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THE DUTY TO ACT: A PROPOSED RULE*

Wallace M. Rudolph **

The alienation of the individual from his fellows is becoming the subject of more and more concern. Repeatedly persons have stood by while thugs beat innocent victims. In one recent case, thirty-eight known witnesses were asked why they allowed a young woman to be assaulted and murdered. Their answer was that they did not wish to be involved.¹ Similar occurrences are easily cited. During the Korean War, for example, one soldier threw two of his fellows out of their prison quarters because they smelled so vilely from the dysentery with which they were afflicted. Thirty-seven other soldiers did nothing, and the two afflicted soldiers died of exposure.²

The first example demonstrates the failure of community spirit among individuals in large units. The latter example demonstrates that in a small community the lack of leadership, rules, and sanctions can result in the same failure. In both these societies, there were neither moral nor legal sanctions to require one person in the group to help another. We know, however, that moral and legal sanctions can reinforce one another. Thus if something is made illegal (such as hoarding during a war), both the societal and individual controls may become stronger.³ The reverse is also true. The failure of a society to punish legally may lead to a complete breakdown of moral sanctions.⁴

* Professor Dale Broeder originally suggested the idea for this article and all the proposed solutions were worked out jointly while he was my colleague at the University of Nebraska. The article is to be in two parts. Professor Broeder will write a critical analysis of the present law; the other part is this article. Professor Broeder's part is forthcoming.

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¹ N.Y. Times, March 27, 1964, p. 1, col. 4.

² See Note, *Misconduct in the Prison Camp*, 56 COLUM. L. REV. 709, 758 n.355 (1956).

³ See generally Schwartz, *Social Factors in the Development of Legal Control: A Case Study of Two Israeli Settlements*, 63 YALE L.J. 471 (1954).

⁴ *Ibid.*

Such a breakdown was achieved by the Chinese in the Korean prisoner of war camps. The Chinese followed an announced policy of refusing to enforce normal military discipline within the camp. Hence no soldier was required to obey a commissioned or noncommissioned officer. This policy effectively destroyed the moral and legal controls within the American prisoner of war community. Destruction of these controls led to the largest proportionate loss of life through disease and disorder ever to be experienced by American prisoners of war.⁵

⁵ A revealing contrast is the experience of the Turkish forces during the Korean War: "[O]f 7,190 United Nations prisoners captured by the Communist forces, 2,730 died during their captivity, which in most cases was less than two years. But, strikingly, of the 229 Turks taken captive, not a single one died during captivity, although they experienced exactly the same treatment and further notwithstanding the fact that more than half were wounded on capture. If the Turks had experienced the same death rate as their allies, 87 Turks would have perished. What spared the lives of these statistical 87 Turks? There is evidence now that it may simply have been a question of prisoner organization patterned to challenge and contain the hostile environment which enveloped them. The senior Turk took care to inform the captors that he was in charge of the other Turks—that if he were to be removed the next senior would assume charge and so on down to the last two privates and, between them, the senior private would be in charge. When a Turk became ill, he was nursed back to health by the group and supplied with extra food and clothing sacrificed by the group; when hospitalized, two Turks were detailed by the senior Turk to go along and remain with the patient as chambermaid and champion until he recovered. They shared clothing and food as need required and attended to hygienic policing, all under supervision of the senior Turk. The sanitation and other orders of the senior were rigidly enforced by the entire group. You might validly ask: 'But were not these same basic health precautions, social decencies and military fundamentals followed by the other allies?' The aforementioned committee appointed by the Secretary of Defense was later to report of conditions among American prisoners of war in Korea in the following language: 'By design and because some officers refused to assume leadership responsibility, organization in some of the POW camps deteriorated to an every-man-for-himself situation. Some of the camps became indescribably filthy. The men scuffled for their food. Hoarders grabbed all the tobacco. Morale decayed to the vanishing point. Each man mistrusted the next. Bullies persecuted the weak and sick. Filth bred disease and contagion swept the camp. So men died from lack of leadership and discipline.'" Manes, *Barbed Wire Command: The Legal Nature of the Command Responsibilities of the Senior Prisoner in a Prisoner of War Camp*, Military L. Rev., Oct. 1960, p. 1, 3-4.

In response to this phenomenon Article IV of the Military Code of Conduct was promulgated which states: "If I become a prisoner of war, I will keep faith with my fellow prisoners. I will give no information or take part in any action which might be harmful to

Thus the anonymity of city life and the lack of legal sanctions can cause the failure of moral sanctions. Law can have no effect on the anonymity of city life. But a new approach by the law could reinforce whatever moral sanctions do exist. And at the very least, the law could protect persons who give way to their better instincts. Under the present state of the law, an individual would be foolish to come to the aid of a stranger, for if he made the stranger's position worse, he would be liable.⁶ Moreover, if

my comrades. If I am senior, I will take command. If not, I will obey the lawful orders of those appointed over me and will back them up in every way." *Id.* at 46.

- ⁶ Exec. Order No. 10631, 20 Fed. Reg. 6057 (1955). RESTATEMENT, TORTS § 323 (1934), states: "(1) One who gratuitously renders services to another, otherwise than by taking charge of him when helpless, is subject to liability for bodily harm caused to the other by his failure, while so doing, to exercise with reasonable care such competence and skill as he possesses or leads the other reasonably to believe that he possesses. (2) One who gratuitously renders services to another, otherwise than by taking charge of him when helpless, is not subject to liability for discontinuing the services if he does not thereby leave the other in a worse position than he was in when the services were begun."

To avoid the application of this rule to professionals various good samaritan statutes have been passed. For example, the American Medical Association law department reports that thirty-one states have at this time some kind of legislation restricting liability for negligence of professionals who voluntarily go to the aid of an injured person. Note, *Adrenalin for the "Good Samaritan,"* 13 DE PAUL L. REV. 297 (1964). Such legislation indicates an unfortunate retreat from the normal rule of ordinary care under negligence law. As Governor Rockefeller stated in his veto of the proposed good samaritan statute in New York: "It represents an undesirable lowering of the standard of accepted conduct which has prevailed for many years. To require a reasonable degree of care in all instances is a proper standard since what is reasonable depends in any situation on all the surrounding circumstances." Memorandum disapproving N.Y. Senate Bill, Introductory No. 1602, Print No. 3384 (Apr. 30, 1962). Governor Kerner of Illinois rejected similar legislation in Illinois. His veto message states the cogent reasons against the adoption of such legislation as follows:

"House Bill 1489 exempts any person licensed to practice medicine in all of its branches in Illinois who in good faith provides emergency care at the scene of an accident or emergency from any civil liability as a result of negligence in providing such care.

"This is a type of statute that has come to be known as a 'Good Samaritan Law,' and it has been adopted in one version or another in almost half of the states. This has resulted from literature widely circulated among doctors recounting the dire consequences in terms of malpractice litigation that can result from a physician's humanitarian act in rendering emergency roadside care to an injured party. So far as I can ascertain, the attendant danger to the physician is

he went to the aid of another and were injured, he would not be indemnified, nor would he be paid for his time.⁷ Only he who does nothing is not liable.⁸

largely, if not wholly, imagined. A systematic inquiry into all of the reported malpractice decisions has failed to disclose a single such 'roadside' instance. Nor do I entertain any doubt but that the courts of the State, in such an action, would take into consideration all of the attendant circumstances and would not permit the unfair treatment of a physician who had responded to such an emergency.

"A leading text in the tort field has noted that the courts have exhibited a tenderness to professional men that has 'few analogies in modern accident law.' . . . To treat physicians with understanding, however, an approach with which I am in sympathy, is quite a different thing from shielding them entirely from liability, regardless of the carelessness exhibited or the damage occasioned thereby, which is what this Bill does. The Bill of Rights of the Illinois Constitution provides that 'Every person ought to find a certain remedy in the laws for all injuries and wrongs which he may receive in his person, property, or reputation' Our courts have demonstrated an increasing tendency to apply this policy so as to abolish traditional immunities to liability enjoyed by governmental bodies. . . . I do not believe that any class of citizens, be they physicians or otherwise, should enjoy a superior position, legally insulated from the consequences of their wrongful conduct.

"The essential unfairness of this type of statute can be appreciated when it is considered that any private citizen untrained in first aid, who volunteers in an emergency may be held legally accountable for his actions, as may a nurse who is less trained than the physician. But the doctor, who is the only one fully trained to render emergency care, would be the very one rendered immune by this Bill from the consequences of his negligent acts. And unlike the private citizen who responds, the action of the physician is not wholly voluntary, since fidelity to the precepts of his profession requires him in an emergency to render service to the best of his ability." Memorandum disapproving Ill. House Bill 1489 (Aug. 26, 1964).

The purpose of this article is to provide another method of obtaining emergency care without reducing the normal standards of care required under existing law.

⁷ Hope, *Officiousness* (pts. 1 & 2), 15 CORNELL L.Q. 25, 205 (1929-1930). A rescuer may be protected, however, if the person rescued was imperiled by the negligence of a third party who caused the original danger. Under the rule set down in *Wagner v. International Ry.*, 232 N.Y. 176, 133 N.E. 437 (1921), the possibility of rescue is one of the foreseeable consequences when A negligently endangers B. Therefore, A may be liable to B's rescuer if the latter suffers any damages.

⁸ RESTATEMENT, TORTS § 314 (1934) states: "The actor's realization that action on his part is necessary for another's aid or protection does not of itself impose upon him a duty to take such action."

This point is amply illustrated by *Yania v. Bigan*, 397 Pa. 316, 321-22, 155 A.2d 343, 346 (1959), where the court said: "The mere fact that Bigan saw Yania in a position of peril in the water imposed upon

The present rules of law offer no complete solution to the problem, though three basic exceptions to the general rule that there is no duty to act do exist. First, a person has a duty to act whenever he has induced another to rely to his detriment upon a gratuitous promise to act.⁹ Second, a person has a duty to act whenever he has some special relationship to the person in need of aid.¹⁰ Third, a person has a duty to act if he controls an active force that may cause physical injury or if another is injured by that active force.¹¹ As we shall see, the first two categories arise from general obligations which do not relate directly to a particular emergency. The third category, however, arises only in an emergency and is not consistent with the present rule that there is no duty to act.

