THE RESCUE CASE RECONSIDERED

In 1934, in consequence of certain dicta which appeared in the judgments of the Lords Justices who decided *Cutler v. United Dairies,* [1] Professor Goodhart in a clear and illuminating article, [2] examined and analysed at length the principles and decisions applicable to the "rescue" cases. Since then, additional English and American cases have been decided and there has been a considerable discussion of many of the related problems in academic literature; in view of both these facts a further attempt at clarification and consolidation seems justifiable.

Perhaps at the outset it would be as well to explain briefly by a hypothetical example what is meant by a "rescue" case, it being clearly understood that the following is but an illustration of only one of the basic situations which give rise to a "rescue" action. Jones drives his motor car down a busy thoroughfare at an excessive speed and with faulty brakes; an old lady, Mrs. Smith, crossing the road, is thereby placed in great peril of being run down. Brown, a bystander, rushes on to the road and manages to thrust Mrs. Smith aside but is himself struck and severely injured. For such injuries he brings action for damages against Jones.

It is clear that the primary and vital question for the court is: Did Jones owe Brown a duty of care in such circumstances? It is only after an affirmative answer has been given to this inquiry that it is necessary for the court to consider such matters as voluntary assumption of risk and remoteness of damage. Yet an examination of the cases shows that insufficient attention has been paid to that first important question; [3] moreover, not only is this so, but little or no distinction is drawn between the various kinds of "rescue" cases that arise. Is there any difference, for example, between the rescue of an innocent third person and that of a negligent defendant himself, between the rescue of the property of a third person and that of a defendant or between any of these classes? It is true that some of the answers to these questions are contained in the actual results of particular cases but very little appears in the judgments to show that the courts are aware of the possibility of any distinction. *Hyett v. Great Western Railway* [4] will serve as an example. This case, in its relation to the present subject, concerned in fact the "rescue" of property belonging to the *defendant,* yet it was treated

[1] (1933) 2 K.B. 297.
[2] 5 Camb. L.J., p. 192.
[3] See, for example, the judgment of Cassels, J., in *Morgan v. Aylen,* (1942) 1 All E.R. 489.
[4] (1947) L.J.R. 1243.

by the Court of Appeal as though it were in all fours with *Steel v. Glasgow Iron and Steel Co.* [5] which involved the rescue of a *third person's* property. [6] The present writer does not claim that different principles do apply; on the contrary; but it is contended that such matters should be discussed and adjudicated upon and not either ignored or assumed. Accordingly, it is proposed to deal with the further discussion of the topic under the following headings:—

A. Rescue of third persons.

B. Rescue of the defendant.

C. Rescue of the property of third persons.

D. Rescue of the defendant's property.

A. *Rescue of Third Persons.*

The history of the "rescue" cases in England begins with *Brandon v. Osborne, Barrett & Co.* [7] In that case the plaintiff husband and wife (it is with the wife's claim only that we are concerned) were in a shop as customers when a portion of the skylight fell and struck the husband. The wife was not touched by the glass but on seeing it falling she tried to drag her husband out of danger and in doing so injured her leg. After referring to Scottish and American cases, Swift, J., held that she was entitled to recover damages.

But in *Cutler v. United Dairies,* [8] the next case in which the matter came before the English courts, Brandon's Case was not mentioned and the Court of Appeal decided for the defendants on the grounds of remoteness of damage and *volenti non fit injuria.*

A year later, however, the doctrine in its present application was given a firm recognition by the decision in *Haynes v. Harwood.* [9] It will be remembered that in this case the plaintiff was a policeman who, on seeing the defendant's runaway horses bolting along a street, rushed on to the road to stop them so as to prevent injury to persons on the thoroughfare. He managed to halt the horses but in doing so he suffered considerable injuries. It was held that he was entitled to damages from the defendant. This decision was followed by Cassels, J., in *Morgan v. Aylen.* [10] There is, accordingly, no doubt that in so far as the issue concerns the rescue of third persons placed in peril by the defendant's negligence, the rescuer can recover damages from the defendant for injuries he receives in the rescue attempt.

But although the results of the decisions are in accord with principle and modern trends, the judgments themselves tend to over-

[5] (1944) S.C. 237.
[6] Both cases are discussed more fully below.
[7] (1924) 1 K.B. 548.
[8] (1933) 2 K.B. 297; considered in greater detail below.
[9] (1935) 1 K.B. 146.
[10] (1942) 1 All E.R. 489.

look what is the most important aspect of the cases, namely, the question of the duty of care. It is proposed at this point, accordingly, to examine that aspect and then briefly to touch upon those issues which arise once it has been established that a duty of care exists. Such an inquiry, of course, also relates to headings (B), (C) and (D) above and what is said here applies also to them.

