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A CRITICAL ANALYSIS OF DUTY BETWEEN STRANGERS IN DUTY TO RESCUE

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ABSTRACT

Traditionally, the courts have not imposed a duty to rescue those in grave peril. According to common law, there is no duty imposed upon a bystander to rescue a stranger who is in need of assistance in an emergency even if the rescue could be done easily and without any risk to the rescuer. Proponents for duty to rescue have illustrated the horrific result of the 'no duty to rescue' rule that a baby can be left drowning, or a blind man may be hit by an oncoming train without warning given by the public as no one can be legally obligated to provide any level of help to another in need. This paper explores the basis for the absence of the duty to rescue in tort law. It also analyses the arguments for and against duty to rescue and how this implicates the duty between strangers.

Keywords: Duty, Rescue, Socio-legal, Tort.

INTRODUCTION

Tort law traditionally focuses on the aspect of liability itself. Common questions include how and when a person would be held liable for his actions. In negligence law, the focus would always be on whether the elements of duty, breach, causation and damages are fulfilled. This paper, however, seeks to present a different perspective of tort law. It submits that rather than simply viewing tort law as determination of liability, tort law also signifies the duty that we owe to one another. Tort law sets up individual responsibilities and rights as well as the boundaries of how we should or are expected to behave. It outlines the duties between strangers.

Goldberg and Zipursky (1998, p. 1743) argue that negligence law embodies "moral principles that contemplate a set of civil obligations we owe one another" and that one central task of the courts is to "elaborate those obligations in a manner that meshes with modern understandings and modern problems; to articulate the set of obligations that matches, roughly, what citizens believe about the care they owe one another".

If a person is exposed to harm, and a bystander knows this and would be able to avert the harm, what would his obligations be? How far would a person be responsible for another's safety? How ought one to behave in such circumstances? This paper explores the principle of duty to rescue in common law by looking at case law for illustrations. It then provides an explanation for the absence of duty to rescue in common law by using landmark cases. Following this, the implications of the no duty to rescue rule is discussed, on which it is asserted that the effects of this rule are not hypothetical but that in reality they affect society at large. This paper then offers a different insight on tort law and urges for legal subjects to be viewed in their true form, as vulnerable subjects which are interdependant and interconnected with one another.

THE ABSENCE OF DUTY TO RESCUE IN COMMON LAW

The principle of no duty to rescue

There is no general duty to rescue in common law. The law has persistently refused to impose on a stranger the moral obligation to render assistance or go to the aid of another. The principle

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that there is no duty in law to aid a stranger is strongly established in case law. A clear illustration of this was given by Lord Atkin (*Donoghue v Stevenson*[2], p. 580) where he stated:

> *The priest and the Levite, when they saw the wounded man by the road, passed by on the other side. He obviously was a person whom they had in contemplation and who was closely and directly affected by their action. Yet the common law does not require a man to act as the Samaritan did.*

The illustration evoked by Lord Atkin was reiterated in the case of Lord Diplock in *Dorset Yacht Co. Ltd. v. Home Office*[3] of which he explains further that an omission to aid others incurs no liability in the English law:

> *...in the conduct of the priest and of the Levite who passed by on the other side, (is) 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 English law.*

It is clear that the position in the law is that there is no duty to aid others even if the harm is foreseeable and may be averted by the bystander. Lord Diplock highlighted that there is an abundance of instances of omissions which "give rise to no legal liability in the doer or omitter for loss or damage sustained by others as a consequence of the act or omission, however reasonably or probably that loss or damage might have been anticipated" (*Dorset Yacht Co. Ltd. v. Home Office*[4], p. 1060).

He provided several examples of which there would be no liability for omission should there be no special relationship between the parties including in matters of trade and land. This position stands regardless of the harm that might befall the other party due to the omission. A powerful example of this was given by him in which:

> *...you need not warn him of a risk of physical danger to which he is about to expose himself unless there is some special relationship between the two of you such as that of occupier of land and visitor; 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 and you may do so with impunity unless there is some special relationship between you such as that of bailor and bailee.* (*Dorset Yacht Co. Ltd. v. Home Office*[5], p. 1060)