The first category, that comprising the reliance cases, includes two basic fact situations. In the first fact situation, the person who needs help does not receive it because he who promised to bring help fails to do so. Under the present rule, the person who offered to bring help is liable for his failure to do so if other help was actually available to the person in need of it. Hence the rule does not operate when an emergency exists (if an emergency may be defined as a situation in which no other help is available), since one would not be liable if he alone were in a position to help

him no legal, although a moral, obligation or duty to go to his rescue unless Bigan was legally responsible, in whole or in part, for placing Yania in the perilous position."

⁹ RESTATEMENT, TORTS §§ 324, 325 (1934) imposes a duty to act whenever a person acts in such a way as to lessen the injured party's chance of receiving help.

¹⁰ RESTATEMENT (SECOND), AGENCY § 512 (1958): "(1) If a servant, while acting within the scope of his employment, comes into a position of imminent danger of serious harm and this is known to the master or to a person who has duties of management, the master is subject to liability for a failure by himself or by such person to exercise reasonable care to avert the threatened harm. (2) If a servant is hurt and thereby becomes helpless when acting within the scope of employment and this is known to the master or to a person having duties of management, the master is subject to liability for his negligent failure or that of such person to give first aid to the servant and to care for him until he can be cared for by others."

¹¹ RESTATEMENT, TORTS § 314, comment c (1934) is illustrative of this point: "The rule stated in this Section applies only where the peril, in which the actor knows that the other is placed, is not due to any active force which is under the actor's control. If a force is within the actor's control, his failure to control it is treated as though he were actively directing it and not as a breach of duty to take affirmative steps to prevent its continuance"

the injured party or to bring help to him.¹² The rule is thus more closely connected to the doctrine of promissory estoppel than to a general duty to act.¹³

Unlike the first, the second fact situation does impose a duty to act when no other help is available. Thus an employer may be required to give aid to an employee whenever the conditions of employment have lessened the employee's chance of obtaining help or have increased the probability that the employee would be injured.¹⁴ Conversely the employer is under no duty to act if

¹² RESTATEMENT, TORTS § 325, illustrations 1 & 2 (1934): "1. A, a guest in B's house, is seriously ill and in need of immediate medical attention. B calls C, a physician, on the telephone. C promises to come immediately thereby causing B not to call other medical aid. C neglects to pay the visit until several hours later; during all of which time B waits expecting C's arrival. In consequence of the delay, A's illness is increased by lack of immediate attention. C is liable to A for the increased illness, irrespective of whether C's services were gratuitous or for compensation. 2. Under the facts similar to those given in Illustration 1, except that C was the only physician who could reach A's bedside before the time at which C himself arrived, C would not be liable to A, under the rule stated in this Section, if it was understood that C was not to be paid for his services."

¹³ Compare RESTATEMENT, TORTS § 325, illustration 1 (1934), with RESTATEMENT, CONTRACTS § 90, illustration 1 (1932): "A promises B not to foreclose for a specified time, a mortgage which A holds on B's land. B thereafter makes improvements on the land. A's promise is binding."

¹⁴ The best example of this relational duty is found in the doctrine of maintenance and cure. Under that doctrine a ship is responsible for the care of its seamen even though no fault is involved and no contractual arrangements are made. ROBINSON, ADMIRALTY § 36 (1939). Thus in *Harris v. Pennsylvania R.R.*, 50 F.2d 866, 868 (4th Cir. 1931), it was stated: "We are referred to no decisions involving the bald question presented in the case at bar, although cases are cited in which the negligent failure of a ship's crew to save a drowning seaman has been treated as a material circumstance in determining the obligation of the vessel. . . . But we have no doubt that a legal obligation rests upon a ship to use due diligence to save one of the crew, who, by his own neglect, falls into the sea; and that the owners are liable if, by failure to perform this duty, his life is lost. The reason is apparent when we consider the peculiar relationship of the seaman to his ship, which, irrespective of statute, has been recognized from the earliest period. The general rules of master and servant apply, but they are modified by the nature of the business. The contract of employment involves not merely a surrender of the personal liberty of the seaman to a greater extent than is customary . . . but it imposes upon the employer an exceptional obligation to care for the well-being of the crew." (Emphasis added.) See generally Bohlen, *The Moral Duty to Aid Others as a Basis of Tort Liability* (pts. 1 & 2), 56 U. PA. L. REV. 217, 316 (1908).

the employee's ability to obtain help was not lessened by the employment or if the risk of injury was not increased by the employment.¹⁵ There is no doctrinal problem in imposing such a duty on employers. For the law can say that this duty to act was voluntarily assumed by the employer through the employment contract, that it was imposed by law under the workmen's compensation laws, or that it arose under tort law because the employer induced the employee to leave a place where he could take care of his wants to go to a place where he was helpless to provide for his own protection. In any case, the law has no difficulty in finding that the employer has voluntarily assumed a duty to act¹⁶ and does not have to solve the problem of whether the employer should be indemnified for the cost of acting.

The second exception to the general rule that there is no duty to act actually imposes a duty to act in cases of special relationships. Thus even when no emergency exists, one person may have a general duty to succor and support another.¹⁷ For example, a father who has a general duty to support his child must act to save that child from danger.¹⁸ In addition, the normal family law doctrine that services given within the family are gratuitous eliminates all problems of indemnification or compensation for the person required to act.¹⁹ It is interesting to note in this con-

¹⁵ *Ibid.*

¹⁶ "Where the accident occurs by pure unavoidable mischance, or through the negligence of a fellow-servant, it is submitted that to hold master to care to extricate the servant from his perilous position involves no novel extension of the master's duties, but results merely from the application to the particular facts of the general principles underlying the duties incident to all mutually beneficial relations voluntarily entered into, and so to the particular relation of master and servant, which is but one of them. Where, however [*sic*], the plaintiff has by his own negligence contributed to bring about the accident which imperils him, or has known and so assumed the risk of that defect in the machinery whereby he is injured, his right to recover may appear more doubtful; but once concede the general duty to provide for the relief of injured or imperiled employees and it seems plain that, though the plaintiff's negligence has contributed to cause the original accident, the defendant has had the last chance to prevent the injury by the proper performance of his legal duties." Bohlen, *supra* note 14, at 330-32. See also RESTATEMENT (SECOND), AGENCY § 512 (1958).

¹⁷ *Rex v. Russell*, [1933] Vict. L.R. 59, 47 HARV. L. REV. 531 (1934). The defendant, although offering no encouragement or persuasion, nevertheless stood by and watched his wife drown their two infant children and then herself. It was held that he was guilty of manslaughter.

¹⁸ NEB. REV. STAT. § 13-106 (Reissue 1962).

¹⁹ 34 C.J.S. *Executors and Administrators* § 371 (1942).

text that the law does impose a duty to act and that such a duty would not be required if there were any validity in the belief that the duty to act is only a moral obligation. Certainly one would expect that moral obligations would be more efficacious than legal obligations within the family; but the law assumes the contrary.

As we have seen, neither the reliance rules nor the special relations rules depend for their validity upon a general duty to act in an emergency. Each rule is simply the rational implication of a particular legal concept. This is not true of the third exception to the general rule that there is no duty to act. For a duty to act is imposed upon any person who controls an object or force which may cause an injury or which has caused an injury.²⁰ Thus we have the last clear chance rule. Under that

²⁰ This category does not include cases where the duty to act is imposed by prior negligence or where the duty to act is imposed because the active agent is a product that is especially dangerous or is warranted to be fit for a particular purpose. The duty to act in such cases arises either because of the general duty to mitigate damages for which a person is already liable or because the warranty has induced reliance on the user. In neither case does the duty to act arise because of an emergency or because no other person or group of persons are in the position to act. *Restatement of Torts* sections covering these cases are:

(1) *RESTATEMENT, TORTS* § 314, illustrations 2 & 3 (1934):

"2. A, a factory owner, sees B, a young child or blind man who has wandered into his factory, about to approach a piece of moving machinery. A is guilty of negligence if he permits the machinery to continue in motion when by the exercise of reasonable care he could stop it before B comes in contact with it. 3. A, a trespasser in the freight yard of the B Railroad Company, falls beneath a slowly moving train. The conductor of the train sees A and by signalling the engineer could readily stop the train in time to prevent its running over A, but does not do so. While a bystander might not be liable to A for deliberately refusing to help him from under the train, the B railroad is liable for permitting the train to continue in motion with knowledge of A's peril."

(2) *RESTATEMENT, TORTS* § 321 (1934):

"If the actor does an act, which at the time he has no reason to believe will involve an unreasonable risk of causing bodily harm to another, but which, because of a change of circumstances or fuller knowledge acquired by the actor, he subsequently realizes or should realize as involving such a risk, the actor is under a duty to use reasonable care to prevent the risk from taking effect."

(3) *RESTATEMENT, TORTS* § 322 (1934):

"If the actor by his tortious conduct has caused such bodily harm to another as to make him helpless, the actor is under a duty to use reasonable care to prevent any further harm which the actor then realizes or should realize as threatening the other.

"*Caveat*: The Institute expresses no opinion as to the existence

rule, a person who is driving an automobile in a safe manner must give way to a wanton driver if by giving way the former can prevent an accident. The only feasible rationale for this rule is that the safe driver alone has the power to prevent the accident and hence a duty to do so. This same rationale ought to apply whenever an act as simple as a warning could prevent an accident. Thus a passer-by who sees that a person is about to walk into a hole ought to be obligated to speak in order to save that person from harm. But this rationale does not prevail for the simple reason that the law has not solved the problems that would arise if duties of this kind were imposed.

Attempts to solve the problems raised by a duty to act rule have been made. And criminal sanctions to impose such a duty have appeared in most civil law countries and in the Soviet Union.²¹ In addition, France and Germany have begun to work

or nonexistence of a similar duty to aid or protect one whom the actor's non-tortious conduct has rendered helpless to aid or protect himself."

- ²¹ "DUTCH PENAL CODE, Art. 450. One who, witnessing the danger of death with which another is suddenly threatened, neglects to give or furnish him such assistance as he can give or procure without reasonable fear of danger to himself or to others, is to be punished, if the death of the person in distress follows, by a detention of three months at most and an amende of three hundred florins at most.

"FRENCH PENAL CODE, Art. 63, paragraph 2 (enacted 1945) provides penalties by fine or imprisonment up to three years against one who abstains voluntarily from giving to a person in peril such aid, by personal action or by calling for help, as he could give without risk to himself or another." SEAVEY, KEETON & KEETON, *CASES ON TORTS* 187-88 (2d ed. 1964).

