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Torts -- Nonfeasance -- Rescue and Foreseeability

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TORTS—NONFEASANCE—RESCUE AND FORESEEABILITY.—*Matthews* v. *MacLaren*[1] is a spectacular case, the facts of which, according to Justice Jessup, "might have been contrived for a bar exam". In the early spring of 1966, MacLaren, the owner of a cabin cruiser called the "Ogopogo" took some friends for a cruise on his boat from Oakville to Port Credit, Ontario. As is customary on such occasions, some alcoholic refreshments were imbibed. On the return journey, the cool, brisk wind made the water somewhat choppy. Most of the passengers went below, but Matthews was sitting on the foredeck. He got up and proceeded toward the stern of the boat when, for no apparent reason, he lost his footing and toppled over backwards into the 44° F waters of Lake Ontario. A passenger shouted "Roly's overboard!" MacLaren threw the boat into neutral as the passengers all scrambled onto the deck. MacLaren reversed the motors and backed up toward where Matthews had been spotted, about forty to fifty feet astern. The engines were shut off and the boat drifted toward Matthews. A life ring and life jacket were thrown into the water by one passenger. Another tried to hook Matthews with a pikepole. Matthews, however, made no attempt to assist himself; he merely floated with outstretched arms, his eyes open and glassy, apparently unconscious. The boat began to drift away. Once more the engine was started and the boat backed up toward Matthews. After a few minutes had elapsed, Horsley, one of the passengers, removed his shoes and trousers, shouted — "My friend! My friend!", dove into the icy water and emerged about ten feet from Matthews. Just then Mrs. Jones, another passenger, noticed Matthews' body fall forward in the water. She, too, leaped in to help but she could not prevent Matthews' body from going under the starboard quarter of the boat. Mr. Jones, on seeing his wife in the water, took over the controls, swung the boat around and approached his wife "bow on", whereupon she was pulled aboard safely. MacLaren then took over the controls again and picked up

[1][1969] 2 O.R. 137 (High Court) reversed [1970] 2 O.R. 487 (C.A.).

Horsley, but, unfortunately, he could not be resuscitated. According to the testimony of a pathologist, Horsley's death was caused by cardiac failure resulting from the sudden shock of being immersed in the cold water. Matthews' body was never recovered and the exact cause of his death remained unknown, although it was probably a heart attack also.

At trial, Matthews' family was denied recovery on the ground that there was no evidence that his death was caused by MacLaren. Horsley's family was awarded damages at trial, but the Ontario Court of Appeal reversed this decision.

These facts raise several important legal issues. The first matter is whether there was any duty to rescue in the circumstances. The second problem is the standard of care expected of one who attempts a lifesaving operation, that is the duty of the rescuer. Thirdly, there is the issue of the nature of the duty to the rescuer who is injured during such an effort. I shall now deal with each of these problems in order.

Duty to rescue

The common law does not require anyone to come to the aid of anyone else, except in a few specific situations.[2] A general duty of affirmative action, it is felt, might infringe unduly upon individual liberty, might endanger potential rescuers and might create too many problems of administration. There are, however, certain relationships which do give rise to a positive duty to render assistance. For example, a bailee, a master, an innkeeper, a shopkeeper may be required to act. Someone who negligently injures another is bound to see that he receives medical attention as may be someone who is in control of an instrumentality which causes damage without neligence. Similarly, one who undertakes to assist also assumes a limited obligation.[3]

There has been a remarkable development in the use of penal legislation to create new tort duties in recent years. Moving by analogy and in sympathy with the legislative policies enshrined in criminal statutes, courts have established new civil duties to act where none had existed before. In *Monk* v. *Warbey*,[4] for example, a *civil* obligation to buy liability insurance was created by relying on a penal statute to this effect. A civil duty to stop and render aid has been based on hit-and-run legislation.[5] So, too, new tort obligations have been founded on violations of statutes that require railways to fence their tracks[6] and hotels to deny

[2] See generally Linden, Tort Liability for Criminal Nonfeasance (1966), 44 Can. Bar Rev. 25.

[3] *Ibid.* [4] [1935] 1 K.B. 75.

[5] See *Brooks* v. *Willig Transport Co.* (1953), 40 Cal. 2d 669, 255 P. 2d 802.

