# COMMENTS

## TORTS—CONTRIBUTORY NEGLIGENCE—THE RESCUE DOCTRINE

*Hammonds v. Haven, 280 S.W.2d 814 (Mo. 1955)*

While driving along a state highway on a dark, rainy evening plaintiff encountered a tree, blown down during a rainstorm, which obstructed the road. Parking his car beside the road, plaintiff prepared to warn approaching motorists of the danger. After failing in his attempts to warn one oncoming motorist from a position adjacent to the highway,[1] plaintiff, upon sighting defendant approaching at a high rate of speed, stationed himself in the center of the road and, lacking other ready means of signaling, attempted to warn defendant by waving his arms. As defendant neared the fallen tree plaintiff leaped toward the side of the road but was struck by defendant as the latter swerved to avoid a collision. The trial court rendered judgment for plaintiff, based upon the jury's finding that defendant was negligent and plaintiff free from contributory negligence. While not contesting the jury's finding of negligence, defendant appealed, contending that plaintiff, by voluntarily assuming his perilous position, was contributorily negligent as a matter of law. The Supreme Court of Missouri affirmed, holding that under the rescue doctrine the question of plaintiff's contributory negligence was properly submitted to the jury.[2]

Although a party injured while voluntarily encountering a known risk ordinarily will be barred from recovery by his own contributory negligence,[3] when his conduct is motivated by the purpose of protecting the life of another,[4] judicial relief may be afforded, in certain situations, by the application of what is commonly termed the "rescue doctrine." The courts have applied the rescue doctrine in two basic factual situations. The standard rescue doctrine situation occurs when a defendant negligently imperils the life of another and the plaintiff

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1. The motorist crashed into the tree and damaged his car, but escaped uninjured. After consulting with plaintiff, he agreed to attempt to stop traffic coming from one side of the fallen tree while plaintiff was to warn motorists approaching from the opposite direction. Brief for Appellant, pp. 6, 7, Hammonds v. Haven, 280 S.W.2d 814 (Mo. 1955).

2. Hammonds v. Haven, 280 S.W.2d 814 (Mo. 1955). Plaintiff sued both the defendant motorist and his employer, alleging that the motorist was acting negligently while in the scope of his employment. Defendant's employer alone appealed, asserting, in addition to the contributory negligence issue, that defendant was not acting within the scope of his employment at the time of the accident. The Supreme Court also ruled for the plaintiff on this point. *Id.* at 818-19.

3. PROSSER, TORTS § 51 (2d ed. 1955); RESTATEMENT, TORTS § 466(a), comment *c* (1934).

4. In some jurisdictions the rescue doctrine also applies to reasonable efforts to protect the property of another. The rescuer, of course, may reasonably encounter greater risks when saving human life than when merely protecting property. PROSSER, TORTS § 49 (2d ed. 1955). Missouri has limited the rescue doctrine to reasonable attempts to protect human life. Eversole v. Wabash R.R., 249 Mo. 523, 155 S.W. 419 (1913).

is injured while attempting to rescue the person imperiled.[5] In such a situation it has become well-recognized that the negligent defendant can be held liable to the rescuer as well as to the person rescued,[6] and the bulk of recent litigation in this area has involved the question of whether the rescuer has maintained a standard of conduct which would justify his obtaining relief. While many cases state that the rescuer can recover unless his conduct is found to be "rash or reckless,"[7] the more accurate formulation is that of the *Restatement of Torts*, which permits recovery against the negligent defendant so long as the rescuer's conduct is "reasonable" in view of all the circumstances of the situation.[8]

