

Judgments sustaining or invalidating state taxation of interstate commerce, insofar as competitive advantages are destroyed or equalized by sales and use taxes, are preventing the most economic distribution of resources.³⁰ Since 1938, decisions in gross-receipts tax cases have purported to be based on analysis of their effects on the flow of interstate commerce. Consequently, Congress, as a body more suitably equipped to make comprehensive economic investigations than the courts, and undoubtedly the holder of power to place its imprimatur on even concededly discriminatory taxation of interstate commerce,³¹ should formulate a national policy based on the conflicting demands of state revenue needs and freedom of movement in interstate trade.

Torts—Negligence—Person Endangered by Own Negligence Liable to Rescuer for Injuries Sustained in Rescue—[New York].—The defendant parked her car on an incline without taking proper precautions to prevent its movement. The plaintiff sustained personal injuries in rescuing the defendant from the path of the automobile after she had walked in front of it and it started to move. The jury found that the defendant's negligence in parking her car was the direct cause of the injury and upon instruction of the court that it was the duty of the defendant to exercise reasonable care to avoid injury to the plaintiff, damages were awarded. On appeal, *held*, there is a legal as well as a moral duty not to expose one's self to undue risk of injury, thereby causing another to undertake a rescue which brings about an undue risk of injury to the other. *Carney v. Buyea*.²

To permit recovery by a rescuer where the act of the rescued created the danger, the principal case removes conceptual barriers hitherto preventing such recovery, and employs the foreseeability test in a new fact situation.

While the law has not recognized any general duty to aid a person who is in peril,² it is well established that where the danger is created by the negligent

³⁰ For a discussion of the economic effects of use tax incidence see Carlson, *Interstate Barrier Effects of the Use Tax*, 8 *Law & Contemp. Prob.* 223 (1947).

³¹ The many dicta and decisions to this effect have recently been reinforced in *Prudential Life Insurance Co. v. Benjamin*, 328 U.S. 408 (1946), sustaining a South Carolina tax on foreign insurance companies measured by business done within the state, regardless of interstate or local character. No similar tax was required of South Carolina insurance companies. The plaintiff, citing *United States v. South-Eastern Underwriters Association*, 322 U.S. 533 (1944) to urge protection of the commerce clause, obtained the Court's concession that the tax discriminated against interstate commerce, but the Court upheld the tax on the authority of the McCarran Act, 59 Stat. 33 (1945), 15 U.S.C.A. §§ 1011-1015 (1945), which declares that "continued regulation and taxation by the several States of the business of insurance is in the public interest. . . ."

² 271 App. Div. 338, 65 N.Y.S. 2d 902 (1946).

² *Osterlind v. Hill*, 263 Mass. 73, 160 N.E. 301 (1928); *Union Pacific Ry. Co. v. Cappier*, 66 Kan. 649, 72 Pac. 281 (1903); *Prosser, Torts* 190-92 (1941); 2 *Rest., Torts* § 314 (1934). *Contra: Dupue v. Fleteau*, 100 Minn. 299, 111 N.W. 1 (1907); cf. *L. S. Ayres & Co. v. Hicks*, 220 Ind. 86, 40 N. E. 2d 334 (1942). The last case, however, can be explained by the fact that the plaintiff was an invitee on the defendant's property, and the defendant failed to halt

conduct of a third person, the rescuer may recover from such person for injuries received in the course of the rescue.³ If the rescue is not reckless or rash, the rescuer will not as a matter of law be denied recovery on the theory that he assumed the risk or that he was contributorily negligent, even though the danger to his own life was clearly apparent.⁴ Moreover, in such cases, when the rescued person is contributorily negligent, the negligence of the rescued is not imputable to the rescuer.⁵

In the rare case where, as here, the situation of the imperiled person is the result of his own careless conduct, the courts have had more difficulty permitting recovery by the rescuer for injury sustained in the rescue.⁶ In the leading case of *Saylor v. Parsons*⁷ the defendant without proper care undertook to undermine a brick wall while demolishing his house. The plaintiff observed that the wall was

the injuring instrumentality before the complete damage had been done. For a vigorous criticism of the rule that there is no duty see Ames, *Law and Morals*, 22 *Harv. L. Rev.* 97, 112 (1908); Bohlen, *The Moral Duty to Aid Others as a Basis of Tort Liability*, 56 *U. of Pa. L. Rev.* 217, 316 (1908); Cardozo, *The Paradoxes of Legal Science* 25 (1928).

