

From the celebrated snail to the good Samaritan*

Lord Cullen, Lord President of the Court of Session and Lord Justice-General of Scotland**

Introduction

My starting point is a famous passage in the speech of Lord Atkin in the Scottish appeal of *Donoghue v Stevenson* [1932] AC 562: 1932 SC (HL) 31, which represents a milestone in the development of the law of negligence in Scotland and throughout common law jurisdictions. I will consider the development of the law of negligence in regard to the duty to rescue, especially over the last ten years. By 'rescue' I mean delivering someone else (to whom I will refer for convenience as 'the victim') or his property from sustaining imminent harm or further harm.

Lord Atkin said in *Donoghue v Stevenson* at page 580/44:

'The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law, is my neighbour? The answer seems to be – persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.'

Two points may be noted about this passage.

First, Lord Atkin was concerned with responsibility of one person for the infliction of injury on another. The context was, of course, the marketing by the defenders of ginger beer which

was 'harmful' by reason of the presence of a decomposed snail, a snail which thereby achieved notoriety in the annals of legal history. However, the law does not limit liability to the case in which one person's negligence inflicts injury on another. Sometimes there is a duty to protect another from injury. In *Hargrave v Goldman* (1963) 110 CLR 40 (affirmed by the Privy Council in [1967] 1 AC 645) Windeyer J stated at page 66:

'Lord Atkin's well-known generalization explains the scope of a duty of care, that is to say it states who can complain of a lack of care when an obligation of care exists. But I venture to think that it is a mistake to treat it as providing always a complete and conclusive test of whether, in a given situation, one person has a legal duty either to act or to refrain

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from acting in the interests of others. The very allusion shows that it has not this universal application.'

Secondly, Lord Atkin pointed that a legal duty did not go so far as a moral duty. In *R v Instan* [1893] 1 QB 450 Lord Chief Justice Coleridge observed at page 453:

'It would not be correct to say that every moral obligation involves a legal duty; but every legal duty is founded on a moral obligation.'

The law does not ignore the promptings of morality. So, in considering claims made by rescuers against the delinquent who caused the situation which led to the rescue (such as in *Haynes v Harwood* [1935] 1 KB 146) the law takes account of the foreseeability of rescue. In the famous words of Cardozo J in *Wagner v International Railway Co* (1921) 232 NY 176 at page 180:

'Danger invites rescue. The cry of distress is the summons to relief. The law does not ignore these reactions of the mind in tracing conduct to its consequences. It recognises them as normal'.

As we shall see, the courts have also used moral considerations to limit the scope of a duty to act. Lord Hoffmann pointed out in *Stovin v Wise* [1996] AC 923 at pages 943-944 that one of the arguments against the imposition of liability for omissions was the moral one the 'why pick on me?' argument. 'A duty to prevent harm to others or to render assistance to a person in danger or distress may apply to a large and indeterminate class of people who happen to be able to do something. Why should one be held liable rather than another?' In some cases courts have emphasised that adults should be regarded as responsible for their own safety, and, far from having an entitlement to protection, should take the consequences of what they have brought upon themselves by their negligence or intemperance. On the other hand it will also be seen that the courts have on occasions relied on professional ethics in deciding there was a duty to act.

A general 'principle'

There is a deeply ingrained opposition to the idea that there is a duty to protect someone else from harm, such as rescuing a victim. In the past at least this has been treated as a general principle. In *Smith (or Maloco) v Littlewoods* [1987] AC 241; 1987 SC (HL) 37 Lord Goff of Chieveley at page 271/76 stated that the fundamental principle was that 'the common law does not impose liability for what are called pure omissions.' He cited a passage in the speech of Lord Diplock in *Home Office v Dorset Yacht Co Ltd* [1970] AC 1004 at page 160 as follows:

'The parable of the good Samaritan which was evoked by Lord Atkin in *Donoghue v Stevenson* illustrates, in the conduct of the priest and Levite who passed by on the other side, an omission which was likely to have as its reasonable and probable consequence damage to the health of the victim of the thieves, but for which the priest and Levite would have incurred no civil liability in

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English law. Examples could be multiplied ... you need not warn (your neighbour) of a risk of physical danger to which he is about to expose himself ...; you may watch your neighbour's goods being ruined by a thunderstorm though the slightest effort on your part could protect them from the rain ...'.

