

SECOND RESTATEMENT OF TORTS

§ 314. Duty to Act for Protection of Others

The fact that the actor realizes or should realize 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.

§ 314 A. Special Relations Giving Rise to Duty to Aid or Protect

(1) A common carrier is under a duty to its passengers to take reasonable action

(a) to protect them against unreasonable risk of physical harm, and

(b) to give them first aid after it knows or has reason to know that they are ill or injured, and to care for them until they can be cared for by others.

(2) An innkeeper is under a similar duty to his guests.

(3) A possessor of land who holds it open to the public is under a similar duty to members of the public who enter in response to his invitation.

(4) One who is required by law to take or who voluntarily takes the custody of another under circumstances such as to deprive the other of his normal opportunities for protection is under a similar duty to the other.

Caveat:

The Institute expresses no opinion as to whether there may not be other relations which impose a similar duty.

§ 321. Duty to Act When Prior Conduct is Found to be Dangerous

(1) If the actor does an act, and subsequently realizes or should realize that it has created an unreasonable risk of causing physical harm to another, he is under a duty to exercise reasonable care to prevent the risk from taking effect.

(2) The rule stated in Subsection (1) applies even though at the time of the act the actor has no reason to believe that it will involve such a risk.

NOTES TO THIS CASE ARE FROM KESSLER +
GILMORE, CONTRACTS, CASES + MATERIALS
(2ND ED. 1970) p. 38-39

HURLEY v. EDDINGFIELD

156 Ind. 416, 59 N.E. 1058 (1901)

BAKER, J. Appellant sued appellee for \$10,000 damages for wrongfully causing the death of his intestate. The court sustained appellee's demurrer to the complaint; and the ruling is assigned as error.

The material facts alleged may be summarized thus: At and for years before decedent's death appellee was a practicing physician at Mace in Montgomery county, duly licensed under the laws of the State. He held himself out to the public as a general practitioner of medicine. He had been decedent's family physician. Decedent became dangerously ill and sent for appellee. The messenger informed appellee of decedent's violent sickness, tendered him his fees for his services, and stated to him that no other physician was procurable in time and that decedent relied on him for attention. No other physician was procurable in time to be of any use, and decedent did rely on appellee for medical assistance. Without any reason whatever, appellee refused to render aid to decedent. No other patients were requiring appellee's immediate service, and he could have gone to the relief of decedent if he had been willing to do so. Death ensued, without decedent's fault, and wholly from appellee's wrongful act.

The alleged wrongful act was appellee's refusal to enter into a contract of employment. Counsel do not contend that, before the enactment of the law regulating the practice of medicine, physicians were bound to render professional service to every one who applied. Wharton on Neg., §731. The act regulating the practice of medicine provides for a board of examiners, standards of qualifications, examinations, licenses to those found qualified, and penalties for practicing without license. Acts 1897, p. 255; Acts 1899, p. 247. The act is a preventive, not a compulsive, measure. In obtaining the State's license (permission) to practice medicine, the State does not require, and the licensee does not engage, that he will practice at all or on other terms than he may choose to accept. Counsel's analogies, drawn from the obligations to the public on the part of innkeepers, common carriers, and the like, are beside the mark.

Judgment affirmed.

Note

1. The few cases which have come up to date have quoted the opinion with approval, e.g., *Buttersworth v. Swint*, 53 Ga. App. 602, 186 S.E. 770 (1936); *L. S. Ayres & Co. v. Hicks*, 220 Ind. 86, 40 N.E.2d 334 (1942). But it is also generally recognized that "when a physician or surgeon takes charge of a case and is employed to attend a patient, unless the terms of employment otherwise limit the service, or notice be given that he will not undertake, or cannot afford,

the subsequent treatment, his employment, as well as the relation of physician and patient, continues until ended by the mutual consent of the parties, or revoked by the dismissal of the physician or surgeon, or until his services are no longer needed. And he must exercise, at his peril, reasonable care and judgment in determining when his attendance may properly and safely be discontinued." *Nash v. Royster*, 189 N.C. 408, 413, 127 S.E. 256, 359 (1925).

What arguments should be considered in evaluating the holding? Does the case still reflect our moral sentiments? See Prosser, *Handbook of the Law of Torts* 336 (3d ed. 1964). More than a hundred years ago Bentham already expressed strong sentiments in favor of imposing a duty to aid backed up by criminal sanctions. "Every man is bound to assist those who have need of assistance if he can do it without exposing himself to sensible inconvenience. This obligation is stronger, in proportion as the danger is the greater for the one and the trouble of preserving him the less for the other . . . the crime would be greater if he refrained from acting not simply from idleness, but from malice or some pecuniary interest." Bentham, *Introduction to the Principles of Morals and Legislation*, 1 Works 164 (Bowring ed. 1843).

