Liability of Search & Rescuers

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The law relating to search and rescuer liability has achieved a precarious balance. Caught amidst the historical common law position and the increasing trend of the courts to encourage altruism are the rescue cases. Common law and "legal literature make it quite clear that absent a special relationship, there is no duty to act for the benefits of others."[1] As a result the courts have had to be creative in rewarding the deserving rescuer compensation for injuries suffered in his rescue attempt. This evolutionary process is evident when one examines the legal history of rescuer liability as it developed in the Anglo- American countries.

The law in the common law countries has always made a point of differentiating between misfeasance and non-feasance. Generally speaking, the law has not been willing to infringe on the individual freedoms of the populace and has therefore been extremely reluctant to impose an affirmative duty to act. There is accordingly no law, generally, against not acting. Although this reluctance to impose a positive duty has often led to disturbing results, the courts have still avoided combining law with morality. Nowhere does the conflict between morality and legality become more evident than with respect to the rescue cases. While there appears to be no duty to rescue, if a rescuer does so attempt, he is held to a certain standard of care. Concurrently, if the rescuer is injured, recovery is possible in certain situations. However, the courts have avoided imposing a duty to "do good to others" and have instead left such arrangement up to the individuals, such as the brave Samaritan or through private contract.

EVOLUTION OF THE LAW RELATING TO SEARCH AND RESCUE

Historically, the common law countries, most notably the United Kingdom, the United States and Canada, were unwilling to compensate a rescuer for injuries he may have suffered in attempting a rescue. "In fact, occasionally the system not only displayed a reluctance to compensate the bystander injured in his attempt to help, but often refused to justify the intervention when the bystander inadvertently caused harm."[2] The courts relied on the maxims voluntary assumption of risk and a new intervening action to deny the rescuer compensation. The maxims provided the courts with an escape hatch. In the case of the former maxim, the courts argued that they did not have to award the rescuer compensation for they said that he voluntarily assumed the risk associated with the rescue attempt. The reasoning in applying the latter maxim was that the act of the rescuer was a new action and was not part of the chain of causation.

Starting from the same premise, that a rescuer was to be denied compensation, each of the above mentioned countries responded to the changing policy concerns of the public and evolved their laws to the point where today, the rescuer is in a much more favoured position. An examination of the evolution of the laws relating to search and rescuers in each of the three mentioned countries will show how the courts reached their present positions.

As already mentioned, the law of England originally did not recognize the right of a rescuer to recover. The case of Brandon vs. Osborne Garrett and Co.[3] stood for this proposition. In the case, the plaintiff upon seeing the glass falling upon her husband "immediately and instinctively" . . . . tried to pull her husband from the spot. In her effort to pull him out of danger, which she reasonably believe to exist, she injured her leg.[4] Swift, J., in his judgment, relied on the decision of Lord Ellenborough in Jones vs. Boyce and stated that "if a person is placed by negligence of the defendant in a position in which he acts under a reasonable apprehension of danger and in consequence of so acting is injured, he is entitled to recover damages, unless his conduct in all the circumstances of the case amounts to contributory negligence."[5]

In this case, the act of trying to save oneself was extended to trying to save one's spouse, child, friend or stranger. Although in this case, the rescuer was awarded compensation, there is strong dicta that indicates that an act deliberately undertaken with full appreciation of the risks involved would be a new intervening action and would "break the chain of causation created by the defendant's negligent act, thereby disallowing recovery by the rescuer."[6] This raised a problem because it seemed to indicate that a rescuer who thought about what he was doing and was injured could not recover; whereas, the rescuer who acted instinctively and was similarly injured could recover. The difference between the two situations being that the act deliberately undertaken would break the chain of causation; whereas, the act instinctively taken would not. The case of Brandon vs. Osborne Garrett and Co.[7] also stands for the proposition that if a rescuer does something a reasonable person ought not to have done, he will be denied recovery.[8] The rationale for not awarding compensation to the foolhardy rescuer is to try and reduce the "frequency of unwarranted rescue efforts.[9] The reckless rescuer is usually denied recovery on the grounds that "such a foolhardy attempt is unforeseeable and, hence, no duty is owed."[10] If the rescue attempt is not foolhardy, the common law is clear that a rescuer can recover from a defendant who negligently endangered the rescued part of from the victim who negligently or carelessly imperilled himself, provided that there is a "reasonable belief that somebody is in peril, and there is a reasonable response by the rescuer."[11] Authority for this principle is the case of Ould's vs. Butler's Wharf.[12] In this case, a rescuer wrongly believed that a fellow workman was in danger of being hit by the hook of a crane. In his effort to effect a rescue, the rescuer was injured. The court recognized that so long as the rescue attempt was reasonable in the circumstances, the rescuer may be compensated. It mattered not the attempt be unnecessary or futile.[13] If there is a reasonable chance of saving life or avoiding injury, the common law cannot deny recovery to those hurt during these attempts for fear that they may be discouraged from their heroic acts.

Up until the case of Haynes vs. Harwood[14] decided in 1935, the generally accepted view was that a person acting voluntarily and incurring certain risk must suffer the consequences of his actions. With the decision in the Haynes[15] case, the courts recognized that the rescue cases comprised an exception to the two well recognized defences of new intervening action and voluntary assumption of risk.

In the Haynes[16] case, an on-duty police constable intervened to stop the defendant's team of runaway horses and was injured. The defendant contended that there was a break in the chain of causation occasioned by the intervention of a consciously acting person between the wrongful conduct of the defendant and the accident, therefore, disentitling the plaintiff to maintain an action. Further, it was said that the constable voluntarily assumed the risk by exposing himself to the danger. Finley, J. in his decision held that the constable owed a duty to the public to preserve life and that "he did not within the true meaning of the doctrine, agree to take a risk knowing all the circumstances.[17] The decision to award damages for the injuries suffered was affirmed by the Court of Appeal. In the Court of Appeal, Greer, L. J. held that "an intervening act by a rescuer does not of itself necessarily prevent the court from coming to a conclusion in the plaintiff's favour if the accident was the natural and probable consequence of the wrongful act."[18]

Greer, L. J. referred to the American case of Eckert vs. Long Island Railroad Co.[19] as authority for the proposition that the doctrine of voluntary assumption of risk should not apply to the rescue cases. In his opinion, the American authority was especially applicable in the present case because the injured rescuer was one who might readily be anticipated to come to the rescue. The court followed the trend that had been established in the United States and Canada and allowed the rescuer to recover. In dealing with the decision of the court in Brandon[20], as it pertained to the issue of a new intervening action. Maugham, L. J. states, "that the decision to allow the rescuer to recover is not dependent on whether he acted deliberately and rationally rather than in a panic.[21]

The courts were coming to the realization that it made very little sense to deny compensation to the brave Samaritan who voluntarily risked injury to himself to help someone in danger, while

allowing the person who acts instinctively to recover. The instinctive actions of the rescuer were deemed to be "non-voluntary and, therefore, not applicable to the voluntary assumption of risk defence.[22] The distinction between the two situations is far too vague and arbitrary and is capable of leading to grave injustice. As Greer, L. J. stated, "it is not essential that a rescuer act on the spur of the moment. It would be absurd to say that if a man deliberately incurs a risk, he is entitled to less protection than if he acts on a sudden impulse.[23] It is correct to describe the rescue act as non-voluntary"[24] in order to rebut the general rule regarding voluntary assumption of risk. With the decision of the court in Haynes vs. Harwood,[25] one of the major inequities of the law relating to rescuers was removed; and the law relating to rescuers was removed; and the law was in a position to evolve sensibly.

After the Haynes[26] case, there was an increasing desire in the British courts to reward the brave rescuer and to further encourage rescue. Initially reluctant to compensate the rescuer, the English courts have followed the lead established by their North American counterparts as clearly demonstrated by the English Court of Appeal's reliance on the case of Eckert vs. Long Island Railroad Co.[27] This willingness to reward the rescuer is premised on the fact that the rescuer acted reasonably in the circumstances and held a reasonable belief that a situation of peril existed.

It is not in every case that someone other than the rescued part is necessarily responsible for the imperilled situation of the rescued part. There are situations where the rescued part carelessly or negligently endangers himself. The ability of a rescuer to recover had been dependent upon the existence of an independent third part, who endangered the rescued part. Rescuers were at one time denied recovery where the part in danger had created his own difficulties. This anomaly in the law was corrected in England with the case of Baker vs. T. E. Hopkins Ltd.[28] in 1958. It was held that: Although no one owes a duty to anyone else to preserve his own safety; yet if, by his own carelessness, a man puts himself into a position of peril of a kind that invites rescue, he would in law be liable for any injury caused to someone whom he ought to have foreseen would attempt to come to his aid.[29]

In this case, a doctor in attempting to rescue two workmen who had gone down a well and were overcome by fumes, died of carbon monoxide poisoning. The defendant argued that the duty of their client to their employees did not extend to the doctor (rescuer). Barry, J. held that "the company not only owed a duty to their employees but also a duty to the rescuer as a person who went to the rescue of the two employees who had been imperilled by the company's negligence.[30] The court did not find that Dr. Baker acted voluntarily so as to accept all the consequences of the defendant's negligence nor did they find that he acted in a foolhardy or unreasonable manner. Hence, a person who endangered himself would be liable to the rescuer for any injuries the rescuer suffered. Moreover, the onus of proving the rescue attempted was foolhardy is now placed on the rescue party.

