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The Question of a Duty To Rescue in Canadian Tort Law: An Answer From France

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I. *Introduction*

"Am I my brother's keeper?"[1]

A man witnesses a canoeist drowning a short distance from the shore.[2] For over forty minutes the tenants of an apartment complex listen to the tortured screams of a woman being murdered in the streets below.[3] A handful of railway employees watch a boy bleed to death for want of medical attention after he was struck by a passing car.[4] The owner of a pleasure craft learns that one of his passengers has fallen overboard into an icy lake.[5] An innocent party to a motor vehicle accident finds that the driver at fault was injured as a result of the mishap.[6] In each of these examples the first mentioned party (or parties) could have safely rendered assistance to the helpless victim. The aim of the present discussion is to show that there ought to be a *legal* obligation to do so in Canadian tort law.

At present, there is no such obligation. While it has been said that the genius of the common law lies in its ability to move with the times, with respect to the recognition of a duty to rescue those in peril, it appears that it has been singularly uninspired. Reflective of the prevailing societal morals and values when first pronounced six hundred years ago, the denial of general duty[7] today seems anachronistic, incongruous and

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1. Genesis, 4:9.
2. *Osterlind* v. *Hill* (1928), 263 Mass. 73, 160 N.E. 301.
3. These were the facts surrounding the murder of Kitty Genovese in New York City, March 26, 1964. Discussed *infra* n. 184.
4. *Union Pacific R.R.* v. *Cappier* (1903), 66 Kan. 649, 72 P. 281.
5. *Horsley* v. *McLaren* [1972] S.C.R. 441, 22 D.L.R. (3d) 545; *affg.* [1970] 2 O.R. 487, 11 D.L.R. (3d) 277; *revg.* [1969]2 O.R. 137, 4 D.L.R. (3d) 557.
6. *See e.g.* Alberta Motor Vehicle Administration Act, R.S.A. 1980, c. M-22, s.76 (1).
7. There is actually a dearth of decisions the *ratio decidendi* of which stands for the proposition that there is no general duty to rescue at common law. One frequently cited American case which is on point seems today to have been wrongly decided: *Osterlind* v. *Hill, supra* n. 2, discussed *infra* at n. 110. There is, however, no similar shortage of dicta on the matter (*see e.g.*

unduly harsh. Encouragingly, the past century has witnessed a clearly discernible trend among the judiciary and the legislatures of Canada towards imposing civil (as well as criminal) liability in an increasing number of situations which previously would have yielded a hands-off response. Nevertheless, for the most part the law has remained stubbornly loyal to the past. Courts, handcuffed by history and compelled by precedent, have at times felt powerless to do more than express personal dismay at callous refusals to observe the most basic of humanitarian obligations. Unless the facts of a case fall within the rather narrowly prescribed scope of one of the recognized exceptions, tradition dictates that liability will not follow upon a refusal to rescue. The defendant's wrong in most cases consists only in the refusal to confer a gratuitous benefit, and with omissions the law generally does not concern itself.

There are, of course, those who oppose the imposition of a general duty to rescue. In support of their position they might argue that pro-duty advocates are bound by the confines of conjecture insofar as the common law has never required rescue. There is, however, a path out of the ivory towers of academic speculation — in many jurisdictions, tort law does insist on assistance. In addition to two American states[8] and many other civil law countries,[9] France has legislation which allows for liability where there has been a failure to attempt to rescue one in peril.[10] The French experience in the past forty-eight years seems proof positive that a workable formula is possible, and that the administrative and philosophical nightmares predicted by opponents of the duty are quite likely unfounded. Consequently, it will be argued that the French law provides an appropriate model which Canadian law should follow. It should be noted at the outset, though, that it is not the aim of this paper to present a comprehensive comparative survey of civil liability for

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Horsley v. *McLaren, supra* n. 5). At any rate, it seems that the proposition is widely accepted and well entrenched in the minds of Canadian tort lawyers (*see e.g.* Rainaldi, *Remedies in Tort* (1987) 16.1-96, para. 141; Linden, *Canadian Tort Law* (3d) 301) and for the sake of convenience the situations in which a duty has definitely been recognized will be referred to as "exceptions". This nomenclature does not affect the analysis.

8. Vermont, YT. STAT. ANN.tit. 12, para. 519 (Equity 1973 & 1983 Supp.); Minnesota, MINN. STAT. ANN. para. 604.05 (West 1983 Supp.).

9. *See* Rudzinski, "The Duty to Rescue: A Comparative Analysis" in *The Good Samaritan and the Law* (J. Ratcliffe ed., 1966) 91; Feldbrugge, "Good and Bad Samaritans: A Comparative Survey of Criminal Law Provisions Concerning Failure to Rescue" (1966), 14 *Amer. J. of Comp. Law* 655; Note "The Failure to Rescue: A Comparative Survey" (1952), 52 *Colum. L. Rev.* 631; DeKuiper, "Stalking the Good Samaritan: Communists, Capitalists and the Duty to Rescue" (1976), 3 *Utah L. Rev.* 529. The countries which have enacted legislation requiring rescue include: Belgium (Code Penal, art. 422), West Germany (German Draft Penal Code, art. 232), Greece (Greek Penal Code, art. 307), Italy (Italian Penal Code, art. 583) and Poland (Penal Code of the Polish People's Republic, art. 144).

10. 1988-89 Code Pénal.

nonfeasance in the two countries. Rather, the purpose of examining the French law is to show that there are not any compelling reasons why a duty *should not* be imposed. Other arguments will be made to show why a duty should be imposed.

The potential scope of an examination of a duty to rescue is daunting because of the broad definition which can be applied to the term "rescue". For present purposes, however, its meaning will be somewhat restricted. The type of situations in question will become clearer when a proposed formula for a duty is discussed[11] and as the paper progresses. For now, a few comments will suffice. A rescue situation is one in which the person in peril is in imminent danger of (further) personal injury which is of a serious nature, or of death. The cause of the peril must be a single act or circumstance, or a set of acts or circumstances which are very closely joined in time. The source of the danger may be natural or man-made. That the victim may be the author of his own misfortune is irrelevant.

The discussion which follows has been divided into six parts. In the first (Chapter II), the context of the rescue question will be set. The traditional common law position will be outlined and the history of the duty in French law will be traced. In Chapter III, article 63§2 of the French Code Penal will be examined and a formula for a Canadian duty will be proposed. Chapter IV will deal at length with the law in Canada as it stands today — the denial of a general duty and the existence of various exceptions. Some time will be spent on an examination of the attempts of several authors to provide a common explanation for all of the exceptions. While perhaps superficially attractive, it will be shown that such theories are inadequate and misleading. The issue is at bottom one of policy and should be treated as such. Chapter V will further develop this idea by examining generally the role of policy in tort law. In Chapter VI various policy arguments, pro and con, will be scrutinized under the light of the French experience. It will be shown that for a Canadian society moving into the 1990's there is little to discourage and much to recommend the imposition of a general duty to rescue. Finally, the various thoughts, concerns and ideas presented throughout the paper will be drawn together by way of conclusion in Chapter VII.

II. *History of Duty to Act at Common Law and in French Law*

It has been said that the anomalous situations in which the common law will impose liability for an omission are abnormal and disturbing.[12]

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11. *Infra*, Chapter III.
12. Bohlen, "The Moral Duty to Aid Others as a Basis of Tort Liability" (1908), 56 *U.Pa.L.Rev.* 217 and 316, at 221, 226.

Indeed, if the structure of the law was to be re-cast it might well be more logical, as Bohlen suggested,[13] to restrict the scope of tort law to cases of active misconduct and to classify all affirmative duties, whether contractual in nature or not, as an area unto itself. The law, however, is as it is. The explanation for its present state is found in the historical development of the remedies available at common law. A detailed analysis of that development would benefit the present discussion very little. (For those interested, however, the area has been canvassed in many excellent works.[14]) Suffice it to say for now that the common law has traditionally been most reluctant to require rescue.

1. *History of Duty to Act in French Law*

Before 1941 the law in France was much the same as it was in the common law world — generally speaking, legal sanctions would not follow upon a refusal to rescue someone.[15] An omission could, of course, give rise to liability if it amounted to a breach of a contractual term (whether express or implied by custom).[16] In criminal law the general rule was unqualified.[17] In tort law there were few exceptions to the general rule.[18] Nonfeasance was actionable only in regards to one upon whom the law imposed an affirmative obligation (e.g. landowners, manufacturers, and those who controlled dangerous persons or chattels).[19] As in common law countries, the result was a series of decisions which, while shocking to the moral sensibilities of the community, were nevertheless legally sound.[20] How long such a state of affairs would have been permitted to continue under normal conditions

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13. *Id.* at 226.

14. *See e.g.* Fifoot, *History and Sources of the Common Law* (1949); Holmes, *The Common Law;* McNeice and Thornton, "Affirmative Duties in Tort" (1949), 58 *Yale L.J.* 1272.

15. Tunc, "The Volunteer and the Good Samaritan" in *The Good Samaritan and the Law, supra* n. 9 at 43. The reasons for the denial of a duty were similar to those cited by English courts (*e.g.* the law was already occupied by wrongful acts, emphasis on individual liberties), see Lawson and Markesinis, *Tortious Liability for Unintentional Harm in the Common Law and the Civil Law* vol. 1 (1982) 52. Discussed *infra* chapter VI.

16. Tunc, Abstention Delictueuse para. 29 [1947] Dalloz Nouveau Repetoire 8.

17. L'Affaire Monnier, Cour d'Appel Portiers, 20 nov. 1901, [1901] Dalloz Jurisprudence, II. 85; Tunc, *Id.,* para. 2.

18. While *dicta* from a 1924 decision of the Cour da Cassation hints at a broad scope of liability for omissions, commentators suggest that the law remained unaltered and mere moral duties would not give rise to a tort action. Tunc, "The Volunteer and the Good Samaritan", *supra* n. 9 at 49.

19. Tunc, "Abstention Delictueuse", *supra* n. 16 at para. 30-33; "The Failure to Rescue: A Comparative Study", *supra* n.9 at 639.

20. Reynaud, "Omission de Secours en Droit Penal" (1945); H. et L. Mazeaud et Tunc, *Traite Theoretique et Pratique de la Responsibilitie Civille Delictuelle et Contractuelle,* 5th ed., Vol. 1, 1957, No. 526.

is unknown. While an increasing number of European countries had come to impose a positive obligation to render aid,[21] remarkable and unfortunate circumstances provided French legislators with a unique impetus.

In 1941 a German officer serving in France was murdered while witnesses stood idly by, refusing to intervene. By way of reprisal the Nazis executed 50 hostages. The Vichy government, coerced by the Germans, hoped to obviate the future need for such drastic measures by providing a means of redress through the more humane channels of the French courts.[22] The result was the enactment of a statute which required intervention for the prevention of crimes and for the assistance of persons in peril.[23] While libertarians opposed to the imposition of this duty can point to the fact that it first arose in France under the pressure of a fascist regime, subsequent events removed that stain. Although the original statute was repealed after the liberation, it is clear that the purpose of doing so was to facilitate improvements. A free French government, declaring the law void, sought not to repudiate the existence of the duty, but rather to retain it in an expanded form. The year 1945 saw the implementation of articles 61-63 of the Penal Code,[24] of which article 63§2 is, for the present purposes, the most pertinent. It provides that:[25]

> Whoever abstains voluntarily from giving such aid to a person that he would have been able to give him without risk to himself or third persons by his personal action or by calling help . . .

shall be liable.

The statute is primarily penal in nature, the criminal punishment for a breach being a term of imprisonment of between three months and five years, or a fine of between 36,000 and 1,500,000 francs, or both. Of more relevance for the present purposes, of course, is the fact that a breach can also give rise to civil liability. Typically, the claim can be dealt with as part of the criminal action, the victim appearing as *partie civile.*

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21. Portugal (1867), Switzerland (1808), Netherlands (1881), Italy (1889), Norway (1902), Russia (1903), Turkey (1926), Denmark (1930), Poland (1932), Germany (1871, 1935). Rudzinski's seminal survey, "The Duty to Rescue: A Comparative Analysis" in *The Good Samaritan and the Law, supra* n. 9 at 91, should be consulted for a detailed discussion.
22. Magnol [1946] Semaine Juridique I. 531.
23. Tunc, Commentaire [1946] Dalloz Legislation 33, 38.
24. [1947] Dalloz Legislation 130. The most significant difference between the two versions is that the later one does not require proof that serious bodily harm or death actually resulted from the failure to give succour.
25. Sera puni des memes pienes quiconque s'abstient volontairement de porter a une personne en peril l'assistance que sans risque pour lui ni pur tiers, il pouvait lui preter, soit par son action personelle, soit en provoquant un secours.

