

# *The Good Samaritan Protection Act:* You Can Lead a Horse to Water, but You Can't Make it Drink

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## I. INTRODUCTION

When faced with an emergency, many people fear making a bad situation demonstrably worse. The idea that “if I do nothing, it’s not my fault if it gets worse” is imbedded in the minds of many Manitobans—and rightly so. There is no positive duty for persons to act when faced with a crisis. What Manitobans are afraid of is the common-law principle that governs assistance in situations where a person has already suffered an injury. Though all law students learn this common law principle in their first year at law school, there may be people unfamiliar with the concept, and it bears repeating here. Individuals who provide assistance in emergencies can be held liable if their attempt to provide relief exacerbates existing injuries or inflicts new injuries.<sup>1</sup> While would-be rescuers may not turn their mind to the fact at the time, if they make the situation worse, they could be sued for negligence and damages could be awarded to the extent that they made an existing medical emergency worse.

Enter *The Good Samaritan Protection Act*.<sup>2</sup> Legislators specifically designed this bill to provide partial immunity from liability to those providing emergency assistance, except in cases of gross negligence. Both the Liberal Party of Manitoba (Liberal(s)) and the New Democratic Party of Manitoba (NDP) went to great pains to pass Good Samaritan legislation. After some negotiation, legislators resolved that there would be bipartisan movement on the bill sponsored by the NDP member, and Bill 214 ultimately became law on 7 December 2006.<sup>3</sup> There are, however, serious questions as to whether such legislation was truly necessary. This paper will provide a history of Manitoba’s

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<sup>1</sup> Manitoba, Legislative Assembly, *Debates and Proceedings*, Vol. LVIII No. 14A (5 December 2006) at 487. [*Debates (5 December 2006)*]

<sup>2</sup> C.C.S.M. c. G65.

<sup>3</sup> *Ibid.*

Good Samaritan legislation, take the reader from the bill's inception through royal assent, as well as provide arguments that show Manitoba already had laws in place that dealt quite well with the liability problems that could arise in situations where volunteers offer well-intentioned, but misguided first aid.

## II. BACKGROUND

The Good Samaritan legislation has a bifurcated history in the Manitoba Legislature. Both the Liberals and the NDP introduced virtually identical legislation, and both parties were intent on having their respective bills enacted into law. Both political parties, albeit through different channels, arrived at a conclusion that Good Samaritan legislation was necessary for Manitoba. However, as is frequently the case, the bill sponsored by the government, rather than the bill sponsored by a private member, is the piece of legislation that actually becomes law.

### A. Liberal History

Leah Ross, one-time editor of *Underneath the Golden Boy* and current associate at Aikins, MacAulay, & Thorvaldson LLP, worked as Liberal Leader Dr. Jon Gerrard's executive assistant. She recalled learning about the common law principle regarding liability in situations where first-responders exacerbate an existing problem from her first year law course in Torts and Compensation Systems.<sup>4</sup> Specifically, Professor Linda Vincent made reference to the fact that many other provinces had Good Samaritan legislation that protected people from liability in situations where they provided first aid or emergency assistance to someone in distress, and that there was no parallel legislation in Manitoba on the issue.<sup>5</sup>

Ms. Ross researched the issue on behalf of the Liberal Party of Manitoba and drafted Bill 201—*The Good Samaritan Act* with the assistance of other Liberal staff members. In drafting Bill 201, all relevant parallel legislation was compared and studied. Ms. Ross discovered that Good Samaritan legislation exists in seven provinces and two territories in Canada,<sup>6</sup> and all 50 states in the United States of

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<sup>4</sup> Telephone interview of Leah Ross (20 November 2007). [Ross I]

<sup>5</sup> *Ibid.*

<sup>6</sup> See *Good Samaritan Act*, R.S.B.C. 1996 c. 172; *Emergency Medical Aid Act*, R.S.A. c. E-7; *The Emergency Medical Aid Act*, R.S.S. 1978, c. E-8; *Good Samaritan Act*, S.O. 2001, c. 2; *Volunteer Services Act*, R.S.N.S., 1989, c. 497; *Emergency Medical Aid Act*, R.S.N.L. 1990, c. E-9; *Volunteers Liability Act*, R.S.P.E.I., c. V-5; *Emergency Medical Aid Act*, R.S.Y. 2002, c. 70; *Emergency Medical Aid Act*, R.S.N.W.T. 1998, c. E-4.

