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Nancy Goldberg

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TORTS—PROXIMATE CAUSE—IS INJURY TO
ORGAN DONOR FORESEEABLE?

Late in the summer of 1963 a New York general practitioner performed an ordinary hernia operation upon a man in his middle thirties. When the patient's postoperative condition indicated the presence of infection, a general surgeon was called in. A few days later, the two physicians proceeded to perform an exploratory operation to determine whether the patient's symptoms were caused by appendicitis or a wound abscess. After both the suspected causes were ruled out, the operation was suspended and a urologist was called in. While the patient remained under anesthesia the three physicians agreed to remove his right kidney although they had failed to palpate a left kidney or to determine its presence by an X-ray,¹ and in spite of the fact that the subject had previously exhibited no laboratory symptoms of kidney disease. As a result of the operation, the patient's one and only, healthy, fused double kidney was removed without his consent or knowledge, and his life was able to be sustained only through the use of an artificial kidney.² From that time on the patient's health steadily deteriorated due to the fact that his body was not tolerating the medical treatments. Competent medical authorities then informed the patient's mother that her son could not survive long without a kidney transplant, and that she was the only donor available. Consequently, she consented to a transplant operation, which was performed successfully.

After recovering,³ the son sued the three doctors for his injuries, and eventually settled the claim. The patient's mother subsequently filed suit against the same doctors for injuries arising out of the loss of her kidney. The Supreme Court of New York, Niagara County, dismissed the suit, contending that the complaint would require the court to "invent a 'brand new cause of action'."⁴ No appeal was prosecuted. *Sirianni v. Anna*, 55 Misc. 2d 553, 285 N.Y.S.2d 709 (Sup. Ct. 1967).

In light of recent medical advances, the question of whether a tortfeasor whose wrong necessitated an organ transplant is liable to a live donor may arise in many future cases. Although the particular facts of the present case may present an anomaly, it is possible to envisage, for example, a suit by a skin graft donor against a fire victim's negligent landlord, or a product

¹ This may be done during an operation by a routine procedure, the intravenous pyelogram, whereby dye is injected into a vein so that the kidney is outlined for X-ray purposes.

² This is a large machine which is used to administer periodic treatments, known as hemodialysis. The purpose of the treatments is to "restore toward normal the chemical composition of the body fluids." *STEDMAN'S MEDICAL DICTIONARY* (21st ed. 1966).

³ Plaintiff's son lived with the borrowed kidney for four years, but died in 1968.

⁴ 55 Misc. 2d 553, 555, 285 N.Y.S.2d 709, 712 (1967).

liability suit brought by a kidney donor against a drug company which manufactured a tetracycline causing kidney disease in the donee. The purpose of this casenote is threefold: to examine the reasoning of the *Sirianni* court, to set out the broad spectrum of the law pertaining to the present cause of action, and to analyze the possibility that a future plaintiff in similar circumstances might recover.

What, then, was the reasoning behind the dismissal? The primary issue in this tort action for negligence was whether or not plaintiff's injury was proximately caused by the "admitted 'wrong' of these defendants as to Carl Sirianni."⁵ The court held that "the classical tests of foreseeability and proximate cause"⁶ militated against recovery for the reason that plaintiff's conduct was a "clearly defined, independent intervening act . . ."⁷ Thus, as plaintiff's act was independent and unforeseeable, it broke the chain of causation and superseded defendant's act.

Secondly, the court reasoned that this case did not fall within the privileged sanctuary of the rescue doctrine. In addition, by characterizing plaintiff's act as "wilful, intentional, voluntary, free from accident and [done] with full knowledge of its consequence,"⁸ the court implied that plaintiff's claim was subject to the affirmative defense of assumption of risk. Although the rescue doctrine is often employed to counter that defense, the *Sirianni* court concluded that a rescuer who acts knowing that she will sustain injury should not be allowed to recover under the rescue doctrine.

Finally, the court commented that this was a "first impression suit"⁹ which called for the invention of a "brand new cause of action."¹⁰ The intent of this language is apparently not to deny that plaintiff's suit is based upon the common law action for negligence, but rather to suggest that recovery for negligence has not previously been granted on the present facts. Thus, the novelty of the facts led to the court's judgment that "such [a] cause of action must be created, not by judicial fiat, but by legislation. . ."¹¹

It has been pointed out that the question of proximate cause is, in the last analysis, one of expediency and a rough sense of justice.¹² The theory, to

⁵ *Id.* at 555, 285 N.Y.S.2d at 711.

⁶ *Id.* at 556, 285 N.Y.S.2d at 712.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.* at 555, 285 N.Y.S.2d at 711.

¹⁰ *Id.* at 555, 285 N.Y.S.2d at 712.

¹¹ *Id.* at 557, 285 N.Y.S.2d at 713.

