

THE RESCUER'S DUTY OF CARE

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Good afternoon ladies and gentleman.

Today I will discuss the rescuer's duty of care, which will involve an analysis of the legal concept of duty of care and accompanying ideas such as the standard of care. I will also talk about the duty of care that is owed to a rescuer.

For our purposes today, the term 'rescuers' is potentially confusing as the law talks about rescuers more broadly than the one context of trained lifesavers, lifeguards or first aiders. Rescuers, as far as the law is concerned, are people who render assistance to a person in trouble and that may be in any number of circumstances. To add more complexity, Australian law distinguishes between rescuers volunteering for a community organisation and rescuers of the Good Samaritan variety. That leaves a third category, namely, that of 'professional' rescuers – persons engaged by certain organisations, to perform the role of rescuer.

The law of negligence imposes a duty on us all to take care so as to avoid injury, loss or damage to another. Lord Atkin of the House of Lords described this duty in the seminal case of *Donoghue v Stevenson*, and I quote:

You must take reasonable care to avoid acts or omissions which you can reasonable foresee would be likely to injure your neighbour.¹

* I would like to acknowledge the research and drafting assistance provided by my Associate, Ms Anna Haynes.

¹ *Donoghue v Stevenson* [1932] AC 562 at 580.

With that knowledge, a common question arises, inquiring whether there is a duty to rescue. Does the passer-by who hears a call of distress emanating from a burning building have a legal duty to do what they can to render assistance or rescue those in trouble?

A DUTY TO RESCUE?

To quote Lord Nicholls of the House of Lords:

*...the bystander does not owe the drowning child or the heedless pedestrian a duty to take steps to save him. Something more is required than being a bystander. There must be some additional reason why it is fair and reasonable that one person should be regarded as his brother's keeper and have legal obligations in that regard.*²

Under the common law, there is no duty on the ordinary citizen to rescue another citizen.³ There may well be a moral duty or a social expectation to go to another's aid, however there is no legal duty to rescue. The law 'casts no duty upon a man to go to the aid of another who is in peril or distress, not caused by him'.⁴

This last point indicates the first of two exceptions to the general rule; namely, there is a duty to rescue where the danger is created by the rescuer themselves.⁵ For example, a motorist whose car is broken down and unlit on a roadway, owes a duty of care to other motorists and should remove the hazard or warn of its presence.⁶

Secondly, a duty to rescue may arise from the relationship that exists between the rescuer and the endangered.⁷ That relationship is characterised by trust and responsibility and results in a duty to act in certain circumstances. Common examples

² *Stovin v Wise* [1996] 3 All ER 801 at 807.

³ *Hargrave v Goldman* (1963) 110 CLR 40; *Jaensch v Coffey* (1984) 155 CLR 549 at 578 per Deane J; *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 477-81 per Brennan J.

⁴ *Hargrave v Goldman* (1963) 110 CLR 40 at 66 per Windeyer J.

⁵ *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 478-9 per Brennan J.

⁶ *Ticehurst v Skeen* (1986) 3 MVR 307 (NSW SC).

⁷ *Horsley v Maclaren (The Ogoopogo)* (1971) 22 DLR (3d) 545 (SCC).

of such a relationship include teachers and pupils; employers and employees; carriers and passengers.

In 1996, a significant change was made to the common law in Australia. The case of *Lowns v Woods*⁸ confirmed that there is no general common law duty to rescue,⁹ but found there was a duty on a medical practitioner to come to the aid of a non-patient. The plaintiff, Patrick Woods was on holiday with his family when he suffered an epileptic seizure. The young boy had been earlier diagnosed with epilepsy and his family was well aware of the dangers inherent in this condition. When the plaintiff's mother returned from her morning walk to find Patrick fitting, she immediately instructed her eldest son to fetch an ambulance and her daughter, Joanna to fetch a doctor.