The case of Videan vs. British Transport Commission,[31] a decision of the Court of Appeal in 1963, is further evidence of the trend in English jurisprudence to provide the rescuer with compensation and to encourage altruism. In this case, a railway station master was killed while attempting to rescue his infant son who was on the railway line. Here the infant son was held to be trespasser. His wife then sued for damages on behalf of her husband. The problem that the court grappled with was one of foreseeability. The defendant claimed that because there was no liability towards the rescued party there could be no liability towards the rescuer. The reasoning behind defence counsel's contention is that if you not foresee the presence of a trespasser, how could you possibly foresee the presence of anyone attempting to rescue the unforeseeable trespasser? However, Denning, M. R. encouraged the courts to continue to promote the concept of the rescuer and stated "that whoever comes to the rescue, the law should see that he does not suffer for it.[32]

The right of the rescuer is an independent right and is not derived from that of the victim. . . suffice it that he ought reasonably to foresee that, if he did not take care, some emergency or other might arise, and that someone or other might be impelled to expose himself to danger in order to effect a rescue.[33]

It has been proposed that the foreseeability requirement is really little more than a facade behind which the courts can hide to shroud the policy considerations present in each case. This is clear when one considers that the element of foreseeability if almost always lacking in the rescue cases. For example, "a reasonable man would not and could not be aware before the event that he was, by his conduct, endangering the rescuer as well as the rescued part of himself for that matter.[34] Although Denning, M. R. more or less nullified the foreseeability problem, it has been suggested that: liability is imposed as the result of judicial policy. The courts when they believe that the intervention of a new force is not so extraordinary as to make it unjust to hold the wrongdoer liable, constantly justify their decisions by speaking of the intervention as foreseeable.[35]

The law has been remoulded to allow rescuers to recover for injuries incurred. It has evolved from the strict principle of voluntary assumption of risk to a more liberal doctrine of foreseeability. The English courts were influenced by, but did not follow, the American lead in denying recovery in the case or professional rescuers. In England the duty to rescue, has gone to rebut the voluntary assumption of risk defence. An examination of the American jurisprudence will illustrate the areas in which their decisions influenced the British and Canadian law.

The American legal system recognized the right of the rescuer to recover. As early as 1871, in the case of Eckert vs. Long Island Railroad Co.,[36] the American courts acknowledged that the voluntary assumption of risk defence should not be applicable to the "rescue" cases. Nonetheless, it was still available to be applied in those cases where the rescuer was obviously reckless or unreasonable in his rescue attempt. In the Eckert[37] case, a child had got upon the defendant's railroad track; and its life was endangered by a negligent approaching train. Eckert went on the track to save the child and was killed. The Eckert[38] case usually cited as authority for the proposition that: the doctrine of voluntary assumption of risk does not apply where the plaintiff has under an exigency caused by the defendant's wrongful misconduct consciously and deliberately faced a risk... to rescue another from imminent danger. . .whether the person is one to whom he owed a duty of protection or not.[39]

The Eckert case, however, is just one among many U.S. cases that have upheld this proposition. It is settled law in the United States that with regard to the rescue cases, the rescuer cannot be deemed to have voluntarily assumed the risk associated with the rescue.

The American cases have extended the doctrine of the rescue cases to cover instances where the plaintiff voluntarily exposed himself to a risk. This proposition was upheld in the case of Liming vs. Illinois Central Railway[40] in 1890. In this case, the defendant railway company negligently set fire to some grass. The plaintiff voluntarily went to a barn to save his neighbour's horses and was subsequently caught by the fire and burned. It was held that although the plaintiff was "under no legal obligation to protect the property, his attempt to do so was lawful. Under the circumstances, it was the natural and probable result of the wrong of the defendant."[41] The American courts did not ponder over the causation issue like the English courts.[42] The problem the English courts faced differentiating between those rescue cases where the rescuer acted voluntarily rather than instinctively never seemed to be an areas of contention in the United States. The American courts were far more willing to treat both situations equally and to consider all reasonable rescue attempts to be outside the ambit of the voluntary assumption of risk defence.

The American courts also came to grips with the foreseeability issued much more quickly than the British. It was the enlightened and famous judgement by Justice Cardozo in Wagner vs.

International Railway Co.[43] which provided the rationale for allowing rescuers to recover even in cases where it could be argued that they were unforeseeable. In this case, a passenger was thrown from a train. The plaintiff in an attempt to rescue the passenger walked back along the train tracks to the point at which he thought his cousin would be. In attempting to effect the rescue, the plaintiff was injured. Justice Cardozo's judgement clearly and succinctly summarizes the issue of foreseeability as it relates to the law of rescuers.

Danger invites rescue. The cry of distress is the summons to relief. The law does not ignore these reactions of the mind in tracing conduct to its consequences. It recognizes them as normal. It places their effects within the range of the natural and probable. The wrong that imperils life is a wrong to the imperiled victim. It is a wrong also to her rescuer. The risk of rescue, if only it be not wanton, is born of the occasion. The emergency begets the man. The wrongdoer may not have foreseen the coming of a deliverer. He is accountable as if he had.[44]

Consequently, the problems associated with foreseeability of the injured rescuer were given less importance. No longer was recovery dependent upon the rescue attempt being foreseeable. This is not to say that a reasonable belief in a real or perceived danger coupled with a reasonable rescue attempt in the circumstances was not required. On the contrary, they are the fundamental prerequisites to commencing an action. Provided that these requirements were met, however; the American courts were inclined to allow the rescuer to recover.

The hurdles that appeared to be insurmountable to the British because their reluctance to discard the safety and restrictiveness of the old maxims were quickly overcome by the Americans. The British system, on the other hand, was far more reluctant to discard the protection of the voluntary assumption of risk and new intervening action defences which had been the basis of legal decisions for decades.

This is clearly demonstrated by the fact that the British lagged the United States by about forty years with regard to compensating the good Samaritan rescuer.

As noted, the American courts treat the "negligent wrongdoer as though he had foreseen the coming of the rescuer[45] and have thus avoided the pitfalls the English encountered when dealing with foreseeability. Further, the American courts have avoided relying on a derivative approach to compensate the rescuer. In other words, the courts do not find it necessary for there to be a duty owed to the rescued party by a defendant for the rescuer to be in a position to recover. "The right of the rescuer is an independent right, not derived from that of the rescued party.[46]

In the case of Pittsburgh Railway vs. Lynch[47], the American court dealt with the situation of a contributorily negligent rescued party and its effect on the claim by the rescuer. In this case, Lynch observed a woman on the railway tracks apparently unaware of the approach of a caboose; and as he believed, in danger of being run down by it. He tried to warn her but could not get her attention. He then hastened to her rescue and pushed her from the track seriously injuring himself. It was contended by the defendant that the rescuer could not recover for the injury to himself if the person rescued was in peril because of such contributory negligence on her part as would have prevented a recovery by her if she had been injured. The court held that "the rescuers cause of action is not affected by the contributory negligence of the rescued party.[48]

The above decision was subsequently upheld in the case of Highland vs. Wilsonian Inv. Co.[49]. In this case, through the negligence of the defendant, ammonia fumes were released into the bakery. Mrs. Highland, thinking Mrs. Damon (the rescued party) was in danger went to the bakery to see if she was alright. To escape the fumes, the two women stepped on to the marquise. Mrs. Highland fell and was injured. The defendant asserted, that since the the woman had escaped from the fume-laden air of the bakery, and had reached a place of safety, the proximate and intervening cause of the injuries was Mrs. Damon's return to the bakery. It was also asserted that

following her for the purpose of rescue was contributory negligence on the part of Mrs. Highland. The court held that even if there was negligence on the part of Mrs. Damon, this negligence "cannot be imputed to Mrs. Highland.[50] Moreover, there is no need for the rescue attempt to be instinctive. "The law does not discriminate between the rescuer oblivious to peril, and the one who counts the cost. It is enough that the act, whether impulsive or deliberate, is the child of the occasion.[51] So long as the requirements of a reasonable belief in a situation of peril and a reasonable rescue attempt in the circumstances are present, the courts will reject the voluntary assumption of risk defence and allow the rescuer to recover regardless of there being no legal duty following to the person in peril.

The duty owed to the rescuer by the defendant evolves from the reasoning shown in the Wagner[52] decision. Namely, that the defendant's act was a wrong to the rescuer because the wrongdoer ought reasonably to have foreseen that his act would cause the rescuer to take the risk of a rescue attempt. Although both the American and the English courts systems reject the derivative approach, the American courts were some fifty-five years ahead of the British courts in coming to the conclusion that the derivative approach was unjust when dealing with the rescue cases. Only those situations that would lend themselves to the derivative approach initially relied on by the courts, would be those where the defendant imperilled the rescued party.

