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Legislation

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Availability itself raises the question as to the *time when availability is to be determined.* There are three possible times for determining what sureties are available: (1) At the time of maturity of the obligation of the principal; (2) At the time of payment by the surety claiming contribution; and (3) At the time of the suit, when the paying surety brings his action against his co-sureties.

As between the time of *maturity* and the time of *payment,* the time of payment should prevail. Suppose, for instance, that there are three co-sureties, S-1, S-2, and S-3, on a certain obligation; and that S-3 is solvent at the date of maturity of the obligation of the principal but insolvent at the date of payment by the paying surety. It is apparent in this situation that the creditor could throw 2/3 of the obligation on any one of the remaining sureties that he chose to sue. Therefore, such time of availability is undesirable as giving the creditor a power of capricious election. That is to say, the paying surety could recover only 1/3 of the amount paid from the remaining solvent co-surety. This assumes, of course, that the obligation is a joint and several one or a joint one.

As between the time of payment and time the paying surety sues for contribution, the latter should govern. Any co-surety could protect himself against the risk of any other co-surety becoming insolvent by paying the required share and then bringing suit for contributory exoneration. So as between the three possibilities, the time of bringing suit by the co-surety seems to be the most desirable.

Joseph H. Robinson

LEGISLATION

"HIT AND RUN" STATUTES.—With considerations solely involving questions of morality American courts uniformly have maintained a policy of strict *laissez faire.* A wrong to receive judicial recognition must have been caused by breach of a legal obligation or neglect of a legal duty. It is as a result of this policy that courts have refused to enforce a promise based solely on a moral consideration, and, consistently denied the existence of a legal duty to aid one imperiled or rendered helpless through no fault of the person sought to be charged. Although the courts have stubbornly refused to take legal cognizance of the admittedly moral duty to assist another imperiled through his own fault, recent legislative enactment in many States makes it a legal duty to render aid in such cases.

There is an unbroken line of authority in America clearly showing the attitude of the courts on this point. In a late case[1] where defend-

[1] Matthews v. Carolina & N. W. R. Co., 94 S. E. 714 (N. C. 1918).

ant railroad company allowed plaintiff to live in one of its shanty cars, and subsequently refused to rescue plaintiff's household goods from a flood which engulfed the shanty car, the Supreme Court of North Carolina held that no legal duty was imposed upon defendant to assist plaintiff. The court cited *Allen v. Hixon*[2] as being decisive of the question. In this case the court said:

"When an employee, without fault on the master's part, becomes placed in a dangerous or painful situation, the master is under no positive legal duty of exercising all reasonable care and diligence to effect such employee's speedy release. Being in no way responsible for the unfortunate occurrence, the master cannot be said to be guilty of a tort if he does not promptly take active steps in coming to the rescue. The only duty arising under such circumstances is one of humanity, and for a breach thereof the law does not, so far as we are informed, impose any liability."

This question was before the Supreme Court of New Hampshire in *Buch v. Armory*,[3] and the court discussed the question in the following words:

"The defendants are not liable unless they owed to plaintiff a legal duty which they neglected to perform. With purely moral obligations the law does not deal. For example, the priest and the Levite who passed on the other side were not, it is supposed, liable at law for the continued suffering of the man who fell among thieves, which they might normally ought to have prevented or relieved."

The court then put this case:

"Suppose A standing close by a railroad, sees a two-year-old babe on the track and a car approaching. He can easily rescue the child with safety to himself, and the instincts of humanity require him to do so. If he does not, he may, perhaps justly be styled a ruthless savage and a moral monster; but he is not liable in damages for the child's injury, or indictable under the statute for its death."

The Supreme Court of the United States disposed of this question in *United States v. Knowles*.[4] The court there said:

"It is undoubtedly the moral duty of every person to extend to others assistance when in danger."

Later in the same opinion the court continued:

"And if such efforts should be omitted by anyone when they could be made without imperiling his own life, he would by his conduct, draw

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2 36 S. E. 810 (Ga. 1900).

3 44 Atl. 809 (N. H. 1897).

4 4 Saw. (U. S.) 517 (1864).

upon himself the just censure and reproach of good men; but this is the only punishment to which he would be subjected by society."

