

Compelling the Good Samaritan: A Renewed Call for a Duty to Rescue

■ By Jeffrey R. Dion, Esq.

March, 1964: Kitty Genovese was murdered on the streets of New York City as thirty-eight of her neighbors watched from their apartment windows and ignored her cries for help. August, 1997: Princess Diana was fatally injured in a car crash in Paris and ten photographers at the scene may yet be charged with failing to assist an accident victim. March, 1998: A taxi driver in Denver was beaten to death in the parking lot of an apartment building and then stuffed into the trunk of his car; several residents heard and witnessed the attack but failed to call the police.

There is a communal responsibility... not only to prevent, reduce and otherwise fight crime, but also to help mitigate the damages resulting therefrom.

From time to time an incident occurs that shocks the public's conscience and raises the collective questions, "How can people turn their backs on someone in mortal danger?" and "What can be done to make bystanders more responsive to people in need of emergency assistance?". These questions often result in a renewed call for the creation of a duty to rescue. Gradually courts and legislatures have made piecemeal attempts to supplement the intrinsic moral duty to act for the benefit of a person in emergent need of assistance, with a

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An Ounce of Prevention: Proving Shopping Center Liability for Third-Party Crime

■ By Philip M. Gerson, Esq.

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In recent years, Americans have been spending more and more of their time in shopping centers. Not only do we shop, but we also dine, drink, meet, socialize, exercise, organize, and protest there. Movies, bars, health clubs, playgrounds, and other facilities complement shops and department stores as shopping center attractions.

Along with this community center lifestyle comes crime. Many courts are responding by holding that business owners and management companies may have a duty to take reasonable measures to protect patrons where criminal acts on the premises are foreseeable. This article discusses techniques for developing cases against the most common size shopping centers where your client may have been the victim of violent crime.

The retail real estate environment has every configuration of space imaginable. Aggregates of retail stores

are commonly called shopping centers. The most recognizable ones are regional and neighborhood centers.

Regional shopping centers are those that generally have very well-known names and 300,000 to 1 million

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legal duty to do so. The subject has even found its way into popular culture. In the final episode of the hit television show *Seinfeld*, the sitcom's four main characters were convicted of failing to come to the aid of a car-jacking victim. The characters' defense was disappointingly similar to the attitude shared by many: in America, the land of individual freedom, you don't have to help anyone.

In this age of community policing, community prosecution, and community justice, governments are finding ways to become more involved with the residents they are sworn to protect. At the same time, residents must also become more involved in creating and maintaining safe communities. There is a communal responsibility, both collectively and individually, not only to prevent, reduce and otherwise fight crime, but also to help mitigate the damages resulting therefrom. There is a minimum level of assistance that an individual should reasonably expect from his fellow human beings. A limited legal duty to rescue can be crafted that is compatible with our distinctively American notion of self reliance. Such a duty is efficient from an economic standpoint and much of the legal ground work has already been laid.

A legal duty to rescue should be imposed when there exists between the parties a relationship based upon intimacy, dependence, common undertaking, or economic benefit. The duty should require a person within such relationship to provide any reasonable, necessary assistance to the other when that person is exposed to grave physical harm to the extent that the assistance can be rendered without danger or peril to himself. For strangers to a victim in need, two simple duties should be imposed: first, a duty to call the police and report a crime committed in their presence; and second, a duty to neither intentionally nor negligently interfere with, interrupt, or prevent the rendering of assistance to a person in danger of grave physical harm.

The Current Duty to Rescue and its Exceptions

One of the first things law students learn in Torts is that there is no duty to rescue another in need, but if a rescue is initiated, it cannot be abandoned if the victim will be left in worse shape than before the rescue. As is frequently the case with legal rules, the basic premise is easily remembered but the exceptions to the rule are quickly forgotten. There is an excep-

tion to the common law rule in that a duty to rescue is imposed if there exists a "special relationship" between the parties. What constitutes a "special relationship" resulting in the imposition of such a duty varies widely from state to state, as discussed below. In some instances, a duty to rescue has been imposed on the general public by statute.