One area where there is a marked difference between the stance taken in the United States and the British courts is in the area referred to as the "professional rescuer" cases. While in England, the presence of a duty to rescue has gone to rebut the voluntary assumption of risk defence, the same cannot be said in the United States. The case of Nastasio vs. Cinnamon[53] stands for the proposition that a professional rescuer cannot recover for injured incurred in the line of duty from the negligent wrongdoer. In this case, an off-duty fireman entered a burning building for the purpose of saving the tenants from injury or death and was killed. The court found that the fire was caused as a direct result of the defendant's negligence.

Where the deceased (rescuer) was brought into contact with the emergency situation . . . solely the reason of his status as a member of the Kansas City Fire Department, he had no choice whether to take the risk of rescue or not, and therefore, did not fall within the ambit of the rescue doctrine. It was his duty of his employer and the public to do so.[54]

It was averred by the widow of the deceased that her husband was a volunteer and that under the rescue doctrine, a voluntary act by a rescuer "prompted by a spontaneous, humane motive to save human life and which the rescuer had no duty to attempt in the sense of a legal obligation to his employment" should entitle his estate to recover.[55] However, the court did not agree and held that "agreeing to perform his duties as a fireman at a time when he was off duty does not make him volunteer.[56] The presence of a duty to rescue precluded the deceased rescuer's estate from recovering.

The relatively recent decision of Gillespie vs. Washington[57] held that "the professional rescuer doctrine excludes from coverage under general rescue doctrine those whose business it is to save lives and prevent injury to persons and property.[58] In this case, a police officer was barred from recovering against the estate of a deceased boat operator for injuries he suffered in attempting to upright the capsized boat.

Black Industries vs. Emco Helicopters Inc.[59] extends the position taken in the Gillespie[60] case. Here, the owner of a helicopter which crashed while fighting a forest fire allegedly caused by a negligent corporation, brought an action to recover for his property loss. Williams, J. held that: the professional rescuer, who has sustained injury or property loss while attempting to rescue persons or property, cannot recover from the one whose negligence created the hazard if the particular cause of the rescuer's injury or loss was foreseeable and not a hidden, unknown, or extra-hazardous danger which could not have been reasonably foreseen.[61] [italics added]

Williams, J. goes so far as to say that "public policy demands that recovery for rescuer's injury or loss of property be barred whenever the rescuer has voluntarily confronted the risk for remuneration while being fully aware of the hazards created by another's negligence.[62]

This can be qualified somewhat by the test established by Maltman vs. Sauer.[63] In this case, an army helicopter en route to the scene of an automobile accident to rescue and remove the injured motorist, crashed. The administrator of the estates of the deceased brought an action against the motorist under the rescue doctrine. This case held that those dangers which are inherent in professional rescue activity and therefore foreseeable are willingly submitted to by the professional rescuer when he accepts the position and the remuneration inextricably connected therewith.[64] The case, however, does grant the professional rescuer some leeway. If he can bring himself within the test set out in the case, there is a possibility, provided that the fundamental requirements of a rescue attempt are present, that he could recover. The test examines: "whether the hazard ultimately responsible for causing the injury is inherently within the ambit of those dangers which are unique to and generally associated with the particular rescue activity?"[65] If the rescuer can prove that the danger he faced was not inherently within the ambit of those dangers, he may be entitled to recover under the general rescuer doctrine.

The rescue doctrine does not necessitate that an individual be prompted by purely altruistic motives. This is not to say, however, that the doctrine applies in the same exact manner to both voluntary and non-voluntary rescuers. "In the case of a professional rescuer, certain hazards are assumed which are not assumed by the voluntary rescuer."[66]

What is the rationale for making the distinction between a regular rescuer and a professional rescuer? The case of Black Industries Inc.,[67] relying on Maltman vs. Sauer[68] expresses the view that public policy demands that "recovery be barred whenever a person, fully aware of a hazard created by another's negligence, voluntarily accepts for remuneration.[69] This stems from the concern of over compensating the injured rescuer. For example, a professional rescuer would receive remuneration for performing his job. Concerned, therewith, would be benefits such as Workers Compensation, if he was injured while in the course of his employment. If the injured party was allowed to recover in tort as well, that would be three sources of compensation for the one party. This general fear of allowing people to profit from their injures explains why the American courts tend to rely on the professional rescuer doctrine.

Canadian courts soon followed the American lead in recognizing that the rescue cases should be an exception to the defence of voluntary assumption of risk. Kimball vs. Butler Brothers[70] was the last case in which a Canadian court relied on the voluntary assumption of risk doctrine as a defence to a claim by a rescuer. In this case, the deceased was employed by the defendant as a civil engineer to work on a tunnel. A fire broke out in one of the tunnels they were constructing, and the plaintiff went to extinguish the fire and rescue the workmen. He was overcome by fumes and suffocated. The plaintiff's estate contends that it was negligence on the part of the employer, in not maintaining proper supervision and permitting the improper use of fire, that caused the plaintiff's death. The court found that the deceased was acting solely as a volunteer and not under any directions from his employer. The court also found that he was fully aware of the danger that existed and yet willingly went into the tunnel a second time. As such, the court held that he "took all the risks in the hope, and on the chance of saving the lives of his fellow men, who were in great danger; and it is nonetheless to his credit that he did so voluntarily and spontaneously, and so without any legal claim upon anyone for anything that he may suffer from the dangers which he was encountering."[71] Unfortunately, he was unable to recover.

The case of Seymour vs. Winnipeg Electric Railway[72] was a breakthrough in Canadian jurisprudence when it rejected the voluntary assumption of risk defence when used in conjunction with the rescue cases. The plaintiff alleged that the defendants, by negligently running a street car at an excessive speed, endangered the life of a child who was upon, the track and that he in endeavouring to rescue the child was himself injured.[73] The court held that the street railway

company was under a duty to exercise care in guarding against accidents to people on their tracks. Richards, J. held that "in such a case, it is foreseeable that someone, like the plaintiff, would risk his/her own safety, and further that the company must guard against injury to such a man as well as to the person he tries to rescue.[74] In the Seymour[75] case, the rescuer was allowed to recover. Justice Richards reasoned that: a rescuer could recover from a negligent wrongdoer. That the trend of a modern legal thought is towards holding that those who risk their safety in attempting to rescue others who are put in peril by the negligence of third persons are entitled to claim such compensation, from such third persons for injuries they receive in such attempts.[76]

It was also stated that: to save human life is a lawful act . . . and a man is doing a lawful and proper act in endeavouring to rescue the person so threatened. His conduct in placing himself in danger in order to effect rescue, unless he is needlessly reckless in exposing himself to injury, is not negligent and does not absolve the third party of responsibility for their negligence.[77]

The Canadian courts had recognized the need to classify the rescue cases apart from the other categories of cases and to make them an exception to the defence of voluntary assumption of risk. The law had finally come to the point of willingly encouraging rescue as well as compensating the rescuer for his heroic efforts. The Canadian law, like the American law, continued to broaden the category of situations in which the rescuer would be allowed to recover. The Canadian courts rejected the derivative approach that had been relied upon in the United Kingdom for so many years. The case of Haigh vs. Grand Trunk Pacific Railway Co.[78] (G.T.P.R.) supports the rejection of the derivative approach. In this case, a brakeman for the defendant company, was injured when he attempted to apply the brakes and stop the train so as to avoid the impending collision of the train and caboose. It was held that "if an intervener is injured, he can recover on the ground that there was negligence against the person in danger or negligence against himself after his intervention."[79] Therefore, it can be seen that the right of the rescuer to recover is not dependent on there being any duty owed to the imperilled victim. Back, J. states that: a person is justified in intervening to save from apparent probable death or serious injury a third person independently of any contractual or natural relationship between the person in danger and the intervener, unless his intervention was unnecessary, rash or reckless under the circumstances.[80]

Here, the actions of the rescuer were not held to be unnecessary, rash or reckless; and he was allowed to recover. Again, as in the United States, it can be seen that in Canada, the rescuer's right to recover is dependent upon the belief in a real or perceived danger coupled with a reasonable rescue attempt in the circumstances and not a specific duty owed by the wrongdoers to the rescued party.

The case of Dupluis vs. New Regina Trading Co. Ltd.[81] was a temporary obstacle for the rescuer seeking to recover damages for injuries suffered in attempting to rescue persons who negligently imperilled themselves. In this case, the defendant's employee had gotten her feet caught between the floor of the elevator shaft and grill work and was suspended downward. The rescuer, in attempting to help her, was killed. His estate commenced an action against the woman's employer. The court found that the rescued party, through her own negligence, endangered herself. The court held that the defendant company should not be liable to the deceased rescuer as there was no negligence on the party of the company towards the rescued. Although it is generally accepted that the right of the rescuer to recover is not derived from that of the rescued party, this is not to say that "it is independent of negligence as to the rescued.[82]

This development in the law is based on the reasoning that: when a person, in breach of duty toward another, places the latter in danger, he, as a reasonable man, should foresee that anyone seeing such other in danger will react to the spectacle and attempt a rescue. It is thus the danger, actual or apprehended to that other which brings the rescuer within the ambit of the negligent party.[83]

Therefore, "there must be an exigency caused by the defendant's wrongful conduct in order for the rescuer to have a claim against the defendant.[84] In Dupuis,[85] there was no wrongful conduct on the part of the defendant employer towards the rescued party; and as such, there could be no separate and independent wrongful conduct towards the rescuer.