Dr Lowns was preparing for the day at his surgery when Joanna presented at the doorstep and requested he come to the plaintiff's aid. The doctor refused to come, indicating the plaintiff be brought to his surgery. Joanna returned to her mother. Patrick was conveyed by ambulance to another surgery and ultimately to hospital, where the seizure was quelled.

The Court of Appeal found that in the circumstances, the doctor owed a duty of care to the patient and that duty was breached by his failure to attend.

Had Dr Lowns come to the child's aid and administered Valium, the Court determined that serious brain damage and paraplegia would most likely have been avoided. This finding was made on the grounds of proximity: physical, circumstantial and causal.

The basis for a finding of circumstantial proximity included the fact that Dr Lowns was 'an adequate medical practitioner to whom a direct request for assistance was made'¹⁰ and in circumstances where he was able to meet the request and was aware of the seriousness of the situation.

⁸ *Lowns v Woods* (1996) Aust Torts Reports 81-376 (NSW Court of Appeal).

⁹ *Ibid.* 63,155 per Kirby P and 63,166 per Mahoney JA and 63,175 per Cole JA.

¹⁰ *Ibid.* 63,176 per Cole JA.

The Court specifically considered the provisions *Medical Practitioners Act 1938* which stipulates the grounds for professional misconduct. President Kirby, now Justice Kirby of the High Court of Australia, spoke of the ‘noble profession of medicine’ and commented as follows:

*This is a high standard. It goes beyond what is expected, and imposed by the law, in the case of other professions. It goes far beyond what may be expected and demanded of an ordinary citizen.*¹¹

The significance of the case is that it is the first time an Australian Court has found that a medical professional was subject to a duty to act or ‘rescue’, in the context of a non-patient. The decision attracted much media attention.

For our purposes today, the decision is not on point, as it concerns a doctor as opposed to a volunteer or ‘professional’ rescuer. The terminology is potentially confusing, so I will pause here to clarify that when I speak of ‘professional’ rescuers, I am referring to people such as lifesavers and lifeguards trained by organisations like the Royal Life Saving Society. ‘Professional’ rescuers have undergone training and assume responsibility for community safety in various settings.

It has been suggested that in light of the *Lowns v Woods* decision, persons who possess skills which are ‘equally life-saving’ or ‘injury-preventing’ to a medical practitioner, and who hold themselves out as possessing those skills, could be subject to a duty to rescue.¹²

Indeed, there are those who argue strongly in favour of imposing a ‘limited prima facie duty to rescue’ on rescuers.¹³ The basis for such an argument is not only physical proximity, that is being physically in a position to assist. Rather, it derives from the potential rescuer’s ‘role’ in society, as someone the general public looks to in

¹¹ Ibid. 63,155.

¹² J Tibballs, ‘Legal Liabilities for Assistance and Lack of Assistance Rendered by Good Samaritans, Volunteers and their Organisations’ (2005) 16 *Insurance Law Journal* 254, 261.

¹³ N Gray and J Edelman, ‘Developing the Law of Omissions: A Common Law Duty to Rescue?’ (1998) 6 *Torts Law Journal* 240, 241.

an emergency. This would include lifeguards, firefighters, coastguards and security personnel, upon the basis that such persons ‘assume a responsibility to individuals in vulnerable situations’.¹⁴

You will recall that certain relationships give rise to a duty to rescue and as such are an exception to the general rule. Some commentators argue that the imposition of a duty to rescue on ‘professional’ rescuers is a logical extension of this already recognised category of affirmative duty.¹⁵ The justification for extending the duty to rescue to include ‘professional’ rescuers such as lifeguards is founded upon the basis of ‘control’ – namely that a rescuer, by virtue of their training ‘enjoys a peculiar vantage in preventing accidents’, so that they are distinct from the average citizen.¹⁶

On this basis, it is argued that ‘any class of professional person which has rescue as an aspect of its work, and which carries on its duties in accordance with standards of conduct or specialised training’,¹⁷ should be subject to a duty to rescue. On first glance, this appears uncontroversial – rescuers are engaged in the practice of rescuing. However, the breadth of any positive duty to rescue must be explored. What of a rescuer who is off duty? Or a retired rescuer?