While not uncommon in Europe, rescue statutes are rare in the United States despite repeated calls to modernize the archaic common law doctrine against the imposition of such a duty. Vermont and Minnesota have enacted statutes creating a general duty to rescue. These statutes will typically state that a person has a legal duty to give reasonable assistance to another who is exposed to grave physical harm to the

Legal authority exists to impose liability on those who negligently or intentionally interfere with a rescue to the victim's detriment when the resulting damages were foreseeable and causally related to the defendant's tortious conduct.

extent that the assistance can be rendered without danger or peril to himself. No existing rescue statute requires a bystander to endanger his own life or safety for the sake of a rescue. Most suspend the duty in the face of serious harm and some in the face of any harm at all. Enforcement of the duty is usually through criminal penalties or civil liability.

Special Relationships That Give Rise to a Common Law Duty to Rescue

In determining whether a duty exists, courts look primarily to the nature of the parties' relationship. Exceptions have been carved out of the "no duty" rule when a "special relationship" exists between the potential rescuer and the injured or endangered party. Courts have recognized a duty when the burdened party receives some type of economic benefit from the relationship, or where there is intimacy or depen-

dence. The party on whom the duty is imposed need not be responsible for the victim's peril. He must simply be in a position to act. Some of the relationships where such a duty has been imposed include Parent - Child, Spousal, Common Carrier - Passenger, Innkeeper - Guest, Storekeeper - Customer, Host - Social Guest, Employer - Employee, Teacher or School Official - Student, Jailer - Inmate, Social Companions on an Outing, Psychotherapists - Third Parties, and Law Enforcement Officer - Crime Victim. While the examples below do not all arise out of criminal acts, they do serve to illustrate the relationships and corresponding duties.

Common Carrier - Passenger — In *Yazoo, MV. Railway v. Byrd*,¹ a passenger fell off of a train through no fault of the carrier. Railroad employees left the passenger lying on the tracks and he died. The railroad was held liable for failure to fulfill its duty to provide proper attention to the passenger after the accident.

Employer - Employee — In the case of *Szabo v. Pennsylvania RR*,² a railroad employee suffered heat stroke while working. At the direction of the employer, some co-workers took him home but left him alone in his house where he died. The Court held that the employer had a duty to provide the necessary medical assistance, and held the railroad liable for its failure to do so.

Social Companions — In *Farwell v. Keaton*,³ two friends out for a social evening became involved in a fight with six youths. One of the friends was severely beaten, but the other was unharmed. The friend who escaped did not obtain any medical assistance for the beating victim, nor did he notify anyone of his condition. In finding for the plaintiff, the Supreme Court of Michigan held that the defendant had a duty to obtain medical assistance or at least notify someone of his friend's condition. The court found that because the defendant and the decedent were companions on a social venture, a common undertaking constituting a "special relationship" was involved. The court concluded that implicit in such a relationship was the understanding that one companion would help the other in peril.

Psychotherapists - Third Parties — In *Tarasoff v. Regents of University of California*,⁴ the Supreme Court of California held that psychotherapists owed an affirmative duty of reasonable care to third parties who are threatened with physical violence by a patient under a psychotherapist's treatment even though no rela-

relationship exists between the therapist and the third-party.

Law Enforcement Officer - Bystander — A passerby who came upon an automobile collision, found one motorist beating the other in *Burdette v. Marks*.⁵ The passerby attempted to assist the woman being beaten and himself became the target of the assailant's attack. The passerby was beaten with fists, a shovel, and a metal pipe. A Deputy Sheriff who was on duty and in uniform arrived at the scene and witnessed the attack, but did not render assistance to the passerby even after such help was requested. The Virginia Supreme Court held that an on-duty Deputy Sheriff has a legal duty to render assistance to a person being severely beaten in his presence.

The current imposition of a duty to rescue through "special relationships" is at best, an uneven patchwork of common law spread across the nation. All dependent or interdependent relationships should give rise to the duty to rescue.

