specifically refers to his description of the Rule of Recognition, and reminds us that the Rule has the *"duality of a core of certainty and a penumbra [my emphasis] of doubt"*⁵² which he states *"imparts to all rules a fringe of vagueness or open texture"*⁵³. He explains this further in the actual Postscript by confirming that the pedigree of the Rule of Recognition is not limited to rules set out in Statutes, or described by Precedents, but also contains Principles of various kinds e.g. Rules of Interpretation, or Judicial Reasoning etc. These are equally posited e.g. in recognised legal textbooks. These Principles are then brought into play in Hart's Hard Cases, or Cases in the Penumbra. The important point being that such 'solutions' are not just plucked from the air, at a Judge's whim (which would be contrary to Positivism), but are reached as a result of applying a posited toolkit for judicial use, and which are familiar to the judges through legal academia, or indeed through their legal education and training. In Hart's words *"... some basic principles ... such as that 'no man may profit from his own wrongdoing' are identified as Law by the 'Pedigree' test in that they have been consistently invoked by Courts in ranges of different cases as providing reasons for decision ..."*⁵⁴

The other main criticisms of Hart's philosophy of Law can be considered as more 'avant-garde' stemming from: the thoughts of the Scandinavian and American Legal Realists; the ideas of the Critical Legal Studies movement; and the Post-Modernist writers.

⁵² Op Cit Note 19 Page 123

⁵³ Ibid

⁵⁴ Ibid, Page 265

The ideas behind Legal Realism were not a direct response to Hart, and the first proponents of Legal Realism, the Scandinavian Legal Realists began writing in the first half of the 20th Century. The first such writer of note was Axel Hagerstrom who challenged the objectivity of posited legal concepts. He argued that such concepts were only objective in terms of the verbal form in which they were stated. He considered that the words used were a device and did not reflect the reality of what individuals actually do⁵⁵. Hagerstrom felt that a more scientific approach to defining law was necessary, and needed to be based on research of what people actually considered to be Law and why they considered themselves to be bound by law. This idea was taken forward by Karl Olivecrona towards the end of the Century who stressed that when we refer to being bound by the law it is important to recognise that more often than not what we mean is people's "feeling of being bound", rather than that there is an objective fact of them being bound by something⁵⁶. These ideas therefore introduced the proposition that it was not enough to just consider law as that which was posited by the state but required research into behavioural science.

Whilst the Scandinavian Realists were generally focused on what the general public actually do, the American School was focussed on what those within the legal system (Judges and Lawyers) actually do. Furthermore, the American legal realists wanted to understand what Judges etc. do in practice, not what they say they do. This approach is most easily considered by looking at the work of Karl Llewellyn, who distinguished between the "*Paper Rules*"⁵⁷ which Judges refer to when setting out their reasons for their decisions (in order to remain within the fabric of the system of which they are part), and the "*Real Rules*" which actually determine why they reach those decisions (which involve a whole matrix of real facts not least those related to their education, their prejudices (innocent or otherwise), their politics or even what

⁵⁵ Hagerstrom, A *Inquiries into the Nature of Law and Morals* (Almquist and Wiksall 1953)

⁵⁶ Olivecrona, K *Law as Fact* (London, Stevens and Sons 1971)

⁵⁷ Llewellyn, K *Jurisprudence*, (Chicago, University of Chicago Press 1962)

they ate for breakfast that morning). This approach again demanded research into the behavioural science of what Judges and Lawyers do, not just an acceptance of posited Law. However and most importantly for my insistence on the overall reliability of Herbert Hart's concepts, Llewellyn was quick to point out that:

"...I feel strongly the unwisdom, when turning the spotlight on behaviour, of throwing overboard emphasis on rules, concepts, ideology and ideological stereotypes and patterns. These last, as we have them, are by themselves confusing, misleading, inadequate to describe or explain. But a jurisprudence which was practically workable could not be built in terms of them, if they had not contained a goodly core of truth and sense"⁵⁸.

Hence I think it is fair to say that neither branch of the Legal Realism movements were demanding a complete displacement of Legal positivism per se, but both were pointing out that there are other factors at play, and that positivist philosophers must not take a blinkered view when trying to define Law. Interestingly Hart seems to have been alive to these exhortations, and notably he prefaced his work with the realisation that his must be an *"essay in descriptive sociology"*⁵⁹. Having said this, it is clear in some instances that Hart seemed to overlook his own intentions. Nonetheless, I do not consider that this compels me to disregard Hart's work as my guiding light, rather it cautions me to bear in mind wider behavioural aspects as I do so.

The Critical Legal Studies Movement (CLS) is widely accepted as having grown out of the earlier Legal Realist movements, and in particular from the American Legal Realists. However, whilst the Legal Realists were generally quite permissive in terms of expressing their views as supplemental to those of Legal positivism, the CLS Movement was much less accommodating.

Their overall philosophy was very much Socialist in character, and they were critical of the manner in which law was being discussed in the late 20th Century in a way in

⁵⁸ Ibid

⁵⁹ Op Cit Note 19

which Liberalism was virtually the philosophical default, and theories of law were promoting individualism. The CLS sought to demonstrate that this was a mistaken approach reflecting the influence and relevant affluence of the large majority of legal academics, legal writers, lawyers, judges and people of influence within the Establishment. They championed what they saw as a far more egalitarian approach and philosophy.

“Liberalism in its various forms plays a central role in shoring up the current system, a system [which] is pervasively unjust.”...“The present system continuously oppresses and exploits people and that legal doctrine keeps them unaware of their true interests”⁶⁰

The CLS Movement expressed a number of common themes i.e. ‘Indeterminacy’, ‘Contradiction’, and False Consciousness. These themes can perhaps be best seen in the works of Duncan Kennedy who in addition to claiming that these characteristics permeate modern legal systems also draws attention to the paradox of the State setting definitive legal rules, and Judges using standards to reach solutions where such rules prove non-definitive in practice. He suggests that this creates uncertainty, with those before the law suffering as a result. He would prefer an altruistic approach to law whereby there are standards that ensure that there is a uniform response with little recognition of individuality, rather than a rigid form of Rules which can be used to benefit, by individuals with the knowledge and/or means to do so: *“... altruistic views on substantive private law issues would lead to a willingness to employ standards in administration, whilst individualism seeks to rely on an insistence of rigid rules rigidly applied”⁶¹.*

These views proposed the interesting suggestion that legal systems in Western democracies in the late 20th Century were the result of capitalist interests seeking to

⁶⁰ Price D A ‘Critical Legal Studies’, *Cambridge Law Journal*, 48 (1989) p 283

⁶¹ Kennedy D ‘Form and Substance in Private Law Adjudication’ *Harvard Law Review* 89 (1976) p 1687

oppress the general public for their own privileged benefit. However, they were very much of the moment, and the solution put forward that the legal systems should be redesigned to produce an egalitarian and altruistic uniformity (in place of rewarding liberal and entrepreneurial individualism) suffered the same fate as the Communist experiment in Eastern Europe which fell with the Berlin Wall in 1996 (i.e. that imposed uniformity led to reduced benefits for all, and that unbridled altruism could lead to anarchy again with dis-benefit to all).

This said, CLS like Legal Realism encourages us, as modern thinkers about Law and Legal systems, to adopt a flexible and unblinkered approach to our researches.

The Post Modernists were much less structured in their criticisms of Hart and by way of example, Costas Douzinas, Ronnie Warrington and Shaun McVeigh (hereinafter DWM), writing in “Postmodern Jurisprudence”, stated:

“The orthodox jurisprudence of modernity constructs theories which portray the law as a coherent body of rules and principles ... post modern theory could not be more different. It distrusts all attempts to create large-scale, totalising theories in order to explain social phenomena”⁶².

They summarised modernity’s position as one where *“the state’s function is no longer to ensure that society moves inexorably along the path of virtue, but to see that contracts are enforced and that fundamental minima of peace and survival are achieved. Legality and Morality now become distinct (my emphasis). The former is a matter of external prescription and coercion; the latter, inward and subjective.”⁶³*

Their attack on Hart was that despite asserting that he had created a ‘descriptive sociology’ he provided *“no anthropological or historical evidence”⁶⁴* to support his

⁶² Douzinas C, Warrington R, McVeigh S *Postmodern Jurisprudence – The law of Texts in the Texts of the Law* (London, Routledge 1991), Introduction

⁶³ Ibid, page 5

⁶⁴ Ibid, page 22.

conclusions. Their plea was to consider Judges' decisions in Context , which was repeated by other writers such as Professors Martha Minnow and Elizabeth Spelman: *"Like others concerned with the failures of abstract universal principles to resolve problems, we emphasize 'context' in order to expose how apparently neutral and universal rules in effect burden or exclude anyone who does not share the characteristics of privileged, white, Christian, able-bodied, heterosexual adult men for whom those rules were actually written"*⁶⁵

There is unquestionably a great deal of insight introduced by such writers into Jurisprudence, and it is now essential to bear these contextual themes in mind in interpreting any theories of Law or Legal systems. However the wider claims of Postmodernism have more recently been challenged themselves, largely on the basis of the findings of experiments conducted by behavioural scientists (whose results have largely nullified the criticism of Harts work as not reflecting anthropological research). As an example Scott Fruehwald published an article in 2011: "When Did Ignorance Become a Point of View?: Postmodern Legal Thought and Behavioural Biology"⁶⁶. Fruehwald is very dismissive of the influence of Postmodernism and commences his criticism by stating: *"As this paper will show, Postmodernism is based on the denial of human nature – it is based on ignorance (lack of knowledge), and it has had a pernicious effect on the law"*⁶⁷. He asserted that the human mind has evolved in the same way as the human physique and that we are hard wired in terms of our outlooks on life⁶⁸. Another critic who demonstrated the 'hard wired' and innate nature of various of our intuitions was Matt Ridley⁶⁹ who's

⁶⁵ Minnow M and Spelman E, 'In Context', *South California Law Review* 63, (1990), p 1597

⁶⁶ Fruehwald E S (2011) "When Did Ignorance Become a Point of View?: Postmodern Legal Thought and Behavioral Biology", last accessed 10.03.2014 at <http://ssrn.com/abstract=1769243>

⁶⁷ Ibid, Page 1

⁶⁸ ibid

⁶⁹ Ridley M (2003) 'The Agile Gene: How Nature turns on Nurture', <http://web.stanford.edu/group/hope/cgi-bin/wordpress/2013/05/the-agile-gene-how-nature-turns-on-nurture-by-matt-ridley/> last accessed 24/07/14

particularly informative experiments studied the views of 'reared-apart' twins on religious fundamentalism: *"the correlation between the resulting scores for identical twins reared apart is 62 percent; for fraternal twins reared apart just 2 percent"*⁷⁰.

Fruehwald also negated another Postmodernist argument that there are no moral universals: *"In addition to others [universals] universals also exist in the [moral content of the] law, including a concept of fairness, distinguishing right and wrong, inheritance rules, murder proscribed, normal distinguished from abnormal states, property, rape proscribed, reciprocal exchanges of labour, goods, or services (reciprocal altruism, redress of wrongs, and some forms of violence proscribed)"*⁷¹. In particular he quoted from the work of Michael Guttentag, who demonstrated: *"most individuals respond negatively to an incestuous relation. But they cannot explain why they reacted this way"*⁷². Whilst suggesting: *"this is a product of natural selection (and thus innate), because of the potential harm from incest"*⁷³.

The idea that there are no universal formations of thought, and no universal morality is fundamental to the "Deconstructualism" at the heart of Postmodernism, and the demolition of these ideas by Behavioural Science leaves Postmodernism considerably discredited. However, it cannot be dismissed entirely, and its value is to have demonstrated a need for a pluralistic approach to Jurisprudence (in much the same way as Legal Realism and the work of the Critical Legal Studies movement has required the dominance of Legal Positivism to be tempered by a recognition that other viewpoints cannot be ignored, both generally, but most importantly at the margins where in hard or novel case the posited Rules tend to run out).

⁷⁰ Ibid at 79

⁷¹ Op Cit Note 66 at Page 22, quoting Brown D.E. (1991) "Human Universals"

⁷² Ibid at Page 24 quoting Guttentag M.D. (2009) "Is there a Law Instinct?"

⁷³ Ibid

2.12 Further Consideration of Hart

Having briefly looked at the main criticisms of Hart I maintain that his Concept of Law (adjusted to reflect additional interpretative principles and certain elements of plurality highlighted by the Deconstructionalists) remains sufficiently all-embracing to represent the best explanation of Law to date.

Hence I now wish to move to Hart's comments regarding 'Justice and Morality', 'Laws and Morals', and (with Tony Honore) his ideas on 'Omissions', since these are the most germane to my project, and my desire to use the concept of 'Rescue' to test various notions of Morality and Law which result from an acceptance of Positivism.

At the very start of his Chapter on 'Justice and Morality', Hart expressed the fundamental 'Battle-line' between the Natural Law and the Positivist points of view i.e. "... *the general contention that between the law and morality there is a connection which is in some sense necessary*"⁷⁴. This has been paraphrased by numerous writers as Hart's objection to 'Any Necessary Connection between Law and Morality'.

Crucially however, Hart concedes that if there is an absence of Justice in the system then it is not a valid system. As to what 'Justice' means, Hart sets out the generally held components which include: like cases should be treated alike; no man should be a judge in his own cause; laws should be intelligible and within the capacity of most people to obey, law should not (generally) be retrospective; there should be the right to a fair hearing, to be heard, to have legal representation, to receive 'reasoned' judgments; and for any penalties to be proportionate etc. etc. These, and various other elements, are generally summarised as 'Natural Justice'.

⁷⁴ Op Cit Note 19, Page 155

Hart therefore re-emphasises that his version of Positivism does not ignore the fact that certain moral elements can be included within any particular legal system, but he rejects the notion that moral elements must be so included. He then makes a considerable concession in his Concept of Law, in that he acknowledges that a typical legal system is likely to have a “*Minimum Content of Natural Law*” (or morality)⁷⁵. He then explores what the nature of this ‘minimum content’ might be and lists: ‘protection of the individual from Serious Harm’⁷⁶; ‘reinforcement of Mutual Forbearance’ (restraint of the strong/ support of the weak)⁷⁷; ‘recognition of certain Property Rights’ (e.g. shelter/food/water)⁷⁸; and provisions for Enforcing all these⁷⁹.

Hart also includes the earlier-mentioned ‘Administrative’ elements of Natural Justice in his description of the Minimum Content of Natural Law.

He then concludes the major part of his Concept of Law by stating that he prefers a form of Positivism which can include this Minimum Content of Natural Law (or Morality), and describes this as the “Wider Concept” [of Positivism], rather than the “Narrower Concept”⁸⁰.

However, in proposing this concession (referred in his Postscript as “Soft Positivism”⁸¹), Hart makes it quite clear that this is as far as he is willing to go, and that, beyond this minimum content, there cannot be any further necessary connection between Morality and Law. **He demonstrates that if we ignore this axiom, and accept a complete and indiscriminate mixing of Law and Morality as forming a legal system, then we inadvertently accept the confusion of two very different concepts**

⁷⁵ Ibid, Page 193

⁷⁶ Ibid, Page 194

⁷⁷ Ibid, Page 195

⁷⁸ Ibid, Page 196

⁷⁹ Ibid, Page 197

⁸⁰ Ibid, Page 209

⁸¹ Ibid

i.e. 'law as it is', and 'law as it ought to be'. If we do this, we would then be forced to accept any specific legal system without criticism i.e. 'warts and all'. However, by maintaining the essential 'SEPARATION' we can continue to subject any particular legal system to INDEPENDENT moral scrutiny, and thereby decide whether it is a system which should, or should not be accepted.

This approach enables us to denounce the most outrageous legal systems (such as that in force in Nazi Germany, in the middle of the 20th Century) as moral abominations

Hart also wrote widely on aspects of Causation, particularly in collaboration with Tony Honore, and in 1959 (just before Hart's publication of the *Concept of Law*) they jointly published "Causation in the Law"⁸². This work looks at Causation in its various guises, and in particular for my work, there is an insightful consideration of the different character of Acts and Omissions (summarised as the "Acts and Omissions Doctrine"). I am especially interested in the Failure to Rescue as a class of Omission, and so Hart and Honore's views on Omissions (covered further in the second edition of their book⁸³, and in Honore's individual work "Responsibility and Fault"⁸⁴) provide further framing for my thesis.

I would therefore reiterate that it is Hart's philosophy of law which forms the main theoretical framework for my thesis. In particular, it is his contention that Law and Morality should generally be kept separate which forms my theoretical blueprint. I include a detailed analysis of Moral Luck as part of my project, and indicate how this supports that contention. I also look at the nature of the Acts and Omissions Doctrine as it applies to Rescues and introduce a wider characterisation of human conduct to

⁸² Hart H & Honore T *Causation in the Law* (Oxford, Oxford University Press, 1959)

⁸³ Hart H & Honore T *Causation in the Law* (Oxford, Oxford University Press, 1985) 2 Ed

⁸⁴ Honore T *Responsibility and Fault* (Oxford, Hart Publishing 1999)

enable me to demonstrate that the inclusion of aspects of Luck leads to more structured conclusions regarding the separation of Law and Morality in defining the 'Jurisprudence of Rescue'.

Part 2 How this Thesis touches on the Debate about Law and Morality

2.13 General Approach

I believe that the importance of maintaining a sufficient separation of Morality and Law cannot be overstated and this is reinforced by consideration of the famous Hart-Devlin Debate which took place in the middle of the 20th Century (and which no doubt led to Hart reiterating the necessity of this separation in his "Concept of Law"⁸⁵ published in 1961, and in his succeeding work: "Law, Liberty and Morality"⁸⁶). Hart stressed the vital importance of maintaining a separation between Law and Morality during what was probably the most notorious clash of views on the subject which broke out in 1959 when Lord Devlin published his lecture "The Enforcement of Morals"⁸⁷.

Devlin's lecture triggered the monumental Debate between himself and Herbert Hart, which centred around whether the law of the State should be used to compel individuals to comply with the prevailing moral code of the citizens of that State. The focus of the debate was whether the Law in England & Wales should prohibit homosexual practices between consenting adults in private. Devlin felt that it should, as it would reinforce Society's natural predisposition that such activity (even in

⁸⁵ Op Cit Note 19

⁸⁶ Hart, H L A, *Law, Liberty and Morality*, (Oxford, Oxford University Press 1962)

⁸⁷ Devlin, Patrick (Lord) (1959) *The Enforcement of Morals* (London, Oxford University Press, 1965)

private) was immoral. Hart, by contrast, felt that it should not, and that the State/Law should not involve itself in the sphere of private morality.

This is not the place to track this difference of opinion in great detail, but Hart pursued his argument based on John Stuart Mill's 'Liberal' principle that: "the only purposes for which power can rightfully be exercised over any member of a civilised Society against his will is to prevent harm to others"⁸⁸. Hart considered that what consenting adults did in private did not harm others whereas Devlin held a contrary view based on two particular points i.e. that simply knowing that two people were acting in an (to Devlin) immoral manner in private was enough to harm Society's Sensibilities, and secondly, that sometimes consent was uninformed, and the participants in (to Devlin) immoral acts in private needed to be protected from harming themselves.

Significantly, the more liberal approach won through, with Hart's views being supported by the thrust of the Wolfenden Report published in 1957, which recommended that homosexual practices between consenting adults in private should no longer be a crime, stating that: "... *there must remain a realm of private morality and immorality which is, in brief and crude terms, not the law's business*"⁸⁹.

However, whilst relaxation of certain offences related to Prostitution (generally) did emerge as a result of the Wolfenden Report, no immediate changes took place relating to Homosexuality. Nonetheless the Report, and Hart's views (rather than Devlin's) were vindicated in 1967 when Homosexual Practices by Consenting Adults in Private, were decriminalised by the Sexual Offences Act of that year⁹⁰.

⁸⁸ Mill J S (1859) "On Liberty", Oxford World Classics, Oxford 2008

⁸⁹ Wolfenden, *Report of the Committee on Homosexual Affairs and Prostitution* (CMD 247 (1957))

⁹⁰ Sexual Offences Act 1967, Chapter 60, The Stationery Office

Returning to Hart's "Law, Liberty and Morality" he described four fundamental questions arising from the relation between Law and Morality: (1) Has the development of the Law been influenced by Morals? (2) Must some reference to Morality enter into an adequate definition of Law? (3) Is Law open to Moral criticism? (4) Is the fact that certain conduct is by common standards Immoral, sufficient to justify making that conduct punishable by Law?⁹¹

Hart answers the first three questions very clearly in his "Concept of Law" i.e. (1) the Development of Law has definitely been influenced by Morals; (2) the inclusion of a Minimum Content of Natural Law is accepted by Hart as part of his definition of Law; and (3) by otherwise maintaining the separation of Law and Morality, Hart ensures that the Law can remain open to moral criticism.

It is Hart's fourth question which is the most germane to my thesis, and is therefore repeated again in full: "Is the fact that certain conduct is by common standards Immoral, sufficient to justify making that conduct punishable by Law"?

In "Law, Liberty and Morality" Hart provides various examples of conduct which have at some time been (and in at least one case still is) penalised by the Law i.e. Suicide, Abortion, Homosexuality, Euthanasia⁹². It is the principle: that certain conduct (acts or omissions), whilst being viewed by many as immoral, should be separate from law, which is at the crux of my thesis.

By way of a modest contribution to the Law and Morality debate, I will posit that whilst attempting the rescue of a person in peril would be seen by most people as a Moral Duty, complications in the jurisprudence of Omissions, and especially the omission

⁹¹ Op Cit Note 86

⁹² Ibid

to rescue (being particularly susceptible to the impact of Moral Luck) point to confirming that Moral obligations should not necessarily translate to Legal obligations and that generally (Easy Rescues aside) there should not be any legally enforceable Duty to Rescue in England and Wales. This viewpoint is expanded in the following Chapters of this work, as is my plea that the Protection of Rescuers should be Legal (rather than Moral) in nature.

3) Moral Luck and Rescuers/Good Samaritans

Up until now I have only provided an outline explanation of the phenomenon of Moral Luck, but it is now essential that I spend a significant part of this work considering the controversial subject. I do this for two main reasons: in the first case I want to fully investigate the impact of Luck on Moral and Legal responsibility, and in the second case I want to review the manner in which Bad Luck (in particular) applies in the case of Rescues. It is unquestionable that a rescue only becomes necessary due to the fact that bad luck of some sort has created an emergency situation from which someone requires to be rescued. By its nature a rescue is not a planned event, and rescue is probably one of the more extreme scenarios where issues of luck affect obligations and responsibilities (i.e. it being unlucky that an emergency arises; unlucky that an agent finds themselves at the scene; unlucky if they find themselves under an obligation/ responsibility for attempting a rescue, and unlucky if the rescue goes wrong).

3.1 The paradox of Moral Luck

The modern analysis of what has come to be called “Moral Luck” effectively began with Bernard Williams’ work of the same name⁹³.

Williams begins this work with a discussion about “Persons, Character and Morality”. He generally establishes a view that for human life to have value, the human being must have a unique character, and should have control over his or her life, if that life is to be considered a life worth living. This idea echoes the philosophy of earlier writers and in particular John Locke and his “Of the State of Nature”⁹⁴, and John Stuart Mill and his “On Liberty”⁹⁵.

⁹³ Williams B, ‘Moral Luck’ in *Philosophical Papers 1973-1980*, (New York, Cambridge University Press 1981)

⁹⁴ Op Cit Note 30

⁹⁵ Op Cit Note 33

However, Williams did not ignore the long history of the theory of Determinism (succinctly defined by Peter Van Inwagen as “every event, including human cognition and behaviour, decision and action, is causally determined by an unbroken chain of prior occurrences”⁹⁶). Williams also kept firmly in mind the Utilitarian principle that the morally preferable outcome is the one which achieves the greatest overall good. This includes the related theory of Consequentialism (which term was coined by Gertrude Anscombe⁹⁷ i.e. that the goodness of an action depends upon the consequences (good or bad) that it produces).

It was the tension between the concept of the importance of personal autonomy and the idea that human beings might just be pawns in a cosmic game of chess that led Williams to articulate the paradox of Moral Luck. He recognised that agents could not fully control the world around them and that the influences of Determinism and Consequentialism will always dictate that matters beyond their control, and especially Luck, will intervene. Hence if it is accepted that an agent should only be held responsible for what he or she can personally control, and the fact that Luck seems to play such an integral part in everything that happens in the world, then paradoxically the agent could be said to have little or no responsibility for anything. If this were true it would be very concerning and would strike at the heart of the fundamental importance of pursuing a life worth living.

The interaction of these two ideas deserves a little further investigation, and it seems appropriate to begin with a consideration of the prospect that our lives might be completely predetermined and beyond our personal control (i.e. dictated by Luck or, as the ancients believed, by the Gods). This presumption has a long pedigree and

⁹⁶ Van Inwagen P, *An Essay on Free Will*, Oxford: Clarendon Press 1983.

⁹⁷ Anscombe G, *Modern Moral Philosophy*, *Philosophy*, 33 (1956), 124

was one of the themes which was explored by Martha Nussbaum in her major work “The Fragility of Goodness: Luck and Ethics in Greek Tragedy and Philosophy”⁹⁸.

Nussbaum demonstrates that the Ancient Greeks, including Aristotle were convinced that the lives of men and women were unavoidably subject to the overriding influence of Fate/the Gods. This approach accepted that the question of whether an agent’s actions were morally praiseworthy was not determined by his/her own direct intentions, but by the fickle decisions of the Gods (a device used to explain what would otherwise appear to be purely matters of luck). For an example of Aristotle’s views on the subject Nussbaum provides the following quote:

*“For many reversals and all sorts of luck come about in the course of a life; and for the person who was most especially going well to encounter great calamities in old age, as in the stories told about Priam in the Trojan War. But when a person has such misfortunes and ends in a wretched condition, nobody says that he is living well”.*⁹⁹

This dominant idea that human lives were in the lap of the Gods (or perhaps a single God) persevered for many centuries. However much more recently, 18th and 19th Century writers began to prefer an explanation of human agency which put much more store in the principle of personal autonomy. They deplored the idea that human beings were not masters of their own destiny.

On the other hand, and as mentioned earlier in this work, John Stuart Mill was particularly adamant that, whereas much in the world might be predetermined (e.g. that a storm will break in the seas around Cape Horn on a given date at a given time), the manner in which human beings might react to such circumstances (i.e. whether or not to attempt to rescue a shipwrecked sailor) will be solely a matter of that person’s character, and particularly their characteristic goodness, courage, and

⁹⁸ Nussbaum M, *The Fragility of Goodness: Luck and Ethics in Greek Tragedy and Philosophy*,(Cambridge, Cambridge University Press(1986)

⁹⁹ Ibid (quoting from Aristotle: Nicomachean Ethics (1100a5-10))

bravery. Furthermore, if a rescue could be attempted without any significant risk of personal injury (an 'Easy' rescue), then the moral character of the individual will determine whether they will actually help, and become a 'Good Samaritan'. This idea that human autonomy should be paramount was emphasised by Mill over and over again, and is reflected in one of his most well known statements: *"The only Freedom which deserves the name, is that of pursuing our own good in our own way ..."*¹⁰⁰.

One of the most regularly quoted philosophers who placed individual goodness at the pinnacle of the human condition, and the one who gave us his famous, and hugely influential concept of the Categorical Imperative: the (universal) 'Good Will' was Immanuel Kant. He proposed the pre-eminence of the Good Will in the following way:

*"A Good Will is good not because of what it performs or effects, not by its aptness for the attainment of some proposed end, but simply by virtue of the volition: that is, it is good in itself, and considered by itself is to be esteemed much higher than all that can be brought about by it in favour of any inclination, nay, even of the sum total of all inclinations"*¹⁰¹

However, Kant went much further, and his specific argument was that whereas much of the human condition may be predetermined, there must be an essential or fundamental core concept that transcends the pre-determined factors, and which is immune to the vagaries of fate, or in terms more pertinent to this thesis: Immune to Luck! Kant continued in the quotation referred to above as follows:

*"Even if it should happen that, by a particularly unfortunate fate or by the niggardly provision of a stepmotherly nature, this [Good] Will should be wholly lacking in power to accomplish its purpose ... [then] ...if there remained only the goodwill ... it would sparkle like a jewel in its own right ... usefulness or fruitlessness can neither diminish nor augment its worth"*¹⁰²

¹⁰⁰ Op Cit Note 33

¹⁰¹ Kant I, (1785) *Fundamental Principals of the Metaphysics of Morals* (London, Longmans 1986)

¹⁰² Ibid

Re-stating Kant's idea, he was firmly emphasising that no matter what hand of cards fate deals to each of us, there is one characteristic which regardless of the 'slings and arrows of outrageous fortune' (borrowing from Shakespeare), and regardless of our physical resources, or physical health, remains entirely in our control, and this is our basic Good Will (or put another way, our Morality).

The competing principles of Determinism, and Personal Autonomy (as briefly summarised above) were fully considered by Bernard Williams and he placed them in careful juxtaposition i.e. on the one hand our lives are, to a considerable degree, subject to fate or luck; whilst on the other hand, if we are to consider ourselves as free-thinking, and free-acting autonomous entities, then we must cling to the idea that we are to a significant extent masters of our own destiny, and that luck should neither dictate nor impact on our moral responsibility for our actions. In other words, if on occasion we accept that we just have to "Trust to Luck", then those occasions should be very very rare (otherwise we completely surrender our individuality and simply become automatons).

It was the tension between these two conflicting ideas of Personal Autonomy and the Intervention of Fate, that Bernard Williams described as the Paradox of Moral Luck i.e. we should only be held responsible for those events over which we have personal control, but we must also recognise that the impact of fate in our lives means that almost everything that we do is in some way subject to luck (and hence beyond our control).

3.2 Bernard Williams' Theory of Moral Luck

Bernard Williams commences his description of Moral Luck by referring to an example based on a hypothetical artist who, in order to fully realise his potential,

decides to abandon his wife and children, and leave for the South Seas¹⁰³. At the point of leaving his family, this decision would be likely to be considered morally reprehensible by most right-minded individuals. However, if as a result of his decision the individual becomes an extremely successful artist, and produces sublime works of art (which produce untold pleasures for civilisation generally), then at that point, his decision to sacrifice everything for his art may be considered, on balance, to have been morally justified. This is a form of Consequentialism and the claim would be that the eventual end justified the original means (relying on the felicific calculus of Bentham's Utilitarianism i.e. that the calculation of the happiness of civilisation generally created by the artist's wonderful works, far outweighs the pain caused to the artist's family when he deserted them).

Loathe as he is to ascribe this set of circumstances to a real life artist, Williams nonetheless provides his artist with the illustrative name 'Gauguin'. What becomes immediately apparent is that the question of whether 'Gauguin' has acted morally, or not, depends upon when his actions are evaluated: either at the outset, or at the conclusion. If judged at the outset (on abandoning his wife and family) 'Gauguin' would generally be considered blameworthy. However, if judged at the conclusion (having given the world great art), he would generally be considered praiseworthy. The difficulty with this situation is that, whether the act under evaluation can be considered morally justified, can only be decided once its consequences are known.

Furthermore, the question of whether the consequences will be positive or negative cannot be predicted at the outset, and will very much depend upon luck. If 'Gauguin' had departed for the South Seas but had been shipwrecked and died on route, then he would never have gone on to produce the wonderful works of art, and

¹⁰³ Op Cit Note 4, Page 22

the felicific calculus would have had a fundamentally negative outcome (the pain that would have been caused to 'Gauguin's' family would have considerably outweighed any happiness resulting from the abortive emigration). In a similar way if 'Gauguin' had reached the South Seas but signally failed to produce noteworthy artworks, then again the calculation would have led to a negative result.

The question of whether the calculation turns out positive or negative is therefore entirely subject to the vagaries of luck: luck in the way things turn out. This is the archetypal situation to which Bernard Williams gives the description: Moral Luck i.e. the situation where the moral characteristics of a human agent's acts or omissions are solely, or predominantly, down to luck.

Just to underline the implications of luck on the moral dilemma created by the story of 'Gauguin', I would like to put forward another luck-based outcome which would change the moral character of the situation in a different way. If 'Gauguin' had thought that he would be dragging his family down by staying, and if on leaving his wife he was confident that she would be looked after by a wealthy suitor, who subsequently married her and adopted their children, - giving them all a life of luxury which they could never have enjoyed with him - then again the consequences of 'Gauguin's' actions would have had a net positive outcome. This outcome is not hypothesised by Williams, but it again underscores the concept of moral luck (i.e. luck in the probability of Mrs 'Gauguin' meeting a wealthy benefactor).

Having thus established the Paradox of Moral Luck, Bernard Williams attempts to deal with the problem that he has created, and suggests a number of ways in which the need to re-assert personal autonomy might be achieved despite the pervasive

intervention of Luck in a person's life and actions. The most interesting solution that he proposed involves the idea of Agentive Regret¹⁰⁴.

Williams recognises that the impact of Moral Luck may mean that Society itself will not hold an agent responsible for matters caused by them (where those matters have largely come about due to bad luck, and hence due to factors beyond the agent's control). However regardless of this, the circumstances might be such that the agent will personally hold themselves responsible, despite the fact that s/he could not have done anything about it, AND where Society completely absolves her/him of responsibility. This idea of self-reproachment was what Williams termed Agentive Regret, and it is this self-criticism which he suggests may be sufficient to re-establish the fundamental characteristic of personal autonomy.

In order to analyse this further, Williams provides the example of a lorry driver who through no fault of his own, runs over a child that has dashed out into the road right in front of the lorry, with the consequence that the child is killed.¹⁰⁵

The lorry driver has clearly caused the death of the child, but society does not hold him responsible, as he had no control over the event (i.e. he would not have had any chance to brake, even if he had been able see the child in time). Society puts the matter down to the bad luck of the lorry driver, in that a boy rushed out in front of the vehicle without looking. However, the lorry driver himself may not be so dismissive, he will still feel that he was instrumental in the boy's death. He is therefore likely to feel guilt or remorse even if there was nothing he could have done to prevent the death. It is this internal feeling of regret which Williams identified as Agentive Regret. It tends to 'square the circle' such that whilst bad luck

¹⁰⁴ Ibid, Page 27

¹⁰⁵ Ibid, Page 28

appears to have absolved the lorry driver of blameworthiness, this is not the end of the matter, and the lorry driver himself still feels blameworthy to some internal extent. Hence luck has not completely 'neutralised' personal feelings of responsibility (autonomy?).

If building on this type of scenario (as described by Williams), a different variant is constructed, then interesting issues arise. In the new example another lorry driver could be placed in a similar situation but this time he is using a mobile phone at the critical time. Again a young boy runs out into the road, and again the driver has absolutely no chance to brake. In this example however the boy is running considerably faster and instead of being killed he is just deflected onto the opposite pavement albeit badly bruised.

Unlike the first situation, the lorry driver will come under considerable criticism from society due to the fact that he was using his mobile phone whilst driving. However, from a causation point of view, the lorry driver will not have been instrumental (unlike in the previous case) in the death of a child. It will again be a fact that in the case of the second lorry driver, he would not have had any time to apply the lorry's brakes (whether he was on his mobile phone or not). The collision with the child is still a matter of bad luck for the lorry driver, but because he was using his mobile phone Society will now quite clearly blame him for some wrongdoing. This public sanction and indeed the legal (criminal) sanction that follows, will make the lorry driver feel much guiltier than the lorry driver in the first example. His feelings of Agentic Regret will be much higher.

The interesting feature between the two examples is that causally speaking there is absolutely no difference between the actual responsibilities of the lorry drivers for the collisions. Both lorry drivers were driving along a road, and in both cases a

boy has run out in front of them without looking, and both had no opportunity to brake. However, luck has played a very different part in the two outcomes. In the first case luck has determined that a child has died. In the second case luck has determined that a child has only been badly bruised.

Neither of the outcomes was within the control of the individual lorry drivers. In the first example the lorry driver was at no fault at all, but a child died. Whilst Society will not apportion blame, the lorry driver, will personally feel considerable Agentic Regret. In the second example, the lorry driver was at some fault (because he was driving whilst using his mobile phone), but fortunately a child has not died. This time Society will penalise the lorry driver, but he is unlikely to experience anywhere near the same degree of Agentic Regret (as the lorry driver who was involved in a death).

It can therefore be seen that whilst the causal responsibility, and the degree of control over the situation, of both drivers is identical (neither would have had any chance to apply the brakes of their vehicle under any circumstances), Luck very materially affects the outcome (both in terms of the degree of injury to the child, but also in terms of the impact upon the lorry driver (in terms of both the way in which Society treats them, and the way in which they will treat themselves)).

Bernard Williams recognised the enormous potential for luck to interfere with the moral outcome of a particular event, and was concerned that this had fundamental repercussions for our basic need to be and feel masters of our own destiny (to possess the necessary personal autonomy to make our lives worth living, and not to simply proceed through life as fate's puppets).

However, Williams did not claim to have a comprehensive solution to the problem which he had identified. Nonetheless he clearly articulated that neither of the previously held views (i.e. that a human agent should only be held responsible for matters which s/he actually has control over; and that if it is recognised that luck plays a significant part in events, then an agent should not be held responsible for the same) can survive unscathed. However, the introduction of the idea of Agentic Regret does alleviate some of the difficulty.

In terms of the theoretical framework of my thesis Agentic Regret is interesting in that even if Society decides not to apply a legal Duty to Rescue (even in the case of an Easy Rescue), then this does not mean that the individual will not sanction him/herself (by feeling regret). Hence the legal and moral consequences remain separate but the agent is not immune to feelings of responsibility.

The next modern writer to contribute materially to the Moral Luck debate was Thomas Nagel in his highly influential work entitled “Mortal Questions”, written in 1979¹⁰⁶. This work is examined in the following sub-section.

3.3 Thomas Nagel’s Theory of Moral Luck

Thomas Nagel also begun his work by considering the philosophy of Immanuel Kant i.e. that the Sovereignty of the human ‘Good Will’ displaced all pretenders as the “Categorical Imperative”¹⁰⁷. This one concept transcends all others and is immune to all other worldly influences, and remains inviolate to such, including luck. Whatever degree of good luck, or bad luck that fate imposes on a human agent, that person can rise above (transcend) such influences and maintain a morally sound position i.e. that of having and exhibiting a good will.

¹⁰⁶ Nagel T, *Mortal Questions*, (New York, Cambridge University Press 1979

¹⁰⁷ Op Cit, Note 101

This idea of Morality's immunity to luck was previously considered to hold great promise for humanity, and suggested that whatever a person's station in life, and whatever misfortunes may befall them, it is possible to rise above it all and maintain an all-conquering good will. Another way of looking at this would be to view the good will as performing the role of a Universal Currency which values everyone on the basis of a totally level playing field: a value criterion that we can all aspire to, whatever disadvantages life chooses to impose upon us.

However, Nagel does not accept this promise, and shares Bernard Williams' view that luck can very substantially influence the moral value of a person's character and actions.

Williams provided the example of the 'Gauguin'-type character, and demonstrated that the moral praiseworthiness or blameworthiness of that character was entirely determined by the consequences (outcome) of his actions. Such consequences being heavily subject to the vagaries of luck.

Nagel provides his own example: *"However jewel-like the goodwill may be, there is a morally significant difference [or outcome] from rescuing someone from a burning building, and dropping him from a 12th storey window while trying to rescue him"*¹⁰⁸

He also suggests that *"someone who was a guard in a Concentration Camp [in WWII] might have led a quiet and harmless life if the Nazis had never come to power in Germany"*¹⁰⁹

¹⁰⁸ Op Cit Note 106

¹⁰⁹ Ibid

Nagel then takes a somewhat more analytical approach than Williams and sets out to describe four types of luck which can affect the moral status of an agent's actions (or omissions):

Luck in the eventual Consequences (in the way things turn out)

Luck in the way one is Constituted (Constitutive Luck)

Luck in individual Circumstances

Luck in Causation (Antecedent situation)

3.3.1 Luck in the Eventual Consequences

Nagel actually described this as the Luck in the way things turn out, and hence it is the specific category of Luck in which he follows the method of Bernard Williams. Nagel provides numerous examples, but one will suffice:

A gunman may decide to shoot and murder a man, and clearly (all other things being equal) he would seem to be someone who should be looked upon as a morally reprehensible person. However, on another occasion the gunman may decide to shoot another man, but in the split second of firing the gun, a bird flies in the path of the bullet thereby deflecting it so that it no longer hits its target but sails harmlessly by. The target is not harmed and the gunman in that case is not a murderer. In the second set of circumstances the gunman may remain undetected and Society no longer has the opportunity to consider the gunman in such a bad light, and hence his moral standing becomes substantially different. On the face of it, Luck in the way things have turned out (due to the appearance of the bird) has undoubtedly influenced his moral standing.

This is the archetypal problem, or moral dilemma between unsuccessful attempts and successful attempts. Many people (and Kant probably amongst them) would suggest that there is morally no difference in the two attempts. However, the large majority of Society would reject this and hold that someone who completes their attempt and succeeds in murdering someone, is more blameworthy than someone who fails to do so.

There is in reality one and only one thing different in the cases of the successful and unsuccessful attempt: in the first case someone dies, in the other they do not. In other words there is a difference in the way things turn out. However, it is undeniable that the reason that things turn out differently is entirely down to luck (e.g. the intervention of a bird). The conclusion must be that luck in the way things turn out does influence the degree to which people's actions, and thereby their moral standings, are judged.

3.3.2 Luck in the way someone is Constituted (Constitutive Luck)

By Constitutive Luck Nagel refers to the manner in which a person's character is made up. I would also add to this, the manner in which a person is constituted by nature (i.e. I include both Nurture and Nature).

In terms of character a person may be brave or timid; they may be optimistic or pessimistic; they may be selfless or selfish; they may be honest or dishonest etc. etc. There may be many reasons why someone has their particular character, and much will depend upon their upbringing, or their education, or their experiences.

However, this review of the impact of luck is not concerned as to how a person has come to possess certain characteristics, but simply with the fact that their particular

character governs the manner in which they will respond to various circumstances. For example, a timid person may be scared to confront anything unusual, whereas a brave person is likely to have no such reservations. Consequently, the timid man may decide to turn a blind eye if they see someone vandalising a building, but the brave man might raise the alarm and warn the vandals off and hence prevent the damage occurring. Society's view of the moral status of the two people will be more positive in relation to the braver person than it will be in relation to the timid person. However, the question of why someone has a timid character or a brave character, will to a large extent be a matter of complete luck e.g. luck as to whether they were raised in a family which was risk averse, or one which recognised risks and confronted them.

A similar point can be made about the physical attributes that nature has provided to a person. One person may be a physically strong person, whereas another may be much weaker. These attributes will dictate how the two people can respond to various circumstances. The strong person would probably have no hesitation in starting to try to move a large number of rocks which have fallen from a collapsed wall adjoining the pavement and which are forcing children into the road. However, the weak person might consider that they do not have the strength to compete such a task and so may not even attempt to do so. The point is again that Society is likely to look at the strong person (who attempts the task) as more morally praiseworthy than the weak person (who does not make such an attempt), even if neither is actually capable of removing the whole of the blockage. The evaluation of the two agents is very different, but the reason for the two different responses is purely a matter of luck: luck in the first person being born strong and the second being born weak.

3.3.3. Luck in Individual Circumstances

Nagel returned to the example of the Concentration Camp Guard to describe this type of luck. He explained that unless someone is in a particular place at a particular time they may never confront a specific set of circumstances which will test their moral character in a specific way. If the hypothetical concentration camp guard, had been born, say, in Australia then he would never have found himself in the German Army, never in that Army in 1943, never stationed in a concentration camp, and never turning a blind eye to the gassing of thousands of men, women, and children.

Society would have no difficulty in judging the concentration camp guard as morally repugnant, but it is completely a matter of luck that the individual was born in Germany in, say, 1910, rather than in Australia in 1980!

If the German guard had never been in Auschwitz, Dachau or Belsen (or any of the other camps) his moral character would never have come under such a terrible test. The fact that he was *there*, and in the peculiar circumstances of that *time*, was completely a matter of luck (bad luck). Once again luck has substantially intervened in defining a person's moral status.

3.3.4. Luck in Causation (i.e. prior Antecedent situation)

Nagel lists this as his fourth category of Luck which can affect a person's moral status, but he does not provide any specific examples in this case. However, he alludes to the chain of circumstances that led up to that particular situation which a person faces when he confronts a specific moral test.

In effect it seems that Nagel was referring to the principle of a chain of causation being responsible for every event which occurs. If any one link in this chain of

causation changes, it is likely that the event anticipated will no longer occur. Whether each sequential link in the chain occurs, and occurs in the right order will, fundamentally, be down to luck. Hence it will again be largely a matter of luck whether someone is in the right place at the right time (or in the wrong place at the wrong time). In any event if an agent finds himself in a specific situation and their moral character comes under test, then the fact that they become a link in that chain of causation will again be predominantly a matter of luck.

3.3.5. Nagel's Conclusions

Thomas Nagel has in my opinion succinctly demonstrated that a wide variety of luck based factors impact upon a person's moral status at any particular time, and he makes it clear that luck plays a much larger part in everyone's lives than appears on the surface. Furthermore, he demonstrates that the moral character of an agent is influenced far more by luck than is generally accepted (and certainly to a much greater degree than was accepted by Immanuel Kant et al).

