DUTY TO AID THE ENDANGERED ACT: THE IMPACT AND POTENTIAL OF THE VERMONT APPROACH

INTRODUCTION

During the past two decades, legal scholars have labored with the legal problems of persons confronted with an emergency.[1] The first question is whether the law should impose upon the potential rescuer the duty to render aid to the endangered. The second question is whether the rescuer should be liable for his or her negligent acts or omissions, when aid has been given voluntarily and gratuitously. Underlying these questions is a pragmatic concern that the growing alienation of individuals within American society is causing a decreased willingness of people to render aid to those in danger.[2] Each jurisdiction of the United States has addressed these issues through laws popularly entitled the Good Samaritan statutes.[3] Although most of the states encourage rescues[4] by statutorily

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1. *See, e.g.*, Ames, *Law and Morals*, 22 HARV. L. REV. 97 (1909); D'Amato, *The "Bad Samaritan" Paradigm*, 70 NW. U. L. REV. 798 (1975); Edgar, *The Bystander's Duty and the Law of Torts—An Alternative Proposal*, 8 ST. MARY'S L. J. 302 (1976); Holland, *The Good Samaritan Laws: A Reappraisal*, 16 J. OF PUB. L. 128 (1967); Landes & Posner, *Salvors, Finders, Good Samaritans, and Other Rescuers: An Economic Study of Law and Altruism*, 7 J. LEGAL STUD. 83 (1978); Linden, *Rescuers and Good Samaritans*, 34 MOD. L. REV. 24 (1971); Norris, *Current Status and Utility of Emergency Medical Care Liability Law*, 15 FORUM 377 (1980); Plant, "GOOD SAMARITAN" LAWS IN LEGAL DILEMMA, 2 TRIAL 34 (Oct.-Nov. 1966); Rudolph, *The Duty to Act: A Proposed Rule*, 44 NEB. L. REV. 499 (1965); Note, *Torts—Immunity—The Good Samaritan Statute, Wis. Stat. § 895.48*, 62 MARQ. L. REV. 469 (1977); 11 GONZ. L. REV. 296 (1975).

2. "The anonymity of city life and the lack of legal sanctions can cause the failure of moral sanctions." Rudolph, *The Duty to Act: A Proposed Rule*, 44 NEB. L. REV. 499, 501 (1965). *See also* Note, *The Duty to Rescue in Tort Law: Implications of Research on Altruism*, 55 IND. L. J. 551, 555-56 (1980) (the effects of bystanders on the individual's willingness to aid). Other explanations, such as the fear of litigation, have been posited by legal scholars. *E.g.*, Scheid, *Affirmative Duty to Act in Emergency Situations—The Return of the Good Samaritan*, 3 J. MAR. J. PRAC. & PROC. 1, 1-3 (1969). For examples of failure to rescue *see* Rivera v. Randle Eastern Ambulance Serv., Inc., 393 So.2d 605 (Fla. App. 1980) (ambulance attendants failed to aid victims of auto collision); State v. Joyce, 139 Vt. 638, 433 A.2d 271 (1981) (witnesses failed to aid assault victim).

3. *See infra* Appendix p. 182-83.

4. It is important to emphasize that the term "rescue" is used in the broadest sense. The term refers to the "act of rescuing (especially persons) from enemies, saving from danger or destruction, . . . succor, deliverance . . . . To deliver or save (a person or thing) from some evil or harm," 2 THE COMPACT EDITION OF THE OXFORD ENGLISH DICTIONARY 2205 (1971); or to the "[a]ct of saving or freeing" BLACK'S LAW DICTIONARY 1175 (rev. 5th ed. 1970). The term is not used in its legal context of "forcibly and knowingly freeing another from arrest . . . or legal custody . . . [or] unlawfully or forcefully taking back goods which have been taken under a distress for rent, damage feasant, etc." *Id.*

granting civil immunity, Vermont alone prescribes a statutory penalty for those who consciously fail to render aid.[5]

Titled the "Duty to Aid the Endangered Act," Section 519 of title 12 of the Vermont Statutes Annotated provides:

> (a) A person who knows that another is exposed to grave physical harm shall, to the extent that the same can be rendered without danger or peril to himself or without interference with important duties owed to others, give reasonable assistance to the exposed person unless that assistance or care is being provided by others.
> (b) A person who provides reasonable assistance in compliance with subsection (a) of this section shall not be liable in civil damages unless his acts constitute gross negligence or unless he will receive or expects to receive remuneration. Nothing contained in this subsection shall alter existing law with respect to tort liability of a practitioner of the healing arts for acts committed in the ordinary course of his practice.
> (c) A person who willfully violates subsection (a) of this section shall be fined not more than $100.00.[6]

On its face, the Vermont statute compels persons to aid those known to be in grave physical danger. Unless specifically exempted by the statute, the willful non-rescuer is subjected to a fine. Should aid be given, the rescuer enjoys immunity from civil liability for ordinary negligence. The unique character of the Vermont approach is a blend of a civil exemption[7] with a criminal penalty.[8] Both characteristics are intended to promote the altruistic purposes of the statute. In analyzing the scope and application of Section 519, commentators have differed upon which characteristic is more important in achieving the statute's legislative objective.[9]

The practical usefulness of Vermont's good samaritan statute is subject to question. Scholars have debated whether law can ever

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5. VT. STAT. ANN. tit. 12, § 519(c) (1973).

6. *Id.* § 519.

7. *See infra* note 130.

8. An argument can be made that § 519 imposes a civil penalty rather than a criminal penalty; the issue has yet to be resolved. *See infra* notes 154-69 and accompanying text.

9. *See* D'Amato, *The "Bad Samaritan" Paradigm*, 70 NW. L. REV. 798, 809-11 (1975) [hereinafter cited as D'Amato] which argues that the solution to the good samaritan problem is "the adoption of a Vermont-type statute coupled with a statutory provision explicitly prohibiting any private action . . . ." *Id.* at 810. Franklin, *Vermont Requires Rescue: A Comment*, 25 STAN. L. REV. 51 (1972) [hereinafter cited as Franklin]. Professor Franklin is more guarded in his appraisal of the Vermont statute. "On paper at least, Vermont has made history but the statute's practical effect remains to be seen." *Id.*

effectively promote moral conduct.[10] Beyond the philosophical issue, significant practical problems undermine the efficacy of the Vermont scheme, both as a civil and as a criminal statute.[11] If Section 519 is inadequate to legislate moral conduct, it can nonetheless serve another important purpose—compensating victims unnecessarily injured because another failed to provide aid.[12] Courts have often used statutes as standards of conduct to impose civil liability.[13] As a supplement to the statute, civil liability will prevent harm by encouraging rescue. When the potential rescuer is not encouraged, imposing liability will, at least, compensate the victim.[14]

I. The Common Law

Section 519 was adopted as a reaction to the practical problems confronting potential rescuers, problems exacerbated by the common law. The Vermont Legislature was most concerned with the reported hesitance of medical and paramedical personnel to respond to emergency situations.[15] The questions of whether the

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10. *See* L. Fuller, The Morality of Law (1964) (discussing the relationship of law and morality); Morality and the Law (R. Wasserstrom ed. 1971) (essays on law as a way of enforcing moral values); *compare* Ames, *Law and Morals*, 22 Harv. L. Rev. 97 (1909) (discussing the common law rule of no duty to rescue and its inconsistency with modern morality), *and* 47 Ind. L.J. 321, 321 (1972) (discussion of the moral context of the good samaritan issue); *with* Epstein, *A Theory of Strict Liability*, 2 J. Legal Stud. 151, 200 (1973) (common law position on no duty to rescue is consistent with moral and economic principles); *and* Note, *Stalking the Good Samaritan: Communists, Capitalists and the Duty to Rescue*, 1976 Utah L. Rev. 529, 541 (moral norms not likely to affect behavior during an emergency).

11. *See infra* notes 114-200 and accompanying text.

12. *But see* D'Amato, *supra* note 9 (arguing against civil liability for failure to rescue).

13. Bussell v. Missouri Pac. R.R. Co., 237 Ark. 812, 376 S.W.2d 545 (1964) (regulation promulgated by federal agency effectively establishes a standard of conduct, the violation of which would be evidence of negligence); Vesely v. Seger, 5 Cal. 3d 153, 486 P.2d 151, 95 Cal. Rptr. 623 (1971) (duty of care and attendant standard of conduct may be found in a legislative enactment which does not provide for civil liability); Ono v. Applegate, 62 Hawaii 131, 612 P.2d 533 (1980) (although statute does not impose civil liability, liquor control statute imposes a duty upon tavern keepers not to serve persons under influence of liquor; violation of statute is evidence of negligence); Annis v. Britton, 232 Mich. 291, 205 N.W. 128 (1925) (housing law is penal statute and imposes a specific duty; if violation of such duty is proximate cause of injury to tenant, civil accountability may be exacted from the landowner); Cole v. Multanomah County, 39 Or. App. 211, 592 P.2d 221 (1979) (statutes and regulations can be basis or evidence of negligence); Zaleskie v. Joyce, 133 Vt. 150, 333 A.2d 110 (1975) (breach of safety statute which proximately causes injury is prima facie evidence of negligence; because driving under influence of intoxicating liquor not proximate cause of injury, plaintiff not contributorily negligent); *see infra* notes 203-10 and accompanying text.

14. *But see* D'Amato, *supra* note 9.

15. *See infra* notes 67-71 and accompanying text; see also Holland, *The Good Samari-*

common law required persons to render aid and whether protections were provided for the "negligent" rescuer were at the heart of the legislature's inquiry.[16]

A. *General Common Law Theory*

Traditionally, the common law has not recognized the duty to render aid to the endangered,[17] and few exceptions have been recognized.[18] This rule has been applied by the courts to three factual situations: (1) the rescuer must physically intervene to prevent imminent harm to the victim;[19] (2) the rescuer need only warn the victim to prevent harm;[20] and (3) the rescuer must alleviate a dangerous condition to prevent harm to unknown potential victims.[21] In each case the courts have rested their decisions on whether a legal duty existed to aid the endangered. "[T]he existence of 'duty'

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tan Laws: A Reappraisal, 16 J. PUB. L. 128, 132-33 (1967) (discussing the fears of medically trained persons which discourage rescues).

16. Transcript, Hearings on H.R. 18 Before the Vermont House Judiciary Committee, 49th Bien. Sess., Jan. 19, 1967.

17. "The fact that the actor realizes or should realize that action on his part is necessary for another's aid or protection does not of itself impose upon him a duty to take such action." RESTATEMENT (SECOND) OF TORTS § 314 (1965)[hereinafter cited as RESTATEMENT]. *See generally* W. L. PROSSER, HANDBOOK OF THE LAW OF TORTS, § 56 (4th ed. 1971) [hereinafter cited as PROSSER].

18. *See infra* notes 35-44 and accompanying text.

19. *See, e.g.*, Allen v. Hixson, 11 Ga. 460, 36 S.E. 810 (1900) (employer has no duty to protect employee from dangerously defective machinery if employee voluntarily acts outside scope of employment); Hurley v. Eddingfield, 156 Ind. 400, 59 N.E. 1058 (1901) (doctor has no duty to accept employment from or aid violently ill, even when no other doctor is available); Union Pac. Ry. v. Cappier, 66 Kan. 649, 72 P. 281 (1903) (railroad employees not negligent in operating train which severs arm of boy and have no duty to get doctor or to aid the boy); Yania v. Bigan, 397 Pa. 316, 155 A.2d 343 (1959) (no duty to rescue person drowning upon one's premises; no duty to rescue person who jumped into water-filled pit due to defendant's taunting and enticing); *see also* Osterlind v. Hill, 263 Mass. 73, 160 N.E. 301 (1928) (no liability for renting canoe and then refusing to rescue person who capsizes the canoe).

20. Sidwell v. McVay, 282 P.2d 756 (Okla. Ct. App. 1955) (man observing his neighbor's child hammering explosives has no duty to warn the child of the danger); Abalo v. Oil Dev. Co., 526 S.W.2d 604 (Tex. Civ. App. Ct. 1975)(although bystander could warn employee of danger of entanglement in machinery, there was no legal duty to do so).

21. *See* Haniboe v. McCarthey, 114 Ga. App. 541, 151 S.E.2d 905 (1966) (property owner has no duty to secure swimming pool to prevent child/invitee from entering and drowning in pool); Buch v. Amory Mfg. Co., 69 N.H. 257, 44 A. 809 (1892) (no duty to prevent child/trespasser from being injured by defendant's factory machinery); Oullette v. Blanchard, 116 N.H. 552, 364 A.2d 631 (1976) (holding that owners and occupiers of land governed by test of reasonable care under all circumstances in the maintenance and operation of their property; the test of foreseeability determines liability or non-liability in these cases); *cf.* Osterlind v. Hill, 263 Mass. 73, 160 N.E. 301 (1928) (no liability for creating dangerous situation by renting canoe to intoxicated person, who, consequently, capsizes canoe and drowns).

is a question of law. '[L]egal duties are not discoverable facts of nature, but merely conclusory expressions [by the courts] that in cases of a particular type, liability should be imposed for damage done.' "[22]

Procedurally, the existence of a legal duty is a threshold question for the court.[23] Should the plaintiff's complaint fail to state a duty owed by the defendant to the plaintiff, the judge will dismiss the complaint without further proceedings.[24] The courts analyze the nature of the parties relationship to determine whether a legal duty exists.[25] Consequently, the courts look to the propinquity of the parties and nature of the parties' affiliation to find a sufficient legal relationship.[26] Other factors may be considered by the courts, such as whether the harm was caused by defendant's action (misfeasance), or by the defendant's inaction (non-feasance).[27]

Having established a sufficient relationship between the parties, the courts then consider a second factor, whether the harm was foreseeable.[28] A legal duty exists when the court finds both a

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22. Thompson v. Alameda, 27 Cal. 3d 741, 750, 614 P.2d 728, 732, 167 Cal. Rptr. 70, 74 (1980) (citing Tarasoff v. Regents of Univ. of California, 17 Cal. 3d 425, 434, 551 P.2d 334, 342, 131 Cal. Rptr. 14, 22 (1976)). *See generally* RESTATEMENT, *supra* note 17, at § 328B; PROSSER, *supra* note 17 at §§ 37, 45, 53.

23. *See* Spurlin v. General Motors Corp., 528 F.2d 612 (Ala. Cir. 1976); Weirum v. RKO General, Inc., 15 Cal. 3d 40, 539 P.2d 36, 123 Cal. Rptr. 468 (1975); Cuppy v. Bunch, 88 S.D. 29, 214 N.W.2d 786 (1974); Maxted v. Pac. Car & Foundry Co., 527 P.2d 832 (Wyo. 1974); RESTATEMENT, *supra* note 17 at § 328B.

24. PROSSER, *supra* note 17 § 37 at 206.

25. As Justice Cardozo pointed out:

> The risk reasonably to be perceived defines the duty to be obeyed, and risk imports relation; it is risk to another or to others within the range of apprehension . . . .
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> Negligence, like risk, is thus a term of relation . . . . But bodily security is protected, not against all forms of interference or aggression, but only against some. One who seeks redress at law does not make out a cause of action by showing without more that there has been damage to his person. If the harm was not willful, he must show that the act as to him had possibilities of danger so many and apparent as to entitle him to be protected . . . . Palsgraf v. Long Island R.R., 248 N.Y. 339, 344-45, 162 N.E. 99, 100-01 (1928).

26. *See, e.g., id.* at 344-45, 162 N.E. at 101.