Likewise, in the context of rescue, Lord Keith of Kinkel observed in *Yuen Kun Yeu v A-G of Hong Kong* [1988] AC 175 at page 192 that if the common law imposed liability for pure omissions 'there would be liability in negligence on the part of one who sees another about to walk over a cliff with his head in the air, and forbears to shout a warning'.

On the other hand, it has been repeatedly stated that if a person sets about rescue but through his negligence makes matters worse than they would have been if he had not intervened, he will be liable, on the basis that he has inflicted injury on the victim. In *Fleming on Torts* 7 ed, the author acutely observed at page 135 that the common law thereby 'created the anomaly of subjecting the incompetent Samaritan to liability while excusing the Levite'.

In *Stovin v Wise*, *supra*, which was concerned with the question of the liability of a highway authority in respect of the non-removal of an obstruction to visibility on land adjoining the highway, Lord Hoffmann set out a number of reasons why the law was reluctant to require an individual to act as if he was 'his brother's keeper.' I have already referred to the moral argument. The political argument was, he said, that it was 'less of an invasion of an individual's freedom for the law to require him to consider the safety of others in his actions rather than to impose upon him a duty to rescue or protect'. The economic argument was that 'the efficient allocation of resources usually requires an activity should bear its own costs ... but there is no similar justification for requiring a person who is not doing anything to spend money on behalf of someone else ... so there must be some special reason why he should have to put his hand in his pocket'.

It is for consideration whether, and to what extent, these considerations warrant a general principle, as opposed to being factors which, according to the circumstances of the particular case,

may be of some weight in determining whether or not there exists a positive duty to protect another.

In recent years a number of decisions of the Privy Council and the House of Lords have considered the basis for a duty of care. In *Caparo Industries Plc v Dickman* [1990] 2 AC 605 Lord Bridge of Harwich at pages 617-618 summarised their effect as follows:

'What emerges is that, in addition to the foreseeability of damage, necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and the party to whom it is owed a relationship characterised by the law as one of proximity' or neighbourhood' and that the situation should be one in which the court considers it fair, just and reasonable that the law should impose a duty of a given scope upon the one party for the benefit of the other'.

Along with that statement may be taken the observation of Savile LJ in *Marc Rich & Co AG v Bishop Rock Marine Co Ltd* [1994] 1 WLR 1071 at page 1077 where he stated:

'... it seems to me that the authorities point to the conclusion that whatever the nature of the harm sustained by the plaintiff, it is necessary to consider the matter not only by inquiring about foreseeability but also by considering the nature of the relationship between the parties; and to be satisfied that in all the circumstances it is fair, just and reasonable to impose a duty of care. Of

course, as Lord Oliver of Aylmerton pointed out in *Caparo Industries Plc v Dickman* ... these three matters overlap with each other and are really facets of the same thing. For example, the relationship between the parties may be such that it is obvious that a lack of care will create a risk of harm and that as a matter of common sense and justice a duty should be imposed.'

It is also necessary to bear in mind the warning given by Lord Woolf M.R in *Kent v Griffiths* [2001] QB 36 at page 50 where he referred to the case of *Osman v UK* (2000) 29 EHRR 245, which I discuss below, and said:

'...there is a danger that statements made in judgments will be applied more widely and more rigidly than was in fact intended. The statements are intended to assist in the difficult task of determining whether a duty of care exists. They are tools not rules. There are cases in which even the three requirements identified by Lord Bridge of Harwich in the *Caparo* case ... may not by themselves provide an answer. Other tools may be needed to provide assistance. It may help to consider whether the subject of the alleged breach is the manner in which a discretion was exercised or the manner in which a decision was executed. With regard to the exercise of a statutory discretion it will be more difficult to establish that there is a duty. If the allegation relates to an activity focused on a restricted number of individuals, the obstacles in the way of establishing



an obligation will be reduced. In these difficult cases it is necessary to examine the facts in detail. They are therefore usually not suitable for determination before the facts have been fully investigated. Before you can apply one case by analogy to another you need to be clear as to the facts to which you are applying it. Otherwise there is a risk that a principle can be applied to a situation where it produces a result which should offend your sense of justice’.