With respect to the argument of vicarious liability of the employer for the actions of the employee, the Saskatchewan Court of Appeal held that, "while a defendant must respond in damages to a rescuer who is injured in going to the rescue of a person endangered by the defendant's negligence, a rescuer has no cause of action against a defendant for injuries sustained in going to the rescue of the defendant's servant whose own negligence placed him in peril.[86] The basic reasoning for this is explained by Cecil A. Wright: to say that there should be liability where no one save the rescued party is at fault . . . would result in the imposition of strict liability for inevitable accidents.[87]

While the plaintiff could not recover from the defendant, the law remained unclear as to whether he could have recovered against the rescued party. It was stated in an editorial note of the Dupuis[88] case that "the good Samaritan quality of the doctrine (rescue doctrine) does not, however, carry to the extent of allowing a rescuer to recover for injuries suffered in rescuing a person who imperils himself by his own negligence.[89] This was to remain an obstacle in the Canadian law for some time. Cecil A.. Wright, however, submits that "there is no reason why careless conduct for one's own safety should not involve liability towards a rescuer who seeks to mitigate the harm likely to result from such carelessness. [90] As was illustrated by the above discussion of the British cases, the rescue doctrine was not applied where the defendant imperilled himself until the case of Baker vs. Hopkins[91] in 1958. Consequently, until the decision in Baker[92], there was no judicial authority, save for the American cases, on which the Canadian courts could rely to impose liability on a person who negligently imperilled himself.

In C.N.R. vs. Bakty[93], the court held that the defendant's negligence created the need for his own rescue. The defendant negligently drove his car into the plaintiff's train. The plaintiff's employee, Carew, came to the rescue of the injured defendant; and as a result, suffered injury to his back. Had the plaintiff not come to the rescue, the defendant could have aggravated his existing injuries. The court held that the plaintiff should recover. Leach, Co. Ct. J. relied on the decision of Lord Denning in Videan vs. British Transport Commission[94] where he stated that "it seems to me that if a person by his own fault creates a situation of peril, he must answer for it to any person who attempts to rescue the person who is in danger . . . if the rescuer is killed or injured in the attempt, he can recover damages from the one whose fault has been the cause of it."[95]

The case of Horsley vs. McLaren[96] is Canada's premier case in the area relating to search and rescue. This is the case of the boating expedition that ended in tragedy with the death of two of the passengers. The facts are as follows:
A passenger on a motorboat (Matthews) fell overboard through no fault of the operator. The operator of the boat (McLaren) attempted a rescue but without result, mainly because he had insisted on backing the boat up instead of following the recommended rescue procedure. After a short time, a second passenger (Horsley) dived into the water in his own attempt to effect a rescue of Matthews. Apparently, he died of shock as a result of the sudden immersion in the extremely cold water. The estates of the two deceased passengers commenced an action against the owner of the boat, McLaren.

The claim of Horsley's estate failed because a majority of the Supreme Court of Canada held that there was no negligence on the part of McLaren in attempting to rescue Matthews as he did and, therefore, there was no negligence that induced Horsley to attempt to effect a rescue by diving into the waters. In the absence of negligence on the part of McLaren, there could be no liability to the second passenger. Ritchie, J. held that there was a situation of peril created when Matthews fell overboard, but that it was not created on the part of McLaren. Before he would impose liability on McLaren for the death of Horsley, Ritchie. J. said "there must be a duty owning to Horsley

stemming from the fact that a new situation of peril was created by McLaren's negligence which induced Horsley to act as he did."[97] Ritchie, J. did not find that this duty existed in the present situation. Hence, the decision in Horsley[98] reaffirms the position taken in the 1963 case of Videan vs. British Transport Commission.[99]

The Court of Appeal in Ontario, had previously dismissed the claim of the second rescuer, Horsley, but on different grounds. In summary, Schroeder, J. proposed that so long as your efforts do not leave the person whose rescue you are attempting to effect in a worse position than when you took over, discontinuing your rescue will not lead to liability. Likewise, Jessup, J.A. reaffirmed the decision of the House of Lords case of East Suffolk River Catchmen Board vs. Kent[100] where it was held that, "where a person gratuitously and without any duty to do so undertakes to confer a benefit upon or go to the aid of another, he incurs no liability unless what he does worsens the condition of that other."[101] While the Supreme Court of Canada did not discuss this aspect of the case, there is a sense in reading the judgment of Ritchie, J. that had McLaren's negligence been such as to place Matthews "in an apparent position of increased danger subsequent to and distinct from the danger to which he had been initially exposed by his accidental fall,[102] Ritchie, J. would have allowed the second rescuer to recover.

While the decision in Horsley vs. McLaren,[103] the case law in Canada appeared to favour the rescuer. Ritchie, J. accepted the view of Laskin, J. who states in his dissent: encouragement by the common law of the rescue of persons in danger would . . . . go beyond reasonable bounds if it involved liability of one rescuer to a succeeding one where the former has not been guilty of any fault which could be said to have induced a second rescue attempt.[104]

Although the trend has been to reward the rescuer, this is not to say that the rescuer is excused if he is unreasonable in his rescue attempt merely because he is a rescuer. In the case of Cleary vs. Hansen,[105] the plaintiff, who committed no driving error, was hit by Hansen. The plaintiff noticing that Hansen's passenger was injured went over to the car to help. He stood in the highway beside the Hansen car and failed to get out of the way with sufficient swiftness when another car hit him and crushed his legs. Here the court held that: Even during an attempt to assist someone in an emergency, the law expects reasonable care to be exercised, even though the standard is reduced to a certain extent. The court does not expect perfection, but rescuers must be sensible. They, like anyone else, must weigh the advantages and the risks of their conduct. Their conduct, too, however, laudable must measure up the standard of the reasonable person in similar circumstances.[106]

However, because the plaintiff did not show sufficient care for his own safety, his claim for damages was necessarily reduced.

There now exists legislation that permits the courts to apportion responsibility for a foolhardy rescuer attempt, therefore, "there is no reason why a reduced award cannot be granted to the rescuer which would give him something for his heroism without ignoring the fact that he was less than careful."[107] The case of Cleary vs. Hansen[108] is an example of a situation where the rescue attempt although not performed up to the proper standard, was not utterly devoid of merit. As such, the court apportioned damages, reducing the rescuer's claim by an amount commensurate to his own negligence while still awarding him something for his concerted efforts.

Toy vs. Argenti[109] continued the above trend. In this case the plaintiff, a car-wash manager, attempted to stop a car belonging to the defendant which the defendant had left running and in gear. In attempting to stop the car, the plaintiff's left thigh was crushed. Esson, J. held that because the plaintiff's actions were extraordinarily risky in comparison to the trivial damage that could have reasonably been anticipated, the plaintiff is held to be contributorily negligent and his claim reduced by thirty percent. This case demonstrated that the courts are very willing to reward rescuers regardless of their contributory negligence. Rather than not allowing recovery, the court merely reduced the claim to account for the plaintiff's negligence.

The law in Canada relating to search and rescuers has been greatly influenced by the laws in England and the United States. An examination of the evolution of the laws in all three countries indicates that Canada has, at least up to the present, tended to follow the American lead and has awarded compensation to the rescuer. The courts felt confident and justified in extending the humanitarian doctrine of rescue because as Cecil A. Wright stated: "as between a careless man and the heroic rescuer, the policy of law favours shifting the loss from the latter to the former."[110] It is questionable whether the above trend is likely to continue in Canada. For instance, the American professional rescuer doctrine has yet to be applied in Canada. To date, the Canadian courts have relied on British precedents. Therefore, it may be assumed that in cases involving professional rescuers, the courts will hold that the presence of a duty to rescue rebuts the voluntary assumption of risk defence as has been the case in England.[111]

THE DUTY TO RESCUE

As noted above, historically there has been no affirmative duty in the Anglo- American countries to effect a rescue. There has been a general aversion to the placing of an affirmative duty on the citizenry. The approach taken has been that: there is no duty to go the aid of a stranger in distress even where there is, on the one hand, a perceivable real danger to the victim, and concurrently when the rendering of the aid would entail no danger or even inconvenience to the would be rescuer."[112]

The general reluctance to require rescue stems from: a framework comprising legal factors which make for a reluctance to punish for mere omissions. Ideological factors which make for a reluctance to coerce free individuals to perform positive acts, and philosophical factors which make for reluctance to use the law in order to further the prospects of moral behaviour.[113]

The law's early desire to "encourage and reflect a strong sense of independence and individualism" was also a significant factor.[114]

This reluctance to impose an affirmative duty is in stark contrast to the Continental countries of Europe. The Continental system not only recognized the duty to help but also the concurrent need to offer "judicial support for the rescuer in the form of compensation for harm suffered and immunity from claims for harm caused."[115] An affirmative duty to rescue was first legislated in 1867 in the Netherlands. Since then, thirteen European countries have followed suit and have adopted a duty to rescue.[116] The Continental countries have gone so far as to impose criminal sanctions, varying in severity, upon those citizens who fail to come to the aid of a fellow citizen in peril. In France, Article 63 of the Code Penal states: whoever is able to prevent by his immediate action, without risk to himself or others, the commission of a serious crime or offence against the person, and voluntarily neglects to do so shall be liable.[117]

The German Criminal Code, under Article 330, likewise states that: Anybody who does not tender aid in an accident . . . situation, although aid is needed and under the circumstances can be expected of him, especially if he would not subject himself thereby to any considerable danger . . . shall be punished by imprisonment not to exceed one year or a fine.[118]

These provisions clearly impose an affirmative duty on the citizens of France and Germany to come to the rescue of their fellow countrymen or risk criminal sanctions.

