Recovery by the Rescuer

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RECOVERY BY THE RESCUER

The purpose of this Comment is to examine the approaches utilized in Louisiana and other jurisdictions to determine the liability of a rescued person, or a third person whose negligence necessitated the rescue, for death or injury to a rescuer. The leading cases have ignored both the quasi contract and negotiorum gestio theories, and have grounded their decisions exclusively on tort principles.

INTRODUCTION

Three basic situations may be distinguished in examining the rescue problem. First, there is the case where the defendant negligently imperils X or X's property, and plaintiff-rescuer, placed by defendant's negligence in the dilemma of choosing between his own safety and aiding X, chooses to intervene and is harmed. The majority rule is that the defendant who is negligent as to X is deemed to be negligent with relation to potential rescuers as a class—persons who, though not in a position of primary danger because of defendant's negligent conduct, may be stimulated to undertake a rescue which subjects them to perils created by defendant's negligent conduct. The wrong to X is also a breach of the duty owed to the prospective rescuer.1 The second situation is represented by cases in which defendant negligently imperils himself, and plaintiff-rescuer is injured while making a reasonable attempt to help defendant. The majority position holds the defendant liable in these cases.2 The third situation involves a defendant who was not negligent with respect to plaintiff until after plaintiff had begun his rescue effort. When defendant's negligence occurred with relation to the stage of plaintiff's rescue attempts is unimportant. The sole question and that focused on by leading negligence decisions is whether defendant has created undue risk of harm. No emphasis is placed upon the sequence of defendant's and plaintiff's acts, nor upon

2. See Henneman v. McCalla, 148 N.W.2d 447 (Iowa 1967); Gambino v. Lubel, 190 So.2d 152 (La. App. 4th Cir. 1966), cert. denied, 191 So.2d 639, 640, 642 (1966); Dodson v. Maddox, 339 Mo. 742, 223 S.W.2d 434 (1949); Ruth v. Ruth, 213 Tenn. 82, 372 S.W.2d 265 (1963).
the manner in which the harm is caused, nor upon the number of events intervening between defendant's negligence and catastrophe. 3

NATURE OF THE DUTY

The leading case of Wagner v. International Ry. 4 dealt with recovery by the rescuer from a third party tortfeasor. Through negligent operation of defendant's train a passenger had been thrown from a crowded car onto a trestle. Plaintiff was injured when he fell through the trestle in attempting to effect a rescue. Justice Cardozo said:

"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 wrong also to the rescuer. The risk of rescue, if only it be not wanton, is born of the occasion. The emergency begets the man. The wrong-doer may not have foreseen the coming of a deliverer. He is accountable as if he had." 5

One has a legal and not merely a moral duty to avoid creating perilous situations which invite rescue attempts. 6 A rescue is always foreseeable as a possible consequence of a negligent act which places someone in peril. 7 The foreseeability of the rescue attempt brings the rescuer within the scope of defendant's


4. 232 N.Y. 176, 133 N.E. 437 (1921); Annot., 19 A.L.R. 1 (1922).

5. Id. at 180, 133 N.E. at 437.


7. Grisby v. Coastal Marine Service of Texas, Inc., 235 F. Supp. 97, 109 (W.D. La. 1964): "If one's fault is a substantial factor in bringing about harm to another, the fact that the actor neither foresaw nor should have foreseen the extent of the harm or the manner in which it occurred does not prevent him from being liable."

Lynch v. Fisher, 34 So.2d 513, 518 (La. App. 2d Cir. 1948): "We think it is well established that the general doctrine of foreseeability is not applicable to the extent of relieving one who sets in motion, through the agency of a negligent act, a chain of circumstances leading to the final resultant injury."

See Restatement (Second) of Torts § 435 (1965).
duty. It has even been held that the rescue of an unsuccessful rescuer who has himself become endangered is foreseeable. It is unnecessary that defendant foresee the particular manner in which the rescue is made; it is sufficient that the dangerous situation in which he placed himself or others invites rescue.

In the leading Louisiana case of Lynch v. Fisher, Fisher's truck, parked on the highway at night without flares or warning lights, was struck from the rear by the Gunters' speeding automobile. Plaintiff, a passerby, extricated Gunter and his wife from their burning car and returned for a floor mat to use as a pillow for the wife's head. On the floor of the car plaintiff found a pistol which he handed to Gunter. Temporarily deranged by the shock of the accident, Gunter fired the pistol striking plaintiff in the leg. The plaintiff sued both Fisher and Gunter alleging his injuries had been caused by their concurrent negligence. Sustaining Gunter's exception of no cause of action, the court held that the truck driver's negligence was the proximate cause of the rescuer's injury, that the doctrine of foreseeability did not necessarily preclude recovery by plaintiff, and that plaintiff could not be charged with contributory negligence in handing the pistol to Gunter.