Thus, a father-in-law who refused to lend a helping hand to his drowning son-in-law was not only incarcerated for three years, but was also ordered to pay 250,000 francs in civil damages.[26]

III. *Article 63§2 of the French Penal Code and a Proposed Duty*[27]

Professor Tunc has distilled from the statute and related case law four conditions which must be met before liability can be incurred.[28] First, the person must be in danger. Unlike the situation in other jurisdictions, the duty is not, however, dependant upon the victim's *life* being in danger.[29] It is enough that there is a serious threat to bodily integrity and health.[30] Interestingly, the statute is breached even where death would inevitably have occurred regardless of whether or not aid was given,[31] although it is otherwise if the person is already dead. Second, the statute is breached only where something *could* have been done, though that "something" is not exhausted by possibilities of personal intervention. Depending on the circumstances, obtaining help from others may be required in lieu of, or in addition to, actual physical involvement.[32] Third, one is required to act only in the absence of risk to himself or third parties. Significantly, however, mere inconvenience is not sufficient to excuse action,[33] nor is risk to property.[34] Finally, the refusal to rescue must be voluntary. It will not be so where one is unaware of the need for assistance. Unlike the duties imposed elsewhere, however, in France one need not be an actual witness at the scene to be under an obligation. It is enough to be "reliably informed" of the circumstances. Thus, physicians have been found liable for failing to make a house call on a patient who was in danger of dying.[35]

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26. Trib. corr. d'Aix 27 mars 1947, D. 1947. 304.
27. During the course of research, it was found that the literature concerning art. 63§2 was based largely on older cases. The annotated Code Pénal (86th ed., 1988-89, pp. 49-51) is illustrative of this fact.
28. Tunc, "The Volunteer and the Good Samaritan" in *The Good Samaritan and the Law, supra* n. 9 at 47.
29. Such a requirement is found in Norway, Denmark, Poland, Czechoslovakia and the Netherlands. Rudzinski "The Duty to Rescue: A Comparative Analysis" in *The Good Samaritan and the Law, id.* at 96.
30. Crim. 31 mai 1949, D. 1949. 347; 21 janv. 1954, D. 1954. 224; 17 dec. 1959, D. 1960. 398.
31. Crim. 23 mars 1953, D. 1953. 371; Trib. corr. Belley, 22 Oct. 1953, D. 1953. 711.
32. Crim. 26 juill. 1954. D. 1954. 666; Trib. corr. Bayeux 22 juin 1954, D. 1954. 603.
33. "The Volunteer and the Good Samaritan" in *The Good Samaritan and the Law, supra* n. 9 at 48.
34. Rouen, 31 mars 1949, D. 1950. Somm. 9; Crim. 30 déc. 1953, D. 1954. 333; Comp. Trib. corr. Orléans, 29 nov. 1950, D. 1951. 246, note de M. Tunc; Trib. corr, d'Aix 27 mars 1947, D. 1947. 304.
35. Crim. 31 mai 1949, D. 1949. 347.

The French statute provides a sensible, comprehensive model for the duty which should be imposed in Canada. First of all, the policy underlying a duty to rescue would not be well served if an obligation existed only where the victim's *life* was in danger. The call for humanitarian behaviour is as real, and nearly as strong, when serious injury is threatened as when life is threatened. It would be most arbitrary and callous to turn a blind eye where, for example, mangled limbs would follow from a refusal to give aid if civil liability was possible where death would follow. Further, while there will be instances where the gravity of the situation will be readily apparent, it would seem to invite problems to restrict the imposition of a duty to such cases. For that reason, the French law is probably also wise to not encourage speculation as to whether or not death is inevitable.[36] Even for those trained in emergency medical procedures, the frenzied circumstances in which a call for help is likely to arise do not portend accurate prognostications. The French statute should also be followed insofar as it does not require the rescue of property which is at risk. Whereas the imposition of a duty is justified where a *person* is facing danger, it may not be where a *thing* is facing danger.

> A prime concern of any legal system is the protection of certain things (tangible or not) which are of value to human beings. Not all these things can have the same value; nor can they always be given efficient protection against all invasions. A hierarchy is thus dictated by moral, economic, and other considerations with the result that the law affords better protection to the better things in life.[37]

On whom should a duty be imposed? Again, the French legislation gives an appropriate response, congruent with the policy of a duty. Some have suggested that only those actually witness to the peril should be obliged to act.[38] It is not at all clear, however, why a duty should be so dependant on chance. If a witness who is physically incapable of undertaking a rescue himself calls over his hedge to his neighbour and explains the situation, why should the neighbour not be similarly required to help? Of course, the line must be drawn at some point — but it is a point which French courts have been able to locate. Thus, a duty should be imposed on one who is either present at the scene or who is "reliably informed". The "reasonable man" standard should be used in deciding

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36. *Supra* n. 30.
37. Lawson and Markesinis, *Tortious Liability for Unintentional Harm in the Common Law and the Civil Law, supra* n. 15 at 49.
38. *See e.g.* Rudzinski, "The Duty to Rescue: A Comparative Analysis" in *The Good Samaritan and the Law, supra* n. 9 at 123. He notes that this is the position in some European countries.

whether a person so informed assessed the circumstances and the need for help properly. However, even if it would otherwise be imposed, a duty may be negated by the circumstances. It would be futile to cast the standard excessively high. A strong, intractable, self-preservationist streak runs through most, a fact which simply can not be denied. Therefore, a bystander should not be obliged to injure himself in an attempt to assist others. (Of course, given the goal being pursued, it should not be open to him to employ methods which would imperil third parties.) The more difficult issue concerns the degree of danger which should justify passivity. It has been suggested that an arithmetic analysis should be used, and that inaction should be excused where "the effort, risk or cost of acting is disproportionately less than the harm or damage avoided."[39] This, however, is not an advisable approach as it would once again require an unrealistically sophisticated appraisal of the circumstances. Although it might be hoped that the possibility of some measure of personal sacrifice would be assumed, the French law is probably realistic in imposing a duty only where it can be satisfied without risk. Neither the call of conscience nor the threat of legal liability can compel most people to knowingly endanger themselves.

Depending on the nature of the situational demands, the requirement under French law is to personally intervene, or obtain help, or both. This is sensible. The spirit of the duty would not be observed if one could walk away simply because personal involvement was impossible if others, who could help, were summonable. Whatever action is called for, however, the rescuer should not be expected to satisfy too high a standard of care. Beggars can not be choosers, and it must be remembered that the victim is getting something for nothing. In contrast to the early common law,[40] French law has been appropriately forgiving of those who mishandle rescue attempts. The emotions and anxiety experienced during times of crises are accounted for, and resulting errors are usually excused.[41] The statutory protection from civil suits which is granted to doctors and nurses in Canada today[42] should be extended to all rescuers. This would encourage Good Samaritanism by denying liability for mishandled efforts except where the complained of conduct amounted to "gross negligence".

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39. Rudolph, "The Duty to Act: A Proposed Rule" (1965), 44 *Neb. L. Rev.* 409 at 509.
40. *See e.g. Anderson* v. *Northern Ry Co.* (1875), 25 U.C.C.P. 301 (C.A.); *Kimball* v. *Butler Bros.* (1910), 15 O.W.R. 221 (C.A.).
41. For further discussion, see Tunc, "The Volunteer and the Good Samaritan" in *The Good Samaritan and the Law, supra* n. 9 at 50-51.
42. *See e.g.* Emergency Medical Aid Act R.S.A. 1980, c. E-9, s. 2. For further discussion, see *infra* at n. 86.

IV. *Current Law: General Absence of Duty and Exceptions*

Common law courts have long felt uncomfortable with the law's general denial of a duty to assist one in peril. When first articulated centuries ago this general principle, reflective of the prevailing values, was accepted without discomfort. As the societal ethos of rugged individualism gradually gave way to a more collectivist spirit, however, judgments denying liability increasingly came to the accompanied by statements of apology and sympathy.[43] Unsuccessful plaintiffs were commonly comforted with the assurance that while their alleged tortfeasors had evaded legal condemnation, judgement of another sort would eventually right any wrongs.[44]

> With the humane side of the question courts are not concerned. It is the omission or negligent discharge of legal duties only which come within the sphere of judicial cognizance. For withholding relief from the suffering, for failure to respond to the calls of worthy charity, or for faltering in the bestowment of brotherly love on the unfortunate, penalties are found not in the laws of men, but in that higher law, the violation of which is condemned by the voice of conscience, whose sentence of punishment for the recreant act is swift and sure.

Inevitably, time began to see the crystallization of conscience into law as the number of "exceptional" situations in which a duty would be imposed grew even larger. Today liability for a failure to act will lie in widely disparate circumstances, many of which would not have been actionable under the traditional common law position. A striking example of this can be seen in regards to the position of ship operators who fail to come to the aid of passengers who have fallen overboard. In 1913 the Appellate Division of the Ontario Supreme Court, noting the lack of precedents which could support the imposition of a duty, dismissed a passenger's action.[45] Six decades later the Supreme Court of Canada in *Horsley* v. *McLaren* expressly held that the earlier decision was no longer good law.[46]

1. *Exceptions to the General Rule*[47]

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43. *See eg. Soulsby* v. *City of Toronto* (1907), 15 O.L.R. 13, 18; *Buch* v. *Armory Mfg. Co.* (1898), 69 N.H. 257, 44A. 809, 810; *Yania* v. *Bigan* (1959), 397 Pa. 316, 332, 155A. 2d 343, 346.

44. *Union Pacific Ry.* v. *Cappier* (1930), 66 Kan. 649 at 658. Of course, as Prosser notes, such remedies are in a "wicked world singularly ineffective either to prevent harm or compensate the victim." *Law of Torts* (1964) 336.

45. *Vanvalkenberg* v. *Northern Navigation Co.* (1913), 30 O.L.R. 142, 19 D.L.R. 649.

46. [1972] S.C.R. 441, 22 D.L.R. (3d) 545, 546, 549.

47. As will become clear many of these "exceptions" do not fit squarely within the concept

(i) *Relationships of Economic Benefit*

The Supreme Court of Canada has on a number of occasions recognized that a duty *may* arise where a relationship of economic benefit exists. In *Jordan House Ltd.* v. *Menow*,[48] Mr. Justice Laskin (as he then was) agreed with the lower court's decision to impose liability upon a hotel which had served beer to a patron who was past the point of visible intoxication and later ejected him out into the night. The action was brought by the patron after he was struck by a vehicle as he weaved his way down a much-traveled highway on foot. It was held that while motorists might be expected to succumb to Good Samaritan impulses and take steps to ensure that the plaintiff safely reached his destination, they were under no legal duty to do so. The hotel, on the other hand, was under such a duty. The basis for the difference seems primarily to have been that the hotel stood in an invitor-invitee relationship with its patron, although, significantly, it was stressed that "a great deal turned on the knowledge of the [hotel] of the patron and his conditions . . . ."[49] Not every tavern-owner would be obliged to "act as a watch dog for all patrons who enter his place of business and drink to excess."[50] The litigants in the *Jordan House* case were particularly well acquainted, and the plaintiffs propensity to over-consumption and subsequent reckless behaviour was well known to the defendant. Indeed, the defendant had earlier ordered its employees not to serve the plaintiff unless he was accompanied by a responsible person.[51]

The recent decision in *Crocker* v. *Sundance Northwest Resorts Ltd.*[52] once again found the Supreme Court of Canada imposing a duty of positive action largely on the basis of an economic relationship.

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of "rescue" as it was earlier defined. What is sometimes required are preventative measures. They are nevertheless included because they represent instances in which the law imposes an obligation of affirmative action, the aim of which is to assist another. That such instances are very similar in nature to "pure rescue" situations is obvious.