³ *Wagner v. International Ry.*, 232 N.Y. 176, 133 N.E. 437 (1921); *Perpich v. Leetonia Min. Co.*, 118 Minn. 508, 137 N.W. 12 (1912); "The risk of rescue, if only it be not wanton, is born of the occasion. The emergency begets the man." Cardozo, J., in *Wagner v. International Ry.*, 232 N.Y. 176, 180, 133 N.E. 437, 438 (1921).

⁴ *Rovinski v. Rowe*, 131 F. 2d 687 (1942); cf. *Haynes v. Harwood*, [1934] 1 K.B. 146, where the English court abandoned English precedents to adopt the American rule. But see *Oklahoma Power & Water Co. v. Jameson*, 188 Okla. 118, 106 P. 2d 1097 (1940). In this case an instruction to the jury, charging that if the plaintiff's decedent was a rescuer he had a right to act to prevent injury or harm to others, even to the extent of endangering his own life, was held reversible error. The decision was based on a provision of the Oklahoma Constitution which provides: "The defense of contributory negligence . . . shall, in all cases whatsoever, be a question of fact, and shall, at all times, be left to the jury." Okla. Const. Art. 23, § 6.

⁵ *Bond v. Baltimore & O. R. Co.*, 82 W. Va. 557, 96 S.E. 932 (1918); *Pierce v. United Gas & Electric Light Co.*, 161 Cal. 176, 118 Pac. 700 (1911).

⁶ In *Butler v. Jersey Coast News Co.*, 109 N.J.L. 255, 160 Atl. 659 (1932), the defendant's truck, driven by the defendant's employee, skidded into and knocked down an electric line pole. The plaintiff was injured by contact with a live wire while assisting the driver who was under the truck. Although the facts clearly raised the rescuer problem, the court, because of the absence of precedents permitting recovery to the plaintiff, was compelled to base its holding on different grounds. Thus the court said: "As we view this case, it does not come within the class known as rescue cases in which the law has been variously determined in courts of justice. These are all cases of obvious danger and risk to the rescuing party, like one jumping overboard to save another's life or rescuing one from a burning building. Here so far as appearances were concerned, there was nothing that necessarily and obviously suggested danger. It is true there was an electric wire with which the plaintiff came into contact, but that the danger of it was so obvious that he ought to have been, as a matter of law, held to avoid it on the theory that he was running into extreme danger as a rescuer would seem not to be the case. For this reason it is unnecessary to invoke or even determine the law of this state in the so-called rescue cases." 109 N.J.L. 255, 257-58, 160 Atl. 659, 660 (1932). In *Dupuis v. New Regina Trading Co. Ltd.*, [1943] 4 D.L.R. 275, noted in 21 *Can. Bar Rev.* 758 (1943), recovery was denied where the plaintiff's decedent lost his life in attempting to aid the defendant's employee who carelessly let herself get suspended in the shaft of the elevator which she operated.

⁷ 122 Iowa 679, 98 N.W. 500 (1904).

about to fall on the defendant, and took precautionary measures which permitted the defendant to escape unharmed, but was himself injured in so doing. The court sustained a directed verdict for the defendant on the basis that the wrong towards the rescuer flows from or is based upon a wrong towards the person in danger.⁸ Since the defendant's duty to protect himself from harm was moral and not legal,⁹ it declared there could be no negligence towards the person rescued, and hence no recovery by the rescuer.

The conclusion in the *Saylor* case that the plaintiff's right is derivative—i.e., dependent solely on the negligence of the defendant toward the rescued—is questionable in the light of the cases where the plaintiff was injured while rescuing a person endangered by the negligent conduct of a third party. In those cases it has been recognized that the negligent conduct of the defendant brings him into a relationship of negligence not only towards the person imperiled, but also towards the rescuer. The language of the cases indicates that the basis for holding the defendant liable is that he should have "foreseen" the possibility of a rescuer at the time of his negligent act.¹⁰ The doubt is increased by the cases where the contributory negligence of the person rescued has not barred recovery by the rescuer.¹¹

A more satisfactory approach to the problem was taken in *Brugh v. Bigelow*,¹² where the court let the questions of negligence and proximate cause go to the jury. Although it distinguished the case from the *Saylor* case,¹³ the court in the *Brugh* case indicated that when the defendant was driving on the highway he was required to exercise due care for the safety of others, including passers-by

⁸ "But negligence on the part of the defendant either toward the rescued or the party making the rescue after the attempt has begun is essential to a recovery in all cases." *Ibid.*, at 681 and 501. In *Dupuis v. New Regina Trading Co. Ltd.*, [1943] 4 D.L.R. 275, 284, the court, citing the *Saylor* case, held that since the rescued could not be "guilty legally . . . of neglecting herself" and since no third person was jeopardized by her negligent conduct, there was no liability to a rescuer.