Unfortunately, this result has somewhat unwelcome repercussions for our fundamental desire that as human beings we should have full personal autonomy (and gives weight to the Determinists who believe that all our lives and actions are pre-determined). Indeed, Nagel recognises this as the inevitable conclusion flowing from his work. He states in his final two pages, the following lines:

"I believe that in a sense the problem has no solution, because something in the idea of agency is incompatible with actions being events, or people being things ... Eventually nothing remains which can be ascribed to the personal self".¹¹⁰

As he further puts it:

"We cannot simply take an external evaluative view of ourselves – of what we most essentially are and what we do. And this remains true even when we have seen that we are not responsible for our existence, or our nature, or the choices we have to make, or the circumstances that give our acts

¹¹⁰ Ibid

*the consequences they have. Those acts remain ours and we remain ourselves, despite the persuasiveness of the reasons that seem to argue us out of existence”.*¹¹¹

He concludes:

*“The problem of Moral Luck cannot be understood without an account of the internal conception of agency and its special connection with the moral attitudes, as opposed to other types of value”.*¹¹²

“I do not have such an account”.¹¹³

In concluding his account of Moral Luck at this point, Nagel leaves its further development and analysis (and possible solution) to subsequent writers. Many such individuals have contributed views on the subject, and the most interesting of these opinions are considered in the following sub-sections.

What can be recognised at this point is a desirability of generally keeping Moral and Legal repercussions separate. If Luck plays such a pervasive role in our lives then it is better to leave most of the consequences in the Moral sphere, rather than the Legal one, and this reinforces the fundamental theoretical framework of my thesis

3.4 Subsequent Views on Moral Luck

Following the pivotal works of Bernard Williams and Thomas Nagel, a considerable number of writers have contributed views on the paradox of Moral Luck, some in support, but most in opposition. The writers that I have considered in this respect are:

Martha Nussbaum.

Judith Andre

Nicholas Rescher

Norvin Richards

¹¹¹ Ibid

¹¹² Ibid

¹¹³ Ibid

Brian Rosebury

Susan Mendus

Judith Jarvis Thomson

Margaret Urban Walker

Donna Dickenson

I have not however reviewed all their works in great detail, but I have paid more attention to the writings of Martha Nussbaum, Susan Mendes, Margaret Urban Walker, and Donna Dickenson given that they are strong proponents of Moral Luck, but also because they concentrate on practical implications, and my thesis is concerned with the practicalities faced by Rescuers.

3.4.1. Martha Nussbaum

It seems logical to begin this review of the various writers on Moral Luck by returning to Martha Nussbaum's work where, writing at the turn of the 21st Century, she traces the debate on Moral Luck to Ancient Greek Philosophy. She addresses this in the opening "Luck and Ethics" section of her major work "The Fragility of Goodness: Luck and Ethics in Greek Tragedy and Philosophy"¹¹⁴.

She begins by contrasting the position of human beings with that of other living organisms. The latter are stated to be unthinking, and therefore entirely subject to the whims of luck. Human beings by contrast possess 'reason', and as sentient, thinking, beings they can save themselves "from living at the mercy of luck"¹¹⁵.

However, in recognising that a totally predictable life would be mundane, Nussbaum refers to ancient Greek philosophy and the underlying principle that for a life to be worth living it must be a good life. Furthermore, for a life to be a good

¹¹⁴ Op Cit Note 98

¹¹⁵ Ibid page 2

life it must be one over which the individual maintains a sufficient degree of control – rather than being a simple automaton (with no real or effective choices).

Having stated this she acknowledges that it is impossible to completely rule out the influence of chance, or luck and poses the question: *"How much Luck ... can we humanly deal with"*¹¹⁶.

She therefore proceeds to make reference (once again) to the more modern thinking of Immanuel Kant, and his view that there was one area of the human condition which was totally immune from the influence of luck i.e. the individual's morality. If this principle was proven to be true, it would solve the question which she had identified from Ancient Greek thought, and would provide the answer that: in the realm of morality, no amount of luck would be too much to live with!

Nussbaum then considers the various ways in which the influential writers, Bernard Williams and Thomas Nagel have suggested that a person's moral condition is unavoidably subject to luck. She refers to the impact of both external contingency (i.e. the combination of worldly events which present challenges to our moral decision making), and internal contingency (i.e. the influence of our internal characters and constitutions which also shape our moral decisions).

In particular, Nussbaum quotes Aristotle's demonstration of a general transition from the optimism of youth, to the pessimism of old age, whereby the debilitating effect of years and years of adverse circumstances (bad luck) will eventually sour an individual's good disposition. It might be said that it is this inexorable descent (in other words, the slow extinguishing of the flame of virtue), which Nussbaum may in essence be describing in her core concept: the "Fragility of Goodness".

¹¹⁶ Ibid page 4

In summarising this comparatively short review of Martha Nussbaum's main theme, there is little doubt that she accepts the fundamental validity of the concept of Moral Luck (anchored as it is in Ancient Greek philosophy). Hence she can be included in that group of writers who recognise that luck inevitably impacts upon human morality. She does not therefore seek to argue away the idea of Moral Luck, but accepts it, by way of acknowledging that it is inevitable that a certain degree of luck intervenes in the pursuit of a virtuous human life.

The alternative of living a life totally immune from luck would be to live a totally predictable life in an unavoidably sterile environment. In fact, it would be akin to living in a permanent sleep, happily insulated from the effects of luck, but passing our days in (what to most) would be an unacceptable realm of shadow. She hence promotes the need to fully recognise the vagaries of Luck, rise above them, and thereby live fulfilling lives as virtuous individuals.

3.4.2. Judith Andre

To provide some balance at this point it is appropriate to consider the views of a number of writers who reject the idea of Moral Luck, and I start with Judith Andre.

Judith Andre analyses the theories of Bernard Williams and Thomas Nagel in her work: "Nagel, Williams, and Moral Luck"¹¹⁷, and concludes that they both accept that luck ultimately interferes with our moral condition: *"Each writer finds destructive inconsistency - possibly incoherence - within our concept of morality"*¹¹⁸.

¹¹⁷ Andre J, Nagel, Williams, and Moral Luck, *Analysis* 43 (1983) pp 202-7

¹¹⁸ Ibid

In particular she looks at the Character of individual actors and refers to a common example through which Moral Luck is often analysed: the attempted gunman (e.g. where two gunmen each fire a shot at an individual, but the first succeeds in killing the victim, whereas the second fails, but only because, by luck, a bird flies in the path of his bullet).

Andre makes it clear that in cases like this the intent of the two gunmen is the same i.e. they both intended to kill a person (and thereby they both committed the same moral wrong). She therefore suggests that instead of evaluating the different outcomes, Society should evaluate the Constitutive morality of the relevant actors, or to use her specific words: "*Society should concentrate on evaluating their moral Character*"¹¹⁹.

The character of an actor will depend on a whole myriad of factors: when were they born, who were they born to, how were they raised, how were they educated etc. etc. However, if at the point of pulling the triggers, the gunmen had exactly the same motive in mind, then Andre suggests that they should both be equally deserving of Society's condemnation. Nagel by contrast would more readily condemn the gunman who was raised with the benefit of all life's advantages, and who should know better; and would to some degree excuse the gunman who had suffered a number of life's disadvantages, lived in a violent environment, and who has never fully appreciated the sanctity of human life.

However, and as referred to in the earlier section, Nagel placed great emphasis on the fact that Luck influences the way in which the Character of different individuals develops. This is quite fatal to Andre's argument and in effect she has only replaced 'Moral Luck' with 'Character Luck'. It remains the case that luck inevitably intervenes in the scenarios that an actor has to face and the moral dilemma

¹¹⁹ Ibid

therefore remains unchanged: the agent continues to be held responsible by reference to factors which are beyond their control.

3.4.3. Nicholas Rescher

Nicholas Rescher also argues that the idea of Moral Luck can be too readily accepted¹²⁰, and begins his article by referring to the philosophy of St Augustine, who attempted to re-interpret the role of luck as simply being a fully integral part of “*God’s all-encompassing plan*”¹²¹. He then quotes from Pascal (1670), who stated “*We find ourselves in this world only through an infinity of accidents*”¹²².

More colourfully, Rescher cites the work of Pascal’s predecessor, Balthasar de Gracian y Morales, who contrasted life with a game of cards: “*In this life fate mixes the cards as she lists, with no consultation of our wishes ... we have no choice but to play the cards she deals to us*”¹²³.

He further establishes the long philosophical pedigree of Luck as an integral part of our lives by referring to the well-known quotation from Shakespeare relating to the “*Slings and Arrows of Outrageous Fortune*”¹²⁴.

Rescher then poses a fundamental question: “*What is Luck?*”, and sets out two concepts: a) that often an outcome occurs by accident (i.e. outside our control), and b) that such an accidental outcome usually has either a positive or negative

¹²⁰ Rescher N, ‘Luck’, *American Philosophical Association*, 64 (1990)

¹²¹ St Augustine (5th Century) *The City of God*, trans by Gerald G and Walsh SJ (New York, Doubleday (Image) Books 1958) Vol 9

¹²² Pascal B (1670) ‘Trois Discours sur la Conditions des Grounds’ (trans Three Speeches on the Principle of the Great). First speech. last accessed 08/01/12 at www.philagora.net/etude-delatext/pascal-text.htm

¹²³ Gracian y Morales, Balthasar (1647), ‘Oráculo Manual y Arte de Prudencia’,(trans “The Art of Wordly Wisdom” by Jacobs J, (London, Macmillan 1892)

¹²⁴ Shakespeare W (1600) *Hamlet*, in *The Oxford Shakespeare*, (Oxford, OUP 1987)

effect (i.e. that it makes a material difference)¹²⁵. Having made these points he continues by demonstrating that this unpredictability in our lives (caused by Luck) has entered our everyday vocabulary, and quotes the examples of “Your Lucky Star”; “A Lucky Rabbit’s Foot” [which, as an aside, reminds one of the old joke that this was not very lucky for the Rabbit!]; “Lady Luck”; “Trust to Luck” etc. etc.

However, in doing this, Rescher is not denying that Luck plays a fundamental role in our lives, but he seeks to demonstrate that its consequences are far less challenging than Williams and Nagel would have us believe, and points to tools such as Insurance to insulate individuals from the impacts of Luck, and the welfare state to look after those who are ‘injured’ as a consequence.

Whilst this is initially encouraging, it tends to suggest that we should not worry about the unpredictability of life, and should be prepared to ignore how individuals respond to bad luck; that our lives are predetermined; and that we can never be in charge of our own destinies.

I find this disturbing and would prefer to reject such a conclusion, and recognise that we are put to various tests on a regular basis and that how we respond to them is a measure of our moral character. The acceptance of Moral Luck, which makes us more conscientious individuals, is to me to be preferred to Rescher’s reduction of our lives to that of being mere automatons (albeit insured), in some great plan.

3.4.4 Norvin Richards

Norvin Richards has also attempted to discount the concept of Moral Luck and took a different stance in his work:” Luck and Desert”¹²⁶, written in 1986. The approach adopted by Richards was to begin by restating the ingredients of Moral Luck which

¹²⁵ Op Cit, No 120

¹²⁶ Richards N, ‘Luck and Desert’, *Mind*, 65 (1986) pp 198-209

he expressed as the contradiction between two fundamental and long held beliefs i.e. that an agent should not be punished for something beyond their personal control, but that an agent should be punished according to the consequences of their actions.

In developing this now familiar theme, he once again drew upon Thomas Nagel's example of the two inattentive drivers (one of whom is lucky and does not come across a young child in his path), and the other who is unlucky and who not only comes across such a child but who also causes the child's death.

Richards recognised the difficulties that these types of example pose, and therefore sought to put forward an alternative explanation, and one based on 'Desert' rather than Luck i.e. that the moral luck paradox can be avoided if, instead of evaluating someone by reference to the outcome that their actions lead to, we take a more equitable approach and evaluate the person by reference to what they *deserve*.

However, this creates an immediate problem for Richards in that that the desert that someone receives will, itself, often be determined by Luck. As referred to earlier, Nagel looked at this under his 'Circumstantial Luck' and used the example of a Nazi officer in a concentration camp during the second world war. If

When such a camp was liberated by Allied soldiers, they would discover the crimes committed by the officer who had been stationed there, and that officer would eventually receive his just deserts for being such a cruel individual. However, it is a matter of Luck that the officer is an individual born in Germany in the 20th century, and if say, he had been born in Australia much later, then even if he still had the same tendency to be cruel, this would never have been put to the same terrible

test. This second individual would never receive the just deserts his cruel character warranted, because of Luck in where and when he was born.

Hence, even when we concentrate on Desert, it is still impossible to isolate the way in which a person is evaluated, from the effects of Luck, and Richards has taken us no further than to replace the idea of 'Moral Luck;' with 'Desert Luck'.

3.4.5 Brian Rosebury

Brian Rosebury's article in October 1995 called "Moral Responsibility and Moral Luck"¹²⁷ suggested that the problem described as Moral Luck was actually one of a lack of knowledge. He felt that limited the knowledge of a situation impeded its proper interpretation and he preferred decisions based on "*fully comprehensive knowledge*"¹²⁸. However, he recognised that it is very rare, if ever, that the actor will have perfect knowledge, since to delay action until absolutely everything is known (and every unexpected possibility is assessed) would subject us to a "*disabling perfectionism*"¹²⁹.

Nonetheless he continues by stating:

*"I maintain that Moral Luck ... is a chimera, and that a recognition of the role of epistemic fallibility, as a variable in moral decision making will help us dispose of it"*¹³⁰.

He then explores a number of examples in order to demonstrate that when Bernard Williams, and Thomas Nagel were defining "Moral Luck", what they were actually describing was really "Epistemic Luck", By the use of this term he meant Luck in terms of the actor not knowing enough information about the matrix of factors which were at play in the event, and thereby leaving him/herself open to the impact of

¹²⁷ Rosebury B, 'Moral Responsibility and Moral Luck, *The Philosophical Review*, 104 (1995) pp 499-524

¹²⁸ Ibid, page 501

¹²⁹ Ibid Page 503

¹³⁰ Ibid, page 505

chance. If the actor had known all the information, then s/he would have been able to avoid the (for example) bad luck waiting around the corner.

Hence in Nagel's Careless Driver example s/he would have foreseen that the child was about to walk out into the road. On this basis it is not the actor's moral status which is determined by luck, but the actor's level of knowledge. Rosebury believes that this approach leaves the actor's moral status immune to luck (which only affects their level of knowledge, not their culpability). In his words: "Morality retains its Sovereignty"¹³¹.

However, there is a contradiction here because it will always be a matter of luck whether an actor is able to amass a complete knowledge of the circumstances they face, before they are required to act. In this sense Rosebury has simply replaced 'Moral Luck' with 'Epistemic Luck'

He seems to acknowledge this issue himself when he makes the following statement near the end of his article: "*Clearly judgements in law are not, or not wholly, regulated according to a luck-free conception of moral responsibility ...*"¹³²

3.4.6 Judith Jarvis Thomson

Judith Jarvis Thomson approached Moral Luck as one of the "cluster of problems about morality that are generated by Determinism"¹³³. She proceeded by reciting the Determinist principle that: "*Whatever we do, we have to do, and cannot refrain from doing*"¹³⁴.

¹³¹ Ibid, page 520

¹³² Ibid, page 522

¹³³ Thomson JJ, 'Morality and Bad Luck, *Metaphilosophy* 20 (1990) pp 203

¹³⁴ Ibid

She then re-stated the moral principle that whatever we do is only to our discredit if we could have refrained from doing it. She therefore reached the conclusion (by conjoining the two principles) that we are forced to accept: *“that nothing a person does is to his or her discredit”*¹³⁵.

However, Thomson immediately sought to avoid the implication of Moral Luck by introducing her own approach to discounting the paradox, by concentrating on the idea of “Blame”, and in order to develop this theme she once again used an inadvertent driver example and contrasted the actions of three drivers backing out of their drive. The first (“Alfred”) backs out with full attention but runs over (and kills) a very young child, from the neighbouring property who has fallen asleep under some leaves at the bottom of the drive. The second (“Bert”) backs out of the drive but is not concentrating (because he is distracted by adjusting his car radio) and also runs over and kills a sleeping child. The third driver (“Carol”) does exactly the same as the second driver Bert, and reverses out without paying attention BUT fortunately for her the child had woken up just five minutes earlier, and toddled back home.

Thomson then seeks to allocate Blame to the three drivers, finding that Alfred should incur no blame (albeit a child died), Bert should incur blame (a child died and he was careless), but also Carol should incur blame (given whilst no-one died, she was equally as careless as Bert).

However, this analysis does not accord with how individuals are blamed in practice: Alfred will be blamed to some extent (and especially by himself), Bert will definitely be blamed, but of most interest, Carol will not be blamed - given no adverse incident ever took place.

¹³⁵ Ibid, Page 204

It seems very much, that in using this example Thomson has failed to appreciate that Luck has dictated how Blame is apportioned, and hence her argument again takes us little if any way forward. Put differently, even if Thomson introduces a new concept of 'Blame Luck' into the debate, the crux remains that Luck has again intervened in individual lives, and it is Luck that has made the difference in the extent to which each individual suffers blame. She has simply substituted 'Blame Luck' for 'Moral Luck'

3.4.7 Susan Mendus

Having looked at some of the arguments put forward against Moral luck, I now return to writers who not only recognise, but champion the idea (and as a result I do this in much more detail).

Susan Mendus' article "The Serpent and the Dove"¹³⁶, has an unusual title, based on Immanuel Kant's words when he commented on the need to reconcile Politics and Morality: "*If politics was to say "be thee wise as Serpents", morality might add, by way of qualification, "and harmless as Doves"*"¹³⁷

Mendus initially identifies with Kant and points to his philosophy that if there is a conflict between politics (the serpent) and morality (the dove), then the former must yield to the latter. This is because, whereas politics can be subject to luck, morality should not be so. Put another way, she comments that politics is only concerned with consequences (which can be subject to luck), whereas morality is only concerned with the Good Will, and is therefore "immune to luck"¹³⁸

¹³⁶ Mendus S, 'The Serpent and the Dove', *Philosophy*, 63, (1988) p 331 331

¹³⁷ Kant I (1724-1804) 'Perpetual Peace'" reprinted in H Reiss 'Kant's Political Writings, (Cambridge, Cambridge University Press 1970)

¹³⁸ Op Cit Note 101

In contrasting the supremacy of the dove in relation to the serpent, Mendus recognises that there are a number of very strong views against the idea that morality is immune to luck, and analyses some of the arguments put forward under the description of Moral Luck.

She concentrates on consequential, or external luck (acknowledging that aspects of Constitutional, or internal luck were to a large extent ignored by Kant). In particular, Mendus re-traces Bernard Williams' example of the 'Gauguin'-like figure and seeks to demonstrate that factors other than moral value are of importance in these outcome based scenarios, and she quotes political or artistic values. In the 'Gauguin' example she accepts that the Artistic Value of the artist's eventual works created in the South Pacific, provided great benefit to humanity and justified his decision to desert his wife and family in Paris (a decision which other than for the success of his art would clearly have been considered immoral). Mendus has no hesitation in labelling the 'Gauguin' figure as a "Serpent", and the deserted wife (and children) a "Dove". However, she quickly reaches the conclusion that examples of this kind demonstrate that Kant's approach was too simplistic and that sometimes Morality must take second place.

Hence Mendus' conclusion is that we have no choice but to accept that it is not a case that the Dove should always have precedence over the Serpent, with morality always being supreme. Having suggested this however, she nevertheless stresses that, in her view, some of the competing values that are important to us are all sometimes susceptible to luck, and sometimes they are not. She encapsulates this in the idea that certain things we do can in one sense be disagreeable, but they will nonetheless be right. More specifically she states that: *"There is some sense in the thought [that something can be] morally disagreeable, but morally*

*justifiable*¹³⁹. She therefore seems to be saying that it may be disagreeable to accept that luck sometimes plays a part in assessing moral value, but this can sometimes otherwise be acceptable if the outcome produced is morally right. Indeed, she reinforces the point by adding: *"In just the same way as we have reason to be grateful that 'Gauguin' chose art rather than morality, so we have (or may have) reason to be grateful that people [sometimes] choose politics rather than morality"*¹⁴⁰.

Susan Mendus therefore seems to accept the idea of Moral Luck to a significant degree, and makes the further important suggestion that *"we must make a distinction between what would be appropriate in an ideal world, and what is required in this world"*¹⁴¹. The inevitable consequence being that we have to accept that sometimes luck intervenes in our lives, and moral experiences. If we do not accept this then the only way to totally avoid the impact of luck would be to live in a clinically sterile environment, where luck is prevented from entering our lives at all. This would not however be a quality life, and going back towards the start of her article (and echoing a number of other writers), Mendus warns that this is not a desirable position and cautions that: *"the price of [complete] moral goodness [would be] eternal impotence"*¹⁴²

3.4.8 Margaret Urban Walker

Margaret Urban Walker is one of the more compelling group of philosophers who accepts, and in fact welcomes the concept of Moral Luck. She states this very early in her article "Moral Luck and the Virtues of Impure Agency"¹⁴³, where she suggests there are three positions in relation to Moral Luck: "Moral Luck is real, but

¹³⁹ Ibid, Page 340

¹⁴⁰ Ibid

¹⁴¹ Ibid, Page 341

¹⁴² Ibid, Page 332

¹⁴³ Walker M U, 'Moral Luck and the Virtue of Impure Agency', *Metaphilosophy* 22 (1991) pp 14-27

constitutes a paradox” ... “Moral Luck is illusory” ... “Moral Luck is real and not paradoxical”¹⁴⁴. She also states: “*In what follows I argue for the reality and deep importance of (resultant and circumstantial) moral luck in human life*”¹⁴⁵. It is particularly noteworthy that Walker restricts her comment to Resultant and Circumstantial luck i.e. Luck in the way things turn out, and Luck in the situations in which we find ourselves.

Walker then sets out the general anatomy of Moral Luck and like many other writers she credits Bernard Williams and Thomas Nagel with having introduced it (“baptised it” in her words) into contemporary literature. She confirms that the two quoted writers were fully of the opinion that Moral Luck is real, but that they also saw it as paradoxical, without persuasive solutions. In contrast to this she cites other writers who have sought to avoid the whole idea of it being a paradox by establishing possible lines of argument which can be used to deny its existence, or which might lead us to re-evaluate the basic premises which cause it to emerge. She includes Norvin Richards in the first category (Richards relying on an argument based on “Desert”) and she includes Nussbaum in the second category (given the latter’s wish to demonstrate that problems with Luck can be traced back to ancient Greece, and hence may only be a faulty modern construct of basic assumptions).

In order to dispel these approaches Walker takes the standpoint that we should openly embrace the fact that we can never be in perfect control of what happens in our lives. She states: “*The truth of moral luck that the rational, responsive moral agent is expected to grasp is that Responsibility outruns Control*”¹⁴⁶. It is this commitment to personal integrity (to deal with whatever life throws at us), which is

¹⁴⁴ Ibid, Page 15

¹⁴⁵ Ibid

¹⁴⁶ Ibid, Page 20

behind the 'subtitle' of her work: "The Virtues of Impure Agency"¹⁴⁷. Walker actually defines Integrity in terms of "*expecting ourselves and others to muster certain resources of character to meet the synergy of choice and fortune*"¹⁴⁸. She also defines Virtue in this context as "*acceptable or even meritorious behaviour which contributes to our living well in concert with others, a distinctly human life*"¹⁴⁹

Walker then moves on to describe possible human reactions to ill luck, and makes the point that to be a virtuous human being we often have to accept situations of bad luck as simply that, and respond in such cases with a dignified grace. She suggests that it is being able to do this, even if circumstances are beyond our control, and life is unfair to us, which separates us as human beings from the rest of the animate world. Further she states that if moral luck did not exist it would remove an important means by which human beings can demonstrate their virtue (and the quality of our lives would be considerably poorer as a result).

Walker proceeds next to make the very insightful comment that "*The view against which moral luck offends is that of pure agency*"¹⁵⁰. She indicates that this is why Kantian's have particular problems with moral luck, and why if we were to consider the reality that agency can never be entirely pure in practice (and will always be impure to a varying degree), then moral luck will cease to be such a problem. She also explains that this is what human beings actually do, they accept that luck (and especially bad luck) exists; they take the rough with the smooth; they apply probabilities to their lives and actions, and trust that they get things right more often than they get things wrong.

¹⁴⁷ Ibid, Page 14

¹⁴⁸ Ibid, Page 20

¹⁴⁹ Ibid

¹⁵⁰ Ibid, Page 23

This view echoes the response of a number of other major writers who have touched on moral luck in their works on Responsibility, including Tony Honore, and Michael Zimmerman.

Tony Honore has stated: *“Human action invites assessment, and the credit we receive for what turns out well, balances out the discredit we incur from what turns out badly” ... “If [human beings] possess normal capacities they succeed and take the credit for their successes, more often than they fail and incur discredit from their failures. They bet as it were on the outcome of their actions, and they win more than they lose”¹⁵¹.*

Michael Zimmerman did not explicitly accept that Moral Luck exists but he did put forward a similar idea in relation to the need to balance the successes and failures we confront. He did this via his concept that we all have a “Ledger of Life” in which both our positive experiences, and our negative experiences are entered, and that over time there is a balancing operation, which we would all hope results in a situation where (as intrinsically good people) we amass more positive than negative experiences over the longer term¹⁵².

All three of these examples of an inherent balancing of our experiences, and a hope that the good should prevail, tend to chime with how human beings, in general, approach their lives, and the way in which the impact of luck is simply considered as one of the factors which we all just have to ‘live with’. Indeed, we have incorporated numerous references to this state of affairs in our everyday vocabularies, and phrases connected with Luck (such as the following) are commonplace: “Trust to Luck”, “As Luck would have it”, “Don’t Push your Luck”,

¹⁵¹ Honore T, *Responsibility and Fault* (Oxford, Hart Publishing 1999)

¹⁵² Zimmerman MJ *An Essay on Moral Responsibility* (New Jersey, Roman & Littlefield 1988)

“Third time Lucky” etc. etc. This incorporation of the principle that we are all susceptible to the vagaries of Luck, into our everyday language, resonates with the linguistic approach of Herbert Hart, who, when confronted with difficult legal problems (his so-called Hard Cases), reverted to solutions which suggested themselves by reference to the way in which everyday people use everyday language to describe everyday events in their lives¹⁵³.

Returning to the work of Margaret Urban Walker, she starts to conclude her article by contrasting the quality of life in being a ‘pure agent’ and of being an agent who lives their life under the influence of Luck (an ‘impure agent’). She indicates that the pure agent is not prone to luck, and therefore he/she will only be responsible for what is within his/her control. Walker therefore suggests that the pure agent will tend to be self-orientated, and impervious to the calamities which confront other people. He/she will only believe in the survival of the fittest (and lead a life which in my words, borrowing from Hobbes, is Nasty and Brutish, and possibly Short).

On the other hand, Walker suggests that an agent who accepts that we can only be impure agents, and susceptible to luck, will tend to be generous and compassionate. S/he will recognise that some people will suffer unfairly from bad luck, and s/he will seek to help those who are unlucky (either directly, perhaps by giving to charity, or indirectly, by perhaps paying insurance premiums to help create a fund from which others can seek to be assisted).

Walker specifically states:

“In particular, pure agents may not be depended on, much less morally required, to assume a share of the ongoing and massive human work of caring, healing, restoring, and cleaning-up, on which each separate life, and the collective one depend. That the very young and old, the weak, the sick, and the otherwise helpless – that is, all of us at some times – depend on the sense of moral responsibility of others unlucky enough to be stuck with the circumstance of their need, will not be the pure agent’s problem. It is alarming to anticipate life in a world

¹⁵³ Op Cit Note 19

*where people routinely and with justification walk away from the harmful, cruel, and even disastrous results, that their actions [or omissions] were critical, even if not sufficient, in bringing about ...All these prospects are real ones in a world from which moral luck has been banished, and agency is purified*¹⁵⁴

In contrast she then makes the far more reassuring statement:

*“Impure Agents are saddled with weighty responsibilities, and the open-ended possibility of acquiring more due to circumstances beyond their control ... These are agents on whom we can depend, or at least to whom the presumption of dependability applies ... To the extent that these agents are people of integrity, they will not fail us, even under the blows of bad fortune, or odd turns of fate that might otherwise prompt denial or opportunism”*¹⁵⁵.

I find Walker’s approach to be most compelling and uplifting, and have chosen her article as the penultimate work of reference within my review of Moral Luck. The article resonates very strongly with my aim of investigating the inter-relationship between Moral Luck and the Good Samaritan (which without coincidence, is the title of my thesis). Her descriptions tally entirely, and the category of persons subject to impure agency undeniably include the Good Samaritans, who go out of their way (and usually at significant personal disadvantage) to go to the rescue, or aid of others in distress. The pure agents are definitely like the Levites, and the Priest who in the parable of the Good Samaritan, simply crossed to the other side of the road.

The final work that I want to consider in my analysis of Moral Luck is that of Donna Dickenson, who fully accepts that Moral Luck exists, and like Walker she seeks to demonstrate how this can be used in a positive manner, although in her case she concentrates on the difficult moral problems which arise in the medical world. However, before turning to the latter’s work I will close this sub-section on Margaret Urban Walker by quoting the closing words in her article: *“Anyone may fail morally in the particular dimension of facing bad moral luck. There are also cases so trying*

¹⁵⁴ Op Cit 143, Page 26

¹⁵⁵ Ibid, Page 27

as to be beyond human endurance, circumstances so shattering that maintaining integrity would be supererogation. They are the stuff of tragedy. But the association of moral luck with tragedy should not obscure the fact that the tragic case is a rare one, whereas more pedestrian instances of moral luck are ubiquitous, and its common challenges are everyday matters. In a world where we need so much from each other, so often, acceptance of our impurity [and the reality of Moral Luck] is not the worst we can do¹⁵⁶.

3.4.9. Donna Dickenson

If, to me, Margaret Urban Walker was the most compelling author to write in favour of the Moral Luck phenomenon in the late 20th Century, then Donna Dickenson is the author who, I think, in the current century, has shown most comprehensively the value of accepting it head on, and who has demonstrated how such an acceptance can assist in resolving difficult moral problems (in her case, particularly in the medical arena). She provided these insights in her work: “Risk and Luck in Medical Ethics”¹⁵⁷, and (in comparison to the other writers) I have reviewed her work in by far the most detail

This book is also of particular interest in connection with my thesis, given that Donna Dickenson writes in the Medical sphere, and my specific interest is in the inter-relationship between Moral Luck and First Aid Volunteering, which is another category within this sphere.

Dickenson begins her work by carrying out her own review of the Moral Luck paradox and asks a very important question as to whether the impact of luck is simply limited to the realm of morality, or does it extend much further into the wider

¹⁵⁶ Ibid, Page 27

¹⁵⁷ Dickenson D, *Risk and Luck in Medical Ethics*, (Cambridge, Polity Press, Blackwell Publishing Ltd, 2003)

realm of “Ethics” (of which morality is only one element). If we can confine the effects of luck just to questions of morality then this would enable us to retreat into the ‘protection’ of the world of Ethics and we could comfort ourselves with the thought that if we cannot rely on our moral decisions as being impervious to luck, we can rely on the fact that if we always seek to be good (or in other words, seek to be virtuous/ ethical), then even if luck does interfere in our lives and actions, then we can insulate ourselves from criticism or censure.

Dickenson immediately takes us back to Kant and his championing of the ‘Good Will’, and poses a devastating question: **“What if having a Good Will is itself partially determined by Luck”**¹⁵⁸. She then provides an example from psychiatric ethics, whereby we have to face the fact that the formative years of some people are so disturbed that they emerge (through no fault of their own – and from the bad luck of being born to abusive parents) with a perverted concept of what it is to be good in the first place.

She quickly proceeds to review Margaret Nussbaum’s work on Virtue Ethics, “The Fragility of Goodness”¹⁵⁹, and reinforces Nussbaum’s view that Goodness itself is fragile, in terms of its vulnerability to Luck. However, whereas Nussbaum maintains that the resort to Goodness and Virtue can on most occasions circumvent the paradox of Moral Luck, Dickenson is less accommodating and openly acknowledges that luck pervades the totality of Ethics. She therefore proceeds in later chapters of her book to investigate how the Medical Profession has risen to this challenge and employed Risk Allocation, and greater reliance on Patient Consent to solve the various problems which confront the medical community due to the vagaries of luck (and Moral Luck in particular).

¹⁵⁸ Ibid, Page 6

¹⁵⁹ Op Cit, Note. 98

Dickenson then considers the various ways in which luck intervenes in human activity, and accepts Thomas Nagel's analysis that luck impacts on our actions (and omissions) in four distinct ways: Consequential Luck; Circumstantial Luck; Causative Luck; and Constitutive Luck. In terms of her interest in the effect of luck in the medical arena she focuses her attention on the two aspects of Consequential Luck (i.e. in the way things turn out), and Constitutive Luck. She clarifies her choice by confirming that she is interested in Luck in the way things turn out as having particular relevance in the area of surgery, where there is always a risk that things will not turn out as expected, and Constitutive Luck as having particular relevance to issues such as why certain patients suffer cancer, kidney failure, liver failure etc.

Dickenson accepts the Moral Luck paradox as actually being helpful to the medical community, because it focuses on the need to recognise risk/luck in the practice of medicine and the development of strategies to deal with the repercussions. In terms of outcome luck, she suggests that it is possible to minimise the adverse impact of luck upon an individual actor, by minimising the matters that s/he is held responsible for, by recognising that there are a relatively limited set of circumstances in which (and over which) the actor has control.

This leads her to concentrate further on Virtue Ethics, and the idea that we should accept that Moral Luck does exist, but then we should focus on how we respond to the challenges that this inevitably creates, and to ensure that in formulating such responses, we strive to ensure that we act in a virtuous and good manner in dealing with the situations that bad luck places us in. She begins this part of her work with the statement:

“Any particular community may choose to honour certain ways of behaving, and to blame others [allowing that luck will play a part in both]: indeed it will need to do so in order to avoid anarchy. But we should not pretend that these purely relative,

*society-specific sets of values are anything like Kant's moral Universals. The possibility of moral absolutes that transcend cultures or societies is thus obliterated by this [virtue centred] interpretation of the moral luck paradox*¹⁶⁰.

She also makes the point that it is up to each community or society to decide what it is prepared to consider praiseworthy or blameworthy in its small part of the World i.e. in its 'system'. Other communities or societies may hold alternative views, and the differences of approach between societies will to a large extent depend upon the degree to which they are prepared to factor luck into their 'system'.

Dickenson then outlines some of the attributes which, whilst they are not universals, are ways of living our lives in a manner that our society deems praiseworthy. She gives the examples of 'Grace' and 'Integrity' and indicates that even when we are not fully in control of an outcome, we can still decide to accept responsibility for that outcome i.e. even if luck turns our best laid plans into harmful outcomes, we can still say to ourselves "That's Life" and as a person of good grace I will accept the responsibility for what results.

Dickenson echoes Nussbaum in this respect, and comments that it is the *"Fragility of Goodness [the fact that goodness is susceptible to luck] which lends an admirable and touching quality to human endeavour"*¹⁶¹.

However even applying qualities such as Grace or Integrity does not wholly rescue us from moral luck, since luck acts in many ways and Constitutive Luck (i.e. luck in the type of people that we are) will determine if and to what extent we are capable of being virtuous people. Put another way, it will depend to a significant degree on where we are born and how we grow up and how we are nurtured as to whether we will approach our lives in a graceful manner, and with integrity.

¹⁶⁰ Op Cit, Note 157, Page 24

¹⁶¹ Ibid

Nonetheless, this is not the end of the matter, and Dickenson saves us from losing ourselves in yet another moral luck maze by introducing the idea of human reason into the debate. What she demonstrates is that if we accept that luck plays a major role in everyday life, then in order to try to live our lives in a good and virtuous manner, then we can exercise our human reason to bring varying levels of control to the challenges that we face. For example, we can seek to remove bad luck from many of the physical things we do by applying our minds to a risk analysis before we proceed, we can also apply probability analysis before deciding the best place to site the most effective flood defences; we can also put society-wide insurance arrangements in place to protect the unlucky amongst us: National insurance and a National Health Service are the obvious examples in the United Kingdom.

In raising the question of control, and the application of reason to try to maximise the level of control which is within our influence, Dickenson is in effect taking us further into the question of 'Luck in the way things turn out' i.e. Consequentialism. She recognises this and the third main section of her work considers the most popular form of consequentialist theory: Utilitarianism.

Dickenson proceeds to analyse Utilitarianism based on Bentham's original Felicific Calculus, and the idea of trying to assign values to all the various positive and negative elements that will apply to a given act or omission. However, this challenge is one of the common criticisms of Utilitarianism i.e. that it is not possible to assign specific values to each element, and that there is a major difficulty in trying to settle on a common currency. In response, she specifically emphasises the value of probability theory as a key means of weighing up the various pro's and con's of each of the actions we might propose to take

This is not surprising given that Dickenson's work is specifically directed to the medical arena, where the use of probability theory has been, and continues to be at the very heart (no pun intended) of medical decision making, and the need in such cases - probably more so than in any other sector - to achieve Maximum Benefit from particular courses of action. She also explains that in the medical sphere there needs to be a vital extension to the basic Utilitarianism mantra, and hence she adds the caveat: 'consistent with minimum harm'. This is understandable because in the medical field it is human lives that are at stake.

Hence by using 'Maximum Benefit, consistent with Minimal Harm' she proceeds to demonstrate how, in medicine (and therefore how, in possibly other walks of life) it is possible to utilise probability theory, and 'Control' to deal with the impact of luck on moral/ethical decision making. Two particular examples will suffice at this stage to demonstrate the practicality of this approach, and these can be taken from the five scenarios put forward by Dickenson: it being most helpful to pick out: 'performing surgery when outcomes are uncertain'; and 'allocating scarce resources in the challenging case of organ transplantation'.

Taking surgery first, it is well-known that with all types of operation there is the risk of complication, or put another way, the risk of bad luck. This might be in terms of failure to recover from being anaesthetised; unexpected damage from a scalpel having to be applied very close to a vital organ; or from the possible implications of post-surgery infection etc. etc. From the surgeon's point of view there may be a difficult moral decision to take when the probability of there being a negative outcome from a certain operation reaches pivotal proportions. Put simply, if in relation to a particular operation the probability of a patient surviving the surgery is only 1 in 3, then the surgeon may prefer not to operate, because he/she will

personally have insufficient control of the situation (due to the unknown impact of luck).

The surgeon appears at first to be in a no-win situation. If she does not operate and the patient dies within, say, two years, she may well be criticised for her omission. On the other hand, if she does operate, but the patient dies on the operating table, she will be likely to be held responsible (not least by herself), and again open to criticism. The outcome resulting from either her action or omission will be outside her control whatever the moral basis on which she reached her decision - this is the paradox of Moral Luck arising in one of its starkest forms.

However, Dickinson demonstrates a way out of the paradox, by introducing the idea of 'patient consent'. If a surgeon is faced with a case where there is the likelihood that one in three patients would not survive this particular operation, but in response the surgeon is able to alert the patient to that probability of risk, and the patient who (with the full facts) gives informed consent, then the risk in the operation is thereby transferred to the patient. The surgeon can then proceed without moral responsibility for the outcome, and if due to bad luck the patient dies, then the doctor is most unlikely to be subject to public criticism (interestingly Dickinson makes the additional point, that the surgeon will no doubt feel regret at the outcome, but she will be unlikely to feel remorse, as she had not assumed responsibility for the risk in the operation - this had been assumed by the patient). By exercising this degree of control over the situation, and transferring the risk to the patient, the surgeon 'escapes' the dilemma that Moral Luck created for her.

Turning to Dickinson's second example, she outlines various problems in relation to organ transplantation where luck plays its role in various ways: the patient who had bad constitutive luck in being a person who suffers from a defective liver; the

donor who has bad luck in the chain of causation that led to him dying in a fatal accident; the doctors who confront bad luck in circumstances (having more patients on their transplant lists, then there are donors); and who also have bad luck in outcomes as to whether when the donor liver is transplanted, the recipient patient rejects the organ (or rather, their body does).

Although Dickinson specifies a number of difficulties in this area, the particular problem I wish to consider at this point, is the luck in circumstances as to who receives a transplant. A doctor may be in a moral dilemma, in that he might have, say, two patients who need a liver transplant, but he can only give a donor liver to one of them. At a basic level if patient A receives the liver, then patient B might die and although he has no real control over which patient should live and which should die, the doctor will nonetheless have some responsibility for the patient who actually dies (despite the fact that it is luck which determines that just one patient lives)

However, the doctor could possibly escape this dilemma by assessing the relative merits of each patient who might receive the liver compared to the other. For example, patient A might be a 65-year-old man, who has lived a life of excess as an alcoholic, and who has contributed little of value to society. By contrast, patient B might be a younger man in his 40s, who has lived his life in moderation, and who is, say, a brilliant teacher, who has brought a high quality education to thousands of pupils in his career to date, and who could teach thousands more if his tragic liver disease could be overcome by the transplant.

If in this case the doctor decides to give the transplant to patient B, and regretfully patient A dies, it is unlikely that the doctor will be blamed for how he approached such a scenario. The doctor has therefore dealt with the Moral Luck dilemma that

faced him and did this by exercising a certain degree of control over the situation. He applied reason to the dilemma, carried out a utilitarian comparison, and chose to provide the transplant to the patient: who had longer to live; who had not contributed to his own illness; and who had (and would continue to have) made a more meaningful contribution to society.

Having provided the above example myself, it should be noted that Dickinson in her work demonstrates that not all Countries would apply the same approach to these types of question. She indicates that in the UK, doctors will often evaluate which patient should receive a donor organ, ahead of another. By contrast she indicates that in Italy, no such evaluation-based approach is operated, and there is a simple reliance on the 'first come - first served' system. Each of these examples acknowledges that Luck is intervening in the scenario, and the Italian approach simply accepts the position and makes no attempt to mitigate the effects of luck and applies the first come first served approach regardless of the 'merit' of competing cases. By contrast, In the UK there is often an evaluation of comparative merits (however if cases are similar in merit, then the eventual outcome will once again be resolved on a first-come first-served basis).

These are not the only methods that can be employed to decide how donated organs might be allocated when there is a shortage, and - in passing- it is instructive to briefly consider the views of Neil Duxbury, who writing before Donna Dickenson in 1999¹⁶², confirmed that he fully accepts that luck pervades our lives, and proposed that we build the impact of luck into our decision making – in his case by reference to Lotteries. i.e. by 'tossing a coin' to decide the allocation of scarce resources. Duxbury actually proposed a more sophisticated system of lottery allocation, and rather than rely on a simple lottery, indicated that weighted

¹⁶² Duxbury, N, *Random Justice* (Oxford, Oxford University Press 1999)

lotteries can be of more utility. Put simply his idea is that if there are ten individuals each waiting for a transplant, and only one organ is available, then each individual can be given a weighted number of 'chances' in the lottery (e.g. the 65 year old persistent alcoholic, that I referred to above might only get one chance, whereas the brilliant 40 year old teacher might get seven chances – other individuals would also receive 'chances' based on the merit of their case). All the chances are then put in the pot and a random one selected, which could quite genuinely turn out to be the one related to the Alcoholic! In this scenario the Doctors are spared the angst of the Moral/Ethical dilemma, and disappointed patients may take some comfort from the fact they all had a fair chance, and Luck alone determined the outcome. This is a very strong example of Moral luck being both a real, and very helpful concept.

I have only concentrated on two of Donna Dickinson's examples of how Moral Luck comes into play in the medical profession, and how by overtly recognising this, practical solutions can be found e.g. via using consent, or by applying reason to the problem. However it should be noted that Dickenson actually provides numerous other examples of the difficult circumstances (most of which involve aspects of luck) which medical professionals have to deal with: a) the “withdrawal of life sustaining treatment/ assisted suicide” - where a brain-dead patient cannot provide consent to what a doctor might propose¹⁶³, (b) the “allocation of healthcare resources [e.g. scarce medicines]” - i.e. the so-called postcode lottery where a patient's access to new and expensive drugs varies depending upon where a person lives¹⁶⁴, (c) “Surrogacy” situations where either of the parties involved in such a ‘transaction’ might subsequently change their minds if, say, the child is born severely disabled¹⁶⁵, (d) “human cloning” and issues such as parents

¹⁶³ Op Cit Note 157, Page 87,

¹⁶⁴ Ibid, Page 104

¹⁶⁵ Ibid, Page 124

conceiving a child in order to provide a possible donor, for an existing sibling who, might have progressive kidney disease¹⁶⁶, (e) “Psychiatric patients and the possible release of someone back into society” who might then re-offend/kill again¹⁶⁷.

Dickenson’s approach which recognises that Luck is unavoidable in these complicated scenarios is very refreshing, and she actually uses the fact that luck prevents medical professionals from exercising full control, to develop solutions which can provide workable solutions to very difficult dilemmas. Her work is perhaps the most convincing example of aspects of Moral Luck being used in practice to assist decision makers to find optimal answers to some of the most testing challenges that anyone might have to face.

3.5 Conclusions on Moral Luck and the Impact on the Law and Morality Debate

Having reviewed the opinions of a number of the most respected writers on the subject, I am personally convinced that Moral Luck is a real phenomenon. The initial proponents: Bernard Williams, and Thomas Nagel made a very strong case, and whilst many subsequent writers have sought to deny its existence, I feel the strength of opinion is that Luck cannot be ignored when the moral content of decision-making is considered.

