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David A. Suemnick

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COMMENTS

WISCONSIN'S "GOOD SAMARITAN" STATUTE

On June 10, 1963, Wisconsin joined at least twenty-three other jurisdictions in granting legislative protection to doctors who treat victims in emergency situations.¹ Section 94 of the Wisconsin Laws of 1963 reads as follows:

An act to create 147.17(7) and 149.06(5) of the statutes, relating to exempting doctors and nurses from civil liability for emergency treatment at the scene of an emergency.

Section 1. 147.17(7) of the statutes is created to read:

147.17(7). No person licensed under this section, who in good faith renders emergency care at the scene of an emergency, is liable for any civil damages as a result of acts or omissions by such person in rendering the emergency care.

For the purposes of this subsection, the scene of an emergency shall be those areas not in the confines of a hospital or other institution which has hospital facilities or a physician's office.

Section 2. 149.06(5) of the statutes is created to read:

149.06(5). No person registered under this section, who in good faith renders emergency care at the scene of an emergency, is liable for any civil damages as a result of acts or omissions by such person in rendering the emergency care.

For the purposes of this subsection, the scene of an emergency shall be those areas not in the confines of a hospital or other institution which has hospital facilities or a physician's office.²

Read literally, the foregoing sections grant immunity from civil liability to doctors and nurses³ who, in "good faith," treat victims of accidents at the scene of the emergency. In effect, this statute deprives a patient treated under emergency conditions of any right he may have had to recover from a doctor or nurse for additional damages arising from negligent treatment.

Generally, acts which take away an individual's rights are justified on the ground that they are required by the overall public welfare.⁴

¹ Statutes of this nature have been enacted in Alabama, Arkansas, California, Connecticut, Georgia, Indiana, Maine, Massachusetts, Mississippi, Nebraska, New Hampshire, New Jersey, New Mexico, North Dakota, Ohio, Oklahoma, Pennsylvania, South Dakota, Tennessee, Texas, Utah, Wyoming, and Virginia.

² Wis. Laws 1963, ch. 94.

³ Those licensed under WIS. STAT. § 147.17(7) (1961) are engaged in the practice of medicine and surgery, and those licensed under WIS. STAT. § 149.06(5) (1961) are engaged in nursing.

⁴ When a legislature enacts a law of this nature, it acts under its so-called police power. Statutes that limit or abolish common-law rights of action have been sustained as a permissible exercise of the police power to correct abuses and evils arising out of a growing multiplicity of suits contrary to the public welfare. *Silver v. Silver*, 280 U.S. 117 (1929). In regard to the abolition of the action for breach of contract to marry, see *Lebohm v. City of Galveston*, 154 Tex. 192, 275 S.W. 2d 951 (1955).

The rising number of automobile accidents has created a problem of grave public concern, which makes it necessary that the victims of these accidents be given proper treatment. The apparent purpose of this statute is to provide for the public welfare by encouraging doctors and nurses to render emergency care to accident victims at the *scene* of the accident. The individual rights of a portion of our society (people negligently treated at the scene of an accident) have been suspended in order to provide others (namely, all accident victims) with the protection that is demanded by the general public welfare.

Necessity of the "Good Samaritan" Law

Before discussing the application of this new statute, it seems imperative to inquire as to whether or not the new law is actually necessary. The apparent reason for its enactment is to encourage doctors and nurses to stop at accident scenes and render emergency care. From this it could be inferred that, as the law exists today, doctors and nurses are not given adequate protection from liability. If the latter is not the case, then the law is unnecessary. The question is, then, would a doctor who treated a victim of an accident have exposed himself to the risk of a malpractice suit under the law as it existed prior to the enactment of the "Good Samaritan" statute.