First of all, then, the duty of care. The rescue cases are, it is unnecessary to say, actions in negligence and, therefore, since "negligence in the air will not do" [11] the plaintiff must establish that the defendant owed him a duty of care. Is that duty original or derivative? Are the plaintiff's rights derived from those of the rescued person or are they based upon a separate wrong done to the plaintiff himself? This may seem merely an academic question but in fact it is not so, because, as will be seen later, upon the answer to it depends the liability of the defendant when it is the defendant himself who is rescued. Almost universal opinion is that the duty is an original one. Building on Lord Atkin's contemplation test as stated in *Donoghue v. Stevenson* [12] it is argued that the defendant ought reasonably to have had in contemplation not only persons who "are actually subject to physical impact" [13] but also those who are induced to come to the rescue of the individual in peril. The plaintiff's right of action is the result not of the wrongfulness of the defendant's conduct towards the person imperilled but of the fact that he should have foreseen that a rescuer would come to that person's aid.

Whilst it is true that this is the position taken by Lord Wright in *Bourhill v. Young* [14] and by others in many academic publications, [15] some American writers, such as Prosser [16] and Bohlen [17] are somewhat startled by the proposition that a reasonable man would have contemplated or foreseen the possibility of the plaintiff acting as he did. Such dissentient voices are few, however, and Evatt, J., in *Chester v. Waverley Corporation,* [18] in expressing the view that a reasonable person would have foreseen the possibility of rescue, stated that the plaintiff's right of recovering necessarily imported a pre-existing duty towards him. Evatt, J., did, indeed, differentiate between the "primary" duty owed to the person imperilled and the "secondary" duty owed to the rescuer but this, it is submitted, is quite another matter from claiming that the latter duty is derived from the former. There are in truth two independent rights, and that this is the view of Evatt, J., is made quite clear by his citation of passages from Professor Goodhart's article quoted

[11] Greer, L.J., in *Haynes v. Harwood,* (1935) 1 K.B. 146, 152.
[12] (1932) A.C. 562, 580.
[13] Lord Wright in *Bourhill v. Young,* (1943) A.C. 92, 108.
[14] *ibid.*
[15] See for example, C.A. Wright in 26 Canadian Bar Review at p. 64.
[16] Torts, p. 359.
[17] Review of Harper, Law of Torts, 47 Harvard L.R. p. 557. Some years earlier, however, Professor Bohlen took a stand which was in accord with the present contention. See Bohlen, Studies in the Law of Torts, p. 568, n. 33.
[18] (1939) 62 C.L.R. 1, 38, 41.

above [19] and from the judgment of Cardozo, J., in *Wagner v. International Railway Co.* [20] which states the position so admirably that it fully justifies setting it forth at length here. "Danger," said the learned Judge, "invites rescue. The cry of distress is the summons to relief. The law does not ignore these reactions of the mind in tracing conduct to its consequences. It recognises them as normal. It places their effects within the range of the natural and probable. The wrong that imperils life is a wrong to the imperilled victim; it is a wrong also to his rescuer." It follows that when in *Haynes v. Harwood* [21] two of the Lords Justices in brief passages based the duty of care owed to the plaintiff policeman upon his rights as a person lawfully using the highway, they were under a misapprehension as to the true principle underlying the present doctrine.

It is contended that it is clear that a duty of care is owed to a rescuer, that that duty is an original one and not derived from the duty owed to the imperilled person, and that it depends upon the principle that the act of rescue could reasonably have been foreseen by the defendant.

The next point that must be considered is to what extent, if any, can a rescuer be met by the defence volenti non fit injuria. This was one of the grounds upon which the plaintiff failed in *Cutler v. United Dairies,* [22] but the circumstances of that case were patently different from the class of rescue cases being here considered. It properly belongs, it is submitted, in category (B) and will be further discussed under that heading. So far as the present class is concerned, the inapplicability of volenti non fit injuria is made abundantly clear by the judgments in *Haynes v. Harwood,* in which the views of Professor Goodhart, as expressed in 5 Cambridge Law Journal, were expressly adopted. It was stated that there could be no voluntary assumption of risk by a plaintiff who, acting under an exigency created by the defendant, deliberately faced a risk of injury to rescue a person placed in danger by the defendant's wrongdoing. The duty, whether it be legal or moral, [23] imposed upon the plaintiff by the peril of the rescued person excludes any choice involving a consent to run the risk of injury, even if the plaintiff acted after cool deliberation and not instinctively. [24]

A further ground upon which the Court of Appeal gave judgment for the defendants in *Cutler v. United Dairies* [25] was that the plaintiff's act in going to the assistance of the defendant's driver was a novus actus interveniens and therefore the injuries the plaintiff suffered could not be regarded in law as the result of the negligence of the driver. Later cases, however, with somewhat different facts,