¹² See Judge Andrews' dissent in *Palsgraf v. Long Island R.R.*, 248 N.Y. 339, 347, 162 N.E. 99, 101 (1928). Commenting on Judge Andrews' dissent, Judge Friendly observed that "where the line will be drawn will vary from age to age; as society has come to rely increasingly on insurance and other methods of loss-sharing, the point may lie further

which lip service is still paid today, that there must be an unbroken continuity between the wrongful act and the injury, dates from the ancient squib case.¹³ Although the operation of an intervening cause has often been held to break the continuity,¹⁴ the cases show that under certain conditions an independent intervening cause will not break the chain of causation. According to one line of reasoning:

Where harmful consequences are brought about by intervening and independent forces, the operation of which might have been *foreseen*, there is no break in the chain of causation of such character as to relieve the actor from liability. This is so even though they are deliberate and independent, but innocent, acts of a human being.¹⁵

The cases following this line of reasoning ride along on the pendulum of foreseeability. In *Liming v. Illinois Central R.R.*, the court believed that "defendant could have foretold, with almost absolute certainty, when it set the fire in question, that plaintiff, being near, would use every reasonable means in attempting to save Ortman's horse from the flames. . . ."¹⁶ By the same token it was thought in *Gibney v. State* that where it might reasonably have been anticipated that a child would fall through an opening in the railing of a bridge, it was also likely "that a parent or other person seeing the child in the water would incur every reasonable hazard for its rescue."¹⁷ In *Smith v. Twin State Gas & Electric Co.*, the intervention of a fire department chief who lit a match while investigating a gas leak was held not to supersede defendant gas company's negligence because "[a]nticipation of the investigation and the way in which it was carried out might be found to be within the reasonable foresight of what was likely to happen from the defendant's dilatory conduct."¹⁸ In *Rovinski v. Rowe*, a federal court case involving a highway accident and related rescue operation, the proper jury instructions stated:

It is the law that whoever does an unlawful act is answerable for all the consequences that may ensue in the ordinary course of events, even though such

off than a century ago." *Petition of Kinsman Transit Co.*, 338 F.2d 708, 725-26 (2d Cir. 1964).

¹³ *Scott v. Shepherd*, 2 W. Bl. 892, 96 Eng. Rep. 525 (1773).

¹⁴ See, e.g., *Richards v. Stanley*, 43 Cal. 2d 60, 271 P.2d 23 (1954); *Robert R. Walker, Inc. v. Burgdorf*, 150 Tex. 603, 244 S.W.2d 506 (1951); *Falk v. Finkleman*, 268 Mass. 524, 168 N.E. 89 (1929); *Perry v. Rochester Lime Co.*, 219 N.Y. 60, 113 N.E. 529 (1916); *Seaboard Air Line Ry. v. Mullin*, 70 Fla. 450, 70 So. 467 (1915); *Berry v. Sugar Notch Borough*, 191 Pa. 345, 43 A. 240 (1899).

¹⁵ *Carlock v. Westchester Lighting Co.*, 268 N.Y. 345, 350, 197 N.E. 306, 308 (1935) (emphasis supplied).

¹⁶ 81 Iowa 246, 253-54, 47 N.W. 66, 66-68 (1890).

¹⁷ 137 N.Y. 1, 6, 33 N.E. 142 (1893).

¹⁸ 83 N.H. 439, 444, 144 A. 57, 59 (1929).

consequences are immediately and directly brought about by an intervening cause . . . if the consequences are such as might with reasonable diligence have been foreseen.¹⁹

In a similar case, *Marshall v. Nugent*, the court stated:

[T]he effort of the courts has been, in the development of this doctrine of proximate causation, to confine the liability of a negligent actor to those harmful consequences which result from the operation of a risk . . . the foreseeability of which rendered the defendant's conduct negligent.²⁰

And recently, in *Gossett v. Burnett*, the question of whether the intervening act of a policeman whose automobile caused a four-car collision was a foreseeable result of a bank's setting of a false alarm was sent to the jury for determination.²¹

Another line of reasoning stems from a famous rescue case, *Wagner v. International Ry.*, in which Justice Cardozo stated that, "the wrongdoer may not have foreseen the coming of a deliverer. He is accountable as if he had."²² These cases, which constitute an exception to the strict foreseeability requirement, either reiterate the Cardozo liturgy or simply presume that the act became foreseeable as a result of the "rescue doctrine." Thus, a wrongdoer has been held liable to rescuers who: rushed to the scene of an ambulance collision,²³ responded to the cries of a driver pinned beneath his automobile,²⁴ attempted to extricate the driver of a truck loaded with butane gas after a collision,²⁵ were sent after workers suffocating in a water main,²⁶ and broke into a garage to save a parent attempting suicide.²⁷

There are, in addition, a growing minority of cases which rely on the *Restatement (Second) of Torts* rather than the "rescue doctrine" as such for the view that an unforeseeable intervening act is proximately caused by a wrongdoer's conduct as long as it was a normal response to that conduct. In *Lynch v. Fisher* a highly improbable chain of events were at issue. Following a collision the plaintiff rescued the driver of the automobile. Finding a gun on the floor of the car, the rescuer handed it to the owner who, temporarily

¹⁹ 131 F.2d 687, 691 (6th Cir. 1942).

²⁰ 222 F.2d 604, 610 (1st Cir. 1955); see Annot., 58 A.L.R.2d 251 (1956).

²¹ 164 S.E.2d 578 (S.C. 1968).

²² *Wagner v. International Ry.*, 232 N.Y. 176, 180, 133 N.E. 437, 438 (1921).

²³ *Blanchard v. Reliable Transfer Co.*, 71 Ga. App. 843, 32 S.E.2d 420 (1944).

²⁴ *Brugh v. Bigelow*, 310 Mich. 74, 16 N.W.2d 668 (1944); see Annot., 158 A.L.R. 184 (1945).

²⁵ *Longacre v. Reddick*, 215 S.W.2d 404 (Tex. Civ. App. 1948).

²⁶ *Cafone v. Spiniello Construction Co.*, 42 N.J. Super. 590, 127 A.2d 441 (1956).

