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THE BYSTANDER'S DUTY AND THE LAW OF TORTS— AN ALTERNATIVE PROPOSAL

J. H. EDGAR, JR.*

Sometime early during Torts class, the law student is confronted with the problem posed by the bystander's duty. The fact pattern may vary, but often it is the hypothetical question of the duty of the bystander to the blind person who unknowingly approaches and falls off a cliff.¹ It is sometimes based upon reported cases in which a person watches the helpless victim drown² or become entangled in an oil field pumping unit.³ It may also arise from a true to life situation in which a person is mugged, victimized, and killed while passersby and neighbors ignore the cries for help.⁴ The common thread running throughout these situations is that the bystander has no legal duty to aid. The blind can be crushed at the bottom of the precipice, the helpless can drown, the woman can be attacked and gang raped while the bystander, as a result of indifference, callousness, or perhaps, sadistic pleasure of seeing another's agony, does nothing and incurs no legal liability.

A number of different disciplines have tried to explain the historic development of this area of tort law.⁵ It has been rationalized as a logical extension of our rugged individualism—the desire not to get involved and to mind one's own business.⁶ Tort scholars have ex-

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1. Green, *The Duty Problem in Negligence Cases*, 28 COLUM. L. REV. 1014, 1027 (1928).

2. *Yania v. Bigan*, 155 A.2d 343, 344 (Pa. 1959).

3. *Abalos v. Oil Dev. Co.*, 526 S.W.2d 604 (Tex. Civ. App.—Amarillo 1975, writ granted) (bystander had ample opportunity to observe and warn victim). The author's submission of an amicus curiae brief in support of petitioner's application for writ of error to the Texas Supreme Court in this case formed the basis for this article.

4. N.Y. Times, March 27, 1964, at 1, col. 4. The *Times* reported three separate stabbings on March 13, 1964, which resulted in the death of Catherine Genovese in Queens, New York. During the attack at least 38 persons observed her plight and cries for help, yet did nothing.

5. A series of excellent articles, essays, and addresses by foreign and domestic law professors, a newspaper editor, a psychiatrist, a sociologist, a police administrator, and a philosopher are collected in *THE GOOD SAMARITAN AND THE LAW* (J.M. Ratcliffe ed. 1966).

6. Gregory, *The Good Samaritan and the Bad: The Anglo-American Law in THE GOOD SAMARITAN AND THE LAW* 31 (J.M. Ratcliffe ed. 1966).

plained it on the basis that a legal duty requires either affirmative conduct on the part of the defendant, or a special relationship between the parties or one for whom the defendant is legally responsible.⁷ In the absence of these elements, a failure to act does not give rise to a legal duty. To be sure, such a cavalier regard for life and limb has been severely criticized by many able scholars.⁸ The courts, however, have steadfastly refused to be swayed from the traditional view that the true bystander is under no legal duty to the victim.

One must admit that if the bystander were placed under a legal duty to attempt rescue or render active assistance to the victim, many problems would arise. For example, should the duty of a professional (such as a physician) be the same as the non-professional? If the bystander were required to intervene and aid in rescue, should the original victim be required to indemnify or otherwise compensate the rescuer for any injury to the latter's person or property resulting from the rescue attempt? The same problem would arise concerning legal responsibility to an innocent third party who was damaged during the rescue operation. In an effort to solve some of these perplexing problems, a model act⁹ and rule¹⁰ have been proposed. One state has even enacted a criminal statute imposing a maximum fine of one hundred dollars for failure to render aid.¹¹

Whether society is ready to impose a common law duty upon the mere observer to rescue or render active aid is doubtful. For that matter, if and when it will ever take such a step is questionable. Admittedly, strong policy arguments can be advanced against requiring the bystander to subject himself to peril and injury by wrestling the blind man from the edge of the cliff, by risking drowning to prevent another from death by the same method, and being beaten and maimed to thwart the attack upon another.