The work of Margaret Urban Walker is very persuasive in this respect. However, the most compelling writer from my point of view is Donna Dickinson, who not only concludes that Moral Luck is a very real phenomenon, but demonstrates how its very existence is actually helpful in enabling practitioners in her profession (e.g. doctors) to deal with complicated problems which would otherwise prove almost

¹⁶⁶ Ibid, Page 137

¹⁶⁷ Ibid, Page 144

beyond resolution, without exposing such doctors to unacceptable moral dilemmas.

It is therefore pertinent to ask the question as to how the outcomes of my investigations into Moral Luck interrelate with my overall intuition that the English Legal system prefers to maintain a separation between Law and Morality (and is thereby reluctant to incorporate a Good Samaritan Act into our Law).

If, as I have demonstrated, it must be accepted that Luck plays a much more substantial role in our lives, than most people would initially accept, then it would seem appropriate to try to ensure that we do not allow the impact of Luck to interfere to too great an extent in our Legal system i.e. we should seek to exclude Luck, as far as practicable, from questions of Legal, and particularly Criminal Liability. It is surely bad enough that the effect of Luck means that in many cases we do not have control over what happens to us and the consequences of what we do, but it would add a whole additional layer of unreasonableness if, in addition, criminal penalties were also applied to us.

Hence in scenarios where substantial degrees of Luck are involved we should be wary of criminalising such situations. On the other hand if (as the paradox of Moral luck has demonstrated) Luck does intervene to a significant extent in the Moral sphere, then it would be much more reasonable to recognise this and 'contain' any sanctions in such a case to solely moral ones. It might still be felt unreasonable to hold an individual to account at all when Luck has intervened in their life, but it is infinitely better if any such accountability is simply Moral in nature (i.e. drawing the criticism of Society) rather than Legal (i.e. imprisonment).

Having said this there is a stronger argument for including a Duty to attempt an Easy Rescue within the Law, and to me there is no doubt that if (despite the vagaries of Luck), someone goes to the aid of a fellow citizen in distress, then the Law should generally protect them from Suit.

I look at all these aspects in the next Chapter of this thesis, where I proceed to investigate the jurisprudence concerning Causation and Responsibility. In particular, I look at the responsibility for Omissions (given the Failure to Rescue is of such great interest to me in my work).

4. Causation, Responsibility, Omission, and Failures to Rescue

Other Chapters of this project consider the crucial question of whether there should be a Duty to Rescue in English Law, and also, whether there should be appropriate systems for the Protection of Rescuers. However, in order to be able to answer these questions it is necessary to investigate the principles of Philosophy and Jurisprudence that surround the Moral and Legal interactions between human beings and the World at large (including the unusual impact of Moral Luck). This is the subject of this Chapter 4. The first part, Sub-Section 4.1 considers Causation in relation to Events that occur, Sub-Section 4.2 asks whether, if a human being can be identified as causing an event, s/he should be held Responsible for the consequences.

The following Sub-Section 4.3 then deliberates on the complications that flow, when it is not Actions which are under scrutiny, but Omissions. It also looks at the so-called 'Acts and Omissions Doctrine' and considers the Failure to Rescue as a special type of Omission. Given the controversy surrounding this doctrine, my work then proceeds in Sub-Section 4.4 to consider a "Different Approach", by treating human conduct on a three (rather than a two) dimensional basis, introducing a (novel) third category of 'Stasis'. Sub-Section 4.5 then extends this three dimensional approach, to Rescue scenarios themselves (adding 'Intermediate Rescues; to the usual twofold categorisation of just 'Easy' and 'Hard' rescues). I then correlate both of these three dimensional approaches into a matrix methodology in Sub-Section 4.6 to aid a more comprehensive analysis of the interaction between types of Rescue and categories of Responsibilities. The Paradox of Moral Luck is reintroduced from Chapter 3 at this point, particularly in relation to how this impacts on hard Rescues, and whether the failure to attempt an Easy Rescue should attract legal, as well as moral censure.

Section 4.7 concludes this part of my work and returns us back to the fundamental question of the degree to which there should be the separation between Law and Morality (such question being at the heart of my entire project).

4.1 Causation

A great deal has been written about Causation, stemming back from antiquity e.g. the writings of Aristotle¹⁶⁸, through the emergence of a more scientific approach e.g. the works of Galileo¹⁶⁹, and especially Sir Isaac Newton¹⁷⁰, and particularly his Laws of Motion¹⁷¹. But I am most especially interested in Causation in the Law, and in looking at this particular aspect, I commence with a review of the works of David Hume, and John Stuart Mill.

However before doing this, it is enlightening to quote a recent definition of Events. I do this because it is the happening of discrete events in our lives that bring legal concepts such as Causation, and Responsibility into play. As the quotation indicates, Events can range from the 'everyday' to the 'monumental' – but they all have consequences, and often legal ones:

“a happening, occurrence, or episode e.g. the General Strike, the sinking of the Titanic, the arrival of guests, the local jumble sale. Events need not be momentous: the fall of a sparrow is as much an event as the fall of the Roman Empire”¹⁷².

4.1.1 The Philosophy of David Hume

David Hume considered the principle of 'Cause and Effect' in his work “The Treatise of Human Nature”¹⁷³ in which he suggested “*we may define a Cause to be an 'object'*

¹⁶⁸ Aristotle, Physics, Book VIII, 257, C. 347 BC last accessed 11/08/08 Stanford Encyclopaedia of Philosophy, <http://plato.stanford.edu/entries/aristotle-natphil/v>

¹⁶⁹ Galileo, *The Dialogue*, (1632), at www.law.umkc.edu last accessed 12/08/08

¹⁷⁰ Newton I (1687) *Philosophiae Naturalis Principia Mathematica*, trans by A Koyne & I Cohen (Cambridge, Cambridge University Press 1972)

¹⁷¹ Ibid

¹⁷² Honderich T, *The Oxford Companion to Philosophy*, (Oxford, Oxford University Press 2005)

¹⁷³ Hume D (1740), *Treatise of Human Nature*, last accessed on 10/11/12 at www.gutenberg.org/dirs/etext03/trthn10.txt

*precedent and contiguous to another, and where all the 'objects' resembling the former are placed in like relations of precedency and contingency to those 'objects' that resemble the latter*¹⁷⁴. He later re-stated a Cause as being *"an object precedent and contiguous to another, and so united with it ... that the idea of the one determines the mind to form the idea of the other"*¹⁷⁵.

Hume then provided a number of Rules for when a Cause and Effect relationship can exist, including: (i) The Cause and Effect must be contiguous in Space and Time; (ii) The Cause must be prior to the Event; (iii) There must be a constant union between the Cause and the Effect; (iv) The same Cause must always produce the same Effect

Summarising the position, it can be posited that in order for a particular effect to have occurred, it is NECESSARY for the related cause to have preceded it. In the foregoing I have emphasised "the related cause", since a major criticism of Hume is that his explanation only allowed for each effect to be brought about by a single cause).

4.1.2 The Philosophy of John Stuart Mill

John Stuart Mill took Hume's analysis further, but commenced with the basic statement: *"It is a Universal truth that every fact which has a beginning has a cause"*¹⁷⁶. He went on to say that *"for every [Phenomenon] there exists some combination of objects or events ... the occurrence of which will always be followed by that Phenomenon"*¹⁷⁷. Mill clearly identifies that there is a "combination" of objects at play, and it is through this plurality that Mill departs from Hume (this combination of causes has, since Mill, been termed the "Plurality of Causes"). He recognised that

¹⁷⁴ Ibid, Vol I, Part III, Section XIV

¹⁷⁵ Ibid

¹⁷⁶ Mill J S (1843) *System of Logic*, Vol I, Book III, Chapter V 'Of the Law of Universal Causation, accessed 10/11/12 at www.google.com/books?id=Y4MEAAAQAAJ p.395

¹⁷⁷ Ibid, at Page 398

causation is most often a combination of more than one factor. This was a very important development by Mill, recognising that Causation is not a simple sequence of iterative steps, but a complex combination of factors acting both together and in series. However, he also realised that some factors (and usually just one of them) is more determinant than others, and he added the following statement: *“In such cases it is very common to single out one only of the antecedents under the denomination of Cause, calling the others mere Conditions”*¹⁷⁸.

Hence Mill had described the modern day formulation of Causation, i.e. that there is a set of Sufficient Conditions which together contribute to a Cause. In addition, he recognised that there was usually an ‘operative’ Cause which was the Necessary Condition within this set of Sufficient Conditions.

4.1.3 “Causation in the Law” by Herbert Hart and Tony Honore¹⁷⁹

Herbert Hart and Tony Honore published their work in 1959 and carried out a detailed review of causation using the linguistic approach in vogue at the time. This involved them in looking at the common sense approach adopted by Society as a whole, but more specifically the language used by judges/courts in reaching their decisions. Their view was that this was more instructive in indicating to lawyers how principles of Causation were applied in practice.

Hart and Honore began their work by reviewing the main philosophical ideas that preceded them. In many respects they accepted the principles established by John Stuart Mill, but criticised his conclusions in a number of ways. In particular they pointed out that Mill only generally concentrated on Natural phenomenon, and not specifically on human Conduct (where issues of motivation and mens rea apply).

¹⁷⁸ Ibid, at Page 399

¹⁷⁹ Hart H & Honore T, *Causation in the Law*, (Oxford, Oxford University Press 1959)

Having demonstrated the need to thoroughly review the role of human beings in Causation, Hart and Honore separated their own approach into “Explanatory Inquiries” being the analysis of factual causation, and into “Attributive Inquiries”, being the extension of causal analysis to look at when factual causation could be attributed to human fault¹⁸⁰. In following this methodology they set the scene for the modern approach to causation, whereby Factual Causation, is distinguished from Policy Issues. Those Philosophers who have since adopted the wider definition of causation (to include both Factual and Policy considerations) have been termed ‘Causal Maximists’, whilst those who adopt a narrower definition of causation to simply include factual elements (leaving policy to be assessed independently) have been termed ‘Causal Minimalists’.

In the Preface to the second edition of their book¹⁸¹, Hart and Honore clearly prefer the causally minimalist approach, since they believe that the alternative of causal maximisation, confuses the picture and prevents actual causation from being analysed objectively, due to aspects of Policy being allowed to cloud legal/ judicial thought. This, they assert, is unhelpful since the law should confine itself to objective rules, which lawyers can identify; and advise upon. If there are Policy reasons why an individual should be excused from the consequences of their part in the causation of an event, then it should be entirely clear that ‘Policy’ is at play, and if factors, such as moral judgements are brought to bear, then it should be clear that this is the case, and such factors should be recognised for what they are: post-event rationalisation, not pre-event causation¹⁸². This approach clearly resonates in Hart’s slightly later work: “The concept of Law”¹⁸³ where he firmly asserts that matters of morality should

¹⁸⁰ Ibid

¹⁸¹ Hart H & Honore T, *Causation in the Law* (Oxford, Oxford Univ’ Press 1985) 2nd Ed

¹⁸² Ibid

¹⁸³ Op Cit, Note 19

be kept clearly separate from matters of law (this being of fundamental importance in my thesis).

Hart and Honore deplored the confusion which had arisen from the preceding case law, where legal causation and legal policy had become intermixed, thereby obscuring the role of law and the role of policy. They particularly eschewed the practice whereby terms such as “Proximate Cause”; “Remoteness of Damage”; “A break in the Chain of Causation”; “Foreseeability”; had entered the vocabulary of Causation. Whilst these were useful devices which judges were able to use to justify particular decisions, they were insufficiently precise, and masked the fact that legal policy was regularly being applied.

It is not necessary to reproduce all the examples which Hart and Honore referred to in order to demonstrate the misleading use of such terms, and two will suffice to illustrate their disquiet:

“Proximate Cause”

The term Proximate Cause was identified in a huge number of case reports both in England, and in the USA, and was generally used as shorthand for the principle that: *“because of convenience of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point. This is not logic. It is practical Politics”* (quoted from *Palsgraf v Long Island Railways Co.*¹⁸⁴). Hart and Honore’s concern was that all the causal steps leading to an event are matters of fact. If for policy reasons some causes are considered to be too remote from the outcome so as to exclude responsibility, then this should be recognised for what it is: Legal Policy. Causal principles should not be ‘debased’ by combining the two aspects of fact and policy via linguistic gymnastics to arrive at a term: “Proximate Cause” to

¹⁸⁴ Op Cit, Note 179, Page 90 *Palsgraf v Long Island Railway Co.* (1928) 248 NY 339

artificially describe when a particular event in a series of events is either sufficiently proximate or not, to anchor an individual's responsibility.

"Foreseeability"

The concept of foreseeability was identified as another device that courts and judges used to either penalise or excuse defendants depending upon Public Policy considerations. The archetypal situation (occurred in 'The Wagon Mound No. 1'¹⁸⁵) and was a case where oil was spilled from a vessel in a wharf in Sydney harbour, and this ignited, causing fire damage to buildings around the wharf. From a policy point of view, the court clearly wished to avoid penalising the shipowners for the fire damage (as it could have extended liability almost without limit, as one building could have simply ignited others in a domino effect). The court therefore chose to use the device of foreseeability to limit the liability (i.e. it concluded that it was not foreseeable that oil on water could ignite unaided, and that the only damage foreseeable, was fouling of the wharf perimeter). This approach however masked the situation that the oil spillage was the factual cause of the fire, and introduced the device of foreseeability as an element of causation to achieve a policy objective. Hart and Honore again complained that this 'debased' the concept of causation, and that it would be more legitimate if the decision was recognised for what it was: a blatant policy decision (which should be evaluated as such).

Whilst Hart and Honore were highly critical of most of the linguistic devices which judges had used to decide actual cases, they nonetheless considered one such device as being more helpful, and this was the "sine qua non" or "But For Test". They accepted that in most cases, the factual cause of an event could be arrived at by identifying the factor 'but for which' the event would not have occurred. However, even they cautioned that no one factor could be regularly separated out as the only

¹⁸⁵ Ibid, Page 273 (The Wagon Mound (No.1) [1961] AC 388)

sine qua non. They used the example of “Fire” to demonstrate this whereby the factors of “Heat”, “Fuel”, “Ignition”, and “Oxygen” were each a sine qua non¹⁸⁶. Taking this further, they in effect, asked us to recognise that in a situation where the but for test, might be applied in an arson case, the guilty person could either be a person who ignited the original (small?) fire, or a person who subsequently poured petrol on it¹⁸⁷. They also clarified that whereas ignition and fuel will often be necessary elements for there to be fire, certain other factors are “mere conditions” for the occurrence of the same (i.e. Oxygen)¹⁸⁸.

Concentrating on situations where there may be more than one factor leading to an event, Hart and Honore pointed to other examples where the But for Test will not identify a unique cause. A particularly instructive example is the two gunmen situation, where both Gunman A and Gunman B fire a fatal shot at a victim at exactly the same time. In the case of a single gunman, the But for Test works because in answer to the question “but for the gunman’s shot, would the victim have died? the answer is NO, and hence the shot can be identified as the unique cause of the victim’s death. However, in the two gunmen case the But for Test will not identify the unique cause. This is because in, say, the case of Gunman A, the answer to the question “but for Gunman A’s shot would the victim have died”, the answer this time is now YES (due to Gunman B’s shot). The same result arises if an identical ‘but for’ question is asked of Gunman B. This leads to the outcome that the But for Test will not operate satisfactorily in such cases. This is an example of what Hart and Honore refer to as “Concurrent Cause” cases¹⁸⁹.

¹⁸⁶ Ibid, page 11

¹⁸⁷ Ibid, page 50

¹⁸⁸ Ibid, page 12

¹⁸⁹ Ibid, page 123

Having raised this problem with the But for Test, Hart and Honore do accept that the test will provide a satisfactory answer in the great majority of cases (provided its limitations are recognised)¹⁹⁰. Then, in order to try to deal with such limitations, and in order to produce an even more helpful algorithm, they developed an extended version which has become known as the “NESS” test, that a condition contributes to some consequence when it is necessary to the sufficiency of a set of conditions which are themselves sufficient for that consequence. This was more simply expressed by Richard Wright, who stated that to be the cause of an event a condition should be *“the Necessary Element of a Sufficient Set of conditions which led to the consequence”*¹⁹¹.

This revised NESS test was shown by Wright to have generally solved the “Concurrent Causes” problem, inherent in the but for test: In the two Gunmen example, the but for test would sequentially exclude both Gunman A, and Gunman B from being the factual cause of the victim’s death, because neither of them was a necessary factor in the killing. By contrast the NESS test successfully includes both gunmen as causes of the outcome, because each gunman’s action was a necessary element of a sufficient set of causes of the victim’s death.

It is in unusual cases like this where Courts achieve justice by finding both gunmen guilty of murder (consider also the equally difficult, “cut-throat defence” cases, when two accuseds seek to avoid a guilty verdict by each blaming the other).

Hart and Honore’s views on Causation became increasingly accepted as the most convincing analysis of the subject, but before concluding my summary of the position

¹⁹⁰ Ibid, page 129

¹⁹¹ Wright R, ‘Causation, Responsibility, Risk, Probability: Naked Statistics and Proof’ *Iowa Law Review* 73 (1988) pp 1001-1023.

it is worthwhile spending a short time looking at one particular criticism of their approach, as espoused by Jane Stapleton

4.1.4 “Choosing what we mean by “Causation” in the Law” - Jane Stapleton¹⁹²

As she states in her preamble, one of the purposes of Jane Stapleton’s article is to critique the work of other primary commentators on the subject.

The writers that Stapleton particularly criticises are Hart and Honore, and their publication: “Causation in the Law”. She raised five main criticisms of their work:

- a) *that they do not specifically include failures to comply with Norms as classes of ‘causes’*
- b) *that they did not adequately recognise remoteness/scope issues as forming Explanative Inquiries, as well as Attributive Inquiries.*
- c) *that their linguistic conclusions were based on insufficient empirical research.*
- d) *that the causal language they ascribed to the courts was often wrongly identified as mixing fact and policy.*
- e) *that their linguistic approach only reflected causal language in use in the mid 20th century.*

The most compelling of the criticisms is the last one which concerns the suggestion that Hart and Honore’s linguistic approach is stuck in time: “[their account] rests on a snapshot of causal usage frozen in the late 1950’s”¹⁹³. Stapleton makes it clear that language reflects Society at the time: “Legislators and Courts change the pattern of legal obligations over time”¹⁹⁴. She particularly refers to the plethora of positive

¹⁹²Stapleton J, ‘Choosing what we mean by “Causation” in the Law’, *Missouri Law Review* 73 (2008) pp 433-480.)

¹⁹³ Ibid, page 464

¹⁹⁴ Ibid

obligations that have been enshrined in law since 1959, and stresses that these are prescriptive, and leave much less room for common sense interpretation (e.g. rules on control, protection, and prevention (particularly in the sphere of Financial Regulation)).

This criticism has some merit, but it is not fatal to Hart and Honore's work, since the analysis of most everyday scenarios still respond to their methodology. Indeed, when Tony Honore prepared the revised material for the second edition of their book in 1985, he did not consider that the intervening 25 years required any significant changes to the linguistic analysis within the book (the author of this Thesis has contacted Jane Stapleton, who has confirmed that as far as she is aware Tony Honore never felt it necessary to respond to her various criticisms).

4.1.5 Conclusions on Causation

Having traced the philosophy of causation from the mid 18th century to the early 21st century, I am convinced that the NESS theory developed by Hart and Honore (building on the earlier work of Hume, and Mill) remains the best method of deciding whether a particular factor is the Necessary element from a set of competing factors each vying for the title of THE cause.

Jane Stapleton causes us to question whether Hart and Honore's methods are locked in the middle of the 20th century, but even she generally concludes that their NESS formula still provides a satisfactory algorithm for establishing Causation (in the great majority of cases)¹⁹⁵.

Reverting back to Hart and Honore, once the factual cause has been identified, separate investigation can proceed as to whether responsibility for the identified

¹⁹⁵ Ibid, page 480

factor can be attributed to a human being. This separate investigative approach enables the principles of Legal causation (characterised by Hart and Honore as Explanative Inquiries) to be pursued free from the confusing influence of legal policy, which clouded earlier attempts by other philosophers to define causation. It then becomes possible to look independently at the Policy issues that may be brought to bear (characterised by Hart and Honore as Attributive Inquiries), and thereby clearly identify when questions of human responsibility for causing events are really under consideration. It is the analysis of the principles of such responsibility that forms the next sub-section of this thesis.

4.2 Responsibility

In commencing a review of the question of human Responsibility for events, it is again useful to consider the thoughts of the 18th, 19th and 20th Century philosophers, and also that of at least one 21st Century commentator.

4.2.1 18th and 19th Century Analysis

John Locke writing in 1764 on “Liberty and Licence”, stressed the importance of individual liberty, but tempered with licence for individuals to live their lives free from the interference of the State, unless they infringe other peoples’ liberties: “... *no one ought to harm another in his life, health, liberty, or possession ... and may not, unless it be to do Justice to an offender, take away or impair the life, ... liberty, health, limb, or goods of another*”¹⁹⁶.

This establishes an elementary principle that whilst we all have basic freedoms, we have a responsibility not to harm the interests of others, and should expect to be sanctioned if we do so, where justice demands it.

¹⁹⁶ Locke J (1764) “Of the State and Nature (Liberty and Licence)” in “The Two Treatises of Civil Government” last accessed 11/11/12 at oll.libertyfund.org/title/222

This theme of the individual being responsible for injuring his fellow man was reinforced by Jeremy Bentham who in his 1789 work "An Introduction to the Principles of Morals and Legislation" stated: *"There are few cases in which it would be expedient to punish a man for hurting himself: but there are few cases, if any, in which it would not be expedient to punish a man for injuring his neighbour"*¹⁹⁷. Bentham in expressing this standpoint clearly echoes his Utilitarian philosophy.

John Stuart Mill followed up Bentham's basic Utilitarian approach towards freedoms and responsibilities in his work "On Liberty"¹⁹⁸ by stating *"the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others"*¹⁹⁹.

Mill takes this further and stresses the importance of individual autonomy, and states the basic liberties which go to characterise man as a worthwhile and progressive being: *"liberty of conscience...liberty of thought and feeling ... liberty of expression ... tastes and pursuits ... liberty in their right to unite with others"*²⁰⁰.

Mill continues by re-affirming the fundamental necessity of these liberties in defining the Human Condition: *"No society in which these liberties are not, on the whole, respected is free ... and none is completely free in which they do not exist absolute and unqualified. The only freedom which deserves the name, is that of pursuing our own good in our own way, so long as we do not attempt to deprive others of theirs"*²⁰¹.

¹⁹⁷ Bentham J (1789) "An Introduction to the Principles of Morals and Legislation" Chapter xvii 20 last accessed 11/11/12 at econlib.org/library/bentham/bnthPML18.html

¹⁹⁸ Mill JS (1859) "On Liberty" last accessed 11/11/12 at www.utilitarianism.com/ol/one.html

¹⁹⁹ Ibid (Chapter I)

²⁰⁰ Ibid

²⁰¹ Ibid

He then adds further stress to this necessity of respecting the similar rights of others: *“Though Society is not founded on a contract ... everyone who receives the protection of Society owes a return for the benefit, and the fact of living in Society renders it indispensable that each should be bound to observe a certain line of conduct to the rest. This conduct consists, first, in not infringing the interests of one another ... and secondly, in each person’s having his share ... of the labours and sacrifices incurred for defending Society or its members from injury or molestation”*²⁰².

Interestingly Mill also differentiated cases where the Law should hold individuals responsible for their harmful actions, and where if no legal norms are violated, one should only be held morally responsible: *“The acts of the individual may be hurtful to others ... without ... violating any of their constituted rights. The offender may then be justly punished by opinion, though not by law”*²⁰³. This is highly pertinent to my work and once again reinforces the view that there should generally be a separation between Moral and Legal repercussions.

Mill also refers to cases where sometimes the actions of one individual may harm the interests of another, but where neither legal nor moral sanctions are appropriate: *“Whoever succeeds in an overcrowded profession, or in a competitive examination ... reaps benefits from the loss of (the) others ... society admits no right either legal or moral in the disappointed competitors”*²⁰⁴.

If we accept the foregoing philosophical doctrine, as I believe we should, then we need to ask ourselves: what is it that justifies Society in interfering with individual liberty (restricting someone’s freedom to act or freedom not to act)? and also what

²⁰² Ibid (Chapter IV)

²⁰³ Ibid

²⁰⁴ Ibid (Chapter V)

entitles us to hold them responsible (with or without sanctions) for their conduct? These questions are considered further below.

4.2.2 20th and 21st Century Analysis

Various answers to the foregoing questions have been provided since Mill wrote on the subject. Hart and Honore were amongst the more significant modern writers to contribute, and in particular the preface to the second edition of their main work, makes reference to various bases of attributing responsibility. Other significant writers commenting in the last 25 years include Joel Feinberg, John M Fischer and Mark Ravizza.

4.2.2.1 “Causation in the Law”: Hart and Honore²⁰⁵

Hart and Honore began their consideration of responsibility by adopting the basic concept developed by Locke, Bentham, and Mill i.e. that the attribution of responsibility will ordinarily flow from whether or not someone who has caused an event has created harm or injury to another individual: *“In the moral judgements of ordinary life, we have occasion to blame people because they have caused harm to others”²⁰⁶*. In other words we must ask ourselves whether a person should be answerable for the harm they have caused. (Hart independently adopted “answerability” from the dictionary definition of Responsibility in his earlier, individual, work: “Punishment and Responsibility”²⁰⁷). Hart and Honore developed this answerability idea by focussing attention on whether someone is liable to compensate other people for harm that has been caused to them²⁰⁸. Through this approach they introduced concepts such as vicarious responsibility where an

²⁰⁵ Op Cit Note 181

²⁰⁶ Ibid (Page 63)

²⁰⁷ Hart HLA, *Punishment and Responsibility* (Oxford, Oxford University Press 1968)

²⁰⁸ Op Cit Note 130, Page 65

individual is held answerable for harm which they have not caused personally, due to the fault of someone for whom they are responsible (i.e. the Employer/Employee situation)²⁰⁹. Conversely they then proceeded to outline a number of situations where even though someone has caused harm to another person, they will not be found legally responsible e.g. they quoted the law of murder in England where the victim must die within one year and a day. They also quoted the situation in New York, where someone who causes a fire which spreads to a row of houses, is only legally responsible for the damage to the first house²¹⁰.

As the above examples show, Hart and Honore supported the idea that it is at the stage of attributing responsibility where it is most appropriate to apply Public Policy. This is consistent with the views they expressed on causation: whether someone causes an event is purely a factual matter, and if there are policy reasons why they should be not be held liable, then this is where the device of allocating 'responsibility' can be used by the courts to achieve results which they consider are fair in the name of justice (i.e. the New York Fire law prevents a tortfeasor suffering liability for an almost unlimited number of damaged properties, when risk allocation amongst many owners (probably insured) is a more equitable outcome).

Other writers also refer to the role of policy in providing justifications/ defences for individuals who may have caused harmful events, and the subject arises again in the subsequent sub-sections below. However it would not be appropriate to leave Hart and Honore without noting their 'summary' that responsibility is defined by "*the liability of a person to be punished, forced to pay compensation, or otherwise subjected to a sanction by the law*"²¹¹. More specifically they identify Fault as the key

²⁰⁹ Ibid

²¹⁰ Ibid (Page 67)

²¹¹ Ibid (Page xlili)

factor upon which legal responsibility can be grounded²¹². “Fault” may arise in different ways i.e. fault in terms of morally deficient behaviour (which may, or may not make the person answerable), or fault in terms of breaching legal requirements or norms (which will generally make them answerable, with a significant sanction).

4.2.2.2 “Harm to Others”: Joel Feinberg²¹³

Like many of his predecessors, Feinberg also alighted on ‘Harm’ as the fundamental factor on which to anchor responsibility. He commenced by reiterating Mill’s basic philosophy i.e. that there should be a general presumption of liberty, and that if an individual’s liberty is to be restricted, and responsibility allocated to him/her then a valid “Liberty-Limiting Principle”²¹⁴ must be involved. He also generally adopted Mill’s concept of “Harm to Others” as the most promising liberty-limiting principle. However, Feinberg posited a wider definition of Harm, by including not only harm to other individuals (“Private Harm”), but also harm to the state generally (“Public Harm”). He combined both elements in what he termed his “Harm Principle”²¹⁵.

Feinberg proceeded to define a number of other liberty-limiting principles, although in my view he over-complicated matters. The most interesting ideas he put forward are: An Offence Principle (he suggested that a person can be offended rather than harmed); and A Legal Moralism Principle (he suggested that even if something does not cause harm or offence, it may still affront morals²¹⁶). However, if we consider that whatever is offensive to us, or affronts our morals, is ‘harmful’ to our peace of mind, we can probably wrap these principles together into the main Harm Principle.

²¹² Ibid (Page xliv)

²¹³ Feinberg J, *Harm to Others*, (Oxford, Oxford University Press 1987)

²¹⁴ Ibid (Page 7)

²¹⁵ Ibid

²¹⁶ Ibid (Page 26)

Feinberg then proceeded to define “Harm” itself. He began by making the point that not all harms are necessarily matters for the law (and especially not the criminal law). He provided the example of a bruised/blistered finger which whilst it will represent a harm, is not particularly harmful, unless the person involved is, perhaps a concert pianist²¹⁷. He also demonstrated that some uses of the word harm are imprecise, and he suggested other similar words that convey a similar idea i.e. “damage”, “tear”, “break” etc. etc.²¹⁸. He therefore decided to establish a specific definition of Harm which can be used to attribute responsibility to individuals, and he settled on the rubric of “Setting Back of Interests”²¹⁹.

Feinberg then proceeded to demonstrate how this idea could embrace all the various types of harm which need to be covered in order to make his definition all-embracing (I will particularly refer to his application of the principle to Omissions in the next major Sub-Section of this work, which includes the Special Case of Failure to Rescue). He then provided a necessary caveat to the use of his formula, and cautioned (like Hart and Honore) that not every setting back of a person’s interests will be actionable in law, or subject to legal sanction. He particularly drew attention to those cases where there must also have been an intention to cause the harm (the general mens rea requirement for most criminal offences), or cases where there may be specific defences that might apply e.g. necessity, self-defence, insanity etc. etc.

The key concepts which should be carried forward from Feinberg’s work are that the Harm Principle is a major tool which can be used to attribute responsibility, and that the way to apply the tool is to analyse whether in causing an event, an individual has wrongfully set back someone’s interest.

²¹⁷ Ibid (Page 31)

²¹⁸ Ibid (Page 33)

²¹⁹ Ibid

4.2.2.3 “Responsibility and Control”: Fischer & Ravizza²²⁰

The subtitle to this work is: “A Theory of Moral Responsibility” and Fischer and Ravizza immediately made the claim that only human beings can be responsible for causing events - because only human beings have a sense of morality. This idea is at the root of their work, which looks at moral responsibility (rather than the more limited basis of enquiry into legal responsibility and especially criminal responsibility).

In defining an approach to moral responsibility, Fischer and Ravizza drew on the works of Peter Strawson²²¹, and Michael Zimmerman²²², to identify the concepts of “Reactive Attitudes”, and the “Ledger of Life” respectively.

The reference to ‘Reactive Attitudes’ is a reference to the idea that we only find someone morally responsible for causing an event, where their conduct raises within us a reaction of blame or praise. If the event, they cause does not provoke any moral reaction within the general members of Society then we can interpret this as suggesting that the individual should not be held responsible for causing it.

This further reference to a ‘Ledger of Life’ is a reference to the idea that to be held morally responsible, a person’s conduct is assessed as though they have thereby amassed credits and debits in a moral ledger. If the debits outweigh the credits then they are considered to attract a reactive attitude of blame, and if vice versa, a reactive attitude of praise.

²²⁰ Fischer JM & Ravizza M, *Responsibility and Control*, (Cambridge, Cambridge University Press 1998)

²²¹ Strawson P, ‘Freedom and Resentment’ *Proceedings of the British Academy* 48 (1962)

²²² Zimmerman MJ, *An Essay on Moral Responsibility* (New Jersey, Roman & Littlefield 1988)

Fischer and Ravazzi then proceeded to explain how they approached the assessment of whether an individual's conduct 'scores' sufficiently to create a reactive attitude, and determine the allocation of blame. They began by drawing on Aristotelian Conditions for imposing responsibility, and identified the two main factors which must be established if responsibility is to be validly applied: "Ignorance", and "Force". In doing this they made direct reference to Aristotle²²³. In terms of ignorance they made the essential point that someone can only be responsible for something if they know (have knowledge) of what they are doing, and that it is wrong.

Fischer and Ravizza concentrated on the second Aristotelian condition: Force, and they made the reasonable point that someone cannot be held responsible for something if they have been forced to do it, and did not act under their own free will (they provided an example of a person who causes harm, because in a Gale, the wind blows them off balance²²⁴). They took this principle further and restated it in terms of asserting that a person should only be responsible for their conduct if they have Control over the situation in which they find themselves. In other words: "an agent must in some sense control his behaviour in order to be morally responsible"²²⁵.

Fischer and Ravizza therefore adopted Control as their overall determinant for allocating responsibility, and it is a useful addition to the general Harm Principle proposed by others as the key factor. In some cases it may not be possible to identify actual harm arising as a means of attributing responsibility, however there may still have been someone who was in sufficient control of a situation, such that it would not be unreasonable to assign some degree of responsibility to them. This is similar to the "Last Clear Chance" doctrine which forms part of the law of Tort in the USA²²⁶.

²²³ Aristotle, *Nicomachean Ethics* 1109b30-111b5, trans by T Irwin (London, Hackett (1985)

²²⁴ Op Cit Note 145

²²⁵ Ibid (Page 14)

²²⁶ Prosser WL & Keeton WP, *Prosser & Keeton on Tort* (Minnesota, West Publishing 1984)

It could be particularly helpful in Rescue cases where a bystander is the only person available who can exert some control over a situation and perform a Rescue!

4.2.3 Conclusions on Responsibility

From the foregoing it can be seen that the subject of attributing responsibility is a complex matter. However, I think a number of general conclusions can be reached: from Locke, Bentham and Mill we can take the idea that assigning responsibility is essentially a matter of deciding when a person's freedom or liberty to act (or not act) just as he pleases can be limited by Society, and the main answer proposed is when his/her conduct is identified as causing harm. Hart and Honore developed this approach further and introduced the related concept of fault. They did this to demonstrate that not all harms are actionable (e.g. when public policy provides exemptions of various kinds), and that fault will often be more indicative of responsibility. Writing more recently Joel Feinberg re-stated the Harm Principle as the key factor, and defined it as the Setting Back of an Interest. However, he also cautioned that not all setting back of interests carry sanctions, and referred to the role of mens rea in criminal cases, and also the general impact of typical defences. Fischer and Ravizza prefer Control as the key factor in deciding whether or not to attribute responsibility.

Consequently, it seems necessary to include all of the above mentioned factors in any overall approach to assigning responsibility. Hence they will all be borne in mind when considering the responsibility for Omissions (and failures to rescue) in the next sub-section.

4.3 Omission (especially the Failure to Rescue)

Having now considered the principles that underlie causation and responsibility, it is possible to proceed to investigate how those principles apply to Omissions. The

analysis of whether omitting to do something can ever be a cause, and then, whether someone can be held responsible for an omission has split philosophers since man started thinking about his impact on the world. The question continues to have extremely important consequences in very many areas, not least in the medical arena where issues such as Euthanasia raise difficult issues connected with preserving or not preserving life. Another area where preserving life raises important questions is around the subject of Rescue, and especially in relation to Failure to Rescue. This topic is of central relevance to this present thesis. However, before specifically considering the issues surrounding rescues, it is necessary to review the jurisprudence applicable to Omissions more generally.

4.3.1 The Classical Approach to Omissions

One of the earliest philosophers to turn attention to the character and nature of Omissions was St Thomas Aquinas, who, it can also be suggested modelled his views on Aristotle's thinking on the matter of Natural Law and its content (which itself was influenced by the legacy of Plato and Socrates).

Aquinas considered the relationship between Actions and Omissions in his colossal work: "Summa Theologica" and commented firstly in Question 71, Article 5 (Whether Every Sin Involves Some Act?) and in Question 72, Article 6 (Whether Sins of Commission and Omission Differ Specifically?)²²⁷. He also commented, in Question 79, Article 4 (Is the Sin of Omission more Serious than the Sin of Transgression)²²⁸.

In answer to the question of "whether every sin involves some act?", Aquinas considered that "*Sin may arise when a man does what he ought not, or by not doing what he ought ... there can be sin without an act*". In answer to the question of

²²⁷ Op Cit Note 20, Q 71, Art 5 , and Q 72, Art 6.

²²⁸ Ibid

“whether sins of commission and omission differ specifically?” He considered that they are formally of the same species of sin (one acting positively, the other negatively), and provided the example: “*Fire gives forth heat... and [at the same time] ... it does not give forth cold*”. He continued that in his view there is nothing morally different in a man who harms a third party either by taking food from their mouth, or a man who harms them by not satiating their hunger by giving them his surplus food. The outcome for the third party is the same: hunger.

Nonetheless, turning to the question of “Is the Sin of Omission more Serious than the Sin of Transgression?”, Aquinas considered that Transgression (an Act) is more serious and he provides the example that failing to show respect to one’s parents is not as serious as positively insulting them.

Taking together Aquinas’ writings on both the character of acts and omissions, and the relative blameworthiness of each, we can summarise that he considered that both acts and omissions are capable of being sins, but that a sinful act is generally more serious than a sinful omission. This coincides with our natural intuition on the subject.

However, Aquinas’ conclusion is an oversimplification in terms of the degree to which a consistency in approach towards Commission and Omission can be maintained in relation to legal duties as compared to moral duties. Three specific examples help make the point and indicate the complexity of the Commission/ Omission conundrum: firstly, if there is a moral duty to provide food to a hungry person, then where is the boundary of this duty, is it to provide food to a person’s own family, or to his neighbours, or to a homeless stranger, or to all the famine victims overseas? (this example is provided by Andrew Ashworth)²²⁹; secondly, there is instinctively a significant difference between letting someone die (omission) and killing someone

²²⁹ Ashworth A, ‘The Scope of Criminal Liability for Omissions’ *LQR* 105 (1989) pp 424-459

(commission): this dichotomy comes to the fore whenever the issue of Euthanasia is discussed (Jonathan Glover provides a thought provoking analysis of the case where resuscitation (or life support) is withheld, compared to where a life shortening drug might be administered²³⁰, and thirdly it is clear that often, situations which we find morally blameworthy do not translate into legal blameworthiness: if there is a moral duty to always tell the truth, should there be a corresponding legal duty? i.e. if we were to be untruthful and tell someone that we support rugby team A (when in fact we support rugby team B), would anyone expect us to be punished under the criminal law for this lie? (this example draws on 'harmless lies' discussed by Kent Greenawalt)²³¹.

These differentiations as to when conduct (act or omission) should incur moral disapproval, or when it should translate into legal responsibility is fundamental to my thesis, and the key idea that a separation should be maintained between Morality and Law (as will be seen from the next sub-section, this separation tends to more readily accepted when we are considering Omissions, rather than Acts).

4.3.2 Commission and Omission (A More Modern Analysis)

It has often been said that English Law is hesitant to impose liability for Omissions e.g. Sir Edward Coke wrote in the 16th Century that "*No man shall be examined upon secret thoughts of his heart, or of his secret opinion: but something ought [only] to be objected against him what he hath spoken or done*"²³². This approach continued largely unaltered over the next 400 years, and even became somewhat institutionalised in the so called "Acts and Omissions Doctrine". This dictates that we

²³⁰ Glover J, *Causing Death and Saving Lives*, (Harmondsworth, Penguin Books 1977)

²³¹ Greenawalt K, "Legal Enforcement of Morality" *A Companion to Philosophy of Law and Legal Theory*, (1996) ed. D Patterson, Oxford, Blackwell Publishers

²³² Coke Sir Edward (1552-1634), ref. Williams G in *Textbook of Criminal Law* (1983) London, Stevens & Co

should treat Omissions differently from Acts, and that whilst the law can legitimately penalise very many harmful acts, it should generally be hesitant to penalise Omissions. This latter admonition was perhaps most forcibly posited by Lord Macaulay in his Notes on the Indian Penal Code in 1837 when he stated: “*We must grant impunity to the vast majority of those omissions ... and must content ourselves with punishing such omissions only when they are distinguished ... by circumstances which mark them out as peculiarly fit objects of penal legislation*”²³³.

4.3.2.1 Acts and Omissions Doctrine

The Doctrine relies on a principle that generally individuals should be held less culpable for omissions than for actions, and this differentiation has been forcibly advocated on a regular basis, and particularly in the medical arena, i.e. it is less blameworthy to allow someone to die, than it is to hasten their death.

This is despite the fact that the Doctrine has regularly been criticised as obscuring the need for the law to approach each individual case on its own merits. The most forceful criticism of the Acts & Omissions Doctrine was expressed by Jonathan Glover²³⁴ writing in 1977. Glover, noted the general rationale for the conventional Doctrine (that intuitively we find it morally more reprehensible to take a life than to refrain from saving one, and that in terms of personal autonomy it is more acceptable to prohibit a limited range of bad acts, than it is to forcibly compel the positive performance of a very wide range of good ones). Nonetheless he objected to the Doctrine by asserting that [if the doctrine means that] “*an act and a deliberate omission with identical consequences can vary in moral value, it [the Doctrine] should be rejected*”²³⁵.

²³³ Lord Macaulay, *Works* ed. Lady Trevelyan, vii (1866) 497 (Notes on the Indian Penal Code, 1837)

²³⁴ Op Cit Note 230

²³⁵ *Ibid* (page 116)

4.3.2.2 The Ashworth: Williams Debate

Whilst views on the Acts and Omissions Doctrine were being bandied backwards and forwards, a very interesting exchange of opinions took place in a debate at the end of the 1980's on the criminalisation of omissions, between Andrew Ashworth and Glanville Williams.

Ashworth

The debate began with Andrew Ashworth publishing an article on "The Scope of Criminal Liability for Omissions"²³⁶ in which he purported to separate writers on the subject into those adhering to 'The Conventional View' and those adhering to 'The Social Responsibility View'.

Ashworth described the Conventional View in terms of a minimalist approach to criminalising omissions under which Omissions should only incur criminal sanctions in exceptional cases. He quoted a number of arguments for this approach²³⁷, mainly relying on personal autonomy and liberty principles i.e. that constraints on a person's liberty to either act, or not to act as they wish, should be kept to the minimum, and trying to impose general positive duties rather than simply prohibiting harmful infringements would be too intrusive to personal autonomy. Ashworth also suggested that criminalising omissions on too wide a basis would be overly-paternalistic and interfere with self-determination. He further suggested that if we insist on people involving themselves in other individual's lives then we will encourage a society of busy-bodies. He added that if we become obliged by law to help others, then where should we draw the line: if I have a legal duty to aid the starving, would this require me to sell all my worldly possessions in order to fully satisfy my obligation? Finally,

²³⁶ Op Cit Note 229

²³⁷ Ibid (Pages 3 & 4)

Ashworth stated that it would be impractical to expect citizens to be fully aware of all the various positive duties that might apply to them, rather than simply needing to know the limited number of things that they are prohibited from doing.

Ashworth then described the alternative Social Responsibility View²³⁸, and made his main claim that, in exchange for living in a protective society, we all have duties not only to avoid harm to our fellow citizens, but also to take positive action to assist them (e.g. rescue them) in time of need. He suggested that this would maximise personal autonomy by creating the necessary mutually supportive environment in which we should all want to live and strive. He also used a Utilitarian argument to justify his claim i.e. that we should adopt a system which provides maximum happiness or saves the maximum number of lives, consistent with the minimum inconvenience to persons generally. He also posited that this approach will create a less selfish, and a morally robust society, for the benefit of all²³⁹.

Ashworth then proceeded to describe various Duty Requirements in which he believes society should impose criminal sanctions, if a citizen fails to fulfil them. He set out five broad classes²⁴⁰:

Prior Dangerous Acts – Ashworth stated that if someone creates dangerous circumstances, then they cannot simply ignore the situation and there will be a positive duty to abate the danger. He quoted the case of R v Miller²⁴¹ where Miller dropped a lighted cigarette in bed, but rather than extinguishing the fire he simply moved to another room. He was found guilty of recklessly damaging the house.

²³⁸ Ibid (Pages 5 & 6)

²³⁹ Ibid

²⁴⁰ Ibid (Page11)

²⁴¹ R v Miler [1983] 2 AC 161

Relationship Duties – Ashworth made reference to those personal situations where a special relationship exists and one party will have a duty to support the other. He quoted, as an example, the Children and Young Persons Act²⁴², where both parents have a positive duty to prevent injury to the health of a child. It would be an offence under this Act to omit to provide food and shelter to a child. This category would also extend to cover a wide range of other relationships i.e. Doctor: Patient, Employer: Employee etc. etc.

Undertaken Duties – Ashworth used this category to describe the wide range of contractual duties which impose positive duties on individuals. One of the examples he quoted was the duty of a Gatekeeper at a railway crossing, to shut the gate when a train is approaching.

Duties related to Property – Ashworth's examples are not compelling but this category probably covers the well-known Rylands v Fletcher²⁴³ situation, where if a person brings a potentially dangerous thing onto their property (a large reservoir of water), they have a positive duty to prevent it escaping.