The common-law rule is that one is required to exercise that degree of care and skill which would be required of an ordinary reasonable man acting in like or similar circumstances.⁵ This common-law rule has been interpreted to mean that a doctor is under a duty to exercise the same degree of care which other doctors of the community would exercise in the same or similar circumstances.⁶ The Wisconsin court has long accepted and applied the rule that

. . . a physician is required to exercise only the degree of care, diligence, judgment, and skill which other physicians of good standing of the same school or system of practice usually exercise in the same or similar localities under like or similar circumstances, having due regard to the advanced state of medical practice at the time in question.⁷

This general rule of conduct has been subjected to some modifications in order to protect doctors acting under special circumstances. Generally, a physician is not required to exercise the same amount of prudence, judgment, and discretion in an emergency as he must under normal conditions.⁸ Thus, when a doctor has acted in an emergency situ-

⁵ RESTATEMENT, TORTS §283 (1934).

⁶ Haggerty v. McCarthy, 344 Mass. 136, 181 N.E. 2d 562 (1962).

⁷ Kuechler v. Volgman, 180 Wis. 238, 242, 192 N.W. 1015, 1017 (1923). This rule was also applied in: Nelson v. Harrington, 72 Wis. 591, 40 N.W. 228 (1888); Wurdemann v. Barnes, 92 Wis. 206, 66 N.W. 111 (1896); Marchand v. Billin, 158 Wis. 184, 147 N.W. 1033 (1914); Hrubes v. Faber, 163 Wis. 89, 157 N.W. 519 (1916); Jaeger v. Stratten, 170 Wis. 579, 176 N.W. 61 (1920); Ahola v. Sincock, 6 Wis. 2d 332, 94 N.W. 2d 566 (1958).

⁸ RESTATEMENT, TORTS § 296 (1934).

ation, the required standard of conduct is determined on the basis of whether or not his actions were reasonable in such an emergency situation.

The determination of what is reasonable conduct by a doctor in an emergency situation presents a difficult problem. The difficulty arises from the reluctance of one doctor to testify against another doctor in a malpractice case, commonly referred to as "the conspiracy of silence." What is reasonable conduct on the part of a doctor is a standard that can only be determined by the testimony of other doctors. Only in cases where there has been a very flagrant violation of the standard of care owed to the patient have doctors been willing to state that the conduct of the fellow-practitioner has been such that he should be held liable for malpractice. The foregoing would seem to indicate that the probability of bringing a successful malpractice suit against a doctor who gave emergency treatment to an accident victim would not be very great.⁹

There are other factors which also limit the possible success of malpractice suits. Malpractice actions are based on negligence; thus, all of the rules regarding the essential elements of actionable negligence are applicable.¹⁰ One of these elements is the placing of the burden of proof on the plaintiff.¹¹ The case of *Kuehnnemann v. Boyd*¹² is a clear statement of the fact that if a defendant doctor is to be held liable in Wisconsin, the burden of proof is upon the plaintiff to show that he failed in the requisite degree of care and skill which is required of a doctor. In practice, this has proved to be a very difficult burden to meet.

It appears to be at least arguable that an application of common-law malpractice rules would provide adequate protection to doctors rendering treatment to victims of emergency situations. Thus, the need of a "Good Samaritan" law becomes questionable.

There are, however, at least two sound arguments that are used to point up the need for protection in addition to that afforded under the common-law rules of malpractice. The first of these arguments relates to the fact that it is not the successful malpractice suit that physicians primarily fear, but rather the very threat of a malpractice suit. The mere fact that a doctor has been sued is often enough to do great harm to his professional standing, and also cause him monetary loss due to a loss of patients. These losses are apt to occur when it becomes known that the doctor has been sued, and often are not overcome even though the suit proves to be unsuccessful. If physicians fear to stop and treat the vic-

⁹ In *Delahunt v. Finton*, 244 Mich. 266, 221 N.W. 168 (1922), it was held that the ordinary rules of negligence are not applicable to a surgeon performing an operation in an emergency.

¹⁰ *Davis v. Virginian Ry.*, 361 U.S. 354 (1960).

¹¹ *Halverson v. Zimmerman*, 60 N.D. 113, 232 N.W. 754 (1930).

¹² 193 Wis. 588, 214 N.W. 326 (1927).

tims of accidents, this reluctance is not due to the fear of being held liable for malpractice, but rather to the possibility of being sued. Against this possibility of being sued they feel that the "Good Samaritan" law would prove to be a strong ally, as it would give them the procedural advantage they are now lacking. Under the statute, the doctors are granted immunity from suit by accident victims to whom they have given "emergency care" at the scene of an accident. The proponents of the statute feel that this immunity from the possibility of suit is necessary if doctors are going to stop and render aid.

