

# The Economic Analysis of Rescue Laws

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## I. INTRODUCTION

ACADEMICS HAVE LONG BEEN fascinated with the question of whether or not the law should be used to compel or promote rescue.<sup>1</sup> To a large extent, however, the issue is moot if the behaviour of those who witness emergencies can not be affected in a significant and positive manner by legal rules.<sup>2</sup> Similarly, the issue is hardly worthy of extended debate if more desirable forms of conduct are achievable only at unacceptably high costs. The project of this paper, therefore, is twofold. It will discuss the likely behavioural effects that "rescue laws" would have on potential victims and on potential rescuers. It will also examine the administrative costs that could attend upon efforts to legally generate an increase in the incidence of succor. As will be seen, those costs are largely a product of the behavioural implications of legally encouraging or requiring rescue.

Suggestions as to how behaviour might be affected by rescue laws could come from several sources.<sup>3</sup> This paper will examine the predictions made by those working in the field of law-and-economics. For in addition to its *positive* and *normative* aspects, the economic analysis of the law also has a *predictive* facet; notions of allocative efficiency have been used to generate not only statements about what is or what ought to be, but also what *would* be. Of course, the complex nature of causation makes it difficult at the best of times to confidently attribute particular patterns of human behaviour to particular legal rules. That task is complicated even further when the legal rules in question are mere proposals that have yet to be enacted. In such

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<sup>1</sup> Among the earliest articles are: F. Bohlen, "The Moral Duty to Aid Others as a Basis of Tort Liability" (1908) 56 U. Pa. L. Rev. 217 and 316, and H.D. Minor, "Moral Obligations as a Basis of Liability" (1923) 9 Va. L. Rev. 420. Indicative of the issue's enduring and growing appeal is the fact that Professor Klar devotes an entire chapter to it in his recent text on tort law: L.N. Klar, *Tort Law* (Toronto: Carswell, 1991) c. 6.

<sup>2</sup> Conceivably, "rescue laws" might be introduced with other goals in mind. A civil liability rule, for example, might be aimed at compensating those who suffer as a result of non-intervention. Most likely, rescue laws would be intended to serve several masters.

<sup>3</sup> The behavioural consequences of rescue laws have been examined from a psychological perspective in M. McInnes, "Psychological Perspectives on Rescue: The Behavioural Implications of Using the Law to Increase the Incidence of Emergency Intervention" (1991) 20 Man. L.J. 656. See also: V. Brady, "The Duty to Rescue in Tort Law: Implications of Research on Altruism" (1980) 55 Ind. L.J. 551; E. Radcliffe, "A Duty to Rescue: The Good, the Bad, and the Indifferent — the Bystander's Dilemma" (1986) 13 Pepperdine L. R. 387 at 399-402.

cases, the legal economist uses economic theories, particular views of human nature, and speculation to generate his or her predictions.

By way of a preface to the discussion that follows, it will be useful to briefly describe the types of laws that could be used to promote emergency intervention.<sup>4</sup> First, a duty to rescue could be imposed in either tort law or criminal law.<sup>5</sup> Second, compensation could be made available to rescuers. Those who render aid could be permitted to claim reimbursement for expenses they incur, remuneration for services they render, or rewards for the efforts they make. Third, rescuers could be allowed to enforce promises of compensation made by grateful rescuees. Finally, rescuers could be granted some form of immunity from suit for harm that they cause in the course of intervention. Collectively, these four possibilities will be referred to as *rescue laws*. The nature of each will become clearer as this paper develops.<sup>6</sup>

### A. Landes & Posner's Positive Economic Theory of Law

Much of the discussion that follows will entail an examination of Landes & Posner's economic analysis of rescue laws. A summary of those authors' approach is therefore in order.

Landes & Posner's primary goal is to construct a *positive* economic theory of law.<sup>7</sup> However, they have also employed economic principles to determine whether or not rescue laws would be *efficient*, and in the

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<sup>4</sup> As will become clear as this paper progresses, a number of the possible rescue laws already exist in a limited form in some jurisdictions.

<sup>5</sup> This paper will follow the legal economists insofar as they focus on the the imposition of a *civil* duty.

<sup>6</sup> The focus of this paper will be on those laws that could (or do) exist in Canada's common law provinces and territories. It should be noted, however, that a number of rescue laws already exist in Quebec. An obligation to render assistance is imposed by several sources, most notably the Quebec *Charter of Human Rights and Freedoms*, R.S.Q. 1977, c. C-12, s. 2 (see S. Rodgers Magnet, "The Right to Emergency Medical Assistance in the Province of Quebec" (1980) 40 R. du B. 373; F.D. Barakett & P.G. Jobin, "Une Modeste Loi du Bon Samaritan Pour le Québec" (1976) 54 Can. Bar. Rev. 290). Further, pursuant to *An Act to Promote Good Citizenship*, R.S.Q. 1977, c. C-20, a commission established under the Workmen's Compensation Act is specifically authorized to compensate a rescuer for injuries sustained in the course of intervention, and the Minister of Justice may recommend to the Government that a rescuer be granted an award of up to \$5000, or a decoration or distinction, even if he does not suffer a loss as a result of his efforts.

<sup>7</sup> W. Landes & R. Posner, *The Economic Structure of Tort Law* (Cambridge, Mass.: Harvard University Press, 1987) at 9 [hereinafter *Tort Law*].

course of doing so, have generated predictions as to the legal and behavioural effects of such laws. A new law would be "efficient" in Landes & Posner's view if it were wealth-maximizing in a Kaldor-Hicks sense — i.e. if the dollar value of the gains to those who would benefit from the law would be sufficient to compensate those who would be disadvantaged by the law, whether or not such compensation was in fact paid.<sup>8</sup> In the context of the rescue debate, an important consequence of that type of analysis is that an "efficient" law would not necessarily be one that minimized the number of people who require, but do not receive, assistance. The optimal law, in terms of wealth-maximization, might well entail a lower incidence of emergency intervention.

Landes & Posner do not share the skepticism of many<sup>9</sup> concerning the law's capacity to shape behaviour and deter undesirable conduct. When they speak of the efficiency or inefficiency of a particular rule, they are largely referring to the behavioural consequences that they believe it would have. They do, of course, recognize the many factors that may blunt the deterrent impact of a law: ignorance of the law or its requirements; a lack of the information needed to make a prudent judgment regarding loss avoidance; health and safety concerns which override the desirability of adhering to the law; clumsiness, inattentiveness and other human foibles; insurance. Nevertheless, they argue that laws *can* have significant deterrent effects, and they cite a number of studies in support of that contention.<sup>10</sup> As will be seen, they believe that rescue laws would have considerable behavioural consequences.

One final preliminary point: it may seem curious, given the importance that they place on the law's capacity to influence behaviour, that Landes & Posner ignore the effects of risk aversion and liability insurance. Both factors have the potential to significantly reduce the extent to which laws affect actions. Landes & Posner's primary justifi-

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<sup>8</sup> There are, of course, other means of measuring economic efficiency. For example, a change is said to be *Pareto superior* if it leaves at least one person better off, and no person worse off. A change that is Kaldor-Hicks efficient is, therefore, *potentially Pareto superior*, though it need not actually be so. The two measures of efficiency are briefly compared *ibid.* at 16-19.

<sup>9</sup> See e.g. S.D. Sugarman, "Doing Away with Tort Law" (1985) 73 Calif. L. Rev. 558; T.G. Ison, *The Forensic Lottery* (London: Staples Press, 1967).

<sup>10</sup> *Supra*, note 7 at 10 n. 30. They cite studies in both criminal and tort law. Surprisingly few studies have examined the ability of tort rules to influence behaviour, and of those that have, many have focussed on rules regarding automobile accidents.

cation for their approach is based on their desire to provide a simple, workable model of law and behaviour. As they suggest,<sup>11</sup> a model that takes account of too many qualifications and variables inevitably lacks integrity; it can rationalize anything, but convincingly explain or predict nothing. They further defend their assumption that people are risk neutral, rather than risk averse, by arguing that there is no compelling reason to assume otherwise in the context of a positive economic theory of private law.<sup>12</sup> Judges, they hold, have been concerned with the efficient allocation of resources, not with risk reduction. If a person is concerned about risks (the argument continues), he can buy insurance. That line of argument *may* be valid in regard to a positive theory of law. Its conclusion (i.e. that people can be assumed to be risk neutral), however, is far too unrealistic in the context of an exercise aimed at predicting the behavioural consequences of rescue laws.<sup>13</sup> In the discussion that follows, it will not be assumed that people are risk neutral or that they have purchased insurance.<sup>14</sup>

## II. ADMINISTRATIVE COSTS OF RESCUE LAWS

THE IMPLEMENTATION AND ENFORCEMENT of rescue laws might entail a variety of costs.<sup>15</sup> The aim of the present section is to identify and

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<sup>11</sup> *Ibid.* at 22.

<sup>12</sup> *Ibid.* at 56–58. Landes & Posner recognize that people are generally considered to be risk averse, and even adduce evidence in support of that proposition: *ibid.* at 56. For purposes of their theory, however, they simply choose to assume otherwise.

<sup>13</sup> See e.g. W. Landes & R. Posner, "Salvors, Finders, Good Samaritans and Other Rescuers: An Economic Study of Law and Altruism" (1978) 7 *J. Legal Stud.* 83 at 94 [hereinafter *Salvors*].

Conceivably, what are considered to be Landes & Posner's "predictions" could be accounted for within their positive analysis. It is possible that the lack of rescue laws in force today is the result of judicial decisions based on notions of economic efficiency. However, that is not a position that Landes & Posner appear to take.

<sup>14</sup> It seems questionable that even an insured party would be risk neutral. Is one with first party insurance really indifferent to the choice between health and compensation? Is one with third party insurance really indifferent to the choice between acting safely and endangering others? See e.g. studies cited in *supra*, note 7 at 10 n. 30.

<sup>15</sup> It could, for instance, lead to an increase in the amount of helping behaviour in society, which in turn could lead to learned helplessness and a lack of initiative. See e.g. A. Rand, *The Virtue of Selfishness* (New York: New American Library, 1964). So, too, it could result in an intolerable infringement on freedoms. See e.g. R. Epstein, "A Theory of Strict Liability" (1973) 2 *J. Legal Stud.* 151 at 199. It is beyond the scope of this

examine some of the potential *administrative costs*. For those concerned with notions of allocative efficiency, such matters are clearly significant. Alone or in association with other potentially negative effects, administrative costs might render an otherwise desirable law unjustifiably expensive. Indeed, in the more extreme cases, even those who do not firmly adhere to economic principles must concede that in a world of limited resources, there are many good things that society simply can not afford.

### A. Costs for Liability Rules

It has been suggested that the costs of enforcing a duty to rescue "would be higher than for any other activity governed by either common or civil law."<sup>16</sup> If that is true, then, by any standard, it may well be that the benefits produced by a duty would come at too dear a price.

