Vanderbilt Law Review

Volume 13
Issue 3 *Issue 3 - June 1960*

Article 6

6-1960

I am Not My Guest's Keeper

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COMMENT

I AM NOT MY GUEST'S KEEPER

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The laisez-faire policy of the common law recently won a resounding victory in Pennsylvania. In an action for the death of her husband, the plaintiff alleged that he was invited by the defendant to visit the latter's land for a consultation upon problems common to their work, strip-mining for coal, which requires deep cuts in the land from which it is necessary to remove accumulated water; that during the conversation the defendant invited the deceased to aid in the repair of a pump in one of the water-filled cuts; that the defendant, by "urging, enticing, taunting and inveigling" his visitor, caused the latter to jump into the cut which contained eight or ten feet of water; that the defendant knowing that the deceased was drowning refused to extend the aid which would have saved him. On demurrer, *held* for the defendant; he had no duty to help his invitee.[1]

It can be readily agreed that there was no coercion in the ordinary sense; that there was no deceit, since it was not stated that the defendant knew and the deceased did not know the depth of water; that the deceased was stupid in jumping and that there is no duty to rescue strangers from dangers, self-created or otherwise.

But the arguments of the court do not meet the issues. It is true that the common law has not adopted the rule suggested by James Barr Ames in 1908—that one who, without inconvenience to himself, can save another from great bodily harm has a duty to do so.[2] But from the earliest time when sealed instruments obtained by fraud or duress could be enforced against the maker, the common law has adopted many of the precepts of the keeper of the king's conscience, the chancellor. The present rules of negligence, even with their large element of objectivity, have been developed in accordance with current conceptions of morality. No longer can one enforce a covenant obtained by force or fraud; nor can a falsifying seller escape liability on the ground that he did not "warrant" the quality of his goods.[3] The non-bargaining deceiver is now liable for loss to those relying

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1. Yania v. Bigan, 397 Pa. 316, 155 A.2d 343 (1959).
2. Ames, *Law and Morals*, 22 HARV. L. REV. 97 (1908).
3. Apparently the law in 1603; Chandler v. Lopus, Cro. Jac. 4, 79 Eng. Rep. 3 (Exch. Ch. 1603).

upon his statements.[4] Bad motive is now recognized as an element in creating a cause of action even in situations in which it was formerly believed that the defendant had an "absolute" right, as in the case of spite fences[5] and interference with percolating waters.[6] The creation of the right of privacy, unprotected by earlier law, is the response of modern courts to morally outrageous conduct.

These situations involve active conduct. But there have been advances where the defendant has done nothing with reference to the injured person. Perhaps the most notable is through the doctrine of equitable estoppel, by which one may lose his property if, knowing that it is about to be sold to an innocent purchaser, he refrains from intervening.[7] Even more striking is the rule which imposes personal liability upon a person who, knowing that another is fraudulently purporting to act on his account or is impersonating him, fails to do what he reasonably can in warning innocent persons who otherwise would be injured by the fraud.[8]

Where there has been a relation between the parties, progress is being made in the area involving physical harm. It is now at least arguable that the rule that one who has, without liability, caused another to be helpless could properly let his victim die from his wound without an attempt to protect him, is no longer law.[9] The duty to aid others has been obliquely recognized in the holding that railroads are responsible for the act of an agent, otherwise unauthorized, in calling for medical assistance for a stranger nonnegligently harmed by a train.[10] One who has done an innocent act but who thereafter learns that it is likely to do harm, is under a duty to act to prevent the harm.[11] A master now has a non-statutory duty

4. First stated, with a dissenting opinion, in 1789: Pasley v. Freeman, 3 T.R. 51, 100 Eng. Rep. 450 (K.B. 1789).

5. Norton v. Randolph, 176 Ala. 381, 58 So. 283 (1912) (semble); *contra,* Musumeci v. Leonardo, 77 R.I. 255, 75 A.2d 175 (1950).