Citizenship Duties – There could be quite a wide range of duties under this heading, and a typical example might be the duty to pay Income Tax²⁴⁴. However, from the point of view of this present thesis it is the possible inclusion of a 'Duty to Rescue' which is most interesting about this category. Ashworth also referred to this possibility when he quoted: "*Should a person who sees another fall into a river be free to walk on, without taking any steps towards a possible rescue?*"²⁴⁵. However, Ashworth was clear that this should only apply to easy rescues²⁴⁶

²⁴² Children and Young Persons Act 1933, Section 1

²⁴³ Rylands v Fletcher (1866) LR 3 HL 330

²⁴⁴ Part I Income and Corporation Taxes Act 1988

²⁴⁵ Op Cit Note 229, Page 13

²⁴⁶ Ibid (Page 14)

Having thereby established some clear situations where society would be justified in imposing criminal liability, Ashworth then concluded his article by making it clear that he favoured 'The Social Responsibility View' over 'The Conventional View (even if the Courts, and most commentators - including Glanville Williams - preferred to adopt the latter).

Williams

Glanville Williams responded to Ashworth's article in 1991²⁴⁷ and expressed disquiet at having been labelled a Conventionalist (since in his words this implied a selfish and callous outlook compared to the Social Responsibility approach which is held up as more virtuous)²⁴⁸. Nonetheless he agreed that there should be no difference between an Act and an Omission to perform a duty (when each results in similar harmful consequences). However, he stated that he was not prepared to go further than that, and preferred the flexibility that the Acts and Omissions Doctrine provided to practitioners and to the courts, as compared to the limitations that would flow from trying to draft legislation to cover the almost unlimited scope of Omission situations (he used the Euthanasia example to underline the point – which is not surprising given that at the time he was Vice President of the Voluntary Euthanasia Society!²⁴⁹). His arguments in favour of the Conventional View included: the fact that Society should concentrate more on repressing active wrongdoing, rather than trying to bring the lethargic up to scratch; the fact that society regularly differentiates harmful acts and omissions and our blood tends to boil quicker over the former; the fact that it would be excessive to try to define every possible actionable omission; and the fact that courts, police, and prisons which are already over-stretched in dealing with the

²⁴⁷ Williams G, 'Criminal Omissions – The Conventional View' *LQR* 107 (1991) pp 86-98

²⁴⁸ *Ibid*

²⁴⁹ *Ibid* (Note 87)

limited number of prohibited acts under the law, would be completely swamped if a wide range of additional offences were created involving omissions²⁵⁰.

Williams then proceeded to take issue with Ashworth's attempt to expand on the broad categories of Duty Requirements, where Omissions should be criminalised. However, he also agreed that the duty to assist in the preservation of life, should be supported, insofar as it might introduce a legal duty to carry out easy rescues.

Judicial opinion during the debate was somewhat muted, but shortly afterwards the highest court in the land reached a landmark decision which, without doubt, provided a very strong endorsement of the Acts and Omissions Doctrine. In the case of *Airedale NHS Trust v Bland*²⁵¹ in 1993, the House of Lords decided that it was lawful for a doctor to withdraw life support to a patient in a persistent vegetative state without such action being treated as causing the patient's death. Their Lordships reached this view by interpreting the doctor's conduct as an Omission (to maintain life support) rather than a positive Act (of shortening a life).

In reaching this result the House breathed new life into the Acts and Omissions Doctrine, and in so doing, clearly provided support to the approach taken by Williams, rather than that taken by Ashworth (albeit the former fully recognised that some omissions - such as the Failure to attempt an Easy Rescue - might legitimately form part of the Law (and the Criminal Law at that)).

4.3.3 21st Century Comment

Writing some 8 years after the House of Lords decision, Tony Honore²⁵², also re-asserted the main Acts and Omissions Doctrine by stating that "*when conduct is*

²⁵⁰ Ibid (Note 89)

²⁵¹ *Airedale NHS Trust v Bland* (1993) 1 All ER 821

²⁵² Honore A, *Responsibility and Fault* (Oxford, Hart Publishing 1999)

*judged from the standpoint of responsibility for the harm it brings about, the acts-and-omissions doctrine is broadly sound*²⁵³. He stated *“By and large, positive acts cause more resentment than omissions with similar results”*²⁵⁴. However, Honore made an important refinement by separating Omissions into two broad categories: those which involve the omission to carry out “Distinct Duties” (which are relatively uncommon e.g. the duty of a Level Crossing operative to shut the gates when a train approaches) and those which involve the omission to carry out “background Duties” (which include the very wide range of situations where citizens owe reciprocal duties to each other as part of belonging to civilised society).

Honore proceeded to clearly state that where omissions involve the not-doing of distinct duties (where the harmful consequences are of a similar degree of magnitude to the harm caused by positive acts), then the ‘acts and omissions doctrine’ should be rejected, and legal sanctions should be applied to them²⁵⁵. But when the omissions involve not-doing background duties, then any harm is usually of a much lower degree of magnitude and the ‘acts and omissions doctrine’ should be maintained (and legal sanctions should not be imposed).

In taking this line, Honore endorsed that part of Ashworth’s article which proposed that there are a considerable number of Duty situations, where Omissions will be equally culpable as harmful acts, and where the Social Responsibility approach demands that sanctions and often criminal sanctions should be applied (one such Omission suggested being the Failure to attempt an Easy Rescue).

More recently, one of today’s leading Criminal Law textbooks makes the clear statement that *“Historically the criminal law has been concerned essentially with prohibiting (and punishing) positive actions rather than with imposing duties to act*

²⁵³ Ibid (Page 43)

²⁵⁴ Ibid (Page 60)

²⁵⁵ Ibid (Page 61)

(and punishing failure to do so)²⁵⁶. The text however goes on to say that, progressively, there have been many situations where liability has been imposed for Omissions. This has most been most clearly illustrated by the increasing number of regulatory offences and the myriad of modern motoring offences e.g.

- a) Failure to Pay Income Tax
- b) Failure to buy a Television Licence
- c) Failure to send Children to School
- d) Failure to have Motor Insurance
- e) Failure to Wear a Seatbelt in a Motor Car
- f) Failure to Stop/provide particulars after a Road Accident.²⁵⁷ etc.

The modern position therefore seems to be that the Acts and Omissions Doctrine is alive and well, and in terms of relevance to my thesis, it is clear that this is one of the more explicit examples where a separation is maintained between conduct which is more often considered a Moral wrong (Omission), and conduct which is more often considered a Legal wrong (Acts).

However, there is definitely a growing tendency to impose legal liability for breaching an increasing number of positive duties (as itemised above), and one additional type of Omission which might justify the application of Sanctions (Moral, Legal, or both), is the Failure to Rescue fellow citizens in distress. But before looking at this in detail, I need to introduce an innovative line of enquiry. I do this because in analysing the dynamic between Acts and Omissions it has struck me that such a polarised view of Human Conduct is too simplistic, and that in particular we should not classify all conduct other than Actions, as Omissions.

²⁵⁶ Card R, Cross R, Jones P, *Criminal Law* (Oxford, Oxford University Press 2006) 17th Ed.

²⁵⁷ Road Traffic Act 1988 Section 170(2)

4.4 A Problem with the word “Omission”

The approach of categorising human conduct in a polarised manner (covering Acts on the one hand, and Omissions on the other) overlooks a fundamental problem in the use of the term Omission. This is because the word “Omission” is not in itself neutral, it comes pre-loaded with Fault!

Unlike the word “Action” which can include either good acts, or bad acts, the word “Omission” by its very nature implies a failure to have done something: pre-supposing that there was a pre-existing obligation to be carried out, or some pre-existing duty to be complied with. In other words the idea of “Omission” brings with it an assumption that some kind of Norm has been violated. Hence, someone can only be said to have omitted something if there was an ‘a priori’ obligation/duty upon them to act in a certain way.

Consequently, I consider that the division of human conduct between acts and omissions is too simplistic and fundamentally flawed. We should therefore try to find an additional, more neutral term which does not pre-suppose fault when describing situations where someone simply remains ‘in neutral’ and does not intervene in the World (in situations where there is no obligation/duty to do so). Various terms come to mind: “inaction”, “non-action”, “non-intervention”, “not doing” etc. etc. However, these themselves, all bring with them further negative overtones (all being formed by the addition of a negating prefix to an otherwise positive verb). I have hence settled on the term “Stasis”, which I define as:

‘a condition in which the status quo is maintained, where nothing is done, and nothing is not done. Where, by analogy to a motor car, the individual concerned stays ‘in neutral’ and simply watches the World go by, behaving in neither a positive nor a negative manner`.

I believe that this is vitally important, since if we accept that there are occasions when as autonomous beings we are entitled to simply remain a bystander or an

onlooker, without incurring an any risk of censure, then this throws an entirely different light on the allocation of responsibility when events happen in the World.

We should definitely be held responsible for our Actions (and if these have harmful consequences, we should expect to be punished, and often by the Criminal Law).

We should certainly be held responsible when we Omit to carry out specific obligations and duties that apply to us (and if there are harmful consequences we should expect, in serious cases to be punished under the criminal law, or in less serious cases to be required to pay compensation under the Civil Law).

However, we should not be held responsible when all we do is remain in Stasis, in situations where there are no legal duties to act. In such cases there should be no place for legal sanctions (although in some cases moral censure might apply e.g. when someone is shunned as a conscientious objector to war)

4.4.1 A Three Dimensional Approach to Human Conduct and Responsibility

It is by virtue of the above more logical approach that I propose to analyse human conduct and responsibility from a three dimensional standpoint: "Acts, Omissions, and Stasis". I have now clearly differentiated these terms and it may be useful to re-emphasise the distinctions (a) Acts by which I mean clear positive conduct where the individual obviously intervenes in the World and should be held responsible for the outcome; (b) Omissions by which I mean failing to perform a Distinct Duty (in Honore's terms), where the individual is clearly expected to intervene in the World, and should be held responsible for the outcome if s/he does not; and (c). Stasis by which I mean simply maintaining the status quo, where the individual definitely does not intervene in the World, and there should be no responsibility one way or the other.

Using this approach, then human conduct at the two extremes of (a) and (b) should clearly incur sanctions where the act, or the failure to act, results in harm. But importantly conduct in the neutral space where the individual simply does nothing, can be more satisfactorily recognised as un-blameworthy, and not demanding of any legal sanction (although there may be an argument for applying moral sanctions in some cases).

4.5 Extending a Three Dimensional Approach to Rescues

The three dimensional approach to human conduct (as described above) is of more significance when it is realised that Rescues themselves are not all similar in nature. The orthodox approach to rescues is to separate them into two categories: Easy Rescues and Hard Rescues. The Easy Rescue situation was perhaps best described by Jeffrie Murphy when referring to a man sitting by a swimming pool who, as an onlooker, sees a very young girl fall in the water, and whom he can rescue by simply putting his arm down and lifting the toddler out²⁵⁸. By contrast I can describe a Hard Rescue scenario as one where a heavy, drunken man falls into a fast flowing river, and the onlooker on this occasion is a small-framed woman who is a non-swimmer.

In the Easy case (where there is no risk to the potential Rescuer) it is likely that most people would consider the situation to be one where there should be duty on the onlooker to intervene. In other words there should be a duty to rescue, and the failure to do so should be classed as an omission and subject to legal sanction.

²⁵⁸ Murphy J, 'Blackmail: A Preliminary Inquiry', *The Monist* 63, (1980) 2

This is the situation in most European countries, and in some US States, and in at least one 'State' in Canada and Australia²⁵⁹ (indeed in some cases, Criminal sanctions apply²⁶⁰).

Conversely in the Hard case (where there is great risk to the potential Rescuer), it is likely that most people would consider the situation to be one where there should be no duty on the onlooker to intervene. In this scenario there should be no duty to rescue; the decision not to rescue should not be classed as an Omission; and there should be no sanction whatsoever.

This however is the point at which commentators seem to leave the matter, and propose that English Law might introduce a legal duty to carry out Easy Rescues, but no legal duty for Hard Rescues. However, I believe this is again an oversimplification, and that there is a third class of Rescue that should be considered: "Intermediate Rescues" (i.e. this time the person in the water is a larger (14 year old) adolescent, the onlooker has learnt to swim and the river whilst not overly deep, is moderately flowing). It is likely in this situation that there would be no consensus among society, and the onlooker would not be expected to put themselves at risk. In other words it would be entirely reasonable if the onlooker remained in Stasis. There would be no Duty to Rescue, and no legal sanction if the onlooker stands back (this is not to say that in other situations different conclusions might be drawn i.e. there might be moral criticism if subsequently the adolescent gets into difficulty trying to extricate him/herself).

²⁵⁹ Op Cit, Note 183

²⁶⁰ French Criminal Code S63(2)

4.6 Correlating a Three Dimensional Approach between Conduct and Rescues

My earlier investigation of Causation relied on the work of Hart and Honore, who insisted that causal questions should be limited to factual causation, with any policy aspects being deferred to the secondary stage of reviewing Responsibility. My preference was then to adopt the NESS test devised by Hart and Honore to determine whether any particular factor is causally significant.

The next step was to consider how Responsibility for Causing events is attributed to individuals, and the Harm Principle defined by Joel Feinberg (as the setting back of an interest) was my preferred tool for this task, backed up by a recognition of various excusing factors e.g. capacity (in its various guises).

These two tests of Causation and Responsibility were then considered in relation to Omissions and the so called Acts and Omissions Doctrine, which (whilst disputed) is still widely accepted as generally valid. In particular the special class of Failures to Rescue was considered and it was shown that the NESS test and the Harm Principle also explain why certain types of Omission (especially the Failure to attempt Easy Rescues) can be treated as deserving of Sanction.

However, I have asserted that a conventional approach to these issues perhaps obscures some more complex dynamics. I have challenged the general standpoint that there are only Acts and Omissions, and demonstrated that "Omission" as a term is not neutral and that if a bystander simply remains passive in the world this can simply be a question of Stasis, not Omission.

I have also challenged the approach whereby Rescues are generally separated into two classes: Easy and Hard, and have suggested that a third category should also be introduced in this area: Intermediate Rescue.

I have done this because adopting the three categories of Act, Omission, and Stasis; and three classes of Rescue: Easy, Intermediate, and Hard, enables a more sophisticated analysis of duty to rescue situations: 'Easy Rescues' which can be considered as an omission and probably warranting a duty backed by the Criminal Law; 'Intermediate Rescues' which are possibly cases of Stasis and warranting at most a Civil sanction, and more probably only moral censure; and 'Hard Rescues' warranting no action or sanction at all.

This three dimensional analysis of Causation/Responsibility, coupled with a three dimensional categorisation of Rescues demonstrates that it is not straight-forward to simply define different types of Failure to Rescue as either matters for the Law or matters of Morality. This approach therefore contributes to the general theme of my thesis, that there is no necessary connection between Law and Morality. The idea that some un-attempted Rescues (Hard Cases) should involve neither Legal nor Moral Sanction; the idea that some un-attempted Rescues (Intermediate Cases) may or may not involve either Legal or Moral Sanction; and the idea that some cases of un-attempted Rescues (Easy Cases) should definitely involve a Legal Sanction, clearly reinforces the principle that a separation between Law and Morality should be maintained, as this enables the moral and legal aspects to be assessed, case by case, without distortion. The importance of maintaining this separation becomes even more important when (referring back to Chapter 3 of this thesis) the impacts of Moral Luck are considered in the Rescue scenario. The vagaries introduced by Luck throw into question whether even Moral sanctions should be directed at potential Rescuers, let alone Legal ones.

4.6.1 Moral Luck and Rescue Scenarios

Having arrived at the conclusion in Chapter 3 that Moral Luck is both very real and very helpful in the medical arena, it is helpful to indicate how it affects First Aid Rescuers (who are also within the Medical sphere): the impact on First Aiders being fundamental to my thesis.

In the First Aid Rescuer context, the impact of Moral Luck manifests itself in various ways and the key elements of interest to me are the bad luck in the circumstances that have to be faced (i.e. the causal chain of events which have created the emergency which has to be dealt with), and the bad luck in the possible outcome that results (i.e. in terms of whether the rescue turns out to be successful or not).

Given these ways in which Moral Luck may affect the situation, questions of whether the first aider should attempt a rescue, and the degree to which (if the rescue goes wrong) they should be responsible to the rescuee (or his/her family) are further examples of difficult moral dilemmas that often have to be faced. However, these Moral Luck implications can be considerably nullified, if the techniques advocated by Donna Dickinson are applied.

In the first case, the question is really: given the bad luck that has arisen to create the emergency, should the rescuer attempt a rescue or not? The rescuer may consider that they are in a dangerous situation and hence face the dilemma of either putting themselves in danger if they respond, or risk the censure of Society, if they do not intervene when the general opinion is that they should have done. In this context it is helpful to reduce the scope for luck to make an impact by attempting to apply a measure of control to the situation, and more particularly - probability theory.

Thus by weighing up the risks involved, the rescuer can, to a large degree eliminate the uncertainty that exists. The degree of danger posed by the emergency can be assessed, and if the risk is clearly too great (i.e. the Rescue is a Difficult Rescue), then it would not be unreasonable if a decision was taken not to attempt a rescue.

The application of probability theory and risk analysis would therefore insulate a would-be rescuer from censure, and his/her bad luck in being present at the scene of an emergency would thereby be avoided (with the proviso, of course, that sometimes the immediacy and intensity of the Emergency may prevent a risk analysis from being carried out at all).

In the second case, the rescuer might intervene (the Rescue being less difficult, albeit still with some risk), but the rescue might turn out badly (e.g. a First Aider might approach a stricken motorcyclist, and in removing them from the wreckage of a crash they might cause the rescuee's spinal cord to be damaged - resulting in paralysis). This would certainly be bad luck in an outcome sense, and could influence the degree to which the attempt to rescue would be considered as morally correct or not, and whether the rescuer should be subject to a possible claim for negligence. In this context two control measures could have been applied: (1) *Probability Theory* i.e. was the probability that the rescuee might be injured by the rescuer, outweighed by the risk that the rescuee would have been seriously injured (or might even have died in the flames of the wreckage if the rescuer had not intervened), and (2) *Informed Consent* i.e. did the rescuee provide actual consent for the rescue to be attempted, or if say, s/he was unconscious, could consent had been implied (as it no doubt it might have been if the alternative of doing nothing would have resulted in their certain death). Both of these measures: the probability of success, and the possibility of consent, would be likely to provide a defence for

the rescuer if having decided (in a situation of uncertainty) to try to carry out a rescue, the intervention of bad luck causes it to go wrong.

4.6.2 Moral Luck and the Protection of Rescuers

The above aspects aside for the moment, I maintain that there is a duality to the impact of Moral Luck in Rescue scenarios. If despite the uncertainties caused by Luck, a Good Samaritan 'goes out on a limb' for Society and attempts a Rescue, then I believe if Luck then plays a further part, and the Rescuer is injured in the process, then it is a moral imperative that Society (and the Law) should act to protect the Good Samaritan from suit, unless his actions were so unreasonable as to have amounted to Gross Negligence.

In a similar manner, if in attempting a rescue, the Rescuer confronts Bad Luck and is him/herself injured in the process (or they suffer losses or damage to their property etc.), then again it would seem a moral imperative that Society (and the law) should again provide protection (on this occasion by way of compensation).

4.6.3 Moral Luck, Rescues, and Responsibility

Moving to the allocation of Responsibility in Rescue scenarios, the application of Moral Luck facilitates a further degree of clarity in terms of categorising both the nature of human conduct involved, and the nature of Rescues themselves. This clearly interacts with my different/ novel approach in Sub-Sections 4.4 above, where I suggest that Conduct in Rescue scenarios should be separated into three categories (Acts, Omissions and Stasis) rather than the traditional two (Acts and Omissions), and also with the introduction of the idea in Sub-Section 4.5 that Rescues should be separated into three Categories (Hard, Easy and Intermediate) rather than the usual two (Easy and Hard).

With the reintroduction of Moral Luck, it is possible to combine all three elements (type of Conduct, type of Rescue, and type of Luck) into an over-arching categorisation of responsibilities. An informative way of demonstrating the interactions at play is via the construction of a suggested Responsibility matrix:

Type of Rescue/ Type of Conduct	Hard Rescue (High impact of Bad Luck)	Intermediate Rescue (Moderate impact of Bad Luck)	Easy Rescue (Low impact of Bad Luck)
Act	a) Action taken despite, no Responsibility b) High Public Acclaim! <u>c) Society responsibility to protect the Rescuer from Suit/Loss</u>	a) Action taken, and No Responsibility if the Rescue is near the Hard end <u>b) Moral Responsibility may arise if Rescue is near the Easy end</u> c) Society should act to protect the Rescuer from Suit/Loss	<u>Moral Responsibility, and for some a Legal Responsibility</u> c) Society should act to protect the Rescuer from Suit/Loss
Omission	Not an Omission and hence no Responsibility, neither Moral, nor Legal	No Responsibility if the Rescue is near the Hard end <u>Moral Responsibility, if the Rescue is near the Easy end</u>	<u>Moral Responsibility, and for some a Legal Responsibility</u>
Stasis	No Responsibility, i.e. neither Moral, or Legal	No Responsibility i.e. neither Moral, or Legal	<u>Moral Responsibility, and for some a Legal Responsibility</u>

Hard Cases

If the individual acts and intervenes to carry out a Rescue in Hard cases, then this is done even though there is no Responsibility to intervene. The Rescuer is likely to attract High Public Acclaim. Luck (especially Bad Luck) plays a significant part in the scenario, and the State has a moral duty to protect the Rescuer from being sued (unless s/he was grossly negligent), and provide compensation in cases of injury or loss.

By contrast if a bystander does not intervene in a Hard Rescue then I have suggested that this not a case of Omission because there is no pre-existing duty to Act. Indeed, our insights into Moral Luck would indicate that the impact of Luck (and especially Bad Luck) is so pervasive that it would be unreasonable to expect anyone to intervene, and hence there should definitely be no Legal responsibility and also no Moral responsibility.

As suggested previously, someone who remains in Stasis neither Acts, nor Omits to Act, and in Hard cases this is entirely acceptable

Intermediate Cases

The individual stepping forward in an Intermediate type of Rescue is again doing so without this being a Responsibility (although the 'Easier' the type of Rescue becomes the more likely it is that Legal Responsibility might begin to accrue). The individual having acted, the State has a moral duty to protect the Rescuer from being sued (unless s/he was grossly negligent), and provide compensation in cases of injury or loss.

Looking at the bystander who does not intervene (possibly an Omission, or a case of Stasis), then I previously left open the question of whether Legal or Moral responsibility should be applied. It is now possible to more fully reflect the implications of Moral Luck i.e. there are likely to be aspects of Circumstantial Luck, Causative Luck, Consequential Luck, and possibly Constitutive Luck which apply. Given all these possible ways in which the individual might have impaired control of the situation, it would again seem that even if we might now consider their conduct to be in the category of Omission, it is still likely that Society would not consider it appropriate to apply Legal responsibility. The question of whether Society might apply a degree of Moral responsibility is less clear, but what can be

said with more certainty is that, the nearer the situation tends towards a Hard rescue the less likely it would be that Moral responsibility might accrue, and the nearer it tends towards an Easy rescue the more likely it would be that Moral responsibility would be imposed.

The person in Stasis will once more have no Legal or Moral responsibility to intervene

Easy Rescues

Finally, if we look at Easy Rescues then the actor who intervenes will suffer no Moral or Legal sanction, but this time his/her reason for intervening could well be because s/he had a distinct Responsibility to do so. By contrast, most of Society would probably impose at least a Moral Responsibility if a bystander remains inactive (whether their non-intervention was a case of Omission, or Stasis). Accepting that an individual should be under some obligation to act in cases of Easy Rescue (whether this is Moral or Legal) then the State has a Moral, and I would suggest Legal, responsibility to protect such a Rescuer from being sued (unless s/he was grossly negligent), and provide compensation in cases of injury or loss.

4.6.4 Particular Responsibilities in respect of Easy Rescues

The preceding paragraphs suggest that everyone should have a Moral duty to respond to Easy Rescues, but some people (myself included) might suggest that this should extend to a Legal duty i.e. it should be an offence to fail to attempt an Easy Rescue. The unusual impact that (Moral) Luck can have in Rescue scenarios, contributes significantly to the explanation as to why there are differing opinions as to criminalising such failure.

In her book, Donna Dickerson welcomed the intervention of Moral Luck in certain Medical scenarios (e.g. in the allocation of donated organs) because it forced practitioners to confront difficult moral issues. We can do the same and use aspects of Luck or Chance to suggest why there might still be an unwillingness to impose legal responsibility in the Easy Rescue scenario. We can suggest that despite elements of Luck having played a part in the situation (not least Circumstantive or Causative Luck) some members of Society will expect the individual to confront these as being low risk complications, and if the individual fails to intervene to save a fellow citizen from harm, then they should suffer Legal Sanctions. However, at present, other members of our Society will recognise that Rescues involve significant elements of Luck (and especially Bad Luck), and hence this factor should absolve the individual of any Legal responsibility. This is likely to be a contributory factor (alongside the reluctance of the English Legal System to criminalise Omissions – and its preference to promote ‘Freedoms’) which has determined that to date there is no Legal Duty to Rescue in English Law.

Different Legal Jurisdictions take a different approach as to whether a Failure to attempt an Easy Rescue should be treated as either a Moral Wrong, or a Legal Wrong. In many cases it is a question of whether the jurisdiction is one based on individual Freedoms (like our Common Law system) or one based on individual Rights (like the Civil Law systems in much of mainland Europe). It is also a matter of the degree to which individual States have been exposed to particularly heinous cases of Failures to attempt Easy Rescues (which cases are usually impacted by elements of Luck - and especially the complications of Bad Luck and Moral Luck).

4.7 Conclusions on Causation, Responsibility, and Failures to Rescue

The outcomes of the preceding sub-sections have demonstrated that different Moral and Legal conclusions have been reached when considering the

philosophical and jurisprudential characteristics of Causation and Responsibility as they arise in Rescue scenarios. These conclusions (and particularly the survival of the Acts and Omissions Doctrine) help us to understand why the English legal system still prefers to maintain a separation between Law and Morality. However they also indicate why some type of good Samaritan Act (at least one protecting would-be Rescuers) should become Law.

Chapter 5 now takes up the discussion, and includes an investigation of the legal position in England and Wales, and how in a departure from the English model, many other 'Western' Jurisdictions have proceeded to introduce Good Samaritan Laws of various kinds.

5. The Law of Rescue in England and Wales, and some other 'Western' Jurisdictions

Earlier in this Thesis I touched somewhat briefly on the law in relation to Rescue in England & Wales and now, in this Chapter, I wish to trace the position in more detail, to demonstrate why it is still the 'Traditional' approach to declare that there is no such defined Law in this Country. This analysis forms the first part of this Chapter 5 of my work, and in the subsequent parts I have considered the position in some other 'Western' Legal Systems, particularly in the United States of America, and to a lesser extent, in Canada, and Australia (i.e. in other English Law based jurisdictions). I have also briefly considered the position in France and Germany (which have Good Samaritan Laws) which is interesting given the growing (until recently) impact of European Law on English Law.

As a preliminary however, I would like to expand on the approach that I have been taking in this thesis: that in considering the inter-relationship between Law and Morality as this applies to individuals confronted with Rescue situations, there are three types of what are often termed 'Good Samaritan Laws': (1) A Law of Rescue in terms of a Duty on Individuals to Rescue others (Legal Obligations of 'Good Samaritans'); (2) A Law of Rescue in terms of the Protection of Rescuers who respond to emergencies (Legal Protection of 'Good Samaritans'); and (3) A Law of Rescue in terms of providing Rescuers with a right to recover for any Injuries or Losses incurred through carrying out a Rescue (Legal Compensation of 'Good Samaritans').

The three laws could be considered as the 'Triumvirate of Good Samaritan Laws' and I have taken this approach because in my view there is a kind of 'Hierarchy of Needs' in terms of Motivating individuals to act as Rescuers when fellow citizens are in danger. In doing this I am pursuing a similar system of categorisation which

Frederick Herzberg applied in his famous Hierarchy of Needs in terms of employee motivations²⁶¹. In summary Herzberg's research indicated that in terms of motivating human beings to do things, some elements are simply 'hygiene' factors i.e. basic comfort factors (e.g. an adequate working environment) which are not particularly motivating (unless they are entirely absent); and other more 'aspirational' factors (e.g. recognition) which are highly motivating if they are encouraged. If this type of approach is applied to the motivation of Rescuers it might be suggested that a basic legal environment is essential to encourage would-be rescuers to act. However, beyond this there would be the 'higher' ideals of 'Good Citizenship' (e.g. public spiritedness or bravery etc.) which would inspire people to act. This latter idea embraces the Moral Sphere, and the influences of Moral Luck have been highlighted in earlier Chapter of this work.

In this sense it can be argued that there is a hierarchical structure in terms of how individuals might be motivated to respond as a Rescuer in emergency situations: (1) If a person knew that if they responded to an emergency, they would be compensated for any injury or loss, this would provide one level of motivation. If then (2) the person knew that if things turned out unexpectedly they would be protected from suit, this would provide another level of motivation. Further (3) if they knew they could be prosecuted if they did not respond to an Easy Rescue, this would provide the highest level of motivation.

I have therefore adopted this Triumvirate approach to reviewing Good Samaritan Laws/ Laws of Rescue in, first England and Wales, and then in other jurisdictions.

²⁶¹ Herzberg F (1959) 'Motivation to Work' in *One more Time: How do You Motivate Employees* (Harvard, Harvard Business School Press 2008)

5.1 The Law of Rescue in England and Wales

5.1.1 The Law of Rescue in terms of any Duty to Rescue

Previously in this work I stated that the position in England and Wales, in relation to the Law of Rescue was ambiguous, and I did this because whereas the considered opinion is that there is no Duty to Rescue in our jurisdiction²⁶², there are undoubtedly situations where distinct classes of individuals are legally obliged to help others in distress e.g. the State Rescue Services (or others under a special obligation i.e. parents). However, these 'special' types of scenario are not the focus of my research, and hence the remainder of this Chapter will be concerned with Rescue more generally i.e. with members of the general public as rescuers.

In the first instance, there is no Statutory Offence of Failure to Rescue, and in addition there is no identified Common Law Offence. Hence there is no Criminal Law Duty to Rescue in this Country.

Turning to any possible Civil Law duty, the textbook position is entirely straightforward, and typically, Markesinis and Deakin in their work 'Tort Law' confirm that in English Law there is an "absence of any general duty to come to the rescue of another who is in a situation of danger"²⁶³. This conclusion is based on the long standing principle in our Jurisdiction, which has been outlined earlier in this work, that generally there is a reluctance to impose liability for Omissions. It also flows from the earlier common law position whereby there was no positive obligation to assist a stranger, nor to concern oneself with the impact of your actions on a stranger unless the law specifically required you to do so (e.g. if you created a nuisance).

²⁶² Op Cit, Note 5

²⁶³ Markesinis B and Deakin S, *Tort Law* (Oxford, Oxford University Press 1999)

Tort Law is however regularly evolving, and the general categories of Negligence recognised by the law have gradually expanded. However, the position regarding Omissions (i.e. that they are not generally actionable) still remains largely unchanged (unless Statute has prescribed otherwise). Five particular legal cases can be referred to in tracing the evolution of the law of negligence, the earliest arising from around the middle of the 19th Century, and the latest towards the end of the 20th Century (the most informative of which is, as it is in relation to many other aspects of Tort Law, the case of *Donoghue v Stevenson*):

Gautret v Egerton (1867)

Donoghue v Stevenson (1932)

Home Office v Dorset Yacht Co Ltd (1970)

Anns v Merton London Borough Council (1978)

Stovin v Wise (1996)

5.1.1.1 *Gautret v Egerton* (1867)²⁶⁴

Gautret appears to be the earliest case which confirmed that there is no legal duty to take positive steps to preserve the life of persons who may be in danger.

In this case the defendant, *Egerton* was the owner an area of land on which numerous waterways and docks were sited. The plaintiff, *Mr Gautret* was legally travelling on the land and fell into one of the docks and died from drowning. *Mr Gautret's* wife sought to establish a duty on *Egerton* to have taken positive steps to protect her husband. However, the Judge (*Willes*) is recorded as stating that in English Law *"there is no duty to do anything, but there is a duty to abstain from doing anything that would injure"*. He is also referred to as saying *"no action will lie against a spiteful man who seeing another running into a position of danger, merely*

²⁶⁴ *Gautret v Egerton* (1867) L R 2, C P 371

omits the warning". The upshot of this was that as Mrs Gautret could not prove that there was any positive duty, obliging Egerton to act, she had no legal redress. In effect there was no recognised Tort which applied to her husband's case and hence there was no cause of action.

This reluctance of English judges to expand the classes of action within the law of Tort continued, and in general the only recognised categories were: Trespass to the Person, Trespass to Land, Nuisance, Defamation, Interference with Another's Goods, Interference with Business Interests, and Allowing the Escape of Dangerous objects (The Rule in Rylands v Fletcher). Indeed, it was very unusual for new torts to emerge around that time, and Rylands v Fletcher itself only arose in 1868²⁶⁵. This situation continued with little if any change until 1932 and the monumental case of Donoghue v Stevenson, and Lord Aitkin's famous "Neighbour Principle". I therefore intend to devote a considerable amount of attention to this highly pivotal case in this Chapter of my work.

5.1.1.2 Donoghue v Stevenson (1932)²⁶⁶

The facts in Donoghue v Stevenson are well known, and concerned Mrs May Donoghue who decided to have a drink with a female friend in a café in Paisley (near Glasgow), Scotland on 26 August 1928. This and some of the following information has been sourced from a number of the websites which have been created in celebration of the case and particularly the "Donaghuev" site²⁶⁷.

The friend purchased a Ginger Beer drink for Mrs Donoghue, and a Pear drink for herself. The Ginger Beer which was provided to Mrs Donoghue came in a brown opaque bottle and after consuming a considerable part of the ginger beer, Mrs

²⁶⁵ Rylands v Fletcher (1868) LR 3 HL 330

²⁶⁶ Donoghue v Stevenson [1932] AC 562 (HL)

²⁶⁷ www.Donoghuev.info last accessed 15.12.2012

Donoghue had a top up, only to find the remains of a partly decomposed snail. She suffered shock and illness from the nauseating discovery that she had already drunk other parts of the snail, and subsequently commenced legal action.

It was at this stage that Mrs Donoghue came up against a number of legal problems. Her initial approach was to try to sue the café owner, who had sold the ginger beer, but she had no direct contractual relationship with him, as it was not her, but her friend who had purchased the drink (the established principle being that there had to be privity between the parties for a plaintiff to sue in negligence: *Winterbottom v. Wright* (1842)²⁶⁸). Therefore, the only option open to her was to try and sue the Manufacturer of the drink, Stevenson, for Negligence. However, she faced a similar problem as before, in that in order to establish negligence against the defendant, she would have to show there was a contract in place between the parties which had been performed negligently.

Hence just as Mrs Donoghue could not prove an actionable link with the café owner (she had no contract with him), she also found that she had no action against the Manufacturer, Stevenson (she had no contract with him either).

The situation therefore looked bleak, but her lawyers felt that they had a sufficiently arguable case to pursue the case right up to the House of Lords where it was heard by Lords Buckmaster, Atkin, Tomlin, Thankerton, and Macmillan. Whereas Lords Buckmaster and Tomlin found against Mrs Donoghue, Lords Thankerton and Macmillan (and especially) Lord Atkin found in her favour, and created a seminal moment in the history of English Law, with the creation of the freestanding Tort of Negligence (as opposed to negligent performance of a contract).

The most famous of the speeches was delivered by Lord Atkin and he felt the starting point in analysing the situation was to consider what Society would deem

²⁶⁸ *Winterbottom v. Wright* (1842) 152 Eng. Rep. 402

the appropriate moral position (fully recognising at that stage that moral codes were different from legal codes). He therefore stated at Page 44 in the Judgement that:

“The liability for negligence, whether you style it such ... is no doubt based upon a general public sentiment of moral wrongdoing”. He continued: “But acts or omissions which any moral code would censure cannot, in a practical world, be treated so as to give a right to every person injured ... to demand relief”. He went on to say: “In this way rules of law arise which limit the range of complaints and the extent of their remedy”.

In the following, and well known part of his judgement, he expressed what has subsequently become known as his “Neighbour Principle”, and in expressing the same he borrowed heavily from the Parable of the Good Samaritan, which merits being repeated here in full (I have underlined the references to neighbourliness):

25 A teacher of the Law came up and tried to trap Jesus. “Teacher,” he asked, “what must I do to receive eternal life?”

26 Jesus answered him, “What do the Scriptures say? How do you interpret them?”

27 The man answered, “Love the Lord your God with all your heart, with all your soul, with all your strength, and with all your mind”; and ‘Love your neighbour as you love yourself.’”

28 “You are right,” Jesus replied; “do this and you will live.”

29 But the teacher of the Law wanted to justify himself, so he asked Jesus, “Who is my neighbour?”

30 Jesus answered, “There was once a man who was going down from Jerusalem to Jericho when robbers attacked him, stripped him, and beat him up, leaving him half dead. **31** It so happened that a priest was going down that road; but when he saw the man, he walked on by, on the other side. **32** In the same way a Levite also came along, went over and looked at the man, and then walked on by, on the other side. **33** But a Samaritan who was travelling that way came upon the man, and when he saw him, his heart was filled with pity.

34 He went over to him, poured oil and wine on his wounds and bandaged them; then he put the man on his own animal and took him to an inn, where he took care of him. **35** The next day he took out two silver coins and gave them to the innkeeper. ‘Take care of him,’ he told the innkeeper, ‘and when I come back this way, I will pay you whatever else you spend on him.’ ”

36 And Jesus concluded, “In your opinion, which one of these three acted like a neighbour towards the man attacked by the robbers?”

37 The teacher of the Law answered, “The one who was kind to him.”

Jesus replied, “You go, then, and do the same.”²⁶⁹

Lord Atkin extended the story of the Good Samaritan and made the following remarks:

²⁶⁹ Op Cit, Note 2

“The Rule that you are to love thy neighbour becomes in law, you must not injure your neighbour, and the lawyer’s question who is my neighbour? receives a restricted reply”²⁷⁰.

“You must take reasonable care to avoid acts or omissions [my emphasis] which you can reasonably foresee would be likely to injure your neighbour”²⁷¹

“Who, then, in law is my neighbour? The answer seems to be, persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts and omissions which are called into question”²⁷².

Lord Atkin then expanded on this principle of ‘Neighbourliness’ and demonstrated that sufficient ‘proximity’ existed between Mrs Donoghue and the manufacturer, Stevenson to make the latter legally liable to the former. In so doing, he and his two colleagues who found in favour of Mrs Donoghue, thereby established our modern Law of the Tort of negligence, which has now been extended in so very many ways.

From the foregoing it might be considered that Donoghue v Stevenson paved the way for the creation of a Tort of ‘Failing (neglecting) to Help a Neighbour in Distress’. However there have been no cases since 1932 in which the courts have been prepared to take the necessary additional step to extend the law of tort in this way. The door does however remain open but there still seems to be a general reluctance to create further laws which would extend the categories of legal liability for omissions (and the Failure to Rescue is in many ways, a major type of omission).

²⁷⁰ Op Cit, Note 266 at page 44

²⁷¹ Ibid

²⁷² Ibid

5.1.1.3 Home Office v Dorset Yacht Co Ltd (1970)²⁷³

Having concluded the last sub-section in a rather pessimistic manner, it can be suggested that Lord Atkin had laid down a challenge to subsequent judges to ensure that the law continued to develop to provide redress where it was just and equitable to do so. Another quotation from his famous judgement reinforces this:

“I do not think so ill of our Jurisprudence as to suppose its principles are so remote from the ordinary needs of civilised society, and the ordinary claims it makes upon its members as to deny a legal remedy where there is so obviously a social wrong”²⁷⁴.

However, it took almost 40 years before a further significant development in the law occurred in Home Office v Dorset Yacht Co Ltd, which can be considered as a case in which the courts went a step further to impose liability where a defendant failed to take steps to intervene to prevent harm to a third party.

In the Dorset Yacht case, the House of Lords held the Home Office liable for not intervening to prevent seven Borstal boys, who were under its control, from causing damage to the Yacht Company’s property. The facts disclosed that the seven boys had escaped from a detention centre, and up until this time the State had never been held liable for escaped prisoners. There were various policy reasons for this, but of particular interest for this work was the point argued by the Home Office lawyers which was that the failure to prevent the boys escaping, or the failure to recapture them sufficiently promptly, were both Omissions, and the law did not generally impose a liability for Omissions. The main policy reasons for not extending liability were expressed by Lord Denning in his Judgement in the Court of Appeal²⁷⁵:

“Many, many a time has a prisoner escaped, or been let out on parole, and done damage. But there is never a case in our law books when the prison authorities have been liable for it. No householder who has been burgled, no person who has been wounded by a criminal, has ever recovered damages from the prison

²⁷³ Home Office v Dorset Yacht Co Ltd [1970] UKHL 2

²⁷⁴ Op Cit, No. 266 at Page 46

²⁷⁵ Home Office v. Dorset Yacht Co Ltd [1970] AC 1004

authorities ...; The householder has claimed on his insurance company, and the injured man can claim on the compensation fund. None has claimed against the prison authorities. I would be reluctant to alter this, if by so doing, we should hamper all the good work being done by our prison authorities”.

However, the House of Lords found in favour of the Yacht Company, and Lord Reid delivered a key speech including the following extract:

“...there has been a steady trend towards regarding the law of negligence as depending on principle so that, when a new point emerges, one should ask not whether it is covered by authority but whether recognised principles apply to it. Donoghue v. Stevenson may be regarded as a milestone, and the well-known passage in Lord Atkin's speech should I think be regarded as a statement of principle. It is not to be treated as if it were a statutory definition. It will require qualification in new circumstances. But I think that the time has come when we can and should say that the principle ought to apply unless there is some justification or valid explanation for its exclusion”²⁷⁶.

Consequently, it was held that that the Home Office officers should have foreseen that if they allowed seven Boys to escape Borstal, then the escapees were very likely to cause damage. Hence the state as the defendant could be considered to owe a duty of care to protect third parties from the effects of their negligence in allowing the escape.

This judgement was considered to have taken the law of negligence for omissions a considerable way forward, and Dias and Markesinis writing in their textbook, ‘Tort Law’²⁷⁷ stated:

“It would seem that the law is moving towards a principle of liability for omissions that whenever a reasonable man in the defendant’s position would have acted, then the defendant should be liable for damages resulting from inaction. Such a test would exclude liability where, for example the defendant is physically unequal to performing the necessary action, such as rescuing a drowning man if he is not a strong swimmer [my emphasis] ... The test of reasonableness in the circumstances should provide a sufficient control on liability just as it does in other aspects of liability for negligence”.

Given this decision in the House of Lords it seemed possible that there might be further scope for the development of the law to provide a remedy where (unlike in

²⁷⁶ Op Cit, No. 273 at Page 26

²⁷⁷ Dias R and Markesinis B, *Tort Law* (Oxford, Oxford University Press 1988)

the Dorset case – when the Home Office directly caused the risk) a person suffers loss when a third party omits to protect them from more indirect risks. This type of scenario arose in the Anns case which follows.

5.1.1.4. Anns v Merton London Borough Council (1978)²⁷⁸

In this case Merton BC approved the building of a block of flats in 1962 (the plans for which showed Foundations of at least 3 feet in thickness. Merton's byelaws provided the Council with the Power (but no Duty) to inspect the foundations before the groundworks were covered over. The flats were finished later that year and sold on long leases. The plaintiffs bought some flats in 1965, but by 1970 major subsidence and cracking developed. On investigation it was found that the foundations were inadequate (being only 2 feet 6 inches in depth). The Plaintiffs therefore sued the Council for not having inspected the Foundations in 1962 (any question of limitation being overcome, given that the defect was latent, and only discovered when excavating around the area of the problem).

The matter which the House of Lords was asked to consider was whether the Council had any liability to strangers (e.g. subsequent purchasers like the Plaintiffs) and whether there was any legal obligation at all, given the Council's Byelaws had not imposed a duty to inspect the Foundations, only a power to do so. The case was different from the Dorset Yacht case as the Council had no duty to require its staff to prevent potential harm (unlike the Home Office which was held to have a direct duty to prevent the Borstal boys from escaping).

The House of Lords found unanimously in favour of the Plaintiffs, and Lord Wilberforce provided the leading Judgement. In particular he stated:

“Through the [series] of cases in this House ... the position has now been reached that in order to establish that a duty of care arises in a particular situation, it is not

²⁷⁸ Anns v. Merton London Borough Council [1978] A.C. 728

*necessary to bring the facts of that situation within those of previous situations in which a duty of care has been held to exist. Rather the question has to be approached in two stages. First one has to ask whether, as between the alleged wrongdoer and the person who has suffered damage there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter, in which case a prima facie duty of care arises. Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise*²⁷⁹.

This was a major advance in the law of negligence and was considered to have introduced a simple two stage test: (a) was there a sufficient relationship of proximity (neighbourliness) between the parties whereby harm could be foreseen to a plaintiff stranger if the defendant failed to act (i.e. ignored a duty of care), and (b) was there any overriding public policy reason to displace such duty of care. On this basis, the imminent recognition of a Duty to Rescue might have been expected, had a sufficiently compelling case have come before the courts.

However, any optimism in this respect was premature, and the next major case on omissions did not occur until 1996, when a significant reversal took place.