Efforts to protect the personal safety of another do not supersede the liability for the original negligence which has endangered it. A defendant who negligently imperils a third person also owes a duty of care to potential rescuers who may


11. 34 So.2d 513 (La. App. 2d Cir. 1948), modified, 41 So.2d 682 (La. App. 2d Cir. 1949); 4 A.L.R.3d 558 (1965); Note, 9 La. L. Rev. 421 (1949).

12. See note supra.

13. 34 So.2d 513, 519 (La. App. 2d Cir. 1948): "In our opinion the original act of negligence alleged upon is so inextricably interwoven with the subsequent occurrences involved that it cannot be disassociated from any of them."
intervene. The duty to the rescuer is clearly an independent one, which arises even when the defendant has endangered only his own safety. The duty owed to the rescuer applies even when there is time for thought.

**CONTRIBUTORY NEGLIGENCE**

The rescuer is not barred from recovery by the contributory negligence of the person rescued. There must, however, be negligence toward the person imperiled before there can be negligence to the rescuer. A bystander does have a legitimate interest in rescuing imperiled persons from imminent dangers created by defendant's conduct. Contributory negligence is not exposing oneself to risk, but to unreasonable risk. If the rescuer's intervention is not foolhardy, the trier of fact may properly find that it was not unreasonable for plaintiff-rescuer to incur the risks incident to the rescue operation. The leading cases on the rescue doctrine hold that it is not contributory negligence for a rescuer to expose himself to danger in a reasonable effort to save another from harm. Whether the plaintiff-rescuer's intervention is reasonable will be judged by the standard of a reasonably prudent man in the presence of another's peril.

In **Gambino v. Lubel**, a recent Louisiana decision, a

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15. See note 10 supra.
18. See Brady v. Chicago & N. W. R.R., 265 Wis. 618, 62 N.W.2d 415 (1954); Rose v. Peters, 62 So.2d 585 (Fla. 1955). Norris v. Atlantic Coast Line R.R., 152 N.C. 505, 513, 67 S.E. 1017, 1021 (1910): "[I]t is well established that, when the life of a human being is suddenly subjected to imminent peril through another's negligence, either a comrade or a bystander may attempt to save it, and his conduct is not subjected to the same exacting rules which obtain under ordinary conditions; nor should contributory negligence on the part of the imperiled person be allowed as a rule to affect the question."
22. 150 So.2d 152 (La. App. 4th Cir. 1966), cert. denied, 191 So.2d 639, 640, 642 (1966). See Hicks v. Nelson, 182 So.2d 151 (La. App. 3d Cir. 1966), where plaintiff's truck was struck from the rear while engaged in pulling
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diabetic motorist consciously in need of insulin continued driving. He became unconscious, and his car stopped with the engine still running. An investigating policeman attempted to aid the defendant and was injured when the latter revived and accelerated the automobile forward. The policeman was viewed as a rescuer and was not charged with contributory negligence for failing to turn off the ignition. The court stated:

“A rescuer is favored in the eyes of the law and is not chargeable with negligence merely because he failed to make the wisest choice to accomplish the purpose. The cause of an injury to a rescuer is the fault which created the peril to those whom he attempts to aid.”23

In Hammonds v. Haven,24 a tree was blown across the road on a dark, rainy night. To warn oncoming drivers, plaintiff went to the center of the road and waved his arms. Defendant negligently ran down plaintiff. In allowing recovery, the court held that under the rescue doctrine conduct which might otherwise be considered contributory negligence may not be so considered where a person is injured in attempting to save others from imminent danger of personal injury or death; since persons are justified in assuming greater risks in protecting human life than they would otherwise be, a rescuer is not guilty of contributory negligence in exposing himself to danger in attempting to save others from serious harm if, in similar circumstances, a reasonably prudent man would so expose himself. The rescue doctrine was found applicable though the defendant did not create the danger, since defendant was found guilty of negligence as to the plaintiff-rescuer after the attempted rescue had commenced.

The rescue doctrine has been thus extended by applying its principles where defendant was not negligent until after plaintiff-

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23. Hicks v. Nelson, 182 So.2d 151, 157 (La. App. 3d Cir. 1966). Henne-man v. McCalla, 148 N.W.2d 447, 454 (Iowa 1967): “[O]ne who sees a person in imminent and serious peril cannot be charged with contributory negligence, as a matter of law, in risking his own life or serious injury in attempting to effect a rescue, provided the attempt is not recklessly or rashly made. In other words, in attempting to save the life of another, one is justified in exposing himself to danger in a manner that under other circumstances would deprive him of legal redress for any injury sustained.”
24. 280 S.W.2d 514 (Mo. 1955).
rescuer has begun his rescue effort. The law is interested in encouraging rescue and does not penalize the instinct to save those imminently imperiled. If the plaintiff-rescuer acts rationally, he is allowed to recover from a defendant who has negligently imperiled himself or a third person. 25