A review of the cases in America shows, therefore, that common law denied the existence of a legal duty to render aid to one imperiled through his own fault, and consequently recognized no civil or criminal liability for failure to act in such cases. The rule of the Tentative Restatement of the Law of Torts [5] merely crystallizes the common law rule when it says:

"The actor's realization that action on his part is necessary for another's aid or protection does not impose upon him the duty to take such action."

It is not easy to understand how the morally inexcusable inaction of standing by and watching another drown when assistance could easily be rendered is condoned by law. The law does not hesitate to mulct in damages one who sets in motion a force which proximately injures another. There can be little doubt, however, that the shameful omission in the former case is more repugnant to society and more deserving of condemnation than the misfeasance of the latter, which, as often as not, amounts to nothing more than innocent neglect. Why, then, does not the law impose upon one the duty to render affirmative relief to another imperiled thru his own fault, and punish for failure to discharge this duty? Dean Roscoe Pound gives the following reasons:[6]

"To some extent there are difficulties of proof. We must be sure the one we hold culpable was not dazed by the emergency. Again he who fails to act may assert some claim that must be weighed against the claims of him whom he failed to help. Thus, in the good Samaritan case the priest and the Levite may have had good cause to fear robbers, if they tarried on the way and were not at the inn before sunset. Also, it may sometimes be difficult to say upon whom the legal duty of being the good Samaritan shall devolve. If John Doe is helpless and starving shall he sue Henry Ford or John D. Rockefeller?"

On the Continent, however, the principle that one has a legal duty to aid another in jeopardy has already been recognized. Thus in the Dutch Penal Code,[7] it is provided that:

"One who, witnessing the danger of death with which another is suddenly threatened, neglects to give or furnish him such assistance as he can give or procure without reasonable fear or danger to him-

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5 TENTATIVE DRAFT No. 4, § 192.

6 POUND, LAW AND MORALS (2nd ed.) 68.

7 ART. 450 [set forth in CASES ON TORTS BY AMES AND SMITH (POUND'S ED.) 142].

self or to others, is to be punished, if the death of the person in distress follows, by detention of three months at most and an amende of three hundred florins at most."

This principle has also found a niche in the German Civil Code,[8] wherein it is provided that:

"One who wilfully brings about damage to another in a manner running counter to good morals is bound to make reparation to the others for the damage."

The eminent scholar and jurist Rudolf Stammler quotes from Liszt as follows:

"I am walking along the bank of a river and I see a man fall in the water and struggle with the waves. I am able to rescue him without any peril to myself; I neglect to do so although other help is not at hand and I foresee that he must drown. In my opinion, liability under section 826 cannot be denied." [9]

To this accurate construction of section 826 of the German Penal Code Stammler made this brief comment "Surely not."

Latterly in America there has been a few cases decided which seem to indicate that the courts will give legal recognition to the moral duty to lend assistance to another when he is imperiled. But a thorough consideration of these cases will show that the court was influenced by the fact that a particular relation existed between plaintiff and defendant. Thus in a Missouri case [10] in which the relation of master and servant existed the court held that the employer had not only a moral duty but also a legal duty to render reasonable assistance to employee who was incapacitated while engaged in the master's employment. Again in a case [11] where the relation of carrier and passenger existed the court held that the duty to render reasonable assistance to a helpless passenger was incidental to such relationship. In *Depue v. Flatau* [12] a slightly different situation existed. In that case defendant helped plaintiff, who had become seriously ill while visiting him on business, into his buggy and put the reins over his shoulders and allowed him to drive toward his home. Plaintiff was thrown from the buggy and injured on the way homeward. The Supreme Court of Minnesota reversed the decision of that trial court which denied recovery to the plaintiff in the premises. But in this case defendant's liability, it seems, is based on the fact

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8 § 826 [set forth in CASES ON TORTS BY AMES AND SMITH (POUND'S ED.) 142].

9 See CASES ON TORTS BY AMES AND SMITH (POUND'S ED.) 142.

10 262 Mo. 569 (1914).

11 Layne v. Chicago & A. R. Co., 157 S. W. 850 (St. Louis Ct. of App. 1913).

12 100 Minn. 299 (1907).

that he took affirmative action in helping plaintiff into his buggy. It is not on all fours therefore with the cases denying legal liability for failure to aid another who is imperiled thru his own fault.