Lord Nicholls in the case of *Stovin v Wise*[6] had further illustrated how there is no duty to rescue owed by a bystander even if the rescue is an easy one. The circumstances may be such, that there is an opportunity to rescue easily and without any inconvenience or exposure to harm for the rescuer, yet he is not obligated to help. Lord Nicholls provided two examples of the absence of a legal duty to take position action, of which the first situation is where a grown person stands by while a young child drowns in a shallow pool. Another example is where a person watches a nearby pedestrian stroll into the path of an oncoming vehicle. Following this, he further stated that:

> *In both instances the callous bystander can foresee serious injury if he does nothing. He does not control the source of the danger, but he has control of the means to avert a dreadful accident. The child or pedestrian is dependent on the bystander: the child is unable to save himself, and the pedestrian is unaware of his danger. The prospective injury is out of all proportion to the burden imposed by having to take preventive steps. All that would be called for is the simplest exertion or a warning shout. Despite this, the recognised legal position is that the bystander does not owe the drowning child or the heedless pedestrian a duty to take steps to save him. Something more is required*

[2] [1932] A.C. 562
[3] [1970] A.C. 1004
[4] [1970] A.C. 1004
[5] [1970] A.C. 1004
[6] [1996] AC 923

> *than being a bystander. There must be some additional reason why it is fair and reasonable that one person should be regarded as his brother's keeper and have legal obligations in that regard.* (*Stovin v Wise* [1996] AC 923, p. 931)

Nonfeasance: basis for no duty to rescue

Courts' reluctance to recognise duty to aid is based on the common belief that legal liability could only be enforced in cases involving misfeasance, where there existed the doing or causing of harm. Duties of care that arise in negligence are duties not to cause harm to others through positive actions. Radcliffe (1986) attributes this to the historical origins of the common law rule which embodies distinction between misfeasance (the causing of harm) and nonfeasance (merely allowing harm to take place through inaction).

The distinction embedded in common law is emphasised by Bohlen (1908) as follows:

> *There is no distinction more deeply rooted in the common law and more fundamental than that between misfeasance and nonfeasance, between active misconduct working positive injury to others and passive in action, a failure to take positive steps to benefit others, or to protect them from harm not created by any wrongful act of the defendant. This distinction is founded on that attitude of extreme individualism so typical of Anglo-Saxon legal thought*. (Bohlen, 1908, pp. 219-220)

Nonfeasance will not give rise to liability as liability was found to exist only when an individual in some way caused harm to another. Hence, imposing a legal duty to rescue was not considered enforceable because it involved an omission to act. The courts did not consider nonfeasance to amount to causation. According to Radcliffe (1986), this notion is based on the theory that nonfeasance left the plaintiff in no worse position than he was in previously. It is also centred on the idea that individual liberty is violated when someone is forced to prevent harm that he has not caused.

The common law does not impose liability on the pure omissions of those who have no special relationship between them. Hence, should harm befall a stranger, omission to help would incur no liability to the bystander as an active or positive duty to help others is not required in tort law when there is a lack of special relationship. As put forward by Lord Hoffman in the case of *Stovin v Wise* [1996] AC 923 (p. 943):

> *There are sound reasons why omissions require different treatment from positive conduct. It is one thing for the law to say that a person who undertakes some activity shall take reasonable care not to cause damage to others. It is another thing for the law to require that a person who is doing nothing in particular shall take steps to prevent another from suffering harm from the acts of third parties (like Mrs. Wise) or natural causes.*

In this case, Lord Hoffman provided political, moral and economic reasons as to why there is no duty owed in such circumstances, specifically on the rule against liability in the context of pure omission. According to him, the political reason is that "it is less an invasion of an individual's freedom for the law to require him to consider the safety of others in his actions than to impose upon him a duty to rescue or protect" (*Stovin v Wise*[7], p. 943).

He further elaborated on the moral reason that it is unfair to hold one liable over the other if the situation is such that there was a large and indeterminate class of people who happened to be able to do something to prevent harm to others or render assistance to a person in danger or distress. This is posed as the 'why pick on me?' argument.

It was also argued in economic terms that there is no similar justification to expect a person who is not doing anything to spend money on behalf of someone else. Lord Hoffman stated:

[7] [1996] AC 923

> *...the efficient allocation of resources usually requires an activity should bear its own costs... liability to pay compensation for loss caused by negligent conduct acts as a deterrent against increasing the cost of the activity to the community and reduces externalities... there must be some special reason why he should have to put his hand in his pocket.* (*Stovin v Wise*[8], p. 944)

Based on Radcliffe's observation and Lord Hoffman's justifications, it could be seen that the reluctance to impose a duty on individuals for an omission reflects the liberal philosophical perspective that embodies tort law, which prioritises individual responsibility over social or collective responsibility. The idea that a person should be responsible for the safety of another is looked upon as a violation of individual liberty.