Mahoney JA provided a very strong dissent to the majority of the Court in *Lowns v Woods*. His Honour was not minded to create ‘a new civil obligation’¹⁸ and made clear his sentiments that it is for the Legislature to do so.

In closing, however, his Honour did comment on the case at hand ‘that the balance of social utility would lie in favour of the imposition of some form of obligation to attend a person upon call. But that obligation is ... one which must be subject to qualifications and exceptions.’¹⁹

In determining how the Courts and the Legislature view ‘the balance of social utility’ is best struck I will now examine the State and Territory legislation relating to

¹⁴ Ibid. 244.

¹⁵ Ibid. 249.

¹⁶ Ibid. 250.

¹⁷ Ibid. 251.

¹⁸ *Lowns v Woods* (1996) Aust Torts Reports 81-376 at 63,168.

rescuers. In doing so, I will move to explore the duty of care a rescuer must adhere to should they engage in rescuing.

THE RESCUER'S DUTY OF CARE

In examining the rescuers duty of care, it is necessary to explore how the prospective rescuer is classified under the law.

Australian law distinguishes between volunteers and Good Samaritans. I will firstly examine how volunteers are addressed by statute.

'Volunteers'

The term volunteer encapsulates those persons who work for a community organisation without fee or reward. This may be with the local football club or an international organisation such as the Royal Life Saving Society.

The States and Territories of Australia have enacted legislation that indemnifies volunteers from personal liability for negligence.²⁰ However the provisions differ markedly. For example, the Northern Territory and Australian Capital Territory stipulate that a volunteer escapes liability provided they are not 'reckless'; whereas the test elsewhere pertains to acting in 'good faith' or 'honestly'.²¹

The provisions of the Australian Capital Territory are a combination of the two, stating:

*A volunteer does not incur personal civil liability for an act done, or omission made, honestly and without recklessness, while carrying out community work, for a community organization, on a voluntary basis.*²²

The Act further specifies that where liability would have otherwise attached to the volunteer, the community organization will attract liability.²³

¹⁹ Ibid.

²⁰ Excepting South Australia and Western Australia.

²¹ For further discussion see Tibballs, above n 12, 266.

It is important to note that the law does not protect a volunteer in every circumstance. For example, a volunteer is not indemnified if impaired by a recreational drug; or they engage in an activity that involves acts or threats of violence, or creates a risk to public health or safety. Further, a volunteer must not act beyond authority or contrary to instructions.²⁴

‘Good Samaritans’

Those citizens who respond to an emergency of their own volition and not out of any obligation to do so are known as Good Samaritans, as in the well-known parable of Luke’s Gospel. A Good Samaritan is a person who responds to an emergency situation and acts without expectation of payment.

I pause here to note that the phrase Good Samaritan is duplicitous in meaning. In parts of Europe and in some American States, and in the Northern Territory, the term refers to a positive duty to rescue.

The relevant Northern Territory provision is contained in the *Criminal Code* and imposes a penalty of 7 years imprisonment upon

*Any person who, being able to provide rescue, resuscitation, medical treatment, first aid or succour of any kind to a person urgently in need of it and whose life may be endangered if it is not provided, **callously** fails to do so... [emphasis added].*²⁵

Such legislation is unique to the Northern Territory.

²² *Civil Law (Wrongs) Act 2002* (ACT), s8(1).

²³ s9(1). A ‘community organisation’ is defined as a corporation that directs or coordinates the carrying out of community work by volunteers (s6).

²⁴ ss7 and 8.

²⁵ s155. See also *Andrew John Salmon v R* (1994) 70 A Crim R 536 per Kearney J wherein a conviction under s155 was overturned on appeal.

The Good Samaritan laws in the remaining Australian jurisdictions were borne out of a fear of rescuers being sued for a failed attempt at rescue that resulted in further injury or death.

