

## Good Samaritan

By Saul Schwartz

The biblical parable of the good samaritan is used to teach the virtue of helping someone in need. Does this virtue carry over to our legal system? How would the priest and the Levite be treated in our courts for their unwillingness to assist a fellow traveller on the road to Jericho? There are three main issues when considering the legal situation of a good samaritan:

- the legal duty of a citizen to assist someone in need
- the compensation for loss or injury, or the rights of a good samaritan
- the liability or risk assumed by a good samaritan.

Canada is in an interesting position with its two legal systems (civil law in Quebec and common law in the rest of the country) to consider the role of the good samaritan. Developments in other common law jurisdictions, such as the United States, indicate some trends in statutory modifications of the common law. In Europe, under civil law, a great deal on uniformity exists in the good samaritan laws.

### COMMON LAW The Duty To Assist

As a general principle, common law does not require a bystander to help someone in peril - the priest and the Levite would not be liable for failing to assist the stranger.

Common law jurisdictions generally rely on inducements - the carrot and stick approach - to persuade citizens to aid others by minimizing risk to themselves. However, several exceptions exist where failure to act could result in both civil and criminal liability.

A "special relationship" may give rise to a duty to assist. Such a relationship exists when, for example, one party derives an economic advantage from the other. An employer may be obligated to assist an employee injured at work. In an accident, common carriers must assist passengers, and innkeepers must aid their quests. Although the spectrum of special relationships has not yet been determined by the courts, the scope will likely expand as it has in the United States.

Another exception occurs when a person creates a situation placing another in danger. A negligent motorist who causes an accident involving injuries is liable if he or she does not provide assistance.

In some circumstances, a person is assumed to have a duty to assist because of the nature of his or her job. Policemen and Firemen, not good samaritans since it is their job to assist in an emergency. In general, a good samaritan is not paid for rescuing people in danger.

### Risks Of A Good Samaritan

In Legal theory, the bystander is safe as long as he or she does absolutely nothing. But as soon as steps are taken to help, immunity for failing to act is removed. If a bystander decides to act as a good samaritan and chooses to intervene, he or she will be liable to the victim if rescue actions were unreasonable, and indeed aggravated the plight of the sufferer.

So long as nothing is done to worsen the situation, a good samaritan can abandon the rescue effort and leave the scene. A point is reached, however, when someone who intervenes is considered to have assumed a legal duty to act, but the rule and limits have not been tested.

The good samaritan probably runs greater risk of being held liable for personal injury or damage to property to a third party than to the victim. But the old common law defense of necessity protects a rescuer from liability for trespass if the individual enters another's property or uses others' goods necessary to save lives or protect property. A good samaritan can break into a garage and seize an axe to save a stranger trapped in a burning car.

### Rights Of A Good Samaritan

What happens when a good samaritan suffers injuries or damage to his or her property as a result of responding to a call for help? Courts formerly considered that risk of loss or injury was voluntarily assumed. Today, the rights of a good samaritan to claim compensation depend mainly on whether the emergency was caused by another's negligence or fault. If danger is caused by the victim, the good samaritan can claim compensation from the victim. If a third party causes the situation, both rescuer and victim can recover damages from that person.

### The Ogoopogo Case

The case of *Horsley v MacLaren*, 1970, represents a controversial example of the right to compensation. A quest (Matthews) on a power boat (the Ogoopogo) owned by the defendant (MacLaren) fell overboard into Lake Ontario. MacLaren tried to rescue Matthews but was unsuccessful. Meanwhile, the plaintiff Horsley (another quest) attempted to save Matthews but both men drowned. The court held that MacLaren had a duty to rescue Matthews because of a special relationship - a power boat operator owed a duty of protective care to the passengers - and if negligent, MacLaren would be liable to Matthews (or his dependents).

Horsley, on the other hand, was a good samaritan with no duty to rescue Matthews. His only recourse was against MacLaren and his right to compensation depended on whether MacLaren had been negligent to Matthews, which the Supreme Court found not to be the case. Since MacLaren was not liable to Matthews, he could not be liable to Horsley.

### Statutory Modifications To The Common Law

The Canadian federal and provincial governments have passed legislation to modify common law rules in certain circumstances. For example, the Criminal Code and child welfare legislation specify that one must provide necessities of life to children, spouses and wards. The Criminal Code also gives a police officer the power to require any citizen to assist in making an arrest for keeping the peace. The Ontario Forest Fires Prevention Act allows a fire warden to enlist any person to help fight a forest fire.

Most statutory modifications impose a duty to assist and offer protection against civil liability in executing that duty. These features common under provincial emergency powers legislation, empower the responsible minister to demand any qualified person to provide aid. Failing to comply could result in a fine or imprisonment. When the new Canadian Emergencies Act is passed, the federal government will have similar powers during public welfare emergencies.