What follows is intended to be more illustrative that exhaustive. Regrettably, some areas (e.g. responsibilities of occupiers' of land, governmental liability) had to be left out because of limitations on the length of this paper. The omission of other areas (e.g. those concerning financial loss, as opposed in physical injury; *see e.g. Monash* v. *Lockhart and Ritchie Ltd.* (1978), 24 N.B.R. (2d) 180, 95 D.L.R. (3d) 647 caused less anxiety. Fortunately, these sacrifices will not affect the strength of the argument which follows.

48. [1974] S.C.R. 239, 38 D.L.R. (3d) 105; *affg.* [1971] 1 O.R. 129, 14 D.L.R. (3d) 345; *affg.* [1970] 1 O.R. 54, 7 D.L.R. (3d) 494.

49. *Id.* at 113. Mr. Justice Ritchie, concurring on the result based his decision on narrower grounds. For him the duty imposed was simply to not serve the plaintiff alcohol when he was drunk.

50. *Id.* at 113.

51. *Id.* at 107.

52. [1988] 1 S.C.R. 1186, 51 D.L.R. (4th) 321, 44 C.C.L.T. 225; *revg.* (1985), 20 D.L.R. (4th) 552, 33 C.C.L.T. 73; *which revd.* (1983), 150 D.L.R. (3d) 478, 25 C.C.L.T. 201.

The defendant, a ski resort operator, in an effort to promote its facilities and improve its financial future, held a "tubing" race in which participants slid down a steep, mogulled hill on inner tubes. The plaintiff and a friend entered the competition and paid a $15.00 entry fee in the hopes of winning the $200.00 offered in prize money. The morning before the first race was marked by heavy drinking as Crocker imbibed various alcoholic beverages, some of which he had brought with him and some of which he had purchased from the defendant. Between the first round of competition, in which Crocker and his team-mate were victorious, and the second round, the plaintiff persisted in drinking and became increasingly intoxicated. The owner of the resort, Beals, noticed Crocker's severely impaired condition and asked the plaintiff if he was fit to continue on in the competition. Receiving an answer in the affirmative, Beals dropped the matter. Durno, the resort's manager, was also alarmed by the situation and suggested to Crocker that he not participate in the second heat. The suggestion was ignored and no further efforts were made to dissuade the plaintiff. During the race Crocker hit a mogul, was tossed from his tube and injured his neck. The result was quadriplegia.

Madam Justice Wilson, delivering the Court's unanimous opinion, overturned the decision of the Ontario Court of Appeal and found that the defendant did owe an obligation to Crocker. Her Ladyship focussed on the line of reasoning used in *Jordan House,* its precursors and progeny, and held that "when a ski resort establishes a competition in a highly dangerous sport *and runs the competition for profit,* it owes a duty of care towards visibly intoxicated participants."[53] It is one thing to encourage or permit sober competitors to race. It is another matter entirely to allow drunken individuals who are incapable of properly slowing or steering their tube with their feet to do the same. Wilson J. also found that the duty to take all reasonable steps to prevent the plaintiff from participating was not met by the defendant's rather tepid efforts. In the end the trial judge's apportionment of fault was adopted, the plaintiff was held to be 25% contributorily negligent and a new trial was ordered to assess the quantum of damages for which the defendant was liable.

In *Arnold* v. *Teno*[54] a four-and-a-half year old infant plaintiff was successful in an action against the driver and owner of an ice cream vending truck. After making a purchase the child happily dashed into the street with her treat. Upon doing so she was struck by a vehicle. The

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53. *Id.* at 1198 e (emphasis added). The element of economic benefit is emphasized elsewhere in the judgment at 1197f, 1197h and 1204f.

54. (1978), 83 D.L.R. (3d) 609, [1978] 2 S.C.R. 287, 3 C.C.L.T. 272; *affg. but varying* 67 D.L.R. (3d) 9, 11 O.R. (2d) 585; *which affd.* 7 O.R. (2d) 276.

Supreme Court of Canada found the driver of the vending truck guilty of negligence based on his failure to warn his young customer of the oncoming traffic, the presence of which would have been readily apparent had he exercised the slightest precaution and glanced out a window at the rear of his vehicle. A duty to take such precautions arose as soon as the defendants put the ice cream truck into operation. At that moment,[55]

> ... they put themselves in such a relationship with their child patrons that they became the neighbour to those children and in the words of Lord Atkin, "must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour."

Mr. Justice Spence noted that the truck, its appearance, and the products and their appearance were all carefully designed to attract child customers. The *quid pro quo* of carrying on the business of selling ice cream in such a manner was the requirement of ensuring that it was done with "ordinary regard for the safety of others".[56] If the cost of fulfilling such a requirement (e.g. by manning each truck with two attendants instead of one) was economically prohibitive, "then the company should not have been carrying on the business ...."[57]

(ii) *Relationships of Control or Supervision*

Individuals often stand in a relationship of control or supervision in which one is dominant over the other. In some instances the price consequent on that power is the obligation to protect the subordinate party from harm. In *Teno* v. *Arnold* the driver and owner of the ice cream truck claimed a contribution from the infant plaintiff's mother on the basis that she had failed in her duty to protect her daughter from harm. While denying that there had been any such breach,[58] Spence J. did confirm the lower court's finding that a duty did exist, citing with approval[59] the decision of the Supreme Court of New Zealand in *McCallion* v. *Dodd*[60]

> A stranger would render himself liable in negligence only if he had on a particular occasion assumed or accepted the care and charge of the child. It seems to me, however, that parents are in a somewhat different

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55. (1978), 83 D.L.R. (3d) 609, 617 (*per* Spence J.).
56. *Id.*
57. *Id.* The court was not unanimous on this point. "The law does not impose a duty to take all safety precautions". *Id.* at 643 (*per* Pigeon J.).
58. *Id.* at 625 (De Grandpré, J. dissenting in part).
59. *Id.* at 623.
60. [1966] N.Z.L.R. 710, 721 (*per* North, P.). *See also* Canadian Criminal Code R.S.C. 1985, c. C-46, s. 215 (1) (duty tending to preservation of the lives of dependents).

> position. . . . I do not consider that a parent *while present* is ever able to shed responsibility for the child's safety. . . .

Similarly, in an employer-employee relationship where the former may dictate working conditions, a duty exists.[61] An obligation has also been recognized as between school and pupil,[62] innkeeper and guest,[63] ship master and passenger,[64] jail and prisoner,[65] and hospital and patient.[66]

Frequently a relationship of control or supervision may give rise to a duty which is owed not to the party under control, but rather to a third party. Thus, a parent owes a duty to ensure that a child does not cause injuries to third parties,[67] and prisons and psychiatric institutions are obliged to protect the public from escaped prisoners[68] and patients.[69] In *Wellesley Hospital* v. *Lawson* Laskin, C.J.C. stated:[70]

> It was not doubted by counsel for the parties that at common law a hospital, especially one providing treatment for mentally ill persons, would be under common law liability if by reason of its failure to provide adequate control and supervision injury occurred to third persons by reason of the conduct or behaviour of a patient.

Finally, an affirmative obligation may also be imposed on one who has control over a dangerous object.[71]

(iii) *Creation of Danger*

Related to the idea that a duty will be imposed on one who has control over an instrument of danger is the idea that a duty will be imposed on one who non-negligently creates a danger. In *Oke* v. *Weide Transport and Carra*[72] the defendant non-negligently collided with a sign post,

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61. Fleming, *Law of Torts* (1983) 142; *Remedies in Tort, supra* n. 7 at 16.1-102.
62. *Williams* v. *Eady* (1893), 10 T.L.R. 41; *Moddejonge* v. *Huron County Bd. of Educ.*, [1972] 2 O.R. 437 (HC.J.); *Portelance* v. *Bd. of Trustees R.C. Sep. Sch. of Grantham*, [1962] 2 O.R. 365, 32 D.L.R. (2d) 337 (C.A.).
63. Fleming, *Law of Torts, supra* n. 61 at 142; *Remedies in Tort, supra* n. 7 at 16.1-102.
64. *Horsley* v. *McLaren supra* n. 5.
65. *Timm* v. *R.* [1965] 1 Ex. C.R. 174; *Ellis* v. *Home Office* [1953] 2 All E.R. 149; *Howley* v. *R.*, [1973] F.C. 184.
66. *Lawson* v. *Wellesley* (1975), 9 O.R. (2d) 677; *affd. on other grounds*, [1978] 1 S.C.R. 893.
67. *Hatfield* v. *Pearson* (1956), 6 D.L.R. (2d) 593; *Starr* v. *Crone*, [1950] 4 D.L.R. 433.
68. *Home Office* v. *Dorset Yacht Co.*, [1970] A.C. 1004, [1970] 2 W.L.R. 1140, [1970] 2 All E.R. 294; *affg.* [1969] 2 Q.B. 412, [1969] 2 All E.R. 564.
69. *Holgate* v. *Lancashire Mental Hosp. Bd.*, [1937] 4 All E.R. 19. In the United States the duty is even broader. *See Tarasoff* v. *Regents of Univ. of Calif.* (1976), 131 Cal. Rptr. 14.
70. (1978), 76 D.L.R. (3d) 688, 691, [1978] 1 S.C.R. 893.
71. *See e.g. Stermer* v. *Lawson* (1977), 79 D.L.R. (3d) 366; *affd.* (1979), 11 C.C.L.T. (B.C.C.A.) lending a motorcycle to a young, unlicensed driver; Rudolph, "The Duty to Act: A Proposed Rule", *supra* n. 39 at 503; *Ayers* v. *Hicks* (1942), 40 N.E. 2d. 334.
72. (1963), 41 D.L.R. (2d) 53.

leaving it bent and protruding from the pavement at right angles. The deceased was later "speared" by the post when it penetrated the floor boards of his car and deflected up into his chest. The majority of the Manitoba Court of Appeal dismissed the plaintiff's action on the grounds of foreseeability, reserving judgment on the question of whether or not the defendant was under a duty to the deceased to do anything about the post.[73] In a celebrated dissent Freedman, J.A., argued that the defendant should be held liable. Unlike other motorists on the highway, Carra's opportunity to observe the danger was more than fleeting. Indeed, he had stopped to clear away some debris resulting from his own accident. Further, he was responsible for the creation of the hazard which eventually caused the death. The essence of Mr. Justice Freedman's opinion is supported elsewhere, affirmative obligations being imposed in various circumstances where a defendant's actions created a situation of peril.[74]

(iv) *Gratuitous Undertakings*

This is a difficult area; difficult because the law is still in an unsettled state, and difficult because it encompasses a number of related but distinct issues. The matter can best be understood if approached in two stages. The first is to ascertain when, if ever, a gratuitous undertaking can give rise to an obligation to act. The second is to determine whether liability does, and should, lie where a person abandons a gratuitously rendered rescue effort mid-stream, leaving the victim undoubtedly disappointed, but not detrimentally affected.

Generally, a mere promise, unsupported by consideration, will not ground an action in either tort or contract. There is, however, an underdeveloped body of law which suggests that where the undertaking is coupled with reliance, a tortious duty may be imposed. In effect, a party, through past conduct, may create a self-imposed obligation to act. Such was the case in *Mercer* v. *South Eastern and Chatham Railway Co.*.[75] The defendant there had voluntarily commenced a routine of locking a gate which opened onto its railway tracks whenever a train

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73. *Id.* at 58.

74. *Jordan House* v. *Menow, supra* n. 48; *Depeu* v. *Flatau* (1907), 100 Minn. 299, 11 N.W. 1 (ejecting an ill person into a wintry night); *Ontario Hospital Services Commission* v. *Borsoski* (1973), 54 D.L.R. (3d) 339, 7 O.R. (2d) 83 (instructing an intoxicated person to drive an automobile); *Haynes* v. *Harwood*, [1935] 1 K.B. 146, [1934] All E.R. Rep. 103 (leaving a horse drawn van unattended in a crowded street). As seen from the last case the category of "creation of danger" is not one which easily or necessarily can be made to parallel the category of "misfeasance".