"Further, once the criminal sanction has been clearly laid down, it may give rise to a civil claim as well."[119] However, it does not appear that German decisions exist which had "permitted this translation of criminal into civil liability."[121] Consequently, the issue remains unsettled.

Quebec is the only province in Canada that has legislated an affirmative duty to rescue.[122] Recent recommendations by the Law Reform Commission of Canada have urged that a formal

affirmative duty to rescue be incorporated into the Criminal Code. However, these recommendations have yet to be implemented.

In order to determine what duties are imposed on the citizen, an examination of the existing common law duties shall be undertaken. In the case of Heaven vs. Pender,[123] it was generally accepted that: wherever one person is by circumstances placed in such a position with regard to another that everyone of ordinary sense who did think would at once recognize that if he did not take ordinary care and skill in his own conduct with regard to those circumstances, he would cause danger of injury to the person or property of such person, a duty arises to use ordinary care and skill to avoid such danger.[124]

The decision in Heaven vs. Pender[125] has been highly scrutinized for it "seems to recognize indirectly the very duty to help which the courts had been so studiously avoiding."[126] While the court did not specifically impose an affirmative duty to rescue on the general populace, it did indicate that there were certain relationships which would give rise to a duty to rescue. One such relationship is found in the circumstance of the above case. Brett, M, R. imposed an affirmative duty to take care in the situation where one party knew that an article sold to the other party was dangerous by reason of some defect (although not dangerous in itself) and failed to warn that party.[127]

The above decision was affirmed in the oft cited case of Donoghue vs. Stevenson[128] in which Lord Atkin tried to establish specifically to whom this duty of care was owed. Lord Atkin stated that "you must take reasonable care to avoid acts or omissions which you could reasonably foresee would be likely to injury your neighbour."[129] The issue now turned on the question: who in law is your neighbour? To this Lord Atkin responded, "someone who is so closely and directly affected by your action that you ought reasonable to have them in contemplation as being so affected when directing your mind to the act or omission in question.[130] So it was that in England, a duty to take reasonable care in relation to your "neighbour" was imposed.

The common law has imposed a duty to rescue in situations such as those that arose in Heaven vs. Pender.[132] The common law further extended the duty to rescue and the subsequent liability to those situations where the rescuer, under no duty to do so undertakes to effect a rescue. While the case of H. R. Moch and Co. vs. Rensselaer Water Co.[133] was decided on different grounds, the court lent support to the above propositions. In this case, the defendant, a water works company, had made a contract with the city of Rensselaer to the supply of water. While this contract was in force, the plaintiff's building caught fire; and it and its contents were destroyed. The defendant, it is alleged omitted and neglected to supply and furnish enough water to extinguish the blaze. Although on the surface it might appear that the court should have awarded damages to the plaintiff, the court was willing to extend the duty of care owed by the promisor to the promisee under the contract to the "indefinite number of potential beneficiaries"[134] coming under the contract.

Further support for this proposition can be found in the American case of Zelenko vs. Gimbel Brothers.[135] Justice Lauer held that "if a defendant undertakes a task even if under no duty to undertake it, the defendant must not omit to do that which an ordinary man would do in performing the task."[136] The common law imposes a duty to rescue when the conduct has gone forward to such a point that discontinuing it would not only result in withholding a benefit but would actually inflict an injury.

The case of Horsley vs. McLaren[137] is one of the paramount cases in the area of rescuer liability in Canada. This case was brought to trial by the widows of the two deceased passengers. At trial, Matthews' family was denied recovery on the grounds that there was no evidence of casual relation between his death and McLaren's conduct. Horsley's family was, however, successful; and McLaren then appealed to the Court of Appeal. The Court of Appeal held that "where a person gratuitously and without any duty to do so undertakes to confer an benefit upon or go the

aid of another, he incurs no liability unless what he does worsens the condition of the others."[138] It was proposed by Jessup, J. A.. that since in all likelihood, Horsely had perished upon hitting the icy waters, McLaren could incur no liability for Horseley's death because his rescue attempt did not worsen the condition of Horsley.

On appeal, the Supreme Court did not make reference to the above issued and decided the case on different grounds. Ritchie, J. in his judgment stated that for Horsely to be successful, it must be shown that the "situation of peril brought about by Matthews was so aggravated by the negligence of McLaren in attempting his rescue as to induce Horsley to risk his life by diving in after him."[139] It was held that the situation of peril was not created by any fault on the part of McLaren nor was McLaren's rescue attempt negligent. McLaren was "not under a duty to do more than take all reasonable steps which would have been likely to effect the rescue of a man who was alive and could take some action to assist himself."[140] Therefore, McLaren was not liable for Horsley's death, and the appeal was dismissed.

Jordan House Ltd. vs. Menow and Honsberger,[141] a case decided two years later by the Supreme Court of Canada dealt with the issue of whether there is a duty imposed on the owners and management of a tavern to take reasonable care to safeguard patrons of the establishment from the likely risk of harm. Laskin, J. held that it was not unreasonable to impose a duty on the hotel to see that an intoxicated patron of their establishment got home safely.[142] Certain facts, such as the fact that the hotel was aware of Menow's propensity to drink, as well as their past experience in dealing with intoxicated persons, contributed to the finding of a duty.

The law in Canada has tended to expand the situations in which a positive duty of care if required. It appears that there is a growing group of special relationships which import an obligation to engage in positive conduct for the benefit of another. Normally, there is some element of control or some economic benefit inuring to the person as a result of the relation, which justifies the creation of the duty.[143]

The Menow[144] case specifically fits into the situation described above.

The more recent case of Crocker vs. Sundance Northwest Resorts Ltd.,[145] a 1988 Supreme Court of Canada decision continues the above trend. The issue to be decided was whether the ski resort had a positive duty at law to take certain steps to prevent a visibly intoxicated person from competing in the resort's dangerous tubing competition. The trial judge, Fitzpatrick, J., held that the ski resort was under a duty to warn or alternatively to rescue the patrons of the resort from injury that could result. At the Supreme Court of Canada, Wilson, J., in her decision followed the decision of Dubin, J. in the Court of Appeal and stated that the relationship between Crocker and Sundance gave rise to a duty to take all reasonable measures to prevent the plaintiff from continuing to participate in a very dangerous activity which was under its full control and supervision and promoted by it for commercial gain . . . that one is under a duty not to place another person in a position where it is foreseeable that the person could suffer injury.[146]

In the Sundance[147] case, because the defendants failed to take sufficient steps to discharge that duty, they were held to be liable for their breach of duty towards the plaintiff. A special relationship is created by the presence of some economic benefit flowing from one person to the other which justifies the imposition of the duty of care. There are still gaps in the system that presently are not accounted for. For instance, there is no duty owed by the person who stands by and allows the blind man to walk into rush hour traffic.

Once it has been established that there is a duty to rescue, the standard of care of the reasonable man in the same or similar circumstances is applied to determine if the rescuer has breached his duty towards the rescued party. Authority for this position can be found in the 1986 American case of Fowler vs. State Farm.[148] Here a guest who was injured when he jumped down

from the balcony of a home, after he and the homeowner were locked out, brought suit against the homeowner and their insurance company. The court concluded that the legal cause of the plaintiff's injuries were not caused by the homeowner's conduct, and as such did not apply the rescue doctrine. However, the court did suggest that "an individual who places himself in danger as the result of an emergency is not held to the same degree of care normally required of an ordinary prudent person."[149] The law still demands that the rescue attempt be reasonable, but the standard of care required is somewhat less than the standard required of the reasonable person.