Enforcement of a duty to rescue presupposes the identification and apprehension of those who could have rendered assistance. According to Rubin, however, it would be very difficult and prohibitively expensive to even ascertain the *existence* of such individuals.<sup>17</sup> He contends that those seeking to enforce a general duty to rescue would face the same type of problems that beset, for example, those involved in the battle against the trade of illegal drugs. Witnesses to a sale of heroin are usually peddlers or consumers of the drug themselves; witnesses to a failure to rescue would probably have failed to fulfil their own duties. And, of course, a person is unlikely to volunteer information if doing so would entail self-incrimination. Further, Rubin notes, because the need for rescue does not follow a pattern in the way that the sale of drugs does, it would not be possible for the authorities to monitor non-rescuers in the way that drug dealers are monitored.

There are reasons to doubt Rubin's assertion that it would be too difficult and too expensive to determine the existence and identity of those who fail to rescue. By drawing an analogy between non-rescue and drug dealing, Rubin glosses over the fact that the latter, unlike the former, is usually a "victimless" offence, at least in an immediate sense. He also assumes that the victim of a wrongful refusal to render aid would invariably die, or would otherwise be incapable of providing

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paper to examine all the possible costs that rescue laws could entail.

<sup>16</sup> P.H. Rubin, "Costs and Benefits of a Duty to Rescue" (1986) 6 *Int'l Rev. Law & Econ.* 273.

<sup>17</sup> *Ibid.* at 274.

evidence on his own behalf. However, unless an obligation was imposed only in life-threatening situations, its breach might not typically prevent victims from giving evidence.<sup>18</sup> And certainly, victims would be well motivated to do so, particularly if the wrong was tortious rather than criminal. There is another reason why the ascertainment and identification of potential defendants might not be as difficult as Rubin and others<sup>19</sup> suggest. The need for rescue would not invariably occur in circumstances of anonymity. For every victim whose need would arise on a subway car crowded with strangers, there might be a victim whose need would arise in the presence of people with whom he was familiar (eg. co-workers or neighbours). In the latter case, the victim (or his personal representative) would have a reasonable idea as to who may have failed to intervene.<sup>20</sup>

In the event that it was most difficult to ascertain the existence of, and to identify, non-rescuers, Rubin states that there are two options available in regard to the enforcement of a duty to rescue. Neither, he says, are very appealing. The first is to simply not enforce the duty, or to enforce it "sub-optimally." Rubin believes that such a course of action would actually lead to a reduction in the incidence of succour because while it would fail to effectively deter undesirable behaviour, it would undermine motivational impulses to act. That argument is examined elsewhere in this paper, and is found to be unconvincing.<sup>21</sup>

The second option is to employ a penalty or fine that is large enough, notwithstanding the low probability of prosecution, to create a situation in which "the expected value of violation is no greater than zero."<sup>22</sup> Rubin argues, however, that the cost of enforcing a duty in that manner would be prohibitively high and would outweigh any benefits derived. To some extent, Rubin's argument can be countered

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<sup>18</sup> Such a duty has been imposed in a number of jurisdictions. See e.g. A. Rudzinski, "The Duty to Rescue: A Comparative Analysis" in J.M. Ratcliffe, ed., *The Good Samaritan and the Law* (New York: Doubleday & Co., 1981) 123. The merit of limiting a duty in such a way is questionable: see e.g. M. McInnes, "The Question of a Duty to Rescue in Canadian Tort Law" (1990) 13 *Dalhousie L.J.* 85 at 91.

<sup>19</sup> See e.g. R. Posner, *Economic Analysis of Law*, 2d ed. (Boston: Little, Brown & Co., 1977) § 6.9 [hereinafter *Economic Analysis*].

<sup>20</sup> For example, in the most famous incident of its type, it was determined that Kitty Genovese's rape and murder was heard by at least thirty-eight of her neighbors, all of whom chose not to become involved. For a full account of the incident, see e.g. A.M. Rosenthal, *Thirty-eight Witnesses* (New York: McGraw-Hill, 1964).

<sup>21</sup> See below, section III(A)(2).

<sup>22</sup> *Supra*, note 16 at 275.

by noting that as typically formulated, a duty to rescue does not demand a great deal of a bystander; she is not required to endanger or unreasonably inconvenience herself.<sup>23</sup> Consequently, it does not follow that an especially heavy penalty would be needed to counter the "value of violation."<sup>24</sup>

### B. Costs for Compensation Rules

It has been said that a law that allowed rescuers to claim compensation for their expenses or efforts would entail greater administrative costs than would a law that allowed victims of non-intervention to bring actions in tort.<sup>25</sup> If that is correct, then a compensation rule would have to generate more benefits than would a liability rule in order to be economically justified. But, as psychologists have found, bystanders are more apt to be influenced by negative inducements than by positive inducements.<sup>26</sup> It would therefore appear relatively difficult to make out a case in favour of a right to restitution.

It is certainly *possible* that a compensation rule would be costlier to administer than a liability rule. Landes & Posner assume that compliance with a liability rule would be widespread, and argue that legal costs associated with tort suits would be incurred only in the exceptional cases of wrongdoing.<sup>27</sup> By contrast, they predict that a compensation rule would be used far more frequently, and would therefore entail "horrendous" costs.<sup>28</sup> Assuming again that rescue would be the rule rather than the exception, Landes & Posner further assume that a compensatory claim would be made in *every* case involving the conferral of a benefit. Even those who would provide assistance in the absence, or in the initial ignorance, of the right to

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<sup>23</sup> See e.g. *Charter of Human Rights and Freedoms*, *supra*, note 6; Vt. Stat. Ann. tit. 12, § 519 (1972); Minn. Stat. Ann. § 604.05 (West Supp. 1984); French C. Pen. art. 63 § 2.

<sup>24</sup> The penalties that are employed in jurisdictions that already have a general duty to rescue are variable. In Vermont and Minnesota, one who wrongfully fails to provide emergency assistance is subject to a fine of \$100. In France, one can be criminally punished by a term of incarceration of between three and five months, or a fine of between 36,000 and 1,500,000 francs, or both. Civil damages can also be awarded.

<sup>25</sup> See e.g., *supra*, note 19 at § 6.9; *supra*, note 13 at 120; W. Landes & R. Posner, "Altruism in Law & Economics" (1978) 68 *Amer. Econ. Rev.* 417 at 421. [hereinafter *Altruism*].

<sup>26</sup> See e.g. J. Lynch Jr., "Why Additive Utility Models Fail as Descriptors of Choice Behavior" (1979) 15 *J. Experimental & Soc. Psych.* 397.

<sup>27</sup> *Altruism*, *supra*, note 25 at 418; *Economic Analysis*, *supra*, note 19 at § 6.9.

<sup>28</sup> *Economic Analysis*, *ibid.*



relief would commence actions. Once a peril has passed (it is argued), altruistic impulses disappear or diminish;<sup>29</sup> and because a person can not be presumed to behave altruistically after a rescue, Landes & Posner assume that he would not.<sup>30</sup>

Landes & Posner's analysis involves a number of questionable assumptions. Particularly if bystanders were induced to action by both the threat of liability and the promise of compensation, rescue might well become the behavioural rule.<sup>31</sup> (Indeed, it may be the case that assistance is already provided more often than not.) The claim that there would therefore be a proliferation of administratively costly restitutionary claims is, however, debatable. First, in many situations, rescue would require little in the way of expenses or effort. Recognizing that the amount of compensation at stake would not be worth the bother and costs involved in a lawsuit, rescuers might often choose to not pursue the relief available to them.<sup>32</sup> Second, some intervenors may place a high value on other, informal forms of compensation, such as public praise or an increased level of self-esteem. To the extent that a demand for monetary compensation would tarnish the noble character of a rescue, and would therefore undermine such rewards, an intervenor might prefer to bear the costs of intervention himself.<sup>33</sup>

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<sup>29</sup> A rescuer's marginal degree of altruism (i.e. the rate at which he is willing to exchange dollars of his own wealth for an increase in the wealth of a victim) is, in Landes & Posner's view, a function of several factors, a number of which are responsive to the wealth of a victim at a given moment. Because of the threat of a catastrophic loss, a victim in grave peril invariably has little wealth (regardless of the condition of his bank account). That is not so once he has been rescued: Altruism, *supra*, note 25 at 418; *supra*, note 13 at 94. See also G.S. Becker & G.J. Stigler, "Law Enforcement, Malfeasance and Compensation of Enforcers" (1974) 3 J. Legal Stud. 1; G.S. Becker, "A Theory of Social Interactions" (1974) 82 J. Pol. Econ. 82.

<sup>30</sup> *Supra*, note 13 at 95; *supra*, note 19 at § 6.9.

<sup>31</sup> That assumption is somewhat inconsistent with other arguments made by Landes & Posner's to the effect that such rules could "overjustify" and hence reduce the incidence of succor, or amount to a "tax" on certain activities and thereby lessen the number of rescues undertaken. Those arguments are discussed below, section III(A)(1)(2).

<sup>32</sup> It could be otherwise if rescuers, like maritime salvors, were entitled not only to reimbursement and remuneration, but reward as well. For a discussion of how salvage awards are computed, see e.g. D.W. Steel & F.D. Rose, eds, *Kennedy's Law of Salvage*, 5th ed. (London: Stevens & Sons, 1985) c. 12; G. Gilmore & C. Black Jr., *The Law of Admiralty*, 2d ed. (Mineola, New York: Foundation Press, 1975) §§ 8.8-8.12.

<sup>33</sup> By way of illustration, the reader may ask herself if she has ever returned a lost wallet and declined to accept a reward offered by its grateful owner. If so, why did she refuse the money? Indeed, why did she return the wallet?

The matter is also discussed *infra* at text accompanying note 65.

True, because public acclaim typically follows immediately upon a heroic act and then quickly dissipates, it might be somewhat immune to the dampening effect of a compensatory claim, which would only have to be commenced within the relevant limitation period.<sup>34</sup> Internally mediated rewards, on the other hand, would seem to be more attuned to subsequent events; the heightened sense of self-esteem that one would feel as a result of a rescue would likely be diminished or even negated if compensation was ever sought. Third, despite Landes & Posner's assumption to the contrary, the impulses that give rise to intervention may not disappear once an emergency comes to an end.<sup>35</sup> Psychological evidence suggests that, in some instances, an altruistic act is the manifestation of a personality trait, rather than a situational response to a particular set of phenomena.<sup>36</sup> Finally, even if a rescuer did bring an action, his suit might be settled more quickly, and less expensively, than is usually the case. Grateful for having been rescued, a victim might readily acknowledge the merit of the claim against him. He would not be in the position, as is typical in civil litigation, of defending himself against an accusation of wrongdoing. Rather, he would simply be asked to pay for the benefit that was conferred upon him.

While Landes & Posner's position may generally be overstated, it undeniably sounds an important note of caution. In some cases at least, the administrative costs attendant upon a compensation rule could be quite high. If, for example, many bystanders cooperated in a rescue effort, it might be expensive to determine who helped, and in what way.<sup>37</sup> Further, if remuneration was made available to the "non-professional," the process needed to quantify the value of the time and effort that had been expended could be protracted and costly.

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<sup>34</sup> Occasionally it might be otherwise. For example, an organization that annually recognizes heroic deeds might be less apt to bestow its honors on one who has demanded compensation from his beneficiary.