²⁷ *Talbert v. Talbert*, 22 Misc. 2d 782, 199 N.Y.S.2d 212 (1960).

deranged by the shock of the collision, shot the rescuer.²⁸ The court refuted the requirement of foreseeability, citing the *Restatement* § 435(1):

If the actor's conduct is a substantial factor in bringing about harm to another, the fact that the actor neither foresaw nor should have foreseen the extent of the harm or the manner in which it occurred does not prevent him from being liable.

This view is also followed in two more probable rescue cases, *Grisby v. Coastal Marine Service of Texas, Inc.*²⁹ and *Britt v. Mangue*.³⁰

The *Restatement* § 435(2), which was not quoted in *Lynch v. Fisher*, states that, "the actor's conduct may be held not to be a legal cause of harm to another where after the event and looking back from the harm to the actor's negligent conduct, it appears to the court highly extraordinary that it should have brought about the harm."³¹ As Dean Prosser notes, "[t]his is very obviously a hindsight approach."³²

The opinion in *Hatch v. Smail*, in addition to citing the *Restatement* § 435(1) with respect to foreseeability, relies on § 443, which refers specifically to intervening acts:

An intervening act of a human being or animal which is a normal response to the stimulus of a situation created by the actor's negligent conduct, is not a superseding cause of harm to another which the actor's conduct is a substantial factor in bringing about.³³

The defendant is also held liable to the rescuer in *Henneman v. McCalla* by virtue of the similar wording in *Restatement* § 447.³⁴

As kidney transplantation is of recent origin, the date on which Sirianni's kidney was negligently removed is relevant in determining whether the contingency of a transplant from a live donor was foreseeable. The first successful human kidney transplant was performed in 1954,³⁵ yet by September 15,

²⁸ 34 So.2d 513 (La. App. 1948), modified 41 So.2d 692 (La. App. 1949). See Comment, 28 LA. L. REV. 609 (1968).

²⁹ 235 F. Supp. 97 (W.D. La. 1964). (Rescuer tried to save persons asphyxiated in barge's wing tank).

³⁰ 261 N.C. 250, 134 S.E.2d 235 (1964); see Annot., 4 A.L.R.3d 551 (1965) (rescuer lifts automobile from arm of negligent driver's wife).

³¹ RESTATEMENT (SECOND) OF TORTS § 435(2) (1965).

³² PROSSER, CASES AND MATERIALS ON TORTS 402 (4th ed. 1967).

³³ *Hatch v. Smail*, 249 Wis. 183, 188, 23 N.W.2d 460, 463 (1946) (passenger injured while attempting to help right overturned automobile).

³⁴ *Henneman v. McCalla*, 148 N.W.2d 447 (Iowa 1967) (decendent struck by intoxicated motorist while attempting to aid negligent driver of pick-up truck).

³⁵ See Goodwin et al., *Human Renal Transplantation II*, 97 CALIF. MED 8 (1962); RAPPAPORT, HUMAN TRANSPLANTATION (1968); Murray et al., *Successful Pregnancies after Human Renal Transplantation*, 269 N. ENG. J. MED. 341 (1963); Richards, *Basic Concepts in Homologous Tissue Transplantation*, 105 AMER. J. SURG. 151 (1963); Murray et al., *Kidney Transplantation in Modified Recipients*, 156 ANN. SURG. 337 (1963).

1963, only 244 kidney transplants had involved live donors.³⁶ The field of kidney transplantation was still new and very experimental. Live donors were typically selected from close members of the family,³⁷ but some doctors discouraged donation from any but identical twins, as the chances of success were minimal.³⁸ Due to the fact that transplantation from live human donors was infrequent and perhaps not well known outside of a community of specialists in September of 1963, the question of whether it was reasonably foreseeable that Sirianni, who had no twin, would receive a live organ donation, is debatable. Since 1963, however, the field of kidney homotransplantation has developed rapidly.³⁹ Worldwide statistics show that 1,741 kidney transplants have been performed to date.⁴⁰ Although literature documenting live kidney transplants was relatively scarce in 1963, articles on the subject have now become numerous, notorious and controversial.⁴¹ Thus, in the future, whenever disease or removal of kidneys is foreseeable the eventuality of a human donation will likewise be foreseeable.

Laying aside, for a moment, the possible application of the rescue doctrine, which was rejected by the *Sirianni* court, the implication that the plaintiff

³⁶ *Human Kidney Transplant Conference*, 2 TRANSPLANTATION 147 (1964).

³⁷ See Hamburger *et al.*, *Kidney Homotransplantation in Man*, 99 ANN. N.Y. ACAD. SCI. 808 (1962); Murray, *Organ Transplantation—The Kidney and the Skin*, 55 SO. MED. J. 890 (1962); Hamburger *et al.*, *Renal Homotransplantation in Man after Radiation of the Recipient*, 322 AMER. J. MED. 854 (1962).

³⁸ Although Richards, in *Basic Concepts in Homologous Tissue Transplantation*, 105 AMER. J. SURG. 151, 163 (1963) noted that, "[s]uccessful homotransplantation of the kidney between nonidentical twins after sublethal body radiation has been demonstrated," there were pessimistic reports in Goodwin *et al.*, *Human Renal Transplantation III: Technical Problems Encountered in Six Cases of Kidney Homotransplantation*, 89 J. UROL. 349 (1963); Murray & Harrison, *Surgical Management of Fifty Patients with Kidney Transplants Including Eighteen Pairs of Twins*, 105 AMER. J. SURG. 205 (1963); and Goodwin, *supra* note 35.