75. [1922] K.B. 549.

passed by. The object of the practice was to prevent that which in fact occurred. The plaintiff, aware of and relying on the defendant's custom, was run down by a locomotive after passing through the unlocked gate. Regrettably, through carelessness the defendant had deviated from its usual procedure. Liability followed.[76]

> [T]o those who knew of the practice that was a "tacit invitation" to cross the line.... It may seem a hardship on a railway company to hold them responsible for the ommission to do something which they were under no obligation to do, and which they did only for the protection of the public. They ought, however, to have contemplated that if a self-imposed duty is ordinarily performed, those who knew of it will draw an inference if on a given occasion it is not performed. If they wish to protect themselves against that inference being drawn they should do so by giving notice, and they did not do so in this case.

Similarly, the Supreme Court of Canada held the Crown partially responsible for the damage occasioned when two ships met in the St. Lawrence River.[77] A set of navigational lights gratuitously installed by the Crown had drifted some 40 feet from its original, proper position, a fact which contributed to the accident. A number of other decisions also support the view that the combination of a gratuitous undertaking and resulting reliance can lead to a duty to act.[78]

The second issue to be addressed in regards to gratuitous undertakings concerns the standard of care which will be imposed on one who commences to effect a rescue in the absence of a duty to do so.[79] On the one hand, the famous American case of *Zelenko* v. *Gimbel Bros.*[80] stands for the proposition that one who gratuitously undertakes a rescue must not fail to do what "an ordinary man would do in performing the task". A different approach was adopted in *East Suffolk Catchment Board* v. *Kent*[81] where it was held that a public body would not be liable for

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76. *Id.* at 554. In an earlier Canadian case, a contrary decision was reached on very similar facts. *Soulsby* v. *City of Toronto supra* n. 43. Recent decisions greatly undermine its authority.

77. *The Queen* v. *Nord-Deutsche Versicherungs-Gelleschaft,* [1971] S.C.R. 849, 20 D.L.R. (3d) 444 *but see Cleveland Cliffs S.S.Co.* v. *R.,* [1957] S.C.R. 810, 10 D.L.R. (2d) 673, 76 C.R.T.C. 14.

78. *See e.g. Grossman and Sun* v. *The King,* [1952] 1 S.C.R. 571, [1952] 2 D.L.R. 241; *Hendricks* v. *The Queen,* [1970] S.C.R. 237; *County of Parkland* v. *Stetar,* [1975] 2 S.C.R. 884.

79. Temporally, this issue finds its origins on the other side of the onset of the "victim's" plight. The questions here deal not with the events leading up to the need for assistance, but with events occuring after that time.

80. (1935), 287 N.Y.S. 134; *affd. without reasons* (1935), 287 N.Y.S. 136.

81. [1941] A.C. 74, [1940] 4 All E.R. 527. The case has been much criticized, and subsequent decisions have put its status into doubt. *City of Kamloops* v. *Nielsen,* [1984] 2 S.C.R. 2, 29 C.C.L.T. 97, [1984] 5 W.W.R.1, (*per* Wilson J.); *Anns* v. *Merton London Borough Council,* [1978] A.C. 728, [1977] 2 W.L.R. 1024, [1977] 2 All E.R. 492.

failing to expediently continue on with a rescue operation unless by doing so it inflicted injury on the plaintiff. The Ontario Court of Appeal subsequently expanded that principle to cover private individuals who gratuitously intervene. In *Horsley* v. *McLaren*[82] Mr. Justice Jessup, basing his comments on *Kent,* stated that "where a person . . . without any duty to do so undertakes to . . . go to the aid of another, he incurs no liability unless what he does worsens the condition of the other."[83] Of course, it is arguable that the mere fact of commencing, then abandoning, an effort may in some instances have a detrimental effect. Other potential rescuers may pass by, confident that the situation is in hand. More dramatically, a drowning man, seeing help apparently approaching, may release a flotation device which he is desparately clinging to for life in order to expend his last precious ounces of energy to thrash towards his saviour. Often, however, a change of heart by the rescuer will leave a rescuee in no worse a position.

The position taken by the Court of Appeal in *Horsley,* while perhaps evincing an un-neighbourly attitude on its face, on further analysis reveals yet another instance of legal encouragement of Good Samaritans. The strict requirement of *Zelenko* has been said to underlie the refusal of many American doctors to become involved at accident scenes.[84] (Better to not act at all than to get in over one's head only to have a court later condemn one's efforts as insufficient.) On the other hand, the rule that liability will lie only if the rescuer's conduct has detrimentally affected the rescuee's status quo is intended, on policy grounds, to foster rescues by limiting the possibility of liability for unsuccessful undertakings. If it were otherwise, potential Samaritans might be discouraged where they could not at the outset confidently judge what exactly would be required and whether they would be up to such a task. The down side of such a rule, of course, is that it also can be used in defence of callousness.[85] Obviously, the position taken in this paper is that such a rule, while praiseworthy in its object, provides an incomplete and unsatisfactory call for succour. It would be better to require assistance, but to also treat rescuers generously by recognizing generally the type of protection afforded doctors under Good Samaritan statutes.[86] Liability for

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82. [1970] 2 O.R. 487.

83. *Id.* at 500. Mr. Justice Schroeder echoed that view, *id.* at 495. Unfortunately, the Supreme Court of Canada, on appeal, refrained from commenting on this matter.

84. Linden, "Rescuers and Good Samaritans" (1971), 10 *Alta. L. Rev.* 89 at 91.

85. Presumably, all else being equal, a rescuer could swim a mile in rough seas to save a drowning child, change his mind five yards from shore and allow the child to drown. The rescuer would surely be ostracized, and it seems unlikely that a legal system which would permit such conduct would be held in high public esteem.

86. *See e.g.* Emergency Medical Aid Act, *supra* n. 42.

mishandled or aborted efforts should give rise to liability only where the conduct amounted to "grossly" unacceptable or inappropriate behaviour. "Damned foolish" behaviour, as opposed to mere "foolish" behaviour, must never be countenanced.[87]

(v) *Statutory Duties*

The exceptions canvassed to this point evince a recognition by the judiciary that the imposition of a duty of affirmative action is, in many instances, proper and necessary. There is also a body of law in which Parliament and the provincial legislatures have played a role.

While much of the legislation imposing positive obligations is only peripherally related to the issue of a duty to rescue (i.e. by requiring that measures be taken to *prevent* perilous situations from arising),[88] "hit-and-run" statutes bear directly on the matter. Illustrative is the Alberta Motor Vehicle Administration Act:[89]

> 76(1) When an accident occurs on a highway, the driver or other person in charge of the vehicle that was directly or indirectly involved in the accident...
>
> (b) shall render all reasonable assistance....

Failure to do so may result in a fine of $500 or imprisonment for a term not exceeding six months.[90] Significantly, the statute is also said to ground a civil action if breached.[91] The provision is interesting for its scope of applicability. The legislature felt that it was justifiable to impose a duty although the only nexus between the parties is common involvement in an accident. More to the point, one must render aid regardless of fault,[92] and even through one's involvement in the accident may only be "indirect". Undeniably praiseworthy in its aim, the statute

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87. Judge Magruder distinguished between "gross negligence" and "negligence" in this way. "God-damned foolish" behaviour, or "recklessness", is, of course, right out of the question.

Despite criticism and derision (Baron Rolfe sarcastically described "gross negligence" as ordinary negligence "with the addition of a vituperative epithet" *Wilson* v. *Brett* (1843), 11 M.&W. 113, 152 E.R. 737.) the courts have managed to make sense of the distinction. Linden, *Canadian Tort Law, supra* n. 7 at 153-155; *Kingston* v. *Drennan* (1897), 27 S.C.R. 46; *Cowper* v. *Studer,* [1950] S.C.R. 450.

88. *See e.g. Commerford* v. *Halifax School Commissioners,* [1950] 2 D.L.R. 207 (N.S.) (snow removal by-law).

89. *Supra* n. 6. *See also* Canadian Criminal Code R.S.C. 1985, c. C-46, s.252(1); Highway Traffic Act R.S.O. 1980, c. 198, s.174(1)(6); Motor Vehicle Act R.S.B.C. 1979, c. 288, s. 62(1).

90. R.S.A. 1980, c. M-22, s. 101(1).

91. Linden, *Canadian Tort Law* (4th ed. 1988) 283.

92. There exists, independently of the statute, a duty to render aid where the driver was tortiously responsible for the injury of the other. *Racine* v. *CNR,* [1923] 2 D.L.R. 572, [1923] 1 W.W.R. 1439, 19 Alta. L.R. 529 (C.A.).

is nevertheless somewhat illogical and arbitrary. Imagine a situation where A, the injured party, was driving while intoxicated, at an excessive speed, the wrong way down a one way street. B, unharmed in the accident which inevitably occurred, was proceeding along the same street in full compliance with the law and common sense. Moments after the collision C, a physician, drove slowly past the mangled frames of A and his car as they lay motionless in the street. It is not altogether logical that as between two innocents (B and C) only he who was the victim of a wrongdoer's actions should be obligated to give succour or face fines or imprisonment. True, B would likely be easier to identify as a defendant if legal proceedings did subsequently arise. Such administrative concerns should not, however, dictate the existence or denial of a duty. Nor can it be said that those involved in accidents are invariably better able to assess the existence or extent of injuries which require attention. Indeed, in the example above C would be more capable of making such decisions and providing such aid as was needed. Obviously there will be situations where it would be impractical and even dangerous for passing motorists to stop and investigate. A busy freeway at rush hour on a Friday afternoon might give rise to such situations. However, under the duty proposed, one would not be required to do that which would endanger lives. Liability should lie only where one passes by in circumstances in which the reasonable man would have ascertained whether aid was needed.

The policy of section 76(1) of the Alberta Motor Vehicle Administration Act, and of similar legislation, is clear. Parliament and provincial legislatures have indicated a new direction for the law by getting involved in the business of encouraging, nay, requiring Good Samaritanism. That is important. What is also important, unfortunately, is that lawmakers in Canada are still bound to the past, imposing duties to rescue only where some relationship, however tenuous, arbitrary and haphazard, provides a comforting excuse for doing so.

A number of other statutes requiring action to be undertaken for the protection or aid of others have been relied upon (in part, at least) to help create duties in tort law.[93] For example, Mr. Justice Spence, of the Supreme Court of Canada, concurred with the "forthright and enlightened" reasoning of the Ontario Court of Appeal in *O'Rourke* v. *Schacht*[94] in which the Ontario Police Act formed part of the basis of the

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93. Mr. Justice Linden of the Ontario High Court of Justice has written extensively in this area. *See Canadian Tort Law supra* n. 89 at 285-303; "Rescuers and Good Samaritans", *supra* n. 84 at 91-97; "Tort Liability for Criminal Nonfeasance" (1966), 44 *Can. Bar Rev.* 25 at 34-65.

94. [1976] 1 S.C.R. 53, 55 D.L.R. (3d) 96; *affg.* [1973] 1 O.R. 221, 30 D.L.R. (3d) 641.

civil duty imposed upon police officers to warn motorists of dangerous conditions on highways. Mr. Justice Laskin (as he then was) relied on the legislative policy of the Canada Shipping Act as a "fortifying element in the recognition of the [common law] duty" of ship masters to rescue passengers who fall overboard.[95] The Act provides that ship masters who fail to render assistance to anyone "found at sea and in danger of being lost" can be liable for a fine.[96] In *Colonial Coach Ltd.* v. *Bennett and CPR*[97] the defendant railway company was required under the Railway Act to erect a fence to prevent cattle from getting onto railway lands.[98] The statute provided for civil liability for any loss occurring "on the railway lands".[99] The dispute arose after a cow had wandered off a farmer's land, through a hole in the railway fence and onto a highway where it was struck by the plaintiff's vehicle. Although the loss did not occur on "railway lands", liability followed. The Ontario Court of Appeal found a tortious duty, their discovery aided by the existence of the Act's provisions. There are other examples.[100] However, it is important to appreciate that the existence of a statutory duty is merely one factor to be considered in the search for tort obligations. The latter does not invariably follow from the former.[101]

However, even those statutory duties which do not translate into tort obligations can be important insofar as they illustrate societal views. On pain of fine or imprisonment,[102] section 3(1) of the Alberta Child Welfare Act provides that:[103]

> Any person who has reasonable and probable grounds to believe and believes that a child is in need of protective services shall forthwith report the matter to a director.