⁹ "Undoubtedly Parsons owed the moral duty of protecting his own person from harm. But the law of life is regarded as sufficient inducement to self-preservation; all that is deemed essential for the government of persons in matters affecting themselves alone." *Saylor v. Parsons*, 122 Iowa 679, 683, 98 N.W. 500, 502 (1904).

¹⁰ "Danger invites rescue. . . . The law does not ignore these reactions of the mind in tracing conduct to its consequences. . . . The wrong that imperils life is a wrong to the imperiled victim; it is a wrong also to his rescuer." *Wagner v. International Ry.*, 232 N.Y. 176, 180, 133 N.E. 437 (1921).

¹¹ Cases cited note 5 supra. But see *Dupuis v. New Regina Trading Co.*, [1943] 4 D.L.R. 275, 284, where the court refused to accept the argument that, since the contributory negligence of the rescued does not bar recovery of the rescuer from the third party, the rescuer's right was evidently not derivative.

¹² 310 Mich. 74, 16 N.W. 2d 668 (1944), where the defendant was caught beneath his car which had overturned after he had driven it recklessly. The plaintiff was injured in an attempt to extricate the defendant.

¹³ *Ibid.*, at 80 and 671. "In that [*Saylor*] case defendant was proceeding at his own risk on private property where the safety of others would not necessarily be involved." In the principal case the defendant was on her own property and the plaintiff was an invitee.

who should be expected to stop and render needful assistance, and that the defendant's claim that he owed himself no duty was without merit.¹⁴

In the instant case the court expressly refused to follow the *Saylor* case,¹⁵ and without the equivocal language of the *Brugh* case regarding the duty of drivers on a public highway, adopted the reasoning of Professor Bohlen when he said:

The rescuer's right of action, therefore, must rest upon the view that one who imperils another, at a place where there may be bystanders, must take into account the chance that some bystander will yield to the meritorious impulse to save life or even property from destruction, and attempt a rescue. If this is so, the right of action depends not upon the wrongfulness of the defendant's conduct in its tendency to imperil the person whose rescue is attempted, but upon its tendency to cause the rescuer to take the risk involved in the attempted rescue.¹⁶

The court concluded that a lack of self-protective care may be negligence towards any person in whose vicinity one exposes one's self to undue risk of injury. This holding suggests a strong analogy to the cases where the plaintiff receives injuries from shock as a result of discovering the body of a suicide,¹⁷ in which it is arguable that the suicide has behaved negligently if his manner and place of self-destruction is such that shock to persons making the discovery would foreseeably arise.¹⁸ The rescue cases may appear more difficult since the conduct may not be characterized as "willful," as it can be in the suicide cases.

There remains the possibility that a court may feel that avoiding danger is so strong and natural an instinct that one who has endangered himself could not be said to have reasonably foreseen the hazard.¹⁹ Although this may be a proper consideration for a jury, it does not seem to be a strong enough basis for directed verdicts of no cause of action as a matter of law.

Workmen's Compensation Acts—Security Funds—Security Fund Subrogated to Employee's Rights against Employer—[Illinois].—An employee of the defendant Illinois corporation was injured in Wisconsin in the course of his em-

¹⁴ *Ibid.*

¹⁵ *Carney v. Buyea*, 271 App. Div. 338, 344, 65 N.Y.S. 2d 902, 909 (1946). "We think there was a legal duty owing by the defendant to the plaintiff not to create an undue risk of injury to him and not merely a moral duty as was held in *Saylor v. Parsons*. . . ."

¹⁶ Bohlen, *Studies in the Law of Torts* 569, n. 33 (1926).

¹⁷ *Blakely v. Shortal's Estate*, 236 Iowa 787, 20 N.W. 2d 28 (1945), noted in 13 *Univ. Chi. L. Rev.* 215 (1946), where recovery from the estate of the suicide was allowed.

¹⁸ "It would seem that a person who carelessly exposes himself to danger or who attempts to take his life in a place where others may be expected to be, does commit a wrongful act toward them in that it exposes them to a recognizable risk of injury." Bohlen, *Studies in the Law of Torts* 569, n. 33 (1926).

¹⁹ The court in the *Saylor* case may have had this in mind when it said, after settling the case on the duty issue, "In the first place there is nothing in the record to indicate that Parsons, in the exercise of ordinary care, could not have undermined the wall with safety to himself. That he so intended must be presumed, for the presumption in favor of prudence is always to be indulged in until the contrary appears. If, then, he might have performed the work with safety to himself, neither he nor the company is chargeable with negligence for not anticipating that he would do it otherwise, and that, if he so did, somebody would attempt to rescue him." *Saylor v. Parsons*, 122 Iowa 679, 684, 98 N.W. 500, 502 (1904).