America.<sup>7</sup> In addition, some jurisdictions impose positive duties on persons to assist in an emergency. Quebec, for example, is the only Canadian province where there is a duty imposed on everyone to help a person in peril.<sup>8</sup> The Quebec *Charter of Human Rights and Freedoms*<sup>9</sup> contains a provision that imposes an obligation to render aid if the rescuer can accomplish it without serious risk to the Good Samaritan or a third person. In similar fashion, the Quebec *Civil Code*<sup>10</sup> obligates every person to act as a *bon père de famille* (a reasonably prudent person). Failure to act prudently would amount to fault and lead to a legal remedy for the victim.<sup>11</sup> The bill was drafted and Dr. Gerrard went about trying to get the bill passed through the legislature.

## B. NDP History

The story of Mr. David Munro brought the need for “Good Samaritan” legislation to St. James-Assiniboia MLA Bonnie Korzeniowski’s attention.<sup>12</sup> Mr. Munro, former Boeing employee, and resident of Gimli, died of a massive heart attack while at work in the summer of 2004. His co-workers looked on helplessly, because none of them was in a position to assist Mr. Munro in his final moments of life. Because of this tragedy, Boeing undertook to train as many staff as possible in cardiopulmonary resuscitation (“CPR”). A total of 42 employees took the training, to prevent future tragedies at the work place.<sup>13</sup> Boeing Industries went even further, purchasing an automatic external defibrillator (“AED”) and training employees in how to use the device.

Problems arose with the installation of the AED device. Employees were hesitant to use the device, and had questions about liability in situations when the device would be employed. Also, the cost of insurance for the device was prohibitively expensive for all but the biggest of industries.<sup>14</sup> The insurance cost of the lone AED device at the Boeing factory was several hundred thousand dollars.<sup>15</sup> These concerns were voiced to Ms. Korzeniowski by one of Boeing’s

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<sup>7</sup> *Ross I, supra* note 4.

<sup>8</sup> Memorandum from Leah Ross, “Arguments Against Good Samaritan Legislation” *Good Samaritan Act* Memo, Liberal Caucus files, 2005, at 1 [*Ross 2*].

<sup>9</sup> *Charter of Human Rights and Freedoms*, R.S.Q., c. C-12.

<sup>10</sup> *Civil Code of Quebec*, S.Q., 1991, c. 64.

<sup>11</sup> *Supra* note 8.

<sup>12</sup> Manitoba, Legislative Assembly, *Debates and Proceedings*, Vol. LVIII No. 16A (7 December 2006) at 579-580. [*Debates (7 December 2006)*]

<sup>13</sup> *Ibid.* at 580-81.

<sup>14</sup> Interview of MLA Bonnie Korzeniowski (26 November 2007) [*Korzeniowski*].

<sup>15</sup> *Ibid.*

employees. Ms. Korzeniowski's team conducted research, and drafted Bill 214 – *The Good Samaritan Protection Act*.

### III. BILL 201 – THE GOOD SAMARITAN ACT

The Liberal Party twice attempted to introduce Bill 201. Dr. Jon Gerrard first introduced the bill (known as Bill 202 when first circulated) in the fall of 2005. It was seconded by Liberal MLA Kevin Lamoureux from Inkster. Dr. Gerrard thought the legislation would protect volunteers and encourage rescuers to assist victims.<sup>16</sup> There was an impasse, and due to the priority of other bills and a lack of support of the other parties, the bill failed to get past first reading.

Dr. Gerrard re-introduced Bill 201 on 17 November 2006, but it became clear to him that his bill was going to die on the table yet again, unless his party worked with the government to ensure that the legislation was enacted before the end of 2006. While bills move quickly once they are at the committee stage, getting Bill 201 to second reading was proving especially difficult. Dr. Gerrard entered into negotiations with Ms. Korzeniowski, each offering the other an opportunity to second their respective bills.<sup>17</sup> On its face, the NDP bill appeared to be a somewhat stronger interpretation of Good Samaritan law, thus, Dr. Gerrard came to second the bill sponsored by Ms. Korzeniowski, and withdraw his own bill from consideration by the Legislative Assembly on 5 December 2006.

### IV. RESCUERS' PSYCHOLOGY

The Boeing employees' reticence to use the AED devices was not without substance. Research has shown that the level of responsibility felt by bystanders when posed with a crisis is inversely proportional to the number of people present at the time. Psychologists Latané and Darley, authors of the landmark text *The Unresponsive Bystander: Why Doesn't He Help?*<sup>18</sup> discovered a phenomenon they termed "diffusion of responsibility."

