TORTS—NEGLIGENCE—THE RESCUE DOCTRINE HELD INAPPLICABLE TO ORGAN TRANSPLANT CASES

In the case of *Sirianni v. Anna*,[1] the plaintiff is a kidney transplant donor and the mother of the adult, emancipated donee. The defendant physicians had negligently removed all kidney tissue from the donee during a previous surgical procedure. It is medically certain that the donee could not have lived long without kidney tissue; a kidney transplant was needed to save his life. The plaintiff volunteered one of her kidneys.

The transplant was successful, and the donee continues to live some 4 years after the transplant operation. His malpractice suit against the defendant physicians was settled for a "substantial sum."

The plaintiff, however, alleges that her health has been impaired by the loss of her kidney and therefore seeks damages on the theory that the defendants' negligence in removing her son's kidney tissue in the original surgery now constitutes a cause of action in her behalf.

The court decided the issue "stripped of its emotionalism" against plaintiff. Plaintiff's premeditated act did not reactivate the consummated negligence of defendants, and the court refused to invent a brand new cause of action outside the concepts of suable torts.

The rescue doctrine was held to be inapplicable. In quoting Judge Cardozo, "The risk of rescue, if only it be not wanton, is born on the occasion,"[2] the court concluded that he used the word "wanton" synonymously with the word "willful." Since plaintiff's act was willful, voluntary and with full knowledge of the consequences, recovery was denied.[3]

Under the rescue doctrine a person may act to save his own property[4] or the lives[5] or property[6] of others from peril created by the defendant's

1. 285 N.Y.S.2d 709 (Sup. Ct. 1967).
2. Wagner v. International Ry., 232 N.Y. 176, 133 N.E. 437, 19 A.L.R. 1 (1921).
3. Sirianni v. Anna, 285 N.Y.S.2d 709 (Sup. Ct. 1967).
4. Atlantic Coast Line R.R. v. Wildman, 29 Ga. App. 745, 116 S.E. 858 (1923), *aff'd*, 157 Ga. 42, 120 S.E. 545 (1923); Hines v Bellah, 26 Ga. App. 361, 106 S.E. 559 (1921); Illinois Cent. R.R. v. Siler, 229 Ill. 390, 82 N.E. 362 (1907).
5. Louisville & N. R.R. v. Orr, 121 Ala. 489, 26 So. 35 (1899); Atlantic & C.A.L. Ry. v. Leach, 91 Ga. 419, 17 S.E. 619 (1893); Blanchard v. Reliable Transfer Co., 71 Ga. App. 843, 32 S.E.2d 420 (1944); Dixon v. New York, N.H. & H.R.R., 207 Mass. 126, 92 N.E. 1030 (1910); Ridley v. Mobile & O.R.R., 114 Tenn. 727, 86 S.W. 606 (1905); Bond v. Baltimore & O.R.R., 82 W. Va. 557, 96 S.E. 932 (1918).
6. Walker Hauling Co. v. Johnson, 110 Ga. App. 620, 139 S.E.2d 496 (1964); Rushton v. Howle, 79 Ga. App. 360, 53 S.E.2d 768 (1949); Liming v. Illinois Cent. R. R., 81 Iowa 246, 47 N.W. 66 (1890); Pegram v. Seaboard Air Line Ry., 139 N.C. 303, 51 S.E. 975 (1905); For a discussion of *Walker Hauling Co. v. Johnson* and the rescue doctrine see note, *Torts—Assumption of Risk—Doctrine of Rescuer*, 16 MERCER L. REV. 363 (1964); For a discussion of *Ruston v. Howle* and related cases see note, *Torts—Application of the Rescue Doctrine to Situations Involving Property*, 12 GA. B.J. 210 (1949).

negligence without assuming the risk where the alternative is to allow the threatened harm to occur.[7]

To justify one in risking his life or serious injury in rescuing another person, the threatening peril must be imminent and real, not merely imaginary and speculative.[8] In determining whether the peril is imminent, the rescuer must be guided by the standard of reasonable care under the circumstances.[9]

There must be actionable negligence on the part of the defendant which is the proximate cause of the peril.[10] Defendant's negligence must also be the proximate cause of injury to the rescuer who interposes to save person or property in peril.[11] In addition, in going to the rescue the rescuer's conduct must not be wanton.[12]

In the *Sirianni* case, the court admits that defendant's negligent surgical procedure was the proximate cause of donee's perilous position. It was a medical fact that peril was imminent. Donee's death seemed certain; his life was temporarily preserved only by using a mechanical device. Donor intervened and saved her son's life but was denied the status of rescuer and the legal advantages thereto because the court felt that her intervention was a wanton (willful) act with full knowledge of the consequences. It is this writer's opinion that in so holding the court misconstrued Cardozo's use of the word "wanton" and thereby imposed an unduly restrictive standard upon plaintiff's conduct.