Insofar as public acclaim would follow immediately upon a rescue, or not at all, another possibility exists. The mere fact that relief could be claimed might inevitably taint the nature of a good deed insofar as others would assume that a rescuer did not sacrifice his own interests in the process. That possibility is considered below, together with the suggestion that the incidence of intervention might decline in consequence: see below, section IV(A)(1).

<sup>35</sup> *Supra*, note 13 at 95.

<sup>36</sup> The evidence is collected in J. Piliavin *et al.*, *Emergency Intervention* (New York: Academic Press, 1981) c. 8.

<sup>37</sup> *supra*, note 13 at 96.

(Indeed, the amount of money spent on the computation process might exceed the value of a claim.) The fact that physicians are currently in the strongest position to claim remuneration<sup>38</sup> may, in part, be attributable to the fact that their services are easily valued by reference to the fee that they usually charge.<sup>39</sup>

### III. BEHAVIOURAL CONSEQUENCES OF LIABILITY RULES

LANDES & POSNER RECOGNIZE that tort law's lack of a general duty to rescue may *appear* to be economically inefficient in many situations.<sup>40</sup> X sees an anvil about to fall on Y's head. At little cost to himself, X could prevent a great loss to Y by shouting out a warning. But for high transaction costs, the parties would surely have negotiated an agreement under which X would provide such a service.<sup>41</sup> Under normal circumstances, an economic analysis would therefore yield the conclusion that a duty ought to be imposed. Landes & Posner resist that conclusion, however, arguing that the behavioural implications of a liability rule are unclear. Upon analyzing a duty that would require cost-justified rescues,<sup>42</sup> they conclude that while the absence of such an obligation is not *necessarily* efficient, neither would

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<sup>38</sup> See e.g. *Matheson v. Smiley*, [1932] 2 D.L.R. 787, [1932] 1 W.W.R. 758 (Man. C.A.); *Cotnam v. Wisdom*, 83 Ark. 601, 104 S.W. 164 (1907); *The Road Traffic Act 1972* (U.K.), 1972, c. 20, s. 155; P.D. Maddaugh & J.D. McCamus, *The Law of Restitution* (Aurora, Ont.: Canada Law Book, 1990) 693; Lord Goff & G. Jones, *The Law of Restitution*, 3d ed. (London: Sweet & Maxwell, 1986) at 342-343; American Law Institute, *Restatement of the Law of Restitution: Quasi-Contract & Constructive Trusts* (St. Paul, Minn.: American Law Institute, 1937) s. 116; G.E. Palmer, *The Law of Restitution* (Boston: Little, Brown, 1978) § 10.4.

<sup>39</sup> See e.g. *Altruism*, *supra*, note 25 at 420. Generally, it would be expected that it would be easier to quantify the measure of compensation in regard to reimbursement for expenses, than for remuneration for services.

<sup>40</sup> *Ibid.* at 417; *supra*, note 19 at § 6.9.

<sup>41</sup> *Altruism*, *supra*, note 25 at 417. The high transaction costs in this case are the result of the limited time available for negotiations and, more importantly, of the tremendous number of potential protectors with whom Y would have to negotiate before going out for a walk.

The same analysis holds true whether X is in a position to prevent any loss from occurring (e.g. by calling out a warning), or merely in a position to prevent a further loss to someone who has already been injured (e.g. by summoning an ambulance).

<sup>42</sup> As will be discussed, Landes & Posner analyze a duty that is formulated significantly differently than that which is usually found in legislation or in academic proposals. Those differences could have important behavioural implications.

its introduction *necessarily* be a step towards inefficiency.<sup>43</sup> The aim of this section is to examine the reasons why Landes & Posner come to that conclusion.

### A. The Effects on Rescuers

On a superficial level, a duty requiring cost-justified rescues would *seem* likely to increase the probability of emergency intervention. Given the choice between (i) providing a level of assistance that would minimize the expected losses from a hazard (including losses to himself and to the victim), and (ii) providing an inadequate level of assistance (perhaps none) and incurring liability in the amount of the victim's losses, the wealth-maximizing bystander would obviously opt for the former.<sup>44</sup> As Landes & Posner note, however, that conclusion fails to account for several important possibilities. For example, it assumes the perception of a duty that is unfailingly enforced without error. If, however, risk neutral, wealth-maximizing bystanders believed that there was only a small chance that a breach would be detected and punished, they might choose to do nothing.<sup>45</sup> A number of other potentially detrimental behavioural effects need to be examined more fully.

#### 1. The "Tax Effect"

Of all the negative effects that a duty to rescue could have, it is the *tax effect* that receives the most consideration from Landes & Posner.<sup>46</sup> Generally, an activity will carry a "tax" insofar as it is perceived as being likely to give rise to situations which could result in liability. At least for those who would not provide an adequate level of assistance in the absence of a legal obligation, a duty to rescue could impose a tax on, and hence lower the utility of, certain activities.<sup>47</sup> The threat of liability could consequently lead some potential

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<sup>43</sup> Salvors, *supra*, note 13 at 124, 127; *Tort Law*, *supra*, note 7 at 146.

<sup>44</sup> Salvors, *ibid.* at 119-120; *Tort Law*, *ibid.* at 143.

<sup>45</sup> The same would even hold true for risk averse bystanders if the likelihood of prosecution was sufficiently remote. As noted above, people are generally risk averse, rather than risk neutral: *supra*, note 12.

<sup>46</sup> *Supra*, note 13 at 119-121; *supra*, note 7 at 143-145.

<sup>47</sup> Generally, those who would provide an adequate level of services in any event would be immune to a duty to rescue's tax effect because it would not require them to alter their behaviour on pain of liability. However, as will be discussed, a duty could affect even so-called "strong altruists" in different ways: see below, section III(A)(2).

rescuers to avoid "hazardous" activities (i.e. those in which the need for rescue might arise), and engage instead in "safe" activities. Setting aside for the moment the issue of how a duty could affect the behaviour of potential victims, the result would be a reduction in the number of rescues.<sup>48</sup>

As Landes & Posner note, calculating the impact of the tax effect is not a simple matter.<sup>49</sup> A potential rescuer would "substitute" away from a hazardous activity to a safe activity if, once the tax had been accounted for, the utility of the latter exceeded the utility of the former.<sup>50</sup> The extent to which the utility of a hazardous activity would be reduced by a liability rule would, say Landes & Posner, be a function of several factors: (i) a potential rescuer's perception of the probability that he would encounter a victim, and hence be exposed to the risk of liability;<sup>51</sup> (ii) the difference between the level of services that a bystander would provide in the absence of a liability rule and the level demanded by the liability rule; and (iii) the extent to which other potential rescuers would substitute away from a hazardous activity, thereby increasing the probability that those remaining in it would encounter a victim in need.<sup>52</sup> One might also add: (iv) a potential rescuer's perception of the probable magnitude of liability, if any.

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<sup>48</sup> If, as Landes & Posner suggest, a duty would affect potential victims as well as potential rescuers, then the issue would not be whether the total number of rescues would decrease, but whether the probability that a person in need of assistance would receive help would decrease. It is possible that a duty could either increase or decrease the number of persons in need. Those possibilities will be explored below.

<sup>49</sup> *Supra*, note 13 at 120–121; *supra*, note 7 at 144–145.

<sup>50</sup> Hence, the smaller the difference in the pre-tax liability between two activities, the greater the likelihood that substitution will occur: *ibid.*

<sup>51</sup> Also included should be his perception of the probability that his wrong would be detected and successfully prosecuted.

<sup>52</sup> Landes & Posner assume that the probability that a given bystander will encounter a victim and will be called upon to render assistance is inversely proportional to the ratio of potential rescuers to victims: Salvors, *supra*, note 13 at 120–121; *Tort Law*, *supra*, note 7 at 144. In general, the assumption seems reasonable. It is possible, however, that the relationship would not be perfect. For instance, to the extent that some emergencies require cooperative efforts, a higher ratio of bystanders to victims would not necessarily reduce the probability that a given bystander would be required to provide help. And insofar as certain potential rescuers and certain potential victims follow particular routes within a hazardous activity, a reduction in the number of those rescuers would not increase the likelihood that a member of another group of rescuers would encounter a victim in need.

In the tax effect, Landes & Posner have undoubtedly uncovered a potentially significant phenomenon. Because damage awards could be very high if a victim suffered terribly as a result of non-intervention, the disutility created by a liability rule could be considerable. Further, if one assumes (as Landes & Posner do not) that potential rescuers are risk averse, rather than risk neutral, the *actual* likelihood of liability might not have to be great in order to induce substitution. The perception of (say) a moderate chance of incurring a financially crippling penalty could be sufficient to discourage some from engaging in a hazardous activity. There are, however, a number of reasons for believing that the impact of the tax effect would not be great.

Landes & Posner's analysis is based on a law that would require cost-justified rescues.<sup>53</sup> In some circumstances, such a duty could obligate a bystander to undertake a dangerous or burdensome effort. As typically formulated, however, a duty to rescue applies only when it can be fulfilled safely and without unreasonable inconvenience.<sup>54</sup> It seems relatively less likely that such a duty would lead to substitution. As always, the possibility of legal errors misattributing fault would exist, but for the most part liability could be avoided by simple efforts that would not significantly diminish the utility of particular activities.

Further, it is unclear whether, or to what extent, it would be possible to identify and avoid situations that involve a substantial probability of encountering a person in need of rescue. While the frailty of the human body is such that the possibility of an emergency is always present, the likelihood of peril in most circumstances is negligible. Further, a number of the identifiable activities that do entail a significant degree of danger would appear to be somewhat immune to the tax effect. First, many are staffed by professional rescuers. Consequently, for example, spectators who witnessed an accident at an automobile race would not be expected to provide primary care if paramedics were on the scene. Second, those involved in some hazardous activities may be of a special breed. A mountain-climber, for example, may be a risk preferring individual who would welcome the opportunity to perform a daring rescue for the benefit of

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<sup>53</sup> Salvors, *ibid.* at 119; *Tort Law, ibid.* at 143.

<sup>54</sup> See *e.g., supra*, note 23; J. Silver, "The Duty to Rescue: A Reexamination and Proposal" (1985) 26 *Wm. & Mary L. Rev.* 423 at 435-436; cf. W. Rudolph, "The Duty to Act: A Proposed Rule" (1965) 44 *Neb. L. Rev.* 499.

a colleague.<sup>55</sup> He may also derive a great deal of utility from his unusual hobby, and may therefore be somewhat immune to any disutility that did take hold.

Finally, the disutility created by the tax effect could be offset by the availability of compensation. While the threat of liability would remain, it could be avoided in a (potentially) costless way if a rescuer could recover reimbursement for his expenses, and perhaps remuneration for his efforts. Landes & Posner doubt the wisdom of coupling a liability rule with a compensation rule, on the basis of administrative cost.<sup>56</sup>

## 2. *The Effects on "Strong Altruists"*

Landes & Posner recognize that *strong altruists* (i.e. those who would provide the level of assistance required by a duty, even in the absence of a duty) would be somewhat immune from the influence of the tax effect.<sup>57</sup> Nevertheless, they suggest three reasons why a duty might drive such individuals to non-intervention.<sup>58</sup>

The first reason why strong altruists might be affected by a duty simply involves an extension of the tax effect. It is argued that as potential rescuers substituted away from an activity, the disutility for those remaining would increase because they would be more likely to encounter a victim in need of help.<sup>59</sup> There may come a point (the argument continues) at which even strong altruists would conclude that they could derive more utility from another activity. Whatever merit the argument may have on its face, it loses much of its appeal once one departs from Landes & Posner's assumption that victims and rescuers do not come from the same pool of humanity.<sup>60</sup> While the sickly or clumsy character of a few individuals may earmark them for an inordinate amount of disaster, it would seem that for most, the

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<sup>55</sup> For that reason, the tax effect might not affect experienced individuals, but it might discourage novices from engaging in an activity.