[6] *Colonial Coach Lines* v. *Bennett & C.P.R.* (1967), 66 D.L.R. (2d) 367 (Ont. C.A.).

alcoholic beverages to intoxicated patrons.[7]

Matthews v. *MacLaren* has made a major contribution to the jurisprudence in this area. Justice Lacourciere, at trial, in an impressive judgment, extended the "quasi-contractual" duty of the carrier to his passenger so that it would apply to the master of a pleasure boat and his invited guest. His Lordship found some support for this position in section 526 of the Canada Shipping Act[8] which reads:

> The master or person in charge of a vessel shall, so far as he can do so without serious danger to his own vessel, her crew and passengers, if any, render assistance to every person, even if that person be a subject of a foreign state at war with Her Majesty, who is found at sea and in danger of being lost, and if he fails to do so he is liable to a fine not exceeding one thousand dollars.

Justice Lacourcière following the legislative policy enshrined in the statute contended: "Parliament reflecting the conscience of the community has seen fit to impose on the master a duty to render assistance to any stranger, including an enemy alien 'found at sea and in danger of being lost' . . .; the common law can be no less solicitous for the safety of an invited guest and must impose upon the master the duty to attempt a rescue, when this can be done without imperilling the safety of the vessel, her crew and passengers. The common law must keep pace with the demands and expectations of a civilized community, the sense of social obligation, and brand as tortious negligence the failure to help a man overboard in accordance with the universal custom of the sea."[9] His Lordship also supported his decision on the ground that one who undertakes a rescue operation assumes a duty to act reasonably.

This reasoning emerged unscathed from the Court of Appeal. Justice Jessup, in his perceptive judgment, argued that section 526 covered not only strangers "found at sea" but also passengers. He declared that he was unable to "adopt . . . an interpretation which would ascribe to Parliament a solicitude for the lives of alien enemies at the same time denied by it to passengers and crews of Canadian ships."[10] He, therefore, assumed that the Canada Shipping Act, "on one or the other of the legal theories by which the courts attach civil consequences to the breach of a penal provision in a statute, will support a cause of action . . .".

Justice Jessup also agreed with Justice Lacourciere's ascription of a duty to the master of a ship to rescue a passenger who falls overboard. These are his words: "The common law reluc-

[7] *Menow* v. *Honsberger & Jordan House Ltd.*, [1970] 1 O.R. 54 (Haines J.).

[8] R.C.S., 1952, c. 29, as am.

[9] [1969] 2 O.R. 137, at p. 143.

[10] [1970] 2 O.R. 487, at p. 500.

tance to penalize non-feasance has yielded to a duty of affirmative care in situations of special relationship between the plaintiff and the defendant as employer and employee, carrier and passenger and occupier and his lawful visitor. A passenger on a ship is in the position of total dependence on the master and I think that peculiar relationship must now be recognized as invoking a duty of the master, incident to the duty to use due care in the carriage by sea of a passenger, of aid against the perils of the sea. Falling overboard is such a peril and in that situation I do not think the common law can do otherwise than to adopt the statutory duty to render assistance."[11]

Justice Schroeder (McGillivray J.A. concurring) was not as enthusiastic as Justice Jessup about utilizing the criminal law to create new tort duties.

Justice Schroeder, in his well-reasoned judgment, refused to accept the notion that the breach of the statute "created" a legal duty to rescue and to use reasonable care in the process. The trial judge was correct in declining to treat the enactment in this way. Nevertheless, he asserted that: "Parliament, in enacting the section, gave expression to humanitarian principles which should guide the consciences of civilized men in their relations even to an enemy who was found in peril at sea and this must have an important bearing on the question as to whether a moral or social duty resting upon the master of a vessel traversing navigable waters to come to the rescue of a passenger who through his own misfortune falls overboard can be ripened into a legal duty not only to come to his passenger's aid, but also to exercise reasonable care in the rescue procedure."[12]

Justice Schroeder recognizes that it is the civil courts, not the legislatures, that are creating these new tort duties by analogy to penal statutes. In most cases the civil courts should follow the criminal law in deciding whether to establish new tort duties, although they need not do so in every case. The legislative policies advanced by penal legislation are generally worthy of respect and support. This is so for reasons of comity, democracy, consistency and superior legislative expertise. Moreover, an additional civil deterrent may foster stricter obedience to the criminal law.[13]

Duty of the rescuer

One of the paradoxes of the law in this area has been that a Bad Samaritan goes free while a Good Samaritan, who bungles a rescue attempt, can be saddled with civil liability. Although there

[11] *Ibid.*, at p. 501.
[12] *Ibid.*, at p. 492.
[13] Linden, *op. cit.*, footnote 2, at p. 64. See also Weiler, Legal Values and Judicial Decision-Making (1970), 48 Can. Bar Rev. 1.