³⁹ The Human Kidney Registry was established in 1963 to tabulate kidney donation and survival rate. See generally, RAPPAPORT, *supra* note 35, at 21.

⁴⁰ Latest statistics are available only through January 1, 1968. See, *Sixth Report of the Human Kidney Transplant Registry*, 6 TRANSPLANTATION 944, 946 (1968). Of these 1,741 transplants, 736 were performed during the years 1966 and 1967.

⁴¹ For some insight into the types of problems created by the transplant "explosion," see Sadler, Jr. & Sadler, *Transplantation and the Law: the Need for Organized Sensitivity*, 57 GEO. L.J. 5 (1968), which was read in full into the Congressional Record, 114 CONG. REC. 12660 (1968); AMA NEWS, Dec. 16, 1968, at 9; Dukiminier & Sanders, *Organ Transplantation: A Proposal for Routine Salvaging of Cadaver Organs*, 279 N. ENG. J. MED. 413 (1968); Stason, *The Uniform Anatomical Gift Act*, 23 BUS. LAW. 919 (1968); Berman, *The Legal Problems of Organ Transplantation*, 13 VILL. L. REV. 751 (1968); Note, 20 S.C.L. REV. 419 (1968); Semansky, *Tissue and Organ Transplants in Human Beings*, 19 BROOKLYN BAR. 172 (1968); Note, 21 VAND. L. REV. 352 (1968); *Symposium on Medical Progress*, 32 LAW & CONTEMP. PROB. 561 (1967); Freund, *Is the Law Ready for Human Experimentation?*, TRIAL, p. 46 (Oct./Nov. 1966); Wasmuth and Stewart, *Medical and Legal Aspects of Organ Transplantation*, 14 CLEV.-MAR. L. REV. 442 (1965).

assumed the risk of injury by submitting to the operation bears some scrutiny. A plaintiff is said to assume a risk created by defendant's breach of duty towards him "when he deliberately chooses to encounter that risk."⁴² The risk is not assumed, however, "where the conduct of the defendant has left him no reasonable alternative. Where the defendant puts him to a choice of evils, there is a species of duress, which destroys all idea of freedom of election."⁴³

In a case where a patient has lost all kidney function, there are basically two alternative means of sustaining his life: his blood can be purified at regular intervals by the use of an artificial kidney,⁴⁴ or he may receive a kidney transplant from a live or cadaver donor. The first possibility is extremely costly and in short supply. However, assuming that the patient has a kidney machine available to him on a long term basis, it is likely that his body will not tolerate the purifying treatments well. A transplant from a cadaver or live donor would then be the remaining possibility. As cadaver organs are also in short supply, however, doctors must frequently resort to using live donors who are blood relatives of the patient. Due to various factors there is usually only one live donor who is acceptable.⁴⁵ The donor, then, is left with two alternatives: he or she may either elect to donate or to face the consequences of failure to do so. This is the "reasonable alternative" with which a plaintiff may be faced.

Various factors have been noted as influencing the donor's decision to volunteer his kidney. Obviously, there is the internal pressure of feeling that "the life of another person is in his hands"⁴⁶ which conflicts with his natural fear of the surgery itself and of the potential consequences of losing an organ. In a case where a court was required to pass upon the donation of kidneys by two minor twins it was decided that forbidding the children to donate to their dying twins would have resulted in a grave emotional impact upon the

⁴² HARPER & JAMES, *THE LAW OF TORTS* 1162 (1956).

⁴³ PROSSER, *THE LAW OF TORTS* 465-66 (3d ed. 1964). According to HARPER & JAMES, *supra* note 42, at 1165-66, "even when a danger is fully known and comprehended plaintiff is not barred from recovery simply because he chooses deliberately to encounter it, in the following situations . . . (7) where plaintiff seeks to rescue another person, or his own or another's property which is endangered by defendant's negligence." The same view is expressed in *RESTATEMENT (SECOND) OF TORTS*, § 496 E, comment c.

⁴⁴ See *supra* note 2.

⁴⁵ See Murray & Barnes, *The World-wide Status of Kidney Transplantation*, *HUMAN TRANSPLANTATION* 45, 59 (1968): "Often, among large families, only one or two are acceptable donors, the others being rejected for hematologic, sociologic, economic, renal functional, or arteriographic indications."

⁴⁶ Sanders & Dukeminier, *Medical Advance and Legal Lag: Hemodialysis and Kidney Transplantation*, 15 *U.C.L.A.L. REV.* 357, 389 (1968). See also Stickel, *Organ Transplantation in Medical and Legal Perspectives*, 32 *LAW & CONTEMP. PROB.* 597, 602 (1967).

healthy twins.⁴⁷ In addition, there are external pressures on donors by members within the family unit and by acquaintances.⁴⁸ Such pressures can often have a greater impact "than any pressure a decent prison administration would bring to bear on inmates,"⁴⁹ and in fact, may amount to "coercion." Due to the possible danger to the donor and the uncertainty that the choice was made without coercion, there are legal barriers to transplantation in some countries.⁵⁰ In view of the element of coercion and the lack of a reasonable alternative, it is doubtful that plaintiff can be said to have assumed the risk.