<sup>56</sup> *Supra*, note 13 at 126.

<sup>57</sup> *Ibid.* at 119.

<sup>58</sup> Theoretically, all three reasons could take hold whether the duty required bystanders to undertake cost-justified efforts or to simply provide assistance that does not entail physical danger or unreasonable inconvenience. In regard to each reason, however, Landes & Posner's arguments carry less weight with the latter formulation.

<sup>59</sup> *Supra*, note 13 at 121.

<sup>60</sup> *Ibid.* at 120 n. 95. The assumption is made in order to simplify the analysis.

chances of becoming a victim or a rescuer are roughly equal.<sup>61</sup> Insofar as that is true, the disutility created by a liability rule would not noticeably increase as potential rescuers substituted away from an activity. Any reduction in the number of non-altruistic potential rescuers would also amount to a reduction in the number of (non-altruistic) potential victims. Those still engaged in an activity after the initial round of substitution occurred would not be required to do significantly more, either quantitatively or qualitatively.<sup>62</sup>

A liability rule could also reduce the level of assistance provided by all types of potential rescuers, including strong altruists, by impinging on personal freedom and hence engendering feelings of resentment. Posner notes that even altruists want to have a choice in times of crisis, and suggests that a legal rule might result in a behavioural backlash.<sup>63</sup> Help that would otherwise be provided may be intentionally withheld in protest. Psychological theory does admit of such a phenomenon, but psychological evidence for it is slight.<sup>64</sup>

Finally, there is no praise to be had for performing a coerced act. As Landes & Posner argue, the presence of a liability rule would make it

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<sup>61</sup> Cf. F. Bristol, "Medical Aspects of Accident Control" (1936) 107 J.A.M.A. 653; A. Blain, "The Automobile Accident — A Medical Problem" (1941) 3 J. Crim. Psychopathology 37; F. James & J.J. Dickinson, "Accident Proneness and Accident Law" (1950) 63 Harv. L. Rev. 769.

<sup>62</sup> Conceivably, there could be a slight increase in a duty's burden. For example, if a cooperative effort were required of a group of bystanders, each member of a smaller group might have to do more.

<sup>63</sup> *Supra*, note 19 at § 6.9.

<sup>64</sup> Occasionally, certain types of individuals will react to what they perceive to be improper forms of external pressure by asserting their freedom and refusing to act in the way that is demanded. In psychological terms, such reactance is explained with reference to costs and benefits. In the present context, the moral self-rewards that would normally follow upon the provision of emergency aid would be negated by the self-castigations that would follow upon capitulation to a demand. The issue is not simply one of being deprived of an opportunity to feel good about oneself; with the perceived attack on freedom it becomes one of feeling bad about oneself. A positive self-appraisal in such circumstances may actually require a refusal to intervene on a victim's behalf. However, while striking in theory, the phenomenon is by no means well documented or frequently observed. The evidence that does exist is sparse and unrelated to emergency situations. See e.g. J. Brehm, *A Theory of Psychological Reactance* (New York: Academic Press, 1966); S. Schwartz, "Normative Influences on Altruism" (1977) 10 Adv. in Exper. Soc. Psych. 221; S. Schwartz & J. Howard, "Helping and Cooperation: A Self-Based Motivational Model" in V. Derlega & J. Grzelak, eds, *Cooperation and Helping Behavior: Theories and Research* (New York: Academic Press, 1982) at 346. The implications that the research holds for the legal rescue debate are fully discussed in McInnes, *supra*, note 3 at section II(A)(3)(b).



difficult for a potential rescuer to convince others that her actions were the product of altruism, not coercion. Deprived of the opportunity to earn accolades, she might not be as inclined to provide emergency assistance.<sup>65</sup> That could be so even if it was widely believed that there was a high degree of error in the law's enforcement; at the time of crisis, prosecution would still be a threat, however slight. Absent empirical evidence, it is difficult to assess the merit of the argument. What can be said is that even if a duty did deprive potential rescuers of one source of motivation, it would provide them with another — i.e. the desire to avoid liability.<sup>66</sup> Further, it may be revealing to note that Landes & Posner's analysis could be applied to most rules in tort and criminal law.<sup>67</sup> It would be difficult to accept, however, that such laws should be repealed, and that behaviour should be governed by private morality alone.<sup>68</sup>

One argument that Landes & Posner do not make is that a liability rule that was enforced with a high degree of error would affect even strong altruists. Regardless of whether or not a bystander acted as required, it is possible that the vagaries of the legal process could

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<sup>65</sup> *Supra*, note 13 at 94, 124; *supra*, note 7 at § 6.9.

The argument perverts the meaning of "altruism," as it is usually defined. To the extent that an individual is an altruist, his concern is with the welfare of others, not with the opinion of others. Because of their unusual use of the term "altruism", Landes & Posner are led away from a similar, though distinguishable, phenomenon. Overjustification is the term psychologists use to describe the process whereby individuals are led by the presence of external inducements to misrepresent to themselves the nature of their actions. Behaviour that would be correctly attributable to altruism in the absence of such inducements is perceptually debased and attributed to (say) a desire to avoid liability. Over time, overjustification can, in theory, diminish the motivational impulses to act. In practice, however, the phenomenon has not proven to be a significant factor in emergency situations: see e.g. Z. Kunda & S. Schwartz, "Undermining Intrinsic Motivation: External Reward and Self-Presentation" (1983) 45 *J. Pers. & Soc. Psych.* 763; cf. S. Uranowitz, "Helping and Self-Attributions" (1975) 31 *J. Pers. & Soc. Psych.* 852; M. Zuckerman, M. Lazzaro & D. Waldgeir, "Undermining the Effects of the Foot-in-the-Door Technique with Extrinsic Rewards" (1979) 9 *J. App. Soc. Psych.* 292. For a more detailed discussion, see McInnes, *supra*, note 3 at section II(A)(3)(a).

<sup>66</sup> The latter source of motivation would affect bystanders to the extent that they believed that non-intervention would be detected and punished.

<sup>67</sup> The point has also been made by S. Levmore, "Waiting For Rescue: An Essay on the Evolution and Incentive Structure of the Law of Obligations" (1986) 72 *Va. L. Rev.* 879 at 885-886.

<sup>68</sup> In defense of Landes & Posner's position, it must be conceded that a voluntary provision of rescue services is more apt to be the subject of public acclaim than would be the case with (say) a voluntary abstention from murder. It would therefore be safer to leave the former to the operation of extralegal forces.

work against him and lead to a finding of fault. That danger is probably not great, however. As evinced by (say) the judicial trend away from finding rescuers contributorily negligent for injuries they sustain in the course of providing aid,<sup>69</sup> the courts are taking an increasingly compassionate and forgiving view of intervenors.

### 3. *The Effects on Maritime Rescuers*

Landes & Posner make several curious comments in regard to the possible effects that a liability rule could have on maritime rescue. First, they warn that if shipowners were held accountable for failing to rescue other seafarers,<sup>70</sup> the expected costs of shipping would increase, and some shipowners would either substitute toward other activities or use less busy shipping lanes.<sup>71</sup> Consequently, those lost at sea would have less chance of being saved.

It is possible,<sup>72</sup> though unlikely, that a duty would have such an effect. First, assuming that there are heavily used sea lanes, it would follow that they would be the site of a high percentage of all emergencies. Consequently, even if there was an obligation not only to rescue, but also to search for those who had sent out distress signals, the costs involved might not be as great as feared.<sup>73</sup> Further, once

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<sup>69</sup> Discussed below, section IV(B).

<sup>70</sup> Landes & Posner actually refer to "pleasure boats in danger", but the context of the statement makes it clear that it is the human content of those craft that is at issue: *supra*, note 13 at 122. Further, they speak of the liability of "shipowners" who fail to rescue. Presumably, they are assuming that a ship's owner would also be its "master". It is the master of a ship who would be in a position to rescue, and who would be subject to any sanctions.

<sup>71</sup> *Ibid.*

<sup>72</sup> For example, one can imagine shippers reacting to a significant increase in insurance premiums brought about by a rash of large liability awards.

<sup>73</sup> Insofar as the need for rescue would arise outside commonly used sea lanes, and to the extent that a duty was imposed upon ships' masters to search for individuals feared lost at sea, the costs involved in the rescue of human life could be high. Several factors militate against that possibility, however. As will be seen shortly, ships' masters are under a duty to rescue, but typically only in regard to those persons who are found at sea and are in danger of being lost (see *e.g.* 46 U.S.C. § 728; *Canada Shipping Act*, R.S.C. 1985, c. S-9, s. 451(1) [hereinafter *Canada Shipping Act*]; *Maritime Conventions Act*, 1911 (U.K.), 1 & 2 Geo. 5, c. 57, s. 6(2) [hereinafter *Maritime Conventions Act*, 1911]; cf. *Merchant Shipping (Safety Convention) Act*, 1949 (U.K.), 12 & 13 Geo. 6, c. 43, s. 22 (1) [hereinafter *Merchant Shipping (Safety Convention) Act*, 1949]). Further, where there is a statutory duty to search for persons, the obligation is lifted as soon as a ship's master is informed that another ship has been requisitioned and is complying with the requisition, or that assistance is no longer needed (*Merchant Shipping (Safety Conven-*

the site of an emergency has been located, the salvage of life, as compared to the salvage of property, is usually a fairly simple and inexpensive exercise.<sup>74</sup> Finally, the best evidence for believing that Landes & Posner's fears would not transpire, is that, as yet, they have not. For, while Landes & Posner strangely omit to make mention of the fact, there already *is* an obligation on ships' masters to rescue seafarers who are in peril.<sup>75</sup>

Landes & Posner also fear that a general liability rule could put professional maritime salvors out of business.<sup>76</sup> Insofar as that fear is based on the alleged inability of an individual to claim compensation for an act that he is legally obligated to perform,<sup>77</sup> it is entirely unconvincing. It is settled law that a ship master's right to claim life salvage is not abrogated by his statutory duty to provide assistance.<sup>78</sup> Even if that were not the case, the availability of compensation could simply be made dependent on an intention to charge for the benefits conferred.<sup>79</sup> Conceivably, if there was a general duty to search and rescue (and not merely to rescue those *found* at sea), professional salvors might experience a decline in the need for their services as victims would be able to call on others for assistance. To the extent that non-professionals were unavailable, or incapable of intervening, however, the income of professionals would not be affected.<sup>80</sup> In any

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*tion) Act, 1949, s. 22(1)).* And, of course, state funded search and rescue operations exist to help those lost at sea.