The German Criminal Code provides: "Whoever does not render help in cases of accident, common danger or necessity although help is required and under the circumstances is exactable, and in particular is possible without danger of serious injury to himself and without violation of other important [*wichtige*] duties, will be punished by imprisonment up to one year or by fine." Dawson, *Negotiorum Gestio: The Altruistic Intermeddler*, 74 HARV. L. REV. 1073, 1104-05 (1961). See also *id.* at 1105 nn.75-76; Comment, *The Failure to Rescue: A Comparative Study*, 52 COLUM. L. REV. 631 (1952).

"The life salvor is a problem of law and morality. The general maritime law, like the common law, 'does not compel active benevolence between man and man,' and 'it is left to one's conscience whether he shall be the Good Samaritan or not.' Although the most elementary instincts of humanity seemingly impose a duty to assist those in distress on the watery highways of the world, it was not until 1910 that the great maritime nations of the world agreed to put legal compulsion behind this obvious moral obligation. In that year the International Salvage Convention proposed the imposition of a duty upon

out a scheme of compensation for persons who obey the duty to act rule or who volunteer to save the life of another.²² With the assurance from the European experience that an obligatory duty

each ship master, 'so far as he can do so without serious danger to his vessel, her crew and passengers, to render assistance to everybody, even though an enemy, found at sea in danger of being lost.' Fulfilling its responsibility as a Convention signatory, the United States enacted this proposal into the Salvage Act of 1912, providing for the fining and imprisonment of violators. But while a master is threatened with a criminal penalty for failing to save the lives of others, performance of this duty does not bring him material reward. Moreover, there is no provision for repayment of any loss the master, shipowner, or crew may suffer in saving lives. That maritime law should reward the property salvor, but not the life salvor, is a paradox that requires an examination of the fundamental elements of the salvage concept in general, and the life salvage concept in particular." Jarett, *The Life Salvor Problem in Admiralty*, 63 YALE L.J. 779, 779-80 (1954).

"TURKISH CRIMINAL CODE art. 476 ('wounded or otherwise in danger of his life'); ITALIAN CRIMINAL CODE art. 593 ('wounded or otherwise in peril'); POLISH CRIMINAL CODE art. 247 ('in a situation directly endangering life'); DANISH CRIMINAL CODE art. 253 ('evident peril to life'); RUMANIAN CRIMINAL CODE art. 489 ('in danger of death'); NORWEGIAN CRIMINAL CODE art. 387 ('evident and immediate danger of death'); PORTUGUESE CRIMINAL CODE art. 2368. The Norwegian and Portuguese provisions appear in COHIN, *L'ABSTENTION FAUTIVE EN DROIT CIVIL ET PENAL* 252-53, 256 (1929). The Portuguese provision applies only to cases where the person in danger has been 'attacked with violence.'

"The vacillations of Russian doctrinal writers on this question are discussed by Hazard, *Soviet Socialism and the Duty to Rescue*, in TWENTIETH CENTURY COMPARATIVE AND CONFLICTS LAW—ESSAYS IN HONOR OF HESSEL E. YNTEMA 160 (1961)." Dawson, *supra* note 21, at 1105 n.76.

- ²² "One question inevitably raised by legislation of this kind is whether the standard of conduct defined by the criminal law is carried over to the law of tort to permit recovery of damages against the person who commits a crime in refusing aid. I have found no German decisions that permit this translation of criminal into civil liability. In one trial-court decision in France, however, the accused in a criminal case had walked away from the scene when his son-in-law fell through ice into a deep canal. The accused also refused, despite the son-in-law's 'peril of death,' to join with a third person in handing out to him a nearby iron bar to which the son-in-law might cling. For this unkindness, excessive even in a father-in-law, the accused was sent to jail for three years. But the son-in-law had apparently managed to scramble out of the icy water, for he appeared in the action as *partie civile* and recovered 25,000 francs from his impervious father-in-law. The general conclusion that the standards of the criminal law define fault for the purposes of damage liability has the strong support of the leading modern French authors on tort liability." Dawson, *supra* note 21, at 1107-08.

to act is workable, we have attempted to formulate a duty to act rule which would fit within the present common law pattern. After a statement of the rule, we will discuss its application to the major problems of compensation, indemnification, diffuse responsibility, and officious intermeddlers.

The rule:

A person has a duty to act whenever:

1. The harm or loss is imminent and there is apparently no other practical alternative to avoid the threatened harm or loss except his own action;
2. Failure to act would result in substantial harm or damage to another person or his property and the effort, risk, or cost of acting is disproportionately less than the harm or damage avoided; and
3. The circumstances placing the person in a position to act are purely fortuitous.

In developing this rule, no attempt has been made or, in our opinion, should be made to alter the existing scheme of social distribution. Such changes in distributive justice, the proper share each person should have in society, as opposed to retributive justice, the re-establishment of shares to persons who have been deprived of them by a wrongful act, are, as Aristotle pointed out in his *Ethics*, for the legislature and not for the courts.²³

The proposed rule does not require a rich man to give money simply because a poor man is without funds. Nor does it apply to the classic hypothetical of the starving beggar who asks the millionaire for money in order to avoid starvation. If the rich man had food with him, he might be required to share it, for the presence of food would be purely fortuitous and within condition three of our rule. But he is not required to share his money, because a man's wealth is not a fortuity. Since his situation does not satisfy condition three of the rule, to impose a duty to act upon him would render him subject at all times to sharing his wealth with his less fortunate brethren. This would involve distributive and not retributive justice and would not be consistent with the policy behind the rule. But this does not mean

²³ ARISTOTLE, *NICOMACHEAN ETHICS*—BOOK V, in MORRIS, *THE GREAT LEGAL PHILOSOPHERS* 16 (1959). Here Aristotle distinguishes between retributive and distributive justice.

that money could not at times be required. If money alone could solve the problem and were it purely fortuitous that a particular person was chosen to give, then money could be required. Thus though condition three protects the classic rich from being obligated to the classic poor, it does allow, under limited circumstances, a person of means who is temporarily without funds to require someone else to lend him money, if the resources to be saved by lending the money exceed substantially the risk of losing the money.

It has been suggested that the law today is inconsistent, unfair, and at odds with the best moral thinking of the community. On the one hand, the citizen has been taught consideration for others and love of his fellow man. Yet if he acts according to these teachings, he may be punished by the very society which propagates them. Of all persons, the volunteer is the least protected by the law. He seems always to be treated as an officious intermeddler. He is treated thus because the courts fear that to alter the present law would be to open a Pandora's box of new legal problems.²⁴ For example, would the party who benefited

²⁴ "Because of this reluctance to countenance 'nonfeasance' as a basis of liability, the law has persistently refused to recognize the moral obligation of common decency and common humanity, to come to the aid of another human being who is in danger, even though the outcome is to cost him his life. Some of the decisions have been shocking in the extreme. The expert swimmer, with a boat and a rope at hand, who sees another drowning before his eyes, is not required to do anything at all about it, but may sit on the dock, smoke his cigarette, and watch the man drown. A physician is under no duty to answer the call of one who is dying and might be saved, nor is anyone required to play the part of Florence Nightingale and bind up the wounds of a stranger who is bleeding to death, or to prevent a neighbor's child from hammering on a dangerous explosive, or to remove a stone from the highway where it is a menace to traffic, or a train from a place where it blocks a fire engine on its way to save a house, or even to cry a warning to one who is walking into the jaws of a dangerous machine. The remedy in such cases is left to the 'higher law' and the 'voice of conscience,' which, in a wicked world, would seem to be singularly ineffective either to prevent the harm or to compensate the victim.

"Such decisions are revolting to any moral sense. They have been denounced with vigor by legal writers. Thus far the difficulties of setting any standards of unselfish service to fellow men, and of making any workable rule to cover possible situations where fifty people might fail to rescue one, has limited any tendency to depart from the rule to cases where some special relation between the parties has afforded a justification for the creation of a duty, without any question of setting up a rule of universal application." PROSSER, *Torts* § 54, at 336-37 (3d ed. 1964).

by an act performed under duty be required to pay for its performance? If so, what should be the rate? the value to him? the cost to the person acting? If the latter, what happens when the result of the action is detrimental even though the action was not negligently performed? In addition, what happens when in performance of this duty the person acting is injured? Is he indemnified? fully? partially? only when the person helped has been negligent? not at all? Suppose further that the first person with a duty to act fails to act and a second person acts in his stead and is injured. Who should pay for the loss? the person benefited by the act of the injured party or the person who previously refused to act? and what of the problem of diffuse responsibility? This problem may be illustrated by the drowning man at a crowded beach. In all the crowd, who is responsible for saving him? Notwithstanding the difficult problems that a change in the rule of conduct concerning the duty to act would entail, we believe that these problems can be solved and that the solutions lie in orthodox common law rules.

Admittedly, this rule does reverse the common law rule concerning the duty to act, but it in no way changes any other rules of law. For example, where the law of damages does not allow recovery for economic losses, emotional injury and the like, a person who failed to act would not be responsible for such damages. As a rule, such a person would not be liable for more damages for failure to act under the proposed rule than he would be for acting voluntarily and negligently under the present rules.

In addition, we recognize certain other exceptions to the general rule. Such exceptions relate to bodily security and personal rights. Ordinarily a person who is opposed to the transfusion of blood should not be held liable for failure to give blood, even though his failure resulted in a loss of life. In a society where the belief in the sanctity of bodily security were less strongly entrenched, the duty to give blood might be imposed. But even in our society, the professional donor or any other person who has already begun to give blood could logically be required to continue to do so. In both these cases, the parties have indicated (by giving blood) that their bodily security was subordinate to some other interest. This other interest would have to be judged by determining whether it involved something disproportionately less important than the interest to be served by giving blood.

Personal rights, such as the right against self-incrimination, are also not changed by the rule. Although a witness may be required to testify under the rule, he may still claim the fifth amendment even though his testimony could clear a person of a

charge of murder. Thus, too, a man present at a gambling establishment or a house of prostitution could still claim the fifth amendment (assuming gambling and fornication are illegal) when asked to testify concerning a murder which had taken place on the premises.

Thus the claim to bodily security and personal rights would ordinarily excuse the individual from his duty to act. Religious beliefs, on the other hand, would not be considered absolute excuses. Thus the orthodox Jew may have to exert effort on Saturday and the Christian Scientist may have to bring medical help. This is so for several reasons. In most cases, the religions themselves have provided for excuses in emergency situations. Then, too, subjective standards are difficult to apply. Only where a belief, such as that involving bodily security or monogamy in marriage, has been accepted by the entire society is it accorded the status of an absolute excuse. These excuses are treated separately from the three conditions of the rule because they are absolute. Under the rule, all other excuses are relative, and the cost or effort of the person required to act is judged only in relationship to the harm or damage to be avoided: the greater the harm or damage possible, the greater the duty to act. Thus we can say only that there can occur no harm or damage great enough to force the abdication of personal rights or bodily security or that such rights are absolute and outside the scope of the rule. Religious beliefs can make no such claim.