Secondly, advocates of the "Good Samaritan" law believe that the protection it grants has been made necessary by a recent change in malpractice law. This change has involved the application of the doctrine of *res ipsa loquitur* to malpractice cases. In the case of *Fehrman v. Smerl*,¹³ the Wisconsin court held that the doctrine of *res ipsa loquitur* may be held applicable in a malpractice suit "where a layman is able to say as a matter of common knowledge that the consequences of the professional treatment are not those which ordinarily result if due care is exercised."¹⁴ It is argued that this change lessens the plaintiff's burden of proof in a malpractice case, and thus increases the possibility of success in malpractice suits. Therefore, doctors treating the victims of accidents should be given the additional protection of an immunity statute. Whether or not this is a valid argument will depend on how broadly the doctrine of *res ipsa loquitur* will be applied in malpractice cases. *Fehrman* seems to indicate that the application will be very restricted.

Apparently, the Wisconsin legislature believed that the common-law protection against successful malpractice suits was not sufficient to encourage doctors to treat accident victims, and thus it was decided to give the doctors the procedural safeguard of immunity from suit in the hope of attaining the goal of getting proper aid for accident victims. The soundness of this decision is subject to attack on the basis of the dearth of cases involving malpractice suits brought against doctors for treatment rendered at the scene of an accident.¹⁵ On the other hand, the existence of a fear of malpractice suits in the medical profession is strong proof of the need of the statute. Whether or not the statute is going to bring additional help to accident victims is a question that can only be answered by the passage of time.

Constitutionality

By enacting a law of this nature, it is possible that the legislature has infringed on the constitutionally guaranteed rights of individuals.

¹³ 20 Wis. 2d 1, 121 N.W. 2d 255 (1963).

¹⁴ *Id.* at 22, 121 N.W. 2d at 266.

¹⁵ Note, 41 NEB. L. REV. 609 (1961).

Under article I, section 9, of the Wisconsin constitution, an individual is guaranteed a remedy for an injury to his person:

Every person is entitled to a certain remedy in the laws for all injuries, or wrongs which he may receive to his person, property, or character: he ought to obtain justice freely, without being obliged to purchase it, completely and without delay, conformably to the laws.

Squaring sections 147.17(7) and 145.06(5) with this provision of the Wisconsin constitution poses a difficult problem. In effect, Wisconsin's "Good Samaritan" law says that one is *not* entitled to bring an action for an injury caused him by a doctor or nurse, if the injury resulted while he was being treated at the scene of an emergency, unless he can prove the doctor or nurse was not acting in good faith. Generally, the rights guaranteed by article I, section 9, of the Wisconsin constitution have been zealously protected by the Wisconsin Supreme Court. *Diana Shooting Club v. Lanoreum*¹⁶ established that every violation by one person of a legal right of another, impairing to any extent, however slight, the enjoyment of that right, was an actionable wrong. In *State ex rel Wickham v. Nygard*,¹⁷ the court declared that article I, section 9, of the constitution was superior to any common-law doctrine in existence when the constitution was enacted, as well as to any statute enacted since the constitution's adoption. The "Good Samaritan" statute appears to fly directly in the face of the rule of law laid down by these two cases, and thus may be subject to the objection of being unconstitutional. The answer to this objection may be found in an evaluation of what the statute actually does. In the case of *State v. Diehl*,¹⁸ it was held that although a remedy may not be taken away altogether, the state in the exercise of its police power may change or modify it, provided some adequate remedy is left. Assuming the law to be a valid exercise of police power, the question is then whether a remedy has been extinguished or merely modified. It is certain that one no longer has a remedy against a doctor or nurse who negligently treats him at the scene of an emergency. However, one may still recover from the party whose wrongful conduct was the cause of his original injury. In other words, one still has a remedy, but the procedure he may use in pursuing it has been limited. This argument of modification is subject to the objection that if a person is the cause of his own original injury, he is left with no remedy against a doctor or nurse whose negligent treatment may have aggravated the original injury. Whether or not the supreme court will accept this argument of mere modification is something that can only be a matter of speculation at this time; how-

¹⁶ 114 Wis. 44, 89 N.W. 880 (1902).