Exceptions to no duty to rescue rule: special relationship

The principle in law that there is no duty to rescue does, however, contain exceptions in which duty to aid is imposed. The rule of no duty to act was premised upon the traditional misfeasance-nonfeasance distinction, and the recognition of a special relationship exception created a duty in the absence of misfeasance, or lack of causation.

Generally, only if there is a special relationship between the parties has a person a positive obligation to act upon another. Thus, outside specific pre-tort relationships, there are no positive duties generally present in tort law; this may be attributed to the fact that negligence law developed against a social and political landscape that favoured individualism over any kind of collective responsibility.

The importance of the existence of a special relationship in order to constitute an omission to act was laid down in the case of *Sutradhar v Natural Environment Research Council*[9]. In this case, the claimant alleged that the British Geological Survery (BGS) under the Natural Environment Research Council had been negligent by failing to issue a geological report on safety, which omission resulted in him suffering arsenic poisoning from the drinking water. It was claimed that the non-issuance of the report had lulled the Bangladesh public health authorities into a false sense of security and inhibited them from testing the water themselves and discovering its toxic properties.

In this case, Lord Hoffman ruled that where there is no prior relationship between parties, there is no actionable negligence for an omission to act. He stated that:

> *But the fact that one has expert knowledge does not in itself create a duty to the whole world to apply that knowledge in solving its problems... BGS therefore owed no positive duties to the government or people of Bangladesh to do anything. They can be liable only for the things they did and the statements they made, not for what they did not do.* (*Sutradhar v Natural Environment Research Council.* (para 27)

If having knowledge does not necessarily create a special relationship between you and the public, what are the criteria which creates a special relationship? A special relationship may exist if there is an undertaking or the creation of reliance upon the other. Lord Hoffman elaborated on this by stating that, "there may be a duty to act if one has undertaken to do so or induced a person to rely upon one doing so. Or the ownership or occupation of land may give rise to a duty to take positive steps for the benefit of those who come upon the land and sometimes for the benefit of neighbours" (2006, p.). He cited the case of *Hargrave v Goldman the High Court of Australia*[10] where Windeyer said, "the trend of judicial development in the law of negligence has been... to find a duty to take care either in some task undertaken, or in the ownership, occupation, or use of land or chattels" (p. 66).

[8] [1996] AC 923
[9] [2006] UKHL 33; [2006] 4 All ER 460
[10] (1963) 110 C.L.R. 40

Historically, courts have developed certain exceptions which justify the imposition of duty to aid and in early common law, the only special relationship falling into the exception to the rule were common carrier to passenger, innkeeper to guest, and shipmaster to seaman. Later, the list of special relationships was expanded to include: "employer to employee, shopkeeper to customer, host to guest, jailer to prisoner, school to student, and companion to companion" (Radcliffe, 1986, p. 396). It also covers "taverns and patrons", "residential rental property owners and tenants", "landowners and invitees" and "merchants and customers" (Brady, 1980, p. 553).

Although the rationale in these cases is not explicitly stated in terms of dependency, according to Brady (1980), dependency is a common denominator of these relationships. She submits that this is manifested by "how the defendant holds some power or control over the plaintiff, in that the defendant has the opportunity to take certain precautions to decrease the probability that harm will come to the plaintiff" (Brady, 1980, p. 533).

However, it is unclear if this is indeed the rationale, as a person who walks pass a drowning baby certainly creates a dependency upon that person to rescue the infant, yet the court does not regard them as having a 'special relationship'. The courts have been criticised for devising various 'special relationship' exceptions to the duty to rescue rule so that the "proliferation of these exceptions has not only threatened to swallow the rule itself but has created a situation where it is no longer possible to determine which relationships are 'special' and which are not" (Radcliffe, 1986, p.404).

The dependency on the definition of special relationship is weak as the law sends a message condoning uncaring behaviour; it is arguable that there need to be circumstances giving rise to a special relationship first, in order to help others. As reiterated by Bender (1988, p. 32), "the law should not permit us casually to cast aside another's safety, health, or interests because we do not personally know the random person who might be injured". Strangers are no less human because we do not know them.