PROXIMATE CAUSE

The principle that a reasonably prudent person may expose himself to danger in an effort to protect human life without breaking the legal chain of causation is well settled. 26 The defendant's negligence in creating the dangerous situation may properly be found to be the proximate cause of plaintiff's injury. 27

In Parks v. Starks, 28 defendant motorist negligently collided with pillars supporting a canopy covering gasoline pumps. The garage owner failed to barricade the canopy. The next day, in attempting to warn some children of the dangerous condition, the plaintiff-rescuer was injured when the canopy fell. In allowing recovery, the court held that a proximate cause is not necessarily the immediate cause or the cause closest in time to the rescuer's injuries. It was for the jury to determine whether the intervening omission of the garage owner, after a nine-hour delay, to barricade and safeguard the premises was sufficiently foreseeable to render defendant liable for the eventual harm to the plaintiff-rescuer.

25. The rescue doctrine was applied in Ruth v. Ruth, 213 Tenn. 82, 372 S.W.2d 285 (1963), where plaintiff alleged that while he was an invitee on defendant's premises, he responded to the latter's cries for help and was injured in rescuing him from a burning room in which the defendant had negligently used a volatile and inflammable substance in repairing an outboard motor. In Scott v. Texaco, Inc., 48 Cal. Rptr. 785 (1966), the plaintiff stood in the left lane of the road behind an overturned car to warn oncoming vehicles. A vehicle stopped in the right lane, and the plaintiff was struck by an oncoming truck which could not pass because both lanes were blocked. The court held that the plaintiff was entitled to instruction that she could recover under the rescue doctrine if she was acting reasonably as a rescuer and unless her conduct was rash and reckless. See Dodson v. Maddox, 359 Mo. 742, 223 S.W.2d 434 (1949) (plaintiff was allowed to invoke res ipsa loquitur in establishing defendant's negligence); Reddick v. Longacre, 228 S.W.2d 294 (Tex. Civ. App. 1950); Corbin v. City of Philadelphia, 195 Pa. St. 461, 45 A. 1070 (1900).

26. See Henneman v. McCalla, 148 N.W.2d 447 (Iowa 1967); Hatch v. Small, 249 Wis. 183, 23 N.W.2d 460 (1946) (cut on the wrist from broken window glass received by one of the persons who had been riding in an automobile in attempting to right it after it had gone off the shoulder of the road and overturned held to be the proximate result of the driver's negligence in operating the automobile).

27. Lynch v. Fisher, 34 So.2d 513, 517 (La. App. 2d Cir. 1948): "The proximate cause of the injury to one who voluntarily interposes to save the lives of persons imperiled by the negligence of others is the negligence which causes the peril."

When the defendant is negligent, the chain of negligence is not broken by the act of rescue.\textsuperscript{29} A proximate cause does not have to be the immediate cause of injury for the term connotes simply a legally responsible cause, whether or not the immediate or more remote cause of harm.\textsuperscript{30} Even though defendant's act may be more remote in the chain of events than other causes, it can be held the proximate cause of plaintiff's harm.\textsuperscript{31}

**Summary of Tortious Liability**

Judicial adoption of common law tort concepts in all American jurisdictions has resulted in the development of the general rules applied in the rescue cases. A rescuer injured while reasonably undertaking a rescue may recover from the rescued person or a third person if the negligence of either created the situation necessitating the rescue or causing the rescuer's injury.\textsuperscript{32} One who sees a person in serious peril will not be charged with contributory negligence in risking his own safety unless he is reckless or rash.\textsuperscript{33} To justify one in risking death or serious

\textsuperscript{29} See note 11 *supra* and accompanying text.
\textsuperscript{30} See Bohlen, Book Review, 47 Harv. L. Rev. 556 (1934).
\textsuperscript{31} See note 28 *supra* and accompanying text.
\textsuperscript{32} It has been held that the rescuer may not recover where his injury is an abnormal one, not reasonably to be expected as a result of the situation. Whitman v. Mobile & O. R.R., 217 Ala. 70, 114 So. 912 (1927) (wrenching side carrying water to extinguish fire). But compare the unusual events for which recovery was allowed in Hines v. Morrow, 236 S.W. 183 (Tex. Civ. App. 1921); St. Louis-San Francisco R.R. v. Ginn, 264 P.2d 351 (Okla. 1953): cf. Lynch v. Fisher, note 11 *supra* and accompanying text.

The only major case denying recovery to the rescuer is Saylor v. Parsons, 122 Iowa 679, 98 N.W. 500 (1904). The plaintiff was injured when, in carrying out his duties as an employee in removing a structure, he threw the prop supporting his side of the wall against the top of the wall, which appeared to be toppling upon the defendant, who was overseeing the work. The latter was saved, but the plaintiff sustained severe personal injuries when the wall caved in upon him. He sued the defendant and the employer. The Iowa court held that the defendant had violated no legal duty in placing himself in a position of danger; and, since the employer had not been negligent as to him, it could not have been negligent as to his rescuer. It pointed out that since defendant apparently felt that he was able to perform his work with safety to himself, he should not be charged with anticipating that someone would attempt to rescue him. This view has been invariably rejected since this case. See generally Annot., 4 A.L.R.3d 551 (1965). See Restatement (Second) of Torts § 445, comment d (1965).