7. See, e.g., C. MORRIS, *MORRIS ON TORTS* 141-44 (1953); W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 56, at 338-39 (4th ed. 1971); GREEN, *The Duty Problem in Negligence Cases*, 28 COLUM. L. REV. 1014, 1026-28 (1928).

8. See generally Ames, *Law and Morals*, 22 HARV. L. REV. 97, 112 (1908); Bohlen, *The Moral Duty to Aid Others as a Basis of Tort Liability*, 56 U. PA. L. REV. 316 (1908); D'Amato, *The "Bad Samaritan" Paradigm*, 70 NW. U.L. REV. 798 (1976) (instead of civil sanctions, criminal penalties are suggested for a failure to rescue); McNeice & Thornton, *Affirmative Duties in Tort*, 58 YALE L.J. 1272 (1949); Seavey, *I Am Not My Guest's Keeper*, 13 VAND. L. REV. 699 (1960); Snyder, *Liability for Negative Conduct*, 35 VA. L. REV. 446 (1949).

9. See Miller & Zimmerman, *The Good Samaritan Act of 1966: A Proposal*, in *THE GOOD SAMARITAN AND THE LAW* 279 (J.M. Ratcliffe ed. 1966).

10. See Rudolph, *The Duty to Act: A Proposed Rule*, 44 NEB. L. REV. 499, 509 (1965).

11. See VT. STAT. ANN. tit. 12, § 519 (1973).

The purpose of this article is to propose a middle ground—one between the traditional concept of no duty at all and the suggested duty of active aid and rescue. Let us simply impose a duty upon the bystander to sound an alarm which would be appropriate under the circumstances. It might take the form of an oral warning directly to the victim that the latter is in a perilous position or, on the other hand, a summons to the fire department, police, or an emergency medical unit may be appropriate. The essential factor, however, is that regardless of the nature of the warning it must correspond to the situation that has elicited it.

By what process should we determine whether the law ought to impose a duty of ordinary care upon the bystander who fails to sound an alarm for someone who is either unaware of or unable to extricate himself from a position of peril? Several choices are available. Some tend to rely upon foreseeability as a test for duty.¹² This test, however, requires affirmative conduct by the defendant as one of its underlying factors.¹³ Also, if foreseeability of harm were the sole determinative factor in establishing duty (i.e., if the risk is foreseeable, a duty arises to protect against that risk), the law would have imposed a duty upon the bystander long ago because it is certainly foreseeable that the blind man will fall off the cliff if the bystander does nothing. Others have attempted to resolve the duty question under the generic terms of "proximate cause" or "public policy."¹⁴ One difficulty with this approach is that these terms often have different meanings for different people and the possibility of confusion is increased. Further, this method does not require the court to state, analyze, evaluate, and discuss what factors were utilized in reaching its judgment.

No one has attempted to articulate the technique by which the duty question in negligence cases should be resolved more eloquently than my respected mentor and friend, Leon Green.¹⁵ The method which he suggests requires that the person attempting resolution of the duty issue actually come to grips with the factors we often lump into either "public

12. See *Heaven v. Pender*, 11 Q.B.D. 503, 508 (1883); RESTATEMENT (SECOND) OF TORTS § 291 (1965).

13. RESTATEMENT (SECOND) OF TORTS § 314 (1965).

14. *Kinsman Transit Co. v. City of Buffalo*, 388 F.2d 821, 824 (2d Cir. 1968) ("Kinsman No. 2"); *Palsgraf v. Long Island R.R.*, 162 N.E. 99, 103-04 (N.Y. 1928) (dissenting opinion).