An interesting development in the area of law relating to the standard of care required of a voluntary organization may be seen in the Smith vs. Horizon Aero Sports Ltd.[150] In this case, the plaintiff became a paraplegic when as a consequence of a mishap on her first parachute jump, she broke her back. The plaintiff alleged that she had not been adequately taught the techniques for controlling the direction of her parachute. The plaintiff brought an action against the parachute jumping school, Horizon Aero Sports, and the Canadian Sport Parachuting Association (C.S.P.A.). The action against the C.S.P.A. was dismissed. In his reasons for dismissal, Esson, J. stated that the "standard of care of the C.S.P.A. with respect to the teaching methods and personnel used in this case must be judged in light of the fact that they were a voluntary organization."[151] This case reiterated the necessity of taking into consideration the status of the rescuer in determining standard of care.

Public policy considerations dictate the imposition of a lower standard of care on a voluntary organization as opposed to a government or commercial agency.

It is in the interest of society that voluntary efforts directed towards promoting excellence and safety in any field of endeavour be encouraged. If the standard expected from a non-profit organization is put too high, such organization may depart the field.[152]

The decision of the court in Horizon Aero Sports[153] suggests that it would be unreasonable to expect the C.S.P.A. to ensure that the standards of training and supervision set by it were being implemented by the member schools. The court was influenced by the C.S.P.A.'s procedures in investigating reported deficiencies in the safety practices of its members.

While there is no legislation in British Columbia that imposes a duty to rescue, there is a Good Samaritan Act[154] which affords some protection to those citizens who do choose to act in any emergency. This Act provides that there shall be no liability for emergency and unless there is gross negligence.

Section 1 states:

> A person who renders emergency medical services or aid to an ill, injured or unconscious person at the immediate scene of an accident or emergency that has caused the illness, injury or unconsciousness is not liable for damages for injury to or death of that person caused by his act or omission in rendering the medical services or aid unless he is grossly negligent.[155]

The exceptions to this general rule are found in section 2:

> Section 1 does not apply where the person rendering the medical services or aid
> a) is employed expressly for that purpose; or
> b) does so with a view to gain.[156]

As noted above, so long as the rescuer acts with the standard of care of the reasonable person in the circumstances they should fall within the ambit of section 1 of the Good Samaritan Act[157] and be protected from any actions that may arise.

A duty imposed by law may be a duty arising by virtue of either common law or statute.[158] At present in Canada, section 2 of the Quebec Charter of Human Rights and Freedoms[159] is the

only statute that imposes a positive duty to rescue outside the ambit of special relationships outlined in the Criminal Code.

Section 2 reads: 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.[160]

The Quebec statute is somewhat less rigid than the European codes. The presence of the 'other valid reason' provision tends to make the Canadian provision less imperative. Nonetheless, the statute does exist; and there are indications that the future revised Criminal Code will contain similar provisions.

At present, the Canadian Criminal Code imposes a general duty on anyone undertaking an act to perform it if its omission would endanger life.[161] Furthermore, section 216 imposes a duty on persons undertaking acts dangerous to life.[162]

The Law Reform Commission has recommended that Canada take a much firmer stance with regard to requiring rescue. Pursuant to recommendation 10(2) of Report 31, a liability would be imposed on "everyone who perceiving another person in immediate danger of death or serious harm, does not take reasonable steps to assist him."[163] The clause is not imperative, however, and allows for an exception.

Section 10(2)(a) does not apply where the person cannot take reasonable steps to assist without risk or death or serious harm to himself or another person or where he has some other valid reason for not doing so.[164]

These clauses build on the principle enunciated in section 2 of the Quebec Charter of Human Rights and Freedoms[165] and try to bring the law in Canada more in line with the laws in the European countries. If Canada continues its trend in expanding the duty of care that one citizen owes to another, it is likely that the proposals of the Law Reform Commission will be incorporated into the new Criminal Code; and a law imposing a positive duty to rescue will be forthcoming.

APPLICATION OF THE LAW RELATING TO SEARCH AND RESCUERS

(How law could be interpreted using scenarios - editor)

On any given day, the Search and Rescue Society of British Columbia (SARBC) can be called upon to assist in the search for persons missing in the wilderness. Not surprisingly, with the recent increases in the number of personal injury cases coming before the courts, the SARBC is concerned about the liability in a rescue attempt. What if the rescuer is injured: What if they injure the party whom they are trying to rescue? Outlined below is a situation that addresses several of the legal issues relating to search and rescue liability.

A four year old girl and her eighteen year old babysitter were wandering through the woods. The eighteen year old was brought along on the outing by the four year old's parents to keep an eye on their daughter. When the two did not return to the camp site, the parents began looking for them. Two hours later they called in the police.

The police made the initial call to the local search and rescue group. They called about 30 people (12 trained and 18 untrained). The local group went through their normal procedure of searching without result. At the end of the second day, an untrained volunteer found the four year old girl. In attempting to rescue the youngster, the volunteer is himself injured. The eighteen year old was not there as she had gone off in search of help.

The next day, with the eighteen year old, the four year old and now the untrained volunteer all missing, the local group requests more resources. Three other search and rescue groups from adjacent areas, one search management team, three dogs and handlers and three hundred and fifty searchers are called in.

Late in the day, a trained member of the search management team located the four year old and the untrained rescuer, both injured at the bottom of the ravine. In his efforts to rescue the two, he was grossly negligent and caused the young girl to incur further injuries.

On day four, the eighteen year old is found alive and well. It has been determined that she needlessly risked the safety of herself and the four year old by straying off the marked nature trails.

Issues

1. Whether the untrained volunteer is entitled to compensation for the injuries sustained in attempting to effect the rescue of the four year old?
2. Whether the four year old who incurred further injury due to the gross negligence of the trained search management member will be entitled to compensation?

Reverse the Order of the Rescuers

3. Whether the trained search management member who is injured in attempting the rescue of the four year old is entitled to recover for his injuries?
4. Whether the four year old girl can recover for injuries suffered when the volunteer rescuer attempted the rescue? (He was not grossly negligent).

The untrained volunteer would likely to be entitled to compensation for the injuries he sustained in attempting to rescue the four year old girl. The common law supports this conclusion, and there are no statutory provisions that restrict the application of the common law. The fact that he voluntarily assumed the risk inherent in the rescue of the youngster had no bearing on his claim since the case of Seymour vs. Winnipeg Electric Railway Co.[166] disallowed the application of the voluntary assumption of risk defence in relation to rescue cases in Canada.[167] Further support for the untrained volunteer can be found the in the Alberta case of Haigh vs. G.T.P.R.[168] where it was held that an intervener is entitled to recover for the injuries sustained in his rescue attempt unless his intervention was unnecessary, rash or reckless under the circumstances.[169]

In the present scenario, it was found that the 18 year old babysitter's negligence caused the harm suffered by the four year old. At one time, the courts in Canada followed the position taken in the case of Dupuis vs. New Regina Trading Co.[170] where it was held that the good samaritan quality of the rescue doctrine did not extend to allow a rescuer to recover for injuries suffered in rescuing a person who imperilled himself. The decision in this case required that there be a duty owed by the defendant to the rescued party as a prerequisite to recovery. However, since 1958 with the decision in Baker vs. T. E. Hopkins[171], the courts in the United Kingdom and Canada have rejected the derivative approach and no longer require there to be a duty owed by the defendant to the rescued party in order for the rescuer to recover. The right of the rescuer to recover is an independent right not derived from that of the rescued party.[172] The person who imperils himself may be as fully liable to the rescuer as would be a third person who imperils another.[173] Therefore, regardless of whether the babysitter was present in the scenario or not, the volunteer should still be able to recover damages for his injuries. In this situation, it is probable that the 18 year old would be liable to the untrained volunteer for the injuries he sustained based on the reasoning that she ought to have foreseen that her negligent act of straying off the marked nature trails would cause somebody (a rescuer) to take the risk of attempting a rescue.[174] This conclusion is, however, premised on the understanding that there was a real or perceived danger;

and that the rescue attempt was reasonable in the circum-stances.[175] If the rescuer was reasonable in his rescue attempt, he should be awarded full compensation. The case of Cleary vs. Hansen[176] is authority for the proposition that the courts will reduce a reward to a rescuer by an amount commensurate to his degree of negligence. If he was contributorily negligent, then there is legislation[177] that apportions responsibility; and the rescuer is rewarded accordingly.

With regard to the injuries sustained by the little girl, which in the situation outlined above were allegedly inflicted due to the gross negligence of the trained member of the Search Management team, it is likely that she will be able to recover from the rescuer from the rescuer as well as the babysitter whose negligence caused her to be in the perilous situation. However, the case of Joblin vs. Associated Dairies Ltd.[178] casts some doubt on the right of the young girl to recover. In Joblin[179] the plaintiff injured his back in 1973 in a fall at the premised where he was employed by the respondents. Later, in 1976, the plaintiff developed a condition known as cervical myelopathy which was wholly unrelated to the 1973 injury. The trial judge awarded the plaintiff general damages and special damages representing loss of earnings from the date of the accident in 1973 to the end of September, 1976.

The defendant appealed against the inclusion of these special damages in the award on the ground that the supervening incapacity of the appellant (plaintiff), attributable to the myelopathy, put an end to their legal liability for any loss of earnings which, but for the myelopathy, would have resulted from the plaintiff's accidental injury in 1973.