<sup>74</sup> *Supra*, note 13 at 104.

<sup>75</sup> See *e.g.*, *Canada Shipping Act*, s.451(1); *Merchant Shipping (Safety Convention) Act, 1949, s.22*; *Maritime Conventions Act, 1911, s. 6*; 46 U.S.C. § 728 (U.S.); Gilmore & Black, *supra*, at § 8.1 n. 7. These duties are backed by criminal sanctions.

<sup>76</sup> *Supra*, note 13 at 122.

<sup>77</sup> *Ibid.*

<sup>78</sup> See *e.g.* *Canada Shipping Act*, s. 451(2); *Maritime Convention Act, 1911, s. 6(2)*; *Merchant Shipping (Safety Convention) Act, 1949, s. 22(8)*; Gilmore & Black, *supra*, note 32 at § 8.4.6.

<sup>79</sup> The law of maritime salvage already contains such a requirement, although it is very easily satisfied: see *e.g.* F.D. Rose, "Restitution for the Rescuer" (1989) 9 Oxford. J. Legal Stud. 167 at 194ff. Similarly, an intention to charge is a necessary condition for compensation in other areas: see *e.g. Matheson v. Smiley, supra*, note 38 (services provided by a physician in an emergency); *Re Rhodes* (1890), 44 Ch. D. 94 (C.A.) (supply of necessaries to a person lacking contractual capacity). A presumption of an intention to charge could be recognized in favour of professional rescuers, but not others.

<sup>80</sup> Indeed, given that all ships' masters are already obliged to rescue those that they find at sea, that would largely appear to already be the case.

event, the financial viability of professional rescue firms depends for the most part on the salvage of property; life salvage is not a major source of income.<sup>81</sup> And there is no movement afoot to implement a general duty to rescue goods.

#### 4. *The Net Effect on Rescuers*

Landes & Posner believe that a duty could either increase or decrease the number of bystanders who undertake rescues.<sup>82</sup> On the one hand, once a victim was found, intervention would generally be more likely because the threat of liability would motivate those who would not otherwise provide assistance. On the other hand, the tax effect could depress the likelihood that a victim would be found, and even strong altruists might be less inclined to help the victims they did find, for the reasons cited earlier. Landes & Posner confess that their analysis does not yield an answer as to which set of effects would dominate.<sup>83</sup>

It has been seen, however, that a number of the arguments made with respect to potential negative effects are overstated, particularly in regard to a duty as it is usually formulated. An obligation to undertake safe and reasonably convenient rescues would be unlikely to impose a significant disutility on activities. Further, a tax effect could only take hold to the extent that hazardous situations could be identified beforehand and avoided. In any event, the disutility of a duty could be offset by the availability of compensation. It is also unlikely that strong altruists would be affected as Landes & Posner fear. First, the possibility that the disutility imposed on potential rescuers would increase as others substituted to safer activities falsely assumes that victims and rescuers do not come from the same pool of humanity. Second, there is very little evidence to suggest that a duty's infringement on freedoms would engender psychological reactance.

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<sup>81</sup> See e.g. *Kennedy's Law of Salvage*, *supra*, note 32 at 461; Gilmore & Black, *supra*, note 32 at § 8.12. While courts will generally attach a high value to the danger to human life (cf. e.g. *The Shreveport, Strachan Shipping Co. v. Cities Services Refining Transport Co.*, 42 F. 2d 524, 1930 A.M.C. 1310 (E.D.S.C. 1930); *The Esso Greensboro, In Re Pacific Far East Line, Inc.*, 314 F. Supp. 1339, 1970 A.M.C. 1592 (N.D. Calif. 1970), it has been said that "modern communications and life saving appliances have greatly reduced the occasions where the saving of life is a significant factor" in salvage awards: *Kennedy's Law of Salvage*, *supra*.

<sup>82</sup> Accounting for the possibility that a duty could (as will be discussed) also affect the number of rescues that are needed, the point can be rephrased to say that a duty to rescue could either increase or decrease the probability that a victim in need will receive assistance.

<sup>83</sup> *Supra*, note 13 at 123; *supra*, note 7 at 145.

The contention that the presence of a coercive duty would deprive altruists of public acclaim, and hence of a source of motivation, is similarly wanting of empirical support. Finally, the arguments made by Landes & Posner in regard to maritime salvors can largely be countered by reference to the law as it currently exists.

### **B. The Effects on Victims**

It is not only the behaviour of bystanders that could be affected by a liability rule.<sup>84</sup> Potential victims might also alter their habits in response to the perception of either an increased or a decreased probability of being rescued.

If the negative effects of a liability rule dominated among potential rescuers, Landes & Posner,<sup>85</sup> among others,<sup>86</sup> believe that potential victims would spend more of their own resources so as to reduce the likelihood of peril. That could entail substituting away from hazardous activities,<sup>87</sup> or taking greater precautions while engaging in the same activities.

Landes & Posner argue that the opposite would occur if a liability rule had the net effect of increasing the number of rescues.<sup>88</sup> Potential victims would participate in hazardous activities in greater numbers and they would spend fewer resources on their own safety.<sup>89</sup> In a sense (the argument runs), they would be somewhat impervious to the dangers that fall within the scope of the tort duty. Caution would be exchanged for the promise of either assistance or monetary damages equal to the value of the loss that would be suffered as a

<sup>84</sup> As mentioned previously, Landes & Posner assume that victims and rescuers do not come from the same pool of humanity.

<sup>85</sup> *Supra*, note 13 at 124; *supra*, note 7 at 146.

<sup>86</sup> See *e.g.*, Epstein, *supra*, note 15 at 203.

<sup>87</sup> From the perspective of a victim, a liability rule could impose an indirect tax on certain activities. If the utility of a particular activity was sufficiently decreased as a result of the lower probability of rescue, victims would forego that activity in favor of more wealth-maximizing pursuits.

<sup>88</sup> Salvors, *supra*, note 13 at 124; *Tort Law*, *supra*, note 7 at 146.

To the extent that a duty might intuitively be assumed to increase the prospect of intervention, and as long as potential victims did not have reason to believe otherwise, the same might be true regardless of the actual effect.

<sup>89</sup> The increased supply of victims would increase the tax effect of the liability rule on rescuers. Consequently, there would be further substitution away from the hazardous activities, although not so much as to decrease the probability of rescue (otherwise, there would not be greater numbers of victims): Salvors, *ibid.*; *Tort Law*, *ibid.*

result of non-intervention. While potential victims would still fear, and guard against, those losses that could not be averted by rescue, they would be immune to the perils of preventable injuries.<sup>90</sup>

The argument largely defies either refutation or validation; the truth of the matter lies buried beneath a blanket of psychological phenomena and complex causal relations. Nevertheless, to the extent that Landes & Posner's assumptions can be questioned, so, too, can their conclusions. First, their prediction once again fails to account for the risk averse nature of most people. But even accepting risk neutrality as a premise, it certainly does not follow that a liability rule would lead potential victims to expose themselves to greater dangers. To believe that it would, one would have to assume that the perceived probability of rescue was very high, or that the duty was thought to be enforced with very few errors.<sup>91</sup> Further, even if potential victims were willing to exchange a dollar's value of physical well-being for a dollar in monetary damages, they might not be so naive as to think that successful plaintiffs are invariably "made whole" again.<sup>92</sup> Finally, even assuming a perfectly operating system of compensation, Landes & Posner's prediction also assumes that potential victims would have the ability to recognize which dangers, if they became manifest, would become known to others, and would give rise to an obligation to rescue. It is only those dangers that would not need to be guarded against.

#### IV. BEHAVIOURAL CONSEQUENCES OF COMPENSATION RULES

THE PRIMARY OBJECT OF this section is to examine the likely behavioural effects of what shall be termed *pure compensation rules* — i.e. rules that allow a rescuer to make a positive monetary claim upon his

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<sup>90</sup> Landes & Posner recognize the possibility of a duty that would require rescue only if a victim took due care for his own safety: *Salvors*, *ibid.* at 124 n. 101; *Tort Law*, *ibid.* at 146 n. 48.

While such a duty would eliminate the substitution of safety inputs between victims and rescuers, it would invite rescuers to make difficult decisions in circumstances in which the likelihood of error would be high.

<sup>91</sup> A similar point would appear to argue against the effectiveness of a duty from the perspective of potential rescuers. If the likelihood of detection and prosecution was perceived to be slight, a risk neutral bystander would be more apt to feel that he could remain idle with impunity. The impact of a duty would increase with both the degree of risk aversion and the perceived probability of detection and prosecution.

<sup>92</sup> For an interesting discussion of the inability of tort law to adequately compensate victims, see Sugarman, *supra*, note 9 at 591–617.

intended beneficiary for expenses incurred, or services rendered, or both.<sup>93</sup> However, it will also be convenient to deal with three other types of compensatory or quasi-compensatory rules: (i) those that allow one who is injured while attempting a rescue to recover for his loss; (ii) those that immunize a rescuer from actions arising out of injuries caused by his error and sustained by his intended beneficiary; and (iii) those that allow a rescuer to enforce a promise of a reward made by a victim subsequent to a rescue. To some degree, each of the four types of compensation already exists, and therefore their effects are (theoretically, at least) capable of description. Their availability, however, is exceptional, and therefore their behavioural impact is largely a matter of prediction.

Before proceeding, it is appropriate to deal with a general point applicable to all four types of rules. Those opposed to such laws might argue that they are unnecessary. Law or no law, parties can always extrajudicially agree on some form of compensation. Nevertheless, it might be preferable not to leave the matter to informal processes. Compensation laws could affect the behaviour of bystanders both directly and indirectly.<sup>94</sup> In some cases, an assurance that intervention would not require the incurrance of a loss could figure explicitly in a bystander's decision to provide assistance. In other cases, compensation rules might have a subtler, though no less significant impact. Though a discussion of the matter lies outside the scope of this paper, it can be noted that laws encouraging intervention could help to remove a number of the psychological barriers that often inhibit action, and could contribute to an environment of helpfulness.<sup>95</sup>

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<sup>93</sup> The term "pure compensation rules" will be used to refer to such possibilities collectively. Where appropriate, the discussion will consider the concepts of reimbursement and remuneration separately. Reference will occasionally be made to rewards (ie. awards that go beyond reimbursement and remuneration). In such cases, it is recognized that the term "compensation" may be somewhat inapposite.

<sup>94</sup> Other arguments favoring the introduction of compensation rules lie outside the scope of a discussion concerned with economic matters. For instance, there may be cases in which only a legal rule could ensure that justice is done once a rescue has occurred. A rescuer may incur an expense that, according to some abstract notion of justice, he ought to be able to recover. His beneficiary, however, may be ungrateful or miserly. (Of course, some might disagree that compensation is ever called for by justice.)

<sup>95</sup> For a full discussion, see McInnes, *supra*, note 3.

### A. The Effects of "Pure Compensation"

There are two questions to consider with respect to pure compensation rules. The first asks how, in general terms, their availability would affect both the level of altruistic rescue inputs and the total level of all rescue inputs. The second asks, more specifically, how different levels of compensation would affect the behaviour of victims and rescuers, before and after an emergency has arisen.