\textsuperscript{33} Henneman v. McCalla, 148 N.W.2d 447, 455 (Iowa 1967): "[I]t is not contributory negligence for a person to expose himself to danger in order to rescue another from peril if, under the circumstances, an ordinarily prudent person might so expose himself in order to save another from harm. The test is whether the conduct of the rescuer was 'natural' or whether he acted with reasonable prudence under the peculiar circumstances then existing."

Rescuers acting in a foolish and extraordinary manner cannot be regarded as any normal part of the original risk; thus, in these cases, they will be considered a superseding cause. Atchison, T. & S. F. R.R. v.
injury, however, the danger threatened must be imminent and real, and not merely imaginary or speculative. If the rescuer himself brought about the danger necessitating the rescue, he is not relieved from the contributory negligence defense. If the rescuer has time to deliberate upon his course of action, but instead acts impulsively, the causal connection between the defendant’s negligence and the rescuer’s injury is viewed as unbroken, the proximate cause of the injury being the negligence which caused the peril.

**OTHER THEORIES**

Other possible theories applicable to the rescue cases have generally been ignored by the courts. These are the common law quasi contract principle and the civilian negotiorum gestio doctrine. In *Webb v. McGowin* the Alabama appellate court based

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35. See Tarnowski v. Fite, 335 Mich. 267, 55 N.W.2d 894 (1952); Hicks v. Nelson, 182 So.2d 181 (La. App. 3d Cir. 1966); see note 22 supra.

36. Wagner v. International R.R., 232 N.Y. 176, 181, 133 N.E. 437, 438 (1921): “The law does not discriminate between the rescuer oblivious of peril and the one who counts the cost. It is enough that the act, whether impulsive or deliberate, is the child of the occasion.” See Restatement (Second) of Torts §§ 449, 459 (1965).

37. 168 So. 196 (Ala. App. 1935). Id. at 197-99: “Any holding that saving a man from death or grievous bodily harm is not a material benefit sufficient to uphold a subsequent promise to pay for the service, necessarily rests on the assumption that saving life and preservation of the body from harm have only a sentimental value. The converse of this is true. Life and preservation of the body have material, pecuniary values, measurable in dollars and cents. Because of this, physicians practice their profession charging for services rendered in saving life and curing the body of its ills, and surgeons perform operations. The same is true as to the law of negligence, authorizing the assessment of damages in personal injury cases based upon the extent of the injuries, earnings, and life expectancies of those injured.

“(I)f . . . appellant saved J. Greely McGowin from death or grievous bodily harm, and McGowin subsequently agreed to pay him for the service rendered, it became a valid and enforceable contract.

“(I)n cases where the promisor, having received a material benefit from the promisee, is morally bound to compensate him for the services rendered and in consideration of this obligation . . . to pay . . . the subsequent promise to pay is an affirmation or ratification of the services rendered carrying with it the presumption that a previous request for the service was made.

“McGowin’s express promise to pay appellant for the services rendered was an affirmation or ratification of what appellant had done raising the presumption that the services had been rendered at McGowin’s request.

“Under the averments of the complaint the services rendered by appel-
recovery on quasi contract rather than tort theory. A workman clearing the upper floor of a mill started to drop a large block to the ground. Upon seeing a person on the ground where the block would have fallen, the worker fell with the block to divert its course. As he sustained injuries causing permanent disability, the person rescued agreed to compensate the worker fifteen dollars every two weeks for the rest of the worker's life.\textsuperscript{38} This situation, of course, is to be distinguished from the case where there is no promise by the rescued person to compensate the rescuer. The court stated that saving a man from death or grievous bodily harm was sufficient "consideration" to uphold a subsequent promise to pay.\textsuperscript{39}

The unanswered question that must be explored is whether the moral obligation of the person rescued is sufficient to allow recovery in the absence of a promise to pay. No other case could be found in which recovery by the rescuer was allowed under the quasi contract theory. All other cases have based recovery on tort principles. It is submitted that a rescuer's chances of recovery would be measurably improved if his claim was predicated on the quasi contract principle rather than tort. Relief against the person rescued under the tort remedy requires that the defendant must have been negligent either in creating the perilous situation or in causing injury to the rescuer during the attempt. The quasi contract obligation generally arises, however, without reference to the "assent" of the obligor and requires

\textsuperscript{38} Id. at 199-200: "We agree with that court [Court of Appeals] that if the benefit be material and substantial, and was to the person of the promisor rather than to his estate it is within the class of material benefits which he has the privilege of recognizing and compensating either by an executed payment or an executory promise to pay. The cases are cited in that opinion. The reason is emphasized when the compensation is not only for the benefits which the promisor received, but also for the injuries either to the property or person of the promisee by reasons of the service rendered."