5.1.1.5. Stovin v Wise (1996)²⁸⁰

The case of Stovin v Wise was specifically referred to by Jeroen Kortman in his book "Altruism in Private Law – Liability for Non-Feasance"²⁸¹, and in focusing his work on Private Law he reinforces a very important factor in Stovin v Wise regarding the difference between Public Law obligations and Private Law liabilities. In the period following Anns v Merton Borough Council there was considerable criticism that a Public Authority (even if it had fallen short in a Public Law sense) should not as a consequence be forced to pay a private person compensation in a

²⁷⁹ Ibid

²⁸⁰ Stovin v Wise [1996] UKHL 15

²⁸¹ Kortman J, *Altruism in Private Law – Liability for Non-Feasance and Negotiorum Gestio* (Oxford, Oxford University Press 2005)

private law action (especially if in imposing the Public Duty, Parliament had not intended to create any private law repercussions).

The decision in *Anns v Merton Borough Council* was therefore treated very much as a case decided on its own particular facts, and it was viewed as an unwelcome 'high watermark' in the law of negligence. It was not therefore a complete surprise when *Stovin v Wise* was decided in a contrary manner.

The facts in *Stovin v Wise* were that Mr Stovin was driving his motorcycle when he was struck by a car driven by Mrs Wise exiting (what was for her) an almost 'blind' junction. Norfolk County Council were joined as defendants because it was alleged that they should have taken action to remove a bank of earth on the land adjoining the highway which obscured a clear view of oncoming traffic at the junction. Mr Stovin won his case at first instance, and in the Court of Appeal (following *Anns*), but the Council decided to Appeal the matter to the House of Lords hoping that the controversy during the intervening years might lead to a different result.

On the facts, the situation was very similar to the position in *Anns*, i.e. a Local Authority had failed to act to prevent harm to a private individual. However, in this case there was even less of a link to Mr Stovin in that the Council had not had any part in creating the situation, whereas in *Anns* the Council had given approval for the building of the block of flats in the first place (in *Stovin*, the bank of earth involved had always been there, it was actually situated on private land adjoining the Council's Highway).

This might have been a basis for the House of Lords to treat *Stovin* differently from *Anns* but the majority of their Lordships only had a temporary difficulty in applying the first stage of Lord Wilberforce's two stage test (from *Anns*). Whilst the Council

had no obligation to remove the bank of earth, they had a power to ask the landowner to do so (or do it themselves and recover the cost). However, this was not enough in itself to impose a duty on the Council (as unlike in *Anns* they had no involvement at all in creating the hazard). However, and unfortunately for the Council, at least one year before the accident they had decided to exercise their power of requiring the removal of the bank, but had not followed this up due to an error. The House of Lords therefore concluded that a Duty of Care had arisen.

It was therefore then necessary to look at Lord Wilberforce's second test i.e. as to whether there was any Policy reason why the duty of care should be overridden. The main speech in the House was given by Lord Hoffman (with Lords Goff and Jauncey agreeing with him, and Lords Nicholls and Slynn dissenting). His main line of argument was to stress that Parliament had only provided the Council with a Power (and not imposed a duty) in relation to the Highway, and if Parliament had intended to create a duty (and possibly private law consequences) then they would have made the Council's intervention mandatory. He also commented that the law should be very wary of creating Private liabilities, as a consequence of a Public Law duty. He commented that a Local Authority's budget was limited and it would be against public policy if Council's were forced to pay compensation every time it used its discretion and refrained from exercising a power available to it. In effect he was saying that it was more appropriate for a council to use its resources to provide public education, or clear public waste, or maintain public recreation grounds etc, than to pay compensation to private individuals against Parliament's intentions. He also made the point that it was inherent in riding/driving on the highway that there would be hazards that everyone would have to face (i.e. rain, fog, animals in the road etc. etc.). It would be unreasonable to remove every hazard and if people wished to use the roads they would have to do so at their own risk.

The Council's Appeal was therefore upheld and the decision in *Anns v Merton Borough Council* was effectively reversed.

5.1.1.6 Conclusion regarding a possible Legal Duty to Rescue in English Law

Despite the promising line of cases involving *Donoghue v Stevenson*, *Home Office v Dorset Yacht Co Ltd*, and *Anns v Merton Borough Council*, it was a disappointment that *Stovin v Wise* effectively halted the 'march' of Tort Law towards a general duty to assist strangers who find themselves faced with danger (i.e. one which might include a legal duty to Rescue citizens in distress).

What is probably needed if the 'march' is to recommence is an outrageous example of a perfectly fit individual, failing to rescue a vulnerable person, in circumstances where there is absolutely no risk to the potential rescuer, and where the vulnerable person dies as a result (i.e. a case which would cause our collective blood to boil to such an extent that the Government would be moved to create either a Criminal Offence or, more likely, a Civil Law Duty).

The wider possibility of a specific Rescue Law being created in English Law is covered in the next major Chapter (6) of this work. However, referring back to *Donoghue v Stevenson*, it is worth mentioning that whilst the Common Law had been amended by the case, it took another 50 years before relevant Legislation was enacted, being the passing of the Sale of Goods Act 1979 (and eventually the Consumer Protection Act 1987 - albeit this followed the prompting of a European Directive). The Wheels of Statutory intervention turn very slowly, and we may have to wait a long time for the heinous example to arise which might prompt a Legislative approach to prescribing a Legal Duty to Rescue.

5.1.2 The Law of Rescue in terms of the Protection of 'Rescuers'

The law in this area is also somewhat undeveloped (although the Social Action, Responsibility and Heroism Act 2015 has provided some very recent assistance). However, as will be seen in Chapter 6 of my thesis, this so-called 'SARAH' Act does not exempt Heroes (Rescuers?) from liability, it simply encourages Courts towards a more favourable interpretation regarding any duty of care involved.

In terms of the common law (and restrictive interpretations of the duties of care) I have been able to identify five cases which have some bearing on the matter:

Daborn v Bath Tramways Motor Co Ltd (1946)

Watt v Hertfordshire County Council (1954)

Bolam v Friern Hospital Management Committee (1957)

Cattley v St John Ambulance (1988)

Day v High Performance Sports Ltd (2003)

5.1.2.1 Daborn v Bath Tramways Motor Co Ltd (1946) 2 All ER 333²⁸²

The first case I have identified involved the driving of an Ambulance during World War II. The defendant's driver had been driving a left hand drive Ambulance which displayed warning signs to this effect (there were no right hand drive vehicles available due to war time pressures) As a consequence she had been unable to provide the usual hand signals to alert other road users as to changes in the vehicle's direction. The Plaintiff was injured and alleged that the Ambulance Company had breached the duty of care which they owed to him.

The main decision in the case was given by Asquith L J who stated:

"the standard of reasonable care is that which is reasonably to be demanded in the circumstances. A relevant circumstance to take into account may be the

²⁸² Daborn v Bath Tramways Motor Co Ltd (1946) 2 All ER 337

*importance of the end to be served by behaving in this way or in that. As has often been pointed out, if all the trains in this country were restricted to a speed of 5 miles per hour, there would be fewer accidents, but our national life would be intolerably slowed down. The purpose to be served, if sufficiently important, justifies the assumption of abnormal risk ... In considering whether reasonable care has been observed, one must balance the risk against consequences of not assuming that risk*²⁸³.

The court therefore decided that the defendants were not liable as the importance/desirability of their actions outweighed the detriment (or any duty of care) to the plaintiff. [This is a very interesting outcome and the concept of 'desirable activity' eventually found its way into Legislation 60 years later, in the Compensation Act 2006, and the need to balance risk against the consequences of deterring Socially Responsible Action (or Heroism) found its way into the SARAH Act 2015 (I will refer to these two pieces of Legislation in more detail in the penultimate Chapter of this thesis).

5.1.2.2 Watt v Hertfordshire county Council (1954)²⁸⁴

'Daborn' was succeeded eight years later by the Watt case which involved the Fire service rushing to save someone who was trapped under a heavy vehicle following a road crash. The fireman involved had to transport a jack to the scene, but the normal HGV vehicle was not available and so he transported the jack in an ordinary truck in which it could not be so well anchored. The jack broke free and injured the plaintiff. The main judgement was given by Denning L J who again found that the emergency circumstances excused the defendants from liability, i.e. "*Saving Life and Limb justified a considerable risk being taken*"²⁸⁵.

However, Lord Denning went on to state an important qualification: "*fire engines ambulances and doctor's cars should not [just] shoot past the traffic lights when*

²⁸³ Ibid

²⁸⁴ Watt v Hertfordshire County Council (1954) 2 All ER 368

²⁸⁵ Ibid at 370

*they show a red light. That is because the risk is too great to warrant the incurring of the danger*²⁸⁶.

Nonetheless Lord Denning restated the general principle i.e. *"It is always a question of balancing the risk against the end"*²⁸⁷. He thereby, once again, emphasised the importance of the 'Desirable Activity', and 'Social Responsibility' concepts.

5.1.2.3 Bolam v Frien Hospital Management Committee (1957)²⁸⁸

The two previous cases are instructive in terms of the Court's approach to 'Rescuers' operating under emergency conditions. However, it is more relevant for my project to consider the Court's response to situations where Good Samaritan's provide personal attention to people in distress or suffering injury.

In the Bolam case the person in distress was a patient in a mental hospital who was being treated for severe depression, with various procedures including Electro Convulsive Therapy. This treatment involved passing an electric current through the patient's brain to create an artificial seizure which could have the effect of displacing their depression.

In Mr Bolam's case he was not strapped down whilst being treated, and as a consequence he flailed around when he was shocked, and suffered various injuries including a serious fracture of his pelvis. The Hospital was then sued for negligence.

²⁸⁶ Ibid at 371

²⁸⁷ Ibid

²⁸⁸ Bolam v Frien Hospital Management Committee (1957) 1 WLR 582

During the Hearing the Court heard that there were differing medical opinions about the way Mr Bolam's treatment was carried out: some considered that restraints were essential, whilst others testified that restraints should not be used in such cases as the actual practice of strapping people down increased the likelihood of fractures.

The Bolam Hearing was conducted before a jury, and the judge who summed up the case for them was McNair J. He made a number of comments including:

*"How do you test whether an act or failure is negligent? In an ordinary case it is generally said, that you judge that by the action of the man in the street. He is the ordinary man. In one case it has been said that you judge it by the conduct of the man on the top of a Clapham omnibus. He is the ordinary man. But where you get a situation which involves the use of some special skill or competence, then the test whether there has been negligence or not is not the test of the man on the top of a Clapham omnibus, because he does not have this special skill. The test is the standard of the ordinary skilled man exercising and professing to have that special skill. A man need not possess the highest skill at the risk of being found negligent ..."*²⁸⁹

This has since become known as the 'Bolam Test' and established the general principle that has been subsequently applied to all allegations of medical negligence.

Interestingly the judge in the Bolam case also went on to say:

*"It is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art. That is a perfectly accurate statement, as long as it is remembered that there may be one or more perfectly proper standards; and if a medical man conforms with one of those proper standards then he is not negligent ..."*²⁹⁰

Given that the doctors at the Frien Hospital had performed the treatment on Mr. Bolam in accordance with the views of one major section of medical opinion, then the court held that they had not been negligent. However, if they had acted less

²⁸⁹ Ibid at 277

²⁹⁰ Ibid

reasonably, or recklessly, or worse, in a grossly negligent manner, then they would have clearly been found liable.

5.1.2.4 *Cattley v St John Ambulance* (1988)²⁹¹

The *Cattley* case is of particular interest to me in my research, in that I am the General Counsel for St John Ambulance (the County's leading First Aid charity) and it was the increasing perception that First Aid Volunteers (Good Samaritans) were vulnerable to being sued for negligence, that led me to commence this project.

The facts in the case were that the Plaintiff, a fifteen year old boy was taking part in a motor bike race, and hit a rut and fell on his back. The First Aiders at the scene were trained volunteers of St John Ambulance. They assessed Mr Cattley and decided that it was necessary to get him to his feet to get him out of danger from other motorbikes, and they helped him to the side of the course. The Plaintiff was then taken to Hospital where it was established that he had some fractured ribs and vertebrae (and some damage to his spinal cord). By the time of the Hearing Mr Cattley was able to walk and move normally, but had a permanent lack of Bowel and Bladder control.

Judge Prosser considered that St John Ambulance owed the Plaintiff a duty of care, but the major issue to be resolved centred on the standard of that duty. The Judge decided to apply the Bolam Test (referred to above) but translated it from the Doctor scenario to a First Aid scenario.

²⁹¹ *Cattley v St John Ambulance* (1988) QBD – Unreported, but see Griffiths G L H, 'The Standard of Care Expected of a First Aid Volunteer' *MLR* 53 (1990), p 255

He reiterated the Bolam Principle: 'The appropriate test is the standard of the ordinary skilled man exercising and professing to have that special skill', but he then re-stated it for a qualified First Aider and decided that such a 'specialist' would be negligent *"if he failed to act in accordance with the standards of the ordinary skilled first aider exercising and professing to have that special skill of a first aider"*²⁹².

The next question was therefore whether the First Aiders had met this standard, and the Judge went on to state:

*"if it can be shown that the defendant acted in accordance with the general and approved practice current at the time in question, then he is unlikely to be viewed as having fallen short of the skill required of him. Furthermore even if there is no complete agreement as to what is approved practice, provided he acts in accordance with any practice approved by a responsible body of medical opinion, this will be sufficient"*²⁹³.

The Judge then found that the defendants' approach to the Plaintiff had been in accordance with the latest version of the Industry First Aid Training Manual, as published jointly by St John Ambulance, St Andrews Ambulance, and the British Red Cross Society. In actual fact he stated that the Manual was: *"nothing less than the First Aider's Bible"*²⁹⁴.

The Defendants were therefore found not to have been negligent and the case was dismissed.

This outcome was extremely important for St John Ambulance, and its volunteers, and for first aiders generally, and in addition to reinforcing the Bolam Test in the field of First Aid, it also included elements of the Daborn, and the Watt decisions,

²⁹² Ibid (from the Lexis transcript)

²⁹³ Ibid

²⁹⁴ Ibid

in that the emergency nature of the accident at the Motor bike race was relevant. Furthermore, there were clearly public policy aspects and the Court was keen to ensure that Good Samaritans were not discouraged from stepping forward to help persons in distress (unlike the situation in some other 'Compensation Culture' jurisdictions).

In short, the Court in *Cattley* also recognised that the enthusiastic, and proficient intervention of First Aiders in Emergency situations was another example of the 'Desirable Activity/ Social Responsibility Defences' which Asquith LJ and Denning LJ had previously alluded to in *Daborn*, and *Watt* respectively, and which have now appeared to varying degrees in the Compensation Act 2006, and the SARAH Act 2015.

5.1.2.5 *Day v High Performance Sports Limited (2003)*²⁹⁵

In this case the female Claimant was participating in an indoor wall climb at the Defendant's climbing centre, and as she reached the higher levels she realised that she was not secured with the necessary anchor ropes. She called out for assistance and the Defendant's Manager decided that the best way to rescue her was to guide a neighbouring climber to help her. Unfortunately, the other climber was relatively inexperienced and before the rescue could be completed, the Claimant fell, hit the ground and suffered severe head injuries and brain damage.

The Claimant therefore sued the Defendants for negligence, claiming that the method of rescue was unsuitable, and that the Defendant's Manager had breached a duty of care that was owed to Ms Day, to carry out the rescue to a satisfactory standard.

²⁹⁵ *Day v High Performance Sports Limited (t/a Castle Climbing Centre) (2003)* All ER

The Judge hearing the case decided as a first principle that there was no duty on the Defendants to attempt a rescue, but having established that a rescue had been commenced, considered that a duty of care to carry out the rescue in an appropriate manner had been assumed.

Nonetheless having taken this stance the Judge also differentiated between what might have been an error of judgment and what might have been negligence. He stressed the fact that in the case under consideration the Manager faced a pressing emergency and that he had needed to make a decision very quickly. The Judge therefore considered that the defendant's actions should not be assessed to the same standard as other action he may have taken if he had had more time to consider all the variety of possible alternative approaches. The Judge therefore decided that the Defendant's actions must be viewed in the emergency context.

Hence the Judge found that even though the Manager had made an error, the error was one of judgment in difficult circumstances, but not an error amounting to negligence.

5.1.2.6 Conclusion in relation Rescue in terms of Protection of Rescuer's

By analysing the series of cases referred to above it can be seen that, in general the Courts are hesitant to conclude that, well-meaning individuals responding in emergency situations, should be found to have been negligent if their interventions turn out to be less than successful. The case of *Daborn v Bath Tramways* established that in emergency situations the standard of any duty of care owed towards a defendant will be at a considerably lower level than might apply in more normal circumstances. However, *Watt v Hertfordshire Co Council* (and the words of Lord Denning) make it clear that this does not create a free for all and that even

in emergency situations a defendant cannot act recklessly and expect the Courts to protect them (e.g. carelessly 'jumping' a red traffic light will still lead to culpability regardless of the emergency situation).

Bolam v Frien Hospital Management Committee transferred these principles into the medical arena, and indicated that when assessing the standard of care applying to Medical Good Samaritans, the test is whether or not the defendant met the standard of the ordinary skilled man exercising and professing to have the special skill that a doctor in his position should have had. The defendant was not expected to have the Absolute skill of the most proficient doctor in that field. The case also indicated that if there was more than one body of medical opinion as to an acceptable treatment for a patient, then it was sufficient that a doctor met one of them.

The case of *Cattley v St John Ambulance* applied the Bolam Test in the area of First Aid, and a similar result arose. In this case it was sufficient if a First Aider applied the procedure set out in the current First Aid Manual published in the sector (even if other First Aid opinion considered that different approaches might be appropriate).

The *Cattley* case was decided in 1988 and reference to the more recent case of *Day v High Performance Sports Limited* re-affirmed that in addition to applying the Bolam Test to 'Rescuers' it was still essential to recognise that in Emergency situations a defendant's actions must be evaluated in that context, and not in the cold light of day, when more time might be available to fully consider all possible risks and options.

It should also be stated that in relation to my particular work, the results of my research of the case law involving the possibility of Volunteer First Aiders being sued for negligence was very sparse (the Cattley case being the only one actually identified and even this was not reported in the main series of law reports). Given this dearth of evidence of First Aid volunteers being sued, a question could be legitimately raised as to why there is such a concern about the possibility of this happening. However, the critical factor is that there is a widespread perception that such Volunteers are regularly sued. It is the widespread perception which creates the mischief, and referring back to my Introduction to this Thesis I quoted the words of Derek Twine, Chief Executive of The Scouts Association who in giving evidence to Parliament stated that: *“69% of his front line volunteers quote the ‘fear of being sued’ as the predominant reason for reducing numbers of voluntary leaders²⁹⁶”*.

It is the chilling effect that this kind of ‘urban myth’ has on volunteering, that originally prompted my research project, and this is the reason why I feel that specific Legislation would be helpful to help dispel the myth, and encourage more people to volunteer as First Aiders and help save more lives. However, I raise this subject in much more detail in the penultimate Chapter (6) of this work (especially in relation to the Compensation Act 2006 and the SARAH Act 2015), and no further consideration of the topic is necessary at this stage.

5.1.3 The law of Rescue in terms of a Rescuer’s right to Recover Losses

This is the third element of the law relating to rescue, and concerns whether the Rescuer can recover compensation for any losses suffered in responding to an emergency, and in the most extreme of cases whether the Rescuer (or indeed their estate) can recover for their personal injuries (or worse, their death).

²⁹⁶ Op Cit, Note 8

There is again no Legislation in English Law which covers this situation, and the traditional position in relation to the general recovery of any outgoings was summarised as late as 1996 in the *Stovin v Wise* case (referred to earlier), where it was stated: *“English Law does not reward someone who voluntarily confers a benefit on another”*²⁹⁷. The position in relation to compensation for personal injury, or death is however more complicated, and there is a certain body of case law covering the situation. The cases that I have reviewed in this respect are:

Cutler v United Dairies (1933)

Haynes v Harwood (1935)

Baker v Hopkins (1959)

Videan v British Transport Commission (1963)

5.1.3.1 Cutler v United Dairies (London) Limited (1933)²⁹⁸

In this case the Defendant’s horses had been unhitched from a milk float and were resting in a field when one of them bolted. The Plaintiff observed the situation and fearing that the horse might cause damage or injure itself he decided to try and bring it under control. Unfortunately, he was unsuccessful and was personally injured. He therefore decided to try to recover compensation from the Dairy in connection with trying to rescue the situation/the horse. However, the court decided that the Dairy owed no duty towards him, and applied the well know maxim: *“Volenti non fit injuria”*: ‘to one who is willing, no harm is done’. The actual words used by the court were:

*“A man is under no duty to run out and stop another person’s horse, and if he chooses to do an act, the ordinary consequences of which is that damage may ensue, the damage must be on his own head”*²⁹⁹.

²⁹⁷ Op Cit, Note 280

²⁹⁸ *Cutler v United Dairies (London) Limited (1933)* 2 KB 297

²⁹⁹ *Ibid* at 303,

The Judge also suggested that the Plaintiff's intervention could not have been reasonably foreseen by the Defendant.

Hence the main rationale for the decision was that the would-be 'Rescuer' had acted voluntarily, and that as there was no imminent danger from the horse it was not reasonably foreseeable that he would intervene. Consequently, the Defendant did not owe the rescuer any duty of care and there was no liability.

5.1.3.2 Haynes v Harwood (1935)³⁰⁰

The case of Haynes v Harwood was a little similar to that of Cutler v United Dairies, and arose just a year or so afterwards.

In the Haynes case the Defendant's horse was left unattended in a street, and adjacent to a group of children playing together. One of the children threw a stone at the Horse which bolted and which then posed a significant threat to a woman and child nearby. The Plaintiff was a policeman who had seen the events unfold, and who rushed forward to try to restrain the horse. Unfortunately, he was injured in the process.

On this occasion the Court found in favour of the Plaintiff, and the Judge made the following comment:

*"a wrongdoer cannot be heard to say that a man is the author of his misfortune because, acting in pursuance of a moral [my emphasis] duty, he attempts to deal with the situation created by the wrong"*³⁰¹

³⁰⁰ Haynes v Harwood (1935) 1 KB 146

³⁰¹ Ibid at 250

This outcome was clearly more promising for would-be rescuers, but the facts of the case were somewhat narrower than in *Cutler*, since the Defendant Harwood was initially in the wrong (in having left the horses unattended), and because the Plaintiff was a policeman who could be considered to be under an official duty to act in such an emergency.

It was not therefore a typical 'Rescue' case i.e. in the *Haynes* scenario the defendant had positively created the situation (rather than it being a truly spontaneous occurrence), and the rescuer was not just an ordinary member of the public with no pre-existing obligation to help, but was a public servant who would be expected to go to the aid of someone (e.g. a woman and child) in distress.

5.1.3.3 *Baker v T E Hopkins and Sons Ltd* (1959)³⁰²

The situation in *Baker v Hopkins* was more tragic, and the courts took a wider stance and allowed a rescuer to recover, even when he was not a public official.

The facts in the *Baker* case were that a gang of men employed by the Defendants had been set to work on cleaning and emptying an old well. A petrol pump was used to help empty the well but there were problems with ventilation in the confined space, and the workmen were overcome by the fumes. A doctor was called to the scene, and realising that the men could die, he went down the well to rescue them. Unfortunately, the rescue was not successful, and worse, the doctor himself was also overcome by the fumes, and all the men died.

The doctor's estate sued the defendants and the court found in the doctor's favour. In particular the court held that given the emergency situation that had arisen, the

³⁰² *Baker v T E Hopkins and Sons Ltd* (1959) 1 WLR 966

doctor had not been able to assess all the possible risks involved and whilst he had bravely volunteered to intervene and try to go to the men's rescue, the defence of *volenti non fit injuria* was not applicable. The Court held that it was foreseeable to the defendants that if they had placed their workmen in a position of danger, it was entirely likely that a brave person would seek to rescue them. The court awarded the doctor's estate significant compensation.

This result seemed much more satisfactory, but it still left some doubt as to whether a general precedent had been set, given the rescuer was a doctor who, it could also be suggested, had a pre-existing professional duty to try to preserve life (although probably not a duty to climb down into a dangerous well to do so).

5.1.3.4 *Videan v British Transport Commission* (1963)³⁰³

In the *Videan* case the facts were that a young child (the daughter of the Station Master employed by the Defendants) had strayed onto a railway line adjacent to the Station House and was at risk of being run down. A small train vehicle was approaching the station, and seeing the danger, the Station Master jumped on the tracks and managed to throw the child clear, but in so doing was killed himself.

The Plaintiff's Estate sued the Defendants and the courts held in the Estate's favour, again holding it to be foreseeable that if a situation had been created where a child could stray onto a railway track, then it was very likely that if someone observed this, then they would seek to rescue the child.

There was an interesting argument in the case and Lord Denning, in a minority, considered that the Railway Operator should not be responsible, given that the child was not authorised to be on the tracks (she was in law a trespasser), and

³⁰³ *Videan v British Transport Commission* (1963) 2 QB 650

they could therefore not have foreseen her presence. By contrast however, the Court of Appeal considered that whilst the presence of the Trespasser could not be foreseen, it could be anticipated that someone observing the situation would attempt a Rescue. Hence the Defendant should be held liable to the Rescuer.

This liability of Occupiers towards Trespassers is beyond the scope of this work (and subsequently the Occupier's Liability Act 1984 has established that occupiers have a lower (but not a nil) duty of care in relation to trespassers (as opposed to authorised visitors)).

Whilst the Videan case is instructive about a defendant's potential liability to a Rescuer, there are facts about the case which could again suggest that it may not create a general precedent. This is because the Station Master was not a complete stranger to the tragedy: he was an employee of the Railway Company who might be expected to react to a danger on his employer's property (especially as he was the station Master), and in addition he was the child's father, and might be expected to do everything he could to ensure her safety.

5.1.3.5 Conclusions in relation to Compensating Would-be Rescuers

Whilst this aspect of the law of rescue is much narrower than the other two, there remains considerable doubt as to whether, if a Stranger acts as a Rescuer, s/he will be able to recover compensation for loss/injury. This is not satisfactory, and it would be preferable if there was also Statutory certainty in this area.

5.1.4 General Conclusions on the Law of Rescue in England and Wales

The above sections dealt with the Law of Rescue in England and Wales in three categories: The Duty to Rescue; the Protection of Rescuers; and the Compensation of Rescuers.

In relation to the Duty to Rescue it was noted that there is no legislation compelling an ordinary citizen to go to the aid of a stranger in distress. It was also established that the traditional position under the common law was also that there was no legal duty to rescue. Various cases have extended the law of negligence generally, but there remains no Legal Duty to Rescue in England.

A similar scenario exists in relation to protecting Rescuers from suit/compensating Rescuers for harm/losses (there being currently no explicit legal protection, albeit steps are being taken to reinterpret general duties of care).

In Overall Summary, it can be seen that the situation concerning the Law of Rescue in England and Wales is unsatisfactory, and it is for this reason that towards the end of this work, I suggest that specific Legislation is essential to bring more certainty. This is the more so given the pervasive intervention of Moral luck in these types of extreme situations. It seems entirely unreasonable that Luck should be allowed to play such a large part in the way that human activity is 'regulated' in the vital area of Rescuing fellow citizens in distress.

It will be seen from the following sections that, to varying degrees, the legal position in various other 'Western' jurisdictions is more favourable to Rescuers.

5.2 The Law of Rescue in the United States of America

Given that the legal system in the United States of America was originally based on English Law, it still retains a substantial body of English Law principles, and a combined Statute and Common Law composition. A very major difference however is that as the USA is a Federation of individual States, then in addition to any Federal Laws, each separate State has its own body of 'local' law. It is not therefore possible to refer to a general United States Law in many areas, and hence in the field of the Law of Rescue, it is necessary to consider the law as it applies in each particular State. However for the purposes of this thesis I intend to limit my research to particular states that have taken specific steps in relation to the three component elements of the Law of Rescue (i.e. A Legal Duty to Rescue, Protection of Rescuers, and Compensation of Rescuers). My purpose is not to present a comprehensive review of the Law of Rescue in every US state, but simply to demonstrate that, in at least some states, specific law has been developed.

5.2.1 The Law of Rescue in terms of a Duty to Rescue

The starting point is to consider the 'traditional' position which, as in English Law, held that there is no common law duty to rescue in the USA. This situation is confirmed by Charles O Gregory in his essay "The Good Samaritan and the Bad: The Anglo-American Law"³⁰⁴. In comparing the situation in US law to the parable of the Good Samaritan, Gregory specifically quoted from the New Hampshire case: *Buch v Amory* (1897)³⁰⁵,

*"with purely moral obligations the law does not deal. For example the Priest and the Levite who passed by on the other side of the road were not, it is supposed, liable at law for the continued suffering of the man who fell among thieves, which they might, and morally ought to have prevented or relieved"*³⁰⁶.

³⁰⁴ Gregory C O 'Essay presented' at a Conference held on 'The Good Samaritan and the Bad' at the University of Chicago on 9th April 1965

³⁰⁵ *Buch v Amory Manufacturing Co* (1897) 69 N.H. 257 44 Atl

³⁰⁶ *Ibid* at 809

Having confirmed that the Law does not impose a general duty to rescue in America, he then proceeded to point out the 'usual' exceptions to the rule i.e. the familial obligations of, say, parents for rescuing their child, or the duty of a Master of a ship to his passengers, or an Employer to his employees injured at work, or a member of the Emergency Services (e.g. a medical professional called to the scene of an accident).

This general position remained unchanged until the mid 1960's when a particularly heinous incident arose in New York: the Genovese case³⁰⁷. Katy (Kitty) Genovese was 28 and on the evening of 13th March 1964 she returned home from her job as a manager at a Nightclub Bar. She parked her car near her home but as she got out she was accosted by a 29 year old married man, Winston Moseley, who stabbed her, but who was frightened off by someone turning their light on, and shouting from a nearby apartment. Miss Genovese cried for assistance but no-one came to her aid, despite it later transpiring that at least thirty eight onlookers had seen the incident! Seeing that no-one had gone to her aid, the assailant attacked her again, stabbing her many more times, and raping her. Moseley then disappeared and his victim staggered to her own apartment where a neighbour finally called the police. When they arrived Kitty Genovese was already dead from the seventeen stab wounds she had suffered.

Winston Moseley was not immediately identified as the Murderer, but he was subsequently arrested for burglary, and during his interrogation, he confessed to the Murder of Kitty Genovese. He was found guilty and sentenced to death, but this was commuted on Appeal to life imprisonment, due to evidence of his mental state not being taken into account at his trial³⁰⁸.

³⁰⁷ Gansberg M, 'Thirty-Eight Who Saw Murder Didn't Call The Police, *New York Times* (New York 1964)

³⁰⁸ *People v Moseley* 43 Misc 2d 505 (N.Y.S. 1964)

The details of this incident are clearly shocking, and although some of the reports were sensationalised, it remains the case that a significant number of Kitty Genovese's neighbours simply turned the other way when a very simple telephone call to the Police may have been all that was required to have saved her life.

The Genovese case created a substantial outcry, and a heated debate took place regarding the desirability of a Good Samaritan Law to oblige citizens to go to the aid of a neighbour in distress. In particular a high level Conference was arranged for Criminologists and Sociologists at the University of Chicago in 1965 entitled: "The Good Samaritan and the Bad"³⁰⁹. In particular one of the presenters at the conference specifically produced a draft of a proposed Statutory provision for a legal Duty to Rescue:

"A person has a duty to act whenever:

- 1) Harm or loss is imminent and there is apparently no other practical alternative to avoid the threatened harm or loss except his own action;*
- 2) Failure to act would result in substantial harm or damage to another person or his property and the effort, risk, or cost of acting is disproportionately less than the harm or damage avoided; and*
- 3) The circumstances placing the person in a position to act is purely fortuitous"³¹⁰*

It might therefore have been considered that a watershed may have been reached and that there was every likelihood that the creation of a legal duty to rescue was imminent. However, despite the appalling nature of the crime and the shocking absence of good neighbourliness demonstrated by the 38 people living near to Miss Genovese, and the intense interest taken in the case by some of the most eminent legal writers on Jurisprudence on both sides of the Atlantic, it was surprising that the State of New York did not (and has not) acted to Legislate. Indeed, none of the other 49 states in the USA acted immediately to so Legislate.

³⁰⁹ Op Cit, Note 304

³¹⁰ Op Cit, Note 304 Rudolph WM (1965) "The Duty to Act: A Proposed Rule"

This was not a particularly promising outcome, but whilst most states seemingly ignored the situation, the three states of Vermont, Minnesota, and Rhode Island (two of which states are adjacent to New York) did actually create specific legislation compelling citizens to attempt 'easy' rescues within a decade or two afterwards³¹¹. In addition, as recorded by Eugene Volokh (Gary Schwartz Professor of Law, UCLA School of Law) another seven states (California, Florida, Hawaii, Massachusetts, Washington, and Wisconsin) subsequently introduced a Statutory duty to at least report observed violent crimes to the Authorities³¹².

The nature of the laws enacted by the states of Vermont, Minnesota, and Rhode Island are therefore of considerable interest and are reproduced below:

Vermont (1973)³¹³

(a) A person who knows that another is exposed to grave physical harm shall, to the extent that the same can be rendered without danger or peril to himself or without interference with important duties owed to others, give reasonable assistance to the exposed person unless that assistance or care is being provided by others.

(b) A person who provides reasonable assistance in compliance with subsection (a) of this section shall not be liable in civil damages unless his acts constitute gross negligence or unless he will receive or expects to receive remuneration. Nothing contained in this subsection shall alter existing law with respect to tort liability of a practitioner of the healing arts for acts committed in the ordinary course of his practice.

(c) A person who wilfully violates subsection (a) of this section shall be fined not more than \$100.00.

Minnesota (1983)³¹⁴

A person at the scene of an emergency who knows that another person is exposed to or has suffered grave physical harm shall, to the extent that the person can do so without danger or peril to self or others, give reasonable assistance to the exposed person. Reasonable assistance may include obtaining or attempting to obtain aid from law enforcement. Failure to do so is a Petty Misdemeanour, involving a fine of less than \$100.

³¹¹ Hyman DA, 'Rescue without Law: An Empirical Perspective on the Duty to Rescue,, *University of Illinois College of Law – Working Papers* (2005), Paper 32

³¹² Volokh E) 'Duty to Rescue/ Report Statutes' (2009), www.volokh.com – last accessed 08/01/13

³¹³ Vermont Statutes Ann Tit 12 Ss 519

³¹⁴ Minnesota Statutes. Ann. Ss 604A.01

Rhode Island (1984)³¹⁵

Any person at the scene of an emergency who knows that another person is exposed to, or has suffered, grave physical harm shall, to the extent that he or she can do so without danger or peril to himself or herself or to others, give reasonable assistance to the exposed person. Any person violating the provisions of this section shall be guilty of a petty misdemeanor and shall be subject to imprisonment for a term not exceeding six (6) months, or by a fine of not more than five hundred dollars (\$500), or both.

As can be seen, each of these provisions only applies to 'easy' Rescues, and each involves criminal sanctions. In Vermont this is a fine of up to \$100, and in Minnesota the level of fine is the same, but the offence is specifically classed as a petty misdemeanor (which does not therefore result in a criminal record). However, in Rhode Island the penalty is a fine of \$500, or imprisonment for up to six months, or both! This is clearly a much more severe penalty, and represents the high-water mark for this type of omission in America.

Having established that at least three states in the USA have introduced a Legal Duty to Rescue into their legal system, it is now possible to move on to the next category of the law of Rescue within that Country, and consider the degree of protection provided to Rescuers who might be sued as result of their Good Samaritanism.

5.2.2 The Law of Rescue in terms of the Protection of Rescuers from Civil Suit

When I looked at the legal duty to carry out Rescues in the last sub-section, it was interesting to note that one of the three relevant states (Vermont) had also introduced a law protecting a rescuer from civil suit, provided he/she was not guilty of Gross Negligence. It can also be demonstrated that whilst only three states have introduced a legal duty to rescue, all the states in America have actually passed laws of one form or another to protect rescuers from civil suit:

³¹⁵ R I Gen Laws Ws 11-56-1

State	Law	State	Law
Alabama	Section 6-5-332	Montana	<u>27-1-714</u>
Alaska	SECTION 09.65.090	North Carolina	G.S. 90-21.16
Arkansas	A.C.A. § 17-95-101	North Dakota	§ 20-9-4.1
Arizona	<u>A.R.S. § 9-500.02.</u>	Nebraska	25-21,186
California	Ann.Cal.Bus. & Prof.Code §2395.	Nevada	(NRS) 41.500
Connecticut	C.G.S.A. §52-557b.	New Hampshire	Section 508:12
Colorado	CRS title 13-21-108	New Mexico	24-10-3
Delaware	16 Del.C. §6801 (a)	New Jersey	
Florida	Section 178.13	New York	<u>Article 30</u>
Georgia	<u>§31-11-8</u>	Ohio	§ 2305.23 & § 4765.49
Hawaii	Sec. 663-1.5	Oklahoma	Title 76. Torts Sec 5 Title 76. Torts Sec 5.4
Idaho	I.C. §5-330	Oregon	(ORS) 30.800
Illinois	210 ILCS 50/3.150	Pennsylvania	42 Pa.C.S.A. § 8 332
Indiana	IC 16-31-6-1	Rhode Island	§ 9-1-27.1
Iowa	I.C.A. §613.17	South Carolina	SECTION 15-1-310
Kansas	K.S.A. §65-2891	South Dakota	§ 20-9-4.1.
Kentucky	KRS §411.148	Tennessee	63-6-218.
Louisiana	LSA-R.S. 37:1731	Texas	6701d
Massachusetts	<u>5-309</u>	Utah	78-11-22
Maryland	Maryland Law 5-309	Virginia	H.B. 2097
Maine	Title 14 164	Vermont	SS 519
Michigan	333.20965	Washington	4.24.3000
Minnesota	604A.01	Washington DC	D.C. CODE 1981 §2-1344.
Mississippi	§73-25-37.	Wisconsin	895.48
Missouri	Section 190.092		

Table of USA Good Samaritan Laws Protecting Rescuers³¹⁶

It is beyond the scope of my thesis to analyse all the various wordings adopted by the individual American states, but it is instructive to note the general rubric adopted by those States which have put in place legislation to protect would be Rescuers in the manner which most accords with the aims of this project. This is best illustrated by the law in Delaware:

“... any person who voluntarily, without the expectation of monetary or other compensation from the person aided or treated, renders first aid, emergency treatment or rescue assistance to a person who is unconscious, ill, injured or in

³¹⁶ www.cprinstructor.com/legal.htm - last accessed 08/01/13

*need of rescue assistance, or any person in obvious physical distress or discomfort shall not be liable for damages for injuries alleged to have been sustained by such person or for damages for the death of such person alleged to have occurred by reason of an act or omission in the rendering of such first aid, emergency treatment or rescue assistance, unless it is established that such injuries or such death were caused wilfully, wantonly or recklessly or by gross negligence on the part of such person*³¹⁷

Particular attention is drawn to the 'exception' whereby there is no immunity if the Rescuer/Good Samaritan acted with Gross Negligence.

5.2.3. The Law of Rescue in terms of Compensating Rescuers

Unlike the previous two sub-sections regarding the Duty to Rescue, and regarding the Protection of Rescuers, it is not necessary to refer to Legislative sources in this instance, since the availability of Compensation for Rescuers has a comparatively long history in America.

The Common Law position in America, was effectively established by Judge Benjamin Cardozo in the famous American case: *Wagner v International Railway Company* (1921)³¹⁸.

In this case, the Plaintiff, Arthur Wagner had boarded a New York train at night-time with his cousin Herbert. At the point at which they boarded the train, the track became an elevated section encompassing a bridge, and at certain stages the carriages overhung the ground, and at a considerable height. The carriage had been allowed to become overcrowded, and having failed to make himself secure Herbert Wagner fell overboard, when the train lurched around a bend on the bridge. Once the train had stopped a number of people decided to try to rescue him. The Plaintiff decided to step down to the rails and edge back along the track, and many others descended right to the ground to make a search.

³¹⁷ 16 Del C Section 6801(a)

³¹⁸ *Wagner v International Railway Company* (1921) 232 N.Y. 176, 133 N.E. 437.

The Plaintiff proceeded in the dark but whilst he could not locate his cousin, he did find his hat, and decided to try to climb down the bridge trestles at that point thinking Herbert might be trapped within them. The people on the ground below had also reached this point, and came across Herbert' Wagner's dead body. Whilst standing there they were shocked when the Plaintiff's body fell at their feet, he having lost his footing in the dark on the tracks above.

The Defendants were sued for compensation, and whilst the issue of liability to Herbert Wagner was not in question, it was a very different situation regarding Arthur Wagner (the would-be Rescuer), and the point to be decided was whether it was foreseeable that after one man had fallen off the train, another would attempt a rescue. If it was foreseeable, then the defendant would owe the Rescuer a duty of care, i.e. a duty to accompany him, or provide him with a lamp to light his way.

The Court at first instance found for the Defendant and decided that the fact that another passenger might attempt a rescue was not foreseeable. However, on Appeal Judge Cardozo reversed this decision, and stated the following words which have since become famous: "Danger 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 effect within the range of the natural and the probable. A wrong that imperils life is a wrong to the imperiled victim, it is also a wrong to his rescuer... The risk of rescue, if only it be not wanton, is born of the occasion. The emergency begets the man. The (Defendant) may not have foreseen the coming of the deliverer. He is accountable as if he had [my underlining to give emphasis]"³¹⁹.

³¹⁹ Ibid

A key element of the decision was that the attempted rescue must not have been wanton, and the Judge found in favour of the Plaintiff in this respect also. Whilst it might have appeared unreasonable for Arthur Wagner to start to descend the bridge trestles, it was not in fact fanciful, given that he had found the victim's hat!

This case has since provided authority for the principle that if a defendant is responsible for a situation in which a third part attempts a rescue, then provided that rescue is not reckless, the defendant will be liable to the rescuer for compensating him for reasonable losses/injury.

5.2.3 Conclusions as to the Law of Rescue in the United States of America

From the foregoing parts of this sub-section it has been established that at least some States impose a Legal Duty to attempt "Easy Rescues"; most States have a law Protecting general Rescuers from suit; and there is also a general Law providing Rescuers with Compensation if a reasonable attempt at a rescue results in losses/injury.

5.3 The Law of Rescue in Canada

The situation in Canada is not too dissimilar to that in the USA in that, in terms of a Legal Duty to Rescue, only a minority (in fact only one) of the Provinces has imposed such a duty, and this is the Province of Quebec. This is not surprising given the Province's French Constitutional heritage/ character. By contrast, all but one of the Provinces provides legal protection to Good Samaritans.

5.3.1 Legal Duty to Rescue in the province of Quebec

The legal duty to rescue in Quebec arises from the Quebec Charter of Human Rights and Freedoms, which as translated states:

"Every person must come to the aid of anyone whose life is in peril, either personally or calling for aid, by giving him the necessary and immediate physical

*assistance, unless it involves danger to himself or a third person, or he has another valid reason.*³²⁰

As can be seen this duty is again limited to 'Easy Rescues' i.e. the citizen is absolved if the assistance required involves danger to himself.

I will next proceed to look at the legal protection of Good Samaritans in Canada, but before doing so it is interesting to note the well known Canadian case of 'The Ogoopogo' (Horsley v. MacLaren)³²¹. The case is not entirely relevant to the core of my Thesis which is concerned with the obligations of the general public, since the Ogoopogo case, whilst famous, was concerned with the obligations of a host (and an owner of a boat) towards his guests, being passengers on the boat (i.e. a 'special duty' case).

The case reiterated the common law position in Canada (following the position in England) that there is no general duty to rescue fellow citizens. However, a particularly interesting aspect of the case was the famous statement of Judge Arthur Jessup, when the case went on Appeal:

*"So, despite the moral outrage of the text writers, it appears presently the law that one can, with immunity, smoke a cigarette on the beach while one's neighbour drowns and, without a word of warning watch a child or blind person walk into certain danger"*³²².

Another interesting aspect of the Ogoopogo case was that the court also expressed the view that if someone starts to carry out a rescue, then unless the risk to them personally becomes unreasonable, then they have a duty to continue the attempt (especially if their intervention has dissuaded others from helping).

³²⁰ Quebec Charter of Human Rights and Freedoms 1975, Article 2

³²¹ The Ogoopogo [1970] 1 Lloyd's Rep 257

³²² Horsley v. MacLaren [1970] 2 O.R. 487, 11 D.L.R. at 277

I shall also refer to the Ogotogo case later in this sub-section 5.3, when I look at the right of a rescuer to recover their losses, if they go to the aid of someone in distress.

5.3.2 Legal Protection of the Good Samaritan in Canada

There are ten Provinces in Canada: Ontario, British Columbia, Alberta, Quebec, Saskatchewan, Manitoba, Nova Scotia, Prince Edward Island, Newfoundland, and New Brunswick (there are also three territories in the North: Yukon, Nunavut, and Northern Territories). For the purposes of this thesis I have concentrated on the Provinces, to develop my analysis, and all of the Provinces have specific Statutes protecting Good Samaritans except New Brunswick, which has presumably decided to accept the vagaries of the common law approach.