27. "A person who has knowledge of circumstances putting him on notice of fraud is rarely found liable for damages for failing to . . . protect another party . . . . The reluctance to impose liability reflects the common law's lenient view toward sins of omission." Equilease Corp. v. Smith Int'l, 588 F.2d 919, 928 (5th Cir. 1979). *See generally* PROSSER, *supra* note 17, § 56 at 338-40.

28. *See* L. S. Ayres & Co. v. Hicks, 220 Ind. 86, 93, 40 N.E.2d 334, 337 (1942) (no duty to guard against unanticipated happenings); Oullette v. Blanchard, 116 N.H. 552, 364 A.2d 631 (1976) (foreseeability is test of liability for owners and occupiers of land); RESTATEMENT,

sufficient relationship between the parties and a foreseeable harm. In the case of the good samaritan, however, the courts have usually found the relationship of the victim and rescuer insufficient to impose a legal duty to act.[29]

Precisely why the courts have refused to find a legal relationship between rescuer and victim has been the focus of much debate.[30] Philosophical considerations do not offer the only explanation. Professor Scheid posits that courts are very concerned with the practical problems of whether a potential rescuer will know a legal duty exists, and whether a court or jury is capable of balancing the conflicting interests of the rescuer and victim.[31]

> The most cogent reason for refusing to adopt a rule that one has a duty to aid another in serious peril was the practical consideration of properly balancing the equities of both parties . . . . A test to determine the gravity of the victim's danger before any duty arose . . . requires a balancing of the degree of the victim's peril against the degree of the rescuer's risk.[32]

Not only is it difficult for a jury or court to evaluate the dangers when in the courtroom's atmosphere of calm deliberation, it is particularly difficult for the potential rescuer confronted with an actual emergency. Consequently, the courts are reluctant to impose

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supra note 17, § 328B.

29. *See supra* notes 17-22 and accompanying text.

30. *See supra* note 1. Some rationales are: (a) new forms of liability would impose further burdens on an already congested judiciary; (b) liability for nonfeasance is contrary to our values of independence and individualism; (c) liability would encourage needless intermeddling by third parties; (d) requiring rescue would infringe on personal freedom of action; (e) it would be difficult to determine who among a crowd of potential rescuers should be liable; (f) determining the degree of danger creating a legal duty of rescue is not easily ascertainable by a jury; and (g) difficulty in determining when the rescue duty is satisfied militates against imposing liability. Linden, *Rescuers and Good Samaritans*, 34 MOD. L. REV. 241, 241-52 (1971).

31. Scheid, *Affirmative Duty to Act in Emergency Situations—The Return of the Good Samaritan*, 3 J. MAR. J. PRAC. & PROC. 1, 4 (1969).

32. *Id.* Professor Epstein theorizes that a legal duty to rescue may require the court to balance the cost of the rescue and the risk of injury to the rescuer against the value of the victim's life to find a legal duty. Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151, 202 (1973). "Most economics textbooks accept that the premises of economic theory do not permit so-called interpersonal comparisons of utility . . . [because] all attempts to compare costs and benefits between different persons require . . . some economic assumption to measure trade-offs in utility between them." *Id.* at 201. Deciding the duty question requires the comparisons of utility between the value of the rescuer's life versus the victim's life which economic theory cannot make. *Id.* at 202.

liability in cases of nonfeasance,[33] preferring to rely on extralegal sanctions (i.e. the influence of conscience, community censure and anticipated spiritual suffering) to encourage altruistic behavior.[34]

Disturbed by the harsh results of the traditional rule,[35] the courts have developed theories to justify imposing a legal duty to render aid.[36] Specifically, the courts have created a number of narrowly drawn exceptions to the general rule by identifying a class of "special relationships."[37] For example, tortfeasors have a duty to

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33. Numerous cases have been "decided on the basis of the traditional common law distinction between acts of 'misfeasance' and 'nonfeasance,' with resulting liability for acting negligently but not for failing or refusing to act . . . with reference to a person . . . in peril and helpless." Pridgen v. Boston Housing Auth., 364 Mass. 696, 708-09, 308 N.E.2d 467, 475 (1974); *see supra* note 27. Several theories have been offered to justify distinguishing cases of misfeasance and nonfeasance. "The former connotes action, the latter inaction. There could be liability if *A* acted carelessly because he then worsened *B*'s position . . . . There can be no liability for inaction . . . for *A* merely failed to confer a positive benefit on *B*." Scheid, *supra* note 31, at 3. Some scholars explain that a rule requiring people to confer benefits upon others runs counter to traditional tenets of Anglo-American law. *Id.* at 4; *see generally* PROSSER, *supra* note 17, § 56 at 338-40 (courts reluctant to impose liability for nonfeasance because of their preoccupation with cases of misbehavior, their desire to promote individualism and their desire not to force people to help one another). To distinguish conduct as active or passive can be difficult and often requires the courts to analyze the relationship of the parties, rather than simply looking to the nature of the act. *Id.* at 339-40. Nevertheless, the courts remain reluctant to impose a duty to rescue.

34. Note, *Stalking the Good Samaritan: Communists, Capitalists and the Duty to Rescue*, 1976 UTAH L. REV. 529, 541; *see also* Holland, *supra* note 1, at 129 (failure to rescue is left to a "higher law" or conscience for enforcement).

35. As one court passionately stated: "To deny recovery merely on the ground of expediency appears to us . . . as a 'pitiful confession of incompetence on the part of the courts of justice,' a distrust in the capacity of courts and juries which we do not share." Lambert v. Brewster, 97 W. Va. 124, 138, 125 S.E.2d 244, 249 (1924); *see also* MacIntosh v. Milano, 168 N.J. Super. 466, 487-89, 403 A.2d 500, 509-10 (1979) (court should not dismiss a complaint solely on the ground that a question is too complex or provides a vehicle for an unscrupulous person to assert frivolous or unfounded claim).

36. *See* L. S. Ayres & Co. v. Hicks, 220 Ind. 86, 40 N.E.2d 334 (1942) (principles of social conduct universally recognized may give rise to a legal duty); Pridgen v. Boston Housing Auth., 364 Mass. 696, 709-10, 308 N.E.2d 467, 476-77 (1974) (relations of parties may give rise to a legal duty); *see also* RESTATEMENT, *supra* note 17, § 322 (tortfeasors have a duty to aid those injured by his or her conduct).

37. Such special relationships include property owners and invitees, Pridgen v. Boston Housing Auth., 364 Mass. 696, 710, 308 N.E.2d 467, 476 (1974); *see also* Weinburg v. Hartman, 65 A.2d 805 (Del. 1949); Custer v. Atlantic & Pac. Tea Co., 43 A.2d 716 (D.C. 1945); Connelly v. Kaufman & Baer Co., 181 Pa. 8, 37 A.2d 125 (1944); carriers and passengers, Yazoo & M. V. R. Co. v. Leflar, 168 Miss. 255, 150 So. 220 (1933); doctors and patients, Tarasoff v. Regents of Univ. of California, 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976); MacIntosh v. Milano, 168 N.J. Super. 466, 403 A.2d A.2d 500, 511-12 (1979); and independent contractors and customers, Coath v. Jones, 277 Pa. Super 479, 419 A.2d 1249 (1980).

Although a special relationship does not exist between landowner and trespasser, once the landowner has knowledge that a trespasser on the premises is in danger, the duties of

rescue victims of their negligent acts.[38] The scope of the duty will depend upon the nature of the relationship.[39] Although a person may have a duty to render aid, the duty may be as limited as warning a potential victim of danger,[40] or as extensive as requiring physical intervention into the perilous situation.[41] For reasons of practicality[42] and public policy,[43] the courts have refused to liberally recognize special relationships.[44] Thus, the courts appear willing to equate a moral duty to render aid with a legal duty, but only within narrow limits.

Although there is no duty to perform rescues, the common law imposes a duty of due care once aid is undertaken.[45] The rescuer-defendant is only required to act reasonably with respect to the circumstances[46] and his or her particular ability.[47] Under common law theory, the courts will find good samaritans liable for their negligent acts or omissions while rendering aid to the imperiled.[48]

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the landowners are much the same as if a special relationship existed. *See* Pridgen v. Boston Housing Auth., 364 Mass. 696, 710-11, 308 N.E.2d 467, 476-77 (1974); Oullette v. Blanchard, 116 N.H. 552, 557-58, 364 A.2d 631, 634 (1976); *cf.* Mile High Fence Co. v. Radovich, 175 Colo. 537, 548, 489 P.2d 308, 314 (1971); Mariorenzi v. Joseph DiPonte, Inc., 114 R.I. 294, 299, 333 A.2d 127, 132 (1975).

See generally RESTATEMENT, *supra* note 17, § 314A; PROSSER, *supra* note 17, § 56.

38. Rivera v. Randle Eastern Ambulance Service, Inc., 393 So. 2d 605, 606 (Fla. Dist. Ct. App. 1981); South v. Nat'l R.R. Passenger Corp., 290 N.W.2d 819, 836-37 (N.D. 1980); *cf.* Cecil v. Hardin, 575 S.W. 268, 271-73 (Tenn. 1978) (although not personally negligent, an aider or abettor is liable for the tortious acts of a joint venturer).

39. *See generally* Annot. 33 A.L.R.3d 298, 301 (1973) (discussing the types of relationships creating a legal duty to render aid).

40. *See* Mangeris v. Gordon, 94 Nev. 402, 402-03, 580 P.2d 481, 483-84 (1978).

41. *See, e.g.,* L. S. Ayres & Co. v. Hicks, 220 Ind. 86, 93, 40 N.E.2d 334, 337 (1942); Pridgen v. Boston Housing Auth., 364 Mass. 696, 710-11, 308 N.E.2d 467, 476-77 (1974).

42. *See* Mid-Cal Nat'l Bank v. Federal Reserve Bank of San Francisco, 590 F.2d 761, 763 (9th Cir. 1979); Thompson v. Alameda, 27 Cal. 3d 741, 753-54, 614 P.2d 728, 734-35, 167 Cal. Rptr. 70, 76-77 (1980); Seibel v. City & County of Honolulu, 61 Hawaii 253, 602 P.2d 532 (1979) (relationship between prosecuting attorney and released criminal not sufficient to require warning to others that criminal may be dangerous).

43. *See, e.g.,* Thompson v. Alameda, 27 Cal. 3d 741, 614 P.2d 728, 735, 167 Cal. Rptr. 70, 80 (1980) (probation and parole programs should be continued as a matter of public policy even though the risk of harm must be borne by the public).

44. *See generally,* PROSSER, *supra* note 17, § 56 at 338-43 (discussing the slow development of the law in recognizing legal duties).

45. *See* Marsalis v. LaSalle, 94 So. 2d 120 (La. App. 1957) (once aid is undertaken, aid must be given with due care); RESTATEMENT, *supra* note 17, §§ 323-24.

46. RESTATEMENT, *supra* note 17, § 324.

47. *See* Derr v. Bonney, 38 Wash. 2d 678, 231 P.2d 637 (1951).

48. *E.g.,* Smith v. Twin State Improvement Corp., 116 Vt. 569, 570, 80 A.2d 664, 665 (1951), *see generally* PROSSER, *supra* note 17, § 56 at 343-48 (although there is no duty to render aid, once aid is rendered the rescuer will be liable for negligence if proper care is not used and injury results).

Only the enactment of the good samaritan statutes has limited the effect of the traditional rule.

B. *Vermont Common Law*

Until 1981, the Vermont Supreme Court had not been called upon to determine whether a person has a legal duty to render aid.[49] In accord with traditional common law theory, the Vermont courts have refused to impose a legal duty unless there is a sufficient relationship between the parties.

> [A]n action will not lie unless the relations of the parties are such that the person charged owes a duty to the person injured . . . . This duty must be one owed directly to him, or to a class to which he belongs. Even though the act or omission complained of involved the breach of a duty owed to someone else, but not to the person injured, the latter has no action.[50]

The court, not the jury, will determine whether a particular relationship gives rise to a legal duty.[51] To do so, the Vermont courts have considered the defendant's ability to prevent harm,[52] the foreseeability of the injury,[53] and whether the duty is necessary and proper in the context of "justice and reason."[54] There is also

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49. State v. Joyce, 139 Vt. 638, 433 A.2d 271 (1981) (common law does not generally impose a duty to render aid).

50. Amblo's Adm'x v. Vermont Associated Petroleum Company, 101 Vt. 448, 450-51, 144 A. 460, 461 (1929) (citations omitted); *see also* Thurber v. Smith, 128 Vt. 216, 260 A.2d 390 (1969) (a contract creates a legal duty to act with due care); Baldwin v. State, 125 Vt. 317, 215 A.2d 492 (1965) (a plaintiff's action must stand on breach of duty owned to plaintiff directly, not derivatively); Woodruff Motors, Inc. v. Commercial Credit Corp., 123 Vt. 404, 190 A.2d 705 (1963) (the relationship of assignor-assignee may create legal duties of due care); Lavallee v. Pratt, 122 Vt. 90, 166 A.2d 195 (1960) (landowners owe no duty of care to unknown trespassers); Beaulac v. Robie, 92 Vt. 27, 102 A. 88 (1917) (landlord has no duty to exercise due care with regard to property in possession of the tenant).

51. Unless plaintiff's complaint alleges sufficient facts showing defendant owed a legal duty to plaintiff the court may dismiss the complaint on defendant's demurrer, Baldwin v. State, 125 Vt. 317, 215 A.2d 492 (1965); Coburn v. Swanton, 94 Vt. 168, 109 A.2d 854 (1920) or on defendant's motion for directed verdict, Eastman v. Williams, 124 Vt. 445, 207 A.2d 146 (1965); *see also* Benoit v. Marvin, 120 Vt. 201, 138 A.2d 312 (1958); Smyth v. Twin State Improvement Corp., 116 Vt. 569, 80 A.2d 664 (1951).

52. Beaulac v. Robie, 92 Vt. 27, 32, 102 A. 88, 90-91 (1917).

53. Sunday v. Stratton Mountain Corp., 136 Vt. 293, 300-01, 390 A.2d 398, 402 (1978).

54. Charron v. Canadian Pac. Ry. Co., 115 Vt. 225, 228, 55 A.2d 614, 616 (1947). The criterion of "justice and reason" allows the court great latitude in establishing legal duties which satisfies the judge's inate sense of fairness.

The fairness concept may also explain the Vermont Supreme Court's use of the "foreseeability" test as a method of determining whether a legal duty exists. "Foreseeable consequences may be significant in the determination of the scope of the legal duty, and whether a duty of care had been violated." Forcier v. Grand Union Stores, Inc., 128 Vt. 389, 393, 264

evidence that the Vermont courts have been hesitant to recognize duties not generally recognized in other jurisdictions.[55] The Vermont courts have not always analyzed the duty question on the basis of the relationship of the parties.[56] Frequently, a Vermont court will focus on the imprecise test of "what would a careful and prudent person have done under like circumstances acting on his judgment then . . . ."[57] Nevertheless, to remain consistent with the common law of other jurisdictions, the Vermont courts will not recognize a common law duty to render aid.[58]

The Vermont Supreme Court has presumed that "[o]ne cannot, ordinarily, . . . have an action for any evil consequence he may suffer, by reason of the omission to perform a duty not owing

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A.2d 796, 799 (1970) (quoting Thompson v. Green Mountain Power Corp., 120 Vt. 478, 485, 144 A.2d 786, 789-90 (1958)). If the court finds that the harm incurred was unforeseeable then there is no liability. Lewis v. Vermont Gas Co., 121 Vt. 168, 183, 151 A.2d 297, 306-07 (1959). Unforeseeable harms can result from either obvious dangers, Green v. Sherburne Corp., 137 Vt. 310, 403 A.2d 278 (1979) (because utility poles are obvious, observable obstacles, there is no duty to warn invitees-skiers of the peril the poles create); Terrill v. Spaulding, 115 Vt. 342, 61 A.2d 611 (1948) (hole in floor was obvious and known to plaintiff so no duty to prevent plaintiff from stepping into the hole); or from latent dangers, Lewis v. Vermont Gas. Co., 121 Vt. 168, 151 A.2d 297 (1959) (gas company is not required to foresee harms caused by defective pipes and appliances privately owned, unless it has notice of such defects); *see also* Winter v. Unaitis, 124 Vt. 249, 204 A.2d 115 (1964) (not foreseeable that child would find explosives on premises and be injured).