[19] *supra,* note 2.
[20] (1921) 232 N.Y. at 180.
[21] (1935) 1 K.B. 146, 152-3, 161.
[22] (1933) 2 K.B. 297.
[23] See (1935) 1 K.B. at 161, 166.
[24] *ibid.* at 164.
[25] (1933) 2 K.B. 297.

have established that a rescuer cannot be met with the defence of remoteness of damage. In *Haynes v. Harwood,* [26] for example, it was held that the plaintiff's injuries were a natural and probable consequence of the negligence of the defendant's servant inasmuch as that negligence was the cause not only of the horses running away but also of the necessity for the plaintiff to intervene. Accordingly, it is no longer possible to defend a rescue action, whether of the present class, or of others, by pleading that the plaintiff's act of rescue was a novus actus interveniens.

There are two other smaller points which should be dealt with before proceeding to a consideration of the next class of rescue case. Firstly, what effect does negligence on the part of the rescued third person have on the rescuer's right of action? Suppose in *Haynes v. Harwood* some one had *carelessly* got in front of the bolting horses and the plaintiff had received injuries in pushing that person clear of the horses' path. Would the plaintiff still have been entitled to succeed against the owners of the horses? It follows that if the correct view is that the duty owed to the rescuer is original and not derivative, the answer to this question must be in the affirmative; as between the rescuer and the owners of the horses the negligence of the third person is irrelevant. The point has not arisen in English cases but American decisions [27] support the conclusion here contended for.

Secondly, what is the effect on the plaintiff's right of action of the plaintiff's own negligence in allowing the rescued person to get into danger? If, in *Morgan v. Aylen,* [28] the child whom the plaintiff had tried to rescue had strayed on to the road through the plaintiff's carelessness, would she have lost her action? It is submitted that she would have, on the basis that her own later negligence and not the defendant's was the cause of her injuries.

B. *Rescue of the Defendant.*

Suppose it is the defendant himself who is rescued by the plaintiff from danger created by the defendant's negligence. Can the plaintiff recover in such a case? It is in connection with such a problem that the importance of a true analysis of the duty owed in the rescue cases strikes home. If in the kind of cases discussed under (A) the conclusion be reached that the duty owed to the plaintiff is a derivative one, that is, derived from the duty owed to the rescued third person, then the plaintiff would fail where his action is brought against the rescued defendant because the latter cannot be legally negligent towards himself. If, on the other hand, the duty is an original one, as is maintained by the present writer, then there should be no distinction between the rescue of third persons and that of the careless defendant himself. Such a defendant,

[26] (1935) 1 K.B. 146.
[27] See 21 Canadian Bar Review, p. 761, n. 17.
[28] (1942) 1 All E.R. 489.

it is submitted, owes the plaintiff a duty of care not to expose him to injury caused by his endeavours to mitigate the harm which the defendant has brought upon himself by his carelessness. [29]

There have been no English cases turning on this point, though it is suggested that the facts of *Cutler v. United Dairies* [30] at least called for a discussion of it. In that case a horse attached to a van belonging to the defendants got out of control and was driven into a field adjoining the plaintiff's property. The plaintiff, on hearing the driver shout for help, went to his assistance and suffered injury when trying to hold the horse. It was held that the plaintiff's own act, and not the negligence of the driver, was the cause of his injuries and that the maxim volenti non fit injuria applied. It seems to the present writer that it could be argued that the facts of this case brought it within the principle of the rescue cases. More strongly, it is urged that the hypothetical case put forward by Scutton, L.J. [31] would receive a different answer to that given by the learned Lord Justice of Appeal. If, by the negligence of its rider, a horse bolts and the plaintiff is injured in an attempt to aid the rider, the plaintiff should, on the principles contended for, be able to recover compensation.

This conclusion is fortified by what has happened in recent American cases which have refused to follow the earlier Iowan decision in *Saylor v. Parsons.* [32] In that case the plaintiff failed when he brought an action for injuries which he received whilst preventing a brick wall negligently undermined by the defendant from falling on the latter. The Iowan Court based its decision on the reasoning that a rescuer's rights were based on the rights of the person rescued. This reasoning, as we have already seen, cannot be supported and was rejected in two later cases, *Carney v. Buyea* [33] and *Brugh v. Bigelow.* [34] On the other hand, it must be admitted that *Saylor v. Parsons* was followed by the Saskatchewan Court of Appeal in *Dupuis v. New Regina Trading Co. Ltd.* [35] But it is submitted that principle confirms the view taken by *Carney v. Buyea* and *Brugh v. Bigelow* which, being the more recent, illustrate the tendency which modern courts are taking in their application of the concept of duty of care. [36] This being so, a rescuer should have an action against a defendant who has imperilled not a third person but himself, in such circumstances, for example, as in *Carney v. Buyea.* In that case the plaintiff sued the defendant for personal injuries received whilst pushing the defendant out of the path of her motor car which she had negligently left on the top of a hill without