The exceptions which we have been discussing, if they are exceptions, would affect the application of the rule in very few cases. Because the rule changes legal relationships, however, problems will arise concerning the legal consequences which should attend breach. These problems concern the awarding of damages against the person required to act and the relationships of third parties to the persons directly affected by the rule. The problems of relationship, which include questions of compensation, indemnification, subrogation, proximate cause, and damages, can best be discussed through examples. The major distinctions arise in the respective applications of the rule to professionals and amateurs. Because under the rule they would be treated differently, the application of the rule to each group will be discussed separately.

DUTY OF PROFESSIONAL TO ACT

The term "professional" is easily defined for our purposes. He is a person who holds himself out to the general public as willing and able to do a certain kind of work for a fee. Thus a

doctor, a lawyer, a carpenter, a plumber, or a tree surgeon is a professional when the work or act he is asked to do relates to the normal work he does for a fee. Conversely a doctor is not a professional if he is required to repair the plumbing nor is a carpenter a professional if he is asked to mend a leg. Let us now proceed to the easiest hypothetical case—that involving a doctor.

Suppose *D*, a doctor (whose name appears, by chance, as the first one in the yellow pages), receives a call from *P*, a patient, at 1:00 o'clock in the morning. *P* complains of pains on the right side, says that he is unable to move, and insists that the doctor come to see him. *P* also states that his house has been quarantined by the health authorities because of measles, which *P*'s son has contracted, and that he is heavily in debt and has no funds with which to pay *D*. *D* answers that he does not make house calls, but that he will come if *P* agrees to pay him five times his usual fee in cash when he arrives and to indemnify him against the risk of catching measles. *D* insists on this indemnity because he has not been inoculated against measles. *P* says that he cannot raise the money nor can he grant the indemnity. In reply, *D* tells him to call another doctor.

After considerable delay, *P* contacts another doctor, *S*. By the time *S* arrives, *P*'s appendix has burst and he dies insolvent. The second doctor, *S*, catches measles and his eyesight is affected. *P*'s administrator and *S* both sue *D* in a jurisdiction that has adopted the proposed rule.

In defense of the complaints, *D* moves to dismiss, stating that:

1. *P* had no money to pay him and therefore he had no duty to act.

2. *P* had refused to pay him a fee five times greater than his usual fee because of *P*'s need of *D*'s services.

3. *D* was an employee of an organization, such as a prepay medical group or a governmental organization, which forbade him from treating persons not in the eligible group, which *P* was not.

4. *P* was a member of a race that was personally repulsive to him, a Caucasian, and as a member of the secret Black Muslim Society he had sworn not to have any dealing with members of the white race.

5. *D* was being called upon in emergency cases more than other doctors because his was the first name in the alphabetical list of doctors.

6. Treating *P* involved too great a risk of catching measles, a disease for which *D* had neglected to be immunized.

7. *D* had retired from practice three months earlier and the only reason that he was listed in the classified section was that the new phone books had not yet been published.

8. *D* had told *P* that he had arranged to have *R*, a young doctor, take his emergency calls and had given *R*'s number to *P*.

9. *D* owes no legal duty to the second doctor.

What is the ruling on the first defense? Normally one does not have to do business with a person who may not be able to pay for the service required. Even public utilities are not required to give services away and the thirteenth amendment forbids involuntary servitude. Yet in applying the rule to this defense, we find that the doctor is required to act. *P* met every requirement of the rule: harm was imminent (a burst appendix), failure to act could cause death, and no facts show that *D* was receiving a disproportionate share of the emergency business. The risks to *D* were that he might contract measles and that he might not be able to collect his fee. But the possible loss of a fee or the contracting of a disease cannot compare with the loss of life itself. In addition, it is clear that the moral sense of the community, even under the present rules, would move most men to act in this situation.

If the first defense fails, so must the second defense. Hence the only issue is whether in an emergency situation one person may with impunity take advantage of another. The answer, of course, is no. The law of duress would allow the party agreeing to the extortionate charge to refuse to pay the agreed price or to recover such payment.²⁵ In all other ways, the same

²⁵ See *Post v. Jones*, 60 U.S. 150 (1856). In this case "salvors" would not give assistance to a stranded whaling vessel, unless the vessel were sold to them at a very profitable price. The original owner was entitled to libel the vessel to set aside the sale. In discussing the case Mr. Justice Grier stated: "The crew were glad to escape with their lives. The ship and cargo, though not actually derelict, must necessarily have been abandoned. The contrivance of an auction sale, under such circumstances, where the master of the *Richmond* was hopeless, helpless, and passive—where there was no market, no money, no competition—where one party had absolute power, and the other no choice but submission—where the vendor must take what is offered or get nothing—is a transaction which has no characteristic of a valid contract. . . . The general interests of commerce will be much better promoted by requiring the salvor to trust for compensation to the liberal recompense usually awarded by courts for such

problems concerning duty to act which surrounded the first defense arise here as well.

The third defense, that *D* had contracted with either a prepay group or a governmental group to treat only eligible persons, could not in any way affect *D*'s duty to act. Individual contract rights, as in the case of inpecuniosity, cannot excuse a person from acting in an emergency situation. The only possible question raised by this contract is whether the prepay group or the government is entitled to the fee for treating the sick individual.²⁶

The fourth defense, that of personal prejudice, is not difficult to handle. Although one of our basic freedoms seems to be the freedom to dislike whom we choose to dislike, statutes in the public utility field have made nondiscrimination a primary duty because of the partial monopoly position of such utilities.²⁷ Furthermore, the common law has required nondiscrimination of inns, restaurants, and other establishments affected with a public interest. Certainly in a more obviously monopolistic situation—e.g., an emergency—where no alternate source of supply exists for the services required, a rule of nondiscrimination ought to be applied. This rule should apply whether the animosity were individual or directed at a group of persons such as that mentioned in the fourth defense. Again the only possible argument that can be made for this defense is that it relates to inviolable religious beliefs or bodily security. In a country devoted to the notion of equal citizenship, this viewpoint is, of course, inadmissible. In an orthodox Hindu country such as pre-independence India, however, where the cost or damage caused by contact with an untouchable might be greater than the loss or damage to the untouchable if the higher caste person did not act, this same viewpoint might be acceptable.²⁸

services. We are of opinion, therefore, that the claimants have not obtained a valid title to the property in dispute, but must be treated as salvors." *Id.* at 159-60.

For a comparable emergency in the business field, see *King Constr. Co. v. W. M. Smith Elec. Co.*, 350 S.W.2d 940 (Tex. Civ. App. 1961).

²⁶ See *United States v. Drumm*, 329 F.2d 109 (1st Cir. 1964). In this case a government inspector was required to account to the government for the salary he received for part-time work with a company he was required to inspect. See also *Bennett—Pacaud Co. v. Dunlop*, [1933] Ont. 246, [1933] 2 D.L.R. 237, where one working for another unknown to his principal was required to account.

²⁷ See 41 Stat. 474 (1920), 49 U.S.C. §§ 1(4), 2, 3 (1958).

²⁸ This relates to the efficacies of religious beliefs. Thus if helping an

The fifth defense, that *D* was being called more often than other doctors, is more difficult to handle. *D* might argue that the fortuity requirement has not been met when he is repeatedly called because his name appears at the beginning of a list of doctors. The spelling of his name is itself a fortuity, however, and *D* must accept the disadvantages of being the first doctor listed in the phone book along with the advantages which have undoubtedly accrued to him by reason of occupying that position.

The sixth defense, that the risk placed upon *D* is too great, raises problems even within the rule. First, in applying the rule, we can see that no person has a duty to act if such action imposes upon him risks comparable in nature to the risk to be avoided. Indeed since the risk to *D* was considerably greater because he had not been inoculated than the risk to inoculated persons would be, *D* would not be required to go unless no inoculated persons were available. This latter instance does no more than restate the rule involving emergencies, for except in cases of diffuse responsibility, no emergency exists when other help is available. In a diffuse responsibility case, however, if the same call were made to a clinic where one doctor was inoculated and the other doctor was not, then only the doctor who was inoculated would be required to go. But this latter circumstance is not really an exception to the rule, since under requirement two the inoculated doctor would be more eligible because no harm would befall him. If, on the other hand, the clinic contained either two inoculated or two uninoculated doctors, the doctor receiving the call would be obliged to go. A further discussion of the problem of diffuse responsibility will follow.

The sixth defense must ultimately fail because the conditions are such that the danger to *D* which comes of exposure to measles is disproportionately less than the danger to *P* of a burst appendix. The rule clearly states that the danger to the person required to act must be disproportionately less than the danger or the damage to be avoided by the required act. But the question arises as to whether a different standard of judgment should apply in the case of a professional than in the case of the non-professional. For the rule applies equally to professionals and

untouchable would pollute a high caste Indian, the cost of the depollution would have to be considered in judging whether what was to be saved was worth the cost under section two of the rule. If a life were at stake, the high caste Indian would be required to act, but he might not be required to act if other untouchables were available to help.

nonprofessionals, but the standards of measuring danger differ depending upon the actor's ability to handle the danger. Thus a professional would be required to act even in the presence of considerable danger, whereas the nonprofessional would not be required to act. This circumstance may be explained in two ways. First, some risks are normal for the professional. The rule may require a test pilot to fly an experimental plane in an emergency, whereas the rule would not require an amateur pilot to fly under similar circumstances. Second, the risk to the professional is actually less due to his superior skill, training, or preparation. Surely the test pilot would be more capable of coping with an emergency than an amateur pilot. And certainly a doctor would know better than the layman how best to minimize the danger of contagion and how best to cure himself if he were taken ill. Thus what on the surface would seem to be a variable standard of duty would actually be the same standard applied to persons of different skills. In the final analysis, then, a standard which requires a slightly greater actual risk could be imposed upon the professional if the risk related directly to and were characteristic of his profession. In the situation described above, for example, one must admit that for a doctor the risk of contagion is normal and that by becoming a doctor one consents to expose himself to such risks.