15. His contributions to legal education over the past sixty years, both in the classroom and in legal writing, are vast. For an excellent collection of a few of his writings which typify the process by which he would determine the duty question see L. GREEN, *THE LITIGATION PROCESS IN TORT LAW* (1965).

policy" or "proximate cause." To the public, the practicing bar, and the student, this procedure has many advantages. It requires the court to recognize, consider, evaluate, and express each specific item which forms a basis for its decision. On reading a reported case, one can understand exactly why the court determined the duty issue in a particular way.¹⁶ While we may not agree with the result the court reaches in formulating its judgment, at least we know what the court is doing and the reasons behind its decision. This is far more preferable than resolving the duty issue under the guise of something else.¹⁷

In resolving the issue of whether the bystander owes the helpless or unaware victim the duty to sound an alarm, Green suggests that we consider the following factors: administrative, moral or ethical, economic, justice, preventative, and precedential.¹⁸ An analysis using this process might take a form similar to that set forth below.

The Administrative Factor

Several questions concerning judicial administration must be considered. If the court recognizes such a duty, will it create more problems than it solves? Can the court system effectively administer such a duty? These questions should present minimal, if any, problems. For example, the courts are already accustomed to efficiently handling the well-known duty of the possessor of land to warn the invitee of known dangers and the duty of a motorist to warn by sounding a horn. Our courts have no difficulty in these areas, and to impose a duty to warn in the situation in question should create no additional administrative problems.

The Moral or Ethical Factor

Moral and ethical considerations with philosophical and religious overtones are ever-present factors to be considered. Deep, subjective judgments are employed which vary from individual to individual, from

16. See *Amaya v. Home Ice, Fuel & Supply Co.*, 29 Cal. Rptr. 33 (1963) for an example of how the court reached its finding on the duty issue.

17. For example, by what process does a court determine whether a cause is proximate or remote, concurrent or intervening, foreseeable or unforeseeable, without consideration of duty?

18. See generally Green, *The Duty Problem in Negligence Cases*, 29 COLUM. L. REV. 255 (1929); Green, *The Duty Problem in Negligence Cases*, 28 COLUM. L. REV. 1014 (1928); Green, *The Study and Teaching of Tort Law*, 34 TEXAS L. REV. 1 (1955).

court to court, and from jurisdiction to jurisdiction. Should the rugged individualism of our heritage continue to prevail? Am I my brother's keeper, if ever so slightly? Unless I have engaged in some affirmative conduct toward the victim or bear some special relationship to him, why cannot I ignore him or, if I desire, perhaps chuckle at his plight? Hopefully, we, as individuals, and the court systems have reached a level as a civilized society in which our humanitarian instincts are sufficiently strong that a duty to warn is recognized as a minimum standard for the type of case under consideration.¹⁹

The Economic Factor

At this point, a court is required to become pragmatic. It must sharpen its pencil, add up the cost, and then balance the result of imposing a duty versus not so doing. On one side of the ledger, we have the value of the harm or hurt to the victim, whether it be great or small. This must be compared to the defendant's cost in preventing the risk of harm. Is it great or small? Admittedly, if the courts were to impose a duty upon the bystander to intervene and rescue the victim, the price might be too great. The court may not want to require the bystander to subject himself to bodily injury in the rescue attempt. Certainly the economical review of the cost to the rescuer may equal or be greater than the harm to the victim. Such a consideration may be a substantial factor in the court's declination to impose a common law duty to rescue. But that is not the proposal herein advanced. A simple warning, whether it be a shout to alert the victim to the peril, a telephone call, or another type of alarm costs the bystander absolutely nothing. Especially when we balance the cost of the warning with the cost to the victim, the scale tips greatly in favor of imposing a duty to warn.

