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The Rescue Doctrine and Breach of Warranty

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TORTS: THE RESCUE DOCTRINE AND BREACH OF WARRANTY

In *Guarino v. Mine Safety Appliance Company,*[1] the New York Court of Appeals held a manufacturer liable, in an action for breach of implied warranty, for deaths and injuries to non-users, basing the decision on a unique application of the rescue doctrine.

On October 2, 1957, Rooney and Fattore, two employees of the Bureau of Sewage Disposal for the City of New York, descended into a sewer to determine the source of water in a bulkhead. Both were wearing oxygen producing masks. Rooney's mask had been manufactured by the defendant, Mine Safety Appliance Company. On the way out of the sewer Rooney collapsed and died of asphyxiation. Fattore removed his mask to call for help, and six members of Rooney's sewer repair team responded to the calls, descending into the sewer without protective masks. Two of them died, and the other four and Fattore were injured by the lethal gas in the tunnel. The five surviving rescuers and the administrators of the estates of the two who were killed sued Mine Safety for breach of implied warranty of merchantability. The plaintiffs based their argument on the "danger invites rescue" theory, claiming that it was the defendant's wrongful act in manufacturing a defective mask which created the danger to which the plaintiffs responded.

The plaintiffs recovered substantial awards[2] in the trial court, and Mine Safety appealed to the New York Supreme Court, Appellate Division, which affirmed the decision subject

[1] 25 N.Y.2d 460, 255 N.E.2d 173, 306 N.Y.S.2d 942 (1969).

[2] The amounts awarded were as follows: For the two deaths, $225,000 for Guarino's death and $20,000 for Messina's death, plus $15,000 for the pain and suffering of each. For the injuries, $7,500 to Fattore, and $1,500 to each of the other four plaintiffs.

to a remittitur.[3] The appellate division sidestepped the defendant's attack on the judment as an "unwarranted and unjustified extension of breach of warranty liability," pointing out that the earlier case of *Rooney v. S. A. Healy Company*[4] had determined that the defendant had committed a breach of warranty as to Rooney, and that the present plaintiffs derived their right to recover through Rooney. Thus, according to the appellate division, the plaintiffs were not recovering directly for breach of warranty. Rather, the actions were founded essentially on the rescue doctrine.

On appeal the New York Court of Appeals in the present case affirmed without dissent, but with a concurring opinion which opposed such an unqualified extension of the application of the rescue doctrine to breach of implied warranty.[5]

The doctrine that "danger invites rescue" is a common law theory originally created to avoid a plaintiff being found contributorily negligent when he voluntarily places himself in a dangerous situation to prevent another person from suffering serious injury or death.[6] The doctrine is

[3] Guarino v. Mine Safety Appliances Co., 31 App. Div. 2d 255, 297 N.Y.S.2d 639 (1969). The remittitur reduced the $225,000 award for Guarino's death to $185,000.

[4] 20 N.Y.2d 42, 228 N.E.2d 383, 281 N.Y.S.2d 321 (1967). This companion case was a wrongful death action in which Rooney's administratrix recovered against the vendor of the defective gas mask. Whether or not this case resolved for the present case the issue of the defective nature of the mask was an important question considered at length by the appellate division. The court determined that res judicata would apply, making it unnecessary to relitigate the issue.

[5] 25 N.Y.2d at 466, 255 N.E.2d at 176, 306 N.Y.S.2d at 946.

[6] Provenzo v. Sam, 23 N.Y.2d 256, 244 N.E.2d 26, 295 N.Y.S. 2d 322 (1968); *see* Rovinski v. Rowe, 131 F.2d 687 (6th Cir. 1942); Bock v. Peabody Co-op. Equity Exch., 186 Kan. 657, 352 P.2d 37 (1960); Eckert v. Long Island R.R., 43 N.Y. 502, 3 Am. R. 721 (1871); Highland v. Wilsonian Inv. Co., 171

recognized in virtually every jurisdiction in the United States.[7] It is normally applied to allow recovery by a rescuer against the third party whose negligence was responsible for the danger to the one rescued.[8] However, it has also been applied in actions against the rescued person where his own negligence had created his perilous position.[9]

The general rules surrounding the rescue doctrine, as expounded by the leading cases in the field, involve rather expansive views of, if not exceptions to, two elementary tort principles — contributory negligence, and duty or foreseeability.

As was stated previously, the rescue doctrine was developed in order to get around the defense of contributory negligence. The doctrine does not eliminate contributory negligence as a defense but rather applies a different standard by which to measure that negligence. The determining question is not whether the rescuer exposed himself to risk, but whether it was exposure to an *unreasonable* risk.[10] And unless the rescue attempt was rashly or recklessly made,

Wash. 34, 17 P.2d 631 (1932). *See generally* 1 T. SHERMAN & A. REDFIELD, A TREATISE ON THE LAW OF NEGLIGENCE § 102 (rev. ed. 1941).