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<sup>16</sup> Jon Gerrard, "Good Samaritans and Legislation to Protect Them", Liberal Caucus file, 3 November 2005, at 1 [*Gerrard 1*]

<sup>17</sup> Interview of MLA Dr. Jon Gerrard (22 November 2007) [*Gerrard 2*]

<sup>18</sup> Bibb Latané & John M. Darley (New York: Appleton-Century-Croft, 1970) at 6; see also Mitchell McInnes, "Psychological Perspectives on Rescue: The Behavioural Implications of Using the Law to Increase the Incidence of Emergency Intervention" (1991) 20 Man. L.J. at 667. [*McInnes 1*]

When only one bystander is present in an emergency, if help is to come it must come from him. Although he may choose to ignore [it]...any pressure to intervene focuses uniquely on him. When there are several observers present, however, the pressures to intervene do not focus on anyone; instead the responsibility for intervention is shared among all the onlookers. As a result, each may be less likely to help.<sup>19</sup>

As numbers increase, potential rescuers will find it easier to justify their inaction to themselves and others.<sup>20</sup> While the Boeing employees may have stood by helpless because they did not know what to do, it is equally likely that there was expectation that “someone else” would jump to the rescue, therefore “I” do not have to shoulder that responsibility.

Apprehension in the face of an emergency is another reason why bystanders may not be quick to assist. The apprehension by bystanders is not just fear of making the situation worse, but also issues concerning a person’s vanity, insecurity, and self-interest.<sup>21</sup> “More discomforting than the humiliation that attends upon the attempted provision of help when none is required is the condemnation that attends upon the provision of help that is considered inappropriate.”<sup>22</sup> People do not want to be found out as not knowing what to do, and would rather stand idly by than assist someone who very obviously needs help. The adage “better safe than sorry” applies to the bystander’s own pride, not to a possible victim’s well-being.<sup>23</sup>

Perhaps more shocking is the notion that rescuers, consciously or unconsciously, embark on an assessment of the emergency to see if they will somehow benefit by trying to assist the injured person. The Piliavin & Piliavin model of bystander behaviour elaborates on the cost assessment that bystanders undertake when deciding on whether or not to intervene. The premise is that observation of an emergency arouses aversive physiological and emotional feelings in the observer, and there is a cost-benefit analysis made by the observer as to whether or not intervening to rid oneself of the aversive feelings is worth the risk.<sup>24</sup> In the Boeing example, doing nothing, while unpleasant (and tragic to

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<sup>19</sup> *Ibid.* at 90.

<sup>20</sup> *McInnes 1, supra*, note 16 at 667.

<sup>21</sup> *Ibid.* at 673.

<sup>22</sup> *Ibid.* at 673-4.

<sup>23</sup> *Ibid.* at 673.

<sup>24</sup> J.A. Piliavin & I.M. Piliavin, “Effect of Blood on Reactions to a Victim” (1972) 23 *Journal of Personality and Social Psychology* 3 at 353; see also J. Peter Rothe *et al.*, “Dynamic Influences on Bystander Actions: Program Recommendations from the Field” (1 June 2002) Alberta Centre for Injury Control and Research, Department of Public Health Sciences, University of Alberta at 4.

Mr. Munro), leads to the absolute certainty that no one will be sued for causing further damage.

Perhaps the most compelling reason why bystanders would choose not to assist comes from rules associated with the delivery of first aid. It is widely known that those who undertake to perform first aid must either complete it or continue until medical personnel arrive. This principle is consistent with the concept that a duty of care attaches to the rescuer as soon as the rescue is commenced. A duty of affirmative action may be created where a person, who is under no duty to rescue, voluntarily embarks on a course of conduct designed to assist a person in danger.<sup>25</sup> For example, if a rescuer starts CPR on an apparent heart attack victim, the rescuer cannot then stop CPR ten seconds later because they no longer feel like performing the life-saving technique. If you start, you must finish. There is, however, no positive duty for persons to act: that is, there is no duty to start. Morals aside, if you do not do anything, absent an existing fiduciary or trust relationship,<sup>26</sup> there is no legal remedy available to the person who could potentially have benefited from your assistance.