¹⁷ 159 Wis. 396, 150 N.W. 513 (1915).

¹⁸ 198 Wis. 326, 223 N.W. 352 (1929).

ever, it is reasonable to conclude that if the argument is not accepted, the constitutionality of the "Good Samaritan" law will be very doubtful.

If the law successfully meets the objection of extinguishment of rights, it could still be subjected to the further argument of unconstitutionality on the grounds of ambiguity. The allegation of ambiguity is illustrated by the many interpretation problems that will face the court when it tries to apply the statute to varying fact situations.

Problem of Construction

When the courts of Wisconsin are called upon to interpret the language of the "Good Samaritan" statute, they will be faced with two alternatives. They may give the act the broadest possible interpretation and application, or they may strictly construe it. Often when the courts are faced with these alternatives, they are able to base their choice on the legislative history of the act involved, but in the case of the "Good Samaritan" law, this aid is not available. The bill was submitted to the Assembly in the following form:

No person licensed under this section, who in good faith renders emergency care at the scene of an emergency, is liable for any civil damages as a result of acts or omissions by such person in rendering emergency care.¹⁹

The bill was subjected to only four amendments in the Assembly. Three of these were rejected.²⁰ The fourth became the second paragraph of the bill, which defines the "scene of an emergency."²¹ The bill was passed by the Assembly by a forty-six to thirty-nine vote and was sent to the Senate where it was passed unanimously. Thus, there is very little in the legislative history of the law to help the courts in interpreting and applying it.

As yet, there have been no cases interpreting similar statutes in other jurisdictions. However, a clearer understanding of the new Wisconsin law may be gained by comparing it with similar statutes in other states.

One of the first interpretive problems courts will be faced with is that of defining what is meant by rendering emergency care in "good faith." Nebraska's statute uses the words "gratuitously and in good faith."²² Since "gratuitously" is defined to mean "without valuable or

¹⁹ Bill No. 88A, Wis. Legis. (1963).

²⁰ Amendment 1-A, which was temporarily laid aside, was a proposal to change "scene of an emergency" to "highway." Amendment 2-A was a statement to the effect that the protection of this section is not intended to, and does not extend to, an existing doctor-patient relationship. Amendment 4-A called for inserting "except for acts or omissions constituting gross negligence" after the word omissions. These three amendments were rejected.

²¹ Proposed amendment 2-A read: "For purpose of this subsection, the scene of an emergency shall be those areas not in the confines of a hospital or other institution which has hospital facilities or a physician's office."

²² Neb. Laws 1961, ch. 110, at 349.

legal consideration,"²³ the problem of whether or not the doctor was acting without the intention of seeking compensation may be posed in an action attempting to deny the doctor the immunity of section 147-17(7).²⁴

In jurisdictions adhering to the doctrine of gross negligence, the belief has been advanced that perhaps "good faith" covers all conduct short of gross negligence.²⁵ However, since Wisconsin has abolished gross negligence, this could hardly be the legislature's intended definition of "good faith."²⁶ Perhaps "good faith" in the Wisconsin statute will apply to all emergency treatment short of intentional misconduct. In this regard, the Wisconsin courts will find Maine's "Good Samaritan" statute a very useful guide in defining "good faith." The Maine statute requires "the exercise of due care."²⁷ A definition of what constitutes "good faith" under the new statute will be necessary in order to make practical application of the law possible.

The Wisconsin courts will face a similar definitional problem when they try to construe what is included under "emergency care." Practically speaking, the only persons who are qualified to define "emergency care" are doctors themselves. Thus, the scope (what constitutes "emergency care") of this law which destroys an individual's remedy is, in effect, to be established by the very persons whom it protects. This may raise a very serious constitutional issue, but how else is the standard of what constitutes "emergency care" to be established? A possible alternative would be to equate "emergency care" with the concept of first aid treatment. But if this were to be the test, it would hardly seem that doctors and nurses would be any more qualified to give this type aid than any other person trained in first aid.