For our purposes today, it is necessary to consider where ‘professional’ rescuers, such as trained lifeguards, fit into this legislative spectrum. It would seem that a distinction is firstly drawn depending whether a person is a volunteer or employee, with the volunteers being specifically addressed by legislation.

Secondly, whether the lifeguard or first aider or ‘professional’ rescuer is on duty or off duty also appears relevant. Ambulance officers, doctors, nurses and paramedics are trained for the very purpose of saving lives and in this sense they do have a ‘duty to rescue’. Thus, ‘professional’ rescuers differ from a Good Samaritan who happens across a person in need of emergency aid and assists them as best they can.

Yet what of a rescuer who is ‘off duty’? Off duty, they are arguably not a volunteer, for the ACT legislation at least, stipulates that they must be in the course of carrying out community work. Are they then a Good Samaritan?

This is a moot point and one not adequately addressed by the legislation.

The ACT definition of Good Samaritan distinguishes between ‘a person’ acting voluntarily and a ‘medically qualified person’ acting voluntarily.²⁶ Is a first aider or lifesaver a ‘medically qualified person acting voluntarily’?

The term ‘medically qualified person’ is defined in the Act and includes: a doctor; a person with professional qualifications in a field of health care; and a person who works, or has worked, as a member of the ambulance service *or in another paramedical capacity*. We are again left to question whether a trained lifeguard or first aider, who does volunteer for a community organization, but is ‘off duty’ at the relevant time, falls within the class ‘another paramedical capacity’.²⁷

²⁶ *Civil Law (Wrongs) Act 2002 (ACT)*, s5(3).

²⁷ Paramedical is defined in the Macquarie Dictionary (3rd ed) as: related to the medical profession in a supplementary capacity, as an ambulance officer, etc.

It is interesting to note the context in which the legislation indemnifying volunteers and Good Samaritans has evolved.

A comprehensive review of the law of negligence in Australia was completed in 2002. The Ipp Report, as it is known, noted a ‘sense of anxiety about the possibility of legal liability for negligence arising from the giving of assistance in emergency situations’.²⁸ Nevertheless, it did not recommend Legislatures enact statute to indemnify rescuers. Rather, the Committee was satisfied that the common law already took into account the relevant experience of the rescuer and the circumstances of the emergency situation.

This recommendation was also made with the knowledge that there is no case law justifying the prevalent fear - a Good Samaritan has not been sued in Australia for a rescue attempt on the basis of negligence.²⁹ The conclusion of the Committee was that it was ‘unnecessary and indeed undesirable’³⁰ to legislate on the issue as it ‘would tip the scales of personal responsibility too heavily in favour of interveners and against the interests of those requiring assistance.’³¹

In spite of this recommendation, each State and Territory now has legislation indemnifying volunteers and / or Good Samaritans or both under differing circumstances.³² The introduction of these laws has not successfully clarified the position of a rescuer under law. As I noted earlier, the provisions vary markedly. For example, the Queensland Good Samaritan laws are limited to medical practitioners or nurses,³³ not the ordinary passerby as elsewhere. And in Victoria, a Good Samaritan is protected even where they caused the emergency and then rendered assistance, which is expressly excluded in New South Wales³⁴ and not addressed elsewhere.

²⁸ Commonwealth of Australia, *Review of the Law of Negligence* (2002) 7.21.

²⁹ *Ibid.*

³⁰ *Ibid.* 7.24.

³¹ *Ibid.*

³² Tibballs, above n 12, 266.

³³ s16 *Law Reform Act 1995* (Qld) specifies ‘medical practitioner, nurse or other person specified under a regulation’.

³⁴ M Eburn, ‘Protecting Volunteers?’ (2003) 18(4) *Australian Journal of Emergency Management* 7, 8.