Given the rule that the rescuer's conduct must be that of a reasonable man under the circumstances, there are two possible analytical approaches upon which a judicial decision can be based: (1) the court may determine that the scope of defendant's liability extends only to reasonable rescue efforts, and that unreasonable rescue attempts are an intervening force insulating defendant from liability; or (2) the court may determine that the rescuer's conduct, if found to be unreasonable, constitutes contributory negligence and precludes recovery. In practice, courts have seldom adopted one approach to the exclusion of the other, and most opinions contain language susceptible of application to both theories.[9] While either approach would seem to be substantially the same in terms of practical results, the failure of a court to enunciate clearly which theory is being applied in an individual case creates considerable confusion when an attempt is made to analyze the basis for the decision. Regardless of the approach adopted, however, it is apparent that the courts have been fully conscious of the commendable motives of the rescuer, and have had little hesitancy in permitting the jury to evaluate the reasonableness of his rescue efforts.[10] Similarly, juries, well aware of the defendant's prior negli-

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5. See, *e.g.*, Wagner v. International Ry., 232 N.Y. 176, 133 N.E. 437 (1921); Corbin v. Philadelphia, 195 Pa. 461, 45 Atl. 1070 (1900); Bond v. Baltimore & O.R.R., 82 W. Va. 557, 96 S.E. 932 (1918).

6. *Ibid.* Cardozo's terse statement of the rescue doctrine is well-known:

> 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 recognizes them as normal. It places their effects within the range of the natural and probable. 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).

7. Eckert v. Long Island R.R., 43 N.Y. 502 (1871); Corbin v. Philadelphia, 195 Pa. 461, 45 Atl. 1070 (1900); Bond v. Baltimore & O.R.R., 82 W. Va. 557, 96 S.E. 932 (1918).

8. RESTATEMENT, TORTS § 472 (1934).

9. See, *e.g.*, Berg v. Great Northern Ry., 70 Minn. 272, 73 N.W. 648 (1897); Hogan v. Bragg, 41 N.D. 203, 170 N.W. 324 (1918).

10. This is no doubt reflective of the general judicial tendency to apply a "double standard" in determining negligence and contributory negligence. See James, *Contributory Negligence*, 62 YALE L.J. 691, 706 (1953); James & Dickin-

gence and naturally sympathetic toward the rescuer's position, have readily returned a verdict for the plaintiff-rescuer.

While the principles applicable to the standard three-party rescue situation have been fairly well-defined, there is still uncertainty concerning a recently developed group of cases in which the rescuer is injured while attempting to protect the defendant after the latter has imperiled himself. In these cases the courts have had difficulty in finding the defendant to be negligent, since negligence traditionally implies a breach of duty, and it seems rather tenuous to reason that the defendant owes himself a duty not to endanger his own life.[11] The majority of courts encountering this problem have permitted the rescuer to recover, however, conveniently avoiding the conceptual difficulty of the situation by considering that the defendant was negligent in creating an undue risk of harm to any person attempting to rescue him.[12] While this reasoning may do some injustice to the established duty analysis of negligence, there is certainly a strong common-sense justification for permitting recovery by the rescuer, whose sacrifice of personal safety was required in order to save defendant from the consequences of his own carelessness.[13]

As in the other two-party rescue situations, the principal case involves a rescuer injured while attempting to protect an imperiled defendant. In addition, however, there are two peculiar factors present: (1) the perilous situation resulted from a combination of defendant's negligent driving and a concurring innocent cause—the fallen tree obstructing the highway; and (2) the principal case is apparently the first rescue situation in which the rescuer was not induced to act by defendant's antecedent negligence. If defendant had not based his appeal merely on the issue of contributory negligence, then the court would have been able to consider directly the question of whether these un-

son, *Accident Proneness and Accident Law*, 63 HARV. L. REV. 769, 786 (1950); Leflar, *The Declining Defense of Contributory Negligence*, 1 ARK. L. REV. 1 (1946).

11. This was the basis for the decision denying recovery in Saylor v. Parsons, 122 Iowa 679, 98 N.W. 500 (1904).

12. Brugh v. Bigelow, 310 Mich. 74, 16 N.W.2d 668 (1944); Carney v. Buyea, 271 App. Div. 338, 65 N.Y.S.2d 902 (4th Dep't 1946); Longacre v. Reddick, 215 S.W.2d 404 (Tex. Civ. App. 1948). It is possible, though hardly reasonable, to distinguish these cases from the *Saylor* case, *supra* note 11, on the ground that *Saylor* was the only case of this type in which the defendant's conduct merely endangered himself, and was not also likely to subject bystanders to a risk of harm.

