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TORTS—THE DUTY TO RESCUE—“AM I MY BROTHER’S KEEPER?”—A recent case, decided by the Supreme Court of Indiana,¹ and commented upon elsewhere in this issue,² involved the interesting question as to the existence of a duty to go to the aid of a person who is in helpless peril through no initial fault on the part of the defendant.

¹ L. S. Ayres & Co. v. Hicks, (Ind. 1942) 40 N. E. (2d) 334.

² *Infra*, p. 564.

A six-year-old youngster, who was accompanying his mother on a shopping tour, fell while descending on an escalator in defendant's department store. Fingers on both of his hands were caught in moving parts of the mechanical stairway. Although it was clear that the original injury was not caused by defendant's negligence, there was delay in stopping the escalator, and the injuries were aggravated as a result of the prolonged operation of the device. The question before the court, then, was most specific: Was there a duty, on the part of the originally innocent defendant, to go to the assistance of the helpless child? The question was answered in the affirmative; the Indiana court found such a relationship, in the case before it, as would justify the imposition of the affirmative duty to aid. The case contained some unusual features—features which were not present in some of the earlier cases in this field. For that reason, if for no other, it may be used as a stepping stone to a brief discussion of the general problem of which it is illustrative.

In an address delivered on the occasion of the seventy-fifth anniversary of the Cincinnati Law School, over thirty-five years ago, Dean Ames deplored the fact that "The law does not compel active benevolence between man and man." He suggested, as a possible "working rule"

"... One who fails to interfere to save another from impending death or great bodily harm, when he might do so with little or no inconvenience to himself, and the death or great bodily harm follows as a consequence of his inaction, shall be punished criminally *and shall make compensation* to the party injured or to his widow and children in case of death."³

One may safely assume that Professor Ames would have objected to the adoption of section 314 of the *Torts Restatement*, wherein it is said that

"The actor's realization that action on his part is necessary for another's aid or protection does not of itself impose upon him the duty to take such action."

If he was justified in labelling the early law as "unmoral," how would he characterize a legal system which permits its Restaters to say that

"A sees B, a blind man, about to step into the street in front of an approaching automobile. A could prevent B from so doing by a word or touch without delaying his own progress. A does not

³ Ames, "Law and Morals," 22 HARV. L. REV. 97 at 112, 113 (1908) (italics added). Another article of this same period calling for greater recognition of moral duty in the law of torts is Bohlen, "The Moral Duty to Aid Others as a Basis of Tort Liability," 56 UNIV. PA. L. REV. 217, 317 (1908).

do so, and B is run over and hurt. A is under no duty to prevent B from stepping into the street and is not liable to B"?⁴

Would he not shudder at the suggestion that

"A, a strong swimmer, sees B, against whom he entertains an unreasonable hatred, floundering in deep water obviously unable to swim. Not knowing B's identity, he takes off his shoes preparatory to plunging in to his aid. Discovering B's identity, he turns away. A is not liable to B"?⁵

There seems to be no reason to doubt the validity of the *Restatement's* exposition; apparently, in 1942 as in 1908, it may still be said that "It is left to one's conscience whether he shall be the Good Samaritan or not."⁶ But, if we read the signs correctly, Professor Ames' labor was not entirely in vain. In fact, the Indiana case to which we have referred, and which we have agreed to use as an approach to the general problem, was anticipated, albeit hopelessly, in Dean Ames' address. Among the hypothetical cases put by the author of "Law and Morals" was one which involved the following facts: The eye of a man was penetrated by the glancing shot from the gun of a *careful* pheasant hunter. Stunned by the shot, the injured man fell, face downward, into a shallow pool by which he was standing. The hunter might easily have saved him, but he let him drown.⁷ Professor Ames, although able to distinguish the case from his other hypothetical cases ("in that the hunter, although he acted innocently, did bring about the dangerous situation"), could not, in 1908, predict success for the widow of the drowned person in an action against the heartless hunter. "Here, too, the lawyer who should try to charge the hunter would lead a forlorn hope."⁸ Need we be so pessimistic today?

One need not labor the point that a person may get into a perilous situation as a result of his own negligence, or as a result of defendant's negligence, or as a result of some third party's fault, or as a consequence of some combination of those factors, or despite the fact that no one was at fault. If the fault basis is employed, exclusively, the answers to the cases involving the fact situations suggested are clear. If we admit the premise that the transition as to the basis of tort liability has changed the earlier question, "Did the defendant do the physical act which damaged the plaintiff?" to "Was the act blameworthy?"⁹ we may be most dubious as to the liability of an initially

⁴ 2 TORTS RESTATEMENT, § 314, and comment b, illustration 1 (1934).