‘Special cases’

In regard to the subject of rescue the courts have so far developed a number of exceptions to the ‘principle’ that there is no duty to rescue. They may be divided, broadly speaking, into three categories, which may to some extent overlap.

Firstly, there may be some antecedent legal relationship between the defender and the victim which gives rise to a duty on the part of the former to protect the latter, if necessary by rescue. The relationship of a parent (or a school) to a child is an obvious example. Likewise the occupier of land, by reason of his legal responsibility in regard to dangers on the land, may be under a duty to take reasonable care to forestall harm to persons entering on it, for example by fencing the danger or by putting up a warning notice about it. (The same does not apply to injuries caused by the criminal conduct of third parties (*Modbury Triangle Shopping Centre Pty Ltd v Anzil* (2000) 176 ALR 411)). Such cases do not require any further elaboration.

Secondly, there are a number of cases in which duty to rescue arises out of a fact that the defender has acted in such a way as to make the victim’s safety dependent on his conduct. In *Watson v British Boxing Board of Control Ltd* [2001] QB 1134 Lord Phillips of Worth Matravers MR stated at para 49:

‘It seems to me that the authorities support a principle that, where A places himself in a relationship to B in which B’s physical safety becomes dependent upon the acts or omissions of A, A’s conduct can suffice to impose on A a duty to exercise reasonable care for B’s safety. In such circumstances A’s conduct can accurately be described as the assumption of responsibility for B, whether responsibility’ is given its lay or legal meaning’.

As he pointed out, it has been held that the prison service owes a duty of care to take reasonable steps to prevent prisoners from committing suicide. In *Kirkham v The Chief Constable of the Greater Manchester Police* [1990] 2 QB 283 it was held that when the police took a person into custody they assumed responsibility to him of passing to the prison authorities to whom he was subsequently transferred information which might affect his well-being; that he had relied on that assumption of responsibility; and that the police were therefore under a duty to apprise the prison authorities of his suicidal tendencies. cf *Reeves v Commissioner of Police of the Metropolitan Area* [2000] AC360,

with concern for his own safety. The duty exists whether the passenger falls overboard accidentally or by reason of his own carelessness’.

On a similar basis it was held in the Canadian case of *Arnold v Teno* (1978) 83 DLR (3d) 609 that a roadside ice cream vendor was liable for failing to warn a child customer of an oncoming car. In the New South Wales case of *R v Taktak* (1988) 14 NSWLR 226 a drug addict was convicted of manslaughter after voluntarily assuming responsibility for the care of a 15 year old heroin user who died of an overdose. He took her to his flat, covered her with a blanket and later tried to wake her but got no response. He effectively prevented any-

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and *Orange v Chief Constable of West Yorkshire Police* [2002] QB 347. A similar approach was adopted in Scotland (*Gibson v Orr* 1999 SC 420) and in Canada (*O’Rourke v Schacht* (1974) 55 DLR (3rd) 96) where the police had taken control of a hazard on a public highway. In *Costello v Chief Constable of the Northumbria Police* [1999] 1 All ER 550 it was held that there were circumstances in which a police officer, in that case a police inspector, could be regarded as having assumed a responsibility, giving rise to a duty of care toward a colleague who was attacked and injured by a prisoner whom they were escorting to a cell.

Likewise in *Horsley v MacLaren: the ‘Ogopogo’* [1971] 2 Lloyd’s Rep 410, Laskin J stated at page 419 in regard to the owner of a boat on which he was carrying invited guests:

‘Having brought his guests into a relationship with him as passengers on his boat, albeit as social or gratuitous passengers, he was obliged to exercise reasonable care for their safety. That obligation extends, in my opinion, to rescue from the perils of the sea where this is consistent with his duty to see to the safety of his other passengers and

one else from assisting or obtaining more effectual assistance. He was held to have assumed a duty of care, but his conviction was quashed on the ground that his conduct fell short of criminal negligence.

