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TORTS—LIABILITY OF RESCUED DEFENDANT WHO CARELESSLY EXPOSES HIMSELF TO DANGER TO RESCUING PLAINTIFF WHO IS INJURED— While visiting defendant's farm, plaintiff was injured pushing defendant from the path of her own automobile which she had stopped on an incline without setting the brake. *Held,* for plaintiff. Lack of self-protective care may be negligence toward any person in whose vicinity one exposes oneself to undue risk of injury. *Carney v. Buyea,* 271 App. Div. 338, 65 N.Y.S. (2d) 902 (1946).

A rescuer injured in a reasonable attempt to aid a third person exposed to danger by the negligence of defendant may recover.[1] It does not amount to contributory negligence to risk life or serious injury in a reasonable attempt to effect a rescue,[2] and the cause of the injury to the rescuer is the negligence of defendant who caused the peril.[3] Courts have had more difficulty with the few

[1] 38 AM. JUR., Negligence, § 80, pp. 738-739; Wagner v. International Railway Co., 232 N.Y. 176, 133 N.E. 437 (1921), 19 A.L.R. 1 at 4 (1922); Tarnow v. Hudson & M. R. Co., 120 N.J.L. 505, 1 A. (2d) 73 (1938).

[2] 2 TORTS RESTATEMENT, § 472 (1934); Bernardine v. New York, 268 App. Div. 444, 51 N.Y.S. (2d) 888 (1944); Wolfinger v. Shaw, 138 Neb. 229, 292 N.W. 731 (1940); Corrie v. Hollaran, 51 Ga. App. 910, 181 S.E. 709 (1935).

[3] PROSSER, LAW OF TORTS 358-360 (1941); Wagner v. International Railway Co., 232 N.Y. 176, 133 N.E. 437 (1921), 19 A.L.R. 1 at 4 (1922); Guille v. Swan, 19 Johns. (N.Y.) 381 (1822); Duff v. Bemidji Motor Service Co., 210 Minn. 456, 299 N.W. 196 (1941). See also 166 A.L.R. 752 (1947) on causation in accident and injury cases.

rescue cases like the principal case in which defendant's action exposes himself rather than a third person to danger. The chief problem in this connection has been one of duty. A leading case in the field, *Saylor v. Parsons*,[4] held in 1904 that a plaintiff injured while preventing a brick wall from falling on the defendant who had not exercised care for his own safety in undermining it with a crowbar could not recover. The court indicated that a rescuing plaintiff's rights were derived from the rights of the person rescued unless defendant had been negligent toward plaintiff after the start of the attempted rescue.[5] In 1932 the New Jersey Court of Errors and Appeals [6] held a defendant, whose driver had driven recklessly on an icy pavement and skidded into an electric light pole, breaking the pole and causing the wires to fall, liable to a plaintiff injured by contact with the wires in going to aid the driver trapped beneath the truck. However, the court did not treat the case as a rescue case because the situation did not involve obvious danger to the rescuing party, but based liability on danger to users of the highway in general caused by knocking the pole down. The *Saylor* case was followed in 1943 by a Canadian court denying recovery in *Dupuis v. New Regina Trading Co., Ltd.*,[7] where defendant's elevator operator, through her own negligence in failing to close the elevator door before starting, had become suspended head down in the elevator shaft and Dupuis was killed when he fell down the shaft attempting to rescue her. On the other hand, in 1944 the Michigan Supreme Court in *Brugh v. Bigelow* [8] held that a plaintiff injured while attempting to aid a defendant pinned beneath the wheel of defendant's car after an accident caused by his own negligence might recover on the theory that defendant by carelessness for his own safety created a dangerous situation in which it was likely that a bystander might be induced to rescue him and be injured. The Michigan court [9] as well as the New York court in the principal case [10] rejected the argument, based on the theory of the *Saylor* case, that defendant could not be liable since plaintiff's rights were derived from those of the rescued person and the rescued person here could have no right because defendant could not be legally negligent toward himself. These two recent cases may indicate a shift in the court's thinking toward the

[4] 122 Iowa 679, 98 N.W. 500 (1904), 64 L.R.A. 542 (1904).

[5] Id. at 681, "But negligence on the part of the defendant either toward the person rescued or the party making the rescue after the attempt has been begun is essential to a recovery in all cases."

[6] Butler v. Jersey Coast News Co., 109 N.J.L. 255, 160 A. 659 (1932).

[7] [1943] 4 D.L.R. 275; reviewed in 21 CAN. B. REV. 758 (1943).

[8] 310 Mich. 74, 16 N.W. (2d) 668 (1944), 158 A.L.R. 184 at 189 (1945). The case is discussed in 25 MICH. B. J. 251 at 337 (1946), 43 MICH. L. REV. 980 (1945), and 10 MO. L. REV. 321 (1945).

[9] 310 Mich. 74 at 81, "Defendant's claim that he owed himself and his rescuer no duty is without merit. His cries for help belied his claimed freedom from duty. Defendant further argues that rescue is unusual and that it is an unusual thing and therefore not to be anticipated that passers-by would respond to relieve known dire necessity resulting from an automobile accident. We understand the contrary to be the case."

[10] 65 N.Y.S. (2d) 902 at 908, "In parking her car as she did, the defendant endangered the safety not only of the bystanders on her farm, but also the safety of herself. . . ."

view, as Professor Bohlen put it, criticizing the *Saylor* case,[11] that "the rescuer's right of action therefore must rest upon the view that one who imperils another at a place where there may be bystanders must take into account the chance that some bystander will yield to the meritorious impulse to save life or even property from destruction, and attempt a rescue. If this is so, the right of action depends not on the wrongfulness of defendant's conduct in its tendency to imperil the person whose rescue is attempted, but upon its tendency to cause the rescuer to take the risk involved in the attempted rescue. And it would seem that a person who carelessly exposes himself to danger or who attempts to take his life in a place where others may be expected to be, does commit a wrongful act towards them in that it exposes them to recognizable risk of injury." Although the justices in the *Saylor* case felt that the possibility of attempted rescue was so remote that it was not foreseeable,[12] the many rescue cases in the courts today point to the opposite conclusion, and, therefore, the change evidenced by the principal case would seem desirable and more in keeping with modern theories of duty in negligence cases.

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[11] STUDIES IN THE LAW OF TORTS, note 33, 568 at 569 (1926). In support of this theory see King, "Some Memorabilia of Michigan Law, 1940-45," 25 MICH. B. J. 251 at 337 (1946).

[12] 122 Iowa 679 at 684, "The instincts of self preservation still so dominates human conduct that acts like that under consideration, in which life itself was risked for the protection of another, are of such rare occurrence as always to commend the special attention and admiration of the entire community, and by the common voice of mankind those who do them are singled out as worthy of enrollment on the scroll of heroes. Because of their infrequency, however, it cannot be said they should enter into the calculations of men as at all likely in the ordinary transactions of life. As they spring from magnanimity, magnanimity must be relied upon in cases like this for reparation."