[7] *See* Annot., 158 A.L.R. 189 (1945); Annot., 19 A.L.R. 4 (1922).

[8] *See* Carter v. United States, 248 F. Supp. 105 (E.D. Okla. 1965); Elliott v. Chicago, Rock Island & Pac. R.R., 203 Kan. 273, 454 P.2d 124 (1969); Atchison, T. & S.F. Ry. v. Kennard, 199 Okla. 1, 181 P.2d 234 (1946); Wagner v. International Ry., 232 N.Y. 176, 133 N.E. 437 (1921).

[9] Ruth v. Ruth, 213 Tenn. 82, 372 S.W.2d 285 (1963); Talbert v. Talbert, 22 Misc. 2d 782, 199 N.Y.S.2d 212 (Sup. Ct. 1960); Carney v. Buyea, 271 App. Div. 338, 65 N.Y.S.2d 902 (1946); Brugh v. Bigelow, 310 Mich. 74, 16 N.W.2d 668 (1944). *But see* Saylor v. Parsons, 122 Iowa 679, 98 N.W. 500 (1904).

[10] For a discussion of the degree of negligence necessary to constitute contributory negligence in rescue cases see Comment, *Recovery by the Rescuer*, 28 LA. L. REV. 609, 612-14 (1968).

the rescuer's action will not be held to be contributory negligence.[11] The test is whether the ever-present "prudent man" would judge the behavior to be rash and reckless, considering all the surrounding circumstances.[12] The rescuer is allowed to act on appearances only, as long as there is a reasonable basis for believing the rescued person is in imminent danger.[13]

Since an action founded on the rescue doctrine has always been basically a negligence case, there must be a breach of duty owed to the plaintiff by the defendant and an injury proximately caused by that breach.[14] The courts have little trouble with the issue of proximate cause. It is apparently well settled that the chain of causation, when the defendant is negligent, is not broken by an act of rescue.[15] This is true even where the rescuer's behavior is not spontaneous, but is planned and deliberate.[16] The element of duty is a more difficult question. Justice Cardozo dealt with this problem

[11] Henneman v. McCalla, 260 Iowa 60, 148 N.W.2d 447 (1967); Parks v. Starks, 342 Mich. 443, 70 N.W.2d 805 (1955); Pittsburg, C., C. & St. L. Ry. v. Lynch, 69 Ohio St. 123, 68 N.E. 703 (1903); Pennsylvania Co. v. Langendorff, 48 Ohio St. 316, 28 N.E. 172 (1891).

[12] *See* Aylor v. Intercounty Constr. Corp., 381 F.2d 930 (D.C. Cir. 1967); Henneman v. McCalla, 260 Iowa 60, 148 N.W.2d 447 (1967); Wolfinger v. Shaw, 138 Neb. 229, 292 N.W. 731 (1940); Eckert v. Long Island R.R., 43 N.Y. 502, 3 Am. R. 721 (1871).

[13] Highland v. Wilsonian Inv. Co., 171 Wash. 34, 17 P.2d 631 (1932); *see* Wolff v. Light, 169 N.W.2d 93 (N.D. 1969).

[14] Provenzo v. Sam, 23 N.Y.2d 256, 244 N.E.2d 26, 296 N.Y.S.2d 322 (1968).

[15] Rovinski v. Rowe, 131 F.2d 687 (6th Cir. 1942); Carter v. United States, 248 F. Supp. 105 (E.D. Okla. 1965); Maryland Steel Co. v. Marney, 88 Md. 482, 42 A. 60 (1898); Duff v. Bemidji Motor Serv. Co., 210 Minn. 456, 299 N.W. 196 (1941); Gibney v. State, 137 N.Y. 1, 33 N.E. 142 (1893).

[16] Wagner v. International Ry., 232 N.Y. 176, 133 N.E. 437 (1921).

in *Wagner v. International Railway Company*[17] which involved an attempted rescue of a passenger who had been thrown from a crowded railway car. Justice Cardozo said, in effect, that although the particular rescuer may not have been foreseen by the wrongdoer, rescuers as a class are *always foreseeable* as a possible consequence of a negligent act which places someone in danger. And the foreseeability of the rescue attempt brings the rescuer within the scope of the wrongdoer's duty. It was this concept that inspired Jusice Cardozo's famous words that "danger invites rescue." Prior to the holding in *Wagner,* the rescue cases were considered an exception to the limitation of duty to the "foreseeable risk."[18]