Humanitarianism dictates that where children are involved relatively little (a belief based on reasonable and probable grounds) is needed to justify the possible incurrence of the ills so feared by those opposed to affirmative duties. Canadians accept (and perhaps welcome) this type of legislation, in part at least, because children are typically unable to help

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95. *Horsley* v. *McLaren, supra* n. 5 at 22 D.L.R. (3d) 560.
96. R.S.C. 1970, c. S-9, s. 516(1).
97. (1967), 66 D.L.R. (2d) 396.
98. R.S.C. 1952, c. 234, s. 277.
99. *Id.* at s. 392.
100. While it is not clear, Criminal Code provisions requiring certain individuals to provide the necessaries of life to children may also ground a tort action. *See e.g. Algiers* v. *Tracy* (1916), 30 D.L.R. 427; *cf. Childs* v. *Forfar* (1921), 51 O.L.R. 210. Discussed in Linden, *Canadian Tort Law, supra* n. 91 at 287-289.
101. *See e.g. Commerford* v. *Halifax School Commission, supra* n. 88; *Bhadauria* v. *Seneca College of Applied Arts & Tech. Bd. Of Gov.* (1981), 17 C.C.L.T. 106, 37 N.R. 455 (S.C.C.).
102. R.S.A. 1980, c. C-8.1, s. 3(6).
103. *Id.*

themselves, and because of the moral repulsion felt towards those who abuse and those who watch in silence. In this regard, an analogy between child abuse situations and rescue situations seems sound. Regardless of the victim's age, a refusal to render aid to one in need should and does attract public censure.

Finally in the area of statutory duties, it should be noted that the Quebec Charter of Human Rights and Freedoms recognizes that.[104]

> Every human being whose life is in peril has a right to assistance.
>
> Every person must come to the aid of anyone whose life is in peril, either personally or calling for aid, by giving him the necessary and immediate physical assistance, unless it involves danger to himself or a third person, or he has another valid reason.

Under the law of Quebec (but not under the laws of common law provinces) harm caused by the breach of such a provision may render the wrongdoer liable for a criminal offence, notwithstanding the fact that the legislation is a provincial enactment. Thus, in *R.* v. *Fortier*[105] the defendant was convicted of homicide on the basis of a failure to provide necessaries to a dying common law spouse.

2. *Summary of the Exceptions*

A number of commentators have sought to distil from the various exceptions a common basis upon which affirmative obligations are imposed and can be rationalized. Most popular is the "benefit theory" which holds that a duty will be placed upon one who has "voluntarily brought himself into a certain relationship with others from which he obtains or expects a benefit."[106] The element of gain purportedly provides a justification for the exacting of a heavy burden,[107] as that burden is said to be based on "a consideration moving to the obligor, though not necessarily from the obligee."[108] It is suggested, however, that unless stretched to an untenable extent, the existence of a benefit (actual or potential) moving to obligor provides at best only a partial explanation. The proposition that "the presence of the benefit [is] a common

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104. Charter of Human Rights and Freedoms, R.S.Q. 1977, c. C-12, s. 2.
105. 17. Nov. 1980, File No. 500-01-050-805, Sup. Crt., Longueil, Que., discussed in Law Reform Commission of Canada, Working Paper 46, *Omissions, Negligence and Endangering* (1985) 18.
106. McNeice & Thornton, "Affirmative Duties in Tort", *supra* n. 14 at 1282-1283; Bohlen, "The Moral Duty to Aid Others as a Basis of Tort Liability", *supra* n. 12 at 220.
107. McNeice & Thornton, *id.* at 1283-1284; Harper, *Torts* (1933) 197.
108. Bohlen, "The Moral Duty to Aid Others as a Basis of Tort Liability", *supra* n. 12 at 220.

influential factor in *all* the affirmative duty situations"[109] is, quite simply, not supported by the case law.

Admittedly the presence of a benefit, and in particular an economic benefit, *may* lead to the imposition of a duty.[110] The case of common carriers is one obvious example.[111] Part of a carrier's "price" exchanged for the fare paid by his passengers is his obligation to protect them. However, the mere fact that one derives an economic benefit does not inevitably lead to the conclusion that a duty will be incurred, nor does the incurrence of a duty necessarily depend on the presence of a benefit. Mr. Justice Laskin (as he then was), while holding that a duty did exist on the facts before the court in *Jordan House Ltd.* v. *Menow,* went on to say that not every tavern-owner would be under a similar duty to all his customers.[112] "A great deal turns on the knowledge of the operator (or his employees) of the patron and his condition. . . ."[113]

The benefit analysis is most unacceptable in regards to parent-child relationships. There is something very distasteful about a legal system which would purportedly downplay altruistic behaviour within the family unit, and seek rather to explain the duty owed by a mother or father as the price to be paid for some benefit actually or potentially moving to the parent. Fortunately, it seems unlikely that the obligations imposed on a parent are founded upon such cynicism. The law simply recognizes that it is just, right and proper for one to protect and aid his or her child, and accordingly it has created a duty to do so. So, too, it recognizes that a parent should take steps to ensure that his or her child does not injure others; such a duty is similarly not explained by the benefit theory.

Gratuitous undertakings by definition can not be explained by the benefit principle, a fact which even the most forceful advocates of the theory concede.[114] Other exceptions to the general rule are similarly damning. What, for example, was the benefit to Mr. McLaren that would explain the duty imposed on him as a boat operator with respect to his

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109. McNeice & Thornton, "Affirmative Duties in Tort", *supra* n. 14 at 1286 (emphasis added).

110. *Osterlind* v. *Hill, supra* n. 2, seems on this basis to have been wrongly decided. The defendant had rented a canoe to the deceased plaintiff who was drowned after the craft overturned a short distance from the shore. The court held that the defendant could not be held liable, though he had listened to the plaintiff's calls for help for half an hour without attempting to help in any way, because no duty was owed.

111. *See e.g. Horsley* v. *McLaren, supra* n. 5 at 22 D.L.R. (3d) 559; McNeice & Thornton, "Affirmative Duties in Tort", *supra* n. 14 at 1285.

112. Discussed *supra* at n. 48.

113. *Supra* at n. 48 at 38 D.L.R. (3d) 113.

114. McNeice & Thornton, "Affirmative Duties in Tort", *supra* n. 14 at 1286-1287.

gratuitous passengers in the famous *Ogopogo Case?*[115] Mr. Justice Laskin (as he then was) expressly noted that the duty "did not depend on the existence of a contract of carriage, nor on whether he was a common carrier or a private carrier of passengers."[116] It seems clear, then, from all that has been said, that the presence of a benefit does not provide *the* unifying, underlying rationale for obligations of affirmative action (though it may be a factor). Any why should it? The imposition of tort duties in other areas is not dependant upon a benefit moving to the obligor.

Other theories as to why or when tort law will impose a duty to act are similarly unsatisfying. Professor Weinrib, starting from the proposition that "[the] common law position on nonfeasance generally relies on contract law, and hence on the market, to regulate the provision of aid to others for independently existing dangers",[117] goes on to argue that an affirmative obligation will be imposed in tort where there is an absence of any social value in the liberty to contract. The evidence offered in defence of this thesis, while somewhat supportive, is sparse and ultimately unpersuasive. Weinrib begins by offering an explanation for the decision of the Supreme Court of Canada in *O'Rourke* v. *Schacht*[118] in which a police officer was held to be under a duty to warn drivers of dangerous conditions on a highway.[119]

> The court's holding required a policeman to confer a benefit on other drivers without permitting him to bargain for compensation. Because society's interest in upholding freedom to contract, if present at all, is very attenuated, however, this coercion and concomitant deprivation of the opportunity to contract are not serious. The transaction costs of negotiating with successive drivers are so high, and the form of negotiation is so unmanageable, that contracting would be highly inefficient if not completely infeasible. More importantly, a policeman's contract to sell information about road conditions would be undesirable and perhaps unenforceable. The police officer is already under a public duty. (footnotes omitted)

Similarly, duties owed by family members to one another are explained on the basis that "family relations [are] never appropriate for market regulation."[120] Finally it is noted that contracts which have been made

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115. *Horsley* v. *McLaren, supra* n. 5, discussed at n. 46.
116. *Id.* at 22 D.L.R. (3d) 559.
117. Weinrib, "The Case for a Duty to Rescue" (1980), 90 *Yale L.J.* 247 at 269.
118. *Supra* n. 94.
119. Weinrib, "Duty to Rescue", *supra* n. 117 at 269.
120. *Id.* at 271.

between rescuers and rescuees have been declared unenforceable as unconscionable or made under duress.[121]

The theory is fatally flawed. First of all, it is rather limited in scope. Weinrib does not, for example, even attempt to explain the basis of the duty found in cases like *Jordan House Ltd.* v. *Menow*:[122] There is no compelling reason why the social values in the liberty to contract could not be served in such situations. It would not be improper or unmanageable for a tavern owner, perhaps in co-operation with a taxi cab company, to arrange safe passage home for its patrons in exchange for a small fee. Secondly, the case law offered in support of the argument is not strong. The question of police officers contracting with citizens received no mention in *O'Rourke* v. *Schacht.* Most of the family cases cited are similarly flawed.[123] *Balfour* v. *Balfour,*[124] which *does* deal with the enforceability of contracts between family members, is of no help. The English Court of Appeal merely held that *some* mutual promises between spouses cannot give rise to a cause of action in contract. Weinrib fails to show that there is a necessary connection between the absence or lack of contracts in some relationships and the imposition of a duty. Finally, the emphasis on contractual matters needlessly complicates and misleads. There exist other, more plausible, explanations for the duties imposed on police officers and parents.

On a more fundamental level it appears that whether or not a duty will be imposed is a policy decision. Neither the benefit theory nor Weinrib's theory are capable of adequately explaining all of the affirmative obligations which exist in tort law, though both may represent factors which, along with others, are at play in the policy field. In some cases the fact that one stands to derive a benefit provides a comforting (and somewhat logical) basis upon which courts can justify a departure from the general rule. Similarly, the fact that certain situations or relationships do not permit aid to be bargained for may tend to counter-balance somewhat the reluctance to coerce action. It is argued here, however, that the time has come to drop hollow pretences, look beyond *ex post facto* rationalizations, and squarely address the question of whether on policy grounds a general duty to aid one in peril should exist.

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121. *Id.* at 271. The discussion centres on the decision of the United States Supreme Court in *Post* v. *Jones* (1857), 60 U.S. (19 How.) 150. A contract had been imposed by rescuers on whalers who had been marooned in the Arctic.

122. Discussed *supra* at n. 48.

123. *People* v. *Beardsley* (1907), 150 Mich. 206, 113 N.W. 1128; *Territory* v. *Manton* (1888), 8 Mont. 95, 19 P. 387; *R.* v. *Russell,* [1933] Vict. 59; *Sommers* v. *Putnam Bd. of Educ.* (1925), 113 Ohio St. 177, 148 N.E. 682.

124. [1919] 2 K.B. 571.

V. *Policy Basis of Tort Development*

A duty to rescue could be either judicially or statutorily created. Although both approaches have features which recommend them, it is the former which is preferred here. On a practical level it seems more likely that the matter would come before a court rather than a legislature. While both are under the strain of a heavy workload, a court can on any given day be confronted with any given issue. On the other hand, the agenda of the legislatures is more structured, and unless events were to create an urgent demand, it seems relatively less probable that time would be devoted to debating the merits and demerits of a general duty to rescue. Admittedly, the judicial imposition of such a duty would be dependant upon an intrepid bench, but the history and progress of the common law has been authored not by "timorous souls", but rather by "bold spirits". Lord Atkin in *Donoghue* v. *Stevenson*[125] provides a particularly fit illustration for present purposes, paving the way, as he did, for a conceptual framework of negligence law based not on various and disparate "exceptions", but rather on a single, general principle.[126] Further, a judicially created duty would have one notable advantage. Creative interpretation of legislation can be pushed only so far, and therefore, once enacted, a statute would more or less stand frozen in time. It would be preferable not to chance having the law strait jacketed by legislative draftsmen. In contrast, a hallmark of the common law is its flexibility, the ability to not only "adapt old conceptions to new facts, but to absorb and apply what is settled and permanent in economics and ethics."[127] The recognition by Canadian courts of affirmative obligations in ever more circumstances illustrates this point.