Indeed, the New South Wales legislation has been accused of fostering ‘two, mutually inconsistent objectives’.³⁵ This is evidenced by the Second Reading Speech wherein the then Premier Bob Carr claimed the Bill would ‘mean no liability for voluntary rescue organizations, such as surf life saving clubs’ within a sentence wherein it was stated that the Bill ‘is not intended to alter the potential liability of a community organization by providing the individual members with immunity.’³⁶

Therefore, the status of the ‘professional’ rescuer, be they an employee or volunteer of a community organization; on or off duty, remains ambiguous.

THE STANDARD OF CARE

Once rescue is attempted, a duty of care arises and is owed by the rescuer to the injured person. Rescuers, be they a volunteer or Good Samaritan or ‘professional’ rescuer are required to take reasonable care whilst attempting rescue.

Whether or not the would be rescuer has any training or skills is relevant to the standard of care that is expected of them. A Royal Lifesaving volunteer may have a bronze medallion and therefore be skilled in first aid methods, whereas an unskilled Good Samaritan, who happens across an emergency, can only draw from their common sense. By the same token, the Good Samaritan may be a nurse who is off duty and is therefore equipped with knowledge of first aid and medical procedure.

In each case, the rescuer should be guided by reasonable care and skill. The law will assess the situation from the view of the reasonable person with the training and knowledge of the rescuer, operating in the same situation. Therefore it is an objective test, founded upon concepts such as reasonableness and reasonable foreseeability, yet balanced by the vicissitudes of life and the given situation.

If you cast your mind about to think of the many stories of rescue that make headlines world wide, it is easy to recognise that such ‘facts’ make every rescue story unique. The challenges faced by a rescuer operating at high altitude in the Himalayas are

³⁵ Ibid.10.

³⁶ Second Reading Speech, Civil Liability Amendment (Personal Responsibility) Bill, 23 Oct 2002.

vastly different to those incumbent upon the rescuers in Beaconsfield, Tasmania who worked for 14 days to rescue two miners trapped 1km below the ground.

A rescuer who possesses some skill or expertise, such as first aid training will be required to act reasonably and within the bounds of their skill and knowledge; but because of their training, they will be in a position to provide more expert care.

Under English case law the standard of care has been described as ‘a duty to the patient to use diligence, care, knowledge, skill and caution in administering treatment.’³⁷

The High Court of Australia has described the standard as follows:

*...the standard of care to be observed by a person with some special skill or competence is that of the ordinary skilled person exercising and professing to have that special skill...*³⁸

Further complexity arises where there is some division in medical opinion of best practice. A rescuer, with some training or qualifications will draw upon that knowledge in an emergency situation. But what if the accepted method of dealing with the injury has changed since the rescuer underwent training?

If the rescuer is an ongoing volunteer or employee of an organisation such as Royal Lifesaving, then one would assume they will receive updates in their qualifications.

If their training and affiliation with any rescue organisation is long in the past, the rescuer may well be in the same position as a Good Samaritan, drawing on their common sense and general knowledge.

Nevertheless, a foreseeable problem arises where there has been a considerable change in accepted practice, for example accepted treatment for resuscitation of the unconscious or choking.

³⁷ *R v Bateman* (1925) 94 LJKB 791 at 794 per Lord Hewart.

³⁸ *Rogers v Whitaker* (1992) 175 CLR 479 at 487 per Mason CJ, Brennan, Dawson, Toohey and McHugh JJ.

It is not uncommon to have a divergence in opinion on the best method of treatment for specific injuries or illnesses. In medical negligence cases, medical opinion is regularly divided along party lines with the plaintiff's medical expert claiming the opposite of the defendant's medical expert. This leaves rescuers and their parent organisations in somewhat of a bind when trying to implement best practice in their training and guidelines.

In England, the common law standard of care is determined 'in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art'.³⁹ This is known as the *Bolam* principle, deriving its title from a case of that name, decided in 1957.

In Australia, the Courts have reserved the right 'to adjudicate on what is the appropriate standard of care'⁴⁰ and as such have declined to follow the *Bolam* principle. For our purposes today, I will not delve further into this debate, suffice to say that it is important that rescue organisations keep abreast of current standards and discussions regarding first aid and rescue procedure.