IMPLICATIONS OF THE NO DUTY TO RESCUE RULE

The discussion on no duty to rescue rule in tort law is not new and has long been debated by scholars, both for and against. The stance of the courts in disregarding the harm that befalls the stranger in void of assistance has been regarded as disturbing and scholars have provided several hypothetical illustrations of this situation. For example, a person may be walking along the shore who sees a victim drowning, yet he has no legal duty to throw a rope, or reach a stick out to help that person (Kelley, 2000). This is the position of the law even if the rescue could be easily done with no inconvenience to the rescuer. Other examples given include failure to warn a blind man of an open manhole, letting a child play in the path of a train, or a baby drowning while others watch (Brady, 1980).

The consequence of the no duty to rescue rule, however, no longer becomes hypothetical as the harm can be seen manifested in real-life situations. In particular, the case of Kitty Genovese in the early sixties where the victim was attacked over a period of thirty-five minutes but none of her neighbours summoned help (Kelley, 2000). According to Radcliffe (1986), the assailant stabbed her, then fled when she screamed for help. But when her screams went unanswered, he returned and struck again before he drove away. He then came back the third time and repeated his attack, killing her. Although thirty-eight of her neighbours either heard or saw from their apartment windows the assault and her screaming for help, no one called the police until she died (Crettez and Deloche, 2011). The one who finally made the call stated that he waited because "he didn't want to get involved" (Radcliffe, 1986, p. 387). This is now known as the Kitty Genovese effect, where many people observe a person in peril but do not act in anticipation of some other bystander stepping in and taking action.

A more recent incident which happened in 2011 was a two year old girl, Yue Yue, was hit by a van and at least eighteen people passed by indifferently, leaving her lying on the ground seriously injured (Tang, 2014). Later, a second van struck her and she died the next morning. The indifference of the bystanders shocked the public and a subsequent study discovered that several sensational lawsuits had actually "embittered the public toward performing heroic deeds for strangers" (Tang, 2014, p. 206).

These incidents, despite happening in New York and Guongdong respectively, have certain similarities which are: firstly, they use a common law tort system; and secondly, they exhibit the reality of failure to rescue and why it is important to discuss the duty to rescue considering the implications to the individual and society at large. The no duty to rescue rule is "a dilemma which not only involves the particular bystander but affects all of the society. It focus on the very essence of society in both the formation and reflection of mankind's true nature and general quality of life" (Radcliffe, 1986, p. 404) .

CONCLUSION

Tort law sets the expectation upon individuals to live as an autonomous, self-reliant and independent adults akin to the liberal legal subject. The asocial view of individual responsibility can be seen expressed by Lord Denning in *Spartan Steel v Martin*[11]:

> *Most people are content to take the risk on themselves… they do not go running around to their solicitors. They do not try to find out whether it was anyone's fault. They just put up with it. They try to make up the… loss by doing more work next day. This is a healthy attitude which the law should encourage* (, p. 38E-G)

Individuals are expected not to interfere with each others' affairs and to be self-sufficient without such assistance even in the face of danger. But the reality is, as suggested by vulnerability theory, we are always exposed to constant and inherent risks of harm. We are far from self-reliant; we are interconnected and dependant to one another. As Fineman (2015, p. 2091) posits:

> *A vulnerability approach disrupts the mantra of "personal responsibility, autonomy, and self-sufficiency" so prevalent in current neoliberal discourse and so often directed at certain designated and stigmatized "vulnerable populations." As embodied and embedded beings, we are all constantly and universally vulnerable to forces beyond individual control.*

The individualistic notion embedded in the no duty to rescue rule becomes problematic once viewed in terms of duty between strangers. Duty to rescue, as put forward by Brady (1980), "presents in dramatic form the fundamental question of duty to others that underlies all of tort law" (p. 551). A central question that the paper seeks to raise is: has tort law through the mechanics of no duty to rescue rule failed to consider the aspects of social dimension that governs individuals, i.e., interconnectedness, caring and dependency?

Furthermore, it also raises the question of whether protection of individual autonomy is more pertinent than the protection of life. As Bender (1988, p. 34) stated, "if we think about the stranger as a human being for a moment, we may realise that much more is involved than balancing one person's interest in having his life saved and another's interest in not having affirmative duties imposed upon him in the absence of a special relationship".

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