6. Gagnon v. French Lick Springs Hotel Co., 163 Ind. 687, 72 N.E. 849 (1904).

7. RESTATEMENT, TORTS §§ 872, 894 (1934).

8. Shapleigh Hardware Co. v. McCoy & Son, 23 Ga. App. 265, 98 S.E. 102 (1919).

9. Union Pac. Ry v. Cappier, 66 Kan. 649, 72 Pac. 281 (1903); Griswold v. Boston & M. R.R., 183 Mass. 434, 67 N.E. 354 (1903). Representative of more humane holdings are Whitesides v. Southern Ry., 128 N.C. 229, 38 S.E. 878 (1901). Section 322 of RESTATEMENT, TORTS (1934), has a caveat. At the time of writing, the Reporter and Advisors of *Restatement of Torts, Second* are recommending a change in the section to a rule imposing a duty of care to prevent further harm. Under many modern statutes, the operator of a motor vehicle involved in an accident without fault has a duty to assist victims to a specified extent. Representative statutes are those construed in Brumfield v. Wofford, 102 S.E.2d 103 (W. Va. 1958); Boyer v. Gulf, C. & S.F., Ry., 306 S.W.2d 215 (Tex. Civ. App. 1957); State v. Ray, 229 N.C. 40, 47 S.E.2d 494 (1948); Summers v. Dominguez, 29 Cal. App. 308, 84 P.2d 237 (1938).

10. Vandalia R.R. v. Bryan, 60 Ind. App. 223, 110 N.E. 218 (1915).

11. Ward v. Morehead City Sea Food Co., 171 N.C. 33, 87 S.E. 958 (1916); RESTATEMENT, TORTS § 321 (1934).

to extend aid to a servant made helpless during working hours from extraneous causes.[12]

The occupier of land has lost much of his freedom from liability. He may become liable to travellers upon an adjacent road for harm caused by the fall of a tree negligently permitted to decay although it had not been planted by the occupier or his predecessors.[13] The infant trespasser doctrine imposes affirmative duties upon him even to those entering his land against his wishes,[14] and he may become liable to adult trespassers harmed by a condition which he should have known would be seriously dangerous to them.[15] Towards visitors the duty is stronger. A host whose guest becomes ill cannot turn him out into the cold;[16] a carrier aware that a passenger is ill can not leave him to die.[17] One in control of a moving force must not only stop it to prevent further harm to an invitee but also has a duty to rescue him.[18]

In the case under discussion, the defendant is not at all like the bad, but legally faultless, Samaritan who fails to aid a stranger. The deceased was a business visitor; the defendant was a factual cause of the danger to him. Neither assumption of risk nor contributory negligence should be a defense; the reason behind the last clear chance doctrine, now in force in some form in all the states, is relevant. But, irrespective of that, a modern court should recognize the implied

12. Anderson v. Atchison, T. & S.F. Ry., 333 U.S. 821 (1948); Carey v. Davis, 190 Iowa 720, 180 N.W. 889 (1921); Szabo v. Pennsylvania R.R., 132 N.J.L. 331, 40 A.2d 562 (1945); RESTATEMENT, (SECOND) AGENCY § 512 (1958). By the admiralty rule, one in charge of a ship has a duty to rescue crew or passengers who have fallen overboard: Harris v. Pennsylvania R.R., 50 F.2d 866 (4th Cir. 1931); Salla v. Hellman, 7 F.2d 953 (S.D. Cal. 1925).

13. Brandywine Hundred Realty Co. v. Cotillo, 55 F.2d 231 (3d Cir. 1931) (in suburbs of a city). *Contra,* Chambers v. Whelen, 44 F.2d 340 (4th Cir. 1930) (in a country district). The Reporter and Advisors for the *Restatement of Torts, Second* are now recommending the replacement of the Caveat in section 363 by a statement that the possessor has a duty of care. From early times the occupier of land had a duty to extinguish fires originating there: Jennings v. Weibel, 204 Cal. 488, 268 Pac. 901 (1928); Chicago & G. T. Ry. v. Burden, 14 Ind. App. 512, 43 N.E. 155 (1896).