#### 1. The Effect on Altruism and Total Rescue Inputs

To be economically justified, pure compensation rules would have to produce an increase in the level of resources spent on rescue (beyond that which is already generated by altruism, other informal inducements, and perhaps a liability rule) at least adequate to offset the costs that they would entail.<sup>96</sup> Landes & Posner doubt the merit of such rules, claiming that their administrative costs would be "horrendous," and arguing that in many situations they would be incapable of significantly increasing the level of rescue.<sup>97</sup> The concern about administrative costs, based largely on the belief that even altruistically motivated rescuers would seek compensation, has already been discussed and doubted.<sup>98</sup> The argument that legal inducements are unnecessary in some situations is undoubtedly true, but surely not as often as Landes & Posner suggest.<sup>99</sup> As between close friends and family members, it is probably true that altruism alone produces a maximum level of effort.<sup>100</sup> There is also evidence to suggest that altruism alone may be adequate in situations involving a victim who is in grave peril and a single, unfamiliar bystander who has at his disposal an inexpensive means of providing relief.<sup>101</sup> However, when Landes & Posner undertake a complex analysis to generate the con-

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<sup>96</sup> Of course, non-economists may argue for pure compensation rules on grounds unrelated to notions of allocative efficiency. Such rules could serve purposes other than the promotion of rescue (e.g. they could psychologically appease those who feel they have been wronged, or they could bring the law into line with commonly held notions of morality).

<sup>97</sup> *Supra*, note 13 at 95-100.

<sup>98</sup> See above, section II(B).

<sup>99</sup> *Supra*, note 13 at 95-97.

<sup>100</sup> See e.g., *supra*, note 36 at 144-150.

<sup>101</sup> Psychologists have found that lone bystanders are apt to help a victim: see e.g. B. Latané & J. Darley, *The Unresponsive Bystander: Why Doesn't He Help?* (New York: Appleton-Century-Croft, 1970).



clusions that altruism is a sufficient source of salvation for a victim surrounded by a number of strangers, and that the probability of rescue increases with crowd size, the chasm between economic theory and psychological observation becomes too wide to bridge. One of the best documented psychological phenomena in the area is the *bystander effect*. It has consistently been found that as the number of witnesses to an emergency *increases*, the likelihood that the person in need will receive help *decreases*.<sup>102</sup> While the level of altruistic feelings may not be diminished, their manifestation is apt to be inhibited by a number of psychological processes.<sup>103</sup>

Landes & Posner analyze the effects of pure compensation rules in two situations.<sup>104</sup> In the first, they assume that the pre-rule level of rescue inputs provided by altruists is less than the level of inputs for which such rules would allow rescuers to claim.<sup>105</sup> If a rule was introduced, Landes & Posner predict that two consequences would follow. First, the total level of rescue inputs would rise as both altruists and non-altruists would be encouraged to assist victims to

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<sup>102</sup> See e.g. Latané & Darley, *ibid.*; B. Latané, S. Nida & D. Wilson, "The Effects of Group Size on Helping Behavior" in J.P. Rushton & R.M. Sorrentino, eds, *Altruism & Helping Behavior* (Hillsdale, N.J.: Lawrence Erlbaum Assoc., 1981) at 305; B. Latané & S. Nida, "Ten Years of Research on Group Size and Helping" (1981) 89 *Psych. Bull.* 308 at 321-322. The implications that the bystander effect has for the legal rescue debate are discussed at length in McInnes, *supra*, note 3.

Indeed, many of the most infamous examples of non-intervention have involved such fact patterns. In the New Bedford incident (fictionalized on film in *The Accused*), a young woman was repeatedly sexually assaulted over the course of an hour. The attack was witnessed by a crowd of men, each of whom could have called the police. They chose instead to encourage the rapists. See e.g. "The Tavern Rape: Cheers and No Help" *Newsweek* (21 March 1983) 25. The incident led two state legislatures to criminalize the failure to report a rape: Mass. Gen. Laws Ann. ch. 268, § 40 (West Supp. 1985); R.I. Gen. Laws § 11-37.3.1-3.3 (1983).

<sup>103</sup> See e.g. *supra*, note 101 at 6; *supra*, note 36 at 181.

<sup>104</sup> *Supra*, note 13 at 98-100.

<sup>105</sup> Landes & Posner assume that the amount of compensation that would be available would be calculated on a per unit basis equal to the rescuer's marginal cost divided by the probability of rescue to a maximum of the value of the inputs that would have minimized the expected losses from the hazard: *ibid.* at 98.

There are, of course, other means of calculating the amount of compensation that should be available. For the present discussion, it is enough to assume that a victim's liability to his rescuer is subject to an upper limit and does not include an element of reward.

the extent indicated by the law.<sup>106</sup> Second, however, altruistic inputs would be eliminated because *all* inputs<sup>107</sup> would be the subject of claims.<sup>108</sup> Landes & Posner conclude that the administrative costs attendant upon the rule would therefore be high, though perhaps justifiable given the benefits produced. A stronger statement is warranted to the extent that the position taken by Landes & Posner in regards to the likely administrative costs is overstated.<sup>109</sup>

Landes & Posner also predict the implications of pure compensation rules in situations in which the pre-rule level of rescue inputs provided by altruists exceeds the level of inputs for which such rules would allow rescuers to claim.<sup>110</sup> First, (they argue) all compensable rescue inputs would again be the subject of claims. Second, non-altruistic rescuers would be encouraged to provide the compensable level of assistance. Third, the number of non-compensable inputs would also increase. That prediction is based on the assumption of a positive and diminishing marginal rate of wealth utility.<sup>111</sup> Because an altruistic rescuer would be able to recover the value of his initial inputs (up to the compensable level), he would be wealthier and hence willing to give even more in order to increase a victim's wealth.

Once again, then, the total level of rescue inputs would rise as a result of a pure compensation rule. It will be recalled that the net increase produced when the pre-rule level of altruistic inputs was assumed to be low was considered cost-justified. In the present context, however, Landes & Posner doubt that the increase generated would warrant the concomitant administrative costs.<sup>112</sup> Clearly,

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<sup>106</sup> It appears that a true non-altruist (i.e. one who places no value, or a negative value, on wealth in another's hands) would not be tempted into action by most forms of compensation rules. Unless an award included a reward element, a rescuer could not benefit from intervention, and he might even suffer a loss (e.g. he may mistakenly provide a level of assistance in excess of what is compensable, or his beneficiary may be judgment proof). (Remuneration would only compensate a rescuer for the value of his services.) A liability rule would be a more effective form of encouragement for such individuals.

<sup>107</sup> Landes & Posner do recognize that exceptionally an altruist may value wealth in another's hands more than in his own. Such rare individuals may provide a level of rescue in excess of what is compensable: *supra*, note 13 at 99.

<sup>108</sup> That proposition has already been examined and questioned: see above, section II(B).

<sup>109</sup> See discussion, *ibid.*

<sup>110</sup> *Supra*, note 13 at 99.

<sup>111</sup> *Ibid.* at 94 n. 26.

<sup>112</sup> *Ibid.* at 99-100.

sufficiently high levels of pre-existing altruistic inputs would obviate the need for legal inducements, and would preclude the possibility of a rule whose benefits outweighed its expenses. It will be recalled, however, that Landes & Posner generally overstate the level of altruistic impulses that exist, and the motivational power of those impulses. One can therefore question the suggestion that the level of input currently provided by potential rescuers could not be increased in an economically justified manner.

Landes & Posner do not subject pure compensation rules to the argument<sup>113</sup> that the presence of external inducements could lessen the appeal of intervention by making it difficult for rescuers to prove that their actions were altruistically based, and thereby to garner social accolades. Presumably, that is because Landes & Posner assume that even "altruists" *would* claim compensation. However, if that assumption is not accepted,<sup>114</sup> then the possibility arises that the availability of compensation could deprive those who value public acclaim over monetary rewards of an important source of motivation. The fact that such individuals could forego their legal rights would not entirely alleviate the concern.<sup>115</sup> Social commendation may be such that it follows immediately upon a heroic act or not at all. The mere possibility that compensation *might* be claimed within the relevant limitation period could lead others to doubt a rescuer's purported selflessness. Admittedly, it is easy to overestimate the actual behavioural impact of such a theory. To be relevant, a bystander would have to believe that others would withhold praise, and the resulting loss in motivation would have to be greater than the motivational gain produced by the compensation rule.<sup>116</sup>

## 2. *The Effect of Different Levels of Compensation*

It is beyond the scope of this paper to explore in detail the various measures of pure compensation that could be made available to rescuers. The present section will therefore be limited to a consideration of the behavioural implications of allowing intervenors to claim, in

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<sup>113</sup> They do make the argument in regard to liability rules: see above, section III(A)(2).

<sup>114</sup> The assumption was examined and doubted above, section II(B).

<sup>115</sup> It would, however, ensure that those motivated by a desire to judge themselves favorably would not be denied their source of motivation.

<sup>116</sup> Unfortunately, there does not appear to be any psychological evidence that bears on the issue. A phenomenon known as the "overjustification effect" is similar, though distinguishable. As examined in McInnes, *supra*, note 3, it is more striking in theory than in practice.

general terms, large awards, moderate awards or no awards for the expenses they incur and the services they render.

If, as is generally the case under the existing law, rescuers are not allowed to claim any compensation, non-altruistic rescues will not be undertaken in the absence of some other form of inducement.<sup>117</sup> As a result of the low probability of rescue, it has been argued that potential victims would (do) overspend on safety precautions to guard against losses.<sup>118</sup> If, on the other hand, intervention was compelled by a liability rule, it is warned that potential victims would under-spend on their own safety.<sup>119</sup> The costs of safety would then be borne by rescuers, though the benefits of those costs would accrue primarily to victims.<sup>120</sup> For reasons cited earlier, it is doubtful that potential victims would react to the promise of a free rescue as strongly as some suggest.<sup>121</sup>

Landes & Posner and others argue that it would not be efficient to award large sums of compensation either.<sup>122</sup> A number of interesting behavioural possibilities underlie that assertion. For the sake of discussion, assume that rescuers were able to recover the full value of the benefits they confer, rather than (say) the full value of the costs they incur.<sup>123</sup> If compensation was to come from public coffers, as some

<sup>117</sup> *Supra*, note 13 at 95–100; *supra*, note 19 at § 6.9.

<sup>118</sup> Altruism, *supra*, note 25 at 418.

<sup>119</sup> That possibility depends in part on the extent to which the tax effect and other inhibiting phenomena were perceived to take hold.

<sup>120</sup> See e.g., *supra*, note 13 at 124; *supra*, note 7 at 146; D. Wittman, "Liability for Harm or Restitution for Benefit?" (1984) 13 J. Legal Stud. 57 at 70 n. 37.

<sup>121</sup> See above, section III(B). Landes & Posner might, but do not, argue that the combined disincentives of a liability rule and the absence of a compensation rule would lead potential rescuers to avoid areas and situations in which the need for intervention might arise.

<sup>122</sup> *Supra*, note 13 at 93; *supra*, note 19 at § 6.9; P. Diamond & J. Mirrlees, "On the Assignment of Liability: The Uniform Case" (1975) 6 Bell J. Econ. & Mgmt. Sci. 487 at 512–513.