In a number of cases courts have required to consider whether the circumstances gave rise to a duty of care to protect victims who were drunk. In *Barrett v Ministry of Defence* [1995] 1 WLR 1217 a naval airman fell unconscious after a lengthy drinking bout. He was placed in his bunk in the recovery position, but next morning it was found that he had suffocated in his own vomit. Beldam LJ said at page 1224:

‘I can see no reason why it should not be fair, just and reasonable for the law to leave a responsible adult to assume responsibility for his own actions in consuming alcoholic drink’.

The court held, on the other hand, that after the victim had fallen unconscious there were faults in supervision which gave rise to liability on the part of the Ministry. This case may be compared with *Jebson v Ministry of Defence* [2000] 1 WLR 2055, in which one of a number of soldiers who were drunk and returning from a recreational outing fell from the

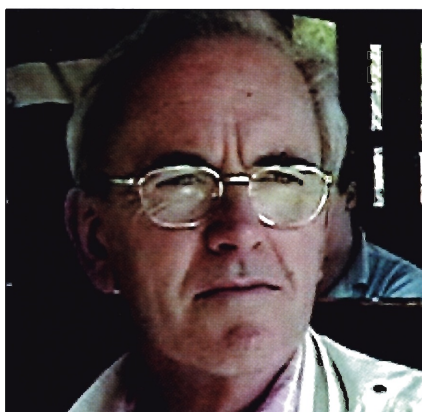
back of an army lorry. The Court of Appeal held that the army owed a duty of care as a carrier. At page 2066 it was pointed out that it was not an invariable rule that drunkenness could not be prayed in aid, nor was it a rule which was

'fair just and reasonable to apply in circumstances where an obligation of care is assumed or impliedly undertaken in respect of a person who it is appreciated is likely to be drunk'.

In *Griffiths v Brown* [1999] PIQR P131 a taxi driver set down an intoxicated passenger on the side of the road opposite the latter's stated destination. It was held in the Queen's Bench Division that whereas a taxi driver had a duty to stop at a place where his passenger could safely alight, the duty was the same whether the passenger was drunk or sober. At page 143 the court considered that 'to hold that the fact that the passenger has consumed alcohol is a fact to which the taxi driver must have regard would ... be unfair, unreasonable and unworkable in practice. A taxi driver would have to make an assessment of the sobriety of his passenger before accepting the fare in order to determine the scope of his duty. Before setting a passenger down, otherwise than precisely at the destination, he would have to assess the passenger's sobriety and the risks involved, by reason of the drinks taken, in the passenger getting from the setting down point to the precise destination.'

The liability of the provider of alcohol to the drunken victim has been considered on a number of occasions. Here there is the added element of the economic benefit to the defender from his relationship with the victim. In *Munro v Porthkerry Park Holiday Estates* (1984) 81 LSG 1368 the victim, having been served by the defender with a large quantity of alcohol, was asked by the defender to leave his premises, after which he fell down a cliff. It was held that the fact that the defender had sold a large quantity of alcohol to the victim did not, of itself, create an enhanced duty of care towards him. It would have been different if the defender had known that the victim was already, or would, if served more alcohol, be, so drunk as to be incapable of taking any care of himself. On the other hand in the Canadian case of *Jordan House Limited v Menow* (1973) 38 DLR (3d) 105 a hotel proprietor was held by the Supreme Court of Canada to be partially liable when a drunken customer was run down after being ejected from the premises, on the basis of a probable risk of personal injury if he was turned out to proceed on foot on a busy highway. It was evidently of importance to the court that

the hotel staff knew about the victim's excessive drinking habits and were aware that he would have to travel home on foot. The court observed that the duty could have been discharged by a call to the police or the victim's employer, or by the summoning of a taxi. No moral blame was attached to the victim. A similar view was taken by the Supreme Court in *Crocker v Sundance North West Resorts Limited* (1988) 51 DLR (4th) 321, in which Wilson J observed at page 328 that the common thread running through *Jordan* and other cases 'is that one is under a duty not to place another person in a position where it is foreseeable that that person could suffer injury'.