## V. BILL 214 – THE GOOD SAMARITAN PROTECTION ACT

Attempts to introduce Bill 214 were also made twice by the government. Ms. Korzeniowski first introduced the bill in the fall of 2005, shortly after Dr. Gerrard's introduction of Bill 201. Again, due to priority of other bills, a lack of support for the bill, and the existence of a competing bill, it failed to get past first reading.

After some negotiation with Dr. Jon Gerrard, Ms. Korzeniowski re-introduced Bill 214 on 5 December 2006—Dr. Gerrard seconded the bill. First and second readings took place on the same day and Ms. Korzeniowski indicated at second reading that the introduction of Bill 214 was timed specifically to coincide with the International Day of the Volunteer, which was (no surprise) 5 December 2006.

### A. Debate

The first in-House debate on *The Good Samaritan Protection Act* occurred on 5 December 2006, when Ms. Korzeniowski introduced Bill 214 to the Legislative Assembly. Both first and second readings took place on the same day.

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<sup>25</sup> Philip Osborne, *The Law of Torts*, 3<sup>rd</sup> ed. (Toronto: Irwin Law, 2007) at 78. [*Osborne*]

<sup>26</sup> Certain relationships in law engender a duty of care, where a person must act. For example: parent-child, teacher-pupil, and doctor-patient. *Ibid.* at 4.

Ms. Korzeniowski, before speaking to the merits of Bill 214, thanked Dr. Gerrard for his cooperation and support of her bill. She then went on to talk about a situation at Boeing, a company located in her riding of St. James-Assiniboia, where an employee collapsed from a major heart attack in 2004 while co-workers stood around helpless to do anything except make him comfortable.<sup>27</sup> The Boeing workers, because of this tragedy, went to great lengths to educate themselves on CPR and first aid to prevent future such tragedies. Boeing went as far as purchasing an AED and training staff on how to use it. The staff however, found the defibrillator to be intimidating, and one employee who happens to be a friend of Ms. Korzeniowski, asked her why Manitoba had no Good Samaritan legislation.<sup>28</sup> His question led to Bill 214.

Ms. Korzeniowski went on to state that changes to CPR techniques and more frequent calls for AEDs in public places make the legislation even more necessary and timely. The addition of the AED to the lexicon of first aid rescue techniques necessitated removal of impediments to the installation of the device in public places.<sup>29</sup> Businesses that are reluctant to install the device need no longer fear, for Bill 214 will protect them from being sued if an untrained individual uses the device in an emergency.

Ms. Korzeniowski also pointed out the differences between Bill 214, and Bill 201, the private members' legislation put to the Legislative Assembly by Dr. Gerrard. She indicated that Bill 214 covers not just people who provide direct medical aid to an injured party, but also those people who provide advice to persons in emergencies. As well, she indicated that Bill 214 clarifies coverage in the case of a member of a volunteer organization such as ski patrols, Neighbourhood Watch, etc.<sup>30</sup> While there may have been a perception that the legislation does not cover those who receive honoraria for their services, a clarifying section was specifically included in Bill 214 to avoid misconceptions regarding volunteers.

Dr. Gerrard, in seconding Bill 214, highlighted the need for such legislation in Manitoba, and its intent to keep people from being so reluctant to help a stranger in need for fear of legal repercussions. Dr. Gerrard also emphasized the fact that Good Samaritan legislation exists in seven provinces and two territories in Canada, and that it was high time that Manitoba enacted similar legislation.<sup>31</sup> In addressing the fact that he had twice attempted to pass similar legislation

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<sup>27</sup> *Debates (5 December 2006)*, *supra*, note 1 at 485-6.

<sup>28</sup> *Ibid.*

<sup>29</sup> *Korzeniowski*, *supra* note 12.

<sup>30</sup> *Debates (5 December 2006)*, *supra* note 1 at 487.

<sup>31</sup> *Ibid.*

without success, Dr. Gerrard indicated that supporting Ms. Korzeniowski with her legislation was the best way to ensure that Manitobans receive the benefit of Good Samaritan legislation.<sup>32</sup> He did, however, make it clear that his party had attempted as early as 2005 to pass similar legislation through the Assembly without success.