Once again, it is not necessary for my thesis to review the wording of each of the relevant Statutes, and the most pertinent formulation is that adopted by Nova Scotia:

“Where, in respect of a person who is ill, injured or unconscious as a result of an accident or other emergency, a volunteer renders services or assistance at any place, the volunteer is not liable for damages for injuries to or the death of that person alleged to have been caused by an act or omission on the part of the volunteer while rendering services or assistance, unless it is established that the injuries or death were caused by gross negligence on the part of the volunteer, and no proceeding shall be commenced against a volunteer which is not based upon his alleged gross negligence”³²³

It is also interesting to note that Quebec again takes a somewhat more extensive approach (although this stems from its French history);

“Where a person comes to the assistance of another person ...he is exempt from all liability for injury that may result from it, unless the injury is due to his intentional or gross fault”³²⁴

³²³ Volunteer Services Act 1987. R.S. c. 497, s. 1.

³²⁴ Quebec Civil Code 1991, Chapter 64 a. 1471

5.3.3 The Law of Rescue in Canada in terms of Compensating Rescuers

Only one Province in Canada has provided a specific Statutory right for rescuers to recover compensation, and unsurprisingly this is Quebec (again following its French law roots). The Quebec wording is:

2. A rescuer who sustains an injury or, if he dies therefrom, a dependant, may obtain a benefit from the [Public Commission].

...

*3. A rescuer must apply to the commission in writing within one year after the injury was sustained; in the case of a dependant, such application must be made within one year after the death of the rescuer.*³²⁵

The other Provinces have therefore left the matter to the common law, which given that Canadian Law has its base in English Law, means that the general line of English cases will also apply in Canada e.g. *Haynes v Harwood*³²⁶, and *Videan v British Transport Commission*³²⁷.

As mentioned earlier, a key Canadian case which underlines the common law position is *Horsley v McLaren, The Ogoopogo (1971)*³²⁸. In this case, McLaren owned a boat and took his friends (including a Mr Mathews and a Mr Horsley) on a boating Trip. Unfortunately, Mr Matthews fell overboard in the icy water, and was unable to swim back to the boat. Mr McLaren therefore undertook a rescue but instead of circling around to Mr Matthews (in the more usual procedure for rescues), he tried to back the boat up, which took an unexpectedly long time. Seeing the attempted rescue beginning to fail, Mr Horsley then dived into the water to save his friend, but he too became overcome by the conditions and both men died.

³²⁵ An Act to Promote Good Citizenship 1977 R.S.Q. Chapter C-20

³²⁶ Op Cit, Note 300

³²⁷ Op Cit, Note 303

³²⁸ *Horsley v McLaren, The Ogoopogo* [1971] 2 Lloyd's Rep 410

Horsley's dependants sued for compensation, and in the Court of first instance the Judge followed the principle that if Party A causes a situation of danger to Party B, then it is foreseeable that Party C, might attempt a rescue, and if C is killed his executors should be able to recover damages.

However, in the relevant Canadian Court of Appeal it was decided on a 3:2 majority that McLaren was not negligent (backing up the boat to rescue Matthews was not orthodox, but it was reasonable). Hence it was not foreseeable that Horsley would see a need to dive in himself, and hence McLaren had no liability towards Horsley.

This was unfortunate for Horsley's dependents, but the case reiterated the general situation, that if a Rescue was foreseeable, then the party whose conduct raised the need for the rescue, is likely to be liable to the rescuer for compensation (unless the rescuer's intervention was in itself foolhardy).

5.3.4 Conclusions on the Law of Rescue in Canada

In summary it has been demonstrated that the Law of Rescue in Canada more closely follows that in the United States of America, than it does that in England:

a) Compared to the three (6%) of the fifty-one states in the USA that impose a legal duty to carry out easy rescues, one province (Quebec) out of the ten main provinces in Canada (10%) does so;

b) Further, and rather like in the USA, where all states provide Statutory protection from suit of one kind or another for rescuers (provided they do not act with gross negligence), all but one of the Canadian provinces (i.e. excluding New Brunswick) also provides similar Statutory protection;

c) Both US Law and Canadian Law provide the facility for rescuers to obtain compensation if they suffer losses in cases: where someone has caused a dangerous situation to arise, the rescuer's intervention is foreseeable, and the rescuer does not act in a foolhardy manner.

5.4 The Law of Rescue in Australia

Australia is the last Common Law based jurisdiction that I have looked at by way of comparing the position with England and Wales.

The situation in Australia has some similarity to that applying in the USA, and also in Canada. As a country Australia also has a 'federal' system of law with each of the seven main 'states' (Queensland, New South Wales, Victoria, South Australia, Western Australia, Northern Territory, and Tasmania) having the capacity to legislate locally (in fact the Northern Territory is, as its name suggests, a 'territory' rather than a state, but one which has the right to self- government).

5.4.1. Legal Duty to Rescue in Australia

The Northern Territory is the only Australian 'state' which makes it a criminal offence to fail to help citizen in distress. Section 155 of the Territory's Criminal Code states:

"Any person who, being able to provide rescue, resuscitation, medical treatment, first aid or succour of any kind to a person urgently in need of it and whose life may be endangered if it is not provided, callously fails to do so is guilty of a crime and is liable to imprisonment for 7 years"³²⁹.

This section of the Northern Territory's criminal code is unusual in Common Law jurisdictions, and in suggesting the reason for its genesis, Tim Pardun, commenting

³²⁹ Northern Territory Criminal Code Act, Section 155

in his article 'Good Samaritan Laws: A Global Perspective' states: "its basis lies in a concept of Social responsibility"³³⁰, and there is an indication that the Section was passed following a number of heinous cases of individuals simply ignoring other citizens in distress when their rescue could have been achieved with little effort and no risk.

It is understood that there has only been one case in the Northern Territory where Section 155 has been tested (and this also involved a particularly shocking set of circumstances). In the case of *Salmon v Chute* (1994)³³¹ a driver was involved in a road traffic accident, and having knocked over a child, simply drove away without trying to provide assistance. The child died as a result of the accident and the hit and run driver was convicted of the Section 155 offence, and sentenced to 12 month's imprisonment. However, Salmon appealed against his conviction on the basis that he had not acted callously, as required by the Section, but had simply panicked, in the heat of the moment.

The higher court decided that the offence required four elements to be proved: the offender must be capable of responding; the responder must be in a position to provide rescue/ first aid etc; the 'victim' must be in need of urgent, life-saving assistance; and the offender must act callously. In the Appellant's case the first three elements were proved, but in relation to the fourth element, it was necessary to show that he had been callous i.e. had thought about the situation, and had intentionally decided to abandon the victim. The court decided that this point was not proved, and that the appellant had actually left the scene in panic, not as a deliberate act. The conviction was therefore overturned.

³³⁰ Pardun J T, 'Good Samaritan Laws: A Global Perspective' *Los Angeles International and Comparative Law Journal* 594 (1997)

³³¹ *Salmon v Shute and Dredge* (1994) 4 N.T.L.R. 149, 151

As mentioned above this is the only case that appears to have arisen under the Legislation, and demonstrates that the courts are likely to be loathe to find someone guilty of the offence. It is therefore somewhat unlikely that the Law will lead to any significant practical benefits in the Northern Territory. It is not therefore surprising that the other Australian States have not followed suit.

5.4.2 The Law Protecting Good Samaritans in Australia

Unlike the situation regarding a Legal Duty to Rescue, all the Australian States, other than Tasmania and Western Australia, have introduced various types of Statutory protection for individuals who step forward as Good Samaritans:

The wording most apposite to my project is that adopted by Southern Australia, in its Civil Liability Act (formerly the Wrongs Act) 1936:

"74 Good Samaritans

"(1) Good Samaritan means –

(a) a person who, acting without expectation of payment or other consideration, comes to the aid of a person who is apparently in need of emergency assistance

or

*(b) a medically qualified person who, acting without expectation of payment or other consideration, gives advice by telephone or some other form of telecommunication about the treatment of a person who is apparently in need of emergency medical assistance"*³³²

(2) A good samaritan incurs no personal civil liability for an act or omission done or made in good faith and without recklessness in assisting a person in apparent need of emergency assistance".

Given that the Northern Territory of Australia is the only 'state' to impose a legal

Duty to Rescue, it is interesting to also look at the way in which it protects

Rescuers, via its Personal Injuries (Liabilities and Damages) Act 2003:

³³² The Civil Liability Act 1936 (SA)

8 Good Samaritans

(1) A good Samaritan does not incur personal civil liability for a personal injury caused by an act done in good faith and without recklessness while giving emergency assistance to a person.

...[and interestingly]

(3) This section does not apply if the Good Samaritan was intoxicated while giving the assistance or advice.

5.4.3 The Law of Rescue in Australia in terms of Compensating Rescuers

The situation regarding the right of a rescuer in Australia to recover compensation if they are injured in carrying out a rescue is consistent with that applying in the other main Common Law based Jurisdictions (e.g. USA and Canada), and recovery is possible provided that it was reasonably foreseeable that the Rescuer would intervene to assist.

This approach was confirmed at a general (National) level in Australia in the case of *Chapman v Hearse* (1961)³³³.

In the *Chapman* case, Mr Chapman had negligently driven his car on a winding road in poor weather conditions and crashed it. The driver of an oncoming vehicle was a Dr Cherry, who seeing the accident left his car to go to Mr Chapman's aid.

Unfortunately, another vehicle was approaching driven by Mr Hearse who was also going too fast in the conditions, and before he could stop he ploughed into Mr Chapman's car, killing Dr Cherry.

³³³ *Chapman v Hearse* (1961) HCA 46

The doctor's executors sued for compensation, and the State court found in their favour holding both Mr Hearse and Mr Chapman responsible - the former as the direct cause of Dr Cherry's death, and the latter as the person creating the original accident, and having thereby led Dr Cherry to attempt the rescue (such rescue being entirely foreseeable in the circumstances). The court held Mr Chapman to be responsible to a degree of 25%).

Mr Chapman then appealed the decision to the National Appeal court seeking a ruling that Mr Hearse should be 100 % responsible, on the basis that his actions were a *Novus Actus Interveniens*.

The Appeal court disagreed and reconfirmed, under the Common Law principle that if it was reasonably foreseeable to a person who causes an accident (the 'actor') that a well-intentioned passer-by would attempt a rescue, then provided the rescuer did not act recklessly the actor would be liable to compensate the rescuer for any appropriate injury or loss sustained.

On this basis the Court rejected the Appeal, and upheld that both Hearse and Chapman were liable to compensate Dr Cherry's estate (Chapman again at 25%)

5.4.4 Conclusions on the Law of Rescue in Australia

As in the case of Canada, the Law of Rescue in Australia more closely follows that in the United States of America, than it does that in England and Wales:

a) One of the states/territories in Australia (the Northern Territory), like Quebec in Canada, has followed the three States in the USA and imposes a legal duty to carry out easy rescues.

b) In addition, and similar to the USA (where all states provide some degree of Statutory protection from suit for rescuers,) and like Canada (where all but one province does so) all parts of Australia, except Tasmania and Western Australia, provide similar protection

c) All three of the Common Law based legal jurisdictions of USA, Canada, and Australia enable rescuers to obtain compensation if they suffer losses in cases, where someone has caused a dangerous situation to arise, the rescuer's intervention is foreseeable, and the rescuer does not act in a foolhardy manner.

The next Sub-Sections in this thesis move on to look at the position in the two continental European countries of France and Germany.

5.5 The Law of Rescue in France

Unlike the situation in the Legal Jurisdictions in the previous Sub-Sections, the French Legal system is founded on Civil Law (Roman Law) principles, rather than Common Law principles. The present French Law essentially emanates from the Napoleonic Code of 1804³³⁴, which itself was very much drawn from traditional Roman Law, codified in the "Corpus Juris Civilis" in the time of Justinian in 534³³⁵.

Unlike the English Common Law System, Civil Law systems are generally much less hesitant in applying sanctions for Omissions, and hence it is not surprising that under many Civil Law systems there is a positive duty to attempt a rescue (albeit an Easy Rescue) of fellow citizens in distress.

³³⁴ Code Napoleon 1804

³³⁵ Corpus Juris Civilis, 534, Justinian I

5.5.1 French Law in Terms of a Legal Duty to Rescue

French Law traditionally included an express Statutory Duty to Rescue, and the modern formulation now appears in the French Criminal Code at Article 223-6:

“Any person, who by his immediate action could have prevented a felony or misdemeanour against the bodily integrity of an individual, without risk to himself, or to third parties, wilfully abstains from doing so, is punished by five year’s imprisonment or a fine of €75,000 [c. £60,000].

*The same penalties apply to anyone who wilfully fails to offer assistance to a person in danger which he could himself provide without risk to himself or to third parties, or by initiating rescue operations” [my emphasis]*³³⁶

The source for this law in its present form originated in somewhat unusual, and definitely distasteful, circumstances which arose in France in 1941 in the Second World War, during the occupation of the Country by Germany. The occupying German Army was obviously unpopular with the local communities, and in some instances attacks were made on German soldiers. On one particular occasion when some German soldiers were attacked in this way, the local French citizens ignored their plight and refused to come to the aid of the individual soldiers injured in the attack. One of the soldiers was a German Officer and as a reprisal for the failure of the citizens to help him, 50 hostages were taken and shot. As a consequence the French Vichy Government passed Article 223-6 into Law³³⁷.

Despite this somewhat dubious history, the Article is now well and truly a part of French Criminal Law, and acts as a helpful encouragement to rescue action (or a deterrent to inaction) in typical rescue situations. The current Article contains four operative elements:

³³⁶ French Penal Code Article 223-6

³³⁷ Tunc A, ‘The Volunteer and the Good Samaritan’ in *The Good Samaritan and the Law* Ed. J Ratcliffe, (Gloucester Mass, Doubleday & Co 1981)

- a) knowledge that a fellow citizen is in distress
- b) an ability to rescue that citizen
- c) absence of risk to the rescuer
- d) a wilful failure to provide assistance

In effect these elements characterise the French legal duty to rescue as being limited to 'Easy Rescues', and this echoes the preferred format in other jurisdictions which have duty to rescue laws i.e. some states in the USA (Vermont, Minnesota, Rhode Island), Quebec in Canada, and the Northern Territory in Australia.

The French approach of limiting the duty to rescue, to easy rescues clearly reflects the philosophical debate referred to earlier in this work, that if a positive duty is to be imposed on a bystander the level of that duty should not be excessive given that when judging would-be Good Samaritans we are firmly in the territory of moral dilemmas, and given that being present at an emergency situation generally only arises due to Bad Luck, then Moral Luck is also a factor. Where Morality and Luck intercept it can be viewed as unreasonable to apply too high a level of affirmative action, and perhaps it is in recognition of these aspects that French Law is satisfied if the bystander simply "initiates rescue operations" i.e. summons the emergency services.

5.5.2 French Law in Terms of Protecting Good Samaritans

The position in French Law in terms of the liability and protection of Good Samaritans, is also entirely clear, being set out explicitly in Statute.

In the first instance, the basic French Law in terms of the tort of Negligence is set out in Article 1382 of the Civil Code which, translated, states:

*"Any act which causes harm obliges the one whose fault caused the harm to make reparation for it"*³³⁸.

³³⁸ French Civil Code, Article 1382

At first this looks unhelpful for the Good Samaritan, in that if in attempting to save someone from danger, the attempt actually causes additional harm then the Rescuer could be pursued for that additional harm. By way of an example, if someone appears to have lost consciousness from drowning, and a rescuer performs CPR (Cardiovascular Pulmonary Resuscitation) to try and save them, then if in doing this, they crack the unconscious person's rib, then under the basic French Law they could be sued for that rib injury, regardless of the fact that they actually saved the individual's life.

However, the position is not so bleak, given that French Law also enshrines the principle of "Etat de Necessite" (Status of Necessity), as set out in the Criminal Code:

"A person is not criminally liable if confronted with a present or imminent danger to himself, another person, or property, he performs an act necessary to ensure the safety of the person or property, except where the means used are disproportionate to the seriousness of the threat"³³⁹.

Whilst this article of the French Code specifically covers Criminal Liability, it has since, 1894 been fully applied to Civil Liability, as defined in essential case law³⁴⁰.

The protection provided by the Status of Necessity has four elements:

- *Imminent Danger (to a person himself, or to a third part, or to property)*
- *Performance of an Act*
- *Necessary to ensure the Safety of a person or property*
- *Proportionate to the seriousness of the threat*

These elements are relatively straightforward, and the first clearly limits the protection to a major incident; the second and third elements are routine, and the fourth point about proportionality is really a question regarding the standard of care

³³⁹ French Penal code, Article 122-7

³⁴⁰ Cass. Civ. 8 Janvier 1894

that the Good Samaritan must meet. As in most legal systems, the standard required is that of the reasonable 'conscionable' man – which in French Law is defined via the principle of the “bon pere de famille” (or the good father of the family). Consequently, if the Good Samaritan performs a rescue with proper care and attention then he will be protected from suit. However, if he is reckless/ grossly negligent, the protection will not apply.

5.5.3 French Law in Terms of Compensating Good Samaritans for any losses

The position in French Law regarding compensating Good Samaritans is also very clear but relies on a concept common in Roman Law based jurisdictions (but virtually unknown in Common Law ones) i.e. the principle of “Actio Negotiorum Gestorum”, which can be traced back to Cicero around 70 BC³⁴¹.

The encyclopaedia definition of the term is “*a person who intervenes without authority in the affairs of another, for the latter’s benefit, is entitled to claim reimbursement and indemnity*”³⁴².

The principle has two parts and that which is of most interest for my work is described as the “actio negotiorum gestorum contraria” providing the right for an Intervener to recover reasonable reimbursement or compensation for expenses or losses (or injuries) incurred as a result of stepping in to assist the ‘Gestio’.

This concept in French Law became enacted into Statute as the “Gestion d’affaires d’autrui” (Management of the Affairs of Another), being part of the Napoleonic Code at Article 1375:

³⁴¹ Cicero, ‘Topica XVII 66’ in Kortman J *Altruism in Private Law: Liability for Nonfeasance and Negotiorum Gestio*, (Oxford, Oxford University Press,2005)

³⁴² Encyclopaedia Britannica Online last accessed on 14/03/13.at www.britannica.com/EBchecked/topic/408120/negotiorumgestio

“The Principal (“Maitre”) whose affairs have been well administered must perform the obligations which the Manager (“Gerant”) has contracted in his name, indemnify him for all personal obligations that he took upon himself, and reimburse him for all the useful and necessary expenses which he incurred”³⁴³ [my emphasis].

5.5.4 Conclusions in relation to French Law

It will be seen from the above that French Law provides all three forms of Good Samaritan law: the Penal Code imposes a duty to perform ‘Easy’ Rescues; the Civil Code provides protection from suit in appropriate cases; and the ‘gestion d’affaires’ principle (enshrined in the Civil Code) allows rescuers to recover compensation for losses or injury in reasonable circumstances.

5.6 The Law of Rescue in Germany

The German Legal system is, like its French counterpart, based on Roman Law, and hence it too features all three of the ‘Standard’ Good Samaritan provisions.

5.6.1 German Law in terms of a Duty to Rescue

The obligation in German Law to go to the aid of a neighbour in distress is set out in Section 323(c) of the Strafgesetzbuch (StGB), the German Criminal Code:

“he who fails to provide help in cases of disaster or imminent danger or distress, although this is necessary and reasonable under the circumstances, and especially without significant danger for himself, will be penalised with imprisonment of up to one year or a fine”³⁴⁴.

As with the provision in French Law, this section is subject to a number of conditions i.e. there must be a disaster, or imminent danger/distress; the intervention must be necessary, the help required must be reasonable, and in

³⁴³ Kortman J (2005) *Altruism in Private Law: Liability for Nonfeasance and Negotiorum Gestio*, (Oxford, Oxford University Press, 2005) at 103

³⁴⁴ German Criminal Code, Section 323 (c)

particular the intervener must be able to provide the assistance without significant risk to himself.

5.6.2 German Law in terms of protecting Good Samaritans

The protection of Good Samaritans in German Civil Law follows similar principles to that in French Law, and the concept of ‘State of Necessity’ also applies, but, in the form of the “Geschäftsführung ohne Auftrag” i.e. the agent of necessity³⁴⁵. If a bystander goes to the aid of someone in distress, and is then sued by that person, then the concept of the agent of necessity will provide a defence to such a suit as confirmed in Section 680 of the Bürgerliches Gesetzbuch (BGB), the German Civil Code:

“If the voluntary Agent acts to ward off danger threatening the Principal, then the agent is only responsible for deliberate intent and gross negligence”³⁴⁶

The stipulation that that the Agent should be responsible for any intentional harm caused to a Principal is simply a statement of the general tort liability to compensate others for damage caused to them. The reference to gross negligence in Section 680 follows the general approach adopted in most legal systems that have Good Samaritan laws i.e. ‘ordinary’ negligence whilst attempting a rescue will not be actionable, but fault in the nature of gross negligence will create legal liability.

5.6.3 German Law in terms of Compensating Good Samaritans

The term “Geschäftsführung ohne Auftrag” also enshrines the Civil Law principle of ‘Negotiorum Gestio in German Civil law. The “Geschäftsführer” is the ‘Gestio’ who intervenes to protect the affairs of the “Geschäftsherr”, and provided certain

³⁴⁵ German Civil Code, Section 677

³⁴⁶ German Civil Code, Section 680

conditions are met the intervener will be able to recover his expenses in providing assistance (and he/his Executor will be able to obtain compensation if he suffers injury/dies)³⁴⁷. The conditions are the usual ones:

- *The Intervener must be a Volunteer i.e. he must be under no legal duty (e.g. a contract) to act for the Principal (this excepts the Criminal Law duty to attempt easy rescues³⁴⁸.*
- *The intervention must have been carried out for the benefit of the Principal*
- *The intervention must have been reasonable (as in French Law, this requirement is 'measured' against the Roman Law principle of conduct consistent with that of the "bonus pater familias" (the good father of the family))³⁴⁹*

5.6.4 Conclusions as to Good Samaritan Law in Germany

In almost the same way as applies in French Law, the position in Germany is relatively straightforward with all three aspects of Good Samaritan Law well defined. The legal duty to attempt 'easy rescues' is defined in the German Criminal Code; the protection of Rescuers from suit is defined in the German Civil Code; as is the basis of providing rescuers with reimbursement of expenses, or compensation for losses or injury.

5.7 Summary of the incidence of Good Samaritan Laws in various 'Western' Legal Jurisdictions

As will be seen from the foregoing Sub-Sections, there is a widely varying practice around the jurisdictions analysed in this part of this work. The most comprehensive approach is adopted in France and Germany where, based on the Roman Law origins of their Legal Systems, all three of the generic Triumvirate of 'Good Samaritan' laws are present (and generally enshrined in Statute) i.e. (1) a law requiring citizens to attempt 'easy rescues'; (2) a law protecting rescuers from suit

³⁴⁷ German Civil Code, Section 683

³⁴⁸ Op Cit, Note 343 at Page107

³⁴⁹ Ibid, Page 49

(providing they are not grossly negligent); and (3) a law compensating rescuers for losses/ injuries.

The position in the USA, Canada, and Australia is less comprehensive, with most of their 'States' only including Good Samaritan laws in their legal systems in terms of the last two elements of the Triumvirate i.e. providing protection from suit, and providing for compensation for losses/injuries. However, in each Jurisdiction, at least one State (and three in the USA) provides the full range of Good Samaritan laws, including the duty to attempt easy rescues. The reasons for including the duty to rescue element differs in the USA/Australia, as compared to Canada.

In the latter case, it is the Province of Quebec which includes the Duty to Rescue law (but this is not surprising given the Province's French characteristics). In the former case each of the three States of the USA, and the one Territory of Australia, have enacted legislation as a result of the incidence or one or more heinous examples where citizens had simply stood by and watched when terrible omissions took place and where they could have intervened to help at no (or very little) risk to themselves.

In terms of the fundamental questions considered in this thesis, these conclusions are instructive: in Civil Law jurisdictions there appears to be a complete willingness to combine both legal and moral elements into Laws which compel Easy Rescues (and provide Protections for Rescuers) with no philosophical imperative of maintaining a separation of the two. The information obtained in this Chapter also indicates that whilst Common Law systems are generally reluctant to follow suit, at least 3 such jurisdictions have, albeit in a relatively minor way, enacted Easy Rescue Laws. However, in all three Jurisdictions it is a very small minority of 'states' which have taken this step (and generally only as a result of notorious

incidents of bystanders ignoring the plight of neighbours in distress). **Having noted this, it remains the case that in the large majority of cases, the ‘states’ in the ‘Western’ jurisdictions considered, have apparently left any sanctions for omitting to assist a neighbour in distress, as solely a moral one.**

Returning to England and Wales at this point, it is apposite to reiterate that there is a complete absence of any Statutory compunction to attempt an Easy Rescue (Statutory or otherwise), and no explicit Statutory exemptions exist in relation to the other two aspects of the Triumvirate of Good Samaritan Laws i.e. there is no Legislation providing rescuers with immunity from suit (albeit the new Social Action, Responsibility and Heroism Act 2015 – seeks to guide courts to adopt a lower duty of care in emergency situations), and there is no Legislation providing the right to compensation for losses/ injuries (although a common law right is well established).

The reasons for the lack of Statutory prescription, may be suggested as being our long jurisprudence of preferring to keep a separation between Law and Morality, our long and complicated history of a Common-Law approach to the development of our legal system (which by and large maintains a distinction between Acts and Omissions), and in relation to Easy Rescues, the lack of any particularly notorious incident to prick the national conscience. It is also highly likely that with aspects of Luck playing such a pronounced role in Rescue Scenarios that, an instinctive recognition of Moral Luck, has meant that there is considerable reluctance to even apply moral sanctions for failures to Rescue, let alone legal ones.

However, and as referred to earlier in this work, my three suggested types of Good Samaritan Law can be viewed as a hierarchy of influences which could encourage individuals to step forward to assist their neighbours in distress. At the first level,

people may be more inclined to act as a Good Samaritan, if they understand that if they proceed to attempt a rescue, and in doing so they incur losses or injuries, then they will be compensated.

At the next level, any reticence in coming forward as a Good Samaritan, might be overcome if a potential Rescuer feels safe in the knowledge that (Gross Negligence excepted) if they go to the aid of someone in distress, they will be protected from being sued, if the rescue proves unsuccessful.

Finally, a legal obligation to attempt an easy rescue, could be considered as the most compelling reason for people to step up to the task when someone else is in danger.

Given the failure of the English Legal System to enthusiastically embrace specific Good Samaritan Laws, it is not surprising that over the last 25 years or so there has been considerable Jurisprudential debate in England and Wales as to whether Legislation should be enacted in one or more of these categories. I will be looking at these aspects in the next Chapter of this Thesis.

6. Recent Initiatives on Liability for Omissions/ an English Good Samaritan Law

As mentioned in the introduction to this work, there has been a considerable degree of discussion within the upper echelons of legal debate in England and Wales regarding three particular aspects which have a direct bearing on my work: (a) The Creation of a Criminal Code, (b) Clarifying Criminal Responsibility for Omissions (which might include the Failure to Rescue), and (c) The emergence of a Compensation Culture and the need to reassure those who volunteer their assistance that they will generally be protected.

6.1 The Creation of a Criminal code?

Unlike many modern Legal Jurisdictions which have a fully Codified system of Criminal Law (a Criminal Code: such as in France or Germany), England and Wales has a mixed system i.e. some law enshrined in Statute, and some residing in the Common Law. As an example, the Offences Against the Person Act of 1861 includes a wide range of offences, but not the crime of Murder, which still remains anchored in the Common law.

The most recent attempt to fully codify the position was begun by the Law Commission in 1989, when they launched Law Commission Consultation Paper 177 entitled "A Criminal code for England and Wales, with Draft Bill and Commentary attached"³⁵⁰. This paper proposed a wholesale revision of the Criminal Law, and following favourable reviews the Commission began to prepare more specific proposals in relation to particular areas of criminal law i.e. Homicide. The Law Commission's formal Report in this respect was published in 1993: "Legislating the Criminal Code, Offences Against the Person and General Principles"³⁵¹.

³⁵⁰ Law Commission No. 177 1989

³⁵¹ Law Commission No. 218 1993

Interestingly the 'preamble' to the Report set out some of the reasons why the Law Commission had embarked on their ambitious task:

*"... [to replace] both the antique and obscure language and the irrational arrangement of the Offences Against the Persons Act 1861, with a set of simple offences expressed in modern and comprehensible terms"*³⁵²

*"... A codifying Statute ... plays a vital role in making the existing law clear, accessible, and easy for citizens to understand and use"*³⁵³

Unfortunately, the optimism around this time for such improvements in our Criminal law never came to fruition, and over 15 years later the Commission's Annual Report was still expressing the hope that progress would be made i.e. the Report for 2008/9 stated (in relation to Offences Against the Person):

*"The Government has said that it plans to legislate on the ... recommendations that it has accepted in principle when Parliamentary time allows"*³⁵⁴.

The lack of Parliamentary time was a continual excuse for delaying progress, but in reality it was also a lack of Parliamentary will that was behind this inertia. This became clear when the Commission's Annual Report of 2009/10 rather closed the door on the general project when it stated:

*"The Government now takes the view that neither the Report, nor the Government's own proposals based on the Report, can be enacted in their present form"*³⁵⁵.

6.2 Clarifying Criminal Responsibility for Omissions (e.g. Failure to Rescue)

Although the Law Commission's project to Codify the Criminal Law stalled, it drew attention to a wide range of aspects of the criminal law which were considered to

³⁵² Ibid, Paragraph 2.1

³⁵³ Ibid, Paragraph 2.4

³⁵⁴ Law Commission Annual Report 2008/9 at www.lawcom.gov.uk last accessed 02/04/2013.

³⁵⁵ Law Commission Annual Report 2009/10 at www.lawcom.gov.uk last accessed 02/04/2013.

be overdue for review. A key aspect for the purposes of this Thesis was a consideration of clarifying the position in relation to criminal liability for Omissions.

This debate was at its most heightened in 1989 when the original project began, and as referred to earlier in this work (at Chapter 4, Section 4.4.2.2) two particular legal commentators (Andrew Ashworth, and Glanville Williams) took up the debate in a somewhat contentious exchange of views

It is not necessary to repeat here the detail of the debate between Ashworth and Williams, but in Summary the former tried to distinguish between a “Conventional View” which he ascribed to Williams (and under which the law should not generally impose liability for Omissions – unless a pre-existing duty is involved); and a “Social Responsibility View” which Ashworth favoured, (and which suggests that to be a good citizen and to share in Society’s privileges, the citizen should be prepared to assist their fellow citizens generally, particularly, in times of danger).

Both writers rehearsed the arguments against expanding criminal liability for omissions i.e. that it would unduly intrude on personal autonomy if too many positive duties to act were imposed on citizens; it would be overly-paternalistic and interfere with self-determination; it would encourage a society of busy-bodies if we insisted on people Involving themselves in other individual’s lives; it would be impossible to define just how far someone would need to go to assist other individuals (i.e. would we need to give up all personal belongings and become missionaries); and with the proliferation of offences, it would make it nigh on impossible for the average citizen to know with sufficient certainty what the law demanded of him/her. Williams accepted that there should be no difference between an Act and an Omission to perform a duty (when each results in similar harmful consequences). However, he stated that he was not prepared to go further

than that, and hence would not support the general criminalisation of Omissions, i.e. he would not support going beyond imposing liability in pre-existing Duty situations.

Interestingly both Ashworth and Williams viewed the obligation to attempt an Easy Rescue as a key pre-existing duty situation and recommended that an offence of this nature should be included in any new Criminal Code.

Despite their views and those of many others, the eventual Law Commission Report did not propose a widespread criminalisation of Omissions to act, but did clarify a recommendation that from a linguistic point view it should not matter if certain offences were phrased in the positive (i.e. by reference to Acts) or in the negative (i.e. by reference to Omissions). The actual words used in their Report, or more accurately in the Draft Bill accompanying the Report, stated:

“For the purposes of an offence which consists wholly or in part of an omission, state of affairs or occurrence, reference in this Act to an “act” shall, where the context permits, be read as including references to the omission, state of affairs, or occurrence by reason of which a person may be guilty of the offence, and references to a person’s acting or doing an act shall be accrued accordingly.”³⁵⁶

The Draft Bill also took up the point that Omissions should be criminalised where a pre-existing legal duty was involved i.e:

*“17. – (1) ... a person causes a result which is an element of an offence when –
(a) he does an act which makes more than a negligible contribution to its occurrence; or*

(b) he omits to do an act which might prevent its occurrence and which he is under a duty to do according to the law relating to the offence”³⁵⁷

However, whilst this might have been considered promising in relation to the possible creation of an offence of omitting to attempt an Easy Rescue, it can be

³⁵⁶ Op Cit, Note 353 (Section 16)

³⁵⁷ Ibid (Section 17)

seen from the preceding Sub-Section, that the Law Commission Report was eventually discarded.

6.3 A Private Member's Bill

Given the lack of progress in the Criminal Law arena, and the fact that there was no likelihood of extending the scope of omissions liability (let alone for the specific case of Failure to Rescue), attention turned from this first limb of my Triumvirate of Good Samaritan Laws, to the second limb i.e. protecting would-be volunteers from Civil Liability if their intervention turned out unsuccessfully.

The initial route followed was an attempt to pass a Private Member's Bill in the House of Commons, and the opportunity arose when in early 2004, Julian Brazier MP came fourth in the Parliamentary Ballot for such Bills. The Bill was called the "Promotion of Volunteering" Bill³⁵⁸ and contained 5 main Sections:

- Section 1 Introductory
- Section 2 Requiring Courts to recognise the Special position of Volunteers
- Section 3 Clarifying Indemnity Insurance arrangements for such Volunteers
- Section 4 Simplifying Data Protection Obligations relating to Volunteering
- Section 5 An Immunity for Volunteers in relation to well-intentioned acts

The key Section of relevance to this thesis was Section 5 which stated:

"Any person who –

*(a) without payment or the expectation of payment, assists any other person, and
(b) has reasonable grounds for believing that the other person is suffering or injured or faces imminent serious injury,*

*shall not as a consequence of any action performed by him in good faith be liable at law for any harm caused to that person unless he intended to cause harm"*³⁵⁹.

³⁵⁸ "Promotion of Volunteering Bill" 2004, Hansard 27 February 2004, TSO

³⁵⁹ Ibid

The Bill seemed to gain initial support from a wide cross-section of the House and proceeded to its Second Reading on 5th March 2004³⁶⁰. However, this was its high watermark and support waned such that when it was due for its Third Reading on 16 July 2004 it was talked out of time.

The failure of the Bill was ascribed to a plethora of problems raised by a wide variety of commentators. In particular the Bill was criticised for attempting to change too many aspects of Volunteering at one and the same time. Indeed, one particular senior lawyer assisting my Employers, St John Ambulance, argued that there would have been a much higher prospect of success if the Bill had simply focused on the Immunity provisions³⁶¹.

Professor Watson-Gandy actually proposed some specific wording for such Legislation but this was not adopted by the Government, nor any individual MP, and hence the prospect of progress via a Private Member's Bill came to an abrupt halt. The likely reason for the lack of support of the Professor's initiative was that his drafting was limited to proposing protection for just a particularly narrow category of Volunteers i.e. First Aiders trained to a specific level of competency³⁶².

6.4 An Inquiry into the Possible Emergence of a Compensation Culture

The previous Sub-Section looked at one attempt to make progress within the Civil Law, but if this and earlier attempts did not make much headway they certainly kept the subject on the table and helped prompt a separate debate into the possibility that a Compensation Culture had taken hold in the UK (fuelled by the aggressive marketing of so called Accident Claim "Specialists")

³⁶⁰ "Promotion of Volunteering Bill" 2004, Hansard 5 March 2004, TSO

³⁶¹ Professor Mark Watson-Gandy, 30 April 2005, 13 Old Square, Lincoln's Inn, London

³⁶² Ibid

The problem was seen as a rapidly increasing phenomenon, given the growing and wide perception that many members of the public were being discouraged from coming forward and attempting acts of Public ‘Goodspiritedness’, because our Society appeared to have embraced a Compensation Culture, whereby ‘No Win - No Fee’ litigation had become established, and whereby individual citizens were showing a willingness to sue their fellow citizens for any unfortunate event which occurred regardless of whether the defendant had acted in a morally praiseworthy manner or otherwise. Discussion of this problem continues in Government and in Parliament today and there is also evidence that the rise of such a Compensation Culture has had a ‘chilling’ effect on Volunteering, and the willingness of individuals to come forward and volunteer within Charities and elsewhere.

The main impetus to the debate arose in an official context via the launch of an Inquiry by the House of Commons Constitutional Affairs Committee in 2005 on the subject of the “Compensation Culture”³⁶³

The Terms of Reference of the Inquiry referred to a number of questions including:

- a) Does the “compensation culture” exist?
- b) Is the notion of a “compensation culture” leading to unnecessary risk aversion?
- c) Should any changes be made to the current laws relating to negligence?

The Inquiry also reviewed relevant draft Legislation being introduced by the Government of the day, and in particular the “Compensation Bill” which was progressing through the House of Lords at the time³⁶⁴.

³⁶³ “Compensation Culture” Constitutional Affairs Committee 1st March 2006 TSO

³⁶⁴ “Compensation Bill [Lords]” House of Lords, First Sitting 20 June 2006 TSO

The particular aspects of the Committee's deliberations that I wish to consider under this heading relate to their investigation into the possible development of a culture of risk-aversion in England and Wales, and the subsequent enactment of the Compensation Act 2006 as a partial reaction to this.

The Committee heard a considerable amount of evidence from a variety of sources indicating concerns that a Compensation Culture had established itself in England and Wales, and that this 'Culture' was leading to a wide range of agencies and individuals acting in a risk averse manner e.g. Local Authorities deciding not to place hanging baskets of flowers in their streets (due to the risk of things falling onto members of the public, who might then sue them)³⁶⁵; Schools deciding to ban children from playing 'conkers' in school playgrounds (due to the risk of a conker hitting a child, and their parents possible suing the school)³⁶⁶; Volunteer Groups deciding not to take young people on camping trips (due to the risk of parents suing them for minor injuries e.g. the case of the Girl Guides being sued when a girl suffered a minor burn when the sausage she was cooking over the campfire, fell onto her leg causing a small blemish!)³⁶⁷; Doctors hesitating to come forward when, say, a patient became unwell at a theatre; or members of the Public being reluctant to become volunteers (due to concerns that the people they help might sue them for potential harm or injury i.e. Scout Leaders fearful of being accused of Abuse; or First Aid volunteers fearing they could be sued in trying to help or rescue people in distress)³⁶⁸.

³⁶⁵ "Compensation Culture" Vol II Constitutional Affairs Committee 1st March 2006, Ev 206

³⁶⁶ Ibid, Ev. 186

³⁶⁷ Ibid, Ev. 76

³⁶⁸ Ibid, Ev. 32, and Ev. 123

Despite these specific examples, the Inquiry nevertheless took a considerable amount of evidence from various commentators relating to the potential impact of Contingency Fee Arrangements (CFAs) i.e. the No Win - No fee structure that was introduced into English Law in 1995 whereby Lawyers could offer to act for claimants 'free of charge' recovering their fees from the defendant if the case was successful (and covering the fees by insurance if the case was lost). Many commentators stated that the introduction of CFAs had encouraged members of the public to bring forward many more claims for what in a large number of cases were rather dubious 'losses'. Indeed, one of the experts who provided testimony to the Committee (District Judge Michael Walker – on behalf of the Association of District Judges) quoted the experience of Knowsley District Council which in the five years following the introduction of CFAs saw personal injury claims against them (for tripping) rise from some 150 cases per year to over 1700³⁶⁹.

However, much of the evidence indicated that it might not be CFAs themselves which were creating the increase in potential claims, but rather it was the spread of the new Claims Management Companies which were responsible for the rise, by capitalising on the situation (especially as the operation of the CFA system in practice had enabled some of these companies to recover 'success' fees equal to 100% of the amount of the damages they were securing for their clients³⁷⁰). Indeed, there was evidence that in order to avoid incurring such large fees, a number of Insurance Companies were settling claims quickly and out of court at lower levels of fees, typically 12%, rather than risk losing much more expensive court cases³⁷¹ (this practice then itself exacerbating the problem). These Claims Management Companies were developing a very poor reputation in terms of artificially inflating the incidence of personal injury claims and were being commonly referred to as

³⁶⁹ Ibid, Ev. 6

³⁷⁰ Ibid, Ev. 6. Q 35

³⁷¹ Ibid, Ev. 19

“Claims Farmers”³⁷². In one case the Inquiry heard of a Claims Company setting itself up in the reception area of a hospital to advertise its services to people as they attended hospital to have injuries attended to³⁷³.

The Commentators also blamed ‘sensational’ Press Headlines for contributing to the problem i.e. headlines which drew attention to the fascinating facts of a case (because they were particularly outrageous), but which failed to follow the stories to their full conclusion, where in many instances the Claims were rejected by the Courts as being without merit³⁷⁴.

This aspect of the Courts rejecting many of the more spurious types of claim raises a very interesting paradox i.e. despite the strong evidence to the contrary the public perception was vastly different, and there had been an undeniable concern (if not fear) that there now existed a real and pervasive compensation culture that put them at risk if they were to consider putting their ‘heads above the parapet’, and attempt any sort of discretionary activity for the benefit of their fellow citizens (rather than simply ‘keep their head down’ and just look after themselves). The strength of this paradox was highlighted in written evidence to the Inquiry which quoted both the, then Prime Minister, Tony Blair, and the Secretary of State for Constitutional Affairs citing the emergence of a compensation culture as blighting public perceptions³⁷⁵.

The testimony and written evidence provided to the Constitutional Affairs Committee was therefore often contradictory and inconsistent. It is not very surprising that the actual outcome of the Inquiry was generally inconclusive, and

³⁷² Ibid, Ev. 12

³⁷³ Ibid, Ev. 3

³⁷⁴ Ibid, Ev. 17

³⁷⁵ Ibid, Ev. 76

no major initiatives arose from the Committee's Report, other than the successful passage of the Compensation Bill through Parliament (and even this was independent of the Inquiry i.e. the Inquiry itself actually concluded that the Bill was unnecessary and possibly even harmful!). The actual words of the Committee, in its Summary, were:

*"Finally ...risk aversion is a concerning modern phenomenon that has an adverse effect on both individuals and the economy as a whole. Instead of a statutory provision restating the law of negligence what is required is a clear leadership by the Government. This should include an education programme making clear that risk management does not equate to the avoidance of all risk ..."*³⁷⁶.

6.5 The Compensation Act 2006

The Compensation Bill was introduced into Parliament in the House of Lords on 27 March 2006 and contained three main proposals: the introduction of the concept of 'Desirable Activity' into the Law of Negligence, the Regulation of Claims Management Services, and a special provision to provide compensation for sufferers of Mesothelioma.

For the purposes of this work, I intend to concentrate on the first part of the Legislation which deals with possibly amending the Law of Negligence, although it was also encouraging that Parliament wanted to introduce a system of Regulating Claims Management Companies.

The Bill received its second reading on 8 June 2006 and the House of Lords took considerable time and a great deal of interest in the proposed wording of Part 1 which read as follows:

"1. Deterrent effect of potential liability

A court considering a claim in negligence or breach of statutory duty may, in determining whether the defendant should have taken particular steps to meet a

³⁷⁶ "Compensation Culture" Constitutional Affairs Committee 1st March 2006 TSO

standard of care (whether by taking precautions against a risk or otherwise), have regard to whether a requirement to take those steps might -

(a) prevent a desirable activity from being undertaken at all, to a particular extent or in a particular way, or

*(b) discourage persons from undertaking functions in connection with a desirable activity.*³⁷⁷

The idea behind the introduction of the concept of 'Desirable Activity' was to modify the Courts' approach to applying an appropriate standard of care towards defendants who are pursued for alleged negligence.

As an example of how the concept was envisaged to work it is instructive to take a scenario of, say, a Girl Guide leader interested in taking some Guides on a camping trip. There is no doubt that the idea of taking a group of young girls on such an activity includes a number of risks, but there is also no doubt that doing so would broaden their experience, confidence, and horizons (which would clearly be 'desirable'). The Guide Leader would wish to carry out a risk assessment, and then carry out reasonable steps to reduce such risks to an acceptable level. Nevertheless, the only way the Leader could actually reduce the risks involved to Nil would be to actually cancel the trip entirely.

However, cancelling such a trip in order to reduce risk to zero would have a very unfortunate outcome, and if everyone thought in this way, then we would wrap young people up in cotton wool and restrict them to living in padded rooms, to prevent them from coming to any possible harm. But in doing this we would create introverted, 'stay at home' individuals, scared of their own shadows, and with no confidence to make their own way in the world. This idea was articulated very well by Professor Heinz Woolf, who was quoted in the evidence provided to the Constitutional Affairs Committee Inquiry (described in the last sub-section) as

³⁷⁷ The Compensation Act 2006 Ch 29, Part , TSO

saying that in addition to needing the normal vitamins for healthy growth, young people also need “Vitamin R” or “Vitamin Risk”³⁷⁸.

In order to address these sorts of issues the Legislation was drafted to provide Courts with a revised test for negligence in such a situation, so that Judges would ensure that an appropriate standard of care was applied in cases before them. If it was suggested to a Court that too-higher standard should have been applied (such that the event involved would have been cancelled entirely) then it would be open to the court to conclude that this was a caution too far, and disproportionate, or (if you will) undesirable.