The seventh defense, that *D* had retired from practice, raises a question basic to the right of freedom of occupation. Certainly the rule concerning the duty to act involves involuntary servitude; but because the rule applies only to emergencies, one may disregard the modest limits imposed on freedom of occupation. Thus in the present case, the doctor is called simply because he is a doctor. That he is retired is purely fortuitous. But the fundamental right of a person to choose his own work is at stake. To impose a higher duty on a retired doctor than on a layman would seem to be an insupportable infringement of freedom. What then of the case of a doctor who has perfected a particularly difficult operation which only he can perform? Perhaps he has now become an artist and has decided to give up medicine and devote his life to painting. Ought a patient who requires such an operation be left to die because the doctor has become an artist?

From the point of view of the patient, the rule should apply. The loss of his life is imminent, and he has no other alternative. The failure of the doctor to act would accordingly create a loss disproportionate to the cost to the doctor of completing the operation. Moreover, that the patient has contracted the disease is

purely fortuitous. From the point of view of the doctor, however, the requirement of his services is not fortuitous. He carries his skills with him and thus he would be continually subject to call. Indeed, the case of the doctor is like that of the rich man in the earlier example. Instead of having to distribute money to the poor, however, the doctor would be required to distribute his time (a good more valuable than money)²⁹ among those needing his services. Thus according to part three of the rule, he is not required to act, for the duty to act arises only when the circumstances on both sides are fortuitous. In the hypothetical case, the choice of the doctor is not fortuitous and would interfere with his chosen occupation. He is required to act only if the circumstances are truly fortuitous. Why then do we make professionals respond to emergency calls? Because by choice they have held themselves out to the public as willing to supply the service. Furthermore, in some cases (*e.g.*, doctors, lawyers, architects, and plumbers), the professional has even asked the state to limit the number of persons able to supply the service.³⁰ Certainly, then, members of such professions and trades ought to be required to act in emergency situations. Presumably carrying out their profession is what they wish to do. There is no special loss of freedom, but only a possible rearrangement of time.

To recapitulate, then, we see that under certain circumstances a professional has a duty to act, but that he may desist from any particular employment. The problem that remains, however, is whether the "monopolist" professional (*i.e.*, the professional who has mastered a particular skill) has a duty to act. The answer is that he may refuse to act if the call upon him is not fortuitous; otherwise he would be continuously subject to the demands of others. For unlike the general run of professionals, he could not substitute emergency work for planned work. But like every other citizen, he would be subject to emergency calls that were fortuitous. In the usual course of practice, however, he could not be called upon to treat everyone who needed his particular skill, since the need for such treatment is not an emergency but a general condition of the community. As we stated earlier, such economic problems are beyond the scope of tort law. Our rule applies only to emergency situations.

²⁹ We must realize that each person has a finite period of time to live and, although money is not infinite, some very rich people might find it impossible to spend their fortunes.

³⁰ Most states have statutes requiring licensing and specialized education. Under such circumstances the number of persons entering the professions have been limited. The American Medical Association has been accused of attempting to limit entrance into the field of medicine.

The eighth defense, that *D* had supplied an adequate substitute, is a valid defense if *D* in fact believed that the substitute were adequate and could be contacted as easily as *D*. In most situations, however, no substitute will be available, for due to the nature of an emergency, time will prevent it. Undoubtedly normal emergency facilities will take care of most cases.³¹ And if these are available, no duty to act exists.

The eighth defense arises from the second doctor's suit against *D*. For coming to *P*'s aid and for losing time because he was ill with measles, *S*, the second doctor, is suing for fees. As to the first claim, *D* could not be primarily liable. *P*, not *D*, called for the services. Nevertheless, *D* had a duty to attend, for he could not establish either defense 5 (i.e., too great a risk) or 6 (i.e., retirement). If *D* had this duty, he could not forsake it without having to compensate the person who did discharge the duty. To test this proposition, let us assume the additional fact that *P* was a prepaid contract patient of *D*. Would not *S* have a right to look to *D* if *P* could not pay him? *S* could at least force *P* to assign to him *P*'s chose in action against *D*.³² Under the new rule, *D*'s duty to act is the same as though he had a contracted duty to act, and *S*, therefore, should be able to look to *D* as a guarantor of *P*'s obligation to pay *S*. What then of *S*'s injury, i.e., the measles contracted while attempting to treat *P*? In this case, *S*, like *D*, is a professional. *S*, therefore, could be reimbursed for his injuries only if all professionals received compensation for injuries sustained while carrying on their professions. Normally professionals are not indemnified or reimbursed for injuries characteristic of their professions on the theory that their fee covers the amount necessary to compensate them for the risk. This principle is, of course, the opposite of that applicable to employees, unskilled workers, or amateurs. Whether the rule is based upon recognition of the professional's skill, knowledge, control, or the fact that his fee includes an insurance factor, the application of the rule that no compensation will be allowed for injuries incurred by a professional while discharging his duty to act seems clearly indicated. Hence under proper application of the rule, *S* may recover only the amount of his fee from *D*, and he may do so only if *P* is unable to make the payment.

³¹ Most cities have emergency service through either fire or police departments or public hospitals. Thus certain persons are in the business of answering emergency calls. Whenever they were available, such persons would have a greater duty to act than would a bystander.

³² RESTATEMENT, CONTRACTS § 151 (1932).

DUTY OF AMATEUR TO ACT

Thus far we have considered only the case of the professional. From that discussion, we discerned that for nonprofessionals different rules apply in regard to compensation for services, indemnification for injuries, and the conditions under which the duty is imposed. Most other considerations apply equally to amateurs and professionals, including the problem of diffuse responsibility discussed below. Since the operation of the rule can best be understood through illustration, we turn again to a hypothetical case.

An illustration of the duty of an amateur to act might involve the question of what a traveler would be obligated to do if he discovered a dangerous condition on a road. If, for example, such a traveler discovered that a large tree had fallen across the road on a blind curve, what would be his duty were it probable that the next traveler on the road would run into the obstacle? Obviously the duty to remove the tree does not belong to the first traveler. The removal would be the duty of the owner of the highway—i.e., the state, if it is a public highway, or the owner of the land, if it is a private road. The duty might also fall upon the abutting owner, if the tree were formerly on private land adjacent to the highway or road. In any case, the ultimate responsibility is not that of the first traveler. What then are his duties under the rule? First, if upon reaching the obstruction he sees another traveler proceeding in such a manner as to indicate that he will hit the obstruction, the first traveler has a duty to warn the second traveler of the danger. Under the present rule, it seems that one person does not have a duty to warn another of impending danger even when it is clear that the second person is unaware of that danger. A simple "look out" is all that the proposed rule requires. And in most cases, people do give this warning. Indeed, giving such a warning is almost a reflex action. Under the rule, of course, such a warning is required. An emergency exists; there is no practical alternative for avoiding the danger; failure to warn would result in substantially more harm than the cost of warning the endangered person; and the person who is in position to warn is there by chance.

To agree that there is a duty to warn is the beginning of the problem. How long and how far does this duty extend? Suppose that an automobile does not approach immediately. Must the traveler wait? Clearly, if in some way he can inform the highway department or the owner of the road that the danger exists, he has done his duty, except when the danger is imminent. Then

he may not leave immediately. He may leave only after the highway department or the owner of the road has had time to see to the safety of the traveling public. Suppose, however, that he cannot contact anyone who has the basic responsibility for the highway. Perhaps after waiting ten minutes, another car approaches. He signals the driver and tells him of the danger. The man thanks him profusely and is about to drive on. Our traveler immediately says that he is leaving, and he tells the new traveler that the latter now has the duty to warn. The new traveler refuses and drives off.

What then is the first traveler's responsibility? May he be kept there indefinitely? The answer must, of course, be no. Yet if he may not be detained indefinitely, how long may he be detained? The law's answer is a reasonable time. Accordingly, in applying the rule, we see that, when the cost to the person required to act becomes too great, he is no longer required to act. In this hypothetical case, then, if the first traveler were unable to stop anyone, he would only be required to put up the best warning possible—i.e., a light, a flare, or a smaller obstruction that would tend to slow down an oncoming driver. He should also stop at the nearest police station to tell the authorities of the danger. Certainly, if a policeman were to arrive while the traveler was still at the scene of the danger, then to inform the policeman of the danger would be sufficient to carry out the traveler's duty.

In any case, after notifying the person in control that danger exists, the duty may not then extend to removing the danger but only to warning the possible victims. If on the other hand it is impossible thus to ameliorate the danger, then a duty to remove the danger may exist. Assume that in the hypothetical situation the best course is to remove the tree and that the first traveler does remove it. What rights has he? Is he paid for his labor? If so, by whom? If he is injured while removing the tree, is he indemnified? If so, by whom? If instead of removing the tree, he orders a tree company to do so, is he responsible for payment? And if he is responsible, can he recover such payment from another person?

For the sake of clarity, let us assume that the road is private and that the owner is known but not available. It is the duty of the owner, when he knows of a dangerous condition, to take appropriate action either by removing the danger or by warning licensees and invitees of such danger.³³ Hence our traveler would

³³ "As in the case of trespassers, the occupier's duties to licensees are most curtailed where a mere condition of the premises is the source

be entitled to payment for the reasonable cost of doing such work or for having it done. Moreover, if the night were harsh and cold, then he would be entitled to receive compensation for the cost of doing the work under extreme conditions. If the job required professional skill and the work done by the traveler only partially accomplished the purpose, then he is entitled merely to the reasonable value of a day laborer's work. Injury to the traveler while he does the work raises the question of indemnification. If he were a professional and had been hired by the owner to do this work, he would not normally be entitled to indemnification, for he would be subject to the defense of assumption of risk. If on the other hand, the owner had hired a young boy who had not understood the risks, the owner might well be responsible for the injury. In our case, the traveler is an amateur who is required by the rule to do some act. Clearly no argument exists concerning assumption of risk by such a person. The amount of compensation to which an amateur is entitled, however, would be lower than that which a professional would receive for the execution of the task, for the fee charged by the professional for his services includes an amount necessary to cover the risk.

But what of the person who refused to stop to help our traveler? Is he responsible? If under the rule our traveler had a right to turn over his duty to the second traveler, such a traveler is mediately responsible. Still, however, the person who has the ultimate responsibility for the road would also be responsible to the second traveler.