[29] See 21 Canadian Bar Review, p. 758.
[30] (1933) 2 K.B. 297.
[31] *ibid* at 303.
[32] (1904) 122 Iowa 679.
[33] (1946) 65 N.Y.S. (2d) 902.
[34] (1944) 310 Mich. 74. Both of these cases are noted in 45 Mich. L.R. 918.
[35] (1943) 4 D.L.R. 275. Noted in 21 Can. B.R. p. 759.
[36] See 45 Mich. L.R. pp. 918, 919; 26 Can. B.R. pp. 46, 64; 58 L.Q.R. pp. 299, 300.

properly applying the brakes. The New York Court of Appeal gave judgment for the plaintiff, holding that, on such facts, the defendant did owe the plaintiff a duty of care. The writer contends that English and Australian courts should come to a like conclusion if and when called upon to consider the question.

C. *Rescue of a Third Person's Property.*

Once it is admitted that an action lies under heading (A), it clearly follows that the same principle applies in the case of the rescue of a third person's property, provided only that the risk undertaken by the rescuer is reasonable in relation to the value of the property rescued.

Such a proposition receives support from the Scottish case of *Steel v. Glasgow Iron and Steel Co.* [37] The defendant company was sued by the widow of the guard of a goods train who lost his life in attempting to prevent a collision between his employers' train and some runaway wagons belonging to the defendant. It was held by the Scottish Court of Session, Lord Mackay dissenting, that the defendants were liable. It is true the property in question belonged to the deceased's employers but such a fact, it is submitted, makes no difference and the same rule would apply in the case of the rescue of the property of a stranger, provided always that the act of the rescuer was reasonable in the circumstances. [38] The rescuer's right of action rests upon the view that one who imperils another's property must take into account the chance that the exigency may impel some third person to try to save that property.

D. *Rescue of the Defendant's Property.*

Similar reasoning applies here. Granted that an action lies under the heading (B), it follows that a rescuer of the defendant's *property* also has an action, subject, of course, to there being a reasonable relation between the risk of injury involved and the value of the property rescued. The facts of *Hyett v. Great Western Railway* [39] raised such a point but it is by no means clear that the decision of the Court is directly apposite. The Court of Appeal did, it is true, refer to *Steel v. Glasgow Iron and Steel Co.;* [40] but, looking at the decision from the angle of the rescue cases, two points emerge. Firstly, the Court made no reference to the possibility of there being any distinction between the rescue of a defendant's property and that of a stranger, nor of there being any difference between Steel's Case and the case before them. Nor, in fact, does Professor Goodhart who discusses it in a typically stimulating note in the Law Quarterly Review. [41] Secondly, the resulting judgment

[37] (1944) S.C. 237; noted in 61 L.Q.R. p. 27.
[38] See Tucker, L.J., in *Hyett v. G.W.R.,* (1947) L.J.R. 1243, 1245-6.
[39] (1947) L.J.R. 1243.
[40] (1944) S.C. 237.
[41] 64 L.Q.R. p. 36.

in favour of the plaintiff was not reached by way of the Court making a finding that in such circumstances a duty of care was owed to an injured rescuer but by holding that the plaintiff was "working *as of right* on the premises" and that the defendant company *"failed to take reasonable care to secure the safety of the premises* on which a plaintiff was working." [42] The rescue cases were cited only to show that "the act of the plaintiff was not a novus actus interveniens breaking the chain of causation." If this is so, then it is incorrect for Professor Goodhart to infer, as he does, [43] that the Court did ask itself whether a duty of care was owed to the plaintiff by virtue of his act of rescue as such. That that should have been the path by which to attain the solution appears quite clearly from Professor Goodhart's remarks and with his statement of principle the writer respectfully agrees. This is the way he puts it: [44] The defendants had been negligent in allowing paraffin to escape; they should have foreseen that someone might reasonably attempt to put out the resulting fire; the plaintiff did in fact make that attempt; therefore, he was entitled to recover damages for the injuries he received. And that, it is submitted, is the general principle which covers the kind of rescue cases at present under discussion.

We have now dealt with the four different classes of circumstances which can give rise to a rescue case. It will be perceived that the same basic principles underlie all four—a defendant by carelessly creating a danger either to life or property, whether his own or that of a stranger, finds himself under a duty of care to a would-be rescuer, whose act is neither a break in the chain of causation for the purposes of the remoteness of damage rule nor a voluntary assumption of a risk for the purposes of the maxim volenti non fit injuria.

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[42] Italics in each case are those of the writer.
[43] *ibid.*
[44] *ibid,* at p. 37.