\textsuperscript{39} Id. at 198: "It is well settled that a moral obligation is a sufficient consideration to support a subsequent promise to pay where the promisor has received a material benefit although there was no original duty or liability resting on the promisor."
the obligor to make restitution even where his negligence has not been proved.

The basis of quasi contract obligation at common law is unjust enrichment, an obligation created only when one has "benefited" from another's performance. Under the common law concept of quasi contract it would seem that a rescuer would have to be successful in his efforts to "benefit" the imperiled party so as to create an obligation. The civilian concept of quasi contract is based upon whether or not one's act is "useful" to another at the time of its performance. Apparently, a rescuer in a civilian jurisdiction, as Louisiana, would quasi contractually bind the person he is attempting to rescue whether or not the efforts are successful. Under either approach the necessity of having to prove the obligor's negligence is obliterated—a clear advantage over the tort approach. Also, if negligence can be proven, the rescuer could base his claim on both tort and quasi contractual principles and thus double his chances of recovery. Quasi contracts at common law are imposed by the law without reference to the assent of the obligor. They arise from the receipt by one person from another of a benefit the retention of which is unjust, and are based on equitable considerations enforceable by legal remedies. The obligor is bound, not because he has promised to make restitution—he may even have explicitly refused to promise—but because he has been unjustly enriched, that is, he has received a benefit, the retention of which would be inequitable. In Louisiana in considering whether the plaintiff has performed a "useful" act it is sufficient to show that he has acted in a way desired by the defendant, and the question of whether the defendant is enriched "in fact" is irrelevant. Even an unsuccessful rescuer in Louisiana would seem to have a quasi contractual cause of action.

Quasi contracts are unlike the duty not to commit a tort, but are similar to most contracts in that the obligor is required to act rather than to forbear. Quasi contracts are particular obligations, that is, they are imposed because of a special state of facts and in favor of a particular person. The duty not to commit a tort is universal; it rests upon one at all times and in favor of all persons. It is easier to prove the existence of a quasi contractual obligation than the commitment of a tort since the former is correlated to a determinate right in personam of some

other person, while the latter is not correlated to any determinate right, either in personam or in rem—only to the general right in rem of every one that no tort shall be committed against him.

Because of the public interest in the performance of rescues, it is submitted that there is a legal obligation on those in need of help, independent of express contract, to pay for damages suffered by another in an emergency rescue attempt. Even though a rescuer usually is prompted by motives of humanity and intends his services to be gratuitous, the rescued person is under a legal obligation to compensate for injury to the rescuer since “danger invites rescue”\(^4\) and unjust enrichment would otherwise result, the rescued party having clearly benefited from the rescue or attempted rescue. Where a third party has created the peril, both the third party and the rescued person would be under a legal obligation to indemnify the rescuer. In rescuing another, the rescuer is benefiting the negligent third person by possibly relieving him of further liability to the person being rescued. Without a contract at common law there is no legal obligation to pay for non-professional services rendered in the preservation of life, the presumption being that the services are intended to be gratuitous.\(^2\) However, this presumption does not imply that a rescuer injured while attempting to rescue is not entitled to recovery from the person in peril. A person who has attempted to preserve another’s life or health, although acting without the other’s knowledge or consent, could feasibly be entitled to restitution from the other for damages received in the act of rescuing.

In the Roman law one of the principal classes of quasi-contractual obligations was negotiorum gestio.\(^3\) Under this doc-

\(^{41}\) See note 5 supra and accompanying text.
\(^{42}\) See note 40 supra.
\(^{43}\) The negotiorum gestio doctrine was stated in the Institutes of Justinian 3, 27, I: “Thus, if one man has managed the business of another during the latter’s absence, each can sue the other by the action on uncommissioned agency; the direct action being available to him whose business was managed, the contrary action to him who managed it. It is clear that these actions cannot properly be said to originate in a contract, for their peculiarity is that they lie only where one man has come forward and managed the business of another without having received any commission so to do, and that other is thereby laid under legal obligation even though he knows nothing of what has taken place. The reason of this is the general convenience; otherwise people might be summoned away by some sudden event of pressing importance, and without commissioning any one to look after and manage their affairs, the result of which would be that during their absence those affairs would be entirely neglected; and of course no one would be likely to attend to them if he were to have
trine, which has been retained in the modern continental codes and in the law of Louisiana, one who intervenes in the management of another's affairs in response to a sense of duty, though not required by law, and performs a "useful" act for which the recipient ought to pay, is entitled to compensation. According to Planiol, negotiorum gestio is applicable where one is injured while trying to stop a runaway horse or taking a wounded horse to a doctor. If the rescuer-gestor fails in his attempt to rescue

no action for the recovery of any outlay he might have incurred in so doing. Conversely, as the uncommissioned agent, if his management is good, lays his principal under a legal obligation, so too he is himself answerable to the latter for an account of his management; and herein he must show that he has satisfied the highest standard of carefulness, for to have displayed such carefulness as he is wont to exercise in his own affairs is not enough, if only a more diligent person could have managed the business better." Scott, Cases on Quasi Contracts 1, translating De obligationibus quasi ex contractu, bk. III, tit. 27 (1932). See Lorenzen, The Negotiorum Gestio in Roman and Modern Civil Law, 13 CORN. L.Q. 190 (1928).