Suppose in the fallen tree situation that a person had already been injured because of the obstacle and that the traveler finds him pinned under a car. Assume further that the most reasonable step to be taken were to extricate the victim from under the car

of harm. 'An owner of land,' it has been said, 'ordinarily owes no duty to a licensee, any more than he does to a trespasser, to keep his premises in a safe condition, because the licensee or trespasser must take the premises as he finds them and assumes the risk of any danger arising out of their condition.' Thus the occupier need not inspect the premises to discover defects or other dangerous conditions. If, however, he learns of such a condition and should realize that it is unreasonably dangerous to a licensee, and if the occupier 'cannot reasonably assume that the licensee knows [of the condition], or by a reasonable use of his faculties would observe' it, then the occupier is under the duty to use due care to avoid the injury, either by removing the danger or by giving reasonable warning of its presence." James, *Tort Liability of Occupiers of Land: Duties Owed to Licensees and Invitees*, 63 YALE L.J. 605, 606 (1954).

and that in doing so our traveler were injured. Who is responsible? The victim or the owner of the land?

First, it is clear that the injured person is or would have been benefited by the acts of the traveler. The injured person could have and, if asked by the traveler, would have contracted to have the traveler help him. We realize that except when medical help is the help furnished, some courts have refused to recognize either an implied or expressed contract for the care of an injured person.³⁴ Under our rule, however, since one person is required to act for the benefit of another who is in danger, a legal arrangement with rights and duties arises. What are the terms of this arrangement? If the services required are the services of a professional and if a professional supplies them, then the price would be the customary charge for the service. And if the professional is injured, there is no need to indemnify him, since the cost relating to the risk of injury is included in the professional's charge.

An entirely different problem arises when the person who has a duty to act has no special skills. How do we compensate him if he is injured? We cannot treat him as the law now treats the volunteer because unlike the volunteer, he has a duty to act. This duty would negate any assumption of risk simply because the actor has no choice. Quite clearly then, a person who acts non-negligently in accordance with the rule and who is injured thereby must be indemnified for the injury. If such is the rule, then who must indemnify him? Obviously the persons whom the actor hoped to or did benefit. Thus in our hypothetical situation, the person pinned under a tree is the person whom the actor hopes to benefit. The victim is, therefore, at least mediately responsible. If, however, some other person caused the injury to the victim, then that person is ultimately responsible to the actor who is injured in his attempt to help the victim. For even under the present law, such a person is responsible to mitigate or alleviate damage or injuries caused by him to another.³⁵

³⁴ *Falcke v. Scottish Imperial Ins. Co.*, 34 Ch. D. 234, 248 (1886), where Lord Bowen said, "The general principle is, beyond all question, that work and labor done or money expended by one man to preserve or benefit the property of another do not according to English law create any lien upon the property saved or benefited, nor, even if standing alone, create any obligation to repay the expenditure. Liabilities are not to be forced upon people behind their backs any more than you can confer a benefit upon a man against his will."

³⁵ RESTATEMENT, TORTS § 322 (1934) provides: "If the actor by his tortious conduct has caused such bodily harm to another as to make him helpless, the actor is under a duty to use reasonable care to prevent

But all attempts to aid a victim may not be helpful to the person ultimately responsible. For example, in a state with a limitation on recovery for wrongful death, the saving of the victim's life by a third party might result in a higher instead of a lower verdict against the person ultimately responsible.³⁶ To

any further harm which the actor then realizes or should realize as threatening the other."

"The words 'further harm' include not only an entirely new harm due to the dangerous position in which the other has been placed by the actor's tortious act . . . but also any increase in the original harm caused by the failure to give assistance . . . and any protraction of the harm which prompt attention would have prevented . . ." RESTATEMENT, TORTS § 322, comment b (1934).

This rule is well illustrated by the following hypothetical: "A and B are both driving carelessly along a lonely ill-lighted road. In consequence, a collision occurs by which B is thrown out of the car into the middle of the road, bleeding profusely and unconscious. A drives on without giving B any attention. A could easily have checked the flow of blood by applying a tourniquet. His failure to do so results in B's death. A is liable under a death statute." RESTATEMENT, TORTS § 322, illustration 4 (1934). "The rule stated in this Section expresses a duty of affirmative action imposed upon the actor because his tortious conduct has rendered the other helpless. The rule is not an extension of the principle of 'legal cause' nor an extension of the doctrine of 'last clear chance.'" RESTATEMENT, TORTS § 322, comment e (1934). See also Annot., 80 A.L.R.2d 299 (1961).

Some states have statutes making it the duty of the nonnegligent driver to aid his negligent counterpart in an auto accident. Once this duty is established, all the considerations raised by our proposed rule apply to such a legally imposed duty to act. These statutes are an important first step in imposing a general duty to act, because no valid distinction can be drawn between an innocent participant in an accident and a bystander in their duty to an accident victim.

³⁶ "The result was that it was more profitable for the defendant to kill the plaintiff than to scratch him, and that the most grievous of all injuries left the bereaved family of the victim, who frequently were destitute, without a remedy. Since this was intolerable, it was changed in England by the passage of the Fatal Accidents Act of 1846, otherwise known as Lord Campbell's Act, which has become a generic name for similar statutes. Every American state now has a statutory remedy for wrongful death. Most of the statutes were modeled upon Lord Campbell's Act, which is a 'death act,' and creates a new cause of action for the death in favor of the decedent's personal representative for the benefit of certain designated persons." PROSSER, *op. cit. supra* note 25, § 121, at 924.

"Under rather less than one-third of the death acts, the discretion of the jury is at least partly controlled by a maximum limit of recovery on behalf of all beneficiaries for a single death. These amounts, however, vary considerably under the different statutes." PROSSER, *op. cit. supra* note 25, § 121, at 932. (Emphasis added.)

state this proposition is to show its fallaciousness, for if the tortfeasor himself refused aid in such circumstances, he would be responsible in most jurisdictions both in tort and criminally. We can conclude, therefore, that he who is responsible for indemnifying a person who is injured in performance of a duty to act is the same person who must compensate him for acting. In other words, the person who would have been benefited if the actor had accomplished his purpose must also indemnify the actor if he is injured while fulfilling his duty to act.

INTERMEDDLERS

Whether the rule extends to compensating intermeddlers or to indemnifying them for their injuries is a question of major significance, since damages in a situation where indemnification is required could far exceed the benefit to the person whom the actor attempts to help. Because the question of the officious intermeddler is involved in the operation and extent of the rule, it can best be discussed through illustrations of the operation of the rule. In each case the question will arise as to whether it is reasonable for a person to act under the given circumstances. Obviously it is unreasonable for a person to attempt to save another person's fifty-dollar watch at the risk of his life, nor does our rule require that he do so. The rule requires a person to act only if the cost or loss to him is disproportionately less than the loss or harm he could prevent by acting. Under this rule, one would not be required to act at the risk of his life in order to save a fifty-dollar watch. A concomitant rule would be that no one would be required to indemnify him if he were injured while so acting. The actor would be treated (as under the law he is now treated) either as a mere volunteer or as an officious intermeddler.

The problem then is not that of officious intermeddlers but of the reasonableness of the person who acts. Undoubtedly man's motives are neither completely selfish nor completely unselfish, but the application of this rule does require an investigation of motives. Hence a judgment could be made on the basis of the facts known to the actor at the time he decided either to act or not to act. Because of the emergency nature of the circumstances, however, he must be given the benefit of the doubt, and he must not be judged by hindsight. Such judgment is difficult, but judgment of this sort is rendered presently in every area where persons are now required to act (*e.g.*, under laws relating to public officials, servants of public utilities, and simple

negligence).³⁷ Certainly decisions in this area will be no more difficult than in any other area of law.

But what happens when the result of the act is not beneficial but in fact makes matters worse either by further injuring the victim or by injuring the actor? First, we can safely say that the ordinary rules of negligence would apply in the same way that they do under the present rule. If the person required to act negligently injures the victim he is attempting to save, then he is liable for the consequences. But the standard of care required is only what is reasonable under the circumstances. If on the other hand, the actor negligently injures himself, the victim would not (as he was required to do for a nonnegligent injury) be required to indemnify the victim. These rules do not solve the problem, however, when there has been no benefit to the victim. In admiralty law, persons salvaging are paid only if they benefit the owners.³⁸ Even in the normal quantum meruit case, payment is

³⁷ "The courts have been compelled to recognize that an actor who is confronted with an emergency is not to be held to the standard of conduct normally applied to one who is in no such situation. An emergency has been defined as a sudden or unexpected event or combination of circumstances which calls for immediate action; and although there are courts which have laid stress upon the 'instinctive action' which usually accompanies such a situation, it seems clear that the basis of the special rule is merely that the actor is left no time for thought, or is reasonably so disturbed or excited, that he cannot weigh alternative courses of action, and must make a speedy decision, based very largely upon impulse or guess. Under such conditions, the actor cannot reasonably be held to the same conduct as one who has had full opportunity to reflect, even though it later appears that he made the wrong decision, which no reasonable man could possibly have made after due deliberation. His choice 'may be mistaken and yet prudent.'" PROSSER, *op. cit. supra* note 25, § 33, at 171-72.

³⁸ "First, there must be a service to maritime property which is in real or impending danger. Secondly, the service must be voluntary in nature. Thirdly, there must be at least partial success in saving property, or a proximate contribution to the ultimate success. . . .

"The antiquity of salvage is the antiquity of maritime trade itself. Since the seas were the primary highways of commerce when maritime customs were developing, merchants and traders influenced the evolution of maritime law. The earliest maritime codes speak of salvage awards as proportions of property saved, and give no consideration to any award for saving lives. The law of salvage was intended to motivate the saving of property for the benefit of owner and salvor alike, and experience quickly proved a material reward to be the most efficacious method of achieving that end. Consequently, the salvor has a lien of highest priority upon the property saved, whether ship or cargo. This lien accrues immediately upon the performance of the service, and gives the salvor a right to proceed *in rem* against the property itself. If necessary, the property may be sold,

only for a benefit.³⁹ But such rules do not seem appropriate in a situation where a person is required to act. In such a case, the pay should be the same whether the actor is successful or unsuccessful.

Although the example of the traveler sets out the main principles of the rule, it does not exemplify all aspects of the rule. One still must ask: What happens when the action benefits the actor more than the person allegedly benefited? What rights does a person have to allow his property to decay? And in the alternative case, does the right to abate a nuisance involve a duty to do so? In order to explore more fully the application of this rule and its ramifications, we must consider the following hypothetical cases.

Hypothetical Case I: A person, either the contiguous owner or a stranger, sees a broken section of fence which previously enclosed a herd of cattle. What are his duties?

Hypothetical Case II: Perishables, say twelve crates of lettuce, are delivered to the wrong business address. What action must be taken by the person who discovers the perishables?

