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NEGLIGENCE -AFFIRMATIVE DUTY TO AID OTHERS

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NEGLIGENCE — AFFIRMATIVE DUTY TO AID OTHERS — The plaintiff alleged that his intestate was taken ill while in the defendant's store. The defendant placed her in an infirmary¹ and there left her for six hours without further medical care. By reason of the lack of medical care the plaintiff's intestate died. On appeal from the lower court's denial of the defendant's motion to dismiss the complaint, *held* that the complaint stated a cause of action. The court assumed that the defendant owed no duty to the intestate to render her any assistance whatsoever, but that upon placing her in the infirmary the defendant assumed the undertaking to give her medical aid. Therefore the

¹ Presumably a rest room in the defendant's store.

defendant was under a duty to render such assistance as an ordinary man would in performing the task. *Zelenko v. Gimbel Bros. Inc.*, 158 Misc. 904, 287 N. Y. S. 134 (1935).

In assuming that the defendant had no duty to act affirmatively, the court was merely voicing the traditional attitude of the courts in their reluctance to compel a man to act.² The absence of a duty to act affirmatively is said to be founded upon the attitude of extreme individualism so typical of all Anglo-Saxon legal thought.³ The often repeated theoretical case involving the babe on the tracks in front of an approaching train, with a bystander calmly standing by, is offered to show the extent of this *laissez faire* policy.⁴ While this policy has been rationalized by pointing to the difficulty of proving that the defendant was not dazed by the emergency or that he could have acted without peril,⁵ the doctrine as a whole is "so divorced from morals that it was bound to breed misgivings."⁶ Thus we find that either by legislation or by judicial limitations certain relationships are recognized as creating a duty to assist others in peril. It has been said that an employer is under a duty to give aid and assistance to an employee suddenly injured while at work or due to the extreme hazards of that work.⁷ Courts have held that carriers owe a duty to give medical aid and assistance, not only to passengers suddenly injured without fault of the carrier,⁸ but also to passengers who become sick while being carried by the carrier.⁹ Ship owners have a duty to make a reasonable effort to aid seamen imperiled without fault of officers or crew.¹⁰ "Hit and run" statutes place upon the driver of a car in most states the duty to stop and aid a person hit by him, regardless of fault.¹¹ However, where there is no relationship existing between the person

² CARDOZO, *THE PARADOXES OF LEGAL SCIENCE* 25 (1928); 6 *NOTRE DAME LAWYER* 372 (1931); MCINTOSH, *NEGLIGENCE IN DELICT I* (1926).

³ Böhlen, "The Moral Duty to Aid Others As Basis of Tort Liability," 56 *UNIV. PA. L. REV.* 217 at 220 (1908).

⁴ *Buch v. Amory Mfg. Co.*, 69 N. H. 257, 44 A. 809 (1897); *Carey v. Davis*, 190 Iowa 720 at 726, 180 N. W. 889, 12 A. L. R. 904 (1921).

⁵ POUND, *LAW AND MORALS*, 2d ed., p. 67 (1926), or as put by Smith, J.: "For withholding relief from the suffering . . . penalties are not found in the laws of men but in that higher law . . . whose sentence of punishment for the recreant act is swift and sure." *Union Pacific Ry. v. Cappier*, 66 Kan. 649 at 653, 72 P. 281, 69 L. R. A. 513 (1903).

⁶ CARDOZO, *THE PARADOXES OF LEGAL SCIENCE* 25 (1928).

⁷ *Carey v. Davis*, 190 Iowa 720, 180 N. W. 889 (1921); *Hunicke v. Meranec Quarry Co.*, 262 Mo. 560, 172 S. W. 43, L. R. A. 1915C 789 and note; and see cases, 39 C. J. 240, notes 63 and 64 (1925).

⁸ *Yazoo & M. V. Ry. v. Byrd*, 89 Miss. 308, 42 So. 286 (1906); *Cincinnati H. & D. R. R. v. Kassen*, 49 Ohio St. 230, 31 N. E. 282 (1892). In *Whitesides v. Southern Ry.*, 128 N. C. 229, 38 S. E. 878 (1901), it was held that after knocking a *trespasser* off a trestle the railroad company owed a duty to stop and care for him.

⁹ Cases cited in 31 L. R. A. (N. S.) 813 (1911) and 31 L. R. A. 261 (1896).

¹⁰ *Harris v. Penna. R. R.*, (C. C. A. 4th, 1931) 50 F. (2d) 866, noted in 30 *MICH. L. REV.* 479 (1932) and in 17 *CORN. L. Q.* 505 (1932).

¹¹ For discussion of these statutes in the light of the common law see 6 *NOTRE DAME LAWYER* 372 (1931); also statute creating duty of master of a ship to rescue anyone at sea. 37 Stat. L. 242, 46 U. S. C., § 728 (1928).

imperiled and the person able to assist upon which a duty may be hung, the courts have firmly refused to hold a person liable for not rendering aid.¹² While this is the law today,¹³ it appears that the courts are becoming more and more astute in finding affirmative action whereby the common-law warning "When you act you must act carefully" can be applied. Thus we find that the mere living together of two adult able-bodied persons is said to have been an undertaking by one to aid and assist the other in time of need. Refusing to give medical aid, or to notify other people who would do so, was so great a breach of duty as to make the defendant guilty of manslaughter.¹⁴ In another case similar to the principal case, when the plaintiff took sick while visiting a friend on business, helping him into his sleigh and handing him the reins was held to be the assumption of a duty to give him the care and attention that a reasonable man would have given.¹⁵ The habit of the courts to readily recognize a voluntary assumption of the duty to aid another is whittling away the last vestige of the old common-law rule. As was said by Justice Cardozo,¹⁶ "We can not say today that the old rule has been supplanted. The rulings are too meagre. Sown, however, are the seeds of scepticism, the precursor often of decay. Some day we may awake to find the old tissues are dissolved. Then will come a new generalization, and with it a new law."

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¹² *Union Pacific Ry. v. Cappier*, 66 Kan. 649, 72 P. 281, 69 L. R. A. 513 (1903). But the court held that acts of rescue by a stranger are the foreseeable consequences of negligently placing one in danger. HARPER, TORTS, § 126, p. 278 (1933). *Brandon v. Osborne Garrett & Co., Ltd.*, [1924] 1 K. B. 548; *Wilkinson v. Kinneil Canal & Coking Coal Co.*, 34 Scot. L. R. 533 (1897).

¹³ 2 TORTS RESTATEMENT, § 314, p. 854 (1934). But in many of the continental countries the law imposes a duty upon a stranger to aid others if it can be done without danger. Dutch Penal Code, art. 450, suggests such a duty.

¹⁴ *The Queen v. Instan*, [1893] 1 Q. B. 450.

¹⁵ *Depue v. Flatau*, 100 Minn. 299, 111 N. W. 1 (1907), discussed in 5 MICH. L. REV. 710 (1907).

¹⁶ CARDOZO, THE PARADOXES OF LEGAL SCIENCE 25 (1928).