45. LA. CIVIL CODE arts. 2293-2300 (1870). Cf. Minyard v. Curtis Products, Inc., 205 So.2d 422, 427 (La. 1968): "The device employed by the courts to grant relief has sometime been the civil law action de in rem verso. Garland v. Scott's Estate, 15 La. Ann. 143 (1860); Payne v. Harrison & Scott, 14 La. Ann. 760 (1859), which is an action for unjust enrichment." 205 So.2d at 432: "There are now five prerequisites to the successful suit by actio de in rem verso: (1) there must be an enrichment, (2) there must be an impoverishment, (3) there must be a connection between the enrichment and resulting impoverishment, (4) there must be an absence of 'justification' or 'cause' for the enrichment and impoverishment, and finally (5) the action will only be allowed when there is no other remedy at law, i.e., the action is subsidiary or corrective in nature. 36 TUL. L. REV. 605, 610." See Comment, 7 TUL. L. REV. 253 (1933).

46. 2 PLANIOL, CIVIL LAW TREATISE (AN ENGLISH TRANSLATION BY THE LOUISIANA STATE LAW INSTITUTE) no. 2273 (1959): "There is 'gestio d'affaires' in every case where a person accomplishes a juridical act in the interest of another without having been charged to do so. It is considered as a quasi-contract." Id. no. 2274: "[I]t seemed indispensable to separate the 'gestio d'affaires' properly so called, from cases involving not juridical acts, but services or material advantages procured for or rendered to another. Thus the jurisprudence considers as a 'gestio d'affaires' the fact of having, by a material act, procured the enrichment of another (Cass., 16 July 1890, D.91.149)." See also Trib. Seine, 3 Jan. 1980, S. 1982.2.217 and Dijon, 12 June 1928, D.H. 1928, 488.

Id. no. 2274A: "[I]n certain cases the jurisprudence has admitted that there was an act of management by the sole fact that there was a useful intervention in the affairs of another (see the study of M. Picard, Rev. trimestrielle, 1922, and the decisions reported)."

According to id. no. 2279 the gestio d'affaires is validated when it has been useful and ratified. In particular cases the usefulness procured for the master dispenses with ratification.

Id. no. 2280: "The determination of whether the management has been useful or not must be made as of the time the different acts of management took place. The usefulness of the intervention of the manager may well disappear in the light of subsequent events, that does not compromise the juridical effects. Classic example: repairs made to a house which subsequently was accidentally burned."

Id. no. 2281: The master whose affair was usefully managed, or who
he still may be entitled to recover as long as he acted reason-
ably under the existing circumstances because the imperiled
person has been the recipient of "useful" efforts.47

In all civil matters, where there is no express law, the judge
is bound to decide according to equity.48 No one ought to "enrich"
himself at the expense of another.49 According to the Louisiana
Civil Code, obligations which arise by operation of law form
quasi contracts.50 The general concept of quasi contractual obliga-
tions in Louisiana is based upon the principle that where there
is a "useful" act by one for another, then the value of that act
must be restituted.51 Basically, any action for indemnification not
based on contract is a claim in quasi contract, and usually in-
ratifies the management... should indemnify the [manager] for all the
expenses and charges of the management, "for all the useful or necessary
expenses he incurred," says Art. 1375. He should, in addition, if the manager
has personally contracted obligations to third persons, procure his discharge,
"indemnify them for them," says Art. 1375."

Id. no. 2282: "[The master's] obligation arises without any voluntary
act on his part; it is independent of his capacity."

47. Comment, 7 Tul. L. Rev. 253, 257 (1933): "In order for the negotiorum
gestio to recover his expenses, there need only have been some advantage
to the principal at the time of the act; a later failure of the expected benefit
under the act is of no moment." La. Civil Code art. 2299 (1870): "Equity
obliges the owner, whose business has been well managed, to comply with
the engagements contracted by the manager, in his name; to indemnify
the manager in all the personal engagements he has contracted; and to
reimburse him all useful and necessary expenses. (Emphasis added.)

a man takes upon himself the management of the affairs of another as a
friend, not for his own benefit and advantage and not against the will but
solely in the interest of another, he is a negotiorum gestor."