The Court of Appeal reduced the damages and the plaintiff appealed to the House of Lords. The House of Lords dismissed the appeal on the reasoning that "when a plaintiff injured by the defendant's tort is wholly incapacitated from earning by supervening illness or accidental injury, the law will no longer treat the tort as a continuing cause of any loss of earning capacity."[180]

It is submitted that the girl could recover from the babysitter. However, if the babysitter could prove that the actions of the Search Management Team member constituted a supervening injury, the law may not treat her tort as continuing. It is my contention, however, that in this situation, the tort of the babysitter would be treated as a continuing cause; and that the court would apportion damages pursuant to the Negligence Act.[181]

The above situation may not hold if the babysitter is not present in the scenario. The degree of skill required of the rescuer is measured objectively, ie. that of the reasonable person in the circumstances. The case of Cleary vs. Hansen[182] held that while the court does not expect perfection, the rescuer must be reasonable in his attempt. The common law recognizes a duty to act carefully when effecting a rescue even if under no positive duty to act.[183] The Ontario Court of Appeal in the case of Horsley vs. McLaren[184] held that "where a person gratuitously and without any duty to do so undertakes to confer a benefit upon or go the aid of another, he incurs no liability unless what he does worsens the condition of the other."[185] On appeal, the Supreme Court of Canada tacitly approved the standard of care applied by the Court of Appeal in finding that McLaren was not so negligent in his rescue attempt as to induce Horsley to risk his life by diving as he did. I submit, therefore, that the standard set forth in the Ontario Court of Appeal decision remains good law in Canada. In the present scenario, it is evident that the trained member of the Search Management team cannot bring himself within the protection of the Horsley[186] decision. Not only is it assumed that the Search Management team member receives remuneration for his efforts and, therefore, is not performing the rescue attempt 'gratuitously;' but, as a professional rescuer, he is under a positive duty to confer the benefit upon the rescued party. As well, since his actions left the four year old in an even worse condition, he is liable for her injuries and should be the one to compensate her.

There is no litigation concerning the Good Samaritan Act;[187] but, upon an initial reading, it would seem abundantly clear that a member of the Search Management team who receives remuneration for his activities would not be within the intended purview of the Statue.[188] The Act

is designed to insulate the volunteer from the litigious wrath of the unfortunate victim; and it is unlikely to protect the professional rescuer.

The case of Hedley Byrne & Co. Ltd. vs. Heller & Partners Ltd.[189] stands for that

"a person who allows his judgement or skill to be relied upon without so qualifying his answer to show that he does not accept responsibility . . . accepts a legal duty to exercise such care as the circumstances require . . . and for a failure to exercise that care an action for negligence will lie if damages results."[190]

Therefore, it follows that if the trained Search Management team member held himself out to be a professional rescuer, then he would be held to a higher standard of care than the volunteer rescuer.

It is reasonable to assume then that the young girl would have ample grounds to commence a civil action against the negligent trained rescuer.

If, in the scenario outlined above, the order of the rescuers was reversed so that it was the member of the Search Management team who came upon the young girl first; the applicable Canadian law would lead to slightly different results. While it is probable that the professional rescuer would be able to recover for the injuries incurred in attempting to rescue the young girl, it is unlikely that the untrained rescuer would be held liable for the injuries inflicted upon her.

With regard to the situation of the professional rescuer, as stated above, it is likely that he would be able to recover for the injuries he suffered. Unlike the American courts, the English and Canadian courts have held that the presence of a duty to rescue, such as that owed by the Search Management team member, rebuts the voluntary assumption of risk defence. It is probable, therefore, that he like the voluntary unremunerated rescuer, will be allowed to recover for injuries incurred. The case law that is authority for compensating the volunteer[191] is equally applicable to the professional rescuer in Canada.

As indicated by the Search and Rescue Society of British Columbia, a rescuer is covered under Workers' Compensation benefits when they effect a rescue. The Workers Compensation Act[192] Section 10 (2) states that "where the cause of injury, disablement or death of a worker is such that an action lies against some person, other than the employer . . . within the scope of this Part; the worker may claim compensation or may bring an action."[193] This section seems to indicate that where they choose to file a civil action the WCB is not subject to further claims by the injured worker. However, it should be noted that s. 10 (5) makes allowance for the situation where the rescuer recovers less than he would otherwise have been entitled to under the Workers Compensation Act[194] by providing that the Board will make up the difference between what he received and what would have been received under WCB. In light of this statue, it is surprising that there are not more claims brought for compensation by injured professional rescuers.

The trend in the American system has been to steer clear of duplicating damage awards; and therefore, overcompensating the rescuer. The belief is that, by allowing the professional injured rescuer to recover through the tort system he would then be compensated threefold:

1. through his remuneration;
2. through workers' compensation benefits;
3. and through the tort system.

It is open to the Canadian courts to address the concerns that the American courts have raised, and thus, develop their own professional rescuer doctrine. The direction the Canadian courts will go is, at present, mere speculation; but the law in Canada currently favours recovery for damages

for a professional rescuer. It is safe to suggest that the courts will strive to maintain an equal balance between encouraging rescue attempts and overcompensating the professional rescuer.

The position of the four year old, with respect to the possibility of recovery for the injuries incurred while the untrained volunteer was attempting to effect her rescue will be examined. The common law in Canada requires the plaintiff to prove that the rescuer was foolhardy in his rescue attempt prior to allowing the rescued party to recover for injuries suffered at the hands of the Good Samaritan. Baker vs. T. E. Hopkins[195] is authority for the above proposition.[196] Further support for the principle that the volunteer rescuer should not be liable may be derived from the case of Smith vs. Horizon Aero Sports Ltd[197]. The court held that the standard of care required of a voluntary organization shall be somewhat lower than that expected or organizations operating for commercial gain. It is stated in the Horizon Aero Sports[198] case that public policy considerations demand that a lower standard of care be required of voluntary organization so as to encourage them to continue to provide their valuable services.

There is also statutory authority in British Columbia to support the common law position. The Good Samaritan Act[199] offers protection to citizens who choose to act in an emergency situation.[200] Pursuant to the Act, it is likely that the volunteer rescuer would not be held liable for the injuries suffered by the young girl, provided that he was not grossly negligent (which in the present scenario it appears was not the case). The rescuer is not excused if he is unreasonable in his attempt merely because he is a volunteer. The general position of the law is that the standard of care required for a volunteer is somewhat less than the standard required of the reasonable person. It is probable that the young girl would be unsuccessful if she chose to commence an action against the volunteer rescuer for the injuries she suffered.

The object of the law in the area of search and rescue has been to encourage and promote a more altruistic society. It is likely that the courts will continue their trend of reshaping and developing the law in this area so as to make it as just and equitable as possible. While it is true that the courts in the past have avoided combining law and morality, it would appear that, in today's ever increasingly interdependent society, such a combination is required. In order to achieve the desired result of a more altruistic society, the common law in the Anglo-American countries may well have to follow the lead of the Continental countries. As stated by Linden in his 1971 article, "Rescuers and Good Samaritans"[201]

Everyone admires a rescuer and a good samaritan, but the denial of recovery to injured rescuers and the imposition of damages for inadvertent harm could hardly encourage altruism.[202]

[1] Law Reform Commission of Canada, Working Paper 46; Omissions, Negligence and Endangering (Ottawa: Law Reform Commission of Canada, 1985) at 17.
[2] Leon Sheleff, The Bystander (Toronto, Lexington Books, 1978) at 101.
[3] Brandon vs. Osborne Garrett & Co. (1924) 1 K.B. 548.
[4] Ibid, p. 549.
[5] Ibid, p. 552.
[6] A. H. Low, "Vilenti, Duty and the Rescuer" (1959) Faculty of Law Review University of Toronto. 128.
[7] Supra, note 3.
[8] Allen M. Linden, "Rescuers and Good Samaritans" (1971) The Modern Law Review 241 at 257.
[9] Allen M. Linden, Canadian Tort Law, 3rd ed. (Toronto, Butterwroth & Co. 1982) at 374.
[10] Ibid, p. 374.
[11] Ould's vs. Butler's Wharf(1953) 2 Lloyd's Rep. 44.
[12] Ibid.
[13] Supra, note 8 at 256.
[14] Haynes vs. Harwood (1935) 1 K. B. 146.
[15] Ibid
[16] Ibid