Several other opposition members spoke in general terms about supporting Bill 214, including Steinbach MLA Kelvin Goertzen, Springfield MLA Ron Schuler, and Southdale MLA Jack Reimer. As well, Inkster MLA Kevin Lamoureux made some comments. All opposition members supported the bill; however they gave credit for the initial idea and subsequent bill to Dr. Gerrard and the Liberal caucus, rather than to Ms. Korzeniowski and/or the government. Mr. Schuler specifically congratulated the members of the Liberal caucus for initially bringing the legislation forward, and noted that having Dr. Gerrard second the bill is a great show of bipartisanship. Mr. Reimer's comments were brief, and had more to do with the series finale of the NBC comedy *Seinfeld* than they did with any perceived excellence or shortcomings of the proposed legislation.

## B. Committee Stage

The Standing Committee on Legislative Affairs met to discuss Bill 214 on 5 December 2006. The bill was, in fact, sent to committee on the same day it was debated at the Legislative Assembly. There were two presenters at the committee stage: one a private citizen, the other an organization. Both presentations supported the bill.

The first presenter was Ms. Leah Ross. Even though the bill went to committee on very short notice, Ms. Ross managed to drive in from Carman, Manitoba to speak at the committee meeting. Ms. Ross spoke favourably about the legislation. Ms. Ross recounted instances where her father, a medical doctor, was called up on many situations to assist persons in medical distress. She highlighted the fact that this bill protects not just off-duty medical professionals, but rather every Manitoban who lends a hand to a person in a time of need.<sup>33</sup>

While Ms. Ross praised the bill, she noted in her comments that the pith and substance of the NDP-sponsored bill varied little (if at all) from the bill sponsored by Dr. Jon Gerrard, the bill that was ultimately pulled from consideration by the Legislative Assembly. When read side-by-side, the bill's interpretation of the meaning of the word "assistance" vis-à-vis the word "aid"

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<sup>32</sup> *Gerrard 2*, *supra* note 15.

<sup>33</sup> Manitoba, Legislative Assembly, *Standing Committee on Legislative Affairs*, 38<sup>th</sup> Leg. 5<sup>th</sup> sess., Vol. LVIII No. 1 (5 December 2006) at 5. [*Committee*]



was identical.<sup>34</sup> Where the private member's bill provided coverage for all Manitobans, the government's bill includes a clarifying provision that, in Ms. Ross' opinion, clarifies very little: "Dr. Gerrard's bill had said that the bill applies to everyone, and this bill says it applies to everyone; however that includes ski patrol workers, other individuals."<sup>35</sup> She lambasted the NDP for blatantly copying a bill previously introduced by an opposition member, and commended Dr. Gerrard and the opposition members for tolerating the NDP's nonsense.

The second presenter was Ms. Eileen Jones, a representative of the Heart and Stroke Foundation of Manitoba ("HSFM"). Ms. Jones applauded the bill, and highlighted how it will directly affect the implementation of programming by HSFM. Specifically, she went over the approach taken by HSFM in educating the public on what to do when faced with persons suffering from cardiac arrest. HSFM has incorporated the use of automated external defibrillators (AEDs), more commonly known as portable defibrillator units as part of its cardiopulmonary resuscitation (CPR) protocol.

Ms. Jones stated that Good Samaritan legislation is vital to HSFM because, currently, public education programs on the use of AEDs had reached a standstill. Many participants in MSFM's CPR-training programs brought forward concerns about being sued for attempting CPR and defibrillation.<sup>36</sup> Ms. Jones stated that the biggest obstacle to expending education regarding resuscitation efforts in situations of cardiac arrest was the lack of Good Samaritan legislation—legislation that would prevent potential recipients of first aid from then turning around and suing the person who gave them first aid.

Good Samaritan legislation would address another concern of Ms. Jones related to liability insurance. At present, in order for the owner of an AED device to obtain liability insurance for the AED, a doctor must sign-off on every event at which an AED device is used. Ms. Jones maintained that the AEDs, as a result of the signing requirement, were used less frequently due to worries that a doctor would not have signed off on its use.<sup>37</sup> She indicated at committee that the existence of Good Samaritan legislation would eliminate the need for doctors to sign off on every use of the AED, as well as eliminate the need for physicians to be in charge of the AED-training programs.<sup>38</sup>

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<sup>34</sup> *Ross I, supra* note 4.

<sup>35</sup> *Committee, supra* note 31.

<sup>36</sup> *Ibid.* at 7.

<sup>37</sup> *Ibid.*

<sup>38</sup> *Ibid.* at 7-8.