As can be seen from the foregoing discussion, underlying the entire theory of the rescue doctrine is the requirement that the need for rescue must grow out of an act of negligence. Yet, in *Guarino,* the court has rejected this traditional notion that the rescue doctrine is applicable only to cases founded on a theory of negligence. The court reviewed the development of the "danger invites rescue" doctrine and noted that all the cases that have invoked the doctrine since it was first promulgated by the courts have been negligence actions. The court proposed, however, that the theory of the action is insignificant in the application of the rescue doctrine, reasoning that the important feature is a wrong committed, and that a "breach of warranty and an act of negligence are each clearly wrongful acts." Three cases are cited in support of this conclusion. Two of the cases, although based on a negligence theory, called the initiating wrong a "culpable act" or a "wrong" rather than a "negligent act." The third case labeled breach of warranty as a "tortious wrong." In *Provenzo v. Sam,*[19] the first case relied upon, it was held that the rescue doctrine should be applied when

[17] *Id.*
[18] *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS 316-17 (3rd ed., Hornbook Series 1964).
[19] 23 N.Y.2d 256, 244 N.E.2d 26, 296 N.Y.S.2d 322 (1968).

one party by his "culpable act" has placed another person in a position of peril which invites the rescuing plaintiff to come to his aid. The court then quoted *Goldberg v. Kollsman Instrument Corporation*[20] which held that a breach of warranty was "a tortious wrong." The court seems to have applied basic logic that a "culpable act" is sufficient to call forth the rescue doctrine, a breach of warranty is a culpable act, and therefore a breach of warranty is sufficient to invoke the rescue doctrine. The court further buttressed its argument with the noted Cardozo opinion in *Wagner v. International Railway Company*[21] which stated that the *"wrong* that imperils life . . . is a wrong also to his rescuer."

In the concurring opinion Judge Scileppi, joined by Judge Burke, maintained that the result should be limited to factual situations similar to the present case, where there is a great moral obligation. In *Guarino*, Judge Scileppi felt that a moral obligation arose out of the unusual factual setting in which the rescuers were all a part of a team engaged in a common effort, and that application of the rescue doctrine to breach of warranty cases should not be extended beyond this. Judge Scileppi based his opposition on his feeling that (1) such an application of the rescue doctrine is too susceptible to abuse, and (2) the elimination of distinctions between breach of warranty and negligence liability "has already gone too far."[22]

The concurring opinion touched upon an aspect of the case which was not decided, but which is deserving of some attention in light of the burgeoning field of products liability. Basically, *Guarino* adds another class to the growing list of those to whom a manufacturer is liable when he makes and distributes a defective product. Although the court of appeals in *Guarino* quotes with approval the appel-

[20] 12 N.Y.2d 432, 191 N.E.2d 81, 240 N.Y.S.2d 592 (1963).
[21] 232 N.Y. 176, 133 N.E. 437 (1921).
[22] 25 N.Y.2d at 466, 255 N.E.2d at 176, 306 N.Y.S.2d at 946.

late division's holding that in this case "the rescuer's status as a user or non-user of the defective instrumentality is not directly revelant" since the judgments were premised fundamentally on the rescue doctrine,[23] the fact remains that *Guarino* did allow recovery by non-users who were not even directly injured by the manufacturer's product.

The requirement of privity of contract in breach of warranty actions has undergone considerable attack and revision in recent years until very little remains of the rule.[24] The entire area is now covered by the Uniform Commercial Code.[25] The class of possible warranty beneficiaries is specifically set out in Section 2-318 which seems to limit liability to the buyer's household and guests in his home who may be reasonably expected to use the goods.[26] And, although Comment 3 indicates the class of beneficiaries was not intended to be limited to those expressly named in Section 2-318,[27] several states have effected changes in the section or have

[23] 25 N.Y.2d at 465, 255 N.E.2d at 175, 306 N.Y.S.2d at 945.

[24] *See* Annot., 75 A.L.R.2d 39 (1961). *See generally* S. SPEISER, RECOVERY FOR WRONGFUL DEATH § 2:11 (1966).

[25] UNIFORM COMMERCIAL CODE §§ 2-314 to -318.

[26] UNIFORM COMMERCIAL CODE § 2-318 (1962 Official Text) provides:

> A seller's warranty whether express or implied extends to any natural person who is in the family or household of his buyer or who is a guest in his home if it is reasonable to expect that such person may use, consume or be affected by the goods and who is injured in person by breach of the warranty. A seller may not exclude or limit the operation of this section.