[17] Ibid., p. 152
[18] Ibid., p. 153
[19] Eckert vs. Long Island Railway Co.(1871) 43 N.Y. 502.
[20] Supra, note 8.
[21] Supra, note 14 at 164.
[22] J. Tiley, "The Rescue Principle" (1967) The Modern Law Review 25 at 26.
[23] Supra, note 6 at 121.
[24] Supra, note 22 at 28.
[25] Supra, note 14.
[26] Ibid.
[27] Supra, note 19.
[28] Baker vs. T. E. Hopkins(1958) 3 All E.R. 147.
[29] Ibid., p. 153.
[30] Ibid., p. 152.
[31] Videan vs. British Transport Commission(1963) 2 All E.R. 860.
[32] Ibid., p. 868.
[33] Ibid., at p. 867.
[34] William L. Prosser, Law of Torts 3rd ed. (St. Paul., Minn.: West Publishing Co., (1964) 315.
[35] Supra, note 6 at 124.
[36] Supra, note 19.
[37] Supra, note 19.
[38] Supra, note 19.
[39] A. L. Goodhart, "Rescue and Voluntary Assumption of Risk"(1971)The Modern Law Review192 at 196.
[40] Liming vs. Illinois Central Railway(1890) 47 N.W. 66.
[41] Supra, note 39 at 198.
[42] Infra, p. 4.
[43] Wagner vs. International Railway Co.(1921) 133 N.E. 437.
[44] Ibid.
[45] Ibid.
[46] Supra, note 39 at 197.
[47] Pittsburgh Railway vs. Lynch(1903) 68 N.E. 703.
[48] Ibid.
[49] Highland vs. Wilsonian Investment Co.(1933) 17 P. 2nd 631.
[50] Ibid, p. 634.
[51] Ibid.
[52] Supra, note 43.
[53] Natasio vs. Cinnamon(1956 295 W.W. 2nd, 117.
[54] Ibid., p. 121.
[55] Ibid., p. 120.
[56] Ibid.
[57] Gillespie vs. Washington(1978) 395 AA., 2nd 18.
[58] Ibid.
[59] Black Industries vs. Emco Helicopters Inc.,(1978) 577 P. 2d 610.
[60] Supra, note 57.
[61] Supra, note 59 at 611.
[62] Ibid.
[63] Maltman vs. Sauer (1975) 530 P. 2d. 254.
[64] Ibid, p. 257.
[65] Ibid., p. 257.
[66] Ibid, p. 256.
[67] Supra, note 59.
[68] Supra, note 63.
[69] Supra, note 59 at 612.
[70] Kimball Vs. Butler Brothers(1970) 15 O.W.R. 221.
[71] Ibid, p. 223.

[72] Seymour vs. Winnipeg Electric Railway(1970) 13 W.L.R. 566.
[73] Ibid., p. 556.
[74] Ibid., p. 568.
[75] Supra., note 72.
[76] Ibid, p. 568.
[77] Ibid., p. 566.
[78] Haigh vs. Grand Trunk Pacific Railway Co.(1914) 8 A.L.R. 153.
[79] Ibid.
[80] Ibid, p. 155.
[81] Dupuis vs. New Regina Trading Co. Ltd.(1943) 4 D.L.R. 275.
[82] Ibid, p. 284.
[83] Ibid.
[84] Supra, note 39.
[85] Supra, note 81.
[86] Supra, note 81 at 275.
[87] Cecil A. Wright, "Case Commentary"(1943) 21 Canadian Bar Review 758.
[88] Supra, note 81.
[89] Supra, note 81 at 275.
[90] Supra, note 87 at 765.
[91] Supra, note 28.
[92] Ibid.
[93] C.N.R. vs. Bakty(1977) 18 O.R. (2d) 481.
[94] Supra, note 31.
[95] Supra, note 31 at 669.
[96] Horsley vs. McLaren(1972) 22 D.L.R. (3d) 545.
[97] Wright. Linden & Klar, Canadian Tor Law, Cases, Notes and Materials, 8th ed. (Toronto: Butterworths & Co., 1985) at 9-54.
[98] Supra, note 96.
[99] Supra, note 31.
[100] East Suffolk Rivers Catchment Board vs. Kent(1949) A.C. 74 (in Horsley vs. McLaren).
[101] Ibid.
[102] Supra, note 97 at 9-53.
[103] Supra, note 96.
[104] Supra, note 96 at 552.
[105] Cleary vs. Hansen1981) 18 C.C.L.T. 147.
[107] Supra, note 8 at 257.
[108] Supra, note 105.
[109] Toy vs. Argenti1980 17 B.C.L.R. 365.
[110] Supra note 87 at 758.
[111] See also Workers Compensation Act, R.S.B.C. 1979, c. 437, s. 10(2). For a discussion regarding the possible application of this section see Infra, p. 49.
[112] Supra, note 2 at 102.
[113] Ibid, p.110.
[114] Supra, note 8 at 242.
[115] Supra, note 2 at 101.
[116] Supra, note 2 at 108.
[117] Ibid.
[118] Ibid.
[119] Ibid, p. 109.
[120] John P. Dawson, "Negotiorum Gestio: The Altrustic Intermeddler" (1961) Harvard Law Review 1073 at 1107.
[121] Ibid, p. 1108.
[122] Under section 2 of the Quebec Charter of Human Rights and Freedoms R.S.Q. 1975 c-12.
[123] Heaven vs. Pender (1883) 11 Q.B.D. 503.
[124] Ibid, p. 509.
[125] Ibid.

[126] Supra, note 2 at 107.
[127] Supra, note 97 at 16-10.
[128] Donoghue vs. Stevenson (1932) A.C. 562.
[129] Ibid, p. 580.
[130] Ibid.
[131] Supra, note 123.
[132] Supra, note 128.
[133] H.R. Moch Co. vs. Rensselaer Water Co., (1928), 159 N.E. 896. The defendant was not held lible for the damages that accrued to the plaintiff's building, the Court of Appeal of New York held that once the rescuer assumes to act, even though done so gratuitously, he is under a duty to act carefully. The hand once set to a task may not be withdrawn with impunity through liability would fail if it had never been applied at all.
[134] Ibid, p. 899.
[135] Zelenko vs. Gimbel Brothers (1935) 287 N.Y.S. 134.
[136] Ibid.
[137] For the facts in this case, see Infra p. 24.
[138] Horsley vs. McLaren 1970) 2 O.R. 487 at 500.
[139] Supra, note 96 at 547.
[140] Ibid.
[141] Jordan House Ltd. vs. Menow and Honsberger (1974) S.C.R. 239.
[142] "When a hotel ejects a drunken patron, it owes a duty of care to the patron to take certain steps to ensure that the patron arrives home safely." Ibid, p. 249.
[143] Supra, note 9 at 304.
[144] Supra, note 141.
[145] Crocker vs. Sundance Northwest Resorts Ltd. 1988 1 S.C.R. (Part 7) 1186.
[146] Ibid, p. 1197.
[147] Supra, note 145.
[148] Fowler vs. State Farm (1986) 485 So. 2d. 168.
[149] Ibid, p. 169.
[150] Smith vs. Horizon Sports Ltd. (1981) 19 C.C.L.T. 89.
[151] Ibid, p. 114.
[152] Ibid, p. 115.
[153] Supra, note 150.
[154] Good Smaritan Act. R.S.B.C. 1979, c. 155.
[155] Ibid, s. 1.
[156] Ibid, s. 2.
[157] Supra, note 154.
[158] R. vs. Coyne (1958 124 C.C.C. 176.
[159] Supra, note 122.
[160] Supra, note 122.
[161] "Everyone who undertakes to do an act is under a legal duty to do it if an omission to do the act is or may be dangerous to life." See Martin's Criminal Code (1988) s. 217.
[162] "Everyone who undertakes to administer surgical or medical treatment to another person or to do any other lawful acts that may endanger the life of another person, is, except in cases of necessity, under a legal duty to have and to use reasonable care in so doing." Supra, note 161 at s. 216.
[163] Law Reform Commission of Canada, Report 31 on the Recodifying of Criminal Law Ottawa: Law Reform Commission of Canada, 1987) at 67.
[164] Ibid.
[165] Supra, note 122.
[166] Supra, note 72.
[167] Infra, aT 20.
[168] Supra, note 78.
[169] Infra, at 21.
[170] Supra, note 78.
[171] Supra, note 28.

[172] Supra, note 49.
[173] Supra, note 96.
[174] Supra, note 43.
[175] Supra, note 11.
[176] Supra, note 105.
[177] Negligence Act RSBC 1979, c. 298, s. 4.
[178] Jobling vs. Associated Daires Ltd. (1980) 2 All E.R. 752 (in Wright, Linden & Klar, Canadian Tort Law, Cases Notes and Materials, at 20-58).
[179] Supra, note 178.
[180] Supra, note 178 at 20-61.
[181] Supra, note 177.
[182] Supra, note 105.
[183] Supra, note 133.
[184] Supra, note 96.
[185] Supra, note 138.
[186] Supra, note 96.
[187] Supra, note 154.
[188] Ibid.
[189] Hedley Byrne & Co. Ltd. vs. Heller & Partners Ltd. (1963) 2 All E.R. 575.
[190] Ibid, p. 575.
[191] Infra, p. 43-44.
[192] Supra, note 111.
[193] Supra, note 111 at s. 10(2).
[194] Supra, note 28.
[195] Supra, note 28.
[196] Supra, note 28.
[197] Supra, note 150.
[198] Supra, note 150.
[199] Supra, p. 48.
[200] Supra, note 107.
[201] Supra, note 107.
[202] Supra, note 107 at 241.