A general duty to rescue, if it is to be recognized judicially, rather than statutorily, will find its home in the tort of negligence. That it could fit within the test set forth by Lord Atkin's famous dictum in *Donoghue* v. *Stevenson* seems clear.[128]

> The rule that you are to love your neighbour becomes in law that you are not to injure your neighbour, and the lawyer's question is, Who is my

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125. [1932] A.C. 562, 101 L.J.P.C. 119, 147 L.T. 281.

126. That is, just as the principle in *Winterbottom* v. *Wright* (1842), 10 M.&W. 109, 152 E.R. 402, 11 L.J. Ex. 415 was done away with, it is hoped that so too the days of liability for a refusal to rescue being available only in "exceptional" circumstances will become a thing of the past.

127. Bohlen, "The Moral Duty to Aid Others as a Basis of Tort Liability", *supra* n. 12 at 336.

128. [1932] A.C. 562, 580. Similar statements appeared in earlier decisions, but it is Lord Atkin's which has withstood the test of time. *Heaven* v. *Pender* (1883), 11 Q.B.D. 503 as limited by *LaLievre* v. *Gould*, [1893] 1 Q.B. 491; *Buckley* v. *Mott* (1920), 50 D.L.R. 508 (N.S.)

> neighbour? receives a restricted reply. You must take reasonable care to avoid acts or *omissions* which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be — persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or *omissions* which are called in question. (emphasis added)

While the "neighbour principle" is clearly only a "road sign"[129] and can not be treated as a statutory test,[130] high authority suggests that it is the general rule and not the exception. In *Dorset Yacht Co. Ltd.* v. *Home Office* Lord Reid recognized that "[i]t will require qualification in new circumstances", but felt that the time had come to apply it "unless there is some justification or valid explanation for its exclusion."[131] Further, though it is clear that a duty to rescue would be a remarkable step forward, there is ample precedent for applying Lord Reid's view to instances of nonfeasance generally. Lord Wilberforce, in *Anns* v. *Merton London Borough Council,* echoed Lord Reid's thoughts in articulating a two part test for the imposition of a duty.[132] He did so without distinguishing between disputes arising out of acts and those arising out of omissions, as in the case before him. For him, a prima facie duty would arise where the parties stood in such proximity to each other that the defendant, had he reasonably contemplated the consequences of his conduct, would have realized that carelessness on his part would be likely to result in damage to the plaintiff. That being so it would then be necessary to "consider whether there are any considerations which ought to negative, or to reduce or limit the scope of the duty. . . ."[133] The relevant question then becomes: what considerations should be accounted for?

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129. Fleming, *The Law of Torts* (1977) 136.

130. *Dorset Yacht Co. Ltd.* v. *Home Office,* [1970] 2 All E.R. 294 at 297 (*per* Lord Reid).

131. *Id.*

132. [1977] 2 All E.R. 492. Despite those decisions, some feel that the neighbour principle is inapplicable to nonfeasance cases. *See e.g.* Smith and Burns, "Donoghue v. Stevenson — The Not So Golden Anniversary" (1983), 46 *Mod. L. Rev.* 147.

The test articulated by Lord Wilberforce has been accepted into Canadian tort law by the Supreme Court of Canada in *City of Kamloops* v. *Nielsen, supra* n. 81. Mr. Justice Estey also accepted and applied the test in *B.D.C. Ltd.* v. *Hofstrand Farms Ltd.,* [1986] 1 S.C.R. 223, 26 D.L.R. (4th) 1.

133. *Id.* at [1977] 2 All E.R. 498. Very recent cases indicate that *Anns* v. *Merton London Borough Council* may stand as the high-water mark in the growth and expansion of the duty concept. Lord Keith of Kinkel, speaking for the House of Lords in *Governors of the Peabody Donation Fund* v. *Sir Lindsay Parkinson & Co. Ltd.,* [1985] A.C. 210 at 240 warned against construing the words of Lord Reid and Lord Wilberforce too broadly, stressing the obvious, fundamental fact that ". . . [the] true question in each case is whether the particular defendant owed to the particular plaintiff a duty of care having the scope which is contended for. . . ." His

These considerations obviously include foresight of risk.[134] Also, the House of Lords recently stressed that no duty should be imposed where it would not be "just and reasonable" to do so.[135] Lord Denning held, however, that "at bottom" the question of duty is:[136]

> ... a matter of public policy which we, as judges, must resolve. This talk of "duty" or "no duty" is simply a way of limiting the range of liability for negligence.

Mr. Justice V.C. MacDonald was equally candid in recognizing the true use of the duty concept.

> [T]here is always a large element of judicial policy and social expediency involved in the determination of the duty problem, however it may be obscured by use of the traditional formulae.[137]

Finally, Lord Wilberforce in *McLoughlin* v. *O'Brian* stated simply that in regard to the imposition of a duty, "[we] must then consider the policy arguments".[138] Thus, despite the reluctance of the reactionary few who disagree,[139] it appears clear that policy considerations do underlie courts' decisions as to when a duty will be imposed.[140] As Prosser has noted, the duty concept is "a shorthand statement of conclusion, rather than an aid

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Lordship then cited with approval the dictum of Lord Morris of Borth-y-Gest in *Dorset Yacht Co. Ltd.* v. *Home Office* (*supra*, n. 130 at 1038) and emphasized that an important consideration is whether it would be "just and reasonable" to impose a duty. *See* also *Curran* v. *Northern Ireland Co-ownership Housing Assn. Ltd.*, [1987] 2 All E.R. 13.

If the expansion days of the duty concept are indeed over, or at least on the wane, then policy considerations stand to take on added importance. It is, however, as yet not clear how, or if, these recent English decisions will impact on Canadian law.

134. "English law does not recognize a duty in the air...." *Bottomley* v. *Bannister*, [1932] 1 K.B. 458 at 476 (*per* Greer L.J.). A duty is owed only to one who is within a foreseeable range of injury. "If no hazard was apparent to the eye of ordinary vigilance, an act... [does] not take to itself the quality of a tort...." *Palsgraf* v. *Long Island R.R.* (1928), 162 N.E. 99 at 107 (*per* Cardozo J.).

135. *Governors of the Peabody Donation Fund* v. *Sir Lindsay Parkinson & Co. Ltd.*, *supra* n. 133.

136. *Dorset Yacht Co.* v. *Home Office*, [1969] 2 All E.R. 564 at 567 (C.A.).

137. *Nova Mink* v. *Trans-Canada Airlines*, [1951] 2 D.L.R. 241 at 254 (N.S.C.A.).

138. [1982] 2 All E.R. 298 at 303.

139. *See e.g. id.* at 310-311 (*per* Lord Scarman); *Rootes* v. *Shelton* (1967), 16 C.L.R. 383 (*per* Kitto J.) (Austr. H.C.). In *Dorset Yacht Co.* v. *Home Office*, [1970] 2 All E.R. 294 at 308, Lord Morris decried the invocation of policy, stating that the imposition of a duty depends on what is "fair and reasonable". It is not clear if or how considerations of what is "fair and reasonable" differ from policy considerations.

140. *See also Hedley Byrne & Co. Ltd.* v. *Heller & Partners Ltd.*, [1964] A.C. 465, [1963] 3 W.L.R. 101, [1963] 2 All E.R. 575 at 615 (*per* Lord Pearce); *Rondel* v. *Worsley*, [1969] 1 A.C. 191; *Demarco* v. *Ungaro* (1979), 21 O.R. (2d) 673, 8 C.C.L.T. 207, 95 D.L.R. (3d) 385 (C.A.); *O'Rourke* v. *Schacht*, *supra* n. 92 at 55 D.L.R. (3d) 114 (*per* Spence J.); Symmons, "The Duty of Care in Negligence: Recently Expressed Policy Elements" (1971), 34 *Mod. L. Rev.* 394 and 528.

to analysis in itself",[141] a device used to limit or expand the scope of liability on the basis of various non-justiciable sounding factors.

The specific considerations to be examined under the general rubric of "policy" will vary somewhat from case to case. Clearly the courts[142] are involved in an "assessment of the demands of society for protection from carelessness of others",[143] but they will also enquire into various administrative difficulties that may follow upon the imposition of a duty. For example, would it lead to a "flood" of litigation? Care must be taken to ensure that the duty imposed not be cast too high, placing an unreasonable burden on the defendant. In altering or developing the law, societal morals and values must also be accounted for if the new demands are not to run counter to public sentiment.[144] So, too, the furtherance of the goals of tort law may be considered. Deterrence of, and compensation for, wrongful conduct are obvious examples, but the imposition of a duty may also serve other, less familiar ends. It may help fill the very real psychological void felt by victims when perceived wrongdoers cannot be reached through legal processes. It is to a consideration of these and other factors which the remainder of the discussion will be directed.

VI. *Policy Considerations*

1. *Policy Arguments Against a Duty to Rescue*

Reflecting the values and attitudes of the times, the development of the early common law was premised upon a philosophy of "rugged individualism".[145]

> Self direction or personal autonomy is a mark of the English race. The Englishman, as opposed to one of Latin lineage, does not so easily coalesce with the mass. He distinctly wishes to live his own life, make his own contacts, or as he frequently says, "muddle through" in his own way.

Each man was to be regarded as self-reliant; able to care for himself and willing to stand alone against any hardships which befell him. Even hardships resulting from, or exacerbated by, this very same spirit of individualism were accepted as the price to be paid for the concomitant sense of dignity and self-respect. Quite naturally it was considered

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141. Prosser, *Handbook on the Law of Torts* (1971) 325.
142. The same policy considerations would be examined if the matter came to be dealt with by the legislatures.
143. *Hedley Byrne & Co.* v. *Heller & Partners Ltd., supra* n. 140 at 615 (*per* Lord Pearce).
144. "Though it is impossible to condense [the factors which are relevant to policy discussions] into a definition ... it must be accepted, I think, that powerful among them is the social outlook and the development of the country at the time when the court acts." *McCarthy* v. *Wellington City,* [1966] N.Z.L.R. 481 at 519 (*per* McCarthy J.).
145. Hope, "Officiousness" (1929), 15 *Cornell L.Q.* 25, 29.

inappropriate for the government or the courts to intervene in regards to omissions — their function was more narrowly aimed at preventing *positive* harm from being done.[146] Indeed, to have regarded the Englishman as requiring or being desirous of the coerced assistance of his fellow countryman would surely have amounted to an affront to the popularly held self image of the English race. The rise of capitalism and perceived desirability of encouraging industrial expansion in later periods undoubtedly reinforced the law's view that individualism should be countenanced. The imposition of affirmative obligations to assist others would have run counter to the push for materialistic progress.

Times have changed. Canadians of today are not embarrassed or reluctant to call for or give help. That this is true is evidenced in the attitudes found running through Canadian society. On a very broad level, the entire social welfare system, embodying as it does health care, pension plans and the like, is strikingly illustrative of the modern ethos. Wartime conscription, of course, potentially entails sacrificing one's life for the good of others. As has been shown, the newer spirit has been manifested many times over in both judicial and legislative recognition of the desirability of requiring succour. Importantly, it is not only at the institutional level that one finds a changed perspective. Citizens of bygone eras may well have looked askance at those who appealed for help in their time of need, and lauded as courageous and proudly independent those who suffered in silence. Such harsh judgements are today unlikely. Condemnation is unlikely to follow upon a cry for help if the situation was truly one of imminent danger. Indeed, silence in such circumstances might be regarded as obstinate and irresponsible. From all that has been said, it seems clear that modern Canadian society is not based on a philosophy of rugged individualism.[147] The view that a duty to rescue is unnecessary and undesirable, so typical of the earlier era, should similarly seem anachronistic.

> Conception of an isolated individual whose obligations are few compared to his possible range of activity deviates from the facts of present-day society. A greater amount of group dependency on the part of each individual as well as a steady increase in the number of affirmative duties established by statute is discernible everywhere. The problem of finding sufficient legal basis for affirmative duties has become less acute than it was under an individualistic form of society.[148]

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146. Hale, "Prima Facie Torts, Combination and Non-feasance" (1946), 46 *Col. L. Rev.* 196, 214.
147. *Crocker* v. *Sundance Northwest Resorts Ltd., supra* n. 52 at 1193.
148. Kirchheimer, "Criminal Omissions" (1942), 55 *Harv. L. Rev.* 641.