Little uniformity exists among Canadian laws to protect the good samaritan. Some provinces have laws that protect the rescuer from liability, unless there is evidence of gross negligence, but do not force a person to assist. Every province except Prince Edward Island has a criminal compensation scheme which would compensate good samaritans injured because of a criminal act. However, no common law province has established a general compensation scheme. Only

five provinces and two territories have general legislation relieving a good samaritan from liability for negligence.

In other Commonwealth countries, the legal position of the good samaritan is broadly similar. Nowhere is there a general legal duty to assist a victim. Few legislative developments have occurred, and the laws closely mirror those in Canada.

Development of the law relating to the good samaritan in the United States resembles that in Canada, and similarly, there has been few cases to test the legislation.

As in Canada, American courts have taken the carrot and stick approach. They have also imposed a legal duty to act in the case of special relationships. But the range of special relationships has broadened to cover more remote circumstances, such as drinking companions on a special outing.

One notable difference in the United States is greater willingness to allow the injured party a civil action for damages based on a violation of criminal statute.

Another similarity is a legal duty not to interfere with someone prepared to help in an emergency. This principle was recently applied in California when a bartender not only refused to call for help, but denied use of the phone to the good samaritan. A murder occurred, and the heirs sued the bar's owner. The court reaffirmed that the defendant owed no legal duty to call the police, but there was a duty not to impede another.

American common law has little success in encouraging the good samaritan, and two famous cases strongly illustrate this point. In a 1964 case in New York, a woman was stabbed outside her apartment building while her neighbours watched. No one called the police. When she screamed, the attacker fled, only to return twice to stab and kill her when no one responded. The second incident occurred in Massachusetts, in 1983, when tavern patrons watched a woman being raped. The assault lasted more than an hour, but no one intervened or called for help. The predominant excuse in both cases was a fear of getting involved, and progress in changing laws to deal with apathy is still sporadic and slow.

All states have enacted statutes to protect the good samaritan from being legally liable to the victim. However, the issues of compensation and indemnification regarding the good samaritan have not as yet received the attention of the legislature.

## CIVIL LAW

In Quebec, the law relating to the good samaritan is in marked contrast to the common law provinces. Quebec is unique in Canada in imposing a duty on everyone to help a person in peril. Violators can also be liable to pay damages to the person who suffers. In spite of these differences, law suits are still virtually non-existent against rescuers, paralleling the experience in the rest of Canada.

While the duty to take action stems from the Quebec Charter of Human Rights and Freedoms enacted in 1975, and the Civil Code, there is still little jurisprudence interpreting these provisions.

The Charter contains a provision that imposes an obligation to render aid if it can be accomplished without serious risk to the good samaritan or a third person.

Under the Civil Code, every person is obligated to act as a bon pere de famille, broadly defined as a reasonably prudent person. Failure to do so would amount to fault and lead to legal wrong.

Quebec is also the only province to have passed, in 1977, an Act to compensate a good samaritan suffering injuries or other losses.

Under civil law in Europe, it is a criminal offence not to assist an individual in an emergency. There is a high degree of uniformity among these European laws. Interestingly, under Roman law and the original codes of some European nations, it was not required that a person provide emergency assistance to a stranger. The duty to assist a person in danger is of recent origin in countries such as France and Belgium.

#### THE CASE OF REFORM

In Canada, there are opposing opinions on the need for reform of the present law governing the rights, duties and liabilities of the good samaritan.

Some, including the Law Reform Commission of Canada, believe that the criminal law would provide a forceful reminder to the bystander about the duty to help in an emergency. They advocate the European approach, or the positive duty approach to reform.

Others, including some industries and organizations, feel that citizens should have fears alleviated about volunteering to give assistance, the negative approach to reform.

Still others prefer to leave the situation as is.

From the standpoint of Emergency Preparedness Canada, imposing a general legal duty to aid a victim backed with sanctions of the criminal law, might make it easier for those vested with special powers to obtain assistance in an emergency. In the past, however, there has been few problems soliciting co-operation in emergencies and no tragic cases like New York or Massachusetts situations.

Since there is no empirical evidence against which to test claims of both the positive and negative liability approaches, the case for reform in Canada rests primarily on suppositions, and does not seem to be a high priority.

In the meantime, good samaritans in Canada will continue to face emergencies with little risk of prosecution and little chance of compensation.

*Mr. Schwartz is Professor of Law at the University of Ottawa, Ottawa, Ont.*

*This article is based on a study prepared by Mr. Schwartz for Emergency Preparedness Canada. Editor's Note: This article appeared in Emergency Planning Digest, April/June 1988. Reprinted for SARNEWS by permission.*