The intended meaning of the word "wanton" becomes apparent when viewed in light of other statements in Judge Cardozo's opinion.

> Danger invites rescue. The cry of distress is the summons to relief. The law does not ignore these reactions of the mind in tracing conduct to its consequences. It recognizes them as normal. It places their effects within the range of the natural and probable. The wrong that imperils life is a wrong to the imperiled victim; it is a wrong also to his rescuer . . . . The risk of rescue, if only it be not wanton, is born of the occasion. The emergency begets the man.[13]

It is noteworthy to see what Judge Cardozo says in regard to a rescuer's premeditated, voluntary conduct.

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7. W. PROSSER, TORTS §67, at 466 (3d ed. 1964). *See generally Moral Challenge to the Legal Doctrine of Rescue*, 14 CLEV.-MAR. L. REV. 334 (1965); Matthew Bender & Co., *Rescuers*, 5A PERSONAL INJURY 437 (1967). For a discussion of liability of the rescued to the rescuer see note, *Torts—Recovery by Rescuer for Negligence of Rescued*, 10 GA. B.J. 390 (1948); Annot., 4 A.L.R.3d 558 (1965).
8. Andrews v. Appalachian Elec. Power Co., 192 Va. 150, 63 S.E.2d 750 (1951).
9. French v. Chase, 48 Wash.2d 825, 297 P.2d 235 (1956).
10. Rose v. Peters, 82 So.2d 585 (Fla. 1955); Dixon v. New York N.H. & H.R. R., 207 Mass. 126, 92 N.E. 1030 (1910).
11. Walker Hauling Co. v. Johnson, 110 Ga. App. 620, 139 S.E.2d 496 (1964); Wagner v. International Ry., 232 N.Y. 176, 133 N.E. 437 (1921).
12. Wagner v. International Ry., 232 N.Y. 176, 133 N.E. 437 (1921).
13. *Id.* at ___, 133 N.E. at 437.

> [T]here must be unbroken continuity between the commission of the wrong and the effort to avert its consequences . . . . Continuity in such circumstances is not broken by the exercise of volition . . . . The law does not discriminate between the rescuer oblivious of peril and the one who counts the cost. It is enough that the act, whether impulsive or deliberate, is the child of the occasion.[14]

Mr. Prosser observes that the terms willful, wanton and reckless have been treated as meaning the same thing, denoting conduct highly unreasonable—an extreme departure from ordinary care.[15]

Therefore, Judge Cardozo used the word "wanton" ostensibly to mean an intentional act of unreasonable character in disregard of known risk. This interpretation is substantiated by the standard which most present day courts apply to a rescuer's conduct—a rescuer must use ordinary care "short of rashness and recklessness."[16]

In *Sirianni,* the court decribed the plaintiff donor's conduct as "premeditated, knowledgeable and purposeful" but never so much as intimated that the plaintiff's conduct was unreasonable under the circumstances. Donor's conduct was in unbroken continuity between the commission of the wrong and the exercise of volition[17] and was reasonable. Her decision did not unreasonably endanger her health when it is a medical fact that "Long life is compatible with loss of one kidney especially when the other is normal."[18] It is likewise not unreasonable for a mother to go to the rescue of her imperiled offspring:

> The instincts of a mother, when she sees her child in distress, will lead her to rush headlong to its rescue, without stopping to count the cost or measure the risk which she is incurring; and to say that an act to which her affection irresistibly impelled her should be charged against her as something imprudent and unnecessary would be to shock a sentiment which is as universal as mankind. The law is not the creature of cold-blooded, merciless