Applicability of the doctrine of negotiorum gestio is a question of fact.
the person is incapable of consent is irrelevant because obligations will
Louisiana Central Lumber Co., 2 La. App. 200 (2d Cir. 1925).

49. Id. art. 1865. See also Oscar v. Louisiana State Ins. Co., 5 Mart. (N.S.)
386, 392 (1827): '[N]o one is permitted to profit by the labor of another,
without compensating him for it. Jure naturae est, neminem cum
alterius deterrimento et injuria fieri locupletiorum. On this principle, the
Roman jurists held, that he who acted for another by transacting his
business, or by making repairs on his property, could recover the amount of
the expenses incurred, or the value of the repairs; provided the acts of the
negotiorum gestor were necessary and useful to the person for whom he
acted. This doctrine has descended to us, and makes a part of the positive
legislation of the state. Dig. Liv. 50, tit. 17; L. 206; ibid. Liv. 3, tit. 5; L. 10
*10, § 1; Toullier, Droit civil Francais, vol. 11, tit. 4, cp. 1, no. 49; C. Code,
2274 and 2278."

50. La. Civil Code art. 2293 (1870): "Quasi contracts are the lawful and
purely voluntary act of a man, from which there results any obligation
whatever to a third person, and sometimes a reciprocal obligation between
the parties."

51. PLANIOl, TRAITÉ ÉLÉMENTAIRE DE DROIT CIVIL, T. 2, nos 812, 813 (8th ed.
volves some type of unjust "enrichment." To assert validly quasi contractual principles the plaintiff-rescuer must allege and prove that as a result of some sacrifice or act on his part he has procured an advantage for the defendant.

Acts of beneficial intervention may result either from the discharge of another's legal obligation or the preservation of another's life or property. It may be dutiful to preserve another's property if the danger to the property is so imminent that notice cannot effectively be given to the owner or the owner needs assistance to preserve it.

**French Doctrine**

The majority of French writers consider that the *gestion d'affaire* (*negotiorum gestio*) may consist as well in the accomplishment of a material fact as in a juridical act. French jurisprudence, conforming to Roman tradition, has always considered that the act of management may result from the accomplishment of a material act. It thus gives the *gestion d'affaire* a vast field of application. A gestor's actions might include, for example, an undertaking to preserve the property of another, stopping a runaway horse, or aiding a motorist in difficulty. In all these cases it is on the basis of principles of *gestion d'affaire* that the gestor will reclaim indemnification for expenses or for his injuries. There is a *gestion d'affaire*, and consequently the creation of obligations from the act of management, only if it has been useful to the master. The utility of the act is to be determined at the moment it is accomplished, for it is possible that by virtue of subsequent events the master will not realize the enrichment. For example, if an immovable upon which the gestor has undertaken indispensable repairs is destroyed by accident, the uninsured and completely unprotected owner is obligated to the gestor though there was no actual enrichment,

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53. Id. at 432.
54. A. Corbin, _Contracts_ § 234 (1952): "[A] farmer's bull has strayed and is in danger of being totally lost or destroyed. A stranger impounds the bull, feeds him, and saves him for the farmer. By the Roman law, the farmer is bound to pay reasonable compensation for the benefit received (*negotiorum gestio*). He may be bound by the Anglo-American law, also, if we search the cases in equity as well as in indebitatus assumpsit. If he is so bound quasi-contractually, that legal duty is a sufficient basis for the farmer's express promise to pay compensation." See A. Corbin, *Quasi-Contractual Obligations*, 21 _Yale L.J._ 533 (1912); _Restatement of Restitution_ § 1, at 112-17 (1937).
56. Id. no. 680.
because the gestor's act was useful at the moment when it was performed.\(^57\)

In a French case\(^58\) plaintiff was burned about the face and arms when a motorcycle gas tank exploded as he was attempting to put out a fire that occurred when the owner of the motorcycle tried to start it. Basing recovery on *gestion d'affaire*,\(^60\) the court held that compensable action does not solely require a juridical act of representation or administration but may stem from activity spontaneously performed in the interest of a third person if it is useful at the moment the management is undertaken. It appeared to plaintiff that he could prevent the extension of a fire which could involve serious responsibility on the part of defendant in the event the fire was communicated to neighboring buildings. The court found justification for holding that by his intervention plaintiff acted in a useful fashion for defendant, and that the latter should indemnify plaintiff for the injuries he suffered.\(^61\)

The purpose of the rules of the *gestion d'affaire* is to encourage persons to render service to others by attending to neglected affairs.\(^62\) The master must indemnify the gestor with respect to all the expenses he has incurred, interest on his advances, the engagements he has contracted in his own name, and damage (e.g., injuries) which he has sustained from the act of management. Though the *gestion d'affaire* is gratuitous in principle, and the gestor is not entitled to general compensation, the gestor is permitted to claim remuneration for expenses or injuries.\(^63\)