### C. Third Reading

Bill 214 was read for the third time on 7 December 2006, just two days after the bill was read for the first time, and on the day the Legislative Assembly closed sessions in anticipation of the winter holidays. MLA Korzeniowski repeated much of her statements from the debates, noting that the bill is more comprehensive than legislation of other jurisdictions (in that it covers advice and not just assistance) and adding comments about the positive effects the bill's existence will have on organizations that promote first aid in times of emergency. The bill "...is about letting people do what is good and right and not have to give a second thought to reprisal when that second could cost or save a life."<sup>39</sup> She also expressed thanks to Dr. Gerrard for his "considerable input" on the legislation.

Key differences from what Ms. Korzeniowski said during debate included the reading of a letter sent to her by Boeing Industries—the company whose predicament was the impetus for the NDP to introduce Bill 214. The letter thanked Ms. Korzeniowski and the other MLAs who supported Bill 214. The letter applauded Ms. Korzeniowski for "...investing in [Manitoba's] citizens by helping remove any hesitation to be more involved when a fellow citizen is in need, through the enactment of [Good Samaritan] legislation."<sup>40</sup> This letter gives insight into the alternate purpose of the legislation—promotion of volunteerism and advertisement to the general community that helping a person in need does not expose one to liability. The letter also made it clear that the staff at Boeing had been working with Ms. Korzeniowski for at least one year on the legislation, leading one to believe that the timing of Bills 201 and 214 was purely coincidental.

Dr. Gerrard added a few comments, thanking the members of the Assembly for their cooperation, and highlighting that Bill 214 will save lives. Where the public perception was that the common law rule applies in Manitoba, this legislation removes virtually all fear for the would-be rescuer.<sup>41</sup>

## VI. IS "GOOD SAMARITAN" LEGISLATION REALLY NECESSARY?

There are mixed opinions as to whether or not Good Samaritan legislation is truly necessary. The argument for the legislation is obvious: it ensures that would-be rescuers are shielded from liability (except in cases of gross negligence) when they offer first aid, and in so doing, exacerbate the existing problem. The

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<sup>39</sup> *Debate (7 December 2006)*, *supra* note 8 at 580.

<sup>40</sup> *Ibid.*

<sup>41</sup> *Ibid.*

legislation is concrete evidence that the public can give first aid assistance and not face a law suit if they make the problem worse. Enacting legislation of this type goes a long way to eliminate the public misconception about providing assistance to those in need of help. Having such legislation would promote volunteerism and altruism in Manitoba. Eight other Canadian jurisdictions already have legislation, and it is important for Manitobans to not be “left out in the cold” regarding liability in emergencies.

There is, however, no empirical evidence against which to test claims of the negative liability approach; legislative initiatives in Canada have rested primarily on the supposition that lowering the duty of care in emergency situations will encourage bystanders to rescue victims.<sup>42</sup> In the face of public perception that they cannot assist for fear of being sued, having a statute that protects the public is useless if the public is unaware of the statute’s existence. Ms. Korzeniowski admitted that there was not a lot of publicity directly related to the passing of *The Good Samaritan Protection Act*, save one or two newspaper articles in the *Winnipeg Free Press*.<sup>43</sup> A search of on-line news archives yielded a solitary reference to the Act, and another reference to the ill-fated Liberal bill.<sup>44</sup> If one of the Act’s purposes is to allay public fear regarding liability, a lack of publicity would indicate that most Manitobans are unaware of the Act, and thus remain fearful about the repercussions of helping a person in need.

The Manitoba Law Reform Commission studied the Good Samaritan issue in 1973. The study was prompted by Alberta’s enactment of its *Emergency Medical Aid Act* (now know as the *Emergency Measures Act*). The Commission determined that having Good Samaritan legislation is not necessary and “cannot be demonstrated to provide any public benefit at this time.”<sup>45</sup> The Commission believed that two conditions needed to be present before Good Samaritan legislation could be shown to produce a benefit or suppress an evil:

Firstly, there would have to be such a spate of lawsuits against doctors, nurses, policemen, firemen and others that they would begin to become overly wary about rendering emergency assistance. Secondly, those lawsuits would have to be decided so consistently in favour of the plaintiffs that the public and the government would become convinced

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<sup>42</sup> *Ross 2, supra* note 6.

<sup>43</sup> *Korzeniowski, supra* note 12.