From a consideration of the cases it would seem that the current of judicial decision is against imposing an affirmative duty upon one to aid another who brought about his own helpless condition. At common law, then, liability to give reasonable assistance to another arises only where the latter's helpless condition is brought about by the former's active misconduct. By recent legislative enactment, however, many states have declared that under particular circumstances a duty exists to render assistance to another imperiled thru his own conduct. The action of the legislature in this regard, it is submitted, amounts to nothing more than raising to a legal status a duty which at common law was considered only moral.

The most conspicuous example of this recent tendency on the part of legislatures are the so-called "hit and run" statutes. Contrawise to common law they impose a duty upon the driver of a vehicle to stop in the event of an accident and assist, or offer to assist, injured persons, altho the collision or accident was brought about through the sole misconduct of the person or persons injured. For the most part the provisions of this type of legislation are the same. The common provision of such statutes is that the driver who meets with an accident brought about with or without his fault, shall immediately stop and render reasonable assistance to all persons injured in such accident. The Indiana legislature has enacted a "hit and run" statute [13] which is typical of those enacted in other states.

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[13] BURNS ANN. STATUTES, SUPP. OF 1929, VOL. 4, SEC. 10142: "Any person, who while driving or operating a motor vehicle or motor bicycle on any highway in this state, although he may not be at fault, shall strike, wound or injure any human being, or shall meet with an accident whereby any other person receives an injury or the property of any other person is damaged, shall immediately stop, render or offer to render assistance, and give to the injured person or to some person who is with such injured person or to the owner or person in charge and control of the damaged property, his name, residence address including street number, city or town, county and state, also the license number of said motor vehicle or motor bicycle and produce or offer for inspection, the certificate of registration therefor: Provided, That if such person is either killed or rendered unconscious and there is no other person to whom such person involved in the accident can report, then such person shall report such information to a police or peace officer, or in case no police or peace officer is in the vicinity of the place of such injury or accident, then he shall report such injury to the nearest police station, peace officer or judicial officer. Any person who shall fail or refuse to comply with the provisions of this section shall, if he shall have caused any injury to any person, be deemed guilty of a felony, and, upon conviction thereof, shall, for a first offense, be punished by a fine of not more than five hundred dollars, to which may be added imprisonment for a term of not to ex-

It will be noted that the Indiana statute [14] only provides a criminal sanction for the violation of its terms. A very interesting question is immediately presented: Does a violation of the provisions of this statute impose civil liability as well, altho it is evident that such liability is not expressly provided for in the statute? That there was no civil liability at common law where the accident was not brought about by the tortious act of defendant is well settled. It is not so clear whether this Indiana statute changes the common law rule in this respect. But before answering this question a few observations are in order.

In the first place there can be no doubt that a driver is civilly liable under Indiana's statute for failure to render assistance to one rendered helpless thru the former's tortious act. Even at common law this liability existed. The Tentative Restatement of the Law of Torts puts the rule as follows:

"If the actor by his tortious conduct has caused such bodily harm to another as to make him helpless, the actor is under a duty to use reasonable care to prevent any further harm which the actor then realizes or ought to realize as threatening the other." [15]

Moreover, where plaintiff is rendered helpless by another's tortious act, and such injury is aggravated by the latter's failure to use reasonable care to prevent this further injury, it is not, in most cases, necessary to predicate recovery for the further injury upon this statute. The connection between the original wrongdoing and the further harm is usually such as to make the original tortious act of the driver the proximate cause of the further harm and thus allow recovery without asserting the statute.

In the next place it is important to observe that in this consideration we are not concerned with the question of liability for the original injury, but solely with the question of whether or not the statute creates civil liability for aggravation of the original injury brought about by the defendant's failure to stop and render reasonable aid. To determine whether or not civil liability exists for the original injury it is not necessary to have resort to this statute, for this question can be answered adequately by application of the famil-

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ceed two years, or by both such fine and imprisonment, and if any such person be convicted a second or subsequent time for a like offense, he shall be deemed guilty of a felony and shall be punished by imprisonment for a term of not less than one year and not more than two years; and if he shall have caused an injury to property, he shall be deemed guilty of a misdemeanor, and, upon conviction thereof, he shall be fined in any sum not less than twenty-five dollars and not more than two hundred and fifty dollars, to which may be added imprisonment for not to exceed sixty days."