\(^{57}\) *Id.* no. 683.  
\(^{59}\) Plaintiff based his first cause of action on article 1384, paragraph 2 of the French Civil Code, which deals with injuries resulting from things. This cause of action was rejected on the ground that the article in question had been modified by an act of 1922 which required a finding of fault for injuries resulting from a fire. The court found no fault on the part of the owner of the motorcycle in trying to start it. The court likewise rejected the second cause of action, which was based also on a theory of fault having created a state of emergency. Although the case does not indicate it, this cause of action was apparently based on article 1382 of the French Civil Code. The claim was rejected because of the finding that the defendant was free of fault. Gaz. Req. 4 Dec. 1940, Gaz. Pal. 1940.2.328, was cited as authority.  
\(^{60}\) The act of management, although it does not enrich the owner, was useful at the time of its performance.  
\(^{63}\) *Id.* n° 689.
No fault being attributable to the gestor when the management conforms to the rules of the Civil Code, the *gestion d'affaire* may not be considered as an application of the principles of civil responsibility. The obligations resulting from the *gestion d'affaire* are not strictly legal obligations, but arise by operation of law.

Although resting on the principle of equity that no one should enrich himself at the expense of another, the obligations of a rescued party do not arise by being saved from injury or death, but because he is bound to indemnify the rescuer-gestor for performing a useful act in his interest even though the act may not have actually caused enrichment. While common law quasi contractual obligations require a finding of "unjust enrichment" on the part of the benefactor, *negotiorum gestio* requires only that the management have been "useful" at the time of its performance.

**CONCLUSION**

In *Lynch v. Fisher* the person rescued shot his rescuer but was not proven to be negligent in causing the wreck or in shooting his rescuer—thus, the rescuer had no cause of action against him. Under quasi contract or *negotiorum gestio* principles the rescuer would have had a cause of action against both the truck driver whose negligence caused the original wreck and against the rescued person. The rescue is beneficial to the third party tortfeasor whose liability to the rescued person may be diminished by the rescue and beneficial to the rescued person simply because his life was saved or an attempt was made to save it.

It is suggested that Louisiana could follow the French in allowing a rescuer to recover under the civilian *negotiorum gestio* theory. By applying the civilian quasi contract princ-
ples, a Louisiana rescuer could double his chances of recovery by basing his claim on both tort and quasi contract. Equity obliges the beneficiary to indemnify his benefactor. Although the majority of both common law and Louisiana cases have based recovery under the rescue doctrine on tort principles, the doctrine of quasi contract (restitution) could be applied in common law jurisdictions and negotiorum gestio (the civilian quasi contractual doctrine) in Louisiana. The rescuer need not prove negligence of the defendant under quasi contract or negotiorum gestio as is presently necessary under the tort principles. The courts have based the rescue doctrine on tort whether the rescuer has sought recovery against the person rescued, or the negligent third person who created the danger, or both of them. The doctrine of quasi contract could be applied in the same cases with the added advantage that the rescuer need only prove unjust enrichment of the rescued person and/or third party.68

Edward A. Kaplan

FIXING LIMITS, AND SURVEYING LAND

The objective of this Comment is to relate the engineer's role in surveying lands and fixing boundaries to the lawyer's role in determining the legal rights of the parties resulting from means of affording relief in all countries of the civil law in situations where special rules of Equity and especially those relating to constructive trusts would be invoked in Anglo-American law.

"There is a negotiorum gestio according to French law, if the following conditions exist: (1) the intervention must not have proceeded from a purely egotistical thought; (2) the intervention must not conflict with the legitimate opposition of the principal; (3) the intervention must have been useful to the principal. The courts no longer inquire into the intention of the gestor, but into his act, which they appreciate in a spirit of liberality. 

If the act is profitable to another, they presume that the gestor did not intend to serve his own ends exclusively." (Emphasis added.) Id. at 207.

68. The basic reasons possibly why the courts have failed to utilize a quasi contract remedy, despite its conceptual availability, have to do with the reasons why in Louisiana the courts have generally characterized suits for personal injuries as tort actions prescriptible within one year (See La. Civ. Code art. 3536 (1870), rather than contractual actions prescriptible in ten years as personal actions (see Id. art. 3544), even in cases where the personal injuries could have been described as resulting from breach of a contractual obligation. These have been dictated by policy reasons underlying the shorter prescriptive period for tort actions (medical examinations concurrent with injuries and others) than for contract actions. The ultimate answer may be to have by statute a general prescriptive period applicable in any event insofar as the claim seeks recovery for personal injury damages while permitting conceptual characterization of actions as either tort, contract, or quasi contract. This reasoning was suggested to the writer by Judge Albert Tate, Jr., Presiding Judge, Louisiana Court of Appeal, Third Circuit, on leave of absence to serve as Professor of Law, Louisiana State University, 1967-68.