<sup>44</sup> See: “New Law Protects Good Samaritans” CBC News Online at <http://www.cbc.ca/news/story/2006/12/27/good-samaritan.html> [2006 Legislation]; “Proposed Law Protects Good Samaritans” CBC News Online at [http://www.cbc.ca/canada/manitoba/story/2005/11/08/mb\\_good-samaritan-20051108.html](http://www.cbc.ca/canada/manitoba/story/2005/11/08/mb_good-samaritan-20051108.html) [2005 Bill]

<sup>45</sup> Manitoba Law Reform Commission, *The Advisability of a Good Samaritan Law in Manitoba* (Manitoba Law Reform Commission, 1973) at 9. [Report]

that many were wrongly decided or that the law exacted too high a standard of performance and care.<sup>46</sup>

The Commission points out that the likelihood of the two conditions ever arising is very slim. For one, Canadians are not as litigious as our American neighbours are. Problems arose in the United States because lawsuits seemed to have deterred physicians and others from stopping to render assistance, for example, in traffic accidents or other medical emergencies.<sup>47</sup> Legislation was enacted in the United States to allay the public's fear of lawsuit.

Second, the Commission findings note that problems arise in situations where there are juries in civil suits.<sup>48</sup> The astronomical American damage awards are what caused fear in Canadian citizens, but such astronomical damage awards are impossible in Canada because negligence cases are rarely, if ever, decided by juries. The Commission thought it inconceivable that a victim would turn around and sue the rescuer (especially if the rescuer were some kind of medical professional). The Commission opined that most victims would be grateful to the rescuer, and not pursue legal action, even if some negative consequence did arise from the rescue.<sup>49</sup> In sum, the Commission found that no pressing need existed for the legislation. Where legislation is usually enacted to cure some kind of perceived problem, no such problem existed, and enacting Good Samaritan legislation would have been moot.

One must be mindful, however, that the Commission delivered its report in 1973 and without the benefit of knowledge about relatively easy medical procedures performable by laypersons. The Heimlich Manoeuvre, for example, was not invented until 1974,<sup>50</sup> and was not universally accepted until years later. Similarly, while CPR existed in some form in 1973, it was largely perceived to be a procedure to be performed by doctors alone; mass, public education about how to perform the technique did not begin in the United States until promulgation of the "chain of survival" concept by the American Heart Association, a concept that encourages bystander CPR.<sup>51</sup>

<sup>46</sup> *Ibid.* at 9-10.

<sup>47</sup> *Ibid.* at 9.

<sup>48</sup> *Ibid.*

<sup>49</sup> *Ibid.* at 4.

<sup>50</sup> The first article on the subject of the life-saving manoeuvre was not published by Dr. Henry Heimlich until 1974. See Dr. Henry Heimlich, "Pop Goes the Café Coronary" (1974) *Emergency Medicine* 6 at 154-55.

<sup>51</sup> Michael Ardagh, "A Brief History of Resuscitation" (7 May 2004) 117 *The New Zealand Medical Journal* at 1193; also see: American Heart Association, Cardiac Life Support Subcommittee and the Emergency Cardiac Care Committee, "Improving survival from sudden cardiac arrest: The "chain of survival" concept" (1991) *Circulation* 83 at 1832-47.

Even in the absence of Good Samaritan legislation, the degree of care that rescuers are expected to exercise is not particularly great. Proponents of the legislation argue that "...[w]ithout the Act, a person rendering emergency assistance would be liable for injuries caused by that assistance if, in the provision of the assistance, the person was negligent."<sup>52</sup> However, a person confronted with an emergency will not be required to exhibit the level of prudence required in a non-emergency situation. The law already provides for exactly the situation contemplated by Good Samaritan legislation. While it is arguable that emergencies necessarily create greater chances for rescuers to act in a negligent manner, the fact that a person is acting in an emergency by necessity lowers the degree of care owed by the rescuer.

The current standard of care for rescuers to meet is that of reasonableness. A Good Samaritan is expected to act reasonably in the circumstances presented. "Emergencies tend to breed excitement, confusion, and anxiety, which may rob the defendant of his usual power to exercise prudent judgment and due care. In retrospect, he may make a poor choice, perform badly, or exacerbate the situation."<sup>53</sup> Courts already recognize this fact and tend to be lenient on those who attempt to rescue others in distress. The law is mindful of the fact that people cannot give a second thought to reprisal in a situation where that second or two could mean life or death for the injured party.