14 *Supra* note 13.

15 TENTATIVE DRAFT No. 4, § 196.

iar common law doctrines of causation, negligence, contributory negligence, etc. The only function of the statute is to impose a duty to stop and render assistance after the accident occurs, and if any civil liability is created by this statute it exists only because this duty has not been observed.

One further observation might not be amiss. Namely, that at common law no duty existed to aid one whom the driver's non-tortious act rendered helpless. On this point the Tentative Restatement has this to say:

"There are cases and dicta which deny the existence of such a duty. These are few in number and in recent years no case has arisen which has required any court to decide the question." [16]

By elimination it would seem that the only innovation that the statute could make, except of course the creation of criminal liability for failure to stop whether or not the accident is caused by the driver's fault, which is its avowed purpose, would be the creation of civil liability for failure to assist one injured thru the non-tortious act of a driver. Narrowed down to this solitary issue we may now attempt the solution of the question already posed: namely, does the Indiana "hit and run" statute create civil liability?

The Tentative Restatement [17] lays down a test as determinative of the question whether or not the violation of a legislative enactment creates civil liability. It is as follows:

"The violation of a legislative enactment by doing a prohibited act, or by failing to do a required act, makes the actor liable for an invasion of an interest of another if:

(a) the intent of the enactment is exclusively or in part to protect an interest of the other as an individual; and
(b) the interest invaded is one which the enactment is intended to protect; and,
(c) where the enactment is intended to protect an interest from a particular hazard, the invasion of the interests results from that hazard; and,
(d) the violation is in law the cause of the invasion, and the other has not disabled himself from maintaining an action."

With this rule as a measuring rod we may proceed to answer our question.

Perhaps, the question can be more clearly answered by a statement of facts that will make its solution important. A while negligently speeding on the left side of a public highway collides with B who is

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16 TENTATIVE DRAFT No. 4, p. 119.
17 TENTATIVE DRAFT No. 4, § 176.

properly on the left side of the same highway going the opposite direction to A. B is not contributory negligent as far as the original wrong goes, having done everything that an ordinary prudent man would have done under the circumstances. The result of the collision is that A sustains a deep cut in his leg. B, however, comes off without a scratch, and after observing A's wound deliberately gets in his car and drives away, leaving A to spend the night on the highway. Gangrene, which could easily have been prevented had B driven A to the next town, sets in and A's leg is amputated. Question: Can A recover damages from B for the amputation of his leg? At common law A could not recover as B had no legal duty to use reasonable care to prevent any further harm from befalling A, who brought about his condition by his own tortious act. Under the Indiana "hit and run" statute is A civilly liable?

The first requirement of the test laid down by the Tentative Restatement that the intent of the enactment must be exclusively or in part to protect an interest of the injured person as an individual is met. The intent of the Indiana "hit and run" statute is to promote A's chances of recovery and inhibit further injury from accruing to him.

That the interest invaded, in the supposed case, is the one which the enactment is intended to protect is obvious. Prevention of further harm, the interest sought to be protected, is invaded.

The particular hazard which the "hit and run" statute seeks to protect A from is, as the very phrase which such statutes have come to be known by indicates, the running away of the other party from the injured person, and the scene of the accident. That the invasion of A's interest, protection from further harm, results from the particular hazard is quite apparent.

Finally the last requirement that the violation be in law the cause of the invasion, and that the injured person has not disabled himself from maintaining the action, is met with. The interest sought to be protected as said above is A's freedom from further harm. The violation; namely, the running away from the scene of the accident and the injured person is the proximate cause, the cause in law, of the invasion. Moreover, A, in the supposed case, did not do anything to disable him from maintaining an action. B's wrong or breach of duty was not exercising reasonable care to aid the injured person. A was not contributory negligent in the present case so as to bar his recovery. He had no alternative; he was forced to stay out on the highway. Nothing he could do could prevent gangrene from setting in.

It appears, then, that violation of the Indiana "hit and run" statute not only creates criminal liability, but also, if the plaintiff does noth-