<sup>123</sup> The assumption is admittedly somewhat extreme. Its merit is that it facilitates a clear illustration of the probable effects of allowing rescuers to claim large amounts of compensation. Those same effects would follow as well from lower, though still generous, awards.

The reward component of awards in maritime salvage law do not appear to have had the feared consequences. It has been suggested that those rewards are not so large as to lead shipowners to take excessive precautions, and that the fact that most ships are guarded against intruders dissuades scoundrels from artificially creating a need for rescue: see *supra*, note 67 at 909.

propose,<sup>124</sup> potential victims would inefficiently underspend on their own safety,<sup>125</sup> for reasons similar to those cited in the preceding paragraph. If, as is usually proposed, compensation was to come from rescues, potential victims might inefficiently overspend on safety.<sup>126</sup> Consider a situation in which a one per cent chance of a \$1,000,000 loss could be averted by a potential victim spending \$5000 on a safety device, or by a rescuer spending \$500 on a rescue.<sup>127</sup> The potential victim should invest in the preventative device. If he did not, and if he became imperilled, he would very likely be rescued, at great cost to himself. As Landes & Posner note, a bystander would treat any loss to the victim as a loss to himself, in the form of foregone revenue, and would therefore be very keen to assist.<sup>128</sup> From an investment of \$500, he could reap a profit of two thousand fold. Indeed, if large awards were made available, the incentive to intervene might be *too* great. Scoundrels would be tempted to create the need for rescue.

Economically, then, a moderate amount of compensation would be more efficient than either a large amount of compensation or no compensation. Behaviourally, a moderate level might again prove to be the best option. If rescuers were able to claim (say) only the value of their expenses, they would not be able to profit from rescue, but neither would they necessarily<sup>129</sup> incur a loss as a result of interven-

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<sup>124</sup> See *e.g.* Silver, *supra*, note 54 at 429 n. 44.

<sup>125</sup> See *e.g.* Salvors, *supra*, note 13 at 92 n. 19; Levmore, *supra*, note 67 at 886.

<sup>126</sup> Salvors, *ibid.* at 92; Levmore, *ibid.* at 884, 886.

<sup>127</sup> The hypothetical is taken from *supra*, note 193 at § 6.9 n. 2.

<sup>128</sup> *Supra*, note 13 at 92. Assuming that an emergency has arisen, the intervenor's actions would be economically efficient if he discovered the victim by chance. It would be otherwise if he spent resources not only on rescue, but on locating the victim as well: *supra*, at n. 21.

<sup>129</sup> Occasionally, a rescuer will be unable to collect on his claim (*e.g.*, because his beneficiary is judgment-proof). In maritime salvage law, a similar problem (arising from the fact that only successful efforts are compensated) is met by the inflation of those awards that are given. The burdens of uncompensated rescues are thereby offset. That solution would appear to be inappropriate for life rescuers on land given the improbability that an individual would be called upon for rescue on numerous occasions. In the maritime context, the problem of unenforceable claims is also reduced by the fact that salvors have a lien on any property that they rescue.

Another possible solution to the problem of unenforceable claims, would be to compensate rescuers out of a public fund. Interestingly, in Canada and England, maritime salvors of life can be compensated from public funds in the event that the value of any salvaged property is exhausted by claims based on the reimbursement of expenses: *Canada Shipping Act*, s. 450(3); *Merchant Shipping Act, 1894* (U.K.), 57 & 58

tion.<sup>130</sup> Further, absent the possibility of profit, the moral hazard of intentionally created perils would not arise. Intervention, therefore, would be encouraged, but only in the desired circumstances. Potential victims would also be encouraged to act in a desirable manner. Because they would not be subject to the risk of financially ruinous liability, they would not be overly cautious. Nevertheless, the prospect of reimbursing (and perhaps remunerating) their benefactors would provide them with an incentive to take some preventative measures.

### **B. Compensation for Injuries**

The law already allows rescuers to claim for a particular type of expense, in certain situations. A rescuer can sue in tort for injuries he sustains as a result of intervention *if* the need for his services was negligently created by the person in peril,<sup>131</sup> or by a third party.<sup>132</sup> The faulty party will not be held fully liable, however, if the rescuer's

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Vict., c. 60, s. 544(3).

<sup>130</sup> Typically, the opportunity costs of rescue would be negligible. In those cases in which the mere provision of free services could constitute a loss (e.g. when a physician renders the type of assistance for which he would normally charge a fee), a conservative measure of remuneration could be made available.

<sup>131</sup> See e.g., *Baker v. Hopkins*, [1958] 3 All E.R. 147; aff'd [1959] 1 W.L.R. 966, [1959] 3 All E.R. 225 (C.A.); *Harrison v. British Railways Board*, [1981] 3 All E.R. 679 (Q.B.); *C.N.R. v. Batky* (1977), 18 O.R. (2d) 481 (Co. Ct); *Lynch v. Fisher*, 34 So.2d 513 (La. App. 1947).

<sup>132</sup> See e.g., *Videan v. British Transport Commission*, [1963] 2 Q.B. 650; *Haynes v. Harwood*, [1935] 1 K.B. 146; *Seymour v. Winnipeg Elec. Ry.*, [1910] 13 W.L.R. 566, 19 Man. R. 412 (C.A.); *Wagner v. Int'l Ry. Co.*, 232 N.Y. 176, 133 N.E. 437 (1921). A third party need not be liable to the victim to be liable to a rescuer: see e.g. *Videan v. British Transport Commission*, *supra*.

intervention was negligently executed.<sup>133</sup> If the initial peril is not negligently created, then an injured rescuer is without redress.

Landes & Posner defend the current structure of the law on the basis that it produces efficient results.<sup>134</sup> They note that but for high transaction costs, a person who negligently creates a peril (be it a victim or a third party) would surely be willing to contract with a rescuer, promising to reimburse him for any injuries he may sustain while providing assistance in a reasonable manner. A simple example will illustrate. Suppose that without assistance, a victim will have a 95 per cent chance of sustaining a loss of \$5000. Assume that with assistance, that loss will almost certainly be averted, but the rescuer will necessarily expose himself to a 20 per cent chance of a loss of the same magnitude. The individual who is ultimately responsible for the victim's loss (be it the victim himself, or his tortfeasor) will clearly choose to engage the rescuer's services; that is the economically efficient option. It would be otherwise, of course, if the hazard's total expected cost was greater with, than without, rescue. That could be the case if the rescuer acted negligently or recklessly, exposing himself futilely to a high risk of serious harm. For example, an unreasonable form of intervention may expose a rescuer to a 70 per cent chance of injury while improving the victim's prospects only marginally. In such a situation, the services would not be bargained for.

Behaviourally, Landes & Posner feel that the current rule is desirable because it encourages bystanders to intervene *if* intervention is apt to create a net benefit. They also note that the total administra-

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<sup>133</sup> See e.g., *Cleary v. Hansen* (1981), 18 C.C.L.T. 147 (Ont. H.C.); *Baker v. Hopkins*, *supra*, note 131; *Morgan v. Aylen*, [1942] 1 All E.R. 489; *Haigh v. Grand Trunk Pacific Ry. Co.* (1914), 7 W.W.R. 806 (Alta. C.A.); Restatement (Second) of Torts § 472 comment c (1965); *Rodriguez v. New York State Thruway Authority*, 82 App. Div. 2d 853, 440 N.Y.S. 2d 49 (1981, 2d Dept.); *Provenzo v. Sam*, 23 N.Y. 2d 256, 296 N.Y.S. 2d 322, 244 N.E. 2d 26 (1968).

It has been noted that the courts will not quickly conclude that a rescuer has acted so unreasonably so as to disentitle himself to full damages (see e.g., J.G. Fleming, *The Law of Torts*, 7th ed. (Sydney: Law Book Company, 1987) at 157). Nevertheless, the contributory negligence plea has succeeded in a number of recent cases (see e.g., *Harrison v. British Railways Board*, *supra*, note 131; *Cleary v. Hansen*, *supra*; *Rodriguez v. New York State Thruway Authority*, *supra*).

It should also be said that if negligent, a rescuer may be liable for any harm caused to his intended beneficiary. See e.g. *Horsley v. McLaren* (*The "Ogopogo"*), [1972] S.C.R. 441, aff'g [1970] 2 O.R. 487, which rev'd (*sub nom Matthews v. McLaren*), [1969] 2 O.R. 137.

<sup>134</sup> *Supra*, note 13 at 111–112; *Tort Law*, *supra*, note 7 at 100–102, 250–251.

tive costs are apt to be less with, than without, the rule.<sup>135</sup> Occasionally, even a reasonable rescuer will be injured.<sup>136</sup> In those cases, he will sue the party who is responsible for the peril, and hence for his injury. Typically, however, a rescuer will not be injured, and he will avert a loss to the victim. In those cases, intervention will not generate any administrative costs, and will save those that would have been incurred in the lawsuit between the victim and the victim's tortfeasor (if any).

Should an injured rescuer be allowed to claim compensation from a rescuee even if the need for assistance arises non-negligently? Once an emergency has arisen, the fact that it is or is not attributable to the negligence of the victim might not appear to make a relevant difference in economic terms. The victim would still be willing to contract a bystander's reasonable services, promising to reimburse him for any injuries sustained in the course of intervention. A rational bystander's willingness to render aid would still be a function of the perceived costs; he would be more willing to become involved if his risk of incurring a loss were less. A compensation rule would, of course, decrease the likelihood that he would ultimately have to bear the cost of any injuries that he suffered.

Landes & Posner, nevertheless, state that the law should not allow an injured rescuer to claim recompense from a non-negligent victim. Such a rule, they argue, would not substantially affect the behaviour of potential rescuers.<sup>137</sup> If a bystander assesses the facts of an emergency and concludes that intervention would entail little risk of injury, then there is no need to encourage him with a promise of compensation. If, on the other hand, significant risks are perceived, then the expected net benefits from rescue will be small or even negative, and the bystander will not intervene, regardless of the availability of compensation.

The argument would appear to say too much. If it is valid in regard to perils that are not the creation of a victim's negligence, then there are no economic or behavioural reasons (identified by Landes & Posner) why it should not also be valid in regard to perils that *are* the

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<sup>135</sup> *Tort Law, ibid.* at 250-251.

<sup>136</sup> Even a remote possibility of harm can become manifest. Further, in some circumstances, a cost-justified rescue may involve a rescuer in certain danger. For example, a bystander would be economically justified in exposing himself to 100% risk of a \$50 loss in order to save a victim from a 100% risk of a \$5000 loss. See also Restatement (Second) of Torts, *supra*, note 133 at § 472 comment a.

<sup>137</sup> *Supra*, note 13 at 111-112.



creation of a victim's negligence.<sup>138</sup> In neither situation is a compensation rule apt to influence a bystander's behaviour if he *knows* that assistance can be safely provided. Similarly, in neither situation is he likely to intervene, regardless of whether or not there is a compensation rule, if he perceives great personal danger.<sup>139</sup>

The rule *could*, however, have an impact in those situations in which a bystander is aware of dangers to which he would willingly expose himself, but for the financial consequences of doing so. More importantly, it could also affect the general environment of emergencies. Given the unsettling nature of crises, many dangers may be perceived dimly, or may exist as worrisome, unspecified possibilities. Such amorphous, yet inhibiting, fears could be assuaged by the promise of compensation.<sup>140</sup> Of course, such perils are not limited to emergencies that are the product of negligence.