The various aspects of the Bill were discussed in great detail during the second reading, and on the particular aspects of Part 1 the major criticism of the drafting was in relation to the perceived difficulties of adequately defining the concept of “Desirable Activities, and the risk that by introducing a new ‘measure’ into the law of negligence, this would simply spurn a whole new category of satellite litigation focussed on just what is, and what is not desirable.

Definitions of ‘Desirable Activity’ suggested during the debate in the House, included recognition that there should be an element of “Public Good”³⁷⁹. It was also suggested that the term should involve *“taking account of the wider social value of activities. The Emergency Services are a good example of that”*³⁸⁰.

Digressing a moment, I was particularly interested in this suggestion when it was raised in the House of Lords, as I saw Emergency Services as also including Volunteer response organisations such as my employer St John Ambulance. I

³⁷⁸ Op Cit Note 376, Ev. 32

³⁷⁹ Compensation Bill 206, Hansard 6 June 2006, at 421, TSO

³⁸⁰ Ibid

therefore personally submitted evidence to the Constitutional Affairs Committee on behalf of St John Ambulance when the Committee was reviewing the Bill. The suggestion I made was that in order to address concerns regarding the need for a suitable definition of desirable activities, the Legislation should include a Non-Exhaustive list of examples, one of which should cover First Aiders going to the rescue of people in distress³⁸¹.

Another major criticism of the Bill was that it would confuse the present legal position, especially since a very similar concept had already (and quite recently) been established as an integral part of the Common Law through the judgement of the Appellate Committee of the House of Lords in the case of *Tomlin v Congleton Borough Council* (2003)³⁸². In this case, which was another of the 'shallow diving' variety, Lord Hoffman stated that:

*"the question of what amounts to 'such care as in all the circumstances of the case is reasonable' depends on assessing, as in the case of common law negligence, not only the likelihood that someone may be injured, and the seriousness of the injury which may occur, but also the social value [my emphasis] of the activity which gives rise to the risk, and the cost of preventative measures"*³⁸³.

One of the other Law Lords who decided the Tomlin case was Lord Hobhouse, and part of his Judgement was specifically quoted in the debate on the Compensation Bill:

*"[It should never be] the policy of the law to require the protection of the foolhardy or reckless few to deprive, or interfere with, the enjoyment by the remainder of society of the liberties and amenities to which they are rightly entitled. Does the law require that all the trees be cut down because some youths may climb them and fall? Does the law require the coastline and other beauty spots to be lined with warning notices? ... The pursuit of an unrestrained culture of blame and compensation has many evil consequences, one of which is certainly the interference with the liberty of the citizen"*³⁸⁴.

³⁸¹ Op Cit Note 376, Ev.123

³⁸² *Tomlin v Congleton Borough Council* [2003] UKHL 47.

³⁸³ *Ibid*

³⁸⁴ *Ibid*

The concern expressed during the Parliamentary debate was that the law was already sufficiently clear, and that in deciding whether a standard of care had been breached it was now necessary to also consider the “Social Value” of the activity involved. By trying to introduce another new, duplicatory and nebulous concept of “Desirable Activity” into the law, the Bill would not clarify the situation but actually confuse it.

Despite considerable reservations raised regarding Part 1 of the Compensation Bill, the Act reached the Statute Book on 25 July 2006 and it was expected that the success or otherwise of its introduction would be measured via the subsequent cases decided by the Courts.

However, and perhaps unsurprisingly, the Act did not lead to any clarification of the law, and a review on the impact of the legislation was carried out by Mr Toby Gee, a law of negligence barrister who published a paper on the subject in November 2010³⁸⁵ which concluded that there had only been one case in which the terms of the Act had been considered, in the 5 years or so since its inception. This was the case of *Robert Lee Uren v Corporate Leisure (UK) Ltd (2010)*³⁸⁶, another shallow diving case, where in reaching his decision Field J stated:

“It [is] common ground that in the context of this case, Part 1 of the Compensation Act 2006 adds nothing to the common law”³⁸⁷.

This was an unfortunate outcome for the supporters of the Compensation Act, and it seems that the Judiciary did not see it adding value to their work in deciding on negligence cases (preferring the “Social Value” approach of Lord Hoffman in the Tomlin case). It was therefore apparent that part 1 of the Compensation Act was

³⁸⁵ Gee T ‘Dancing around the Maypole - Does Part 1 of the Compensation Act 2006 Protect Beneficial Activities’ (London, Crown Office Chambers (2010)

³⁸⁶ *Robert Lee Uren v Corporate Leisure (UK) Ltd, MOD etc.* [2010] EWCH 46

³⁸⁷ *Ibid*

'stillborn'. Any hope that it would make the law clearer for the average citizen had been overly optimistic, and it therefore did little to dispel the commonly held perception that if a member of the public 'steps up to the plate' and performs a well-intended intervention for Society, there is a very real risk they will be sued if the result is less than perfect. It was clear that a much more explicit Good Samaritan Law was required.

6.6 Common Sense, Common Safety

Given the lacklustre impact of the Compensation Act 2006, or perhaps because of it, the Prime Minister, David Cameron decided to commission a report on the seemingly relentless growth of a risk averse Society and unbridled litigation. Mr Cameron asked Lord Young of Graffham to produce the report and in his letter commissioning it he stated:

"A damaging compensation culture has arisen, as if people can absolve themselves from any personal responsibility for their own actions, with the spectre of lawyers all too willing to pounce with a claim for damages on the slightest pretext ... We're going to put a stop to senseless rules that get in the way of volunteering, stop adults from helping out with other people's children, and penalise our Police and Fire services for acts of bravery"³⁸⁸.

Lord Young himself expanded these sentiments in his foreword to the Report and stated:

"I believe that a Compensation Culture driven by litigation is at the heart of the problem ... last year over 800,000 compensation claims were made in the UK"³⁸⁹

He summarised his findings in his report by referring to two distinct issues: an over-zealous application of aspects of Health and Safety in the Workplace; and an over-exaggerated fear of litigation amongst Society generally, which was having an

³⁸⁸ "Common Sense, Common Safety" (October 2010), The Cabinet Office

³⁸⁹ Ibid, at P.7

adverse effect in respect of: “schools and fetes, voluntary work, and everyday sports and cultural activities”³⁹⁰.

The Report made 12 specific Recommendations ranging from: reducing unnecessary Health and Safety requirements; to specifying minimum qualifications for Risk Assessment consultants; to simplifying Civil Litigation; and also “to clarify (through Legislation if necessary) that people will not be held liable for any consequences due to well-intentioned voluntary acts on their part”³⁹¹.

Clearly this last mentioned recommendation is the one which is most germane to my project, and it is interesting that the detailed section of the report on this subject is entitled: “Good Samaritan Clause”. The Section includes the statement:

“One of the great misconceptions, often perpetuated by the media is that we can be liable for the consequences of any voluntary acts on our part. During winter 2009/10 advice was given on television and radio to householders not to clear the snow in front of their properties in case any passerby would fall and then sue. This is another manifestation of the fear of litigation. In fact there is no liability in the normal way, and the Lord Chief Justice himself is reported as saying that he had never come across a case where someone was sued in such circumstances”³⁹².

Lord Young concluded his remarks under this heading by saying:

“It is important to have clarity around this issue and at some point in the future we should legislate to achieve this if we cannot ensure by other means that people are aware of their legal position when undertaking such acts ... There is no Liability in such cases unless Negligence can be proved”³⁹³ [given the experience in many of the other Western jurisdictions which have Good Samaritan Acts, I would suggest that Lord Young’s reference to simply “Negligence, should have been to “Gross Negligence”].

³⁹⁰ Ibid

³⁹¹ Ibid, at P.15

³⁹² Ibid, at P.23

³⁹³ Ibid

In order to try to give impetus to his report Lord Young agreed to oversee the implementation of its recommendations, and he also set out an outline timetable in the Annex of the report³⁹⁴.

This seemed very promising but unfortunately, shortly after the publication of the Report, Lord Young made some ill-advised remarks about the economic recession afflicting the UK at the time, and despite the major hardships facing the large majority of the population, he stated that: “Most Britons have never had it so Good”. These comments were considered politically naïve, and in order to prevent prolonged embarrassment to the Government, Lord Young promptly resigned. Regretfully the momentum of the Report on “Common Sense, Common Safety” largely went with him!

6.7 The Social Action, Responsibility and Heroism Act 2015

Fortunately, the impetus to try to reassure the Public was not lost entirely, and in the Autumn of 2014 the Ministry of Justice commenced a number of consultations in advance of bringing forward a new Bill to try to clarify the legal position. Consequently, the Social Action, Responsibility and Heroism Bill was introduced into Parliament by the Ministry of Justice on 10 November 2014

The Bill was very concise and sought to clarify the law of negligence by indicating that when the Courts assess the Duty of Care to be applied in any particular case, they must include an assessment as to the degree to which the defendant was acting in a public-spirited manner. The Bill quoted three particular types of public spiritedness: ‘Social Action’, ‘Responsibility’ and ‘Heroism’ (gaining the mnemonic SARAH):

³⁹⁴ Ibid, at P.61

Social Action, Responsibility and Heroism Bill

1 *When this Act applies*

This Act applies when a court, in considering a claim that a person was negligent or in breach of statutory duty, is determining the steps that the person was required to take to meet a standard of care.

2 *Social Action*

The court must have regard to whether the alleged negligence or breach of statutory duty occurred when the person was acting for the benefit of society or any of its members.

3 *Responsibility*

The court must have regard to whether the person, in carrying out the activity in the course of which the alleged negligence or breach of statutory duty occurred, demonstrated a generally responsible approach towards protecting the safety or other interests of others.

4 *Heroism*

The court must have regard to whether the alleged negligence or breach of statutory duty occurred when the person was acting heroically by intervening in an emergency to assist an individual in danger, and without regard to the person's own safety or other interests³⁹⁵.

For the purposes of my thesis, the aspect of Heroism was of prime interest, and it was quite clear that the actions of First Aiders going to the rescue of individuals in distress were an integral part of this category. This was endorsed by the fact that St John Ambulance (my employer) was invited at an early stage to input advice and comments to the Ministry (this was, in part a result of my previous contributions to the development of the earlier Compensation Act and subsequent discussions).

A number of objections were raised at the various readings of the Bill, both in the House of Commons and in the House of Lords (where most of the debate took place). In particular it was asserted that the Legislation would not change the Law, but would simply require the courts to weigh up all the factors which should be

³⁹⁵ <http://publications.parliament.uk/pa/bills/lbill/2014-2015/0047>, last accessed 10/11/14

borne in mind in reaching their decision – a duty which already applied. However, evidence submitted by St John Ambulance (based on research with the public) indicated that there was still a significant perception that individuals could be sued if they attempted to help in Emergencies and something went wrong³⁹⁶. In particular nearly half of those surveyed (49%) in one part of the country cited this threat as the main reason they were hesitant to become a volunteer First Aiders (elsewhere the main reason dictating whether someone would become a first-aid-er was if they had received First Aid training and whether they felt confident in using these skills – their level of confidence being influenced by a number of factors, including the fear of legal repercussions)

Other concerns were expressed in relation to Clauses 2 and 3 of the Bill and the worry that they might be used by unscrupulous Employers to avoid duties towards their workers. This element of the Bill was not germane to this thesis, but in any event sufficient reassurances were provided by the Government to ensure that these objections did not interrupt progress.

Returning to Clause 4 regarding Heroism, I and St John Ambulance had a major concern with the last eleven words of the Section: “, and without regard to the person’s own safety or other interests”. The problem with the words was that St John Ambulance First Aid Training makes it clear that Individuals should not generally respond in an emergency without carrying out an appropriate risk assessment. The words in the Bill were therefore unacceptable to the Charity and submissions were made to the Minister’s team to have them removed.

These submissions were considered very seriously and the Author and colleagues (including a representative of the British Red Cross Society) were invited to a

³⁹⁶ Survey by ICM (British Polling Council) 22-25 August 2014

meeting by the Minister of State for Justice, Lord Faulks (who was steering the Bill through the House of Lords) to discuss the matter. Our views were accepted by the Ministry and an Amendment to remove the words was approved at the House of Lords Committee Stage where Lord Faulks stated:

*“The noble Lords, Lord Pannick and Lord Beecham, supported by the noble and learned Lord Hope have proposed in Amendment 10 to remove the final words of the Clause [Clause 4] which refer to acting “without regard to the person’s own safety or other interests”. I am grateful to them for tabling this amendment because we have been considering this issue carefully following correspondence received from St John Ambulance...If its misgivings can be allayed through the omission of the words in question, that is certainly something we would be willing to consider ...”*³⁹⁷

The relevant amendments to the Bill at that stage were then Approved.

The passage of the Bill was thereafter relatively straightforward and it was passed by the House of Commons on 2 February 2015, with Justice Secretary, Chris Grayling (Lord Chancellor), stating as part of his summary that:

*“We debated a proposed amendment that emanated from St John Ambulance [deleting the last 11 words of the original Clause] ... I did as I undertook to do and went away and thought carefully about the measure. I listened to debates in the Lords and decided there was no reason not to accept the St John Ambulance recommendation ...”*³⁹⁸

The new Act received Royal Assent on 12 February 2015, and came into force on 13 April 2015. It now remains to see whether it will have the desired effect in setting aside the strong public perception that Rescuers who step forward to assist citizens in distress, are in danger of being sued if despite their best efforts the rescue is not successful.

³⁹⁷ Hansard, ‘Social Action, Responsibility and Heroism Bill’, (Committee Stage, London, House of Lords 18th November 2014)

³⁹⁸ Hansard, ‘Social Action, Responsibility and Heroism Act (London, House of Lords, 2nd February 2015)

Whilst the author was very pleased with the outcome of the passing of the SARAH Act, it must still be said that it is unlikely to be the most effective way to reassure potential rescuers that (other than in cases of gross negligence) they will not be sued in Rescue situations. The preferred approach would still be for explicit Legislation to be passed which specifically exempts liability (i.e. along the same lines as is provided in all the other Western Jurisdictions which I considered in Chapter 5 above).

6.8 Conclusions in Relation to Recent Initiatives to amend English Law

Although there have been regular initiatives in relation to the possible introduction of a comprehensive suite of Good Samaritan Laws in England and Wales over the last 25 years or so, there has actually been little practical progress in this field.

An attempt to introduce a Statutory Criminal Code, to include an extended criminal liability for Omissions (and including the failure to attempt an easy rescue) eventually failed due to the lack of Parliamentary time, and interest.

Despite this, two particular legal commentators (Andrew Ashworth and Glanville Williams) tried to resurrect the movement to extend numerous aspects of the existing Criminal Law from simply covering positive actions, to additionally cover some specific omissions (again making particular reference to the Failure to Rescue within their ambit). These two commentators recommended that the failure to rescue should be an integral part of the Law Commission Report No. 17, but again due to the lack of political will, most of the Report's major recommendations (include a legal duty to rescue) never came to fruition.

Given the failure to make progress in the Criminal Law sphere, interest seemed to turn to the problems that appeared to have surfaced in the Civil Law arena. In the

first instance this took the form of the introduction of a Private Member's Bill, but this was unsuccessful, due predominantly because it was too ambitious and too wide-ranging. The second initiative attracted more interest and focussed on an investigation into the rise of the so-called "Compensation Culture". This was particularly considered by the Parliamentary Constitutional Affairs Committee which investigated the matter and published their conclusions in March 2006. Despite considerable evidence to the contrary, the Committee did not conclude that such a culture had emerged (mainly on the basis that the actual number of cases before the courts had actually reduced over the period covered by the Inquiry's research). This conclusion failed however to consider cases settled out of court and most importantly it gave little credence to the fact that perceptions are sometimes more important than reported facts, and that the British Public had definitely perceived the emergence of a Compensation Culture.

Although the Committee's Report into a possible compensation culture decided that the Compensation Act 2006 was unnecessary, the Legislation actually proceeded. However, the recourse to a new embryonic legal concept of a "Desirable Activity" seemed somewhat 'stillborn, and given the lack of enthusiasm of both Legal commentators generally, and more importantly the Courts and Judges in particular, the Legislation led to little if no improvement, and it certainly had little effect in terms of clarifying the law for the general public.

The situation moved on and in 2010 the Establishment seemed to have accepted that the 'Compensation Culture' was very real, and very debilitating, and a promising Report was produced by Lord Young of Graffham which foreshadowed the possible introduction of a specific Good Samaritan Act to make the liability position clearer to would-be volunteers. Unfortunately, this initiative generally lost momentum alongside Lord Young's resignation from Government.

All was not lost however and Lord Young's report was resurrected in the Ministry of Justice in 2014, and subsequently on 12 February 2015 the Social Action, Responsibility and Heroism Act 2015 became law. Whilst this is generally welcome, it could be said that the approach adopted in the Act is again too obscure in that it does not explicitly exempt Good Samaritans from legal liability. Instead it attempts to provide reassurance by making it a requirement that the Courts must bear in mind the public spirited intention of the individual when deciding liability.

This is not ideal but is the best result achievable in the current political climate, and reflects the prevailing theme in the English Legal System which is generally reluctant to introduce Laws in situations where Moral Censure or Moral Conscience would appear to cover the situation. However, I maintain that in order to dispel the negative perceptions that have arisen as a resultant of the emergence of a Compensation Culture, it is essential for a more explicit Good Samaritan law is put in place to encourage more volunteer rescuers to step forward. A strong recommendation to this effect therefore emerges when I provide the Conclusion to my work in the next, and final, Chapter of this thesis.

7. Summary, Conclusions and Recommendation

7.1 Review of Chapters 1-6

I began Chapter 1 by explaining that I am the General Counsel and Company Secretary of the St John Ambulance charity, which has some 40,000 volunteers, who work tirelessly to provide an emergency First Aid service to the public. They do this 24 hours a day, 365 days a year and come across situations which range from requiring minimum intervention to full scale Cardio Pulmonary Resuscitation, where lives are literally saved.

Despite these public-spirited intentions, First Aid intervention can sometimes be unsuccessful, and it is not unknown for the charity and the volunteers to be pursued for negligence where the outcome is adverse. These First Aiders are clearly Good Samaritans, and I wanted to investigate the problem of Good Samaritans being inappropriately sued. I also wanted to consider the legal position more fully, and given that First Aiders are also a category of Rescuer, I wanted additionally to investigate the degree to which Rescuers may be considered to have a Duty to go to the aid of citizens in distress.

St John Ambulance First Aiders are not the only type of volunteers who are concerned that when they provide services in the community they may be laying themselves open to the threat of being sued. In my Introduction I also drew attention to the 'chilling' effect that inappropriate litigation against volunteers was having on new volunteers coming forward for recruitment in all areas of public service, and on the retention of existing volunteers (indeed from Footnote 10, I quoted a statement from the Deputy Chief Executive of Volunteering England who suggested that up to 1 million individuals may have been considering giving up volunteering because of the fear that they may be litigated against). I also

commented that this concern cannot be 'calibrated' by looking at the actual number of legal claims made against volunteers, since - as is the case in many other walks of life – it is perceptions that are more damaging than reality.

I introduced the concept of Moral Luck into my thesis, as this was the unique and intriguing factor that caused me to look at the Good Samaritan problem in a novel way (especially as my Literature Review had indicated that no one else appeared to have juxtaposed these two ideas). Moral Luck was first posited as a concept by Bernard Williams in 1967 when he suggested that it was not possible to pre-judge the morality of any given decision, until the outcome of that decision was fully known (with many outcomes being prone to Luck in various ways) Thomas Nagel took the concept of Moral Luck further and subdivided it into four categories: Constitutive Luck (the type of person you are); Circumstantial Luck (the kind of situations you face); Causative Luck (the chain of events that has occurred); and Outcome Luck (the way things turn out).

It appeared to me that Volunteer First Aiders are affected by all these types of Luck, which then impinge upon their decisions to go to the aid of people in distress, and upon the moral framework within which Society will judge their actions. In a Rescue situation where someone has been injured (usually emergency situations) it is a matter of luck whether the volunteer is a 'brave' person who is prepared to intervene (Constitutive Luck); it is a matter of luck if they happen to be present at that place at that time on that date (Circumstantial Luck), it is a matter of luck that a series of particular events have conspired to cause the emergency (Causative Luck); and it may be a matter of luck as to whether the volunteer's efforts are successful i.e. if the victim survives and if they do, whether s/he emerges with debilitating brain damage (Luck in Outcomes).

It is the scope for all these types of luck to occur, in an emergency situation, which led me to suggest that any evaluation of the volunteer's behaviour, whether morally or legally, is highly susceptible to the effects of luck, and must recognise that the volunteer will not be in full control of events. A moral or legal judgement as to whether they should have intervened (or whether they should simply have ignored the victim's plight - like the Priest and the Levite who walked by on the other side in the Parable of the Good Samaritan) is influenced substantially by factors of luck.

It seemed to me that if, despite the heavy influence that Luck can play on the motives, circumstances and outcomes involved, the Volunteer nonetheless steps forward to help, then the least the Law can do is to protect them from being sued if things inadvertently go wrong, and provide them with compensation if they are injured/suffer loss.

There then remained the other aspects of Moral Luck in Rescue situations and I was also keen to investigate further whether these might mitigate towards or against the creation of a Legal Duty to Rescue (especially in situations of 'Easy' Rescue), or whether as is the case in English law (but not in many other Western Jurisdictions) any obligation to attempt a Rescue should be left to moral considerations rather than legal ones.

Having taken a cursory look as to how Rescue laws had been developed in other Jurisdictions, I put forward in the second part of Chapter 1, a hypothesis as to how such matters might be translated into English Law. I did this by proposing a draft Good Samaritan Act (which is reproduced again here, on the following page):

Hypothetical Good Samaritan Act

Section 1. Duty to Attempt an Easy Rescue

Subject to no unreasonable risk to themselves, anyone who fails to attempt the Rescue of another person in an Emergency, shall be guilty of an offence punishable by a fine not exceeding level [2]* on the Standard Scale.

Section 2. Protection of Volunteer Rescuers

Any Volunteer who attempts to Rescue another person in an Emergency, shall not be liable for any loss or harm so arising provided they have acted reasonably and without Gross Negligence.

Section 3. Compensation for Volunteer Rescuers

Any Volunteer who, acting reasonably, attempts to Rescue another person in an Emergency, and who suffers harm or loss, shall be entitled to Compensation.

Interpretation

“Emergency” means an unexpected and/or uncontrolled situation which involves danger or serious harm to human life.

“Rescue” means a response to an immediate emergency, whereby a human being is saved (or might be saved) from the danger of loss of life or serious harm. Such response includes, as a minimum, the summoning of the Statutory Emergency Services, where the Rescuer has a reasonable opportunity to do so.

“Volunteer” means an individual who acts without expectation of payment or other remuneration.

* Level 2 on the date of drafting this specimen Act was £500.

This hypothesis could be seen as an 'ideal' solution, but it soon became very clear from my further researches (described in the Chapters 2 to 6) that there were competing considerations which were likely to make the adoption of statutory Good Samaritan laws in England and Wales very challenging.

In Chapter 2 of my work I investigated the two competing theoretical constructs of Natural Law, and Positive Law (the former advocating that Law is just there and reflects the inherent morality of the Society involved; the latter advocating that Law is just the Legal Rules and Principles posited by that particular Society and nothing more). Positivists generally prefer a position whereby there is no necessary connection between Law and Morality. A consequence is that some legal systems might be more inclined to include laws relating to Rescue as either Legal (and possibly Statutory) in nature, or alternatively matters solely for the Moral sphere.

In taking this aspect of my research forward, I traced the views of the prominent philosophers on both sides of the argument and conclude by adopting the philosophy of Herbert Hart, I did this because I was convinced by his rationale that a legal system has more credibility if Law and Morality are separate. If the Legal System is a combination of both the Legal and the Moral, then it is not possible to make independent moral criticisms of its content i.e. if the most immoral conduct is incorporated in and condoned by the Law e.g. the persecution of Jews in Nazi Germany, then it cannot be (internally) challenged. By keeping Law and Morality separate, the opportunity to express Morale criticism of the Law is more effectively preserved.

Chapter 3 of my work covered the seminal part of my research and investigated, in detail, the concept of 'Moral Luck' and its influence on the arguments advanced for Good Samaritan Laws (particularly on the possibilities of imposing legal duties to Rescue; and on providing legal protections for Rescuers who go to the aid of strangers, and run the risk of being sued if things turn out adversely).

Sub-Section 3.1 introduced the 'Paradox of Moral Luck' and cited Bernard Williams' book of similar title. Williams reiterated some of the ideas of earlier philosophers (especially Locke and Mill) that for human beings to live lives worth living they need to be autonomous, with control over their own destiny. They should therefore only be held responsible (either legally or morally) for circumstances within their control. However, he also realised that Luck plays a significant part in all our lives, and that the vagaries of Luck often mean that we cannot fully control what happens to us. For Williams this is the Paradox of Moral Luck: the idea of Luck, or Fate, or the Gods, determining our lives stretching right back to the classical Greek philosophers, as fully discussed by Martha Nussbaum in 1986.

The idea that we are all responsible for what happens to us regardless of whether Luck interferes in our lives is disturbing, and one philosopher in particular, Immanuel Kant, insisted that the moral evaluation of our actions should be immune to luck. He did this by emphasising "Good Will" as his categorical imperative, which could transcend all the brickbats that Luck can throw at us.

Williams did not accept this and used a Gauguin-like figure to demonstrate that even the moral judgement of a person is subject to luck. He suggested that if a budding artist deserts his wife and family and sails to the South Pacific to fulfil his artistic promise, it is not possible to morally evaluate his decision until the outcome

of his emigration is known. If he becomes a phenomenal artist whose works bring pleasure to millions then this could be judged to outweigh the suffering brought to his wife and children, from their desertion. However, the question of whether he becomes a successful artist is subject to a high degree of luck (not least that he is not lost at sea sailing around the Cape). Williams described this as outcome luck, or luck in the way things turn out, and was satisfied that outcome luck fundamentally affects the moral assessment of the individual involved.

Thomas Nagel took the idea of Moral Luck further and indicated that Williams' Outcome Luck was only one of the ways in which Luck can impact on the Moral evaluation of human conduct. Nagel put forward four categories where luck will play a part: Consequential Luck (i.e. Williams' principle of the way things turn out); Constitutive luck (i.e. in the way a person's nature has been formed); Circumstantial Luck (i.e. the situations we find ourselves in); and Causative Luck (i.e. in the way we are involved in the series of events which cause an outcome).

Nagel provided various examples of how luck interferes with human conduct in these various ways, and reached the unnerving conclusion that in reality we are unavoidably prone to luck, and that this is very difficult to reconcile with our wish to be responsible for our own lives and actions. He concluded his work with the challenging admission that he did not have an answer to the problem.

I decided to pursue Moral Luck further and investigate how various subsequent writers had attempted to solve the Paradox.

I looked further at the work of Martha Nussbaum, and her conclusions that Moral Luck definitely exists and that to a large degree we just have to accept what luck

throws at us and make the best of it. The alternative of living in a sterile 'bubble' to make sure we are immune to luck is just as, if not more, unpalatable.

I looked at the work of various writers who sought to dispel the idea of Moral Luck, but found that in most cases their arguments were somewhat circular and simply replaced 'Moral Luck' with alternative Luck definitions. In the case of Judith Andre she introduced 'Character Luck', Norvin Richards, 'Desert Luck', Brian Rosebury, 'Epistemic Luck', and Judith Jarvis Thomson, 'Blame Luck. I also looked at an article by Nicholas Rescher who seemed to accept that luck plays a large role in our lives, but that we should ignore it, given tools such as insurance and the welfare state would look after the 'unlucky'. I rejected this as unpalatable since it implied that we should take no responsibility for what happens to us in the world, and simply proceed through our lives as automatons.

Having considered a number of writers who sought to reject the idea of Moral Luck, I then turned my attention back to those who fully, or at least partially, accepted the concept and considered the work of Susan Mendus, Margaret Urban Walker, Tony Honore, Michael Zimmerman, and Donna Dickenson.

Susan Mendus began her article by acknowledging that Kant's 'Goodwill' can, in most cases transcend adversity (i.e. the Dove will trump the Serpent – the basis of the title of her article), but accepted that Luck will sometimes interfere with morality, stating that something can be both morally disagreeable but also morally right. She also considered that the Kantian view represented an Ideal world, but we live in the Real world, and need to celebrate its wonderful unpredictability. I fully concurred with this view.

Margaret Urban Walker enthusiastically embraced Moral Luck and made the point that whilst we have to accept what life throws at us, we must then make the best

of our 'lot'. It is this rising above adversity which she celebrated as living a "distinctly human life" (rather than suffering a brutish existence, blaming everything that happens on nature, and taking responsibility for nothing). In fully embracing Moral Luck she demonstrated that this makes us caring and selfless individuals (who are prepared to go to the aid of people who are visited by bad luck). She indicated that the alternative, of being selfish automatons who simply cross to the other side of the road (like the Levite and Priest in the Parable of the Good Samaritan) when someone else suffers bad luck, would saddle us with lives simply not worth living. I can only repeat that I found Walker's approach to Moral Luck most uplifting and inspiring, and one of the major reasons why I persist in the hope that English Law will eventually and explicitly protect Good Samaritans from the threat of undue litigation.

During my review of Margaret Urban Walker's article, I also came across relevant material from Tony Honore and Michael Zimmerman. Neither of these writers specifically commented on the Paradox of Moral Luck, but they both recognised that in establishing responsibility for a person's acts or omissions it is necessary to factor in the impact of Luck. Honore suggested that individuals have to accept the impact of both bad luck and good luck in their lives and should be comforted by the likelihood that over the long term they will "win more than they lose" Michael Zimmerman put forward a similar point when he posited the idea of the "Ledger of Life" where having posted both our negative (debit) and positive (credit) experiences in the same, most individuals will find that, as intrinsically good people, our ledgers will end up with a balance in the credit column.

The last writer that I considered in my review of Moral Luck was Donna Dickenson, whose work (predominantly in the field of Medical Ethics) I also found uplifting and inspiring. Dickenson began by proposing her devastating challenge to Kantian thought i.e. what if having a 'goodwill' is a matter of luck! She then concentrated

on Outcome Luck and Constitutive Luck and gave examples of how these regularly occur in the world of medicine e.g. the outcomes of surgery, or the lottery of incurring diseases/injuries. She fully embraced the impact of luck in these areas and demonstrated how this forces the medical profession to develop strategies to cope with uncertainty, and equally importantly, how medical ethics plays its part, with the challenge being to approach medical uncertainty in a virtuous manner. Indeed, she stated that without these 'coping' strategies Medical Professionals would simply descend into an abyss of depression as they faced daily, the catastrophes that luck throws at their morally innocent patients.

Very interestingly, Dickenson re-directed me to the realisation that Moral Luck in the way things turn out is one form of Consequentialism, and hence in the medical world in particular, Jeremy Bentham's Utilitarian 'felicific calculus' is extremely helpful in resolving moral dilemmas. Dickenson stressed that with demand always outstripping supply in her world (e.g. the number of patients needing liver transplants, always exceeding supply of donor organs) it has to be the case that decisions are taken on the basis of the greatest good to the greatest number, or, maximising benefit whilst minimising harm.

Having demonstrated the incidence of Luck in the medical arena, Dickenson outlined various strategies for dealing with the moral dilemmas that then arise. She particularly looked at Luck in the way things turn out and gave the example of a surgeon facing a difficult operation where the outcome has a high degree of uncertainty, and introduced a solution based on the notion of consent, so that the surgeon can neutralise the effect of moral luck on his conduct by ensuring that the patient specifically consents to the element of risk in the operation.

Dickenson also looked at Constitutive Luck and the complications that arise when there are far more patients with defective organs than there are donor organs available for transplant. In this example she explains how by considering probabilities of prognosis it is possible to reach a morally defensible position as to who should receive an organ, even though luck (bad luck) prevents the lives of all deserving patients to be saved.

These highly practical approaches to the acceptance of Moral Luck, and the problems these throw up in the medical arena were very instructive and led me to conclude that in my area of investigation (the moral duties and protections of Good Samaritan First Aiders) Moral Luck must be acknowledged and consequently our legal system should recognise this in its approach to this special category of Rescuers. In particular I narrowed down three particular aspects which the law should address to respond to the impact of Moral Luck on Good Samaritans.

Firstly, given the huge impact of Luck in the creation of Rescue (Emergency) situations it would be inappropriate to impose criminal responsibility to carry out Rescues (an exception might be situations of Easy rescues).

Secondly, if despite the vagaries of Luck a person intervenes as a Rescuer, then unless s/he is grossly negligent it should be incumbent on the State to protect such individuals from suit by an injured rescuee/their personal representatives.

Thirdly, if in carrying out a rescue, the rescuer has the bad luck of being injured (or suffers loss to their property) then I believe that it is entirely appropriate that they should be permitted to recover compensation for such injury or loss.

As I reached the end of Chapter 3 of my thesis, I recognised that the different ways in which Luck intersected with the Moral and Legal consequences of Rescue situations, once again reinforced a separation between Morality and the Law, and perhaps an explanation of why in the English legal system there were no Statutory Good Samaritan Laws. I realised that if luck played such a pervasive role in our lives, then it might be better if any duty to rescue was left in the Moral, rather than the Legal, sphere. However, I considered that if a citizen (despite the effects of Luck), attempted a rescue, then the least Society should do is to enact a specific law exempting such a person from suit if (absent Gross Negligence) the rescue was unsuccessful. This had consequences for my hypothetical good Samaritan Act.

Turning to Chapter 4 of my project I looked at the main philosophical aspects of Emergencies and Rescues, under the heading: "Causation, Responsibility, Omissions, and Failure to Rescue".

I commenced the Chapter by looking at the vital concept of Causation. My approach was to start with the work of the 'Neo-Classical' philosophers such as David Hume and John Stuart Mill. The former reduced to writing the intuitive idea that an Event must be preceded by a 'Cause'. However, this explanation was too simplistic in that it only allowed that, generally, each event only had one specific cause. John Stuart Mill took the idea further and recorded that an Event will generally have a number of causes i.e. there is a chain of causation. He expanded this further to talk of a set of significant conditions being required to cause an event, but also that there was always a Necessary Condition within that set, which was the prime cause of that event.

Sub-Section 4.1.3 leapt forward to the work of Herbert Hart and Tony Honore, and their seminal work "Causation in the Law". They took a linguistic approach to

causation, and looked at how Courts generally reached decisions in real cases, where the analysis of causation was the key element. They found that such decisions were generally the result of the interaction of human interventions AND policy considerations. Hart and Honore stated that they preferred a 'Causally Minimal' approach which ignored the distraction of policy aspects and concentrated solely on the human activity involved. In particular they deplored the many linguistic devices which they believed had been developed by the courts as simplistic tools to either artificially limit or artificially expand the extent of the cause of an event where they felt policy considerations required this e.g. "Proximate Cause", "Remoteness", "Foreseeability" etc. etc.

Nonetheless, Hart and Honore preferred one particular linguistic device: the "But for Test" given that it assisted the analysis of factual causation (without the confusion of 'Policy' factors). They accepted that the test would generally enable the correct cause of an event to be determined, but pointed out that in some cases the test would not enable a single unique cause to be identified e.g. their 'two gunmen' cases. They therefore developed an improved approach which has been termed the 'NESS' test. This test prescribes that, to be the cause of an event a Condition should be the Necessary Element of a Sufficient Set of Conditions.

There were some later criticisms of Hart and Honore's work (particularly those of Jane Stapleton) but most commentators generally accept that their modified 'But for Test': "NESS", remains the most effective way to decide what the operative cause of an event is.

Having established a sufficiently reliable means of establishing the Cause of an event, I moved in Sub-Section 4.2 to look at how Responsibility can be assigned

for that Cause. I did this by looking at the work of various philosophers and started again with some Neo-Classical writers i.e. John Locke, John Stuart Mill, and Jeremy Bentham. John Locke posited the principle of Personal Liberty, tempered with not infringing other people's liberties, and being held responsible any such infringement.

Jeremy Bentham expressed this another way by making it clear that he accepted that it was expedient to punish a man for injuring his neighbour (i.e. to hold that man responsible for the injury). John Stuart Mill reinforced this by positing that it is acceptable to exercise control over someone to prevent harm to others. He did this by emphasising the idea of a "Social Contract" whereby the State provides us with individual liberties, but holds us responsible if we wrongfully interfere with, or limit, those of others. Mill also differentiated between cases where a person 'should' be held legally responsible, and other case where a person might only be held morally responsible.

Criminal Law and Civil Law in England and Wales in the 18th and 19th Centuries generally developed along the lines of these principles, and my next step was to consider the later works of 20th and 21st Century philosophers and in particular those of Hart and Honore, Joel Feinberg, John M Fischer and Mark Ravizza.

Hart and Honore looked at practical examples as to when people are generally held responsible for harm to others, but (in keeping with one of Hart's common themes) they also pointed to rarer cases where people were held responsible for things which were not actually their fault (e.g. Vicarious Liability); or alternatively case where people are excused from liability despite being responsible, because the law applies a limiting factor (e.g. Foreseeability). In effect they stated that

Causation is a matter of fact, but responsibility is also a matter of Public Policy. They particularly homed in on “Fault” as a useful tool for assigning Responsibility.

Joel Feinberg pursued a different but similar tool to help allocate responsibility, and he concentrated on ‘Harm’ as the measure, describing it as a valid liberty-limiting principle (by reference to Mill’s doctrine). Feinberg defined ‘Harm’ as a “setting back of interests” and confirmed that not all setting backs should incur legal responsibility (some should only receive moral censure, and some could be excused by applying Public Policy i.e. in a case such as where a person charged with assault is excused because they acted in self defence).

John M Fischer and Mark Ravizza looked at aspects of ‘Control’, ‘Choice, and ‘Capacity’ in deciding whether someone should be held responsible for setting back another’s interests. In short they considered that someone should only be held responsible for harms if a) they sufficient knowledge of the situation, and b) they were in a position to control the outcome (i.e. did they have any choice in what happened, or any capacity to change what happened?).

Putting all these ideas together I concluded that in reaching decisions on responsibility, all the foregoing points needed to be considered: personal liberty, the social contract, policy, harm, fault, control, choice, and capacity. I then moved on to consider responsibility in the complicated area of ‘Omissions’.

Sub-Section 4.3 began with a review of the writings of a number of Classical philosophers. In particular I looked at the works of St Thomas Aquinas who recognised that sins can be committed both by commission and omission, and who concluded that they should be considered equally wrong, especially when the harm to the third party was equally detrimental. However, he also concluded that

commissions are typically more blameworthy than omissions. I then rolled forward to 16th Century England and the opinion of Edward Coke who, in stating that generally we should only be responsible for what we do rather than for what we do not do, set the scene for English Law for the next four hundred years.

This naturally led me to the so-called “Acts and Omissions Doctrine” which has traditionally held sway in English Law i.e. that intuitively we find it more reprehensible to take a life rather than to avoid saving one (famously articulated by the poet Arthur Clough as “Thou shall’t not kill, but need’st not strive officiously to keep alive”). Jonathan Glover rejected this idea when he wrote in 1977 and (echoing Aquinas) claimed that the doctrine masked a more correct, case by case analysis, and especially in cases where the commission or omission had identical consequences in terms of moral evaluation.

The most well-known public debate on the value or otherwise of the Acts and Omissions Doctrine was between Andrew Ashworth and Glanville Williams in the late 1980s. The former suggested that there were two views, the conventional one that liability only existed for omissions in very limited and specific ‘duty’ scenarios (e.g. the parental duty to look after a child, or the doctor’s duty to look after a patient etc.); and the wider social responsibility view that we should be responsible for all our conduct (including omissions), if we are to be conscientious members of society. Ashworth continued by stating that he preferred a wider approach (in a reference to Mill), and suggested that we should all accept a social responsibility, drawn from an acceptance of a social contract, to do all we reasonably can, to not only help ourselves but also to help others. He then went on to suggest that Glanville Williams was of a more “Conventional” view, which took a narrower (and allegedly a more selfish stance).

This prompted Williams to respond by stating that he rejected the allegation that the Conventional view was more selfish, but nonetheless he preferred an approach which concentrated on defining specific wrongful acts, and specific 'duty situations' rather than one which left open the possibility that every possible omission could result in a legal sanction (he indicated that this would be an unacceptable interference with personal freedom and autonomy).

Williams' standpoint received substantial reinforcement from the decision of the House of Lords in the well-known case of *Airedale NHS Trust v Bland* in 1993 (where withdrawing life support for a terminally ill patient was rejected as being a criminal offence). This Minimal rather than Maximal approach to criminalising omissions was also supported by Tony Honore in 1999, and also by more recent writers such as Card, Cross and Jones in 2006.

I therefore reached the conclusion that the Acts and Omissions Doctrine is still alive and well, and that English Law continues to draw a distinct difference between actions and omissions, albeit that more and more 'duty' situations are being established where legal liability for Omissions will be recognised.

I then proceeded to consider the degree to which a Failure to Rescue might become one of those duty situations where an omission might attract a legal sanction in England & Wales. I had noted earlier in my work that many other Western Jurisdictions impose Statutory obligations to go to the Rescue of fellow citizens in distress (e.g. most of Europe). Despite this, it was entirely clear that no such duty existed in this country, and the main reason for this repeated the earlier philosophy of Locke, Bentham, and Mill, which stressed the importance of personal autonomy, and which suggested that imposing an ever increasing range of positive obligations would be essentially offensive to this principle. Whilst I accepted the

general thrust of this approach, I noted that in those Jurisdictions which impose a Duty to Rescue, this had often arisen as a result of a particularly heinous example of a failure to rescue e.g. the Kitty Genovese case in the North Eastern United States of America (where a large number of people ignored the plight of a young woman who was murdered when, at no risk to themselves, the onlookers could have saved her life by at least calling the Police).

The idea of introducing a Duty to attempt an Easy Rescue in England & Wales had gained some weight amongst many commentators, and not least with Ashworth and Williams who, despite their philosophical differences, both indicated that such a failure was a type of duty situation which might warrant the introduction of a sanction.

The research in this Chapter was persuasive in terms of maintaining a separation of Moral and Legal aspects. In terms of Causation I had established that normally the causes of an event were generally a matter of fact, but in some cases the identification of causes was either extended or limited for public policy reasons. It was clear in this scenario that Moral considerations should only focus on the facts, even if the Law was prepared to adopt a wider remit. Similarly, in relation to Responsibility I identified that the concept of Control was critical in determining when individuals might, or might not be held responsible in particular situations. Again there were examples where for policy reasons responsibility might be extended or excused, and this led me to conclude that in the Moral sphere, responsibility is generally limited to cases where the actor is able to exert control over outcomes, even if the Law is prepared to go further. Once again this had significant consequences for my hypothetical Good Samaritan Act.

It was through my research into the interrelationship of all these factors that I began to recognise that categorising human conduct into either Acts or Omissions might be too simplistic, and identified that a different approach might be useful, to gauge how the law might respond to different types of Rescue scenario. I pursued this different approach in the latter part of Chapter 4 of the thesis.

In outlining my different way of looking at the situation I challenged the polarised Acts and Omissions approach and suggested a third category of analysing human conduct. I did this because whereas the concept of actions can be clearly understood, the same cannot be said for omissions, given that the term itself is pre-loaded with fault i.e. to “omit” implies a pre-existing obligation to actually do something. I considered that this is inappropriate and that sometimes simply ‘waiting in neutral’ or remaining in “Stasis” was a legitimate position.

Relying on this, I emphasised a new three dimensional approach to evaluating behaviour i.e. Action; Stasis; and Omission. I also demonstrated that Rescues could also be analysed on a similar three dimensional basis i.e. Hard, Intermediate and Easy rescues.

I pointed to the ‘usual’ example put forward to describe an Easy rescue being that of a toddler having fallen face down in a shallow pool of water (where pulling the child from danger would involve no significant risk to an onlooker). I also gave the example of a Hard Rescue where for example a petite non-swimming onlooker might be faced with a large and panicking man struggling in a raging torrent of water in a swollen river.

Whereas virtually all commentators leave the matter at this stage, I explained that Easy and Hard rescues are at the extremes and that there is a continuum of Rescue situations with many cases being capable of description as Intermediate Rescues. I gave the example of an onlooker who is a strong swimmer faced with rescuing say a 10 year old child who has knocked himself unconscious falling into a shallow stream, close to the bank.

Having analysed responsibility into three categories, and Rescues into three categories, and recognising that there are three systems of applying sanctions to human behaviour (Criminal, Civil, and Moral), I put forward a different rubric for evaluating all these variables. I also took account of what I had learnt about Moral Luck and in combining all these factors, I postulated that Omissions to attempt Easy Rescues might justify a Criminal sanction; Not attempting Immediate Rescues (and remaining in Stasis) might incur a civil law sanction, but if anything would probably be a simple matter of Moral censure; whereas any Failures to attempt Hard Rescues should definitely not incur legal sanction (nor any moral criticism). These differing approaches to different combinations of circumstances once again underlined the way in which the English legal system separated various Moral and Legal responsibilities.

Most strikingly, I came to the realisation that as the Acts and Omissions Doctrine was very much alive and well in our Legal system, it would probably operate against a legal duty to rescue from forming part of our Statute law for the foreseeable future. This indicated that my hypothetical Good Samaritan Act might be too optimistic, but reinforced my resolve that there should nonetheless be Statutory protections for rescuers.

I therefore began Chapter 5 of my thesis by reviewing the existing position regarding Good Samaritan Laws in England and Wales, and analysed this by reference to what I had by then termed the 'Triumvirate of Good Samaritan Laws' i.e. a Legal Duty to Rescue; a Legal Right to Protection from Suit, and a Legal Right to Recover Compensation.