The Duty to Report

Even if a person is not legally obligated to render assistance to a complete stranger, he may be compelled to alert the police to a crime in progress so that the police, in turn, may render assistance as needed. Each state should enact a statutory duty for witnesses to call the police when a crime is committed in their presence. Massachusetts and Rhode Island have established a duty on the part of witnesses to report certain crimes. In May 1983, Rhode Island enacted a law making it a misdemeanor for anyone, other than the victim, to fail to report a rape that takes place in his or her presence. Violation of the statute may result in up to one year in jail, a \$500 fine or both. Massachusetts enacted a similar law in December 1983, which requires any person witnessing a crime to report that crime to the police.

The Duty Not to Interfere with or Interrupt a Rescue

While reporting statutes are usually enforced with criminal penalties, civil liability can be an effective remedy for the negligent or intentional interference with a rescue. A person who chooses not to come to the aid of another in distress should, at the very least, not prevent a third party's efforts to aid the victim. If a person prevents another from calling emergency services, blocks the path of rescue personnel en route to an emergency, or disables the municipal water

system when there is a fire emergency, he should be held civilly liable. Legal authority exists to impose liability on those who negligently or intentionally interfere with a rescue to the victim's detriment when the resulting damages were foreseeable and causally related to the defendant's tortious conduct.

In *Soldano v. O'Daniels*,⁶ a business owner was held liable for his employee's refusal of a Good Samaritan's request to call the police for the benefit of a man being beaten across the street from the establishment. Though a telephone was readily available to the employee, he refused to call the police or even allow the Good Samaritan to use the phone for that purpose. The court concluded that a possessor of land who holds it open to the public, may, by that undertaking have a duty to give assistance. At the very least, the business should accommodate another's rescue effort when there is little cost to the business.

In explaining its departure from traditional common law, the *Soldano* court noted "While courts of law should not yield to every passing current of popular thought, nonetheless it appears inevitable that unless they adopt as legal, those popular standards which they themselves, as men, regard as just and socially practicable, but which as judges, they refuse to recognize solely because they are not the standards of the past of Brian, of Rolle, of Fineux, and of Coke; they will more and more lose their distinctive common law character as part of the machinery whereby freemen do justice among themselves."⁷

Practical Efficiencies

A legal rule requiring, under pain of liability, a rescue when it can be accomplished at little cost and no danger to the rescuer is economically efficient given the low cost of completing the rescue and the high cost of failing to do so.⁸ It is that "easy rescue" which is being advocated.

Critics argue that requiring the performance of affirmative acts is overly coercive and not properly a government function, yet there are numerous laws that require employers to provide safe workplaces or require the reporting of suspected child abuse. Many states have a hit and run statute requiring any driver who is involved in an automobile collision, regardless of whether he is at fault, to give assistance to anyone injured in the collision.

Finally, some may argue that such a rule of liability could not be practically implemented. Yet, its operation in Europe, Vermont and Minnesota demonstrates that the imposition of

such a duty will not clog the courts or otherwise impede the administration of justice.

Conclusion

When technological advances have made emergency assistance just an anonymous phone call away, we can no longer allow persons to callously look away from a violent crime in progress. Legal support exists for the imposition of a duty to rescue, which could serve to prevent or at least lessen the impact of violent crime. The expansion or codification of such a duty is not a panacea; it is simply one more tool available to law enforcement as it works to strengthen the public's understanding that crime is not an issue for the police alone. Victim attorneys and advocates must work towards the creation of such a law both in the legislatures and in the courts. ■

1. 89 Miss. 308, 42 So. 286 (1906).
2. 132 N.J.L. 331, 40 A.2d 562 (Cl. Err & App., 1945).
3. 396 Mich. 281, 240 N.W.2d 217 (1976).
4. 17 Cal.3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976).
5. 244 Va. 309, 421 S.E.2d 419 (1992).
6. 141 Cal.App.3d 445, 190 Cal. Rptr. 310 (1983).
7. *Citing* Bohlen, F.H. "The Moral Duty to Aid Others as a Basis of Tort Liability," 56 U.Pa.L.Rev. 316, 334-337 (1908).
8. *See*, Epstein, R.A. "A Theory of Strict Liability," *Journal of Legal Studies* 2:151 - 204 (1973); Hasen, R.L. "The Efficient Duty to Rescue," *International Review of Law and Economics* 15:141-150 (1995).

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