Lord Cullen (William Douglas Cullen) was appointed Lord President in November 2001. He has been a judge since 1986 and a Privy Counsellor since 1997. He is a graduate of the Universities of St Andrews (MA) and Edinburgh (LLB) and was admitted to the Faculty of Advocates in 1960. He was appointed Queen's Counsel in 1973. Lord Cullen was a chairman of Medical Appeal Tribunals from 1977 until his appointment as a judge. From 1988 to 1990 he conducted the public inquiry into the shootings at Dunblane Primary School. In October 1999 he was appointed to chair the Ladbroke Grove Rail Inquiry.

He is a former member of the Royal Commission on Ancient and Historical Monuments of Scotland. He has been awarded honorary degrees of LLD from the Universities of Aberdeen and St Andrews, and DUniv from Heriot-Watt University.

Thirdly, the question of a duty to rescue has arisen in the case of persons (or bodies) with some special skill or expertise which is used for the benefit of the public at large. In a number of cases the body has been one acting under statutory powers, and in that connection consideration has been given to factors such as the availability of resources, the existence of other tasks and the proper use of public funds (I may add, in parenthesis, that cases in which the

courts have considered whether a person in some official position had a duty to warn someone about the dangerous tendencies of a third party lie somewhat beyond the scope of 'rescue', but they do tend to raise similar problems. So far as I know, the courts have declined to uphold a claim by an adult that he should have been prevented from harming himself by his own illegal act !)

At the outset it is useful to consider the position of **the police**. In *Alexandrou v Oxford* [1993] 4 All ER 328 a shopkeeper called for the police after a burglar alarm had been activated. It was claimed that the theft would have been prevented if the police had carried out a proper inspection. It was held that the relationship between the shopkeeper and the police was insufficient to create a duty of care. If there were such a duty 'it must follow', in the words of Glidewell J at page 338, 'that they (the police) would be under a similar duty to any person who informs them, whether by 999 call or in some other way, that a burglary, or indeed any crime, against himself or his property is being committed or is about to be committed'. Moreover, such a duty should not be imposed as a matter of policy.

Next, **the fire service**. In *Capital and Counties Plc v Hampshire City Council* [1997] QB 1004 a fire brigade had responded to a call, but after tackling the fire, failed to extinguish it. Giving the judgment of the Court of Appeal, Stuart-Smith LJ observed at page 1030:

'...the fire brigade is not under a common law duty to answer the call for help, and are not under a duty to take care to do so. If, therefore, they fail to turn up, or fail to turn up in time, because they have carelessly misunderstood the message, got lost on the way or run into a tree, they are not liable'.

The court also held that it was not enough that the fire brigade had attended and fought the fire, even though a senior officer had assumed control of the fire-fighting operation. It was not a case in which duty of care could be based on the assumption of responsibility and reliance. It would have been different if the fire brigade had themselves caused danger. The court rejected, as the basis for a duty of care to respond to the public, the doctrine of 'general reliance' which had been adopted in the Australian case of *Sutherland Shire Council v Heyman* (1985) 157 CLR 424. Likewise, in *OLL v Secretary of State for Transport* [1997] 3 All ER 897 it was held that **the coastguard** would not be liable for not responding to an emergency at sea or for

responding negligently. There was no valid distinction between the coastguard misdirecting their own people and misdirecting others. Neither would directly inflict positive injury. cf *Daley v US* (1980) 499 FSupp 1005, and *DFDS Seacruises (Bahamas) Ltd v United States*, 676 FSupp 1193 (SDFla 1987).

It is plain that whether a duty of care is owed to someone by a person who exercises a particular skill or profession depends not only on the foreseeability of harm but also on whether there is a sufficient nexus between them. This is sometimes expressed as 'an assumption of responsibility'.

However, as Lord Slynn of Hadley pointed out in *Phelps v Hillingdon London Borough Council* [2001] AC 619 at page 654: 'That phrase can be misleading in that it can suggest that the professional person must knowingly and

deliberately accept responsibility. It is, however, clear that the test is an objective one. ... The phrase means simply that the law recognises that there is a duty of care. It is not so much that responsibility is assumed as that it is recognised or imposed by the law'.