are few reported cases against Good Samaritans,[14] the law may act as a disincentive to potential rescuers. Doctors, in particular, have expressed a disinclination to offer assistance to those in peril and in recognition of this problem several jurisdictions have enacted Good Samaritan legislation which relieves doctors and others from liability in these circumstances, unless there is gross negligence.[15]

The *Matthews* decision casts light on this problem. The trial judge, Lacourciere J., seemed ready to exact the usual standard of reasonable care from the rescuer: "What would the reasonable boat operator do in the circumstances . . .?", he asked. On the basis of the evidence, he found the defendant negligent in that he used the "wrong procedure" in backing up the boat to affect the rescue because of his "excessive consumption of alcohol".[16]

The Court of Appeal, however, held that there was only an error in judgment, not negligence. Relying on *East Suffolk River Catchment Board* v. *Kent*,[17] Justice Jessup adopted a different test for these rescue cases. He felt that "where a person gratuitously and without any duty to do so undertakes to confer a benefit upon or go to the aid of another he incurs no liability unless what he does worsens the condition of that other".[18] Disagreeing with the trial judge, Justice Jessup stated: "I think it is an unfortunate development in the law which leaves the Good Samaritan liable to be mulcted in damages and apparently in the United States it is one that has produced a marked reluctance of doctors to aid victims." Justice Schroeder warned judges not to treat *Donoghue* v. *Stevenson*[19] as an "open invitation to . . . depart from their traditional function as expounders and interpreters of the law and to assume the function of legislators".[20] His Lordship asserted that "the law must ever continue to be a living force to achieve its true ends, and judges have not shrunk from the task of moulding the law to keep pace with changing mores as civilization progresses". Consequently, "if a person embarks upon a rescue, he is not under any liability to the person to whose aid he has come so long as discontinuance of his efforts did not leave the other in a worse condition than when he took charge". He concluded that the rescue effort of MacLaren did not worsen Matthews' position, even though it may not have complied with the standard of "text-book perfection" laid down by the expert evidence and

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[14] See *Zelenko* v. *Gimbel Bros.* (1935), 287 N.Y.S. 134.
[15] See, for example, The Emergency Medical Aid Act, S.A., 1969, c. 28, s. 3.
[16] *Supra*, footnote 9, at pp. 145-146.
[17] [1941] A.C. 74.
[18] [1970] 2 O.R. 487, at p. 500.
[19] [1932] A.C. 562.
[20] *Supra*, footnote 10, at p. 493.

adopted by the trial judge. Justice Schroeder said "It is ever so easy to be wise after the event . . .".

Justice Schroeder was probably too lenient in his assessment of the defendant's conduct. MacLaren was guilty of more than a mere slip; he adopted a totally wrong procedure. Moreover, the trial judge had the opportunity of hearing the evidence and his findings should be given more weight by the Court of Appeal.

It is hard to know whether the *Kent* rule[21] will actually alter the conduct of potential rescuers. At the least, however, it will be more difficult for them to offer fear of civil liability as an excuse for refusing to grant assistance. Let us hope that Good Samaritanism will be advanced thereby.

Duty to the rescuer

The trial judgment in *Matthews* articulated with clarity the duty to a rescuer, but the Court of Appeal reversed the decision on the unfortunate ground of lack of foresight. Justice Lacourciere used the risk theory to recognize the duty to Horsley, the rescuer. His Lordship felt that his "conduct was not futile, reckless, rash, wanton or foolhardy", and that he "was not guilty of contributory negligence".[22] Nor did it matter that the person being rescued could not have been helped. *Volenti* was rejected, first because it was not pleaded, and second, because the plaintiff did not freely and voluntarily, with full knowledge of the nature and extent of the risk he ran, impliedly *agree* to incur it. Justice Lacourciere concluded that the defendant's negligence in effecting the rescue induced the rescuer which was "within the risk created by the defendant's negligent conduct".[23]

The Court of Appeal, however, denied compensation to Horsley. Justice Jessup agreed that a rescue attempt by a passenger *is* a foreseeable consequence of a mishandled rescue attempt. Nevertheless, His Lordship felt that a rescue by Horsley *in particular* could not be reasonably anticipated, since he had been warned to remain in the cabin because of his inexperience with boating. "By that command . . ." said Justice Jessup, "MacLaren insulated Horsley from such perils of the voyage as were eventually encountered . . .".[24]