Applying the statute will also require an adequate definition of "the scene of an emergency." The statute includes a definition of "scene of an emergency,"²⁸ but this definition is so broad that some judicial interpretation will be needed when the law is applied to concrete cases. In this regard, it should be noted that Maine requires that treatment take place at the scene of an "accident."²⁹ "Accident" is probably cap-

²³ BLACK, LAW DICTIONARY (4th ed. 1951).

²⁴ For an interesting discussion of the possibility of a quasi-contract recovery for reasonable value of services by a doctor, see Note, *supra* note 15. See also *Garvey v. Stadler*, 67 Wis. 512, 30 N.W. 787 (1886).

²⁵ Note, 1963 B. U. L. REV. 140 (1963).

²⁶ *Bielski v. Schulze*, 16 Wis. 2d 1, 114 N.W. 2d 105 (1961). In view of the *Bielski* decision, it is hard to understand why thirty-seven members of the Assembly voted in favor of Amendment 4-A to Bill 88 A, which amendment proposed adding "except for acts or omissions constituting gross negligence" to the bill following the word "omissions."

²⁷ ME. REV. STAT. ch. 66, § 9-A (Supp. 1961).

²⁸ For the purpose of this subsection, the scene of an emergency shall be those areas not in the confines of a hospital or other institution having hospital facilities, or a physician's office. Wis. Laws 1963, ch. 94.

²⁹ ME. REV. STAT. ch. 66, § 9-A (Supp. 1961).

able of being subjected to a more limited meaning than is "emergency." The Massachusetts "Good Samaritan" law goes even farther and limits the immunity to treatment at the "scene of a highway accident."³⁰ Statutes such as these may be used by the Wisconsin courts in limiting "scene of an emergency" when they apply the "Good Samaritan" statute.

Wisconsin courts will have little trouble in deciding who should be granted immunity under the statute if they accept the phrase "persons licensed under this statute"³¹ as conclusive of the legislative intent. However, when the grant of immunity is viewed in light of a policy of encouraging the rendering of aid in emergency situations, a broader application of who should be given immunity may be deemed desirable. This would be especially true if first aid type treatment were to be the definition of "emergency care." In other states having "Good Samaritan" statutes, various categories of persons have been included under this section of the statute. All of the statutes immunize physicians and surgeons. The statutory law of South Dakota and Utah grants osteopaths immunity.³² California includes midwives in their immunity section,³³ and Texas and Wyoming go all the way, stating that "all persons" rendering aid in an emergency are immune from suit.³⁴ Texas and Wyoming seem to grant the greatest incentive toward rendering aid at the scene of an emergency, but at the same time they completely destroy the remedy rights of an emergency victim and therefore are more susceptible to attack on a constitutional ground. Apparently, the Wisconsin legislature felt that exempting doctors and nurses was an acceptable medium between the statutes at the two extremes; namely, "physicians and surgeons only" and "all persons."

Other Practical Problems

In addition to the aforementioned problems of language interpretation, several practical questions are certain to arise under the "Good Samaritan" law. One can not help but wonder if a doctor who is called to the scene of an emergency will be given the same immunity as a doctor who just happens upon an accident. Is it really emergency care when a doctor is called to the scene of an accident? What if a doctor is called to a factory infirmary to treat an accident victim? An infirmary usually lacks hospital facilities, but, factually speaking, such treatment often is not emergency care. Also to be answered is the question of how much treatment will a doctor be allowed to render under the "Good Samaritan" statute and still be within the limit of rendering "emergency

³⁰ MASS. GEN. LAWS ch. 112, § 123 (1962).

³¹ Wis. Laws 1963, ch. 94.

³² S. D. Laws 1961, ch. 317, at 681; UTAH CODE ANN. § 58-12-23 (Supp. 1961).

³³ CAL. BUS. & PROF. CODE § 2144 (1961).