55. For example, the Vermont Supreme Court denied causes of action for negligent infliction of mental distress stating: "The concept of legal duty . . . is embedded too firmly in our laws to be discarded . . . . [I]t has never been suggested that everyone who is adversely affected by an injury inflicted upon another should be allowed to recover his damages." Guilmette v. Alexander, 128 Vt. 116, 119, 259 A.2d 12, 14-15 (1969). The supreme court later reversed because of society's increased valuation of privacy and emotional well-being, and because of the wide acceptance of actions based on the infliction of emotional distress. Sheltra v. Smith, 136 Vt. 472, 473-75, 392 A.2d 431, 432-33 (1978).

56. *See, e.g.*, Woodruff Motors, Inc. v. Commercial Credit Corp., 123 Vt. 404, 406, 190 A.2d 705, 707 (1963); Lavallee v. Pratt, 122 Vt. 90, 93, 166 A.2d 195, 197-98 (1960); Agosta v. Granite City Real Estate Co., 116 Vt. 526, 528-29, 80 A.2d 534, 535-36 (1951); Amblo's Adm'x. v. Vermont Associated Petroleum Corp., 101 Vt. 448, 450-51, 144 A.2d 460, 461 (1929).

57. Waite v. Brown, 132 Vt. 20, 29, 312 A.2d 915, 919 (1973); Garafano v. Neshobe Beach Club, Inc., 126 Vt. 566, 573, 238 A.2d 70, 76 (1967); *see* LaFaso v. LaFaso, 126 Vt. 90, 93, 223 A.2d 814, 817-18 (1966); Winter v. Unaitis, 124 Vt. 249, 253, 204 A.2d 115, 118 (1964); Terrill v. Spaulding, 115 Vt. 342, 344, 61 A.2d 611, 612 (1948).

58. *Cf.* Lavallee v. Pratt, 122 Vt. 90, 166 A.2d 195 (1960) (landowners/occupiers are not liable for injuries to unknown trespasser caused by static conditions on the premises); *accord* Chicoine v. Cashman, 108 Vt. 133, 183 A.2d 487 (1936) (landowner has no duty to protect trespasser-adult or child from dangerous condition on the premises—blasting caps); Amblo's Adm'x v. Vermont Associated Petroleum Corp., 101 Vt. 448, 451, 144 A. 460, 461 (1929) (landowner has no duty to protect trespassers from dangers on the premises—open trenches).

to himself.' "[59] Perceived concepts of fairness,[60] practicality,[61] and public policy[62] have been the supreme court's traditional justifications for the presumption limiting justiciable actions. Although the Vermont courts could recognize the common law duty to aid the endangered, the courts are not likely to abandon the presumption and impose a duty not expressly established by statute.[63]

Under Vermont common law, persons aiding the imperiled are liable for their negligent acts or omissions. The Vermont Supreme Court has held:

> Even a volunteer or a stranger is liable for an injury negligently inflicted on the property of another; the law imposes an obligation upon everyone who attempts to do anything for another, even gratuitously, to exercise some degree of care and skill in the performance of what he has undertaken, for nonperformance of which an action lies.[64]

The Vermont courts will consider the circumstances and dangers surrounding the defendant's acts or omissions as mitigating factors.[65] Although the requisite standard of care may be reduced, the

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59. Amblo's Adm'x v. Vermont Associated Petroleum Corp., 101 Vt. 448, 451, 144 A. 460, 461 (1929).

60. *See* Charron v. Canadian Pac. Ry. Co., 115 Vt. 225, 228, 55 A.2d 614, 616 (1947).

61. *Compare* Guilmette v. Alexander, 128 Vt. 116, 119, 259 A.2d 12, 15 (1969) (citing Waube v. Warrington, 216 Wis. 603, 613, 258 N.W. 497, 500-01 (1935)) (suits must be brought within manageable limits); *with* Sheltra v. Smith, 136 Vt. 472, 473, 392 A.2d 431, 432-33 (1978) (social values may outweigh practical considerations in finding a legal duty).

62. *See, e.g.*, Green v. Sherburne, 137 Vt. 310, 312, 403 A.2d 278, 280 (1979) (the degree of care imposed would be in proportion to the degree of foreseeability of risk involved); Lavallee v. Pratt, 122 Vt. 90, 93, 166 A.2d 195, 197 (1960) (the requirement of a legal relation prior to imposing liability protects landowners from liability for injuries incurred by trespassers); Trudo v. Lazarus, 116 Vt. 221, 223, 73 A.2d 306, 307 (1950) (landowner not liable for injuries of trespasser even though premise was attractive nuisance).

63. Several theories could be utilized by the court to find a duty to aid the endangered. For example: a) Liability for negligence requires consideration of consequences reasonably anticipated by a prudent person. LaFaso v. LaFaso, 126 Vt. 90, 94, 223 A.2d 814, 817 (1966). If a prudent person could anticipate injury due to a person's failure to rescue, then a duty to aid could be found. b) The test of negligence is what would a prudent person do under similar circumstances. Garafano v. Neshobe Beach Club, Inc., 126 Vt. 566, 573, 238 A.2d 70, 76 (1968). If a prudent person would perform a rescue, then there is a duty to render aid.

These arguments, no matter how appealing, become impotent if the court requires a showing of a preexisting legal relationship. State v. Joyce, 139 Vt. 638, 433 A.2d 271 (1981); *see supra* text accompanying notes 49-63.

64. Smyth v. Twin State Improvement Corp., 116 Vt. 569, 570, 80 A.2d 664, 665 (1951) (dictum).

65. *See* Forcier v. Grand Union Stores, Inc. 128 Vt. 389, 393, 264 A.2d 796, 799 (1970). As the Vermont Supreme Court explained:

> When one is confronted with a sudden peril through no fault of his own he is

good samaritan may be liable, nonetheless, for a charitable act.[66]

The Problem as Viewed by the Legislature

When Section 519 was introduced, the Vermont legislators were familiar with the concerns of potential rescuers.[67] During the House Judiciary Committee Hearings, testimony was offered by a physician that "in the course of years there has been a developing fear on the part of medical people . . . of legal entanglement."[68] This fear was not held solely by doctors, but was shared by others trained in emergency medical care.[69] Throughout the legislative hearings none of the witnesses, for or against the act, could offer personal knowledge of a good samaritan being held liable for negligence by the Vermont courts.[70] Incidents were reported, however, of persons refusing to render aid in an emergency, implicitly due to the threat of civil liability.[71]

> not held to the exercise of the same degree of care as when he has time for reflection, for the law recognizes that a prudent man so brought face to face with an unexpected danger may fail to use the best judgment, may omit some precaution he could have taken or may not choose the best available method of meeting the dangers of the situation . . . . Under such circumstances he is not negligent if he does what a prudent man would or might have done.

Stevens v. Nurenburg, 117 Vt. 525, 533, 97 A.2d 250, 256-57 (1953) (citations omitted).

66. *See* Stevens v. Nurenburg, 117 Vt. 525, 533, 97 A.2d 250, 256-57 (1953). As the Vermont Supreme Court has explained:

> The rule, known as the rescue doctrine, is well settled that one who sees a person in imminent and serious peril caused by the negligence of another cannot be charged with contributory negligence, as a matter of law, in risking his own injury, provided the attempt is not recklessly or rashly made.

Wilford v. Salvucci, 117 Vt. 495, 498, 95 A.2d 37, 39 (1953). Thus a rescuer must use reasonable care to protect against injuring both the victim and the rescuer, or be liable for negligence.

67. A substantially different version of Section 519 was proposed in 1965. The Vermont Legislature passed the bill, but were unsuccessful in their attempt to override the Governor's veto. Transcript, *Hearings on H.R. 18 Before the Vermont House Judiciary Committee*, 49th Bien. Sess., Jan. 19, 1967, at 1 [hereinafter cited as *1967 Hearings*]; *see also Governor's Veto Message, H.R. 18, Journal of the House*, Wednesday, June 2, 1965, 631-32.

68. *1967 Hearings, supra* note 67, at 2 (testimony of Dr. Porter Dale); *see also id.* at 16 (testimony of Dr. Roy Buttles, President of the Vermont State Medical Society).

69. *Id.* at 8-9 (testimony of Mr. Paradee, ambulance service operator); *id.* at 14 (Mr. H. Wilhelm, member of Stowe Ski Patrol).

70. *See, e.g., id.* at 4 (testimony of Dr. Porter Dale).

71. The operator of an ambulance service testified that doctors would not provide assistance at the scene of an emergency when requested. *1967 Hearings, supra* note 67, at 8-9 (testimony of Mr. Paradee).

The past president of the Vermont Medical Society stated doctors are unwilling to participate in an "emergency service" program. *Id.* at 6-7 (testimony of Dr. Bishop McGill, past president of Vermont Medical Society). A rescue squad operator reported his company had voted to suspend operations if some civil immunity were not enacted by the state. *Id.* at 9

Since few appellate suits have been brought against good samaritans,[72] some scholars question the validity of the litigation fears of the act's proponents.[73] The paucity of cases is not conclusive in determining the reasonableness of their litigation fears. The mere filing of a civil action can cause adverse publicity, which is especially undesirable for members of the medical profession.[74] In addition to the time and expense inherent to the process of litigation,[75] a costly out-of-court settlement is likely without there having been a test of the sufficiency of the complaint.[76] Despite the lack of case law, the act's proponents have good reason to fear litigation.

A lawyer opposing the act recommended insurance as a method of allaying the fears of potential rescuers.[77] In response, paramedics and first aid personnel testified that the cost of insurance was prohibitive for some emergency care providers.[78] Furthermore, insurance would not compensate a good samaritan for the

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(testimony of Mr. Paradee). State Representative Pickard testified from personal knowledge about a "case where an injured [person] was left by [a] doctor afraid of being sued." Record of Committee Meetings, VERMONT HOUSE JUDICIARY COMMITTEE, H.R. 18, 49th Bien. Sess., Jan. 11, 1967, 1, 1.

72. Only 7 such suits had been filed by 1980. Linden, 15 FORUM 377, 390-91 (1980); *see also* 189 J. AM. MED. A. 859, 864-66 (Sept. 1964) (statistical survey of physicians on whether good samaritan statutes encourage rescue, and number of actual suits brought against doctors acting as good samaritans).

73. As Professor Norris theorizes: "A conclusion that can be drawn from the lack of reported cases and the lack of findings of liability against good samaritans, both before and after enactment of good samaritan legislation, is that litigation against good samaritans was never a problem to begin with." Norris, *supra* note 1, at 391. Professor Norris explains, however, that Americans are increasingly litigation-conscious, and consequently suits against good samaritans may occur more frequently. *Id.*

74. *1967 Hearings, supra* note 67, at 4-5 (testimony of Dr. Porter Dale).

75. For members of the Vermont medical profession, bringing an action for malpractice initiates a peer review of the doctor's actions in addition to any judicial review. *Id.* at 15-16 (testimony of Dr. Bishop McGill, past president of Vermont Medical Aid Society). For some non-medical persons, the cost of litigation itself may be prohibitive. *Id.* at 24.

76. Settlements are likely because physicians and others wish to avoid the expense and adverse publicity associated with litigation. *See id.* at 5, 15-16; *see also* Plant, *supra* note 1, at 34 (good samaritan laws may allay litigation fears).

77. *1967 Hearings, supra* note 67, at 18. (Bernard Lisman, Vermont Trial Lawyer's Association).

78. First aid personnel are frequently insured only for services performed within the scope of their employment, not for aid given gratuitously after business hours. *Id.* at 15 (testimony of Mr. H. Wilhelm, Stowe Ski Patrol). Personnel of some Vermont rescue squads are unpaid and the squads' services are provided without charge, making the cost of insurance prohibitive. *See id.* at 11 (testimony of Mr. Paradee, ambulance service operator). In addition, non-medical persons are not likely to insure against the rare instances when they will be required to perform rescues. *See id.* at 24 (testimony of State Representative Hoxie).

adverse publicity caused by the filing of a lawsuit.[79]

Initially, the legislators drafting Section 519 revealed some of the Act's general purposes. The sponsors wished to protect doctors, nurses and the public[80] from civil liability, or at least to reduce their litigation fears.[81] The draftsmen were aware of the inherent inability of Vermont common law to meet their objectives.[82] Using broad statutory language, the legislators provided civil immunity for a wide variety of rescuers rendering reasonable aid,[83] and encouraged reluctant rescuers by imposing criminal sanctions.[84] Implicitly, the statute seeks to discourage suits, but compel rescue.

Alternatives Considered by the Legislature

To apply Section 519, it is important to understand the scope the Legislature intended for the statute. Although the testimony before the legislative committees[85] discussed the Act in regard to roadside accidents,[86] there is substantial evidence suggesting the Act was intended to have a broader application. Unlike an earlier, unsuccessful Vermont good samaritan bill,[87] Section 519 does not

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79. *See supra* text accompanying notes 72-76.

80. Vermont House Judiciary Committee, H.R. 18, 49th Bien. Sess., Jan. 11, 1967.

81. *1967 Hearings, supra* note 67, at 46. *See also* Vermont House Judiciary Committee, H.R. 18, Jan. 26, 1967.

82. Under Vermont common law the jury is instructed that the emergency nature of the circumstances is a mitigating factor in determining the defendant's liability for negligence. *Id.* at 22; *see also supra* note 65. Representative Hoxie argued that, in a negligence action, evaluating all the factors, including mitigating circumstances, was an extremely difficult task for any jury. *1967 Hearings, supra* note 67, at 22-23.

83. The legislators considered the needs of volunteer firemen, rescue squad operators and physicians when rendering emergency assistance. *See, e.g., 1967 Hearings, supra* note 67, at 7-8, 29. Section 519(b) only requires "reasonable assistance," and does not, consequently, limit aid to first aid or other medical care. *See supra* text accompanying note 6.

84. Vt. Stat. Ann. tit. 12, § 519(c) (1973). The inclusion of both civil and criminal characteristics indicates the legislators appreciated the fact that suits would not, and probably should not, be discouraged entirely. Under the Act, grossly negligent rescuers are still liable for the injuries caused by their acts of gross negligence. *Id.*, § 519(b).

85. The opinions of the individual legislators are not conclusive or controlling in determining the legislative purpose of the Act; a legislator's comments during a floor debate are not entitled to the same weight as a carefully drafted committee report. State v. Brinegar, 379 F. Supp. 606, 611 (1974).

86. *See 1967 Hearings, supra* note 67, 1-30 (doctors, rescue squads, volunteer firemen and ski patrolmen rendering aid at scene of automobile accident not adequately protected by common law).