In addition, I described these as a hierarchy in terms of the degree to which they would incentivise volunteers to come forward as Good Samaritans. I suggested that as a bare minimum there should be compensation for any losses incurred, then there should be protection from inappropriate law suits, and as a final 'encouragement' it should be unlawful to fail to attempt an Easy Rescue.

Starting with the idea of a Criminal Law Duty to attempt an Easy Rescue, I established that there was no such law in England & Wales and reiterated the traditional reluctance of the English Legal System to impose responsibility for Omissions. In particular the case of *Gautret v Egerton* (1867) confirmed this position in the case of Failure (omission) to Rescue.

I therefore proceed to consider whether there was any Civil Law Duty to rescue i.e. was there a Tort of failing to attempt an Easy Rescue. There was clearly no existing tort of this kind, but I reviewed the manner in which English law had expanded the categories of Tort in the last 80 years or so. I naturally concentrated this review on looking at *Donoghue v Stevenson* (1932) the ultimate ground-breaking case which opened up the scope for new actions within the tort of negligence, and introduced Lord Atkins' "Neighbour Principle" (which as he acknowledged drew heavily from the Parable of the Good Samaritan). Given this widely acknowledged precedent, I suggested that if an appropriate case arose, a court could use the Neighbour principle to establish the Tort of Failure to Help a Neighbour in Distress.

I then demonstrated how subsequent cases had continued to expand tortious liability for certain omissions and cited *Home Office v Dorset Yacht Co Ltd* (1970) as a key case expanding liability to include failure to prevent some Borstal Boys from causing damage (but this hinged on the Home Office being under a pre-existing duty to properly supervise the boys). I also cited *Anns v Merton Borough Council* (1978) where the courts went further and held the Council liable in a case where there was no pre-existing duty to properly inspect building foundations (but only a power to do so). This gradual expansion of the Law of Tort for omissions was encouraging, but this was the high-water mark, because in the final case in the sequence of cases that I looked at (being *Stovin v Wise* (1996)), the court drew back from expanding the law any further and found against the Plaintiff who sought to suggest that a Highway Authority had an obligation to remove any natural feature close to a road which might partially obscure sight lines (whether on the Authority's land or not).

I therefore concluded that the scope for the emergence of a new Legal offence of Failing to Attempt an Easy Rescue was closed for the time being, and turned my attention to the second limb of the Triumvirate: did English Law include protection for Good Samaritans against suit if a rescue turned out unsuccessfully.

Having established that there was no Statutory Protection in this respect, I looked at a number of court cases starting with *Daborn v Bath Tramways Motor Co Ltd* (1946), where it was held that in cases of emergency a defendant may sometimes be excused for acting (or omitting to act) in a way which, absent the emergency, might be held to be tortious. I then looked at *Watt v Hertfordshire County Council* (1954) where again, in an emergency situation the court absolved the defendant from liability by applying a lower than normal standard of care. Next, and the main

case I looked at (*Bolam v Frien Hospital Management Committee (1957)*) involved the standard of care expected of Medical Practitioners, where it was decided that the standard of care to be applied was that of the ordinary competent man practising that particular skill. In effect *Bolam* decided that a professional person is not required to apply the highest possible level of skill, but the level of skill to be properly expected of a person with typical training and experience in that profession. I was keen to highlight how this approach had been applied in one case concerning First Aiders who also operate in the medical sphere, and often in Rescue scenarios, and I referred to *Cattley v St John Ambulance (1988)* where the court excused the Charity (my employer) from liability when it demonstrated that its volunteer first aiders had provided assistance at an accident, strictly in accordance with Procedures set down in the industry standard First Aid Manual.

The last case I looked at in this category was *Day v High Performance Sports Ltd (2003)*, where the courts re-emphasised the point that there was no general duty to attempt a rescue (of someone stuck at the top of a climbing wall). However, it was also decided that once a rescue had been commenced the rescuer must proceed with reasonable care and skill. In the *Day* case the court proceeded to find that the actions of the defendant were acceptable in the emergency circumstances.

Having reviewed the cases with some optimism, I was nonetheless left to conclude that the legal position was not sufficiently clear to allay the concerns of would be volunteers. This was because public perception, shaped by the perceived emergence of a Compensation Culture, was clearly of the view that the risk of liability was substantial (which was deterring volunteers from coming forward), and also because the regular stream of court cases clearly indicated that the law was

not conclusively defined (as it would have been if there was specific Statutory protection).

The last aspect I looked at in English Law was whether there was a well-defined right to recover compensation if in carrying out a Rescue the individual suffered harm or loss of property. It was once again clear that there is no Statutory protection, so I again looked at the common law and four specific, decided cases.

In *Cutler v United Dairies* (1933) the courts reached a disappointing conclusion that a bystander who helped stop a runaway horse should not be entitled to recover compensation for injuries sustained in the intervention, because he had been under no obligation to assist (applying the old maxim: *volenti non fit injuria*).

The outcome was more favourable in *Haynes v Harwood* (1935) where in somewhat similar circumstances a policeman intervened to stop a bolting horse which was approaching a mother and child. He too was injured but the court held that he should recover from the defendants. However, the outcome was complicated by the fact that as a public servant, the policeman was recognised as having a pre-existing duty to go to the aid of the public.

The next case I looked at was *Baker v T. E. Hopkins* (1959) which was very tragic when, as a rescuer, a doctor went down a well in which workmen had been overcome by fumes from the pump they were using. The doctor got into difficulties and died alongside the workmen. The Doctor's estate was able to recover (but I once again questioned whether the doctor might have been considered to be under a doctor/patient duty in going to the aid of the workmen).

The final case I looked at was *Videan v British Transport Commission* (1963) where a railway stationmaster was killed in leaping on to the tracks to save a child from a runaway truck. The courts found for his estate but here too complicating factors existed: as the stationmaster was employed to keep his station safe, he might have been considered to be under a duty of Employment to intervene, and more pertinently he was the child's father and so could have been considered to have been under a parent/ child duty.

Consequently, having looked at all four cases I was unable to identify an example of Compensation being provided to a Rescuer, in circumstances where the intervener could be considered as a complete stranger to the situation (i.e. under no pre-existing duty to assist).

I therefore summarised that the position in England & Wales was that: (1) there is no Duty under the Criminal Law to Attempt an Easy Rescue, and whilst there is conflicting case law regarding civil liability for omissions to perform duties or powers – there is certainly no Statutory Sanction; (2) there is no Statutory Protection for Rescuers from being Sued if a rescue is unsuccessful, and although there is some case law indicating protection for some classes of intervener, the situation is obscure and the strong public perception is that volunteers can be sued all too readily (fuelled by fears about an increasing Compensation Culture); and (3) there is no Statutory right for rescuers to recover compensation if they are injured or suffer loss, and although there is some case law indicating that recovery may be successful, the cases are generally based on pre-existing duty situations.

This absence of Legislation in respect of all three categories in my Triumvirate of Good Samaritan Laws, well and truly demonstrated that under English Law there was definitely a separation between the Moral reactions and Legal reactions to the

problems that arise in Rescue scenarios. Furthermore, whilst the English Common Law contained some examples of individuals being excused from liability, or being awarded compensation, these were generally limited to their special circumstances, and I was left with the conviction that in these areas the position would be much more satisfactory, if explicit Legislation was passed

In the subsequent parts of Chapter 5 of this work I contrasted the position in England & Wales (in relation to the Triumvirate of Good Samaritan Laws), with that in some other Western jurisdictions, and commenced with the United States of America in sub-Section 5.2.

Starting with the Legal Duty to Attempt Easy Rescues, I found that whilst the large majority of States did not impose any Statutory duty to rescue, three particular States (Vermont, Minnesota, and Rhode Island) had not only legislated in this respect, but had actually made the Failure to Attempt an Easy Rescue a criminal offence (in response to the particularly heinous case of the murder of Kitty Genovese”).

By contrast, and turning to the protection of Good Samaritans, I found that 100% of States provided some kind of exemption from liability (albeit the classes of person covered, and the extent of the cover varied considerably, although all States require that the Good Samaritan must not have acted with Gross Negligence).

The position of Compensating Rescuers for injury or losses is also much clearer in the USA, given the pivotal case of *Wagner v International Railway Company* (1921), where Judge Benjamin Cardozo made his very famous statements that “Dander invites Rescue” and “The Emergency begets the man”. This case provided

an entirely clear precedent regarding the entitlement to compensation, and has been followed consistently across the country.

In Sub-Section 5.3, I looked at the position in Canada which was very similar to that in the USA i.e. (1) whilst most Provinces do not have a Statutory duty to Attempt an Easy Rescue, one particular Province does so (albeit this is Quebec which, with its French roots, has a Civil Law rather than a Common Law pedigree); (2) nearly all Provinces have Good Samaritan laws to protect Good Samaritans provided they have not acted with Gross Negligence – (New Brunswick being the exception); and (3) all Provinces have a well developed common law system of compensating Good Samaritans for injury or loss (with Quebec actually providing a statutory right to the same). The common law right being particularly reinforced via the famous Ogoopogo (Horsley v McLaren) Case.

The next Jurisdiction I considered was Australia in Sub-Section 5.4, and my findings were similar to those relating to the USA and Canada. Most 'States' do not impose a legal duty to attempt Easy Rescues (but one, the Northern Territory does so under its criminal law). By contrast all the 'States', except Tasmania, and Western Australia, have laws protecting Good Samaritans from suit, providing they have not been Grossly Negligent. Further in terms of compensating Rescuers, the position in Australia is generally clear and the court decision to reimburse a rescuer in Chapman v Hearse (1961) has National application.

I decided that Sub-Sections 5.2, 5.3, and 5.4 had provided a sufficient review of some other typical Common Law jurisdictions, and hence in sub-Sections 5.5 and 5.6 I looked at two Civil Law jurisdictions.

In Sub-Section 5.5 I considered the situation in France, and demonstrated that the Continental Civil Law Tradition stretches right back to Roman Law (AD 534), and imposes an explicit obligation to assist a fellow citizen in distress. The French Legal System makes it a Criminal offence to fail to attempt an Easy Rescue, and this was first fully embodied in the Napoleonic Code of 1804, and is now codified in Article 223-6 of the Criminal Code. Referring next to the protection of Good Samaritans under French Law, the position is also entirely clear with the relevant provisions being set out in Article 1382 of the French Civil Code which applies the long standing Civil Law concept of the 'Agent of Necessity' (although the protection of the Agent only applies where he acts reasonably and without Gross Negligence - i.e. in the fashion of the *bonus pater familias*, or good father of the family).

The position in relation to compensating Good Samaritans for injuries or losses is slightly more complicated and is based on the ancient Civil Law principle (unknown to the Common Law) of "Actio Negotiorum Gestorum" which is traceable to Roman Law. The French equivalent is the 'Geston d'affaires d'autri' which was also part of the Napoleonic Code and now forms Article 1375 of the French Civil Code. The concept applies generally and not just to Good Samaritan Rescuers, the overall principle being that if the intervener (the Gerant) acts voluntarily, in an emergency, and in a reasonable manner to assist a stranger, then s/he will be able to recover for losses incurred.

It can therefore be seen that in France all three of the Triumvirate of Good Samaritan Laws are firmly in place and all three have the full force of Statute.

The final 'Western' Jurisdiction that I looked at in Sub-Section 5.6 was Germany and unsurprisingly, given that German Law is also drawn from the same Civil law source as French Law, the position is almost identical to that applying in France.

The legal duty to attempt an Easy Rescue is also a Criminal Law obligation and in Germany it is set out in Section 323(c) of the Criminal Code. The Protection of Good Samaritans is also confirmed by Statute, with the relevant provision being Section 680 of the German Civil Code (which as usual excludes conduct amounting to Gross Negligence). The remaining element of Good Samaritan Law in Germany is the Compensation of Rescuers, and like the position in France the Civil Law principle of 'Actio Negotiorum Getsorum' again applies, with the German equivalent being 'Geschäftsführung Ohne Auftrag' which is enshrined in Section 683 of the German Civil Code.

I therefore concluded Chapter 5 of this Thesis by indicating that despite the reluctance of the English Legal System to provide explicit, Statutory Good Samaritan Laws, the situation is different to varying degrees in the other main Western 'Common Law' jurisdictions, and also in the two leading Western 'Civil Law' jurisdictions. The reluctance within the English Legal system seemingly being a result of our legal system being fundamentally a 'Freedoms' based system (rather than a 'Rights' based one) and also because we appear to be more willing to accept that the paradox of Moral Luck is real and can seriously distort allocations of legal responsibility.

However, the fact that many other major 'Western' jurisdictions had seen fit to enact Statutory Good Samaritan Laws (to varying degrees), led me to the conviction that something more needed to be done under English Law. In particular it reinforced my resolve to put forward my own Good Samaritan Act, albeit that (unlike in my original hypothesis), it would probably be a Statute with only two operative Sections - the idea of a Criminal Offence of Failure to attempt an Easy Rescue having become very much relegated in my ambitions.

However, before forming a definitive conclusion on the matter, I decided to review recent initiatives and discussion in England & Wales in this area, which I did in Chapter 6 of this work.

I commenced the penultimate Chapter of my project by looking, in Sub-Section 6.1, at the work of the Law Commission in England and Wales in the 20th Century to codify the Criminal Law, or in other words create a Criminal Code. I especially looked at the attempt to introduce criminal liability for a wider class of omissions, and, in particular, the suggestion by some commentators that there should be a new criminal offence of Failing to Attempt an Easy Rescue.

In Sub-Section 6.2 I looked again at the debate between Andrew Ashworth and Glanville Williams, and despite each commentator holding a different view on Omissions generally, they both suggested that the Failure to attempt an Easy Rescue was in the category which might be criminalised. However, no such initiative came from this debate, and indeed the work of the Law Commission, generally, to create a Criminal Code fizzled out through the lack of Parliamentary time and interest.

Sub-Section 6.3 concentrated on the Protection of Rescuers and investigated the attempt to introduce a Private Member's Bill on the subject, but noted that this was talked out of time by those who felt that it was too wide-ranging/pervasive.

In Sub-Section 6.4, I looked at the wider issue of whether a 'Compensation Culture' had become established in England and Wales, and the extent to which this might be adversely affecting individuals in coming forward as volunteers. In particular, I looked at the proceedings, and Report of the House of Commons Constitutional Affairs Committee on the "Compensation Culture" which commenced in 2005, and

as part of its remit looked at the 'nascent' Compensation Bill which was proceeding through Parliament at the time.

In Sub-Section 6.5, I considered the eventual passage of the Compensation Act 2006 onto the Statute book. The Act has two main Sections which are germane to my project, with the first providing a degree of reassurance and protection to people carrying out "Desirable Activities", and the second seeking the effective Regulation of Claims Management Companies. I welcomed both parts of the Act, but in particular, the first Section which sought to adjust the standard of care applicable when "desirable activities" were being performed. I was concerned however that this term was not defined and therefore in providing evidence to the Committee for my employers: St John Ambulance, I suggested that a non-exhaustive list of example activities might be helpful (with First Aid volunteers coming forward as Good Samaritan Rescuers being such an example).

The Act appeared to have extended the Statutory Law of Negligence along the lines set out in *Tomlin v Congleton Borough Council* (2003), but regrettably only one case emerged between 2006 and 2010 (*Robert Lee Uren v Corporate Leisure (UK) Ltd* (2010)), and in that case the Judge involved stated that he felt that the Compensation Act had added nothing new to the Law.

This was not a very promising outcome and hence I turned my attention in Sub-Section 6.6 to the Report commissioned by the Government in 2010 entitled "Common Sense, Common Safety". This report covered a number of areas, one of which was to recommend immunity from suit for individuals carrying out well intentioned voluntary acts. Regrettably its author, Lord Young of Graffham, left the Government shortly after its publication and the situation stalled.

Finally, and somewhat more encouragingly, Lord Young's report was resurrected in the Autumn of 2014, and in Sub-Section 6.7 of my thesis, I tracked the progress of the Social Action, Responsibility and Heroism (SARAH) Bill which quickly followed, and in relation to which I was able to personally make a contribution on behalf of St John Ambulance. Amongst other things the Bill sought to make it mandatory for Courts to consider the extent to which an individual was acting heroically when assessing whether or not they had met the standard of care necessary in the circumstances they were involved in. This approach was encouraging and Hansard records that St John Ambulance First Aiders were definitely in contemplation as a category of heroes in relevant circumstances (it also records the efforts made on behalf of the Charity to have the specific wording of the operative Clause amended to remove an unnecessary limitation on its application). These efforts were successful and the Social Action, Responsibility and Heroism Act (as amended) received Royal Assent on 12 February 2015.

This outcome whilst promising in that it introduced some Statutory clarification on the protection of Rescuers, was disappointing in that it did not provide an explicit exemption from suit, and I personally consider that such a Statutory immunity would be far more preferable, and far more effective in allaying the fears of would-be volunteers.

Indeed, the most effective approach, from my point view, to encourage Good Samaritans to respond when their neighbours are in distress, would be for an explicit Good Samaritan Act to appear on the Statute book. This had been an early hypothesis, and at the very start of this thesis I proposed a Three-Section draft statute. However for the reasons described so far in this in this Chapter 7, I gradually came to an appreciation that a Two-Section statute was more realistic, and more likely to be adopted. My Two-Section draft Statute (excluding a Duty to

attempt Easy Rescues) represents my final Conclusions and Recommendation, and is set out on the final page of this thesis.

7.2 Final Conclusions and Recommendation

As can be seen from the foregoing, this thesis has looked at the question of whether there are specific Good Samaritan Laws in England and Wales (being of particular interest to me as General Counsel of the Country's premier First Aid charity: St John Ambulance). In this work I have made it clear that I was looking at a Triumvirate of Good Samaritan Laws: a law imposing a duty to attempt easy rescues; a law protecting rescuers from suit if a rescue is unsuccessful; and a law to compensate rescuers for any injury/loss suffered in making a rescue. In recognition of this Triumvirate I originally put forward a hypothetical Three-Section Good Samaritan Act.

I then explained that I recognised the reluctance of English Law to translate too many Moral responsibilities into Law and traced the long jurisprudence in our County which I believed underpinned this.

I also explained the paradox of Moral Luck and suggested that the pervading influence of luck in our lives might be another reason for the separation of Law and Morality (if situations arise where Luck plays a significant part, then it would seem better to leave any sanctions in such cases as Moral ones, rather than legal ones).

In pursuing my work I looked at aspects of Causation, Responsibility, and particularly responsibility for Omissions (especially the failure to attempt a Rescue).

In researching the traditional (Acts and Omissions) approach to these elements I deduced that a different approach was needed, and that human conduct can be categorised into three classes (rather than two): Actions, Omissions and Stasis, and that Rescues can also be categorised into three classes: Easy, Intermediate, and Hard.

I used this insight to demonstrate that a kind of matrix approach might be applicable whereby (1) Positive Action is required in the case of Easy Rescues (with possible criminal sanctions for omission), (2) Stasis is more acceptable in the case of Intermediate Rescues (with the possibility of a Civil Law sanction, but probably with only Moral censure applying), and (3) No responsibility should attach in the case of Hard Rescues (neither Legal nor Moral).

I reintroduced my findings in relation to Moral Luck to help in differentiating when Legal, or Moral (or Legal and Moral) censure was appropriate. I reiterated that this might be a reason why there were no explicit laws requiring Rescues to be attempted, but repeated that if despite the vagaries of Moral luck, a Good Samaritan steps forward and attempts a Rescue, then the least they should expect is that, provided they have acted reasonably, then the State should exempt them from civil liability if the rescue turns out unsuccessfully, and also compensate them if they suffer injury or loss.

In order to 'benchmark' the position in England and Wales I carried out a review of the existence or otherwise of my Triumvirate of Good Samaritan Laws in this Country, compared to the position in a number of other leading Western jurisdictions. I found that in England and Wales there are no sufficiently explicit (Statutory) laws in respect of any of the three types of

Good Samaritan laws, whereas in all the other jurisdictions I reviewed, at least one of their 'States' imposed a criminal law Duty to Attempt an Easy Rescue; virtually all their States provided explicit Statutory Protection from Suit for Good Samaritans (except in the case of Gross Negligence); and all their States provided some form of clearly recognised Compensation to Rescuers for Harm Suffered or Losses Incurred).

I therefore went on to review recent developments in English Law in this regard. However, I found that the Compensation Act 2006 had not brought about any significant changes, and had certainly not allayed the fears of Volunteer First Aiders (heightened by the advent of a compensation culture) that they might be sued if they went to the aid of someone who had been injured. I was however encouraged to some degree by the passing of the Social Action, Responsibility and Heroism Act 2015.

All these facts influenced my thinking in relation to my Three-Section hypothesis for a new Good Samaritan Act. It was clear that there were many factors hindering the prospect of Statutory Good Samaritan laws being introduced into the Legal system in England and Wales. The most compelling of those reasons were those relating to the preservation of personal autonomy; and the system's pedigree of being a system based on Freedoms, rather than Rights; and the wish to avoid saddling individuals with an ever increasing body of positive duties.

Allied to this is the acceptance by a considerable number of commentators (including myself) of the Paradox of Moral Luck, and hence an overall preference to assign incidents involving significant aspects of Luck, to the Moral sphere rather than the Legal one (the separation of Law and Morality,

in our legal system facilitating this more readily). It was also clear that with the traditional Acts and Omission Doctrine continuing to have sway, the idea of compelling individuals to attempt rescues was unlikely to 'cut ice' with Law-makers.

During my studies I have noticed that it is often counterproductive to be too ambitious with proposed Legislation. Hence my final Recommendation, as the Conclusion to this thesis, is a Draft Good Samaritan Act with only two operative Sections (omitting a Duty to Rescue section) and this appears as the final Page overleaf.

Good Samaritan Act

Section 1. Protection of Volunteer Rescuers

Any Volunteer who attempts to Rescue another person in an Emergency, shall not be liable for any loss or harm so arising provided they have acted reasonably and without Gross Negligence.

Section 2. Compensation for Volunteer Rescuers

Any Volunteer who, acting reasonably, attempts to Rescue another person in an Emergency, and who suffers harm or loss, shall be entitled to Compensation.

Interpretation

“Emergency” means an unexpected and/or uncontrolled situation which involves danger or serious harm to human life.

“Rescue” means a response to an immediate emergency, whereby a human being is saved (or might be saved) from the danger of loss of life or serious harm. Such response includes, as a minimum, the summoning of the Statutory Emergency Services, where the Rescuer has a reasonable opportunity to do so.

“Volunteer” means an individual who acts without expectation of payment or other remuneration.

APPENDIX – GLOSSARY: “EMERGENCY” AND “RESCUE”

1. Emergency

In this work it has been necessary to limit in scope, the concept of an Emergency. My approach in doing this has been to define Emergencies more generally, and then contract these definitions to establish the type of emergencies which form the basis of the Rescue interventions that underpin the thesis.

1.1 The Dictionary Definition of Emergency

“A serious, unexpected, and potentially dangerous situation requiring immediate action”³⁹⁹

This definition raises a number of avenues for consideration around the words: “serious”, “unexpected”, “dangerous”, “immediate”, and “action”. These are analysed later in this Glossary.

1.2 A Statutory Viewpoint of Emergency

Emergencies are defined in the Civil Contingencies Act 2004 as follows:

“(1) *In this Part “emergency” means –*

- (a) an event or situation which threatens serious damage to human welfare ...,*
- (b) an event or situation which threatens serious damage to the environment ...,*
- (c) war, or terrorism, which threatens serious damage to the security ...*⁴⁰⁰

The legislation continues in Section (2) as follows:

“(2) *For the purposes of subsection (1) (a) an event or situation threatens damage to human welfare only if it involves, causes or may cause –*

- (a) loss of human life,*
- (b) human illness or injury,*

³⁹⁹ ‘The Concise Oxford English Dictionary’, (Oxford, Oxford University Press 2006)

⁴⁰⁰ Civil Contingencies Act (2004), Chapter 36, Part I

- (c) *homelessness,*
- (d) *damage to property,*
- (e) *disruption of a supply of money, food, water, energy, or fuel,*
- (f) *disruption of a system of communication,*
- (g) *disruption of a system for transport, or*
- (h) *disruption of services relating to health*⁴⁰¹

This statutory definition also raises specific elements which require more detailed consideration. However, I would wish to confirm at this point that the reference to “human welfare” deliberately excludes the question of danger to animals, which is beyond the scope of my Thesis. In a similar way I would also confirm that danger to the environment is beyond the remit of this particular Work. I will nonetheless consider these aspects in a little more detail in the following parts of this Glossary.

1.3 “Danger”

The dictionary definition of emergency includes a reference to dangerous situations and hence it is instructive to also consider a dictionary definition of “Danger”:

“an element of risk, peril, hazard, jeopardy, endangerment, imperilment, precariousness, insecurity, instability”⁴⁰²

This definition points to the harm that may arise or has arisen, but does not differentiate between whether the harm is foreseen or unforeseen (in my view it is the combination of the unexpected nature of a situation, and the attendant danger involved, which categorises an emergency).

⁴⁰¹ Ibid

⁴⁰² ‘Oxford American Thesaurus of Current English’, Oxford, Oxford University Press (1999)

1.4 Force Majeure”

Picking up the point of foreseeability, the concept of Force Majeure (most commonly found in contract law) is helpful in looking at this aspect. There are various definitions of the term, which originates from the French Civil Code (a particularly succinct definition for my purposes is from a Dictionary of Finance and Banking);

“Force Majeure (French: Superior Force) An event outside the control of [a] party ... (such as a ... riot, war, act of God)”⁴⁰³.

When such a Force Majeure clause is used in a legal contract it generally recites a wide range of possible events that are considered to be beyond the foresight of the parties and which therefore excuse them from fulfilling their obligations. A typical list would include: “violent storm ..., extraordinary high tide, unprecedented rainfall, extraordinary flood, earthquake, fire ..., lightning, an extraordinary frost or snowfall etc.”⁴⁰⁴,

This definition introduces another element and that is the degree of uncontrollability presented by an emergency. It is not simply that an event is unexpected, which causes the emergency, it is also whether or not the protagonists are able to control the situation that arises (plus the degree of danger that accompanies the event).

1.5 Further Analysis

Considering these various definitions together, there are clearly a number of recurring concepts which require elaboration:

“Serious”

⁴⁰³ ‘A Dictionary of Finance and Banking’ (Oxford, Oxford University Press 2005)

⁴⁰⁴ ‘Halsbury’s Laws of England, Contract Vol 9(1), (London, Butterworths Law 1997)

“Unexpected” (unforeseen)

“Dangerous”

“Human Welfare” (loss of life, human illness or injury)

“Outside the Control”

1.5.1 “Serious”

The question of the seriousness of an incident is indicative of whether or not an emergency has arisen. However, the notion of whether an incident is serious is not the same as whether the incident is dangerous.

A serious incident could certainly call for a response from the State Emergency Services (and might also illicit a response from the average citizen, albeit not by virtue of any “Duty” to respond). By way of an example, a large spillage of oil from an oil tanker could cause a serious incident in terms of threat to the coast-line and the environment. Nonetheless such a spillage is unlikely to represent a danger to human life and hence would probably not be termed dangerous in this respect. The state would no doubt wish to respond to protect the environment, and animal welfare volunteers would seek to protect wildlife. However, neither of these responses would have the character of a Duty to Rescue.

On a different tack, some incidents even though they could be harmful to human beings, may not be sufficiently serious to justify being classed as an emergency. For example, there could be an outbreak of the common cold in a particular local community, which has the capacity to cause harm to, say, vulnerable people. However, the common cold is a routine part of day to day life and would not ordinarily be considered an emergency. However, if in any particular year, the incidence of people catching colds grew unusually, then it might escalate to epidemic proportions. This would probably then be considered to be an

Emergency. But even here the factor which causes it to be viewed as an emergency might well be that it has become serious in terms of people being unable to attend work, or operate public services etc, it need not relate to any major increase in the danger of the situation to the average person's health or welfare. In this sense the incident might be termed an emergency by reason of the seriousness of its economic consequences, but not necessarily by reason of the danger it presents to human life or welfare.

I have therefore taken the view that seriousness, in the context of this Section relates more to the quantitative aspects of the incident, rather than the qualitative (in terms of the capacity to cause danger) aspects (see also 2.2.5.3 below for a review of the element of danger).

1.5.2 "Unexpected"

It is almost by definition that an emergency will be unexpected. If a certain set of circumstances was either known about in advance or was reasonably foreseeable, then they are less likely to represent an emergency when they occur. For example, if a weather pattern develops which indicates a major snowfall in the next 72 hours then this could indicate a serious threat to the transport routes in the vicinity, but given the advance notice, steps can be taken to respond: roads can be gritted, journeys can be rescheduled, snow ploughs can be at the ready. In the circumstances the event is not unexpected and given the steps taken, it may not represent an emergency. By contrast if a freak snowfall occurs without warning the situation could be very different. No preparations will have been made, roads will be treacherous, serious accidents could arise, and large numbers of people are likely to be stranded. The unexpected nature of the situation is likely to cause danger to human welfare and an emergency!

To illustrate a further feature of an unexpected event, take the example of a collapsed building. If this was an expected event, say, a controlled demolition, the area would have been evacuated and it would not represent an emergency. However, if the collapse was unexpected then it will lead to unusual reactions from individuals at the scene. People may panic, people may run, people may abandon ordinary courtesies. These responses themselves can lead to the situation taking on the character of an Emergency. People may be trampled, limbs might be broken, human life may be in danger. The unexpected nature of the event has raised the stakes, created an emergency and might well prompt the intervention of would-be rescuers.

1.5.3 “Dangerous”

As mentioned above deciding whether an incident is dangerous can raise similar types of issues to that arising when discussing the Seriousness of a situation.

However, the key difference with incidents that are dangerous, is their potential to cause the loss of human life or a threat to human welfare.

The earlier definition of danger refers to terms such as risk, peril, hazard, jeopardy, endangerment etc. These words imply harm as opposed to mere seriousness (which might only relate to economic consequences).

In considering whether an incident is dangerous we really need to consider whether it has the capacity to cause substantial harm to an individual. If the incident threatens loss of life or a major injury, the incident will almost certainly represent an Emergency. On the contrary, if an incident merely threatens to inconvenience an individual or perhaps cause them minor bruising, then the incident will be unlikely to represent an emergency. However, where the dividing line between an

Emergency, and a mere incident cannot be exactly defined, much would depend upon the amount of danger inherent in each particular case.

It should also be borne in mind that a situation which commences as a mere incident, could become an Emergency as the degree of danger increases, and vice versa.

Interestingly, if the question of the degree of danger can be said to determine whether an emergency exists, it can also be considered to be the trigger which may cause a would-be rescuer to intervene. If the risk of danger to the victim is high and the associated risk of danger to the rescuer is low, then a rescue may well be attempted. If the risk of danger to the victim is low and the associated risk of danger to the rescuer is high, then a rescue is unlikely to be attempted. If the risk of danger to the victim is high and the associated risk of danger to the rescuer is also high, then the possibility of a rescue being attempted is uncertain.

This relationship between danger, an emergency and rescue was neatly summed up by Judge Benjamin Cardozo in the seminal American case: *Wagner v International Railway Company* (1921) when he said “Danger Invites rescue” ... “The emergency begets the man”⁴⁰⁵. The question of when an emergency might demand a rescue is considered in depth in the substantive parts of this Thesis.

1.5.4 “Human Welfare” (loss of human life, human illness, or injury)

One of the key definitions of an Emergency makes reference to the risk to human welfare. This raises an important distinction in that, for the purposes of considering whether any duty to attempt a rescue arises, it is the threat to human welfare which generally provides the key impetus.

⁴⁰⁵ *Wagner v International Railway Company* (1921) 232 N.Y. 176, 133 N.E. 437.

This is not to say that if another type of living organism was endangered, it would not be laudable (or indeed economic) to attempt to rescue it e.g. if a stable of champion racehorses caught fire, there would be a great deal of concern to try to rescue the animals. However, in terms of a duty to rescue as referenced in my thesis, most people would only see a duty arising when human life was at stake, not the life of a lower level animal.

On a similar basis, some of the dictionary definitions of Emergency point to other consequences i.e. damage to property and damage to the environment.

There is no question that an incident which threatens to destroy property or to destroy the environment is serious, and a great deal of human effort might be expended to try to avoid such consequences. However, in the general case there will not be an immediate threat to human life arising from such incidents and hence emergencies of these types do not beget rescues and do not come within the remit of this Work.

1.5.5 “Outside the Control”

This element of the definitions considered earlier in this Appendix, touches on the degree to which events are outside the control of the actors who have been forced into playing a role in an incident.

There are similarities to the concept of whether an event is expected or not. But again there are significant differences. In particular an event may be entirely expected, but the fact that the circumstances are outside the control of the protagonists may nonetheless categorise the event as an emergency.

As an example, the annual yachting event at Cowes on the Isle of Wight is an entirely expected (and indeed planned for) event each year and the sailing

fraternity expect choppy seas and strong winds as a necessary part of the week. Ordinarily the combination of these conditions will not represent an emergency.

However, if on a particular day, in any particular year, there is a sudden violent storm along the English coast, the nature of the event might change dramatically, possibly with overturned yachts, sailors in the water, and possible drownings. In such a situation it is not necessarily the fact that very choppy seas and very high winds have arisen that might determine that an emergency has occurred (after-all these types of conditions are entirely expected and perhaps necessary for good racing). What changes the situation is that, whereas the desired good racing conditions are generally within the control of the individuals, the sudden escalation of the conditions has taken them outside their control. It is this feature, being outside the control of the actors, which here constitutes the Emergency.

Force Majeure was a term defined earlier in this Glossary, to provide a pointer to the types of situation which, being beyond the control of the individuals involved, may constitute an Emergency. There are a number of generic situations which come within the term Force Majeure and which very many people would describe as "Acts of God". Typical examples are fire, storm, flood and earthquake.

The reasons why these types of event create emergency situations is that they are generally beyond the control of the actors affected by them. Questions as to seriousness and danger arise again e.g. whilst an earthquake is an Act of God, if it is not severe, or it takes place in an unpopulated area (or under the sea), then it may not represent an emergency.

Before leaving this topic, it presents an opportunity to introduce the idea of Moral Luck into the discussion about emergencies. The key Chapter of my thesis dealing with Moral Luck covers the subject in considerable detail, but it is apposite to

mention here that one of the fundamental characteristics of an Emergency is that it involves matters beyond a person's control. We often use language along the lines of "it is just a matter of luck" that someone might find themselves in an emergency situation, or put more pointedly "it was a matter of bad luck" (or alternatively it was an Act of God).

Hence if a person is unlucky enough to find themselves present at an emergency, and the situation involves circumstances which are beyond his/ her control, then it is possible to advance a very compelling argument that such a person should not have a duty to rescue imposed upon them (certainly not a legal duty and probably not even a moral one). It is this whole line of argument that is at the crux of my entire project.

1.6 Summary of the Situation in relation to Emergencies

The foregoing analysis regarding the nature of an emergency, enables the 'concept' to be narrowed down, for the purposes of my Substantive work.

My Project specifically addresses the question of whether in this Country a duty to rescue should exist either legally or morally. But before considering this question it is essential to understand what types of emergency fall within the remit of the project.

From the discussion of the various definitions considered earlier, it is appropriate to state that in my Work an emergency means:

"An unexpected and/or uncontrolled situation which involves danger to human life or the danger of serious harm to human beings".

2. Rescue

In the same way that the concept of an Emergency needed to be limited in scope for the purposes of my Thesis, it is necessary to do likewise regarding the concept of Rescue – not all situations in which individuals might try to go to the aid of their fellow human beings are within the remit of my research.

2.1 The Dictionary Definition of Rescue

“Save from a dangerous or distressing situation”⁴⁰⁶ and

“Action to Save People or Property from Danger”⁴⁰⁷

The key concepts in relation to Rescue therefore seem to be “Saving”; “Danger”; “Distress”; “People”; and “Property”.

I have considered each of these aspects, but in somewhat reverse order.

2.1.1 “Property”

In much the same way as discussed in relation to the term “Emergency”, the possibility of an individual attempting to rescue property is, whilst commendable, beyond the interest of my Work. Particular agencies will often attempt to ‘rescue’ property e.g. the Fire Service seeking to extinguish a building on fire. Furthermore, in the sense that domesticated animals are property, an attempted rescue of say, a horse in peril is again commendable, but this type of act does not form part of the subject of my research.

⁴⁰⁶ ‘The Concise Oxford English Dictionary’ (Oxford, Oxford University Press, 2006)

⁴⁰⁷ ‘Oxford Dictionary of Law’ (Oxford, Oxford University Press 2006)

2.1.2 “People”

Clearly the rescue of human beings is entirely central to my Work and little more needs to be said about the matter.

2.1.3 “Danger”

This concept was reviewed when considering the term “Emergency”. Similar issues arise again in relation to Rescue. My interest in my substantive Work was to consider when a threat of danger/harm to a human being warrants rescue. Not all instances of danger would raise the question of rescue: if an individual has been hurt in a rail accident, the degree of harm could run from a small cut on their finger, to the severing of a major artery. In the first case rescue is very unlikely to be necessary. However, in the second case, if a rescue is not performed (and a tourniquet - or other suitable pressure – is not applied correctly to the limb) the victim will almost certainly die.

In this sense danger is a question of degree and using another term discussed in relation to “Emergency”, it is pertinent to suggest that the need to rescue only generally arises when serious danger to an individual is involved.

2.1.4 “Distress”

Distress is a different matter and suggests a degree of harm below that of danger. As mentioned above, danger occasioning rescue may be described as danger of loss of life, or danger of serious injury. Distress suggests scenarios short of this i.e. the dictionary definition of: “extreme anxiety, sorrow or pain”⁴⁰⁸

⁴⁰⁸ ‘The Concise Oxford English Dictionary’ (Oxford, Oxford University Press, 2006)

Of these aspects, the occasion of extreme pain probably fall into the more severe category, and is akin to serious injury (although it may not be life-threatening).

However, even here not all instances of extreme pain might warrant a rescue (a dentist may unavoidably cause someone extreme pain for a short period of time, but this would not warrant them being rescued from the dentist's chair).

Turning to the elements of anxiety or sorrow, these are clearly important states of mind but do not generally take physical form and would not ordinarily indicate either a threat to life or threat of serious injury. As such, anxiety or sorrow of themselves will not normally warrant a rescue.

As examples, consider some beggars on the street of one of England's major cities. They may well be in distress and exhibit anxiety, but we would not generally consider that their situation is one which warrants rescue (having said this, a number of charities working with the homeless may well feel motivated to respond). Similarly, recently bereaved people may exhibit extreme signs of sorrow and grief, but generally they would not fall into the category of warranting a rescue (again certain charities may offer counselling services in this respect).

2.1.5 "Saving"

"Saving" as a term raises some interesting aspects and saving could be taken to encompass some specific situations:

2.1.5.1 Saving from Death or Major Injury

This activity is the one to which my research was specifically directed. However even here there are certain situations where saving a person's life would not be

germane to my Work. For example, we may not have a duty to rescue someone who is adamant about committing suicide. More controversially it must probably be said that there should be no duty to donate bone marrow (or perhaps a kidney) to save another's life. These are not types of rescue from death or major injury, which my work intended to cover

2.1.5.2 Saving from Distress

As mentioned earlier, unless distress is in the form of extreme pain, then the saving of someone in distress was unlikely to be a particular concern of my thesis. The example given earlier concerned beggars. However other situations can be envisaged where human beings are in a state of distress, but where rescue in terms of them being physically saved by the average citizen of this Country was outside my remit. Other examples could be saving: famine victims overseas; the poverty stricken (either here or overseas); or people with an untreatable disease etc. It is not my intention to be callous in relation to such groups and I applaud the many, many professionals, organisations, and volunteers who do provide care in such cases. My purpose is simply to indicate that the concept of 'saving' someone raises many categories of interest. The only category that my Work was specifically concerned with, was the rescue of persons under threat of loss of life or serious harm, as a result of an Emergency, and even here it was only concerned with rescues by the average citizen (not, for example, rescues by the State).

2.1.5.3 Saving from Confinement

This is another area where the terms 'saving' or 'rescue' are often applied, and where generally the subject matter is, in virtually all cases, outside the scope of my thesis. Certainly the idea that an individual might be rescued from prison (or an escape might be facilitated) was not one for this project. Similarly, issues around

the rescue of a mentally ill person from a secure institution would be beyond my project remit.

2.2 Further Analysis

The last few pages have considered various components of rescues and numerous examples have been provided of certain types of situations which were deliberately treated as being outside the scope of my Work.

In addition, there are some specific categories or classes of rescue which I also specifically excluded from my research.

These exclusions can be helpfully defined, not in terms of the situation of the victim, but by reference to the nature of the rescuer.

2.2.1 State Rescue Services (including allied bodies)

There are a number of State Rescue services e.g. the Fire Service, the Police Force, the Ambulance Service, HM Coastguard etc. In addition, the Armed Services often play the part of a state rescue service in times of major emergency. Similarly, some Non-Governmental bodies also provide major services e.g. the Royal National Lifeboat Institution (RNLI) and the Mountain Rescue Service.

These rescuers all have at least one thing in common in that they are likely to be under a statutory duty to carry out rescues, or a contractual duty to carry out rescues, or have assumed a specific duty to carry out rescues.

The main interest of my Work was to consider whether and how a Duty to Rescue should be applied to the ordinary citizen: the private Good Samaritan. The fact that

the aforementioned formal services are obliged to carry out rescues will mean that in very many cases of emergency, a victim will be assured of being rescued.

However, the more interesting situations arise when the formal emergency services are either unavailable, or over-stretched, and it falls on the 'genuine' volunteer to step forward and consider a rescue.

The formal rescue services provide a vital service to the citizens of England and Wales, but my work was concerned with informal rescuers and whether any duty to rescue might apply to them, and also whether if they carry out a rescue, the law will protect them if they are sued as a result of an unsuccessful rescue, or whether the law provides for them to be compensated if they suffer loss.

2.2.2 Individuals in Special Relationships to Victims

Whereas it was stated earlier that there is no general duty to rescue in English Law, it was also stated that certain classes of people are in a special position, where a duty will be imposed. One class is the State Rescue Services, another is where the rescuer has a special relationship with the victim.

2.2.2.1 Relationships of Dependence

It is settled law that a parent has a duty to protect their child from danger (see *Surtees v Kingston on Thames BC* (1992)⁴⁰⁹, which interestingly was a foster parent case). In addition, schools have been held to owe such duties to pupils⁴¹⁰.

⁴⁰⁹ *Surtees v Kingston Upon Thames Borough Council* (1992) P.I.Q.R. Page 101

⁴¹⁰ *Woodbridge School v Chittock* (2002) EWCA Civ 915

2.2.2.2 Contractual Relationships

In numerous situations a contractual relationship between two parties may impose a duty on one of them to rescue the other e.g. an employer has a duty to assist an employee injured in an industrial accident, and a carrier at sea has a duty to rescue a passenger who falls overboard⁴¹¹

2.2.2.3 Medical Professionals

In certain situations Medical Professionals have been held to owe a duty to attempt to save a patient's life. However, in England and Wales this is not a legal duty⁴¹². Nonetheless the Professional Body regulating Doctors in the UK imposes a professional duty on such professionals (the breach of which could result in such a doctor being struck off the Register)⁴¹³.

The issue is related not so much to when a doctor is acting in their employment (when they would no doubt could be considered as a part of the state emergency services or considered as under a contractual duty as an employee), but when they are acting in a private capacity i.e. if they face an emergency whilst at the theatre they are obliged to act as a Good Samaritan, or can just turn a blind eye.

The position of other medical professionals is not so clear, and the situation of a Nurse or of a Paramedic who may be under different regulatory regimes to a doctor, raises interesting questions. Certainly First Aiders who will not ordinarily hold 'professional' qualifications are unlikely to be under any legal duty or professional duty to rescue. It will be recalled from the Introduction to my substantive Work, that it is the position of the average First Aider that interested me most in my research.

⁴¹¹ *Horsley v Maclaren*, *The Ogoogo* (1971) 2. Lloyds Rep 410

⁴¹² *Dias R & Markesinis B*, *Tort Law* (1992) Oxford, Clarendon Press p.160

⁴¹³ General Medical Council (2006) *Guidance on Good practice*, Para 11

2.3. Approach to Classes of Rescuers

Whilst the special situation of certain kinds of would-be Rescuers are of interest (e.g. firemen, or parents etc.) it must be reiterated that my Thesis did not intend to address cases where the State, or persons under specific obligations are obliged to attempt rescues. The main focus of my Work was to look in considerable depth at the situation regarding individual, voluntary rescuers.

2.4 Summary of the Situation in relation to Rescues

As with the nature of Emergencies, it is now possible to more clearly define the types of Rescue that my research was primarily concentrated upon.

It has been seen that the term “Rescue” can embrace a wide range of aspects and that many of them were to be specifically excluded from my research. From the points raised above it can now be confirmed that within my substantive Work, the term “Rescue” was taken to mean:

“A direct response to an immediate emergency whereby a human being is saved (or might be saved) from the danger of loss of life or serious harm, by a Volunteer”.

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TWO QUOTATIONS

“The Darkest places in Hell are reserved for those
who maintain their neutrality in times of Moral crisis

Dante Alighieri 1265-1321

“Every Man is Guilty of all the Good he Didn't Do”

Francois-Marie Arouet (Voltaire) 1694 -1778