The case of *Horsley v. McLaren*<sup>54</sup> illustrates the law as it applies to situations of sudden peril. The Supreme Court of Canada considered the actions of a pleasure-boat owner when a passenger fell overboard and died in the ice-cold water. Where the correct rescue technique was to employ a bow-on procedure, the defendant backed the boat toward the passenger. A majority of the Court held that while a mistake may have been made in the heat of the moment, the defendant acted in good faith and did his best to rescue his passenger.<sup>55</sup> This principle, while more than 35 years old, is still sound jurisprudence and would hold as equally today as it did for Mr. McLaren in 1972.

The situations contemplated by Good Samaritan legislation do not arise very frequently. Prior to the enactment of the Good Samaritan legislation, there were no suits successfully brought against rescuers.<sup>56</sup> Only three of the Good

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<sup>52</sup> S.M. Wexler, "Case Comment *Fraser v. Kelowna Motorcycle Club*" (1994) 52 *The Advocate* 2 at 251.

<sup>53</sup> *Osborne*, *supra* note 23 at 6.

<sup>54</sup> (1971), [1972] S.C.R. 441 [*Horsley*]

<sup>55</sup> *Osborne*, *supra* note 23 at 36.

<sup>56</sup> *Ross 2*, *supra* note 8 at 1.

Samaritan statutes have received judicial consideration.<sup>57</sup> Alberta has had Good Samaritan legislation on its books for more than thirty years, but has only litigated one case on the subject.<sup>58</sup> Even though it is likely that some victims are reluctant to sue their rescuers, a lack of jurisprudence on the topic indicates that it is equally likely that there is no pressing need for legislation. In these circumstances, where cases requiring litigation rarely arise, leaving the ultimate decision to a judge who has become familiar with the facts and nuances of the case may be the more prudent strategy.

## VII. CONCLUSION

*The Good Samaritan Protection Act* was passed quickly, to coincide with both the International Day of the Volunteer and the end of the 38<sup>th</sup> session of Manitoba's Legislature. With the increase of volunteerism around the holiday season, one can understand why there was a push to pass the legislation near the end of the calendar year. The legislation, however (at least from the legal perspective), was unnecessary. Both common law principles and long-standing case law cover most, if not all, situations in which a rescuer's liability is at issue. In her final comments to the Legislative Assembly, Ms. Korzeniowski aptly pointed out that she believes that "...people will jump in and act without thinking about possible legal liability. We've seen and heard about acts of heroism many times..."<sup>59</sup> The law recognizes that people, while altruistic, are not perfect, and that their actions in an emergency may not necessarily reflect their behaviour in a non-emergency situation. The statute addresses the concern that imposition of a duty of care on voluntary rescuers may create a significant disincentive to altruistic behaviour.<sup>60</sup> One would think that most citizens would jump in to assist regardless of the existence of protective legislation, and without turning their minds to the existence of any such legislation before offering assistance.

To the extent that *The Good Samaritan Protection Act* makes training of the public in the use of AEDs easier, and makes the public less fearful of using the devices, it is a good idea. If the law changes people's minds, causing them to deliver first aid rather than stand idly by, then all the better. If the law assists

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<sup>57</sup> See *Re: Osinchuk* [1983] A.J. No. 933 [*Osinchuk*], *Nelson v. Victoria County (Municipality)* (1987) 81 N.S.R. (2d) 334 [*Nelson*], *Fraser v. Kelowna Motorcycle Club* [1988] B.C.J. No. 343 [*Fraser*]

<sup>58</sup> *Osinchuk*, *supra* note 55.

<sup>59</sup> *Debates (7 December 2006)*, *supra* note 8 at 580.

<sup>60</sup> *Osborne*, *supra* note 18 at 79.

organizations involved in educating the public in the delivery of their services, and reduces insurance costs for first aid devices, this too is laudable. More publicity of the Act's existence would go a long way in making Manitobans aware of the fact that they would not be liable in circumstances where they provide well-intentioned but incorrect rescue procedures.

However, as the saying goes: you can lead a horse to water, but you can't make it drink. Irrespective of how much publicity (if any) was received by the Act, it does not impose a positive duty on persons to act in times of distress. If the aim of the legislation was to get Manitobans to be more altruistic in times of need, the Legislative Assembly ought to have drafted law that imposes a positive duty on its citizens. Where the eternal optimist would state that Manitobans would help regardless of the law's existence, a cynic would point out that nobody does anything unless there is a personal benefit. When given the option between doing something, but possibly being sued for your actions, and doing nothing and not being sued, most people would choose the latter. Helping is still optional. If helping were a codified duty, the less damaging alternative to the rescuer would be to help, and more people would ultimately lend a helping hand.