87. H.R. 86, proposed in 1965, provided:

> *Section 1:* This act shall be known and may be cited as the "Good Samaritan Act."
>
> *Section 2:* A person licensed to practice any method of treatment of human

limit civil immunity to medically trained personnel or to persons rendering care at the scene of an emergency.[88] The language of Section 519 is broad, using terms such as "a person"[89] "exposed,"[90] "grave physical harm,"[91] and "reasonable assistance."[92] The Legislature considered a number of statutory alternatives when drafting the Act. For example, the Vermont Attorney General's recommendation of enforcing the duty to rescue without also providing civil immunity, was considered but not adopted.[93] In addition, the Legislature was aware of a number of model statutes when drafting the Act.[94] A comparison of the model statutes with Section 519 reveals the liberal application intended by the Legislature.

An early draft of Section 519, focusing on civil immunity, was based upon a Texas statute,[95] considered by one Vermont legisla-

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> ailments, disease, pain, injury, deformity, mental or physical condition, or licensed to render services ancillary thereto, who in good faith renders emergency care at the scene of an accident or emergency to a victim thereof, shall not be liable for civil damages as a result of his acts or omissions.

H.R. 86 Adj. Sess. (1965).

88. *See supra* text accompanying note 6.

89. VT. STAT. ANN. tit. 12, § 519(a) (1973).

90. *Id.; see infra* note 182.

91. *Vt. Stat. Ann.* tit. 12, § 519(a) (1973).

92. *Id.*

93. The recommendation to impose a statutory penalty for failure to provide aid was made by Vermont Attorney General James L. Oakes, Record of Committee Meetings, *Senate Judiciary Committee*, 49th Bien. Sess., Feb. 14, 1967 at 4, and by opponents of the Act, *1967 Hearings, supra* note 67 at 21-22, 39, 46.

94. *See* State v. D'Amico, 136 Vt. 153, 156, 385 A.2d 1082, 1084 (1978) (although the rationale of the model code is not binding, it is indicative of what the General Assembly intended); *cf.* In re Market Area, 112 Vt. 285, 23 A.2d 536 (1942) (laws are presumed to be drafted with knowledge of all existing laws on the subject).

The House Judiciary Committee was aware that 60% of the states had already enacted good samaritan statutes. *1967 Hearings, supra* note 67 at 2. (Testimony of Dr. Porter Dale) (California which grants immunity for physicians and surgeons giving gratuitous aid at the scene of an emergency; Maryland, North Dakota and Pennsylvania which grant immunities to physicians, surgeons and nurses rendering aid at the scene of an emergency; Florida, Idaho, Nevada, New Hampshire, North Carolina and Texas which grant immunities to anyone who renders aid at the scene of an emergency). *Id.* at 3. The legislators were also aware of the novel statutory schemes adopted by several civil law countries (the Netherlands, Germany, and France); *Id.* at 22; Record of Committee Meetings, *Vermont Senate Judiciary Committee*, H. 18, Feb. 28, 1967 at 4. For a list of State good samaritan statutes *see infra* Appendix.

95. *Tex. Rev. Civ. Stat. Ann.* art. 1a (Vernon 1969); The statute provides in relevant part:

tor to be the best of its kind.[96] Although similar in several respects,[97] the Vermont and Texas statutes differ substantially. The Texas Act simply grants civil immunity for aid rendered at the scene of an emergency; no duty to provide emergency assistance is created, nor is such a duty enforced through monetary penalties.[98] The Vermont statute grants a broader civil immunity because the language "reasonable assistance" does not expressly limit protection to aid rendered at the scene of the emergency.[99] Section 519 may cover such acts as transporting victims to medical facilities, leaving the emergency scene to seek help, and other forms of aid. By refusing to adopt the express limitations of other states' good samaritan statutes, it appears the Vermont Legislature wished to provide more extensive protection for good samaritans.

The Vermont Legislature was also aware of the good samaritan statutes of such civil law countries as France, Germany and the Netherlands.[100] Article 63 of the French Penal Code[101] imposes a duty to render aid[102] upon persons, who know or are reliably informed[103] that another is in serious physical danger. Like the Vermont act, the French statute does not require aid if the rescue involves danger to the rescuer,[104] and imposes penalties for "voluntary" violations of the statute.[105] Significantly, the French

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> No person shall be liable in civil damages who administers emergency care in good faith at the scene of an emergency . . . unless such acts are wilfully or wantonly negligent; provided that nothing herein shall apply to . . . care . . . rendered for remuneration or with the expectation of remuneration . . . .

Id.

96. Record of Committee Meetings, *Vermont House Judiciary Committee*, H. R. 18, Jan. 26, 1967.

97. The statutes of both Vermont and Texas provide civil immunity from ordinary negligence actions for anyone who renders aid. Rescuers are still liable, however, for acts constituting gross negligence, or if remuneration is involved. *Compare supra* text accompanying note 6 *with supra* note 95.

98. *See supra* note 95.

99. *See supra* text accompanying note 6. Other states have expressly limited their good samaritan immunities in several ways. *See infra* Appendix p. ___.

100. Record of Committee Meetings *Vermont Senate Judiciary Committee*, H. 18, Feb. 28, 1967; *see also supra* note 94.

101. Art. 63, CODE PENAL [C. PEN.] 59 ed., Petits Codes Dallog, Paris 1962 p. 40, *reprinted in* Rudzinski, THE DUTY TO RESCUE: A COMPARATIVE ANALYSIS, THE GOOD SAMARITAN AND THE LAW, 91, 130-31 (J. Ratcliffe ed. 1962) [hereinafter cited as Rudzinski]; *see generally* Tunc, *The Volunteer and the Good Samaritan*, THE GOOD SAMARITAN AND THE LAW, 43 (J. Ratcliffe ed. 1962) [hereinafter cited as Tunc].

102. Rudzinski, *supra* note 101, at 98.

103. *Id.* at 102.

104. *Id.* at 106.

105. *Id.* at 109.

statutory penalties include both fines and imprisonment. These penalties are more severe than those provided in the Vermont statute.[106] In addition to the criminal penalties,[107] French courts have routinely recognized violations of Article 63 as giving rise to civil liability.[108] As a result, the French statute penalizes violators and compensates the victims of such unlawful behavior.

Article 63 incorporates many of the features of the statutes of Germany,[109] the Netherlands,[110] and other European countries.[111] A majority of European countries have imposed civil liability for either failing to render aid or for violating the statutes requiring rescue.[112] Although the European statutes are criminal statutes, the statutes may be the basis for a victim's civil action to obtain compensation.

The imposition of civil liability by civil law countries differs markedly from common law tradition. The reason for this distinction is not entirely clear.[113] Nevertheless, Vermont legislators were

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106. A person violating the French good samaritan statute may be sentenced to a maximum of 5 years in prison and fined between 360 to 15,000 francs. *Id.* at 110; Tunc, *supra* note 101, at 47.

107. In France in 1962, 52 persons were imprisoned and 12 were fined for failure to rescue under the good samaritan statute. Tunc, *supra* note 101, at 57-58.

108. Rudzinski, *supra* note 101, at 113, 113 n.61; Tunc, *supra* note 83, at 49.

109. Rudzinki, *supra* note 101, at 130 app. Article 330c of the German penal code requires:

> Whoever does not render help in cases of accident, common danger or necessity although help is required and under the circumstances is exactable, and in particular is possible without danger of serious injury to himself and without other important . . . duties, will be punished up to one year or with money fine.

Dawson, *Rewards for the Rescue of Human Life?*, THE GOOD SAMARITAN AND THE LAW, 63, 69 (J. Ratcliffe ed. 1962) [hereinafter cited as Dawson]. Violation of the statute may be the basis of a civil action for damages. Rudzinski, *supra* note 101 at 112-13; *but see* Dawson, at 71 (author asserts no German cases found showing violation of German good samaritan statute was basis for civil liability claim).

110. Rudzinski, *supra* note 101 at 126 app. Under the Dutch penal code, article 452, the duty to render aid arises when there is sudden and imminent danger to human life. *Id.* at 96. Only those outsiders witnessing or finding a person in distress are required to render aid. *Id.* at 101. There is no duty to perform rescues which involve personal danger to the rescuer. *Id.* at 106-07. Criminal penalties (detention and a fine) are imposed when a party "voluntarily" refuses to lend assistance which results in the victim's death. *Id.* at 109-10, 110 n.57.

111. *See generally id.* at 91-134 (comparison of good samaritan statutes of numerous countries).

112. *Id.* at 111-15.

113. There are many variables which could explain the different development common and civil law traditions. The good samaritan statutes of Europe were enacted under varying circumstances over a long period of time, between 1867 and 1961. *See id.* at 91-92 n.3. For example, the Nazi party was responsible for enacting the German, Dawson, *supra* note 109

aware of both legal traditions when drafting Section 519. The striking similarities of the French and Vermont statutes suggest that the Vermont Legislature intended Section 519 to establish a standard of social conduct.

THE VERMONT "AID THE ENDANGERED" SCHEME

A. *Initial Questions of Efficacy*

After the enactment of Section 519, some legal scholars expressed optimism that the statute could effectively encourage rescues, either by the imposition of criminal penalties[114] or by the grant of civil immunity.[115] In the fourteen years since its enactment, however, there has been only one appellate decision construing the statute.[116] In addition, there is no available record of a prosecution under the statute.[117] It is possible the statute has

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at 69, and French statutes, Tunc, *supra* note 101 at 4. Nevertheless, at the close of World War II both nations reenacted their good samaritan statutes. Some scholars argue that the common law countries place a higher value on promoting individuality and discouraging intermeddling. *Id.* at 91-92; *see supra* note 18. Yet the common law has had no difficulty in imposing affirmative duties upon persons in special relation with the victim. *See supra* text accompanying notes 35-44.

114. Professor D'Amato posits that criminal sanctions are more appropriate than tort liability because: a) the duty to rescue is owed to society and not to the individual, D'Amato, *supra* note 9, at 806-08; b) when society has been wronged a criminal sanction is appropriate, *id.* at 807-08; c) criminal sanctions heighten the public moral sensibility while the safeguard of prosecutorial discretion promotes fairness, *id.* at 809-10; and d) tort actions are subject to abuse and are ineffective against judgment-proof defendants, *id.* at 807-08.

115. Professor Franklin states that while the Vermont statutory scheme is criminal in nature, Franklin, *supra* note 9 at 55, civil liability for statutory violations may be desirable because: a) the criminal penalties need reinforcement, *id.* at 56; b) civil liability is no less appropriate here than in cases of negligence or violations of other statutory duties, *id.;* and c) a criminal statute puts the public on notice of proper social behaviour and thus later high civil awards are not unexpected, *id.* at 56-57.

116. There have been only two court cases mentioning Section 519. In State v. Joyce, 139 Vt. 638, 433 A.2d 271 (1981), the supreme court found the statute did not require bystanders to intervene in a fight. In St. Johnsbury & Lamoille County R.R. v. Canadian Pac. Ry. Co., 341 F. Supp. 1368, 1373 n.5 (D. Vt. 1972) the court refused to apply section 519 because the statute "relates to 'Emergency medical care,' but deals only with 'physical' harm to 'persons,' and does not mention civil liability." *Id.*

117. Ascertaining whether there have actually been any prosecutions under Section 519 would be possible, but highly impractical. The Office Supervisor for the Vermont Criminal Information Center stated that she was unaware of any such prosecutions and that all such records pass her desk before being filed. Telephone interview with Janet Stranahan, Office Supervisor for the Vermont Criminal Information Center, March 20, 1981. Several Vermont State's Attorneys were also unaware of any prosecutions under Section 519. Telephone interview with Jesse Corum, Windham County State's Attorney, March 20, 1981; telephone interview with Mark Keller, Chittenden County State's Attorney, March 20, 1981; telephone interview with James P. Mongeon Rutland County State's Attorney, March 20, 1981.

never been violated, but this seems unlikely.[118] Questioning the enforceability of the statute is revealing, but of greater practical significance is questioning whether the statute is likely to be enforced.[119]

To better evaluate the utility of Section 519 as a standard of social conduct, one should consider the civil and criminal components separately. If civil immunity cannot increase rescues by reducing litigation fears, and if criminal sanctions are too cumbersome to enforce, it is appropriate to consider alternatives to supplement the statutory scheme.

B. *The Statutory Incentives*

It is questionable whether the civil immunity established under Section 519(b) is sufficient to encourage members of the public to aid the endangered. To be efficacious the statute must both immunize negligent rescuers and discourage victims from filing suits.[120]

Victims are not likely to be discouraged from filing suits against the "negligent" good samaritan. The goal of the victim-plaintiff is to recover the cost of the injury, whether or not that requires success at trial. Filing a lawsuit demonstrates to the defendant the victim's determination to recover. As a result, the reluctant defendant is more likely to forego the costs, publicity, and embarrassment of trial by negotiating a settlement. Should negotiation fail, the matter can still be resolved at trial.

Two factors probably influence the victim's decision to file

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118. In 1962, the French government successfully prosecuted 64 persons for violating a statute very similar to Vermont's Duty to Aid the Endangered Act. *See* Tunc, *supra* note 101, at 58; *cf.* State v. Joyce, 139 Vt. 638, 433 A.2d 271 (1981) (bystanders failed to rescue assault victim by calling police). Analogously, numerous violators of VT. STAT. ANN. tit. 23, § 1128 (1978) (requiring drivers involved in an accident to render aid to victims of motor vehicle accidents) have been successfully prosecuted, but no fines have been imposed upon the passengers who also left the scene without rendering aid. *See also infra* notes 158, 160.

119. The difficulty in enforcing Section 519 goes beyond the fact that State's Attorney offices have not received complaints about violations of the statute. Prosecutorial resources are limited and prosecutors handling a full case load may not have the time or money to handle the complex litigation demanded by Section 519. If a complaint is filed by a private citizen, however, prosecutors will be compelled to act. Telephone interview with James P. Mongeon; Rutland County State's Attorney, March 20, 1981.

120. *See* Note, *The Duty to Rescue*, 47 IND. L.J. 321, 327 (1972). Litigation can result in the loss of time, money and reputation. *See supra* text accompanying notes 74-76. The justification for Section 519 is that fears of litigation are quelled. *See* Plant, *supra* note 1, at 34.

suit. First, as the value of the plaintiff's action increases, so should the willingness of the victim to risk litigation. Second, as the uncertainty of the outcome of the trial increases, the victim should anticipate that the defendant will be more likely to agree to a settlement.[121] The broad statutory language of Section 519(b)[122] contributes to the unpredictability of litigation under the statute and encourages victims to bring lawsuits against good samaritans.[123] The complexity of Section 519(b) litigation is evidenced by the breadth of legal and factual issues confronting the parties at trial.

An initial legal question is whether the grant of civil immunity for ordinary negligence under Section 519(b) is constitutional.[124] The Vermont Constitution provides, in relevant part, that "[e]very person within this state ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs which he may receive . . . ."[125] Even though statutes are presumed to be constitutional unless clear evidence establishes otherwise,[126] a victim could argue that subsection 519(b) violates the Vermont Constitution by precluding plaintiffs from exercising their right to sue negligent rescuers. Whether such a constitutional challenge would be suc-

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121. The more factual and legal issues to be decided at trial, the costlier and more time consuming litigation can become.

> [The good samaritan statutes] leave a great many factual questions to be decided by a jury, thereby encouraging the emergency patient to bring actions . . . . It is, therefore, overly optimistic to anticipate that substantially more doctors will stop at automobile accidents or aid injured strangers. The fear of malpractice suits persists less from the threat of an adverse judgment than from concern that the commencement of any action will damage a doctor's reputation.

64 COLUM. L. REV. 1301, 1311 (1964). Assuming a defendant-rescuer is more concerned with costs and reputation than with vindicating a principle, the defendant will agree to a settlement when the cost of settlement is less than the cost of a successful resolution at trial.