This is clearly illustrated in the case of the provision of **medical services**. I take first **the ambulance service**. In *Kent v Griffiths*, *supra* the Court of Appeal accepted that it was arguable that a duty of care on the part of an ambulance service arose once a call for assistance had been accepted. In that case it was alleged that, owing to delay in the arrival of the ambulance, the plaintiff had suffered a miscarriage and brain damage. The fact that the service functioned in circumstances of financial constraint, with competing claims and limited resources, did not exclude a duty of care on policy grounds. The ambulance service should be regarded as part of the health service where a duty of care to patients normally existed, rather than as providing services equivalent to those received by the police or the fire service when responding to a 999 call. It may be noted that at para 17 Lord Woolf observed that even if the ambulance

service had not been under any private law duty, in that case it would certainly have been under a public duty to exercise its discretion to provide an ambulance because there was no rational reason which would justify its discretion being exercised in any other manner.

As regard **hospital doctors**, in *Barnett v Chelsea and Kensington Hospital Management Committee* [1969] 1 QB 428 it was held that a casualty department was under a duty of care to treat a person who presented himself at the department complaining of illness. On the other hand it was implicit that a casualty

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department which closed its doors and said that no patients could be received would owe no duty of care. In the case of a department which professes to provide emergency care, the duty will arise when there is an awareness of the need for it. In *Egedebo v Windermere District Hospital Association* (1993) 78 BCLR it was held, partly in reliance on an ethical obligation to render aid, that a doctor was in breach of a duty to treat, despite being 'off duty'.

The duty of a **general medical practitioner** towards a person who is registered as his patient begins, it appears, when he is requested to provide medical services or becomes aware of the need for them. But what if a doctor in his surgery receives a call to attend someone with whom he has no existing relationship? In the remarkable Australian case of *Lowns v Woods* (1996) Aust Torts Reports 81 a mother sent her daughter to the surgery of a nearby doctor after her son suffered an epileptic attack. The doctor declined to attend and insisted that the boy should be brought to him by ambulance. The trial judge found that the gravity and urgency of the situation had been sufficiently explained to the doctor. He held that the doctor should have

been prepared to travel the 300 metres or so then to the child at his home. Had he done so it is likely that the boy's seizure would have been arrested by the administration of drugs, and the consequent brain damage and quadriplegia would have been averted. The award of damages against the doctor was upheld by the New South Wales Court of Appeal. It should be noted that Kirby P stressed the physical proximity, the fact that the request was made in a professional context (ie the doctor was at his place of practice) and that there was a statutory provision obliging doctors in New South Wales to attend promptly to any person whom they reasonably believed to be in need of urgent medical attention or face a charge of professional misconduct. The breach of the statute created no remedy in tort, but the statute was considered to provide background evidence as to what the legislature, the medical profession and the public would reasonably expect to be done.

What if a doctor by chance encounters someone who is ill or has sustained injury? So far as the law of negligence is concerned, it is clear that he may ignore the situation with impunity – and likewise the call 'Is there a doctor in the house?' (see *In Re F* [1990] 2 AC1, per Lord Goff at pages 77-78, where he said that a doctor who responded would be 'impelled by no greater duty than that imposed by his own Hippocratic oath'). On the other hand it may be noted that, according to the terms of service of general practitioners in the United Kingdom, they are required to give on request 'treatment which is immediately required owing to an accident or other emergency' in their practice area (para 4 (1) (h) of Schedule 2 to the National Health Service (General Medical Services) Regulations 1992). Furthermore, the Code of Ethics of the General Medical Council states: 'In an emergency you must offer any one at risk the treatment you could reasonably be expected to provide'. Similar ethical statements can be found in the medical codes of other jurisdictions, including Australia, Canada, Ireland and the U.S.A.

What is expected of a doctor if he does attend to someone in such a situation? In *Capital and Counties plc v Hampshire*

County Council, supra, Stuart-Smith LJ at page 1035 expressed the view *obiter* that

‘A doctor who happened to witness a road accident will very likely go to the assistance of anyone injured, but he is not under any legal obligation to do so (save in certain limited circumstances) ... if he volunteers assistance, his only duty as a matter of law is not to make the victim’s condition worse’.