The utility of the "rescue doctrine" is that, in addition to modifying the strict requirement of foreseeability,⁵¹ it exempts plaintiff from the traditional defenses of contributory negligence or assumption of risk. The rescue doctrine, briefly stated, is that one who sees a person in imminent and serious peril through the negligence of another cannot be charged with contributory negligence⁵² or assumption of risk⁵³ as a matter of law, in risking his own life

⁴⁷ Minors were permitted to donate to their twins in *Masden v. Harrison*, Supreme Judicial Ct. of Mass., No. 68651 Equity (June 12, 1957), on the grounds that forbidding the children to donate to their dying twins would have resulted in a grave emotional impact upon the healthy twins. For discussion of the case, see Curran, *A Problem of Consent: Kidney Transplantation in Minors*, 34 N.Y.U.L. REV. 891 (1959) and Freund, *Ethical Problems in Human Experiments*, 273 N. ENG. J. MED. 687, 691 (1965).

⁴⁸ See Stickel, *supra* note 46, at 600; Cortesini, *Outlines of a Legislation on Transplantation*, ETHICS IN MEDICAL PROGRESS 171, 185 (1966).

⁴⁹ D. Daube, *Transplantation: Acceptability of Procedures and the Required Legal Sanctions*, ETHICS IN MEDICAL PROGRESS 188, 197-98 (1966).

⁵⁰ On Canadian law, see Castel, *Some Legal Aspects of Human Organ Transplantation*, 46 CAN. B. REV. 345, at 365 n. 50 on possible noncompliance with § 45 of the CANADIAN CRIMINAL CODE. See also Revillard, ETHICS IN MEDICAL PROGRESS 95 (1966): "Irreparable removals, such as kidney removals, have been forbidden by French law." There is, in addition, a similar prohibition in the ITALIAN CIVIL CODE art. 5 (1940). Stickel, *supra* note 46, suggests that the prohibition has been removed recently.

⁵¹ See notes and text, *supra* notes 21-23.

⁵² See *Jay v. Walla Walla College*, 53 Wash. 2d 590, 335 P.2d 458 (1959); *Hawkins v. Palmer*, 29 Wash. 2d 570, 188 P.2d 121, 123 (1947). The rescue doctrine "is most frequently applicable when the plaintiff encounters a known danger for the purpose of saving a third person . . . from harm threatened by the negligence of defendant." RESTATEMENT (SECOND) OF TORTS § 472, comment b (1965). In the following cases contributory negligence is excused due to the application of the rescue doctrine: *Gambino v. Lubel*, 190 So.2d 152 (La. App. 1966); *Ruth v. Ruth*, 213 Tenn. 82, 372 S.W.2d 285 (1963); *Brown v. Ross*, 345 Mich. 54, 75 N.W.2d 68 (1956); *Parks v. Starks*, 342 Mich. 443, 70 N.W.2d 805 (1955); *Rovinski v. Rowe*, *supra* note 19; *French v. Chase*, 48 Wash. 2d 825, 297 P.2d 235 (1956); *Cote v. Palmer*, 127 Conn. 321, 16 A.2d 595 (1940). See also 38 AM. JUR., *Negligence*, § 228 (1941); and 65A C.J.S., *Negligence*, § 124 (1966).

⁵³ In *Henneman v. McCalla*, *supra* note 34, at 455, the court notes that the two defenses have been differentiated in that "assumption of risk involves more or less deliberation, whereas contributory negligence implies lack of care, and hence absence of

or serious injury in attempting to effect a rescue, provided that the attempt is not rashly or recklessly made. The *Sirianni* court refused to apply the rescue doctrine on the grounds that it is only relevant where "the rescuer launches to the rescue unmindful of and without knowing his fate."⁵⁴ Mrs. Sirianni knew that she would be injured to some extent if she volunteered her kidney to rescue her son. Thus, following the court's reasoning, she was not entitled to avail herself of the rescue doctrine. On the other hand, in Justice Cardozo's landmark rescue decision, it was asserted that "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."⁵⁵ There is authority for the view that the rescue doctrine will enable an injured rescuer to recover "even though the person attempting the rescue knows that it involves great hazard to himself without certainty of accomplishing the attempted rescue and even though in attempting such rescue he thereby imperils his own life."⁵⁶

However, even if the element of deliberation presented no barrier to recovery, an organ donor would have difficulty in benefiting from the rescue doctrine as it stands today. This is due to the fact that the doctrine is presently viewed as merging into the sudden emergency doctrine.⁵⁷ Thus, most of the reported cases stress that lack of time was the crucial factor in granting recovery under the rescue doctrine. In *Pennsylvania Co. v. Langendorf*, "there was but the fraction of a minute in which to resolve and act, or action would come too late."⁵⁸ In *Linnehan v. Sampson*, "the emergency was

deliberate choice." For cases describing the rescue doctrine as excusing assumption of risk, see *Marshall v. Nugent*, *supra* note 20; *Brugh v. Bigelow*, *supra* note 24; *Duff v. Bemidji Motor Service Co.*, 210 Minn. 456, 299 N.W. 196 (1941); *Corbin v. City of Philadelphia*, 195 Pa. 461, 471, 45 A. 1070, 1074 (1900).

⁵⁴ *Supra* note 4, at 556, 285 N.Y.S.2d at 712 (1967). Recovery in the *Sirianni* case based on the rescue doctrine has been suggested in *Berman*, *supra* note 41; Note, 37 *FORDHAM L. REV.* 133 (1968); Note, 19 *MERCER L. REV.* 469 (1968).