122. *See supra* text accompanying notes 88-92.

123. Norris, *supra* note 1, at 392. "[V]ery little of the . . . terminology [in the good samaritan statutes] is defined. Thus considerable doubt may exist as to whether the immunity granted by a specific statute applies to a given situation." *Id.* at 391. The good samaritan statutes leave many factual issues for the jury thereby encouraging lawsuits. *See* 64 COLUM. L. REV. 1301, 1311 (1964); *cf.* Rudolph, *The Duty to Act: A Proposed Rule*, 44 NEB. L. REV. 499, 536 (1965) (adoption of good samaritan statute providing civil immunity for rescue will change the behavior of the individual very little, but might create a better environment for the individual to be a good citizen).

124. The Vermont legislators were concerned with the question of the constitutionality of the good samaritan statute. *1967 Hearings, supra* note 67, at 21. The Attorney General's Office for the Commonwealth of Kentucky published an opinion that Kentucky's good samaritan statute violated the state constitution. Op. Att'y Gen. 79-535 (1979).

125. VT. CONST. art. 4 (1972).

126. State v. Bartlett, 128 Vt. 618, 621, 270 A.2d 168, 170 (1970) ("[T]he invalidity of a legislative act must be clear before it can be declared unconstitutional.").

cessful is open to question. The United States Supreme Court has granted the states significant discretion in enacting statutes granting civil immunity.[127] Consequently, the state supreme courts construing constitutional provisions similar to Vermont's have upheld statutes granting civil immunity,[128] particularly the good samaritan statutes.[129]

Application of Section 519(b) would also require the Vermont courts to determine the scope of the statute by interpreting the relevant language. As a statute of limitation,[130] Section 519(b) is remedial in nature and should be interpreted liberally.[131] The power of trial courts to dismiss suits as a matter of law should be limited because liberally construed statutes apply to a broader range of factual situations than narrowly construed statutes. Therefore, a greater number of cases should be presented to the jury.[132] Once a case reaches the jury, a number of difficult factual issues must be resolved.

It is unclear from the language of Section 519(b) who is to receive civil immunity. The first sentence of the statute provides: "A

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127. *See* Duke Power Co. v. Carolina Envt'l Study Group, Inc., 438 U.S. 59, 88 n.32 (1978); Silver v. Silver, 280 U.S. 117, 121-22 (1929).

128. *See* Taylor v. Keefe, 134 Conn. 156, 56 A.2d 768 (1947) (an injury is not compensable absent recognition by common or statutory law; within province of courts and legislature to redefine and abolish existing definitions of injury).

129. *See, e.g.*, Primes v. Tyler, 43 Ohio St. 2d 195, n.5, 331 N.E.2d 723, 727n.5 (1975).

130. Section 519 is located in chapter 23 of title 12 of the Vermont Statutes Annotated, which is labelled "Limitations of Time for Commencement of Actions," (abbreviated as "Limitations of Actions"). Captions and statutory titles are relevant indicators of the legislature's intent. *See* State v. Lynch, 137 Vt. 607, 613, 409 A.2d 1001, 1005 (1979); *cf.* In re Greenough, 116 Vt. 227, 75 A.2d 569 (1950) (title of statute making act a crime is only considered when meaning of statute is doubtful).

131. Meunier v. Leno, 125 Vt. 30, 33, 209 A.2d 485, 488 (1965). Statutes which are remedial in nature are to be construed liberally, whether or not in "derogation" of the common law. *See* Vaillancourt v. Medical Center Hosp. of Vt., Inc., 139 Vt. 138, 141, 425 A.2d 92, 94 (1980).

> It is an established principle that the rules of the common law are not to be changed by doubtful implications, nor overturned except by clear and unambiguous language . . . and the rule is equally well established that those remedial statutes are to be construed liberally to effectuate their purpose . . . . [T]here is no conflict between these rules of construction. A remedial statute asserted as modifying the rule of the common law must receive a strict construction on the question of whether it does modify it; but if found, when so regarded, that it was intended to replace a common law rule, in whole or in part, it must be given the same effect by liberal construction . . . .

In re Dexter 93 Vt. 304, 312, 107 A.2d 134, 136-37 (1919).

132. *See supra* note 123.

person who provides reasonable assistance in compliance with subsection (a) shall not be liable in civil damages . . . ."[133] The courts must determine what constitutes "compliance with subsection (a)." The question is whether the Vermont statute protects: 1) any person giving aid under the circumstances described in subsection (a), whether or not a legal duty exists;[134] or 2) only persons legally required to give aid. Under the first interpretation, a trial court could grant Section 519(b) immunity even if: a) the rescuer owed important duties to other; b) the rescuer had incurred a risk of grave physical harm when giving aid; or c) the rescuer had merely assisted others already rendering aid. Under the second interpretation, the Vermont courts could limit the negligence immunity to those persons legally required to render aid[135] (*i.e.* none of the statutory exceptions to the duty requirement applied). Such a narrow construction of the statute would seem unlikely because it would frustrate the legislative intent of encouraging altruism.[136] Should the courts adopt a narrow interpretation, however, the statute would lead to bad results, such as discouraging medically trained persons from rendering aid because non-medically trained persons

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133. VT. STAT. ANN. tit. 12, § 519(b) (1973).

134. Under Section 519(a), there is no duty to render assistance when aid involves "danger or peril to [the rescuer] or . . . interference with important duties owed to others . . . [or] assistance or care is being provided by others." VT. STAT. ANN. tit. 12, § 519(a) (1973). Although these exceptions may apply, the rescuer may elect to render aid nonetheless. The question arises whether persons who render aid, even though not compelled by law to do so, enjoy the civil immunity of Section 519(b).

135. Theoretically, the prerequisites for subsection (b) immunity are: 1) victim is exposed to grave physical harm; 2) no risk of danger for rescuer to render aid; 3) rescuer owes no important duties to others; 4) rescuer renders reasonable assistance to the person exposed to danger; and 5) care is not being provided by others. VT. STAT. ANN. tit. 12, § 519(a) (1973). Some jurisdictions apply the good samaritan statutes to protect rescuers aiding victims of violent assaults. *See, e.g.*, Pope v. State, 284 Md. 309, 396 A.2d 1054 (1979); MD. ANN. CODE art. 27, § 12A (1976) (statute does not apply to rendering aid other than to victims of violent crimes); *but see* State v. Wenger, 58 Ohio St.2d 336, 390 N.E.2d 801 (1979) (good samaritan statute does not protect all forms of rescue). The *Wenger* decision implies that if a rescuer renders aid without a requirement or right to do so, the rescuer acts at his own peril. *Id.* (right to aid assault victim only attaches when the victim has a right to self defense; victim had no right to defend self from plainclothes police officer making lawful arrest); *see also* Dailey v. Birmingham, 378 So.2d 728, 729 (Ala. 1979) (volunteer acting without any duty to do so is charged with a duty of care and is liable if negligent).

136. *See supra* notes 80-84 and accompanying text. "The fundamental rule in the construction of statutes is to ascertain and give effect to the intention of the legislature." Swanton Village v. Highgate, 131 Vt. 318, 321, 305 A.2d 586, 588 (1973). Therefore, "it is essential that the construction not be such that will render the act ineffective or lead to irrational consequences." Audette v. Greer, 134 Vt. 300, 302, 360 A.2d 66, 68 (1976); *but see* Malone v. Seattle, 24 Wash. App. 217, 600 P.2d 647 (1979) (legislative intent found in plain words of statute and only look beyond statutory language if ambiguity is present.)

were already providing assistance.

A person who "will receive or expects to receive remuneration" is expressly excluded from the statutory protections of Section 519(b).[137] Theoretically the statute protects the volunteer but holds the paid professional to the standard of care established for that profession. Some persons, such as off-duty policemen and volunteer firemen, may be described as both professionals and as volunteers. The states are divided on how to classify these "professional volunteers,"[138] creating further interpretive problems for the courts.

After determining who is protected, the courts will be required to determine when the protections apply. Under the Vermont statute, practitioners of the healing arts are expressly excluded from the civil immunity provision if they are acting within the "ordinary course" of their practice.[139] The implicit justification for this exclusion is to maintain the standards and integrity of the medical profession.[140] The difficulty presented is in determining when a medical practitioner is acting within the "ordinary course" of his practice. Courts have differed as to what circumstances permit medical personnel to benefit from the protections of the good samaritan statutes.[141] The analysis as to when the protections apply may be different if the rescuer is not a practitioner of the healing arts. The courts may focus upon the nature of the danger and upon the presence of other rescuers at the scene of the emergency to

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137. VT. STAT. ANN. tit. 12, § 519(b) (1973).

138. *See* Lee v. State, 490 P.2d 1206, 1210 (Alaska 1971) (state police are not volunteers and are not protected by the state's good samaritan statute); Macy v. Heverin, 44 Md. 358, 408 A.2d 1067 (1979) (volunteer firemen are not protected under the state's good samaritan statute.)

139. *See supra* text accompanying note 6.

140. *See* Guerrero v. Copper Queen Hosp., 112 Ariz. 104, 537 P.2d 1329 (1975); Colby v. Schwartz 78 Cal.App.3d 885, 144 Cal.Rptr. 624 (1978); Gragg v. Neurological Associates, 152 Ga. App. 586, 263 S.E.2d 496 (1979); Markman v. Kotler, 52 A.D.2d 579, 382 N.Y.S.2d 522 (1976).

141. *Cf.* McKenna v. Cedars of Lebanon Hosp., 93 Cal.App.3d 282, 155 Cal.Rptr. 631 (1979) (doctor who is not on-call and provides gratuitous emergency aid to a victim in a hospital is protected under the state's good samaritan statute); Hamburger v. Henry Ford Hosp., 91 Mich. App. 580, 284 N.W.2d 155 (1979) (scene of emergency alone does not justify application of immunities of good samaritan statute, the doctor claiming immunity must also show that there was no established doctor-patient relationship prior to rendering aid); Markman v. Kotler, 52 A.D.2d 579, 382 N.Y.S.2d 522 (1976) (doctor who creates the emergency cannot benefit from the immunities of the state's good samaritan statute for acts performed in the subsequent rescue).

determine if the protections apply.[142]

The immunity created by Section 519(b) is not absolute. The good samaritan is liable for acts constituting "gross negligence."[143] Determining how careless a good samaritan may be before liability is incurred presents a difficult task for the factfinder.[144] Applying the gross negligence standard would be far easier and more predictable if the term was routinely used within the Vermont common law, but such is not the case.[145] The Vermont Supreme Court has defined gross negligence as "the failure to exercise even a slight degree of care."[146] Although some support for the gross negligence standard has been expressed,[147] neither the Vermont courts nor the Legislature has been satisfied.[148] The difficulty in applying the standard lies in distinguishing ordinary from gross negligence. The factfinder must resolve this issue without any clear analytical method available for determining whether liability should be imposed upon the "negligent" rescuer.

In light of the complex legal and factual issues arising under Section 519(b), the Act appears incapable of easing the apprehensions of potential rescuers.[149] The statute may serve a valuable

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142. *See supra* text accompanying notes 133-36.

143. VT. STAT. ANN. tit. 12, § 519(b) (1973).

144. *See* Rivard v. Roy, 124 Vt. 32, 35, 196 A.2d 497, 500 (1963).

145. "[T]he notion of descriptive 'degrees' of negligence, such as 'ordinary,' 'gross' and 'wilful,' was not part of our common law, but was imported by enactment of the so-called guest passenger statute, No. 78 of the Acts of 1929. In 1970 that statute . . . was repealed." Green v. Sherburne Corp., 137 Vt. 310, 312, 403 A.2d 278, 80 (1979).

146. Peck v. Gluck, 113 Vt. 53, 55, 29 A.2d 814, 815 (1943); Rich v. Hall, 107 Vt. 455, 457-58, 181 A. 113, 114 (1935); *see also* Rivard v. Roy, 124 Vt. 32, 35, 196 A.2d 497, 500 (1963) (the existence of ordinary or gross negligence turns on the facts of the case); *cf.* Sorrell v. White, 103 Vt. 277, 282-85, 153 A.2d 359, 362-63 (1931) (distinguishing "gross" negligence from "willful" negligence).

147. Langdon-Davies v. Stalbird, 122 Vt. 56, 57, 163 A.2d 873, 875 (1960) (quantitative measurement of grossness of negligence can be deduced by weighing the evidence and passing on the credibility of witnesses).

148. "The phraseology [of gross and willful negligence] occasionally still echoes . . . but it was so ineffective as a definition of duty . . . ." Green v. Sherburne Corp., 137 Vt. 310, 312-13, 403 A.2d 278, 280 (1979). The statute enacting the gross negligence standard was repealed in 1970. *See supra* note 145.

149. Studies conducted by the American Medical Association reveal that whether or not a state provides civil immunities for good samaritans, doctors are as likely to refuse to render aid as they are to provide it. Norris, *Current Status and Utility of Emergency Medical Care Liability Law*, 15 FORUM 377, 392-93 (1980). The good samaritan statutes leave complex factual questions to be determined before liability is proved or disproved, establishing a basis for litigation. In such a case, bystanders will not perform rescues due to the costs of defending against or settling negligence actions. Holland, *supra* note 1 at 133-34.

purpose by encouraging altruistic behavior[150] and by protecting rescuers from civil liability,[151] but substantial grounds still exist for litigation. The Legislature may have created an unresolvable dichotomy. The vague language of Section 519 provides a civil immunity which protects a broad category of rescuers. This vague language, however, is highly susceptible to litigation, which discourages rescue.

C. *The Statutory Penalties*

If the civil immunity granted under Section 519(b) cannot entice people to perform rescues, the question arises whether the penalties of Section 519(c) can coerce people to perform rescues. The issue is not whether the statute *can* be enforced, but whether the statute *will* be enforced. Practical considerations, such as the time and cost of prosecution, and the enforcement priority[152] established for a Section 519(c) offense, will affect the state's attorney's decision to prosecute.[153] The Duty to Aid the Endangered Act presents a substantial number of complex legal and factual issues which will discourage Vermont's state's attorneys from seeking convictions under the Act. Similar to the considerations of the potential rescuer, the state's attorney is less likely to act if the defendant raises issues requiring costly and complex litigation.

Before a complaint could be brought, the court must determine whether Section 519(c) is a criminal or civil statute.[154] This

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150. *See generally* Note, *The Duty to Rescue in Tort Law: Implications of Research on Altruism*, 55 IND. L.J. 551 (1980) (research on altruism suggests a legal duty to render aid may lead to more rescue behavior because the legal duty 1) decreases ambiguity by providing a rule of behavior, and 2) affects the cost-reward calculus people use in deciding whether to render aid). Section 519(b) provides protection from civil liability for good samaritans even though the statute may not encourage the litigation-conscious rescuer to render aid.

151. *See, e.g.*, Wallace v. Hall, 145 Ga.App. 610, 244 S.E.2d 129 (1978) (housewife not liable for negligently rendering aid to workman who had fallen off a ladder; state's good samaritan statute applied).

152. "Enforcement priority" refers to the practice of prosecutors, either formally or informally, setting priorities on the classes of cases they will seek convictions and the cases they will plea bargain or dismiss. *See* State's Attorney v. Attorney General, 138 Vt. 10, 409 A.2d 599 (1979) (state's attorney has broad discretion in deciding whether to prosecute); *cf.* D'Amato, *supra* note 9, at 810 (prosecutorial discretion in safeguarding good samaritans); W. LAFAVE & A. SCOTT, CRIMINAL LAW, § 4 at 15 (1972) (use of prosecutorial discretion as a means of promoting important policies).

