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NEGLIGENCE-APPLICATION OF THE RESCUE DOCTRINE WHERE PERSONAL PROPERTY IS INVOLVED

Thomas Hartwell
University of Michigan Law School

NEGLIGENCE—APPLICATION OF THE RESCUE DOCTRINE WHERE PERSONAL PROPERTY IS INVOLVED—The defendant's servant, while parking the defendant's automobile, negligently failed to secure the brakes. At defendant's request, plaintiff police officer attempted to enter the automobile after it had started to roll, hoping to avert any possible collision. In so doing, he slipped on a stone and was injured. Defendant demurred to plaintiff's complaint on the grounds that the plain-

tiff was contributorily negligent, as a matter of law, and that the rescue doctrine should not apply where that rescued from peril created by the defendant is not human life or the rescuer's own property. *Held,* the rescue doctrine was correctly applied even though the thing rescued was not the property of the plaintiff. It was a question of fact for the jury whether the plaintiff's conduct amounted to contributory negligence. *Rushton v. Howle* (Ga. 1949) 53 S.E. (2d) 768.

The rescue doctrine allows a plaintiff to recover for injuries sustained in reasonable attempts at rescuing a thing exposed to danger by the defendant's negligence.[1] The problem which has concerned the courts in cases of this kind is whether the plaintiff should be barred from recovery because of the voluntary nature of his act of intervention in the face of a known peril.[2] Thus, the question has been whether (1) the plaintiff's act should be considered as having broken the chain of causation, or (2) the act should place the plaintiff under the general common law disability in regard to voluntary assumption of risk, or (3) the act should bar the plaintiff as being contributorily negligent. The factors affecting any decision are the extent that legal, social, or moral duties have influenced the voluntary nature of the plaintiff's act, and the general public benefit which would result from what might be called an exception to the general rule of assumption of risk. In those cases where the subject of rescue has been a human life, the answer is clear.[3] A recognition of the social forces influencing the decision of one who sees another in danger, as well as a respect for human life, have led courts to allow the plaintiff recovery. Where mere property has been involved, there are cases in which it is summarily held that the rescue doctrine should not be extended.[4] There is strong authority, however, for the position that there should be no distinction between cases where life or property is the subject of rescue, at least when the plaintiff can be said to be under more than a purely social duty to prevent destruction. Thus, when the plaintiff is the owner of the property,[5] or

[1] It is important to remember that this discussion deals only with those attempts at rescue which, in view of the circumstances, can be considered reasonable. Some factors which must be taken into account are (1) the value of that which was rescued, (2) the risk that appeared involved to the rescuer, and (3) the relationship between the rescuer and that which was rescued. See Cote v. Palmer, 127 Conn. 321, 16 A. (2d) 595 (1940); McKay v. Atlantic Coast Line Ry., 160 N.C. 260, 75 S.E. 1081 (1912); Wagner v. International Ry., 232 N.Y. 176, 133 N.E. 437 (1921).

[2] For an analysis of the problems involved see BOHLEN, STUDIES IN THE LAW OF TORTS, c. 6 (1926). Prof. Goodhart shows how the basic inquiry is in regard to assumption of risk in "Rescue and Voluntary Assumption of Risk," 5 CAMB. L.J. 192 (1934).

[3] Eckert v. Long Island Ry., 43 N.Y. 502 (1871). Cardozo writes a colorful opinion in support of the Eckert case in Wagner v. International Ry., supra, note 1. See also Brugh v. Bigelow, 310 Mich. 74, 16 N.W. (2d) 668 (1944).

[4] Eversole v. Wabash Ry., 249 Mo. 523, 155 S.W. 419 (1913); Delano Mill Co. v. Osgood, (C.C.A. 1st, 1917) 246 F. 273; Johnson v. Terminal R. Assn., 320 Mo. 884, 8 S.W. (2d) 821 (1928); Cook v. Johnston, 58 Mich. 437, 25 N.W. 388 (1885). But cf. Eckert v. Long Island Ry., supra, note 3.

[5] Illinois Central Ry. v. Siler, 229 Ill. 390, 82 N.E. 362 (1907); Wardrop v. Santi Moving Express Co., 233 N.Y. 227, 135 N.E. 272 (1922); McKay v. Atlantic Coast Line Ry., supra, note 1.

employed by the owner,[6] the weight of authority holds that he is protected in his reasonable attempts at its rescue. While there is no legal duty on the plaintiff in these cases to subject himself to any risk, he is required, for the purpose of mitigating damages, or by his contract with his employer, to display at least a minimum standard of reasonable care toward the property. Failure to follow the rescue doctrine might place a premium on unfaithful service or subject the owner of property to the unfair risk of acting at his peril. Finally, there is some authority that the plaintiff need be under no obligation at all with respect to the property.[7] Thus, in the case of *Liming v. Illinois Central Ry.*,[8] it was recognized that the social duty of the plaintiff to prevent unnecessary destruction of property, coupled with the public censure which might accrue should plaintiff fail to come to the aid of his neighbor, were in themselves sufficient reason to justify application of the doctrine. In the present case the decision is placed on this broad ground. There is an additional factor, however, in that plaintiff is a police officer. Here again the court might well feel that the danger of fostering unfaithful service should weigh heavily in plaintiff's favor. Nevertheless, it is believed that the broader ground is preferable in that it best serves the public interest and allows the jury, peculiarly suited for this purpose, to be the ultimate judge of human relations.

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[6] The doctrine was extended to employees in Hollenback v. Stone and Webster Engineering Corp., 46 Mont. 559, 129 P. 1058 (1913); Henshaw v. Belyea, 220 Cal. 458, 31 P. (2d) 348 (1934). In this last case there is an excellent discussion of the various decisions. But, cf. Johnson v. Terminal R. Assn., supra, note 4, and Delano Mill Co. v. Osgood, supra, note 4, where the employees' acts were considered beyond the scope of their employment.

[7] Liming v. Ill. Central Ry., 81 Iowa 246, 47 N.W. 66 (1890); Johannsen v. Mid-Continent Petroleum Co., 232 Iowa 805, 5 N.W. (2d) 20 (1942); Henry v. Cleveland, C. C. and St. L. R. Co., 67 F. 426 (1895).

[8] Supra, note 7.