14. *Id.* at ___, 133 N.E. at 438.
15. W. PROSSER, *supra* note 7, at 188.
16. Walker Hauling Co. v. Johnson, 110 Ga. App. 620, 139 S.E.2d 496 (1964) (rash and reckless); Ruston v. Howle, 79 Ga. App. 360, 53 S.E.2d 768 (1949) (rash and reckless); Blanchard v. Reliable Transfer Co., 71 Ga. App. 843, 32 S.E.2d 420 (1944) (rash and reckless); Lashley v. Dawson, 162 Md. 549, 160 A. 738 (1932) (reckless indifference); Legan & McClure Lumber Co. v. Fairchild, 155 Miss. 271, 124 So. 336 (1929) (rash and reckless); Andrews v. Appalachian Elec. Power Co., 192 Va. 150, 63 S.E.2d 750 (1951) (rash and reckless). *See also* Matthew Bender & Co., *supra* note 7, at 457.
17. The mere fact that the donor had time to reflect on her decision does not break the continuity of the wrong and the act. Wagner v. International Ry., 232 N.Y. 176, ___, 133 N.E. 437, 438 (1921). "In this case the plaintiff walked more than 400 feet in going to Herbert's [Plaintiff's cousin who had fallen from a moving electric railway car] aid. He had time to reflect and weigh; impulse had been followed by choice . . . ." In Walker Hauling Co. v. Johnson, 110 Ga. App. 620, 139 S.E.2d 496 (1964), the plaintiff, a volunteer fireman, drove from his home to another city in Georgia to assist in extinguishing a fire caused by defendant's negligence and on defendant's premises.
18. The Allen Smith Co., 3 LAWYERS' MEDICAL CYCLOPEDIA OF PERSONAL INJURIES AND ALLIED SPECIALTIES §27.30, at 610 (1959).

> logic, and its inherent justice and humanity will never for a moment permit the act of a mother in saving her offspring, no matter how desperate it may have been, to be imputed to her as negligence, or at any time or in any manner used to her detriment.[19]

By making organ transplants a practical surgical procedure modern medicine has afforded man a new form of rescue. Most organ transplants, of course, will be necessary for reasons other than someone's negligence; but where as a proximate cause of defendant's negligence, an organ transplant is necessary to save a donee from imminent peril, injuries suffered as a result of donor's reasonable, voluntary act should not go unremedied because of the novelty of the rescue.

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TORTS—WRONGFUL DEATH—ATTRACTIVE NUISANCE DOCTRINE HELD APPLICABLE

The plaintiff, as special administrator of the estate of his deceased son, brought an action against the defendant landowner for the child's death. The child, while trespassing upon the defendant's land, had fallen from a ladder when he attempted to climb to the top of a 72-foot silo. The evidence adduced at the trial showed that the deceased, age 12, and a companion, age 14, were playing around the silo when deceased decided to climb to the top by means of the ladder affixed to the side. The purpose of the climb was to see a large number of pigeons roosting on top of the silo. Further evidence at the trial showed that these boys and many others had played on or around the silos before, and it was generally known to the landowner that the pigeons atop the silo attracted youngsters. The United States District Court for the District of South Dakota rendered judgment for the plaintiff, allowing a jury verdict of $15,482. On appeal, the Eighth Circuit Court of Appeals affirmed this decision holding that the evidence presented a question for the jury as to the landowner's negligence in maintaining such a condition on his land.[1] Recovery was allowed here under the South Dakota attractive nuisance doctrine, or more specifically under the RESTATEMENT OF TORTS section dealing with occupiers of land and followed by South Dakota courts.[2] This RESTATEMENT section is an attempt to set down guidelines for a uniform application of the at-

19. Walters v. Denver Consol. Elec. Light Co., 12 Colo. App. 145, ___, 54 P. 960, 962 (1898).
1. Cargill, Inc. v. Zimmer, 374 F.2d 924 (8th Cir. 1967).
2. Kuhn v. Watertown Cement Prod. Co., 75 S.D. 491, 68 N.W.2d 241 (1955); McLeod v. Tri-State Milling Co., 71 S.D. 362, 24 N.W.2d 485 (1946); Morris v. City of Britton, 66 S.D. 121, 279 N.W. 531 (1938). Recovery under attractive nuisance was denied in all these cases but the courts showed in all of them that South Dakota uses essentially the same elements and rationale as included in the RESTATEMENT (SECOND) OF TORTS §339 (1965). Actually, recovery was allowed in the *McLeod* case, but under a duty created by a city ordinance.