The first type protects categories of rescuers from liability to the victim where certain conditions are satisfied.

Stuart-Smith LJ made similar statements in a number of later cases.

In *Watson v British Boxing Board of Control, supra*, Lord Phillips, after reviewing the authorities in this field, at said at para 57 that the cases

‘support the proposition that the act of undertaking to cater for the medical needs of a victim of illness or injury will generally carry with it the duty to exercise reasonable care in addressing those needs. While this may not be true of the volunteer who offers assistance at the scene of an accident, it will be true of a body whose purpose is or includes the provision of such assistance’.

However, it may be questioned whether there is a sound basis in law for so limiting the duty of a doctor. The reasonable care expected of the doctor must, of course, depend on the expertise which he normally professes and the circumstances of the emergency which he is facing. It is of interest to note that many years ago in *Everett v Griffiths* [1920] 3 KB 163, Atkin LJ, as he then was, stated at page 213 that the case of the medical practitioner was subject to special considerations. He was liable to the patient if he caused pain or suffering by the omission to use a reasonable degree of special skill and care. This obligation ‘would, in my judgment, apply to a doctor acting gratuitously in a public institution, or in the case of emergency in a street accident; and its existence is independent of the volition of the patient, for it would apply

though the patient were unconscious or incapable of exercising a conscious volition’.

The intervention of legislation

This survey of cases at common law demonstrates that a *sine qua non* of a duty to take reasonable care to effect rescue is that there should be a connection between the vic-

tim and the defender on which the former is entitled to rely. This will more readily give rise to a duty where the defender is a medical professional whose aid the victim has sought to enlist. As for the

rescuer, the common law protects him to the extent that he may have a claim of damages in respect of any injuries sustained by him in effecting the rescue which are due to the fault of someone else. However, the law does little to encourage rescue.

In a large number of jurisdictions statutory provisions have been made with a view to this end. They are generally of one or other of two types.

The first type protects categories of rescuers from liability to the victim where certain conditions are satisfied. A typical example is section 16 of the Law Reform Act 1995 of Queensland which provides:

‘Liability at law shall not attach to a medical practitioner, nurse or other person prescribed under a regulation in respect of an Act done or omitted in the course of rendering medical care, aid or assistance to an injured person in circumstances of emergency –

- (a) at or near the scene of the incident or other occurrence constituting the emergency;
 - (b) while the injured person is being transported from the scene of the incident or other occurrence constituting the emergency to a hospital or other place at which adequate medical care is available;
- if –

- (c) the act is done or omitted in good faith and without gross negligence; and
- (d) the services are performed without fee or reward or expectation of fee or reward’.

More recently sections 26 and 27 of the Civil Liability Act 2003 provide for similar protection for persons and prescribed entities who perform duties for the enhancement of public safety in respect of the giving of first aid or other aid or assistance to persons in distress. Sections 38 to 44 provide a certain degree of protection for persons who do community work on a voluntary basis.

Following a recommendation by the Victorian Law Reform Commission the Wrongs and Other Acts (Public Liability Insurance Reform) Act 2002 now provides for the protection against claims of negligence of volunteers who render medical assistance at an accident or in emergency where the victim is injured or at risk of death or injury. In a number of the provinces of Canada similar provisions have been made in favour of volunteers, so long as it is not established that there is gross negligence. In Quebec the protection extends to persons who take part in a rescue or the taking of emergency measures for disaster prevention, so long as they acted in good faith.

That is, as it were, the ‘carrot’ approach. The other is the laying on of the ‘stick’. In a number of European countries the criminal code makes the failure to rescue into an offence. Thus, for example, Article 63 of the French Code Penal states:

‘Whoever is able to prevent by his immediate action, without risk to himself or others, the commission of a serious crime or offence against the

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person, and voluntarily neglects to do so shall be liable’.

Article 330 of the German Criminal Code states:

'Anybody who does not render aid in an accident ... situation, though aid is needed and under the circumstances can be expected of him, especially if he would not subject himself to any considerable danger ... shall be punished by imprisonment not to exceed one year or a fine'.