Implicit throughout the discussion so far has been the assumption that a general duty to rescue *would* be consistent with commonly held notions of morality. The time has come to support this view. Of course, it would probably be adequate to simply state that most Canadians would intuitively impute moral blame to one who refused to undertake a rescue which could have safely be performed.[149] Beyond that, however, there is strong basis for equating the two. The Biblical parable of the Good Samaritan is well known. Jesus was asked by a teacher of law what must be done to inherit eternal life.[150] He replied "Love your neighbour as yourself" and explained:

> "A man was going down from Jerusalem to Jericho, when he fell into the hands of robbers. They stripped him of his clothes, beat him and went away, leaving him half dead. A priest happened to be going down the same road, and when he saw the man, he passed on the other side. So too, a Levite, when he came to the place and saw him, passed by the other side. But a Samaritan, as he traveled, came where the man was; and when he saw him, he took pity on him. He went to him and bandaged his wounds, pouring oil and wine. Then he put the man on his own donkey, took him to an inn and took care of him. . . ."
>
> "Which of these three do you think was a neighbour of the man who fell into the hands of robbers?"
>
> The expert in law replied, "The one who had mercy on him."
>
> Jesus told him, "Go and do likewise."

The law and Christian beliefs have always been inextricably linked to some extent. In 1828 Chief Justice Best asserted that

> . . .there is no act which Christianity forbids, that the law will not reach: if it were otherwise, Christianity would not be, as it has always been held to be, part of the law of England.[151]

That statement, at least by modern standards, goes too far. More accurate today is the view of Lord Atkin. While he felt that "law has always necessarily ingrained in it moral teaching", he also recognized that "law and morality do not cover identical fields"[152] and accordingly based his conception of a neighbourly duty on narrower grounds than that which Christian morality would have dictated.[153] Nevertheless, it is clear that a

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149. Dismissing the views of Ulpian and Jean-Jacques Rousseau, Professor Tunc denies that intuition or instinct can be "relied upon as a source of universally accepted rules of moral law." "Tort Law and the Moral Law" (1972), 30 *A.C.L.J.* 247, 248.

150. Luke 10:25. For similar teachings, see Genesis 4:9 and Matthew 25:41.

151. *Bird* v. *Holbrook* (1828), 4 Bing. 628, 130 E.R. 911.

152. (1932), *Journal of the Society of Public Teachers of Law* 30.

153. *Donoghue* v. *Stevenson supra* n. 125 at 580. Surprisingly, some take an opposing view. Professor Smith and Professor Burns speak of the "autonomy of the law as a separate social

duty to rescue, *if* it was imposed, would be consistent with public morality insofar as Christian values are still accepted by the masses.[154]

The best indicator that a duty to rescue would be consistent with morality or conscience, however, is seen in the possible responses to a call for help. Basically, two are possible. First of all, the bystander may become involved and personally provide relief or summon one who is better equipped to do the job. Morality would surely underlie the altruistic response. Alternatively, the bystander may pass by as the Levite and the priest did. If, as in most cases, the bystander later tried to justify his inaction, the role of morality is again evident. "I'm not a doctor — I couldn't have helped." "Someone else will stop for the poor guy." "It's none of my business." Such responses are unfortunately familiar to all but the most saintly among us. What is clear is that if not for the pangs of guilt, if not for the need to placate one's brothersome conscience, if not for the knowledge that the morally correct choice was not made, such rationalizations would be pointless and would not occur.

Epstein has argued that in a society in which the government can force one to gratuitously confer a benefit upon another, "it becomes impossible to tell where liberty ends and obligation begins".[155] While this may overstate the matter somewhat, the undeniable fact is that the imposition of a general duty to rescue *would* detract from personal freedom. The question to be asked is whether, given the nature of Canadian society and the expectations of Canadian citizens, this infringement would be intolerable. The answer should be in the negative. The security, comfort and sense of well-being one derives from life in a humane and civilized community are acquired at a cost, and part of that cost is the sacrifice of some measure of personal freedom. In many ways, Canadian society is founded on, and held together by, compromise and concession. Various positive obligations create and re-enforce the values and expectations held by its citizens; it is tacitly assumed that one can be assured of not having to "go it alone". Of course, when one receives, one must give as well. True, if Canadian society is to retain its basic nature, liberty must at some point prevail over the call for personal sacrifice. However, practically speaking, the duty advocated would seldomly be invoked, and when it was, it would only require action which would not expose the

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institution, independent of morality" as being a "hallmark of English jurisprudence". "Donoghue v. Stevenson — The Not So Golden Anniversary" *supra* n. 132 at 163. It is difficult to know what to make of such a statement.

154. The 1981 Canadian census revealed that out of a total population of 24,083,495, some 21,678,745 were Christians. Presumably, those who consider themselves to be Christians hold Christian values.

155. Epstein, "A Theory of Strict Liability" (1973), 2 *J. Legal Stud.* 151 at 199.

rescuer to danger. The extent to which freedom would be threatened would not be great.

Significantly, even John Stuart Mill conceded the desirability of a duty to assist. Mill advocated extreme libertarianism as a means of achieving a healthy and progressive society, and denounced government interference and restraints on freedom. Still, upon estimating the long term consequences of allowing one to stand idle while another cried for help, he stated that:[156]

> There are many positive acts for the benefit of others which. . .[a person] may rightfully be compelled to perform such as. . . to perform certain acts of personal beneficence, such as saving a fellow creature's life. . . . A person may cause evil to others not only by his action — but by his inaction, and in either case he is justly accountable to them for injury.

Other libertarians have similarly shied away from extremism and have recognized the need to impose some restriction on the scope of freedom available to each citizen. Bentham posed the question:[157]

> In cases where the person is in danger, why should it not be made the duty of every man to save another from mischief, when it can be done without prejudicing himself. . .?

For Bentham there could be no response.

It has been suggested that the imposition of a duty to rescue would have an insidious effect on society insofar as it would establish "an exalted form of socialism."[158] Decades after the paronoiac days of the Cold War such sentiments seem pathetically insecure. A duty has been imposed by regimes from all points on the ideological spectrum, from Nazi Germany to post-revolutionary Russia to Minnesota in the Reagan era. There is nothing to suggest that an obligation to save those in peril has ever resulted in a perceptible swing to the political left. Such a shift certainly has not been consequent to Article 63 of the French Penal Code.[159] It is difficult, then, to accept that the foundations of Canadian society are so fragile that they could be altered simply by pulling the law into line with the prevailing societal attitudes. Indeed, given that Canadian society has evolved towards collectivism and away from individualism, it is not altogether clear that such a shift, even if it did transpire, would be unwelcome.

In defence of the traditional common law view it has been said that the law should not require one to jeopardize his pocket-book or safety in an

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156. *On Liberty* (1947) 11.
157. *An Introduction to the Principles of Morals and Legislation* (1970) 292-293.
158. Minor, "Moral Obligations as a Basis of Liability" (1923), 9 *Va. L. Rev.* 421 at 422.
159. Note "The Failure to Rescue: A Comparative Study", *supra* n. 9 at 642.

attempt to save a person in peril.[160] This argument is no longer supportable because recent developments have seen tort law soften its attitude towards rescuers, and also because it assumes the imposition of a duty in *all* cases. First, while the early common law did invoke the concepts of *volenti*[161] and causation[162] to deny the claims of rescuers who are injured as a result of their efforts, jurists of the 20th century have increasingly come to praise and encourage Good Samaritans.[163] Consequently, compensation is available to the reasonable[164] rescuer from one who negligently created the perilous situation (be it either the "victim" himself,[165] or his tortfeasor[166]) or from a third party responsible for supervening negligence.[167] Going further, Canadian courts have also permitted an intervener who intended to charge for his efforts to claim remuneration for services he has rendered. The plaintiff in *Matheson* v. *Smiley,*[168] a surgeon who tried but failed to revive a suicide, was successful in his suit against the estate of the deceased. The policy behind such decisions is clear. Cardozo once announced that "danger invites rescue";[169] it is increasingly clear that so, too, does the law. Further, not only would a rescuer not have to pay for expenses associated with any injuries sustained, he would also not be required to underwrite general charitable efforts. It has been suggested that once begun, the imposition of a duty to rescue could not logically be stopped short of requiring perfect altruism, the wealthy being obliged to donate money in order to further the alleviation of hardship.[170] Lawyers and judges, however, are professional line-drawers. The meaning attributed to "rescue" for the

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160. McNeice & Thornton, "Affirmative Duties in Tort", *supra* n. 14 at 1288; Linden, "Tort Liability for Criminal Nonfeasance", *supra* n. 93 at 30.
161. *See e.g. Kimball* v. *Butler Bros., supra* n. 40.
162. *See e.g. Anderson* v. *Northern Ry. Co., supra* n. 40.
163. *See e.g. Attorney General for Ontario* v. *Crompton* (1976), 1 C.C.L.T. 81. A detailed analysis of the position in civil law countries can be found in Dawson, "Rewards for the Rescue of Human Life?" in *The Good Samaritan and the Law, supra* n. 9 at 62.
164. The "foolhardy" and the "rash" will not be compensated. *Baker* v. *Hopkins,* [1958] 3 All E.R. 147 (Q.B.D.); *affd.* [1959] 1 W.L.R. 966, [1959] 3 All E.R. 225 (C.A.); *Haigh* v. *Grand Trunk Pacific Ry. Co.* (1914), 7 W.W.R. (N.S.) 806. Recent developments suggest that the courts may also be willing to employ the doctrine of contributory negligence to deny compensation in part. *See e.g. Sayers* v. *Harlow Urban District Council,* [1958] 2 All E.R. 342 (C.A.); *Holomis* v. *Dubuc* (1974), 56 D.L.R. (3d) 351.
165. *Baker* v. *Hopkins id.;* Wright, Note (1934), 21 *Can. Bar Rev.* 758.; *Horsley* v. *McLaren supra* n. 5 at 22 D.L.R. (3d) 558.
166. *Haynes* v. *Harwood, supra* n. 74; *Morgan* v. *Aylen,* [1942] 1 All E.R. 489; *Seymour* v. *Winnipeg Electric Ry.* (1910), 13 W.L.R. 566, 19 Man. R. 412.
167. *Horsley* v. *McLaren, supra* n. 5.
168. [1932] 2 D.L.R. 787; *cf. Soldiers' Memorial Hospital* v. *Sanford,* [1934] 2 D.L.R. 334.
169. *Wagner* v. *Intl. Railroad Co.* (1921), 232, N.Y. Supp. 176, 133 N.E. 437.
170. Epstein, "A Theory of Strict Liability", *supra* n. 155 at 203.

purpose of the present discussion can and should exclude the notion of "economic beneficence".[171] They are responses to clearly distinguishable situations. In the former, the peril involves strong elements of immediacy and urgency. The potential rescuer is the only one (or one of a relatively small group) who could give the required aid in time. In the latter, the call for help can be announced to the world at large. Charitable relief of suffering is typically undertaken by established organizations or governments, and is administered over a period of time. Further, if the situations are not distinguished, the result would be not retributive justice (which is the purpose of imposing a duty) but rather distributive justice. An unfair, unreasonable and unrealistic burden would be thrust on anyone with any wealth.[172]

Secondly, while it is inevitable that mishaps would occur under the proposed duty, a bystander need not court disaster in order to fulfil his obligations. To reiterate, the model advocated, based on the French experience, would only require that which could be done safely.

On a very practical level, one reason that common law courts initially refused to entertain tort actions for nonfeasance was that they were already overburdened with more pressing concerns. Priorities were established, and in view of the abundance of cases involving active misconduct, the courts understandably regarded the question of whether a person should be liable for an omission as being too remote to warrant attention.[173] Today, of course, the situation is different. While Canadian courts are under considerable strain, they commonly do hear disputes centred on nonfeasance. The relevant question now is whether the imposition of a duty to rescue would intolerably exacerbate an already difficult situation. That is, would there be an unmanageable "flood" of litigation?