Hypothetical Case III: A passing stranger discovers a diseased elm tree in a neighborhood where there are many elm trees that are free of disease. What action must such a person take?

Hypothetical Case IV: A garage mechanic who is hired for a motor tune-up notices that the brakes are badly worn. What action must be taken?

Hypothetical Case V: A passing stranger sees a person who is obviously drunk attempt to start his car in a busy part of town. What action must be taken?

Hypothetical Case VI: A customer in a restaurant notices a puddle of salad oil on the floor. What duty does he have?

In the first hypothetical, what is the rule when a person sees a fence broken and valuable cattle escaping? Clearly he has a duty to notify the owner. But what if he does so and the warning is ineffective, or what if he cannot contact the owner? Is he required to hire a crew either to round up the cattle or to fix the fence? First, let us consider the contiguous owner. In such a case, the duty to act coincides with the duty of the contiguous owner

and the salvor may have his claim satisfied from the proceeds of the sale." Jarett, *The Life Salvor Problem in Admiralty*, 63 YALE L.J. 779, 780-81 (1954).

³⁹ See Annot., 59 A.L.R. 604 (1929); 58 AM. JUR. *Work and Labor* § 35 (1948).

to protect his own property. The cost of fixing the fence or herding the cattle is, of course, chargeable to the original owner if the original owner had a duty to keep his animals on his own land. If instead of a contiguous owner a third party were to see the animals escaping, he would probably have a duty both to the original owner and to the contiguous owner. The contiguous owner, however, would only be mediately responsible. The original owner would be ultimately responsible. Assume that the third person could contact neither the owner nor the contiguous owner and that he attempted to hire a fence repairman who either refused to act or asked for a guarantee for his fee. What remains for the stranger to do? Applying the rule to such a situation, the stranger must act unless the cost of repairs is disproportionately more than the savings to be made. Since his duty arose fortuitously, he would be responsible to the repairman who finally did act, but he would be able to charge either the owner, who is ultimately responsible, or the contiguous owner, who is mediately responsible, for the cost of the repairs. This answer assumes that a proper judgment was made and that the cost of saving the cattle and fixing the fence was considerably less than the value of the cattle.

What to do about the perishable lettuce raises a similar question. In this case, it can be assumed that the owner does not want the goods to spoil. The major difference between this case and that of the cattle is that the rotting of the lettuce would not cause damage to other property. In the cattle case, on the other hand, the owner has a duty to stop such damage, and in certain cases he could probably be enjoined from allowing his cattle to run. In the case of the perishable lettuce, again the most obvious action is to notify the owner. And if the owner or the person who is responsible for delivering the goods can be notified, the duty to act is complete. Then either the owner or the person who misdelivered the goods would be responsible for the lettuce, and if they wished that the lettuce rot, it would be their business. But what happens if no one is available to give directions? The goods must be sold for the best price reasonably available, and the proceeds, less expenses, must be turned over to the owner.⁴⁰

⁴⁰ The procedure required under the proposed rule is the same procedure required by NEB. REV. STAT., U.C.C. § 2-603 (1964): "Merchant buyer's duties as to rightfully rejected goods.

"(1) Subject to any security interest in the buyer (subsection (3) of section 2-711), when the seller has no agent or place of business at the market of rejection a merchant buyer is under a duty after rejection of goods in his possession or control to follow any reasonable instructions received from the seller with respect to the goods and in

The third hypothetical, which involves the spread of dutch elm disease, raises the issue of officious intermeddling. If the disease were not contagious and if it would not spread to another's property, the only duty would be to contact the owner of the diseased tree. Once the owner is informed, no further action would be necessary, because the law recognizes the right of a person to destroy his own property. If the owner could not be found, then other action would be required, providing that the cost of such action would be disproportionately less than the loss to be averted by acting. Such action would probably include calling a tree surgeon. The persons benefited (*i.e.*, the actual owner and the contiguous owners) would be ultimately responsible, and the actor would be mediately responsible to the person called to help. Assume, however, that the first tree surgeon contacted by the actor refused to come, that a second tree surgeon was called, and that neither the contiguous owners nor the actual owner had funds to pay the bill. The first tree surgeon would then have to indemnify the second tree surgeon for the cost of destroying the diseased tree. This is, of course, the same case as that of the doctor described above who must indemnify a second doctor for the cost of treating a patient whom the first doctor refused to treat.

Since in the present case more than the actual owner's interest is involved, the duty of a third party to act does not run exclusively to the owner. The actor can, therefore, satisfy his duty by informing a contiguous owner or, in most jurisdictions, a public official. The power of interested individuals and public officials to abate a nuisance is indisputable.⁴¹ Hence if the actor is a stranger, he would only be required to inform a proper party. The cost distribution of averting the danger would follow the method now provided for abating nuisances. If the owner refuses

the absence of such instructions to make reasonable efforts to sell them for the sellers account if they are perishable or threaten to decline in value speedily. Instructions are not reasonable if on demand indemnity for expenses is not forthcoming.

"(2) When the buyer sells goods under subsection (1), he is entitled to reimbursement from the seller or out of the proceeds for reasonable expenses of caring for and selling them, and if the expenses include no selling commission then to such commission as is usual in the trade or if there is none to a reasonable sum not exceeding ten per cent on the gross proceeds.

"(3) In complying with this section the buyer is held only to good faith and good faith conduct hereunder is neither acceptance nor conversion nor the basis of an action for damages."

⁴¹ RESTATEMENT, TORTS §§ 201-03 (1934).

or is unable to act, the public official or a person who is injured by the nuisance may act and may then charge the cost to the owner.⁴²

The fourth hypothetical (that of the garage mechanic who discovers faulty brakes) involves the same principles. Thus the owner of a car may not wish to repair it, but that he should have the right to drive a car with improper brakes is absurd. Indeed, such action is considered criminal in most jurisdictions. Hence when the mechanic discovers the faulty brakes, he must either inform the owner of the defect or he must repair the brakes. Furthermore, the mechanic may have a duty to inform the police if after advising the owner of the defect, the owner refused to repair the brakes and intended to drive with improper brakes.⁴³

⁴² *City of San Antonio v. Mackey's Estate*, 22 Tex. Civ. App. 145, 54 S.W. 33 (1899).

⁴³ See Broeder, *Silence and Perjury Before Police Officers*, 40 NEB. L. REV. 63, 64-65 (1960), where he states:

"The conventional answer, however, is misleading. While the part about misdemeanors is true—the law has never, except perhaps in the case of law enforcement officers, imposed any affirmative duty to report misdemeanors, regardless of the circumstances—the matter as to treason and felonies is not nearly so clear cut. As a matter of fact, nothing about the subject seems ever to have been altogether clear, and modern American authority at least would seem to compel the drawing of various distinctions. Much may depend, for example, on whether we are speaking about a simple failure to disclose felonies to the authorities with no intention on defendant's part of aiding the felon or of profiting from his silence or of impeding a police investigation or on whether such factors are present. Other distinctions may also occasionally be important. There is some reason to believe, for instance, that failing to disclose information concerning another person's felonies when requested to do so by law enforcement officers may be quite different from simply failing to volunteer information, that law enforcement officers are perhaps dealt with differently in this area from other people and that various groups of persons who might otherwise be subject to criminal liability for failing to speak out may be protected because of their businesses or professions or because of the way in which information concerning the felonies comes to their attention. . . .

"Probably it is best to begin with the history and the English law on the question. Such distinguished common law commentators as Coke, Hale, Hawkins, East and Blackstone unqualifiedly asserted that a simple failure without any ulterior purpose to disclose another's felony to the authorities was punishable as a common law misdemeanor—known as misprision of felony—and that it was a misdemeanor even to stand by and watch a felony without at least attempting to prevent it and this latter apparently without regard to the bystander's ability effectively to intervene. And such statements, particularly as regards the criminality of failing to disclose felonies

The fifth hypothetical case (that of the drunken driver) presents a problem similar to that of the garage mechanic. The only difference is that because of voluntary drunkenness, the driver cannot be made aware of the danger. If the person who sees the drunk is a member of his family or either a tavern keeper or a social host who has contributed to his drunkenness,⁴⁴ such a person would have a duty to act even though his presence is not fortuitous. Our rule applies only when the person who sees the drunk is a stranger. Undoubtedly a warning will not be heeded by the drunk. Hence since the public as well as the drunk are involved, a warning to the police would be the appropriate action. A problem arises only when the police are unavailable. Then the only appropriate action would be an attempt to stop the drunk by force. Part two of the rule would here be applicable. In accordance with part two, if the possibility existed of substantial physical danger to the actor, he would have no duty to act.

Hypothetical case number six illustrates the fact that in most cases the duty to act is merely a duty to warn. If a customer notices a dangerous condition, *i.e.*, a puddle of salad oil on the floor of a restaurant, what must he do? He must warn the owners of the store or, if someone were about to walk near the oil, he must warn such a person.

In view of the preceding illustrations, it is clear that the application of this rule is no more difficult than the application of any other rule. But in questions of diffuse responsibility, application of this rule is somewhat more complex.

to the authorities, have many times been repeated by later English and American commentators so as to give them almost the force and effect of law."

⁴⁴ The duty in such cases may be inferred from the liability imposed upon such persons by Dram Shop Laws. See, *e.g.*, ILL. STAT. ANN. ch. 43, § 135 (Smith-Hurd Supp. 1964):

"Every person, who shall be injured, in person or property by any intoxicated person, shall have a right of action in his or her own name, severally or jointly, against any person or persons who shall, by selling or giving alcoholic liquor, have caused the intoxication, in whole or in part, of such person; and any person owning, renting, leasing or permitting the occupation of any building or premises, and having knowledge that alcoholic liquors are to be sold therein, or who having leased the same for other purposes, shall knowingly permit therein the sale of any alcoholic liquors that have caused, in whole or in part, the intoxication of any person, shall be liable, severally or jointly, with the person or persons selling or giving liquors aforesaid"

DIFFUSE RESPONSIBILITY

In the emergency setting, diffuse responsibility is exemplified by the hypothetical case of the drowning man at the crowded beach. The presence of all the people at the beach is fortuitous, and the danger, at least to persons with swimming ability, is substantially less than the danger to the drowning man if nothing is done. Clearly the persons with the most ability to swim have a greater duty because to such persons the risk is less than to nonswimmers. If a professional life guard were present, he alone would have the duty. But if no life guard were present, then all able swimmers would have a duty to save the drowning man. Yet what would happen if everyone refused to act? Before discussing this problem, we must decide what happens to one who does act in the emergency.