Assuming that a court wants to impose liability, how should it be rationalized? How should it be confined to prevent run-away social engineering? Would a rule be workable imposing upon a physician a duty to give aid unless he refuses for cause? Should a statute be passed imposing on a physician a duty to give aid in an emergency? Should such a statute be passed only in a jurisdiction which has a Good Samaritan law? For examples of Good Samaritan laws, see Cal. Bus. & Prof. Code §2144 (West 1959), §2725.5 (West 1963); Conn. Gen. Stat. Ann. §52-557b (1963); Wis. Stat. Ann. §§147, 17(7), 149, 06(5) (West 1963). On the duty to aid imposed by admiralty law, see Gilmore and Black, *The Law of Admiralty* §8.4 (1957). See 1964 Wis. L. Rev. 494; 51 Calif. L. Rev. 816 (1963).

2. Consult Wyman, *The Inherent Limitation of the Public Service Duty to Particular Classes*, 23 Harv. L. Rev. 339 (1910); Lenhoff, *The Scope of Compulsory Contracts Proper*, 43 Colum. L. Rev. 586 (1943). For the attitude of the common law with regard to the duty to render aid in any emergency, see Bohlen, *The Moral Duty to Aid Others as a Basis of Tort Liability*, 56 U. Pa. L. Rev. 217 (1908); 52 Colum. L. Rev. 631 (1952). For the compensation of the rescuer, see Dawson, *The Altruistic Intermeddler*, 74 Harv. L. Rev. 817, 1073 (1961).

3. Freedom of contract has suffered serious limitations to prevent discrimination in employment, housing, and public accommodation. Discussion of the pertinent legislation and case law lies outside the scope of this casebook.

GREAT ATLANTIC & PACIFIC TEA CO. v. CREAM OF WHEAT CO., 227 Fed. 46 (2d Cir. 1915). Lacombe, J.: "We had supposed that it was elementary law that a trader could buy from whom he pleased and sell to whom he pleased, and that his selection of seller and buyer was wholly his own concern. 'It is a part of a man's civil rights that he be at liberty to refuse business relations with any person whomsoever, whether the refusal rests upon reason, or is the result of whim, caprice, prejudice, or malice.' *Cooley on Torts*, p. 278. See, also, our own opinion in *Greater New York Film Co. v. Biograph Co.*, 203 Fed. 39, 121 C.C.A. 375.

"Before the Sherman Act it was the law that a trader might reject the offer of a proposing buyer, for any reason that appealed to him; it might be because he did not like the other's business methods, or because he had some personal difference with him, political, racial, or social. That was purely his own affair, with which nobody else had any concern. Neither the Sherman Act, nor any decision of the Supreme Court construing the same, nor the Clayton Act, has changed the law in this particular. We have not yet reached the stage where the selection of a trader's customers is made for him by the government."

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§ 13. Battery: Harmful Contact

An actor is subject to liability to another for battery if

(a) he acts intending to cause a harmful or offensive contact with the person of the other or a third person, or an imminent apprehension of such a contact, and

(b) a harmful contact with the person of the other directly or indirectly results.

§ 16. Character of Intent Necessary

(1) If an act is done with the intention of inflicting upon another an offensive but not a harmful bodily

contact, or of putting another in apprehension of either a harmful or offensive bodily contact, and such act causes a bodily contact to the other, the actor is liable to the other for a battery although the act was not done with the intention of bringing about the resulting bodily harm.

R. von Jhering

"The Formal Realisability of Law"

(This is a translation of the French translation of a section of Der Geist des Romischen Rechts (The Spirit of Roman Law), 2d ed. 1883. The passage is found in volume 1 of the French translation at pp. 51-56. The English version is not a good translation of the French, but conveys its sense adequately.)

I distinguish material realisability from formal realisability. By the first, I mean the utility or expediency of the clauses at the heart of the law. Their expediency is naturally relative, determined as it is by the relation mentioned earlier which exists between the law and the exigencies of the era, the character of a particular people and the conditions of life itself. By formal realisability, in contrast, I mean facility and certainty in the process of applying abstract law to concrete cases. According to whether this operation demands a more or less considerable intellectual effort, and according to whether the results are more or less certain, I will say that there is more or less formal realisability. I do not understand by that the facility or difficulty one encounters in understanding the laws one must apply. From the moment a law has been correctly understood once, the task is complete and need not be again undertaken for each individual case. The task of which the ease or difficulty is in question concerns the application of the law, or the transformation of the abstract law into a concrete one, and this task renews itself with each new case.