13. The utter absurdity of distinguishing between the three-party and two-party rescue situations can be illustrated by the factual situation in Brugh v. Bigelow, 310 Mich. 74, 16 N.W.2d 668 (1944). Defendant's reckless driving had caused his car to overturn, pinning himself and a passenger beneath the wreckage. Plaintiff arrived, extricated the passenger, and then was injured while attempting to rescue defendant. Had the court accepted the view that there is no liability to a rescuer injured while protecting an imperiled defendant, it would have had to deny recovery while at the same time admitting that the rescuer could have recovered if he had been injured while rescuing defendant's passenger. The court quite properly permitted the rescuer to recover.

usual factors precluded application of the rescue doctrine. Since the rescuer's contributory negligence was the only issue appealed it is extremely difficult to evaluate the implications of the court's application of the rescue doctrine. It is not unreasonable to infer, however, that the court in the principal case, at least, would give slight weight to these factors, since they were raised by defendant while asserting his defense of contributory negligence,[14] and the court did not consider them of sufficient importance to merit discussion in the opinion. It is still an open question, however, whether this case subsequently will be considered as a precedent when a Missouri court is confronted by a similar factual situation *and* has the opportunity to rule on these peculiar problems.

It seems fairly certain, however, that the principal case, when construed with a prior Missouri case, *Dodson v. Maddox*,[15] has committed the Missouri courts to the view that a defendant who has imperiled himself can be held liable to his rescuer so long as the latter is not contributorily negligent. Certainly, there can be no quarrel with this view. Despite the factual distinction, there is no difference in principle between the three-party and the two-party rescue situations. In both situations the rescuer is motivated by the desire of protecting the person whose life is imperiled; his conduct would be the same whether the person rescued is the defendant himself or a third party imperiled by the negligence of the defendant. Thus, it is submitted that the court correctly applied the rescue doctrine to the factual situation in the principal case and, under that doctrine, properly submitted the question of plaintiff's contributory negligence to the jury.

14. Brief for Appellant, pp. 23, 24, Hammonds v. Haven, 280 S.W.2d 814 (Mo. 1955).

15. 359 Mo. 742, 223 S.W.2d 434 (1949). In the *Dodson* case a gasoline transport truck driven by defendant's servant crashed into a ditch and overturned, pinning the driver underneath. While plaintiff was attempting to rescue the driver the gasoline ignited causing plaintiff severe injuries. The court stated that the rescue doctrine was not applicable, since there was no showing that defendants had been negligent toward the person rescued, the driver of the truck. The court apparently conceived of the rescue doctrine as applicable only in the standard three-party situation in which the rescuer is injured while protecting a third person imperiled by defendant's negligence. The court went on to hold, however, that defendants, through their driver, were required to exercise ordinary care in the operation of the vehicle and finally permitted plaintiff to recover on the theory of res ipsa loquitur. The defendants in the *Dodson* case did not assert that plaintiff was contributorily negligent, but rather relied on the contention that there was no showing of their negligence toward plaintiff. The appeal of the case was thus the exact opposite of the principal case, where contributory negligence alone was appealed. While neither case alone may be definite authority, it would seem that, construing the two cases together, there is no question that the Missouri courts are now committed to allowing recovery by a reasonable rescuer from a defendant who has imperiled himself.

The statement of the *Dodson* case regarding the applicability of the rescue doctrine resulted in complete confusion. Prosser treats the case as accepting the view that a defendant (or as in *Dodson*, the defendants' servant) negligently imperiling himself becomes liable to his own rescuer. PROSSER, TORTS 173 (2d ed. 1955). Yet the case has been criticized for its failure to apply the rescue doctrine in the two-party rescue situation. 16 MO. L. REV. 68 (1951).