153. *See supra* note 119.

154. As explained by the United States Supreme Court: "The question whether a statutorily-defined penalty is civil or criminal is a matter of statutory construction." United States v. Ward, 100 S.Ct. 2636, 2641 (1980). The fact that not all statutes are presumed to be criminal has created a complex issue for the courts. *See* Kennedy v. Mendoza-Martinez,

determination has a significant impact both on how a complaint is brought,[155] and on the scope of the defendant's due process rights.[156] Criminal prosecutions provide defendants with greater procedural and substantive protections than civil actions, thereby placing a heavy burden upon the state's attorney.[157]

To avoid the costs of criminal litigation, the state could argue that, prior to the enactment of Section 519, the duty to provide aid existed for particular persons under Vermont law.[158] These preex-

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372 U.S. 144, 168-69 (1963); State v. Santi, 132 Vt. 615, 617-18, 326 A.2d 149, 150-51 (1974); *see generally* LAFAVE, *supra* note 152, § 7 at 38-39 (distinguishing civil and criminal penalties).

155. Vermont's State's Attorneys are granted broad discretion in deciding whether to initiate a criminal prosecution. A decision not to prosecute is given great deference by the courts. State's Attorney v. Attorney General, 138 Vt. 10, 409 A.2d 599 (1979). Once a decision has been made to initiate a criminal complaint, the prosecutor must establish probable cause for the complaint. VT. R. CRIM. P. 4(b) (1974). The State's Attorney has the option to prosecute either by indictment or information. VT. R. CRIM. P. 7 (1974).

156. The Vermont Supreme Court has held that a person who commits an offense has a right to a jury trial, as guaranteed by VT. STAT. ANN. tit. 13, § 7002 (Supp. 1981). State v. Santi, 132 Vt. 615, 616-18, 326 A.2d 149, 151 (1974) (traffic statute imposed fine for violation and fine establishes violation of statute as a criminal offense; because traffic statute does not expressly deny right to jury, defendant may exercise statutory right to jury trial); *see also* VT. CONST. art. 10 (Supp. 1981) (establishing right to jury trial). Criminal trials provide defendants other safeguards: such as, guaranteeing defendant's right to a speedy trial, State v. Dragon, 130 Vt. 570, 298 A.2d 856 (1972), denying the state the right to a directed verdict, Helvering v. Mitchell, 303 U.S. 391 (1938), preventing a defendant from being tried twice for the same offense, *id.*, establishing proof of each element of the offense beyond a reasonable doubt, State v. Colby, 139 Vt. 475, 431 A.2d 462 (1981), and requiring the state to show probable cause when bringing a criminal complaint, Woodmansee v. Smith, 130 Vt. 383, 296 A.2d 182 (1972); VT. R. CRIM. P. 4 (1974). *See generally* LAFAVE, *supra* note 152, § 4 (discussing the characteristics and policies of criminal procedure).

157. Under some circumstances, the defense attorney may prefer that the non-rescuer's case be tried as a criminal matter rather than as a civil matter because the state incurs a higher burden of proof. Interview with Timothy S. Rieser, Washington County Public Defender, April 6, 1982; *see also* In re Winship, 397 U.S. 358 (1970) (prosecutor must prove case beyond a reasonable doubt); State v. Colby, 139 Vt. 475, 431 A.2d 462 (1981) (state must prove all the essential elements of an offense beyond a reasonable doubt).

158. The duty to render aid has been imposed by statute. For example, VT. STAT. ANN. tit. 23, § 1128 (1978) requires the driver of a motor vehicle involved in an accident to render any assistance reasonable necessary. The penalty for violating the statute is a fine of up to $2,000.00. *Id.*; *see also* State v. Sawyer, 126 Vt. 372, 230 A.2d 425 (1967) (statute is not unconstitutional by requiring assistance); State v. Severance, 120 Vt. 268, 138 A.2d 425 (1956) (purpose of "Hit & Run" statute is to prevent injuries to the helpless). VT. STAT. ANN. tit. 13, §§ 1353, 1354 (Supp. 1981) requires certain persons, such as doctors and other medical personnel, to report evidence of child abuse. The statute also offers immunity from civil and criminal liability for other specific classes of persons (*i.e.*, teachers, day care workers and psychologists) who voluntarily report evidence of child abuse. *Id.* Vermont common law has also imposed a duty to render aid. *See supra* text accompanying notes 49-54, 63; *see also* Eastman v. Williams, 124 Vt. 445, 201 A.2d 146 (1965) (teacher is personally liable to pupils under teacher's supervision for injuries caused by teacher's negligent act or nonfea-

isting legal duties are limited to persons in a statutorily or judicially recognized relationship with the victim.[159] Section 519 merely expands the duty to rescue to anyone who knows another is exposed to grave physical harm.[160] The state could also point out that because the Act is not located in the criminal code, but in the chapter on Limitations of Actions,[161] the penalty is civil and not criminal. Arguably, the state could conclude that the intent of the Legislature was to expand a civil duty through a civil statute. As a result, the state would request that the court not grant the substantive and procedural rights of criminal law to defendants subject to a Section 519 action.[162]

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sance); Ready v. Peters, 119 Vt. 10, 117 A.2d 375 (1955) (taxicab operator has a duty to protect passengers from injuries the operator could foresee and avert by warning the victim).

159. See supra note 158.

160. Under VT. STAT. ANN. tit. 23, § 1128 (1972) only the driver is required to aid to the injured when the driver is involved in a motor vehicle accident. *Cf.* Cecil v. Hardin, 575 S.W.2d 268, 270 (1970) (passenger has no legal duty to assist person injured by the automobile the passenger was riding in, unless some special relationship exists). Applying Section 519, passengers would also be required to render emergency care, or incur the fine. Vermont's Child Abuse Statute, VT. STAT. ANN. tit. 13, § 1353 (Supp. 1981), only requires certain persons, such as doctors and nurses, to report evidence of child abuse. Although Section 519 could not be construed to require everyone to report evidence of child abuse, the good samaritan statute could impose a general duty to report immediately an incident of abuse when observed. *Cf.* State v. Joyce, 139 Vt. 638, 433 A.2d 271 (1981) (no duty to intervene into a fight under Section 519(a)). Vermont law does not require persons to report crimes. *Cf.* State v. Wilson, 80 Vt. 249, 67 A. 533 (1907) (misprison is an offense at common law recognized by Vermont law which is criminal neglect to prevent a felony or to bring a felon to justice; the state must prove evil intent for defendant to be guilty of misprison). Applying Section 519, a person may be required to report to the police when a crime in progress is exposing a person to grave physical harm. *Cf.* State v. Joyce, 139 Vt. 638, 433 A.2d 271 (1981) (although court found no duty under Section 519 to intervene in a fight, the court did not answer whether the witnesses had a statutory duty to report the fight to the police). This interpretation of Section 519 assumes that "reasonable assistance" should be liberally construed to require at least some assistance for the endangered. "Reasonable assistance" can include calling for help as well as undertaking an actual rescue. *See* supra notes 85-92, 99 and accompanying text. The Vermont Supreme Court has stated, however, that Section 519 "create[s] a duty . . . under some circumstances," implying that narrow limits to the statutory duty may exist. State v. Joyce, 139 Vt. at 641, 433 A.2d at 273.

161. *See supra* note 130. This argument should not be persuasive because other statutes, not located in the criminal code, have been held to establish criminal penalties. *See* State v. Santi, 132 Vt. 615, 616-18, 326 A.2d 149, 151 (1974) (traffic statute imposing fines for violations of the motor vehicle code establishes a criminal offense); *see also* VT. STAT. ANN. tit. 23, § 1128 (1972) (imposing a fine for driver's failure to remain at the scene of a motor vehicle accident to render assistance); State v. Bosworth, 124 Vt. 3, 197 A.2d 211 (1963) (violation of VT. STAT. ANN. tit. 9, § 34(c) (1970) (repealed 1967) making a usurious loan was a misdemeanor).

162. The state would be able to impose the fine for failure to rescue even though the penalty is civil in nature. *See* Helvering v. Mitchell, 303 U.S. 391, 400 (1938) (payment of sums of money are sanctions enforceable by civil proceedings); Bauer v. Malloy, 135 Vt. 175,

Scholars analyzing the Vermont statute, however, have assumed that Section 519(c) is a criminal statute.[163] This assumption is supported by a number of persuasive considerations. Most importantly, the Vermont Supreme Court has held that the imposition of a fine is dispositive in defining a statute as criminal.[164] Civil penalties usually take the form of administrative action,[165] not fines.[166] The imposition of criminal penalties is consistent with the legislative purpose of the Act.[167] Furthermore, the Legislature's intent to create a criminal penalty may be adduced from the model acts considered by the legislators.[168] It is unlikely that an appeal to the United States Supreme Court, to overturn a Vermont decision construing the statute as civil, would be successful.[169]

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376 A.2d 17 (1977) (suspension of a motor vehicle license is a civil penalty enforceable by the state).

163. *See, e.g.*, D'Amato, *supra* note 9, at 804 (advocating criminal penalties for failure to rescue and rejecting imposition of civil liability); Franklin, supra note 9 at 55-57 (criminal statute at core of regulatory pattern; criminal statute states legislative demand most clearly; and fine closer to gravity of offense than civil damage award).

164. State v. Santi, 132 Vt. 615, 617-18, 326 A.2d 149, 151 (1974); *cf.* In re Mears, 124 Vt. 131, 198 A.2d 27 (1964) (penalty of imprisonment means crime is a felony, even though alternative of a fine would make the crime a misdemeanor).

165. *See, e.g.*, Bauer v. Malloy, 135 Vt. 175, 376 A.2d 17 (1977) (suspension of motor vehicle license by state is civil penalty); State v. Santi, 132 Vt. 615, 326 A.2d 149 (1974) (commissioner may revoke license but imposition of fine is criminal penalty); *see also* Helvering v. Mitchell, 303 U.S. 391, 402-04 (1938) (distinguishing between civil and criminal proceedings).

166. *Compare* Bauer v. Malloy, 135 Vt. 175, 177, 376 A.2d 17, 18 (1977) (suspension of operator's license is a civil penalty); *with* State v. Santi, 132 Vt. 615, 616-17, 326 A.2d 149, 151 (1974) (a fine is an imposition of a penalty for a criminal act).

167. *See supra* notes 80-84 and accompanying text.

168. *See supra* text accompanying notes 100-06. The Vermont Legislature did establish criminal penalties to coerce drivers involved in motor vehicle accidents to render aid. *See supra* note 158.

169. The United States Supreme Court has distinguished criminal from civil statutes by analyzing seven different factors:

> Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of *scienter*, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned . . . .

Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-69 (1963). Although these seven criteria are neither exhaustive nor dispositive, they do lend guidance in understanding the Court's analysis. United States v. Ward, 100 S.Ct. 2636, 2641 (1980). Section 519 meets some of the requirements of the *Kennedy* test: a) *scienter* is required by the term "willfully" in subsection (c); and b) imposing fines has historically been considered a criminal sanction in Vermont, *see supra* note 164 and accompanying text.

A second threshold question could be raised by the non-rescuer. If Section 519 is a criminal statute, the defendant could challenge the constitutionality of the Act as being void for vagueness.[170] The defendant could argue that Section 519 does not sufficiently describe when the duty arises or the type of aid to be rendered.

To prosecute a violation of a criminal statute, a Vermont state's attorney must either receive a complaint,[171] or establish through a police investigation that a violation has occurred.[172] Once a complaint or police report is filed, the state's attorney must determine if probable cause exists to support a prosecution.[173] Should the evidence establish probable cause, the state's attorney may issue a summons for the non-rescuer to appear before a judicial officer.[174] At trial, misdemeanor defendants have an absolute right to a trial by jury.[175] To convict, the jury verdict must be unanimous[176] and each juror must have been persuaded beyond a

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170. In State v. Dragon, 133 Vt. 620, 349 A.2d 720 (1975) the supreme court explained: "The doctrine concerning void for vagueness applies particularly to conduct not otherwise criminal made so by legislative enactment, or where the line between criminal and non-criminal conduct is blurred, indefinite or indistinct." *Id.* at 622, 349 A.2d at 721. This would appear particularly true of Section 519, both because it sanctions conduct not otherwise criminal, *see* State v. Joyce, 139 Vt. 638, 433 A.2d 271 (1981) (common law did not impose duty to render aid, but section requires aid under some circumstances), and because the vague language of Section 519 does not clearly distinguish criminal from non-criminal conduct.

> When a statute is attacked on vagueness grounds under the due process clause of the Fifth and Fourteenth Amendments of the Federal Constitution, the theory of the attack is that the party against whom the statute is to be applied did not receive fair warning that his conduct was prohibited . . . . "No one may be required at peril of life, liberty, or property to speculate as to what the state commands or forbids."

State v. Bartlett, 128 Vt. 618, 622, 270 A.2d 168, 170 (1970) (quoting Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939)). The "void for vagueness" argument may not apply to Section 519 prosecutions, because the statute requires violations to be willful. "[W]here wilfulness is an essential element of the crime . . . one convicted cannot allege a statute was vague . . . . 'A mind intent upon wilful evasion is inconsistent with surprised innocence.'" *Id.* at 623, 270 A.2d at 171 (quoting United States v. Ragen, 314 U.S. 513, 524 (1942)).

171. State's attorney may prosecute a case on the basis of an indictment or information. *See* State v. Leach, 77 Vt. 166, 59 A. 168 (1904); VT. R. CRIM. P. 7 (1974). Although the state's attorney can prosecute violations of Section 519 without a complaint, it appears such prosecutions will be unlikely due to the heavy demands already placed upon the prosecutor. *See supra* note 119.

172. VT. R. CRIM. P. 4(b) (1974).

173. Woodmansee v. Smith, 130 Vt. 383, 385, 296 A.2d 182, 184 (1972).

174. VT. R. CRIM. P. 4(c) (1974).

175. *See* State v. Santi, 132 Vt. 615, 616, 326 A.2d 149, 151 (1974).

176. State v. Benoit, 131 Vt. 631, 313 A.2d 387 (1973) (verdict is unanimous decision by a jury on a question of fact); VT. R. CRIM. P. 31(a) (1974).

reasonable doubt[177] that the defendant violated the statute.

The state's attorney's job is made particularly difficult because the elements of a Section 519 offense are not easily discernible, and because the vague statutory language has not been interpreted by the courts.[178] For the purpose of this analysis, assume the elements of the crime are: 1) defendant had knowledge of victim's peril; 2) victim was actually exposed to grave physical harm; 3) defendant failed to give reasonable assistance; 4) defendant had no excuse, (rescue involved danger to rescuer; rescuer owed important duties to others, or others were already assisting the victim); and 5) defendant willfully violated the statute. Considering each element of the offense will illustrate the difficulties faced by the state's attorney.

First, the state must establish that the non-rescuer had knowledge that another was exposed to grave physical harm. Knowledge may be defined as: a person having an actual awareness of a fact; a person being informed of a fact; or if not actually informed, a reasonable person under similar circumstances would have been aware of a fact.[179] The last definition is sometimes referred to as imputed or constructive knowledge.[180] Each of these definitions imposes a different burden of proof. For example, the bystander may know an automobile accident has occured, but not whether the accident victim actually incurred an injury constituting exposure to grave physical harm. Proving actual knowledge in this situation would be practically impossible without an admission from the bystander. If the state need only prove constructive knowledge, the state could establish knowledge by evidence of the seriousness of the automobile collision. Extensive damage to the automobile would inform a reasonable person that serious injury probably occurred and that investigation and assistance were required. The Vermont Supreme Court has permitted knowledge to be shown by circumstantial evidence.[181] In balancing the need for enforcement with other policies,

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177. In re Winship, 397 U.S. 358 (1970); State v. Colby, 139 Vt. 475, 431 A.2d 462 (1981).