⁵⁵ *Wagner v. International Ry. Co.*, *supra* note 22, at 181, 133 N.E. at 438.

⁵⁶ 65A C.J.S., *Negligence*, § 124 (1966). See *Lolli v. Market Street R.R.*, 43 Cal. App. 2d 166, 110 P.2d 436, 438 (1941); *French v. Chase*, *supra* note 52; *Louisville & N.R.R. v. Orr*, 26 So. 35, 121 Ala. 489 (1899); *Gibney v. State*, 137 N.Y. 1, 33 N.E. 142 (1893); *Eckert v. The Long Island R.R.*, 43 N.Y. 502, 3 Am. Rep. 721 (1871); Note, 21 *MO. L. REV.* 193, 194 (1956); Goodhart, *Rescue and Voluntary Assumption of Risk*, 5 *CAMB. L.J.* 192, 196 (1934).

⁵⁷ Note the merging of the doctrines in *Ruth v. Ruth*, 213 Tenn. 82, 90, 372 S.W.2d 285, 289 (1963): "It thus appears that, if under the *rescue doctrine*, the plaintiff was not guilty of negligence in responding to the cries for help from the defendant, then he would be entitled to the benefit of the *sudden emergency doctrine* in determining whether or not he acted negligently in his attempt to extricate him and the defendant from the perilous situation in which he found himself upon entering the burning room" (emphasis supplied). See also 38 *AM. JUR.*, *Negligence* § 361 (1941).

⁵⁸ 48 *OHIO ST.* 316, 28 N.E. 172 (1891).

sudden, allowing but little time for deliberation."⁵⁹ In *Eckert v. The Long Island R.R.*⁶⁰ and *West Chicago Street R.R. v. Liderman*, the plaintiff had to act "instantly, if at all, as a moment's delay would have been fatal."⁶¹ The court in *Perpich v. Leetonia Mining Co.* points to "a sudden emergency,"⁶² while the opinion in *Bond v. Baltimore & O.R.R.* asserts that, "in almost every instance of rescue, there is an emergency calling for quick determination of the course of action."⁶³ There is, in addition to these classic early cases, a considerable amount of recent authority for the view that the danger must be "imminent."⁶⁴ On the other hand, there has been some leniency as to the amount of time allowed. Cardozo, in the aforementioned rescue decision, seemed to be on the verge of expanding the doctrine.⁶⁵ In *Wolfinger v. Shaw*, it was sufficient if there was a reasonable apprehension of danger, even though danger to a definite person was not imminent.⁶⁶ In *Hammonds v. Haven*, plaintiff was allowed to recover when he risked injury in order to warn a person who had not yet arrived on the scene.⁶⁷ There is dictum in *Henneman v. McCalla* to the effect that the rescue doctrine "is applicable even though no danger is actually imminent if the conduct of the rescuer is that of an ordinarily prudent person under the existing circumstances."⁶⁸

The policy question thus arises: where a defendant has created a situation of great danger to another, should a rescuer trying reasonably to avert the threatened harm be precluded from recovery either by the degree of the

⁵⁹ 126 Mass. 506, 511, 30 Am. Rep. 692, 694 (1879).

⁶⁰ *Supra* note 56.

⁶¹ 187 Ill. 463, 58 N.E. 367 (1900).

⁶² 118 Minn. 508, 137 N.W. 12 (1912).

⁶³ 82 W. Va. 557, 96 S.E. 132, 5 A.L.R. 201 (1918).

⁶⁴ The word "imminent" is itself ambiguous as to the amount of time allowed. It is defined as "near at hand; mediate rather than immediate; close rather than touching; impending; on the point of happening; threatening; menacing; perilous." BLACK'S LAW DICTIONARY 884 (4th ed. 1968). The following recent cases stress the lack of time for hesitation in rescue: *Grigsby v. Coastal Marine Service of Texas, Inc.*, *supra* note 29; *Britt v. Mangum*, *supra* note 30; *Rovinski v. Rowe*, *supra* note 19; *Cote v. Palmer*, *supra* note 52; *Brown v. Ross*, *supra* note 52; *Parks v. Starks*, *supra* note 52; *Ruth v. Ruth*, *supra* note 52; *Arnold v. Northern States Power Co.*, 209 Minn. 551, 297 N.W. 182 (1941); *Scott v. Texaco, Inc.*, 48 Cal. Rptr. 785 (Dist. Ct. App. 1966).

⁶⁵ "He had time to reflect and weigh; impulse had been followed by choice . . . We find no warrant for thus shortening the chain of jural causes. We may assume, though we are not required to decide, that peril and rescue must be in substance one transaction; that the sight of the one must have aroused the impulse to the other; in short, that there must be unbroken continuity between the commission of the wrong and the effort to avert its consequences." *Wagner v. International Ry. Co.*, *supra* note 22, at 181, 133 N.E. at 438.

⁶⁶ 138 Neb. 229, 292 N.W. 731 (1940).

⁶⁷ 280 S.W.2d 814 (Mo. 1955).

⁶⁸ *Supra* note 34, at 455.

certainty of the harm or by the lapse of time and if so, how would the proper amount of uncertainty or time be measured? Although the insistence upon prompt action may be partly due to the policy of prohibiting plaintiffs from wilfully subjecting others to liability, in the transplant situation the desire to keep one's own organs would be a veritable insurance policy for defendants. Thus, the kidney case may foreshadow the breakdown of the rescue doctrine as it is presently applied and its replacement by a broader concept.