⁵ Id., comment c, illustration 4.

⁶ Ames, "Law and Morals," 22 HARV. L. REV. 97 at 112 (1908).

⁷ Id. at 112.

⁸ Id. at 113.

⁹ Id. at 99. More accurately, perhaps, the second question has qualified the earlier question by the addition of the fault requirement.

blameless defendant who merely *fails to act*. But is it so clear that the quality of defendant's conduct is always the determining factor? Dean Ames noted certain exceptions, based, he said, on "public policy."¹⁰ Today we could add, to the exceptions he had in mind, other cases of liability which indicate a willingness, on the part of our courts, to place liability on a defendant who has been guilty of no real fault.¹¹ Some of these exceptional cases may, quite properly, be based upon "public policy"; one may argue that, in one possible interpretation of that phrase, all legal principles are based upon public policy. But some of the situations involving liability without fault are certainly based upon something more personal: the tremendous risk involved in the defendant's activity,¹² if, though carefully done, something "goes wrong"; or the utter helplessness of the plaintiff.¹³ It is quite natural that, in this rescue field, the second alternative suggests itself as a matter of prime importance. Cases involving drowning sailors¹⁴ or injured employees¹⁵ emphasize this feature; what more natural an "extension" of this idea than to apply it in the case of a person who has been struck, for example, by defendant's carefully-operated train, or his properly-driven automobile?¹⁶ To rely on a layman's impression as to what the "law ought to be" is dangerous in any case, but it is an argument with which even great judges have toyed in some cases. And it may be demonstrated, I think, that the ordinary man, if the question were put to him, would suppose that although he might not have to be a Good Samaritan (might not have to aid the plaintiff if some third party had caused the perilous situation), he would be in an entirely different position if his car, for example, had struck the plaintiff and created the perilous situation. The Indiana case seems to be the first nonrailroad case in which the defendant's ownership and control of the danger-

¹⁰ Ames, "Law and Morals," 22 HARV. L. REV. 97 at 100, 109 (1908).

¹¹ Consider, for example, *Baxter v. Ford Motor Co.*, 168 Wash. 456, 12 P. (2d) 409, 15 P. (2d) 1118 (1932); *Green v. General Petroleum Corp.*, 205 Cal. 328, 270 P. 952 (1928); *Exner v. Sherman Power Construction Co.*, (C. C. A. 2d, 1931) 54 F. (2d) 510.

¹² This is the real justification apparently for the imposition of liability in the *Green* and *Exner* cases cited supra, note 11.

¹³ This attribute is emphasized in the "last clear chance" cases, and though the rescue cases are of a different sort, it is interesting to note that the Indiana Supreme Court, in the *Hicks* case, suggests that "The measure of that duty is not unlike that imposed by the rule of the last clear chance or doctrine of discovered peril." *L. S. Ayres & Co. v. Hicks*, (Ind. 1942) 40 N. E. (2d) 334 at 338.

¹⁴ See, for example, *Harris v. Pennsylvania R. R.*, (C. C. A. 4th, 1931) 50 F. (2d) 866, commented upon in 30 MICH. L. REV. 479 (1931).

¹⁵ *Hunicke v. Meramec Quarry Co.*, 262 Mo. 560, 172 S. W. 43 (1914).

¹⁶ The now familiar "hit-run" statutes often contain legislative sanction for the imposition of the rescue duty, though the primary purpose of the statute may be an entirely different one.

creating agency is emphasized. And even in that case there is a little cloudiness, for the court states that the affirmative duty to rescue is imposed if defendant is "a master, or an invitor," or when the dangerous agency is under defendant's control; and the court specifically found that the plaintiff was an invitee. We are left to speculate as to what the court will do if the next case involves a licensee-plaintiff, or a trespassing plaintiff. However, some gain is better than none; the Indiana case was free from the possible argument that it was really a case of negligent action, rather than inaction; and the court did state, as a possible basis for the imposition of the duty to aid, "management and control of the instrumentality" which was causing the aggravated injuries. What has been, in the main, up to this time, law review and classroom argument, now has at least some measure of judicial sanction.

P. A. L.