14. First stated in Railroad v. Stout, 84 U.S. (17 Wall.) 657 (1873). The statement of the rule in RESTATEMENT, TORTS § 339 (1934) has been widely accepted. As there stated, the rule is limited to artificial conditions, but in § 337 is a caveat which applies to trespassers in general who are hurt by highly dangerous natural conditions.

15. Cornucopia Gold Mines v. Locken, 150 F.2d 75 (9th Cir. 1945); RESTATEMENT, TORTS §§ 335, 337 (1934).

16. Depue v. Flatau, 100 Minn. 299, 111 N.W. 1 (1907). See also Brotherton v. Manhattan Beach Imp. Co., 46 Neb. 563, 67 N.W. 479 (1896), *aff'd on rehearing,* 50 Neb. 214, 69 N.W. 757 (1897); Larkin v. Saltair Beach Co., 30 Utah 86, 83 Pac. 686 (1905), (the operator of a beach has a duty to provide a guard to aid people in peril).

17. Endelman v. Palmer, 65 F. Supp. 436 (S.D.N.Y 1946); Middleton v. Whitridge, 213 N.Y. 499, 108 N.E. 192 (1915). In Yazoo & M.V. R.R. v. Byrd, 89 Miss. 308, 42 So. 286 (1906), it was held that a railroad had a duty to aid a drunken passenger who had fallen from the train.

18. L. S. Ayres & Co. v. Hicks, 220 Ind. 86, 40 N.E.2d 334 (1942) (semble); Connelly v. Kaufman & Baer Co., 349 Pa. 261, 37 A.2d 125 (1944).

promise to give aid in case of need. Surely if the host in an automobile were to ask his guest to drive and then to urge him to drive recklessly, it should at least be left to the jury to say whether it was not implicit that, if disaster were to come, the host would make an effort to save the driver, pinned behind the wheel in a burning wreck.[19]

It is not strange that there are no exact precedents; the conduct with which the defendant is charged is fortunately not common in civilized society. The citations relied upon by the court in denying liability are not persuasive. Section 314 of the *Restatement of Torts* merely states the generality that one has no duty to aid strangers.[20] The language of the 19th century Pennsylvania case cited[21] refers only to conduct by the defendant, in fact found reasonable, in an unsuccessful attempt to rescue a person with whom he had had no prior connection.

It may be that Dean Ames' formula involves a risk of making goodhearted people liable without fault, as where a timid automobilist is sued for refusing to pick up a "thummer," who in fact needs help[22] or where a swimmer drowns in full view of unobservant, or perhaps, stupid people. But precedent does not require that the court should deny the liability of a host who successfully invites a guest to do a stupidly dangerous act and then callously leaves him to drown, thereby denying the existence of any decency in the relation of host and guest.

19. *Compare* Regina v. Cowan, [1956] Vict. L.R. 18, in which an Australian trial court left to the jury the question whether the defendant who was living with a woman not his wife was under a duty to aid her when she became helpless. In Independent-Eastern Torpedo Co. v. Ackerman, 214 F.2d 775 (10th Cir. 1954), it was held that one of two contractors working on an oil well, but having no contractual relation with each other, was under a duty to warn the others of dangers known to the first but not to the other.

20. More pertinent is Connelly v. Kaufman & Baer Co., *supra* note 18.

21. Brown v. French, 104 Pa. 604 (1883).

22. See Note, *The Failure to Rescue: A Comparative Study*, 52 COLUM. L. REV. 631 (1952), which discusses the feasibility of requiring a person to aid a stranger in distress and compares the common law with the modern Soviet and French Codes which embody the principle suggested by Ames.