So far as I have been able to discover the Northern Territory of Australia stands in an unusual position, in comparison to most common law jurisdictions in that it has created an offence of failing to rescue. Section 155 of its Criminal Code states:

'Any person who, being able to provide rescue, resuscitation, medical treatment, first aid or succour of any kind to a person urgently in need of it and whose life may be endangered if it is not provided, callously fails to do so is guilty of a crime and is liable to imprisonment for 7 years'.

This section was interpreted in *Salmon v Chute* (1994) 94 NTR 1; *R v Salmon* (1994) 70 A Crim R 536, where the conviction related to leaving the scene of an accident after a child had been injured.

Section 151(1) of the New Zealand Crimes Act 1961 is also of interest. It provides:

Everyone who has charge of any other person unable, by reason of detention, age, sickness, insanity, or any other cause, to withdraw himself from such charge, and unable to provide himself with the necessaries of life, is (whether such charge is undertaken by him under any contract or is imposed upon him by law or by reason of his unlawful act or otherwise howsoever) under a legal duty to supply that person with the necessaries of life, and is criminally responsible for omitting without lawful excuse to perform such duty if the death of that person is caused, or if his life is endangered or his health permanently injured, by such omission.'

There is no affirmative duty to rescue anywhere in Canada other than in Quebec, where section 2 of the Charter of Human Rights and Freedoms states:

'Every human being whose life is in peril has a right to assistance. Every person must come to the aid of anyone whose life is in peril either personally or

calling for aid, by giving him the necessary and immediate physical assistance ... unless it involves danger to himself or a third person, or he has another valid reason'.

The Canadian Criminal Code presently imposes a general duty on anyone undertaking an act to perform it if its omission would endanger life. The Canadian Law Reform Commission has recommended that liability should

sources, it may justify the taking of risks which otherwise would be unacceptable. No more can be expected of the skill of a rescuer than would be reasonable in the case of a person placed in his position, and he is entitled to be judged in the light of what appeared to him to be the situation. Furthermore, to impose the 'stick', runs into some of the objections which have been put forward in

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be imposed on 'everyone who perceiving another person in immediate danger of death or serious harm does not take reasonable steps to assist him', save where the person cannot take reasonable steps to assist without risk of death or serious harm to himself or another person or where he has some other valid reason for not doing so.

As regards the position of professionals in the medical field, I have referred earlier to the statutory provision in New South Wales which was taken into account by the court in *Lowns v Woods, supra*, and to the regulations in the United Kingdom in respect to general practitioners.

A number of authorities and commentators have questioned the need or effectiveness of such provisions. On the one hand, it can be said that it is only to the good if persons are encouraged to act in response to the promptings of morality without fear of being made liable for having mishandled the rescue. On the other hand, it is said that there are virtually no examples of cases in which rescuers have been held liable for negligence in the execution of a rescue. It has to be borne in mind, it is said, that the court would be slow to criticise those who had taken action in 'battle conditions', in the words of Mustill LJ in *Wilsher v Essex Area Health Authority* [1987] QB 730 at page 749. Much may depend on the degree of threat to the victim's life. Having regard to the available re-

justifying the opposition of the common law to a general duty, namely an undue restraint on personal liberty when weighed against the gain to the victim or to society. If there are a number of bystanders, which of them is to shoulder the blame? And how can a would-be rescuer determine whether or not rescuing the victim would put himself at risk?

Lastly, it remains for me to take note of the possible effect in the United Kingdom of the incorporation by the Human Rights Act 1998 of the European Convention of Human Rights and Fundamental Freedoms Article 2 declares: 'Everyone's right to life shall be guaranteed by law'. It is arguable that this not only imposes a positive obligation on the state to provide essential medical services but also, through the obligation on the courts to ensure that the common law is compatible with the Convention, may lead to a development of a duty to go to the aid of others where this is a proportionate response. In *Osman v UK* (2000) 29 EHRR 245 it was held, at para 116 that, in view of the fundamental nature of the right declared by article 2, 'it is sufficient for an applicant to show that the authorities did not do all that could be reasonably expected of them to avoid a real and immediate risk to life of which they have or ought to have knowledge. This is a question which can only be answered in the light of all the circumstances of any particular case'. 