Justice Schroeder went even further in limiting the protection afforded to rescuers. He stated: "The temperature of the water and the continuing efforts of all on board to bring Matthews to the safety of the vessel all militated against such an act on the part of any of the passengers as a probability to be reasonably anticipated. Nothing in the evidence points to Horsley's knowledge of the

[21] *Supra*, footnote 17.
[22] *Supra*, footnote 9, at p. 149.
[23] *Ibid.*, at p. 150.
[24] *Supra*, footnote 10, at p. 502.

proper operation of a boat in an emergency of this kind, nor is there any evidence which suggests that he had any valid reason for supposing that MacLaren's conduct in the circumstances was not what it ought to be. Moreover, MacLaren had told Horsley to confine himself to the cockpit or cabin. It is not suggested that Horsley had made his intention known to MacLaren, and it would scarcely be anticipated in any event that any passenger would dive into the water without at least taking precautions for his own safety by donning a life jacket or attaching a rope to himself, especially when he could see the effect that the very cold water had had upon Matthews."[25]

Such a slavish reliance on foresight is downright disappointing.[26] To accept Justice Jessup's reasoning would be to require foresight of a particular individual prior to the recognition of a duty owed to him, a theory that was impliedly rejected in *Jones* v. *Wabigwan*.[27] Foreseeability is an elusive enough concept already. To expect this kind of precise foresight is unacceptable and contrary to authority.[28] Justice Schroeder's view is even harsher. Although he is on sound ground when he states that without negligence on behalf of the defendant there can be no recovery by a rescuer, he is not when he discusses the specific nature of the rescue attempt. It is true that an effort to save someone can be so utterly stupid as to fall outside the ambit of the law's protection. If this occurs there is said to be no duty owed to that rescuer and foresight is an important element in this determination. Such a result would follow if someone jumped off the fifty-fourth floor of the Toronto-Dominion Centre to rescue a child on the road. But where a rescue attempt is merely unwise or careless, the courts should and do handle it as a problem of contributory negligence and reduce the amount of the rescuer's recovery, rather than eliminate it altogether.

Another defect in the Court of Appeal's decision is the conclusion that the disobedience of the order to stay below was unforeseeable.[29] The courts have recognized as foreseeable acts that are much more unexpectable such as the violation of the rules of a transit company,[30] the theft of articles[31] and even suicide.[32] The flouting of an order to stay below, is not unforeseeable in the

[25] *Ibid.*, at p. 496.
[26] See below.
[27] [1970] 1 O.R. 366, reversing [1968] 2 O.R. 837.
[28] See *Hughes* v. *Lord Advocate*, [1963] A.C. 837, 1 All E.R. 705.
[29] See generally on this problem, Linden, Down with Foreseeability! Of Thin Skulls and Rescuers (1969), 47 Can. Bar Rev. 545.
[30] *Harris* v. *T.T.C. and Miller*, [1967] S.C.R. 460.
[31] *Stansbie* v. *Troman*, [1948] 2 K.B. 48, 1 All E.R. 599 (C.A.); *Patten* v. *Silberschein*, [1936] 3 W.W.R. 169, 51 B.C.R. 133; *cf. Duce* v. *Rourke* (1951), 1 W.W.R. 305 (Alta).
[32] *Pigney* v. *Pointers Transport Services, Ltd.*, [1957] 1 W.L.R. 1121, 2 All E.R. 807; *Stadel* v. *Albertson*, [1954] 2 D.L.R. 328 (Sask.).

emergency situation that arose.

My criticism of the judgment of the Court of Appeal is not limited to the application of the foresight rule—it goes to the foresight rule itself. Our courts must not continue to invoke it or reject it whenever they wish. They must give us more guidance on how they decide which results will be within the scope of the risk and which will fall outside it. In the rescue area, the courts do their utmost to encourage responsible attempts at saving life and property. The rescuer is not and should not be denied aid unless he is absolutely foolhardy. Rather than using foresight theory, the courts should regulate careless lifesaving efforts by the device of comparative negligence, which is more flexible and more just. Perhaps the Supreme Court of Canada will use this opportunity to clarify and improve the law in this area by restoring the trial decision of Justice Lacourciere.

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[1] (1869), L.R. 6 Q.B. 1. As to recent problems in this area see (1969), 1 A.C.L. Rev. 122; (1970), 33 Mod. L. Rev. 1; (1970), 20 U. Tor. L.J. 81.

[2] [1937] 1 All E.R. 725.