Nevertheless, there may be economic or behavioural reasons to limit the scope of a compensation rule to situations that stem from negligence. Economically, it *may* be more efficient for potential victims to take steps to avoid perils than it is for bystanders to perform rescues. A rule that placed the cost of rescuers' injuries on negligent victims would encourage the latter to act in a non-negligent (safer) manner. Further, psychological studies have revealed that victims are more likely to receive assistance if they are judged to have become innocently imperilled.<sup>141</sup> Consequently, there may be more need for a law that provides bystanders with an additional incentive to intervene on behalf of those who are known or suspected to have negligently created their own perils. It is doubtful, however, that the availability of relief should turn on such narrow grounds.

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<sup>138</sup> There may be reasons related to certain notions of justice as to why only victims who are somehow at fault should be liable for any losses sustained by their rescuers.

<sup>139</sup> Occasionally, rescue will occur despite obvious perils. Certain types of individuals will act irrationally in certain types of emergencies, and will become oblivious to the dangers involved. The phenomenon of impulsive helping has been examined from a psychological perspective in *supra*, note 36, c. 7.

<sup>140</sup> See McInnes, *supra*, note 3.

<sup>141</sup> See e.g. I. Piliavin, J. Rodin & J. Piliavin, "Good Samaritanism: An Underground Phenomenon?" (1969) 13 *J. Pers. & Soc. Psych.* 289; J. Schopler & M. Matthews, "The Influence of the Perceived Causal Locus of Partner's Dependence on the Use of Interpersonal Power" (1965) 2 *J. Pers. & Soc. Psych.* 609.

### C. Enforcement of Subsequent Promises

A third form of compensation that the law could make available to intervenors would involve the enforcement of promises made subsequent to a rescue.<sup>142</sup> In a moment of gratitude, an individual may promise to reward his rescuer, only to later go back on his word. Orthodox contract law, of course, holds that promises unsupported by good consideration are not enforceable. Services that precede a promise are considered past consideration, and past consideration is usually held to be no consideration at all.<sup>143</sup> The rescuer would appear to be without any means of legal redress.<sup>144</sup>

While it has yet to be adopted in Canada or England, an unusual doctrine in the American law of contract allows rescuers to enforce such promises.<sup>145</sup> It is difficult to imagine that a bystander's decision as to intervention would be significantly influenced by the enforceability of a promise that a victim may or may not make, and may or may not honour. Landes & Posner admit as much, but argue in favor of an enforcement rule on other grounds.<sup>146</sup> A grateful rescuee can reward his benefactor with a lump sum payment, or with periodic payments. Assume that he wants to make the full extent of his gratitude known immediately. A promise of periodic payments is only really of value if it is irrevocable, for one can not depend on an unen-

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<sup>142</sup> A contract entered into after an emergency has arisen, but before intervention occurs, will be unenforceable as being unconscionable or the product of duress: see *e.g.*, *Post v. Jones*, 60 U.S. (19 How.) 150 (U.S.S.C. 1857).

<sup>143</sup> *Dent v. Bennett* (1839), 4 My. & Cr. 269, 41 E.R. 105; *Eastwood v. Kenyon* (1840), 11 Ad. & E. 438, 113 E.R. 482; *Re Grosch*, [1945] 3 D.L.R. 63 (Alta. S.C. App. Div.); Restatement (Second) of Contracts § 86 (1981).

<sup>144</sup> Occasionally, a rescuer may benefit from one of the established exceptions to the consideration rule. If, in good faith, he brings or threatens to bring an action to enforce the promise, and the rescuee offers to settle the claim, then the compromise between the parties is binding, regardless of the actual merit of the original claim: see *e.g.* *Horton v. Horton*, [1961] 1 Q.B. 215; *Francis v. Allen* (1918), 57 S.C.R. 373 (S.C.C.); *Restatement of the Law, second, Contracts, ibid.* at § 86, comment d.

<sup>145</sup> See *Webb v. McGowin*, 27 Ala. App. 82, 168 So. 196 (1935), cert. denied 232 Ala. 274, 168 So. 169 (1936); *Estate of Hatten*, 233 Wisc. 199, 288 N.W. 278 (1940); E. Farnsworth, *Contracts* (Boston: Little, Brown, 1982) § 2.8 at 56-57; cf. *Harrington v. Taylor*, 255 N.C. 690, 36 S.E.2d 227 (1945).

The few authorities that do exist all involve claims made against a rescuee's estate. Consequently, it is possible, though very doubtful, that the rule actually has more to do with adherence to a decedent's wishes than with rescue law: *supra*, note 67 at 901 n. 79.

<sup>146</sup> *Supra*, note 13 at 116; R. Posner, "Gratuitous Promises in Law and Economics" (1977) 6 J. Legal Stud. 411 at 418-419.

forceable promise. Consequently, if a rescuee is of limited resources, he will be unable to adequately express his feelings unless he can bind himself to a promise of future payments. It would probably be beyond his financial means to purchase an annuity that would ensure that his rescuer would receive (say) \$50 per week for the remainder of his life.<sup>147</sup> Landes & Posner's reasoning is certainly ingenious. It is doubtful, however, that it is sufficiently compelling to warrant an exception to one of the best established rules in the law of contract.<sup>148</sup>

#### D. Immunity from Liability

Though they have not yet been the subject of an economic analysis, laws that immunize rescuers from liability for harm caused during intervention are mentioned here for the sake of completeness. They can be considered "compensatory" insofar as they repay a rescuer for his services by shielding him from some lawsuits. "Good Samaritan" statutes (as they are commonly called) have already been enacted in at least a limited form in most Canadian jurisdictions.<sup>149</sup> Typically,

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<sup>147</sup> The example is based on the facts of the leading case of *Webb v. McGowin*, *supra*, note 145.

<sup>148</sup> As Professor Atiyah has noted in regards to the rule concerning past consideration, the "orthodoxy in [the] area has been stronger than elsewhere": P.S. Atiyah, *Essays on Contract* (New York: Oxford University Press, 1986) at 218.

The exception has also been defended on the basis that many of the dangers that would normally arise if past consideration was held to be sufficient are absent, or at least diminished, in the type of situation at hand. While skepticism is usually warranted in regard to an alleged promise for the payment of past services, one would not be surprised to hear that a grateful rescuee had made such a promise. Further, courts are generally reluctant to require that payment be made for unrequested benefits, in part because of the difficulty of, in effect, writing a contract for the parties. However, the terms of such an "implied contract" may be supplied by a grateful rescuee. See Restatement (Second) of Contracts, *supra*, note 143 at § 86 comment d; *supra*, note 13 at 116.

<sup>149</sup> See *Emergency Medical Aid Act*, R.S.A. 1980, c. E-9; *Good Samaritan Act*, R.S.B.C. 1979 c. 155; *The Emergency Medical Aid Act*, S.N. 1971 No. 15; *Emergency Medical Aid Act*, R.S.N.W.T. 1988, c. E-4; *Volunteer Services Act*, R.S.N.S. 1989, c. 197; *Medical Act*, R.S.P.E.I. 1988, c. M-5, s. 50; *Emergency Medical Aid Act*, R.S.S. 1978, c. E-8; *Emergency Medical Aid Act*, R.S.Y.T. 1986, c. 52.

All fifty American states, plus the District of Columbia, have passed some form of "Good Samaritan" statute. Citations to all are given in R. Mason, "Good Samaritan Laws—Legal Disarray: An Update" (1986) 38 *Mercer L. Rev.* 1439.

they exempt "voluntary"<sup>150</sup> rescuers from liability for injuries that are not caused by "gross negligence."<sup>151</sup>

In economic and behavioural terms, such laws would appear to have much in common with those laws that allow a rescuer to recover for injuries that he sustains as a result of intervention. Both sets of laws lower the expected costs of rescue, and hence encourage bystanders to provide reasonable assistance.<sup>152</sup> A law that provided immunity for all injuries caused (whether by negligence or by gross negligence) might be undesirable insofar as it would grant rescuers a licence to act unreasonably and inefficiently. Interestingly, however, such immunity has been granted in a number of American jurisdictions.<sup>153</sup>

## V. CONCLUSION

THE RESCUE DEBATE HAS benefitted from many arguments over the years. Some participants have pitched their comments at a high level of abstraction, and have suggested from a philosophical perspective how the introduction of rescue laws might affect society.<sup>154</sup> Such contributions are certainly important. At times, however, more mundane and practical issues have received too little attention. Laws exist to

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<sup>150</sup> In a number of American decisions involving statutes similar to those found in Canada, it has been held that the Good Samaritan immunity is not available to those who are under a duty to act, and who, therefore, do not require an additional incentive to act. The aim of the legislation, apparently, is to benefit victims, rather than to empathize with rescuers. See *e.g.* *Tiedeman v. Tiedeman*, 435 N.W. 2d 86 (Minn. 1979); *Lee v. State*, 490 P. 2d 1206 (Alaska 1971). As yet, Canadian courts have not considered the matter.

<sup>151</sup> Among the Canadian statutes, the legislation in Prince Edward Island is unique in several respects. First, it does not offer protection to those outside the medical profession. Second, it does not measure conduct by a standard of "gross negligence". Rather, it holds that a physician or surgeon will be held liable only if he or she acted in a manner that would constitute negligence "if committed by a person of ordinary experience, learning and skill": *Medical Act*, R.S.P.E.I. 1988, c. M-5, s. 50(b).

<sup>152</sup> A number of empirical studies have investigated the behavioural impact of "Good Samaritan" statutes. As yet, it is unclear what effect, if any, the statutes have on bystanders. See *e.g.* "First Results: 1963 Professional-Liability Survey" (1964) 189 J.A.M.A. 859 at 865; *Newsweek* (4 September 1961) 41; R.J. Gray & G.S. Sharpe, "Doctors, Samaritans and the Accident Law" (1973) 11 Osgoode Hall L.J. 1.

<sup>153</sup> See *e.g.*, Neb. Rev. Stat. § 25-21, 186 (1985).

<sup>154</sup> See *e.g.* Minor, *supra*, note 1 at 422; Epstein, *supra*, note 15. For an excellent philosophical discussion of the rescue debate, see E. Weinrib, "The Case for a Duty to Rescue" (1980) 90 Yale L.J. 247.

govern the everyday lives of all people, not simply to provide grist for the philosopher's mill.

The predictions of legal economists are important for two reasons. First, they reveal how the behavioural responses of those affected by rescue laws could be reflected in the legal process. Many legal economists argue that (at times prohibitively) high administrative costs would attend upon the introduction of liability rules and compensation rules. Their reasons for believing so, while occasionally worrisome, have generally been found to be wanting and unpersuasive. Second, the predictions of legal economists are important because they reveal a number of possible behavioural implications of requiring or encouraging intervention. Again, though some of the arguments are intriguing and do give pause for thought, most are overstated, based on untenable assumptions, or contradicted by the existing evidence.