The experience under the French statute is encouraging for advocates of general duty. Statistics indicate that while actions under 63§2 of the Penal Code are of a sufficient number to generate public awareness and

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171. As has been noted elsewhere, the proposed duty *would* require that money be expended in the very unlikely event that, first, only it could alleviate the danger and second, that there is a defined and limited class of persons who could provide it. Rudoph, "The Duty to Act: A Proposed Rule", *supra* n. 39 at 509-510. For a different analysis, but same conclusion, *see* Weinrib "The Case for a Duty to Rescue", *supra* n. 117 at 272.

Such a position appears to be consistent with the reasoning of Lord Denning and Lord Justice Edmund Davies in *London Borough of Southwark* v. *Williams*, [1971] 2 All E.R. 175 (C.A.). The issue in that case focussed on the defence of necessity in a criminal action against desparate squatters, but it is akin to the rescue situation insofar as it involves the involuntary transfer of property.

172. *Id.*, Rudolph.

173. Fleming, *Law of Torts* (3d ed., 1965) 145.

deter wrongful conduct, they are not so common so as to swamp the legal system.[174] Admittedly, such figures are dependant upon many variables. Still, given that the population of Canada is about half that of France, it seems unlikely that Canadian courts would be overloaded with complaints of succour withheld. Canada simply is not that inhospitable a place.

Finally, other administrative concerns can be considered under the rubric of "policy". In light of the French experience these fears would prove to be unfounded. For example, the argument that it would be too difficult to properly identify defendants[175] is hardly convincing. Where the pool of defendants is large (e.g. where thirty bystanders watch an infant drown in a flooded ditch) the well-advised plaintiff would simply sue every onlooker who could be identified. As in France, a duty should be imposed on each of them.[176] It is not open to a tortfeasor to excuse his own conduct by pointing to the moral culpability of others. It would be futile for him to complain, "why pick on me?".[177] On the other hand, there will be many instances where there will be considerable difficulty in finding even one person to sue. One who is responsible for an omission does not as readily identify himself through his conduct as does one who is responsible for an act. That, however, certainly does not persuasively argue against the imposition of a duty. The policy of France's "rescue law", or of child abuse reporting statutes in Canada, are well served despite such administrative difficulties. It would be ridiculous to suggest that the law should placidly resign itself to the fact that atrocities are committed and throw its hands up in despair simply because the perpetrators are not immediately identifiable.

2. *Policy Arguments in Favour of a Duty to Rescue*

Most of what has been said up to this point has simply rebutted arguments made against the imposition of a duty to rescue. That, of course, only takes the issue half of the way home. It is necessary to show not only that bad things would not come from a duty, but also that good things would.

From a practical viewpoint, the best possible result which could come from the imposition of a duty would be an increase in the number of

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174. *See* Tunc, "The Volunteer and the Good Samaritan" in *The Good Samaritan and the Law, supra* n. 9 at 57.
175. Posner, *Economic Theory of the Law* (1986) at §6.9.
176. *Supra* n. 26.
177. Of course, he can, however, pursue other tortfeasors for contribution. *See County of Parkland* v. *Stetar, supra* n. 78 (*per* Dickson J.); Linden, *Canadian Tort Law, supra* n. 7 at 92.

rescues which are undertaken. A duty probably would not lead to an increase in the number of people requiring rescue,[178] but it could lead to an increase in the number of people performing rescues. While it is true that any effect would be dependant on public awareness, it seems that the masses are not as uninformed on legal matters as might be thought. As the issues involved in rescue cases are applicable to everyone, easily accessible and intrinsically interesting, a change to the traditional law is likely to be widely reported by the media. Certainly the decision of the Supreme Court of Canada in *Jordan House Ltd.* v. *Menow*[179] reached the appropriate audience. A survey of tavern owners disclosed that over 70 percent had become aware of the court's holding through newspaper and magazine articles.[180] Even where the media's influence is not so readily apparent it appears that people are quite well informed. An international survey conducted in 1965 asked citizens of West Germany (which had a legal duty) and Austria and the United States (which did not) if they thought there was a legal duty, as opposed to a mere moral duty, to be a Good Samaritan.[181] Between 74 percent and 86 percent gave the correct answer.

Assuming that people would be aware of a duty to rescue if it existed, the question then becomes whether they would more often aid those in peril. Posner's suggestion that the existence of an obligation would paradoxically lead to fewer rescuers is, in the absence of empirical support, difficult to accept.[182] First, his prediction that (for example) a strong swimmer would avoid the beach because there might be a call for help is dubious to say the least. Given that the sacrifice required would be minimal and non-life threatening, it seems unlikely that such a person would shun the water and the pleasure that it brings her, as well as the possibility of glory and personal pride which would follow upon a rescue. Secondly, Posner's prediction that altruists, who would otherwise become involved, would refuse on the grounds that a legal duty would be coercive and would deprive them of the power of choice, is untenable. It is certainly a cynical view, but beyond that it seems to fly in the face of common sense. How likely is it that a person, otherwise predisposed to

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178. A very tenuous argument could be made that reliance on the existence of a duty would lead people to engage in riskier activities. This is highly unlikely. Is one apt to seek out unnecessary dangers, confident that others will successfully fulfil their legal obligation to rescue?

179. Discussed *supra* at n. 48.

180. Wright and Linden, *Canadian Tort Law: Cases, Notes and Materials* (1980) 7-45.

181. Zeisel, "An International Experiment on the Effects of a Good Samaritan Law" in *The Good Samaritan and the Law, supra* n. 9 at 208.

182. Posner, *Economic Theory of Law, supra* n. 175.

benevolent behaviour, would be so offended by legal recognition of his own values that he would consciously commit a tort and incur liability and public condemnation? Have Canadians stopped reporting child abuse because of the statutory obligation placed upon them? Have they fled from highway accident scenes for the same reason, although their natural reaction would be to stay and give succour? Have the French refused to rescue simply because article 63§2 exists? Admittedly such matters are not easily given to empirical study, and opinions as to what effect a duty would have cannot be conclusively shown to be true or false. Still, it does seem far more probable that, if anything, a duty would lead to more, not fewer, rescues.

On another level, the imposition of a general duty to rescue would benefit not only those in peril, but the law as well. The law is vain and self-interested; members of the legal profession take pains to ensure that justice is done *and* that it is seen to be done. In denying the existence of a duty the law is serving neither of those ends. The cost of such a course was eloquently stated by Bohlen:[183]

> ... a system of law which lags too far behind the universally received conceptions of abstract justice, in the end must lose the sympathy, the confidence, perhaps even the respect of the community.

While recent years have seen an increasing number of exceptions being made to the general rule, most circumstances will still not require action. Isolated though they may be, incidents such as the one involving Kitty Genovese,[184] lead to a hue and cry which cannot have anything other than a detrimental effect on the law. Less dramatic but more common incidents have the same invidious effect on a regular basis. The prognosis for a legal system characterized by "dogma on the books ... divorced from morality"[185] can not be a healthy one.

The imposition of a duty to rescue would also be a positive development in that it would serve the various goals of tort law. It would likely lessen the incidence of socially undesirable behaviour as it would provide an incentive (the avoidance of liability) to those who are capable of action and who are aware of the moral call for help, but who are simply callous or recalcitrant. That is, it would act as a deterring factor.

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183. Bohlen, "The Moral Duty to Aid Others as a Basis of Tort Liability", *supra* n. 12 at 337.
184. The most famous case of its kind, the murder of Kitty Genovese in New York City in 1964 took place on a well-lit street. Above at least 38 people watched and listened from the comforts of their apartments, and though the attack lasted for over forty minutes, none saw fit to respond to the victim's cries for help with even so much as a phone call to the police. Censured by the public, none were punished by the law for their inaction. N.Y. Times 27 March 1964.
185. Cardozo, *The Paradoxes of Legal Science* (1928) 25.

Similarly, the frequency with which succour is withheld would diminish as tort law's function as an educator would be employed. To reiterate, societal attitudes have undergone considerable change over the past centuries. Unfortunately, there are always those who do not appreciate the emergence (or even existence) of such changes. While they take the advantages of living in a community which, based on a new ethos, cares for them in their time of need, they fail to reciprocate in kind and satisfy basic humanitarian expectations. For this group the imposition of a duty would serve as a medium for the message, and as a manifestation of the message itself.

Other goals of tort law would be served as well. Some are more esoteric than others. The availability of a tort action would, for example, satisfy an important psychological need by appeasing those aggrieved by another's inaction.[186] On a less abstract level, tort law's compensatory function would be served as those who sustain injury or further injury could turn to their wrongdoers for reparation. Finally, tort law's justice component would be furthered. The deceptively simple idea here is that where one wrongfully injures another, one ought to make amends. Personal responsibility for one's conduct is a notion which is first taught to us as children, and which lies at the heart of the commonly held view of justice.

VII. *Conclusions*

In the latter part of the twentieth century Canadian judges and legislators have come to recognize a duty to rescue in an increasing number of situations. It has been argued that at bottom such duties are rooted in policy. The time has come to re-assess whether a more general duty would, on policy grounds, be warranted and wise.

The denial of a general duty has its foundations in an era long since past. The eloquence of Bohlen's explanation is incomparable.[187]

> [E]thical and moral conceptions, which are not the mere temporary manifestation of a passing wave of sentimentalism or puritanism . . . find a real and permanent place in the settled convictions of a race and . . . of necessity do in time color the judicial conception of legal obligation . . . . [W]hat are now regarded as legal duties as distinguished from moral and ethical duties, merely embody the crude conceptions on such points

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186. The Soviet experience illustrates the importance of this function of tort law. Shortly after the revolution, tort law was done away with. The psychological desire to exact vengeance upon one's wrongdoer was, however, found to be voracious and tort actions were re-instituted. Gray, "The Soviet Law: The New Principles Annotated", [1964] *U.Ill. L.F.* 180; McLaren, "The Origins of Tortious Liability: Insight from Contemporary Tribal Societies" (1975), 25 *U. of T. L.J.* 42, as cited in Linden, *Canadian Tort Law, supra* n. 7 at 15.

187. "The Moral Duty to Aid Others as a Basis of Tort Liability", *supra* n. 12 at 335.

> prevalent at the early stage of national civilization and social development when the King's Court took over into its keeping, and undertook the task of enforcing the common or customary law of England.

Still, the fact that the origins of an idea can be traced to antiquity does not necessarily mean that it is an anachronism whose time for burial has come. The ethical and moral conceptions of the present must be examined before any such judgment can be pronounced. From all that has been said, however, it appears abundantly clear that the view embodied in the law's general denial of a duty to undertake a rescue *is* an anachronism. Accordingly, the law should be altered so as to reflect the settled convictions of Canadians today.

Admittedly, affecting such a change would not be easy. Developments might continue to be slow and uncertain as judges and legislators cautiously invoke various devices as means of justifying their progressive steps. The affinity which the law has for "special relationships", for example, may come to be even more pronounced. It is already seen in statutes which require motorists to provide assistance after an accident only if they were brought into association with the injured party through common involvement in the accident.[188] It is argued, however, that if need be the term can be stretched to cover rescue situations. The (increasingly) collective nature of Canadian society begets "special relationships". Given the values and expectations of its citizens, it seems reasonable to find one arising in circumstances where one has a unique opportunity to save a fellow human being from death or serious physical harm without incurring an element of personal risk. Whether the concept of "special relationship" would be reaffirmed or repudiated by such a broad definition is really irrelevant. The argument being made is that the insistence on such rationalizing labels only tends to obscure the more fundamental questions of whether or not a general duty to rescue should be recognized.

The policy considerations which must be accounted for in answering this question are many. On the basis of the experience in France over the past four decades it has been shown that the administrative and philosophical fears of those who oppose a duty are largely unfounded. So, too, it has been shown that the existence of an obligation to assist those in peril would have many positive effects. Prosser has said that "changing social conditions lead constantly to the recognition of new duties".[189] One can hope.

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188. *See also Crocker* v. *Sundance Northwest Resorts Ltd., supra* n. 52 at 1197; *Hague* v. *Billings* (1989), 68 O.R. (2d) 321 at 336.
189. *Handbook on the Law of Torts* (1964) 334.