THE DUTY OF CARE OWED TO RESCUERS

It is equally important to note that a duty of care is owed to the rescuer who renders assistance to a would-be plaintiff. A negligent defendant owes a duty to their injured plaintiff and to any good citizen who comes to their aid and in the course of rescue, are themselves injured.⁴¹

Rescuers were once legally unprotected from injury or loss arising out of a rescue attempt. The law took the view that any such risk was 'voluntarily assumed' by the rescuer who chose to place themselves in a potentially dangerous or injurious situation.

³⁹ *Bolam v Friern Hospital Management Committee* [1957] 2 All ER 118 at 188 per McNair J.

⁴⁰ *Rogers v Whitaker* (1992) 175 CLR 479 at 487 per Mason CJ, Brennan, Dawson, Toohey and McHugh JJ.

The shift in the law was aptly described by Lord Denning, who stated that ‘[w]hoever comes to the rescue, the law should see that he does not suffer for it’.⁴²

If a person puts another, such as a rescuer, in a situation of peril, they owe a duty of care to the rescuer who suffers injury.⁴³ This duty arises where a rescue attempt is reasonably foreseeable from the situation of peril created by the defendant’s negligence; and where injury to the rescuer is also reasonably foreseeable.⁴⁴

This duty of care is owed even if the rescuer voluntarily comes to the aid of the victim, and were under no legal obligation to assist. And the duty remains even if it turns out that the rescuer mistook the situation as one of peril, though it was only apparently so.

Finally, the House of Lords have expressly rejected what is known as the ‘firefighters rule’.⁴⁵ This doctrine, adopted in certain American jurisdictions, precludes claims in negligence by injured firefighters on the basis that their very purpose is to operate in the dangerous circumstances from which the claim resulted. The Court found no reason why the firefighters should be held ‘at a disadvantage as compared to the layman’.⁴⁶

The law maintains this protection for rescuers so as to hold people accountable for their actions – so that the foolish, reckless or negligent actions of one are not free of responsibility when they endanger or harm another, such as a rescuer.

⁴¹ *Haynes v Harwood* [1935] 1 KB 146 (CA). Note also that a duty of care to a rescuer was established where the defendant did not owe a duty of care to the imperilled person (a trespasser): *Videan v British Transport Commission* [1963] 2 All ER 860 (CA).

⁴² *Videan v British Transport Co* [1963] 2 All ER 860 (CA).

⁴³ *Chapman v Hearse* (1961) 106 CLR 112.

⁴⁴ *Harrison v British Railways Board* [1981] 3 All ER 679.

⁴⁵ *Ogwo v Taylor* [1987] All ER 961 at 966.

⁴⁶ *Ibid.* 965.

CONCLUSION

In spite of any moral expectation that may exist, the law does not require the random passerby to stop and render assistance to an injured stranger. The law instead requires an additional reason why it is fair and reasonable to burden someone with a positive duty to act. Rescuers, voluntarily fill that void between the law, morality and social expectation. By undertaking training, and in holding themselves out to the world as a rescuer, life guards and life savers along with paramedics, and volunteer firefighters put their skills and potentially their own safety on the line for the benefit of others.

Despite the uncertainties I have highlighted today, the law does acknowledge the important work of those engaged in rescuing. In Australia, statute indemnifies rescuers who act with due skill and care, should there be a failed rescue attempt. Similarly the common law relies upon reasonableness as a guide and takes into account the circumstances of each case, including the relevant experience and training of the rescuer. Finally, the law recognizes a duty of care owed to rescuers, and in doing so acknowledges this act of service and the risks inherent in rescuing.

Let me pause here to commend the very important work of lifesavers and lifeguards. Be they a volunteer or an employee, those who dedicate their time and efforts to the Life Saving cause are providing an invaluable service to the community. They are also part of a long and admirable history, starting in 1891 in England, and expanding to Australia in 1894. It is a cause of which I am very proud.