The Preventative Factor

Two allied considerations are involved in examining this particular factor. First, who is in the best position to prevent the loss—the victim

19. Judicial recognition of this humanitarian principle has been exemplified in other negligence cases. The defendant who has created an unreasonable risk of harm owes a duty of ordinary care to the rescuer even though the latter knows or should know of the peril. See *Wagner v. International Ry.*, 133 N.E. 437, 438 (N.Y. 1921). By the same token, the party who has the last clear chance or discovers the peril of the plaintiff has a duty to exercise ordinary care without regard to the presence or absence of initial primary or contributory negligence of the parties. *Ford v. Panhandle & S.F. Ry.*, 151 Tex. 538, 541, 252 S.W.2d 561, 562 (Tex. 1952).

or the bystander? If the victim has been momentarily distracted or otherwise unaware of the danger or is under physical attack or other disability so that self-extrication is impractical, it seems clear that the bystander is not only in the best position, but is in the *last* and *only* position to avert the injury.²⁰ The next phase of the problem involves the question of whether the imposition of a duty to warn would minimize, eliminate, or prevent such losses. In other words, would a warning to the blind man avert his fatal steps, a call to the lifeguard save the drowning person, a summons to the police save a life from brutal attack? The likelihood is extremely high that it would.

The Justice Factor

The justice factor is a very elusive, relative, judgmental concept at best. While it is extremely difficult, if not impossible, to define the word "justice" so that it covers all types of risks under all types of circumstances, each of us has a visceral reaction when we feel that justice has been either applied or ignored. It invokes the balancing process of all the above factors using wisdom, objectivity, an innate sense of fairness, pragmatism, and a crystal ball for good measure. Here we see the role of the judiciary in using the most subjective process of all. When all these matters are considered, the scales of justice should be tipped in favor of imposing a duty on the bystander to sound an alarm.

The Precedential Factor

There is no question that *stare decisis* plays a major role in the court's determination of whether or not to impose legal responsibilities. It should. Many virtues emanate from an organized, steady development of legal principles. Society, to a large extent, actually depends on the ability to rely upon the precept that the law yesterday will also be the law today. If it were not for the dependability of this stabilizing factor, our economic, social, and political processes would have no base upon which to build. But there are limits. As our needs change, our social structure changes; the law must modify itself to meet such needs and changes. Our highly industrialized, mobile society could not function if, for example, our judicial system had not recognized that liability

20. This factor is also undoubtedly part of the underlying basis for recognizing the doctrine of last clear chance or discovered peril. See *Letcher v. Derricott*, 383 P.2d 533, 537 (Kan. 1963).

would result from the intentional inducement of another to breach a contract,²¹ that privity of contract would no longer insulate the manufacturer in negligence cases,²² and that recovery would be permitted for injury caused by defective products without regard to negligence.²³ Hundreds of additional examples could be used to illustrate the point that precedent must and does give way to progress. Therefore, we should be ready to accept this modest proposal by imposing a duty to warn.

Recognition of a duty to warn does not mean that liability will follow. Many bystanders do and will continue to warn, thus fulfilling their duty. The more courageous will even attempt rescue. Even those who do not warn may not be liable because the jury may not determine that the failure to warn was negligent under the circumstances. For example, some bystanders may become transfixed and so paralyzed with fright that they cannot utter a sound. Others may suffer such an emotional collapse that their ability to warn has been destroyed. In some cases, the warning, although timely, may have been too late to avert tragedy. In such instances, as in many negligence cases, the jury may properly find either that the failure to warn was not negligence or that there was a lack of requisite causal connection. Recovery may also be barred by either the victim's contributory negligence or by the minimal amount of damages resulting from the defendant's breach of his duty to warn.

To ask the court to impose a duty upon the bystander to warn is a viable middle ground. Under the guidelines previously suggested, such a duty is flexible enough to prevent injustice to the bystander while reaching a more humanitarian result for the victim. The proposal is workable and can avert useless tragedy. For the courts to ignore such an approach to this problem would result in the perpetuation of a legal anachronism.

21. *Lumley v. Gye*, 118 Eng. Rep. 749 (Q.B. 1853).

22. *MacPherson v. Buick Motor Co.*, 111 N.E. 1050, 1053 (N.Y. 1916).

23. RESTATEMENT (SECOND) OF TORTS § 402A (1965).