Having disposed of the rescue doctrine, the *Sirianni* opinion concluded with a call for legislation: "If public policy requires that a donor is permitted to maintain a cause of action under the circumstances here, such cause of action must be created, not by judicial fiat, but by legislation as was the case when the legislature of this State created the cause of action for wrongful death."⁶⁹ The plain language of the opinion would require that the legislature enact a specific statute regarding organ donors whose donation was necessitated by the defendant's negligent act. Such legislation is called for, according to the *Sirianni* court, because "no such theory of suit as alleged in plaintiff's complaint has ever before, it seems, been put forward in any court anywhere."⁷⁰

On the other hand, in a recent decision of the New York high court, Judge Keating reiterated the notion that, "this court will continually seek to keep the common law of this State abreast of the needs . . . of our age. 'We act in the finest common-law tradition when we adapt and alter decisional law to produce common sense justice. . . . Legislative action there could, of course, be, but *we abdicate our own function, in a field peculiarly nonstatutory*, when we refuse to reconsider an old and unsatisfactory court-made rule.'"⁷¹ The propriety of judicial lawmaking, however, is not questioned by the *Sirianni* court. It acknowledges that the state's judiciary, in recent years, has allowed recovery for injuries sustained "en ventre,"⁷² removed the immunity of charitable hospitals,⁷³ allowed recovery for psychic injuries,⁷⁴ and dispensed with the requirement of privity of contract in tort warranty actions.⁷⁵ By dismissing the present action, then, the opinion appears to draw a distinction

⁶⁹ *Supra* note 4, at 557, 285 N.Y.S.2d at 713.

⁷⁰ *Supra* note 4, at 555, 285 N.Y.S.2d at 711.

⁷¹ *Millington v. Southwestern Elevator Co.*, 22 N.Y.2d 498, 508, 239 N.E.2d 897, 903 (emphasis supplied) (overrules previous decision holding that wife had no cause of action for her loss of consortium).

⁷² Recovery for prenatal injuries was allowed in *Woods v. Lancet*, 303 N.Y. 349, 102 N.E.2d 691; *see* Annot., 21 A.L.R.2d 1250 (1951).

⁷³ *Bing v. Thunig*, 2 N.Y.2d 656, 163 N.Y.S.2d 3, 143 N.E.2d 3 (1957).

⁷⁴ *Battalla v. State of New York*, 10 N.Y.2d 237, 219 N.Y.S.2d 34, 176 N.E.2d 729 (1961); *Ferrara v. Galluchio*, 5 N.Y.2d 237, 176 N.Y.S.2d 996, 152 N.E.2d 249, 71 A.L.R.2d 331 (1960).

⁷⁵ *Goldberg v. Kollsman Instrument Corp.*, 12 N.Y.2d 432, 240 N.Y.S.2d 592, 191 N.E.2d 81 (1963); *Greenberg v. Lorenz*, 9 N.Y.2d 195, 213 N.Y.S.2d 39, 173 N.E.2d 773 (1961).

between the court's function of removing legal restrictions formerly imposed by judicial decisions and the court's function of extending existing causes of action to new fact situations. Thus, while the court concedes that it may modify or overrule a court-made decision, it concludes that it has no authority to fill in the gaps in the law. Contrarily, a judge has been described as one who:

legislates only between the gaps. He fills the open spaces in the law Innovate, however, he must, for with new conditions there must be new rules The judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant, roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to "the primordial necessity of order in the social life." Wide enough in all conscience is the field of discretion that remains.⁷⁶

While the courts of other jurisdictions have also "legislated" in the areas cited by the *Sirianni* court, one area of judicial legislation is particularly relevant to this casenote. The hypothetical suit mentioned earlier, wherein a kidney donor sues a manufacturer, would be governed by judicial decisions in the recently developing area of products liability. In the landmark case of *MacPherson v. Buick Motor Co.*⁷⁷ Cardozo "legislated" to remove the barrier posed by the requirement of privity of contract in actions for negligence against manufacturers. Although that decision facilitated recovery for injured plaintiffs, negligent manufacture was found very difficult to prove, and plaintiff's attorneys began to turn to the theory of breach of warranty. Inherent in this action, however, were the contract requirements of privity and timely notice to the manufacturer. A disclaimer of liability was said to be a defense. The courts, in awarding recovery to injured plaintiffs, have to date used as many as twenty-nine different devices to get around these requirements.⁷⁸ For example, in *Baxter v. Ford Motor Co.*⁷⁹ a Washington court recognized strict liability for an express warranty without requiring privity of contract because plaintiff had relied on representations that "ran" to him. Following this extension for express warranty, a Texas court in *Decker & Sons v. Capps*⁸⁰ stated that no privity was required for implied warranty in a food case

⁷⁶ CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 113, 137, 141 (1948).

⁷⁷ 217 N.Y. 382, 111 N.E. 1050 (1916). For an incisive discussion of the *MacPherson* case and the decisions leading up to it, see LEVI, *AN INTRODUCTION TO LEGAL REASONING* (1948).

⁷⁸ See Prosser, *The Assault upon the Citadel*, 69 *YALE L.J.* 1099 (1960); Traynor, *The Ways and Meanings of Defective Products and Strict Liability*, 32 *TENN. L. REV.* 363 (1965); Prosser, *The Fall of the Citadel*, 50 *MINN. L. REV.* 791 (1966); Comment, 18 *DEPAUL L. REV.* 223 (1968); Annot., 13 *A.L.R.3d* 1057 (1963).