178. Only in State v. Joyce, 139 Vt. 638, 433 A.2d 271 (1981) has the Vermont Supreme Court construed Section 519, but not in the context of a criminal prosecution. *See supra* note 119.

179. LAFAVE, *supra* note 152, § 28, at 197-98 (defining degrees of knowledge necessary for criminal liability).

180. *Id.*

181. "[A] jury might properly be instructed that actual knowledge . . . may be inferred from all the circumstances. However, the jury may not be absolved of its responsibility to

the courts may adopt the less restrictive definition of knowledge for Section 519.

With respect to the second element, the question arises as to what degree of exposure to harm is necessary to invoke the duty to act? Arguably, everyone is exposed to grave physical harm;[182] whether the likelihood of harm is great enough to justify criminal sanctions for inaction is another matter. Persons exposed to grave physical harm may include: seriously injured persons without assistance; persons threatened with imminent harm; and persons not yet harmed but threatened with a foreseeable, not imminent, harm.[183] The legislative history of Section 519 indicates the Vermont Legislature intended to impose sanctions for failure to aid the seriously injured, but it is not clear the sanctions were intended to apply for failure to prevent every foreseeable injury.[184]

Consider the unsettling problem of the thoroughly intoxicated patron leaving the local tavern. When the patron attempts to drive home, he exposes himself, pedestrians and other motorists to the grave physical harm likely to result from an automobile accident. The difficult task for the factfinder is determining whether the threat of harm was so great as to justify imposing fines upon strangers who knowingly refused to intervene. Implicitly the factfinder may be inclined to look to other facts, such as the relationship of the patron to the other customers, to justify imposing a fine for failure to render aid.[185] The statute, however, does not make such evidence relevant because the duty to act is imposed upon anyone who knows another is exposed to harm. Whether an injury actually results from the exposure to harm is not relevant; the statute requires persons to render aid to those exposed to harm, not just to

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find, where required, actual knowledge . . . ." State v. Daigle, 136 Vt. 178, 182, 385 A.2d 1115, 1117 (1978) (citing People v. Mackell, 47 App.Div.2d 209, 218-19, 366 N.Y.S.2d 173, 182-83 (1975)).

182. The term "exposure" has been defined as "the state of being exposed, openness to danger; accessibility to *anything* that *may affect*, especially detrimentally." BALLENTINE'S LAW DICTIONARY 441 (3d ed. 1969) (emphasis added). As a verb, "expose" means "[t]o place in a position where the object spoken of is open to danger, or where it is near or accessible to anything which may affect it detrimentally . . . . BLACK'S LAW DICTIONARY 520 (rev. 5th ed. 1979).

183. For cases presenting the courts with comparable factual situations *see supra* note 19-21 and accompanying text.

184. In State v. Joyce, 139 Vt. 638, 641, 433 A.2d 271, 273 (1981) the Vermont Supreme Court explained the duty to rescue only arose in some circumstances.

185. *See supra* note 142 and accompanying text.

the injured.[186] The issue of exposure not only presents arduous interpretive questions for the court, but also perplexing factual issues for the jury.

The statutory elements of knowledge and exposure may interact to complicate the litigation. In the case of a bystander witnessing an assault, the bystander knows an assault is taking place, but not whether the assault constitutes "exposure to grave physical harm." In some instances, the assault may not appear serious enough to pose a risk of serious injury to the victim.[187] Even when the bystander knows the assault constitutes a risk of serious harm, the bystander cannot know whether the victim will in fact be harmed. In some circumstances, the assailant may be a plain-clothes police officer making a lawful arrest.[188] Assuming the officer will not inflict serious injury unless such is necessary and lawful,[189] the person arrested is not actually exposed to grave physical harm. The bystander must know both that a risk of harm exists and that the risk of harm is sufficient to create a duty to render aid. The courts may also require a finding that the exposure to harm was in fact serious enough to warrant imposing a duty to render aid.

Another troublesome question is whether criminal liability can be imposed because the aid rendered is not reasonable. If the aid rendered is not reasonable, the rescuer has not complied with subsection (a) and is in violation of subsection (c).[190] The issue is complicated by the fact that reasonable assistance can take many forms, depending upon the circumstances surrounding the injury.

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186. *See supra* text accompanying note 6.

187. For example, although there may be duty to intervene in a fight, constituting a battery, *but see* State v. Joyce, 139 Vt. 638, 433 A.2d 271 (1981), there may be no duty to intervene in a dispute, constituting an assault. The court may determine that because an assault does not involve physical harm to the victim, but only some threat of harm, the exposure to injury is not sufficient to give rise to a duty to render aid. *See generally* LAFAVE, *supra* note 152, at 603 (distinguishing assault and battery).

188. *See* Pope v. State, 396 A.2d 1054 (Md. 1979).

189. It is possible the arresting officer would act outside the scope of the officer's legal authority, such as by using excessive force. A bystander could be justified in aiding the victim of an officer using excessive force when making an arrest. *See* State v. Wenger, 58 Ohio St. 336, 390 N.E.2d 801 (1979) (right to aid another only attaches when victim had right to self-defense, no such right attaches when police officer makes lawful arrest); *but cf.* State v. Joyce, 139 Vt. 638, 641, 433 A.2d 271, 273 (1981) (no duty to intervene in fight exists under Section 519).

190. For a comparable factual situation *see* Dahl v. Turner, 80 N.M. 564, 458 P.2d 816 (1969) (by providing ride to plaintiff, an accident victim, not to a hospital but to another point, the care provided by defendant was not emergency care and not protected by New Mexico's good samaritan statute).

In the example of the intoxicated patron, reasonable assistance includes transporting the patron home, arranging for alternative transportation, reporting the patron's behavior to the police, and using force to prevent the patron from driving the automobile until the patron is fit. The reasonableness of the aid will also depend upon when the samaritan completes or ceases providing aid. Should the rescuer render some aid to the injured, but leave before completing the necessary services, the court could find the aid rendered was not reasonable. For example, although it may be reasonable to provide the victim first aid, it may be unreasonable to refuse to transport the victim to a hospital. Consequently the jury may find the rescuer-defendant's assistance was unreasonable and a willful violation of subsection (a), permitting the court to hold the defendant criminally liable.

In addition to the requirements of Section 519(a), the state must prove that the violation was willful.[191] The term "willful" has received some attention by the United States Supreme Court[192] and the Vermont Supreme Court.[193] The impact of requiring violations to be willful is to place a heavier burden of proof and persuasion upon the state's attorney.

A number of affirmative defenses could be raised by a defendant to a Section 519(c) prosecution, further complicating the issues at trial. Section 519(a) excuses potential rescuers from providing assistance: 1) if aid cannot be rendered without danger to the rescuer,[194] 2) if an important duty is owed to another, or 3) if aid is already being provided by others.[195] Non-statutory defenses include the arguments that defendant could not render aid due to physical impossibility[196] or incapacity.[197] The defendant may also

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191. VT. STAT. ANN. tit. 12, § 519(c) (1973).

192. The United States Supreme Court has defined the term "willful" to include intentional, knowing or voluntary acts, or acts done without justifiable excuse. United States v. Murdock, 290 U.S. 389, 394-95 (1933); *see generally* LAFAVE, *supra* note 152, § 28 at 195-98 (distinguishing intent and knowledge as elements of a crime).

193. *Cf.* Sorrell v. White, 103 Vt. 277, 153 A. 359 (1931) (in dicta the court distinguishes acts constituting wilful negligence from acts constituting gross negligence.)

194. *Compare* VT. STAT. ANN. tit. 12, § 519(a) (1973) (no duty to render aid if such aid exposes rescuer to peril) *with* State v. Warshow, 138 Vt. 22, 410 A.2d 1000 (1980) (imminent danger may justify act which would otherwise constitute criminal offense).

195. *See supra* text accompanying note 6.

196. Impossibility may include the defendant's lack of knowledge of proper first aid, lack of time to react to the danger, or inability to reach the victim. *See generally* LAFAVE, supra note 152, §26, at 188-89 (explaining the nature of the affirmative defense of impossibility).

contend that, due to mistake, the defendant did not understand the circumstances as giving rise to a duty to render assistance.[198]

Unless a complaint is brought by a victim or the conduct of the non-rescuer is extremely reprehensible it is unlikely that Vermont's state's attorneys will pursue prosecutions under the statute. Imposing criminal liability for failure to confer a benefit upon another transcends traditional concepts of law enforcement.[199] The practical problems and costs of Section 519 prosecutions must be placed in perspective; the fine imposed cannot exceed $100.00. Certainly principles of law and justice explain the need for Section 519(c) prosecutions, but such arguments are unlikely to persuade the pragmatic state's attorney confronted with increasingly congested courts and diminishing prosecutorial resources.[200]

An Alternative Enforcement Scheme

The likely failure of the Vermont statute to encourage rescue[201] raises the question whether the statute could better serve its

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197. As the Vermont Supreme Court has explained:

> [O]ur cases do not limit the application of the "diminished capacity" doctrine to the use of intoxicants . . . .
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> The concept is directed at the evidentiary duty of the state to establish those elements of the crime charged requiring a conscious mental ingredient . . . . The distinction is that diminished capacity is legally applicable to disabilities not amounting to insanity . . . . Evidence offered under this rubric is relevant to prove the existence of a mental defect or obstacle to the presence of a state of mind which is an element of the crime . . . .

State v. Smth, 136 Vt. 520, 527, 396 A.2d 126, 130 (1978); *see also* State v. Watson, 114 Vt. 543, 49 A.2d 174 (1946) (test of whether child can be found guilty of crime rests on whether child is not insane and has sufficient mentality to comprehend the quality and character of acts and to resist the doing of a wrongful act). Incapacity may include the non-rescuer's drunkenness, fear or shock, immaturity, or physical weakness. *See generally* LaFave, *supra* note 152, §26 at 188-89 (discussing incapacity as a defense to criminal liability).

198. The non-rescuer could argue that failure to aid was not willful because the non-rescuer did not understand the circumstances to be perilous, or that such circumstances were not the type of circumstances which gave rise to a duty to render aid. *See generally* LaFave, *supra* note 152, §47 at 356-60 (mistake includes errors in fact and errors in believed legal effect of statute).

199. The traditional Anglo-American position on criminal omissions confines the duty to render aid to narrowly-defined categories. LaFave, *supra* note 152, §26 at 190-91. Determining whether criminal laws which substantially deviate from traditional principles of American criminal law will be enforced goes beyond the scope of this note.

200. The state's attorney may be willing to incur the expense of Section 519 litigation in the most egregious case to make an example of the violator. When the moral blameworthiness of the non-rescuer is less severe, however, the prosecutor may be more willing to plea bargain than to prosecute. *See supra* note 119.

201. In State v. Joyce, 139 Vt. 638, 433 A.2d 271 (1981) the supreme court noted that none of the witnesses to the beating attempted to summon help. Non-rescue behavior will

legislative purpose by imposing civil liability for failure to render reasonable assistance. Although the Duty to Aid the Endangered Act does not expressly impose civil liability upon persons who violate the statute, the statute does not expressly bar civil liability.[202] In accord with other jurisdictions,[203] the Vermont Supreme Court has recognized statutory violations as giving rise to civil liability.[204] As the court explained: "There may be . . . circumstances under which the breach of a statutory duty will be determinative of the existence of negligence . . . or negligence per se."[205] Although the court has never subsequently explained the precise circumstances justifying civil liability, a reasonable argument can be posited that such liability is necessary to achieve the objectives of Section 519.

The violation of a statute intended to protect the public safety creates a rebuttable presumption of negligence.[206] The presumption "shifts to the party against whom it operates the burden of [producing] evidence. And the *prima facie* case would become the established case if nothing further appears."[207]

> Our law is that the duties of the parties and the effect of safety are all merged in the establishment of the standard of conduct of prudent persons in the same circumstances . . . . This is the standard by which the actions of the parties are to

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probably continue unless the courts and prosecutors begin to discourage such behavior.

202. *See supra* text accompanying note 6; Thayer, *Public Wrong and Private Action*, 27 HARV. L. REV. 317, 320 (1913); Note, *The Use of Criminal Statutes in the Creation of New Torts*, 48 COLUM. L. REV. 456, 458 (1948).

203. Many state courts have recognized that a violation of a statute can give rise to civil liability. *E.g.*, Bussell v. Missouri Pac. R.R. Co., 376 S.W.2d 545, 549 (Ark. 1964); Vesely v. Sager, 95 Cal. Rptr. 623, 486 P.2d 151 (1971); Annis v. Britton, 232 Mich. 291, 205 N.W. 128 (1925); Cole v. Multnomah County, 39 Or. App. 211, 592 P.2d 221 (1979).

204. The Vermont Supreme Court has explained that "it is generally accepted in this state that breach of a safety statute makes *prima facie* case of negligence . . . . But it is also true that such negligence must be proximate cause of the accident which followed." Zaleski v. Joyce, 133 Vt. 150, 153, 333 A.2d 110, 112 (1975) (citing Campbell v. Beede, 124 Vt. 434, 207 A.2d 236 (1965)); *see also* Weeks v. Burnor, 132 Vt. 603, 608, 326 A.2d 138, 141 (1974) (traffic statute regulating operation of motor vehicle establishes a duty of care); Smith v. Grove, 119 Vt. 106, 119 A.2d 880 (1956) (statute requiring hand and directional signals when operating a motor vehicle establishes a duty of care); Stark v. First Nat'l Stores, Inc., 117 Vt. 231, 232-33, 88 A.2d 831, 832-33 (1952) (ordinance requiring downspout on building establishes a duty of care); Appleyard v. Ray Co., 115 Vt. 519, 521-22, 66 A.2d 10, 12 (1949) ("rules of the road" establish duty of due care); Shea v. Pilette, 108 Vt. 446, 189 A.154 (1937) (ordinance banning coasting or sledding on city streets establishes a duty of care); Kilpatrick v. Grand Trunk Ry. Co., 74 Vt. 288, 52 A. 531 (1902) (statute regulating ladders and steps on railway cars establishes a duty of care).

205. Shea v. Pilette, 108 Vt. 446, 451, 189 A. 154, 156 (1937) (citations omitted).

206. Weeks v. Burnor, 132 Vt. 603, 608, 326 A.2d 138, 141 (1974).

207. Larmay v. Van Etten, 129 Vt. 368, 371, 278 A.2d 736, 739 (1971) (emphasis added).

> be tested from the standpoint of due care, and by which liability for negligent actions is to be determined.[208]

It would be the responsibility of the defendant to show the basic facts constituting a defense.[209] Ultimately, determining whether the defendant's conduct was negligent is a question for the factfinder.[210]

Section 519 creates a standard of conduct for persons confronted with an emergency. Much like Vermont's "Hit and Run" Statute,[211] Section 519 creates a duty to render reasonable assistance to persons in danger. The purpose of the statute is to promote public safety by encouraging aid which prevents or abates personal injury.[212] As a safety statute,[213] Section 519 should create a rebuttable presumption of negligence if a defendant has failed to render aid. To escape liability, the defendant would be required to show: 1) that the circumstances did not create a duty to render aid;[214] 2) that the statutory exemptions of subsection (a) did apply;[215] or 3) that violating the statute was not in fact negligent.[216]

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208. Burns v. Bombard, 128 Vt. 178, 181, 260 A.2d 219, 221 (1969) (citations omitted); *see, e.g.*, Weeks v. Burnor, 132 Vt. 603, 608, 326 A.2d 138, 141 (1974).