[27] UNIFORM COMMERCIAL CODE § 2-318, Comment 3 (1962 Official Text) provides:

> This section expressly includes as beneficiaries within its provisions the family, household, and guests of the purchaser. Beyond this, the section is neutral and is not intended to enlarge or restrict the developing case law on whether the seller's warranties, given to his buyer who resells, extend to other persons in the distributive chain.

substituted anti-privity statutes,[28] fearing that the section may be contrary to their existing policy of allowing recovery without privity. Even the more liberal jurisdictions, however, have not yet extended the manufacturer's liability to include one who not only was a non-user, but was not directly injured by the product.

We may conclude then that the apparent effect of *Guarino* is to make a new remedy available to certain qualified plaintiffs bringing actions for wrongful death or personal injuries, which in the process, adds a new warranty beneficiary to whom a manufacturer may be liable. In order to take advantage of this new remedy against a manufacturer, only two broad prerequisites must be satisfied. First, the plaintiff must have been injured in any of various reasonable acts of rescue, and second, the one being rescued must have been endangered by defective goods which were manufactured by the defendant. It should be noted that the rescue doctrine does not require that the endangered party be injured.[29] In fact, many times he escapes unharmed and only the rescuer suffers injury or death.

There is increasing litigation in the field of products liability, and breach of warranty actions are far from rare. The *Guarino* decision takes on added impact when you consider that in every situation which involves an injury allegedly caused by a defective instrumentality, there is a possibility of a deliverer arriving on the scene. Especially is this true considering the broad scope of the rescue doctrine which has held that even going for medical aid is an act of rescue.[30]

[28] California, Utah, Virginia, Arkansas, Connecticut, Colorado, Alabama, South Dakota, Wyoming and Texas have all changed § 2-318 in some form, permitting the courts to broaden the scope of warranty protection. Comment, *UCC Section* 2-318: *Effect on Washington Requirements of Privity in Products Liability Suits,* 42 WASH. L. REV. 253 (1966).

[29] *See* Elliott v. Chicago, Rock Island & Pac. R.R., 203 Kan. 273, 454 P.2d 124 (1969); Hatch v. Globe Laundry Co., 132 Me.

Existing Oklahoma law indicates that the result reached in *Guarino* could very well have been reached in an Oklahoma court. Oklahoma is in accord with the majority of jurisdictions in accepting the theory of the rescue doctrine. Although the Oklahoma Supreme Court early held that the application of the doctrine was "inhibited" by the constitutional provision that contributory negligence is a jury question,[31] a later case indicated that, with the proper jury instructions, the rescue doctrine may be applied.[32] This view was more recently affirmed in *Carter v. United States*,[33] a federal district court case arising out of the Eastern District of Oklahoma, which allowed recovery based on the rescue doctrine. Oklahoma also has evidenced, both before and after adoption of the Uniform Commercial Code, a liberal view of the necessity of privity in breach of warranty actions.[34] There appears to be no reason why the *Guarino* dedision could not be followed in Oklahoma.

It is submitted that breach of warranty is a fertile field for a logical extension of the rescue doctrine. It may be true that the expansion of the doctrine is open to abuse, as Judge Scileppi pointed out. However, it is difficult to see how the rescue doctrine would be more widely susceptible to abuse in breach of warranty actions than it is in negligence cases.

379, 171 A. 387 (1934); Parks v. Starks, 342 Mich. 443, 70 N.W.2d 805 (1955); Eckert v. Long Island R.R., 43 N.Y. 502, 3 Am. R. 721 (1871).

[30] Carter v. United States, 248 F. Supp. 105 (E.D. Okla. 1965).

[31] Oklahoma Power & Water Co. v. Jamison, 188 Okla. 118, 106 P.2d 1097 (1940).

[32] Atchison, T. & S.F. Ry. v. Kennard, 199 Okla. 1, 181 P.2d 234 (1946).

[33] 248 F. Supp. 105 (E.D. Okla. 1965).

[34] *See* Speed Fastners, Inc. v. Newsom, 382 F.2d 395 (10th Cir. 1967); Barnhart v. Freeman Equip. Co., 441 P.2d 993 (Okla. 1968); Marathon Battery Co. v. Kilpatrick, 418 P.2d 900 (Okla. 1965); Crane Co. v. Sears, 168 Okla. 603, 35 P.2d 916 (1934).

In an ordinary rescue situation, the rescuer who subjects himself to danger and is thereby injured would be remediless without aid of the rescue doctrine. A rescuer should not be rendered once again without remedy because the need for rescue arose from a breach of warranty rather than from negligence. This concept is most aptly expressed by the court in the *Guarino* opinion:

> To require that a rescuer answering the cry for help make inquiry as to the nature of the culpable act that imperils someone's life would defy all logic.[35]

Both the law and the facts seem to support the decision reached in *Guarino v. Mine Safety Appliance Company.*

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[35] 25 N.Y.2d at 464, 255 N.E.2d at 175, 306 N.Y.S.2d at 945.