⁷⁹ 168 Wash. 456, 12 P.2d 409 (1932).

⁸⁰ 139 Tex. 609, 164 S.W.2d 828 (1942).

because of the public policy of protecting health. Then, in 1960, the New Jersey Supreme Court in *Henningsen v. Bloomfield Motors, Inc.*⁸¹ did for implied warranty what Cardozo had done in *MacPherson v. Buick Motor Co.*⁸² for negligence: it initiated a waiver of the privity requirement for all types of dangerous products.

One of the most recent developments in this evolutionary process occurred in California in 1963. Justice Traynor, whose special concurrence in the *Escola v. Coca-Cola Bottling Co.*⁸³ case had already stirred much controversy, handed down the majority opinion in *Greenman v. Yuba Power Products, Inc.*⁸⁴ The opinion stated that "the liability is not one governed by the law of contract warranties but by the law of strict liability in tort."⁸⁵ This trend has been reflected in the *Restatement (Second) of Torts*. Section 402A of the 1962 draft recognized an action in strict liability for food products. Section 402A was then revised in 1962 to include other products for intimate bodily use. The same section now provides for strict liability for all products which are unreasonably dangerous.

This development in the law is evidenced by two recent Illinois decisions. The court in *Suvada v. White Motor Co.*⁸⁶ extended the notion of strict liability to all products without a requirement of privity so long as plaintiffs prove "that their injury or damage resulted from a condition of the product, that the condition was an unreasonably dangerous one and that the condition existed at the time it left the manufacturer's control."⁸⁷ The Illinois Appellate Court lauded the notion of recovery under the new tort action, saying that "*Suvada* inaugurates a new era in products liability law in Illinois . . . Hereafter, manufacturers of unreasonably dangerous products are strictly liable to the hapless victims of their machines or products."⁸⁸

As tetracycline is a product intended for human consumption, privity of contract would be excused in the majority of states. One caveat, however, is necessary at this point. Even in a jurisdiction which has excused the requirement of privity in tort warranty actions or has allowed recovery for defective products under a strict liability theory, an "unavoidably unsafe product"⁸⁹ may be excepted from the classification of products where recovery will be

⁸¹ 32 N.J. 358, 161 A.2d 69 (1960).

⁸² *Supra* note 77.

⁸³ 24 Cal. 2d 453, 461-68, 150 P.2d 436, 440-44 (1944) (Traynor, J., concurring).

⁸⁴ 59 Cal. 2d 57, 377 P.2d 897, Annot., 13 A.L.R.3d 1049 (1967).

⁸⁵ *Id.* at 63, 377 P.2d at 901.

⁸⁶ 32 Ill. 2d 612, 210 N.E.2d 182 (1965).

⁸⁷ *Id.* at 623, 210 N.E.2d at 188.

⁸⁸ *Wright v. Massey-Harris, Inc.*, 68 Ill. App. 2d 70, 77-8, 215 N.E.2d 465, 469 (1966).

⁸⁹ 2 RESTATEMENT (SECOND) OF TORTS § 402A, comment k (1965), states that "products which, in the present state of human knowledge, are quite incapable of being made safe for their intended use" are not unreasonably dangerous so long as proper warning is given.

allowed. A beneficial drug such as tetracycline is likely to fall within this exception.

In summary, the lack of legislation does not appear to be a serious barrier to recovery by a future organ donor, as negligence and products liability have been particularly nonstatutory fields. A plaintiff's basic objectives would be to demonstrate proximate cause and to effectively refute the defense of assumption of risk. Since a future court could properly conclude that a kidney or skin transplant is a foreseeable result of damage to a donee's organ, the fact that the donor was an intervening third party should not operate to break the chain or proximate causality. The problem of overcoming the defense of assumption of risk would be more difficult. Although a strong argument can be made against the position that plaintiff assumed the risk, the court might choose not to accept it. Plaintiff should offer the alternative argument that he is entitled to the benefit of the rescue doctrine to which assumption of risk is no defense. Then, even if the court accepts defendant's assumption of risk argument, the result would turn on how broadly the court construes the time element in the rescue doctrine. If it finds that a transplant operation is a rescue of one in imminent peril, the plaintiff would recover. On the other hand, if the court finds that plaintiff did not assume the risk there would be recovery without the benefit of the rescue doctrine. Due to the merging of the rescue doctrine and the sudden emergency doctrine it is unlikely that organ donors will be able to rely upon that doctrine unless it becomes enlarged.

In an action against a manufacturer for breach of tort warranty or in strict liability for defective products there would be an additional barrier to recovery if the product which caused the injury to the donee was "unavoidably unsafe." On the other hand, the fact that a product could not, by the application of human skill, be made safe, might be no barrier to recovery in a jurisdiction where manufacturers of defective products are held absolutely liable. In light of insurance coverage and the trend of expanding tort liability some future organ donors may be expected to recover either upon a negligence, tort warranty, strict liability or absolute liability theory.

Nancy Goldberg

TRUSTS—ILLINOIS LAND TRUST—A BENEFICIAL INTEREST IS A "GENERAL INTANGIBLE" UNDER U.C.C. ARTICLE 9

On February 23, 1960, Jerome and Arlene Pascal contemporaneously executed both a deed in trust and a companion trust agreement naming the American National Bank as trustee, thereby placing their Highland Park home in an Illinois land trust. Four years thereafter, Arlene Pascal, as sole