209. Proof of a violation under Section 519 only "establishes defendant's negligence . . . *prima facie*, shifting the burden of going forward on the issue of negligence to the defendant . . . . The defendant may . . . introduce evidence to prove either that he did not in fact violate the ordinance or that his violation was not in fact negligent." Nash v. J. J. Newberry Co., 510 F.2d 429, 434 (2d Cir. 1975); *see also* Larmay v. Van Etten, 129 Vt. 368, 371, 278 A.2d 736, 739 (1971) (the presumption of negligence may be rebutted, but is to be given the weight of evidence).

210. *See* Heath v. Orlandi, 127 Vt. 204, 207, 243 A.2d 792, 794-95 (1968).

211. VT. STAT. ANN. tit. 23, § 1128 (1978); *see supra* notes 158, 160 (discussing the "Hit and Run" statute and how Section 519 may be applied to "Hit and Run" cases).

212. For examples of the courts construing a statute or ordinance as a safety statute *see* cases cited *supra* note 204.

213. *Cf.* State v. Severance, 120 Vt. 268, 138 A.2d 425 (1957) (purpose of VT. STAT. ANN. tit. 23, § 1128 (1978) (requiring drivers to render assistance is to prevent injuries to the helpless).

> The only legitimate interests society can have in encouraging rescue are loss prevention and loss distribution . . . . Punishment for failure to rescue can serve only as a deterrent. Civil liability can both deter and distribute loss . . . . [E]ither civil liability alone, or in combination with criminal liability, would best encourage the socially valuable behavior of the Good Samaritan.

Note, *Stalking the Good Samaritan: Communists, Capitalists, and the Duty to Rescue*, 1976 UTAH L. REV. 529, 543.

214. The problem presented is whether the victim must actually be exposed to physical harm for the duty to render aid to be imposed. *See supra* notes 182-89 and accompanying text.

215. *See supra* text accompanying note 6.

216. *See supra* note 209.

Some scholars have argued that imposition of civil liability for violation of Section 519 is unfair.[217] The non-rescuer who did not create the perilous situation should not be liable for all harms the plaintiff incurs; those who created the risk of harm probably are more culpable. Fairness requires that the amount of damages should be apportioned according to the degree of culpability. Under Vermont Common Law, however, the courts apply the rule of joint and several liability to ensure the plaintiff's recovery regardless of the degree of the defendant's culpability.[218] Vermont courts have also denied defendants right to contribution from joint wrongdoers.[219] The danger presented is that non-rescuers may be compelled to pay an entire damage award although only partially responsible for the injury.

In Vermont, imposing liability for violations of Section 519 need not be harsh. Vermont has enacted a comparative negligence statute to allow courts to apportion liability among joint tortfeasors.[220] In the context of the good samaritan statute, the person who failed to render aid should be liable only for the

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217. *E.g.* D'Amato, *supra* note 9 at 807-09 (tort liability does not encourage judgment proof persons to render aid; tort liability is subject to abuse unlike criminal liability; tort liability rewards risk takers and penalizes risk avoiders; and, no moral reason justifies imposing liability upon person who did not create the risk of harm); *contra* Franklin, *supra* note 9 at 55-57 (high damage award for civil liability might be an appropriate supplement to criminal liability).

218. *See, e.g.*, Sharon v. Anahama Realty Co., 97 Vt. 336, 123 A. 192 (1924) (whenever separate and independent acts of several persons concur and produce a single and indivisible injury, which would not have occurred without concurrence, each person is responsible for the entire result).

219. *See, e.g.*, Howard v. Spafford, 132 Vt. 434, 321 A.2d 74 (1974) (Vermont precludes contribution among joint tortfeasors); *cf.* Viens v. Anthony Co., 282 F. Supp. 983 (1968) (Vermont law does not allow indemnity as between joint wrongdoers); *but cf.* Bardwell Motor Inn, Inc. v. Ararallo, 135 Vt. 571, 381 A.2d 1061 (1977) (right to indemnity applies if there is an express agreement to indemnify or the circumstances are such that an agreement may be implied).

220. VT. STAT. ANN. tit. 12, § 1036 (Supp. 1981).

> § 1036. COMPARATIVE NEGLIGENCE
>
> Contributory negligence shall not bar recovery in an action by any plaintiff, or his legal representative, to recover damages for negligence resulting in death, personal injury or property damage, if the negligence was not greater than the causal total negligence of the defendant or defendants, but the damage shall be diminished by general verdict in proportion to the amount of negligence attributed to the plaintiff. Where recovery is allowed against more than one defendant, each defendant shall be liable for that proportion of the total dollar amount awarded as damages in the ratio of the amount of his causal negligence to the amount of causal negligence attributed to all defendants against whom recovery is allowed.

Id.

amount of injury directly resulting from the failure to provide assistance.[221] Assuming a plaintiff sues both the tortfeasor and the non-rescuer, the tortfeasor creating the danger would be liable for causing the harm, and the non-rescuer would be liable for the aggravation of injury resulting from the failure to rescue. Whether a defendant non-rescuer may introduce the negligence of others, who were not joined in the litigation and found liable, to mitigate the defendant's damages is still open to question.[222]

It is important not to underestimate the complexities involved in applying the rules of comparative negligence. The degree of fault of each tortfeasor cannot be precisely calculated. If the original tortfeasor is unavailable, the jury may impose excessive liability on the non-rescuer out of a desire to compensate the victim-plaintiff. These difficulties alone should not bar innocent victims from obtaining compensation from those who violate a statutory standard of reasonable conduct. The courts have the alternative of interpreting the statutes, or applying new doctrine, to ensure fair results.[223] For victims to recover damages without disproportionately burdening non-rescuers, it may be necessary for the supreme court to reinterpret the comparative negligence statute and the doctrine of contribution. The courts could allow the negligence of third parties to mitigate a defendant's liability, and allow defendants to bring actions for contribution against negligent third parties.

The incentive of a monetary award may motivate the victim to undertake the complex litigation involved in a Section 519 action, even though the state's attorney is reluctant to prosecute.[224] The

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221. *Id.* "The Vermont [comparative negligence] statute . . . does away with joint and several liability among joint tortfeasors held liable in a judgment. They are liable only severally, and not jointly; their liability is only in proportion that their negligence bears to the causal negligence of the sued defendants held liable." Howard v. Spafford, 132 Vt. 434, 437, 321 A.2d 74, 76 (1974) (dicta); *see generally* Note, *Comparative Negligence in Vermont: A Solution or a Problem,* 40 ALB. L. REV. 777 (1976) (discussing application of Vermont's comparative negligence statute).

222. *See supra* note 221; *see also* Stannard v. Harris, 135 Vt. 544, 546-47, 380 A.2d 101, 103 (1977) (dicta) (under Vermont comparative negligence statute, joint tortfeasors are only liable severally and in proportion to their negligence).

223. *See* Conn v. Town of Brattleboro, 120 Vt. 315, 320, 140 A.2d 6, 9-10 (1958) (language of legislature may be enlarged or restrained to effectuate the intent of the legislature); Smith & Son, Inc. v. Town of Hartford, 109 Vt. 326, 330, 196 A. 281, 283 (1938) (courts may consider spirit of legislation to imply terms not stated in statute or to ignore express language not consistent with the spirit of the statute).

224. The state's attorney will obtain, at most, a fine of $100.00 from a defendant. *See supra* text accompanying note 6. The victim will not recover any portion of the criminal

mere violation of Section 519 will not guarantee civil recovery, rather statutory violations will create a cause of action and ease the plaintiff's burdens of proof.[225] Civil liability will supplement the criminal penalties imposed by the Duty to Aid the Endangered Act, and promote the policies established by the Vermont Legislature.

CONCLUSION

It remains questionable whether the Vermont statute will be effective in promoting altruism. The ability of victims and state's attorneys to litigate Section 519 violations is hampered by the complexity of the requisite legal and factual issues. Although the Vermont courts may liberally construe the statute to facilitate civil and criminal actions, the burden still remains upon victims and state's attorneys to affect compliance. Imposing civil liability would deter violations and compensate victims. More importantly, civil liability would provide an alternative to burdensome criminal prosecutions. Without civil liability Section 519 will still protect the good samaritan, but it is doubtful whether it will compel the reluctant bystander to render assistance.

Lon T. McClintock

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fine, and will be apt to pursue litigation if likely to recover a damage award. *See supra* notes 120-23 and accompanying text.

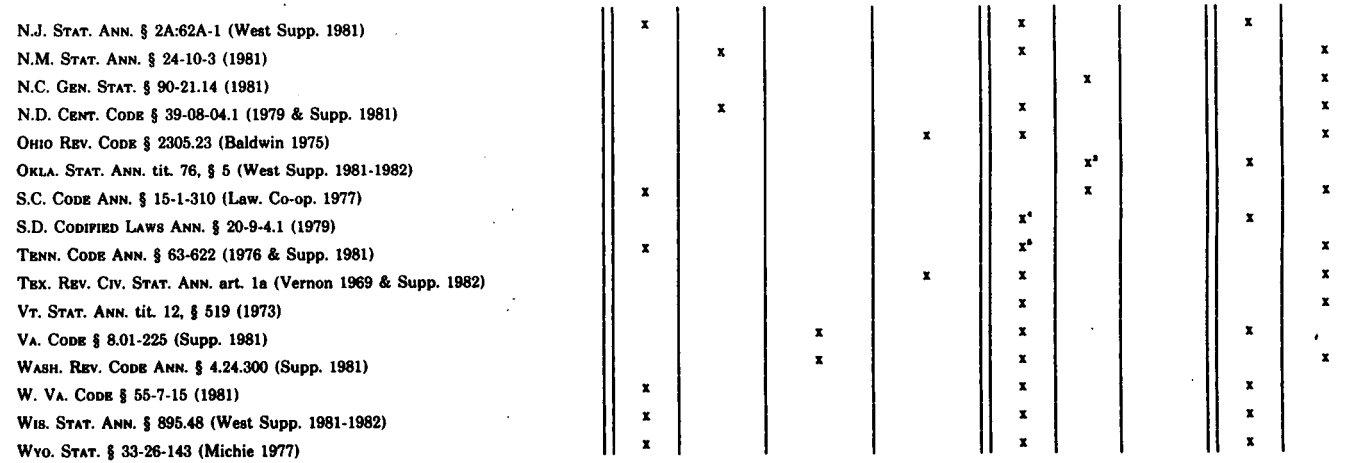
225. *See supra* notes 203-05 and accompanying text.

APPENDIX

The Good Samaritan Statutes

Thirty-five jurisdictions provide some form of civil immunity for any person who aids another needing emergency assistance. Although the statutes have many similar provisions, the statutes have significant differences—especially with regard to the degree of negligence immune from liability, the type of aid which may be rendered and the location the aid may be rendered. The chart below indicates the general—not precise—characteristics of the states' good samaritan statutes.

STATE	LOCATION				TYPE OF CARE			IMMUNITY	
	At Scene of Emergency	At or Near Scene of Emergency	At Scene of Emergency or Enroute to Medical Facility	At Scene of Emergency Not Inside a Medical Facility	Good Faith Emergency Care	1st Aid or Medical Care	Need Not Seek Doctor to Care For Injured	From Claims for Civil Damages	Only From Claims for Ordinary Negligence
ALASKA STAT. § 09.65.090 (Supp. 1981)	x				x			x	
ARIZ. REV. STAT. ANN. §§ 32-1471 (Supp. 1981-1982)	x				x				x
ARK. STAT. ANN. § 72-624 (1979)	x				x			x	
COL. REV. STAT. § 13-21-108 (Supp. 1980)	x				x			x	
DEL. CODE ANN. tit. 16, § 6801 (Supp. 1980)	x				x				x
D.C. CODE ANN. § 2-1344 (1981)	x					x[1]			x
FLA. STAT. ANN. § 768.13 (West Supp. 1981)				x	x			x	
GA. CODE ANN. § 84-930 (1979)	x				x		x	x	
HAWAII REV. STAT. § 663-1.5 (1975 & Supp. 1980)	x				x				x
IDAHO CODE §§ 5-330 to 5-331 (1979)	x					x			x
IND. CODE §§ 34-4-12-1 to 2 (1973 & Supp. 1980)	x				x				x
IOWA CODE ANN. § 613.17 (Supp. 1981-1982)	x				x				x
MAINE REV. STAT. ANN. tit. 14, § 164 (1980)				x[2]		x			x
MINN. STAT. ANN. § 604.05 (1981)			x		x			x	
MISS. CODE ANN. § 73-25-37 (Supp. 1980)									
MONT. CODE ANN. § 27-1-714 (1981)	x				x				x
NEB. REV. STAT. § 25-1152 (1979)	x				x		x	x	
NEV. REV. STAT. § 41.500 (1979)					x		x		x
N.H. REV. STAT. ANN. § 508:12 (Supp. 1979)			x		x				x



1. The District of Columbia Statute provides both emergency care or emergency medical assistance are protected from negligence claims.
2. The Maine Statute applies to care rendered any place outside a medical facility.
3. The Oklahoma Statute limits the type of aid to artificial respiration, restoration of circulation, prevention of blood loss or restoration of heart action.
4. The South Dakota Statute does not apply to operation of motor vehicle in rendering emergency aid.
5. The Tennessee Statute also protects individuals assisting others giving emergency aid.

The statutes of fifteen jurisdictions provide civil immunity only for persons who have received some emergency care or health care training. ALA. CODE § 6-5-332 (1975); CAL. BUS. & PROF. CODE § 2395 (West Supp. 1981); CONN. GEN. STAT. ANN. § 52-557b (West Supp. 1981); ILL. ANN. STAT. ch. 111, § 4404 (Smith-Hurd 1978); KAN. STAT. ANN. § 65-2891 (1980); KY. REV. STAT. ANN. § 411.148 (Baldwin 1981); LA. REV. STAT. ANN. §§ 40:1235, 37:1731, 37:1732 (West 1974 & Supp. 1982); MASS. ANN. LAWS ch. 112, § 12B (Michie/Law. Co-op. Supp. 1981); MICH. STAT. ANN. § 14.15 (203.79) (1980); MO. ANN. STAT. § 190.195 (Vernon 1982); N.Y. EDUC. LAW § 6527(2) (McKinney 1972); OR. REV. STAT. § 30.800(2) (1979); PA. CONS. STAT. ANN. § 8332 (Purdon 1981); R.I. GEN. LAWS § 5-31-26, 5-34-38, 5-37-14 (1976 & Supp. 1981); UTAH CODE ANN. § 58-12-23 (1974). Several jurisdictions providing civil immunity to any person who renders aid also have statutes specially protecting persons with medical or emergency training. MONT. CODE ANN. § 41-1-407 (1981); NEV. REV. STAT. § 41.505 (1981); N.H. REV. STAT. ANN. § 508.12a (Supp. 1979); OKLA. STAT. ANN. tit. 76, §§ 5(a)(1), 5(a)(3) (Supp. 1981-1982); S.D. CODIFIED LAWS ANN. § 20-9-4 (1979); VA. CODE §§ 8.01-225(A1)—(C) (Supp. 1981); WYO. STAT. § 33-26-143(b) (1977).

The Maryland statute permits witnesses of violent assaults to use force to assist the victim of the assault, but does not provide civil immunity for rescues. MD. ANN. CODE art. 27, § 12A (1976). Of the fifty-one jurisdictions, only Vermont imposes penalties for failure to render aid to the endangered. VT. STAT. ANN. tit. 12, § 519(c) (1973).