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To apply a law is to discern and express concretely what it proposes abstractly. Now this operation can be very easy or literally bristle with problems. The skill and rectitude of the judgment of the person who must apply the rule (legal diagnosis) have a great influence here, but the difficulty or ease of applying a rule is determined by the rule itself, depending upon whether the criteria of its application are easy or difficult to recognize.

Every law attaches to a specified hypothesis ("if someone did this or that"), a specific consequence ("in that case, this or that will happen.") Applying the law is therefore: (1) to determine whether the hypothesis indeed happens in the case in question; and (2) to express in a concrete manner the purely abstract consequence, for example, to evaluate in money the damages someone must pay. It is plain that the terms in which the hypothesis and its consequences are stated are very important. Take for example the manner of treating slander in ancient Roman law and in modern law. In ancient law the consequence of slander, that is its penalty, consisted of a predetermined fine (25 as) whereas in modern law it is left to the discretion of the judge. In ancient times, from the moment it was established that slander had occurred, the consequence (fine of 25 as) automatically followed. Later, by contrast, it is necessary to determine carefully the individual circumstances of the case, that is the social rank of the offender and the offended, the time, the place, etc., and the determination of the penalty could present great difficulties to the judge. As to the

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"hypothesis," it is equally evident that if it has as subject matter the general case "injury of honor" the determination of the existence of this hypothesis in the case in point is much more difficult than if as in many ancient laws it referred to a specific fact. In ancient law this would be any external, easily recognizable fact, for example, "if one struck someone else, if one accused someone of an offense, etc."

The more general and subjective the manner in which the conditions and consequences of a legal rule are expressed, the harder it is to recognize them in a concrete case. The more concrete and external they are, the easier this task becomes. This facility in recognizing concretely the abstractions of the law is in practice much more important than the logical perfection and abstract content of the law. Those clauses which are roughly constructed, but which are attached to outside criteria which are easy to recognize in concreto, are better from a practical point of view than those laws which are perfect with respect to form and essence, but which have no formal realisability. Indeed, the importance of this last quality is not only to facilitate, to simplify and consequently to accelerate the application of the law, but also to insure the uniform application of the law. The more external and striking the aspects of the situation to be identified, the more chance there is that each aspect will be correctly characterized; in contrast, the more subjective the criteria to be identified, the greater the danger of errors.

Facility of application exerts a determining influence upon the logical development of the law. It often compels the

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abandonment of the original purity of legal ideas in favor of forms which make them more easily tractable in practice. What they lose on the one hand, they regain with interest on the other. To clarify this point we will take the example of civil and political personal capacity (majority and electoral right). Suppose that a legislator wishes to regulate this legally and he comes forth with this idea: he who has the judgment and stability of character required to regulate his own affairs will be of full age; he who possesses the capacity and wish to contribute to the good of the state will be an eligible elector. As just as this idea is, it would be absurd to institute it as a law in abstract form, as one would suffer infinite pains to determine in each case the existence of these conditions. This legislator would create an inexhaustible source of controversies and would give free reign to the arbitrariness of the judge. The most irreproachable application of his law would not be safe from the objection of partiality, which the legislator would have provoked by his own action. How can the legislator avoid this stumbling-block? Instead of these conditions, he will fix others, which have with the first a certain correlation, although not a one-to-one correspondence, but which have the advantage over them of being more easily and surely recognized in a concrete manner; for example, the attainment of 25 years of age for majority, the possession of a certain wealth, the practice of certain professions, etc., for the right of elector. This deviation from the original legislative idea, this abandonment of a more exact hypothesis in an abstract form, in favor of a less

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exact and less adequate one more easily recognized in practice, is required by one of the law's own purposes--by the desirability of facility and certainty in its functioning. It is possible here and there in applying this law that mistakes will occur, that majority or electoral rights will be granted or refused in particular cases where they wouldn't be under the abstract terms; yet this concrete more of procedure is nonetheless preferable, in view of the necessities of life. This point of view, in law, is the only determinant.

The concept of the formal realisability of the law thus refers to a principle quite distinct from the internal logic of legal ideas and which often modifies or impedes its free development. . . .