If such a person saves the drowning swimmer, he is entitled to compensation. His claim would be against the person benefited. Our prior analysis has shown that the person primarily liable is the drowning man. But if he had been put into the dangerous position by the negligent action of another person, then that other person would be liable. Thus if either the person saved or the person who caused the danger can pay the fee, no further problem exists.

The same answer applies to indemnification in the event that the rescuer is injured or drowned. If such is the case, he or his estate must be indemnified by the person benefited. If, however, the drowning man is not saved and dies penniless and if no other person contributed to the drowning, who is to pay the would-be rescuer for his injuries and trouble? To answer this question, we may return to the example of the doctor. In that case, if the first doctor refused to act, the second doctor could look to the first in the event that he was unable to collect from the person benefited. This procedure must also apply to questions of diffuse responsibility, though no one person in a group of equally qualified persons would seem to have a greater duty to act than the others (as would be the circumstance in our example of the clinic doctors). For in such cases it would seem that all would be equally liable. Thus if the swimmer who attempted to save the drowning man were drowned in the attempt, the remaining swimmers could be held responsible to the estate of the rescuer. If no one acted, however, the entire group of swimmers would be liable to the estate of the deceased victim on the same basis. This rule could and should be applied in all cases of diffuse responsibility whether they come under the duty to act in emergencies or not. For the emergency rule merely establishes the duty to act, where-

as the duty to contribute should apply whenever the law finds that all members of a group are equally responsible for a certain duty. Thus contribution should be required for the upkeep of a common stairway just as contributions should be required from all children in a support of parents case.⁴⁵

Clearly, then, diffuse responsibility can be difficult only if the law refuses to recognize contribution. We realize that in some situations it will be difficult to know all of the persons who might have the duty, but in such cases the group will be large, and the hardship of contributing will be small. That there should be no contribution by persons equally liable is unjust, and the mere fact that the conventional tort rule does not permit contribution should not govern the apportionment of damages under the proposed rule. Courts should not be required to apply undesirable old rules to new situations. Here they would have the opportunity to limit a rule which is generally considered unfair.

RELATED PROBLEMS

The preceding discussion relates strictly to the proposed rule. In that discussion, we have claimed that the suggested change of the common law rule of no duty to act was not an attempt to alter the present economic distribution of goods in society, and we believe that an examination of the changes to be wrought by the adoption of this rule will bear us out. Nevertheless, an adoption of this rule will cause at least some reconsideration of certain other rules of law. Basically the areas of law that are most closely related to the problems of the duty to act are the last clear chance rule, the duty of the sovereign to compensate for the use of personal goods or services, and the application of the proximate cause rule to this new duty to act.

First, let us look at the rule concerning the last clear chance. As stated above, the application of this rule has led to a mass of incoherent, illogical decisions.⁴⁶ Fortunately, however, the prob-

⁴⁵ NEB. REV. STAT. §§ 68-101, -102 (Reissue 1958).

⁴⁶ PROSSER, TORTS § 65, at 443 (3d ed. 1964) summarizes the criticism as follows:

"This variety of irreconcilable rules, all purporting to be the same, and the lack of any rational fundamental theory to support them, suggest that the 'last clear chance' doctrine is more a matter of dissatisfaction with the defense of contributory negligence than anything else. In its application, it is not infrequent that the greater the defendant's negligence, the less his liability will be. The driver who looks carefully and discovers the danger, and is then slow in applying

lem posed by the last clear chance rule may be easily solved by the adoption of the present rule. By definition, the facts in a last clear chance situation always indicate an emergency, for the person required to act is the only person who can avoid the accident. What happens then when our rule is applied to a last clear chance situation? Suppose that a bus full of passengers is approaching a child who is playing in the street. Assume that the child is negligently attended and that the bus is proceeding nonnegligently. Thus only action by the bus driver can save the child. Must the driver act? Yes, if by so acting the danger to himself, his passengers, and his cargo is disproportionately less than the harm to be avoided. Assume then that the driver acts to save the child, and that because of his action, five passengers receive whiplash injuries and some valuable glass carried by the bus is broken. Under the rule, the child or the person who negligently let the child wander into the street is ultimately responsible for all of the damages. But in the event that such persons are impecunious, who is mediately responsible? It must be assumed that the bus company is mediately responsible. Under the normal carriage contract for hire, the carrier is an insurer against loss except for acts of the sovereign, acts of God, and acts of the public enemy. The carrier would be responsible for the damage resulting from acts required under the rule. The same criterion would apply in the case of personal injury. For the rule that the highest degree of care is required of common carriers would probably result in liability of the carrier. In the latter circumstance, a caveat must, however, be issued if the danger to the passengers were of a certain magnitude. For the driver would not then have a duty to act since the danger to the driver, to his cargo, and to his passengers would not be disproportionately less than the danger to be avoided. In the preceding case, mediate responsibility would shift to the passengers if, for example, they were guests instead of paid passengers. The guests in such a case would have to bear the loss if the loss to them was substantially less than the harm avoided. Thus it appears that the proposed rule works

his brakes, may be liable, while the one who does not look at all, or who has no effective brakes to apply, may not. Recognition of the absurdity of such distinctions has played a considerable part in the extension of the doctrine to new situations. Nor is it easy to defend a rule which absolves the plaintiff entirely from his own negligence, and places the loss upon the defendant, whose fault may be the lesser of the two. It is probable that the future development of the law of contributory negligence will lie along the lines of statutory or common law apportionment of the damages, rather than the last clear chance."

consistently within the present legal rules and that unlike the present last clear chance rule, it is applicable to problems related to damage to third parties and to the defendant actor.

Another related problem is the duty of citizens to act on the command of the sovereign. This is another exception to the present rule of no duty to act. Under the present law, a citizen must give both his time and property to the state when in an emergency the sovereign calls upon him to do so. Thus a policeman may order a citizen to help chase a fleeing felon even at the risk of loss of property and life to the person required to act.⁴⁷ Again, in time of war, the state may requisition goods and services as easily as it may draft men into the armed forces. The same rule applies in cases of natural disasters such as fires or floods. In such cases, the state may call upon all citizens to act and under certain circumstances, may even destroy private property. Because this exception to the no duty to act rule has not been thought out either as a rule of law or as a constitutional matter, no compensation is normally paid to persons who lose property, life, or health. There have been a few cases, however, in which workmen's compensation has been paid to a person required by the police to aid them in pursuance of their duty.⁴⁸ If properly analyzed, all action required by the state of its citizens (either in giving services or property) should be compensable under the fifth amendment. Under that amendment, the state has no right to require property or service without the payment of compensation.⁴⁹ This rule of compensation could, and probably should,

⁴⁷ See, e.g., NEB. REV. STAT. § 28-728 (Reissue 1964): "Whoever, having been called upon by the sheriff or other ministerial officer, in any county in this state, to assist such officer or other officer in apprehending any person charged with or convicted of any offense against any of the laws of this state, or in securing such offender when apprehended . . . neglects or refuses to render such assistance, shall be fined in any sum not exceeding fifty dollars." See also ALA. CODE tit. 14, § 404 (1940); ARIZ. REV. STAT. ANN. § 13-542 (1956); CAL. PEN. CODE § 150; OKLA. STAT. tit. 21, § 537 (1951); WYO. STAT. § 6-181 (1957). See generally Note, *The Private Person's Duty to Assist the Police in Arrest*, 13 Wyo. L.J. 72 (1958).

⁴⁸ See, e.g., *Riker v. City of New York*, 204 Misc. 878, 126 N.Y.S.2d 229 (Sup. Ct. 1953); *Industrial Comm'n of Ohio v. Turek*, 129 Ohio St. 545, 196 N.E. 382 (1935); *Blackman v. City of Cincinnati*, 66 Ohio App. 495, 35 N.E.2d 164 (1941).

⁴⁹ "Most courts have held these provisions [forbidding the taking of property without just compensation] to be self-executing, so that even where the legislature fails to provide a procedure for prosecuting such claims against the state, an action may be maintained in the courts to recover compensation . . ." James, *Tort Liability of Gov-*

apply to situations not involving emergencies, such as wrongful imprisonment and interrogation of either alleged criminals or insane persons.

Under the proposed rule, every citizen in a disaster area would have a duty to act. At the same time, such a person would be entitled to compensation for his services and indemnification for any losses or damages suffered while acting for the public good. Thus, in an epidemic, doctors could be mobilized and drugs requisitioned. In a flood situation, individuals could be drafted to man dikes, and property could be destroyed in order to save lives and other property. This power to save the community at the expense of the individual exists under the present law, but the existing law makes little or no provision for compensating those who are engaged in the work of saving the community. Moreover, in most cases relief is given only through private legislation or administrative claims provisions. Under the rule, however, the cost of this service would be assessed against the person helped. In the case of disasters such as floods and fires, the cost would be assessed against the governmental unit charged with the duty of protecting the area affected by the natural disaster. In the event that an agency other than God negligently causes a disaster, the rule would require that the cost be assessed against that agency.

A duty to act rule already partially applies in the public disaster field. The proposed rule would rationalize its application. Moreover, the proposed rule would provide for a fair distribution of losses sustained in such a disaster. And under the proposed rule, no changes would be made in determining how losses from a disaster are to be borne, but the full costs of combating the disaster would be shifted to the state or to the agency of the state which was authorized to act in the emergency situation. Adoption of the rule is thus consistent with the general trend of the law of torts toward the socialization of costs and away from arbitrating allocation of losses.

SUMMARY

Adoption of the proposed rule will do little to change the behavior of the individual, except insofar as it might create an

ernmental Units and Their Officers, 22 U. CHI. L. REV. 610, 618 (1955). For a modern application of this principle see the action of Judge William East's order to the United States to pay a lawyer ordered to defend an indigent. *Time Magazine*, July 10, 1964, p. 46.

environment in which he could be a better citizen. But the rule will protect and compensate the few good samaritans who are sometimes penalized for their virtues. Moreover, the rule will not turn anyone into a busybody, for the consideration of reasonableness of action will not allow more protection to the really officious intermeddler than he now has under the law. Nor will such a rule cause persons to fear for their property because of an act they inadvertently failed to do, since in most cases our marvelously complex economy has provided specialists who perform such acts. And since the circumstances of a real emergency will always be clear and the action required will be performed instinctively, in practically all such situations the rule will simply protect the man who acts as society expects him to act.



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