³⁴ Texas Laws 1961, ch. 317, at 681; WYO. STAT. ANN. 33-343.1 (Supp. 1961).

care." Certainly, there is a point at which extensive treatment goes beyond "emergency care," and when this point is passed, the doctor should once again become subject to the general rules and standards of conduct relating to malpractice. In this regard, the limitation of the Wisconsin statute to persons licensed under chapter 147 or 149 of the statutes may be questioned. It appears that an out-of-state doctor is not immune under our statute. Must a non-resident doctor act at the peril of a malpractice suit because he is not licensed under chapter 147 of the Wisconsin statutes? If this doctor is not protected by the statute, it is questionable whether the purpose of the law of getting "qualified" persons to render aid at accidents is being fulfilled by its present wording.

This leads to another important consideration. Although a higher standard of care may be required of doctors and nurses, are not police officers and other persons who have been trained in rendering first aid as qualified as doctors and nurses to render emergency treatment in the form of first aid to accident victims? Yet they are not encouraged to stop and render such care by the granting of immunity.

A question may also be raised concerning the fact that the immunity granted by this statute is completely contrary to the recent judicial trend in Wisconsin and throughout the country to extend tort liability.³⁵ Part of the rationale underlying these cases has been the idea that, by abolishing the immunities, the burden of the cost of an injury is shifted to the party best able to bear such cost. A "Good Samaritan" statute, such as Wisconsin's, hardly seems to be in accord with such philosophy. A disabled accident victim (part of whose disability may have been caused by the negligent act of a doctor treating him) is certainly less capable of bearing the loss of the disability than the physician (or his liability insurer) who may have caused the disability. It seems reasonable that the physician should be required to pay the cost of the disability, at least to the extent that his negligence contributed to aggravation of the injury. One cannot help but wonder whether or not the immunity granted by the "Good Samaritan" law expresses a legislative intent contrary to the recently developing judicial policy of destruction of tort immunity. This thought is given credence by chapter 198 of the Wisconsin Laws of 1963 which limits the liability of a municipality to twenty-five thousand dollars for any single injury.³⁶ Since this law was enacted subsequent to the *Holytz* case,³⁷ it might be taken to indicate that the legislature wishes to place limitations on the judicial extension of tort liability.

³⁵ *Kojis v. Doctors Hospital*, 12 Wis. 2d 367, 107 N.W. 2d 131 (1961) abolished charitable immunity; *Holytz v. City of Milwaukee*, 17 Wis. 2d 26, 115 N.W. 2d 618 (1962) abolished municipal immunity; *Goller v. White*, 20 Wis. 2d 402, 122 N.W. 2d 193 (1963) abolished parental immunity.

³⁶ Wis. Laws 1963, ch. 193.

³⁷ *Holytz v. City of Milwaukee*, *supra* note 35.

Conclusion

In enacting sections 147.17(7) and 149.06(5), the Wisconsin legislature has enacted a law which, at the very least, will prove to be controversial, especially with regard to its constitutionality. The law was enacted for the apparent reason of encouraging qualified people; namely, doctors and nurses, to render aid at the scene of an emergency. To accomplish this purpose and to avoid attack on the ground that it is ambiguous, it is necessary to give the law a very broad interpretation. However, at the same time, the statute appears to infringe upon an individual's rights to redress for wrongs done to his person. Thus, unless the statute is strictly construed, it will be vulnerable to attack on the grounds of unconstitutionality. If the "Good Samaritan" law is to be practically applied, the courts must solve this dilemma arising between a broad and a strict interpretation of the law. The fact that common-law malpractice concepts have not allowed unfair malpractice suits against doctors who have rendered emergency treatment may well be determinative when a case involving this law comes before the supreme court, especially if it can be factually demonstrated that a fear of such suits is unfounded. If physicians are given adequate protection by common-law rules, there is no need to give them additional statutory protection at the expense of depriving injured individuals of their constitutionally guaranteed rights.³⁸ In view of their questionable need and potentially broad scope, sections 147.17(7) and 149.06(5) of the Wisconsin statutes, as they are presently worded, may well be held to be unconstitutional if so challenged.

DAVID A. SUEMNICK

³⁸ The general rule is that "there is no duty to answer the call of one who is dying and might be saved nor . . . to play the part of a Good Samaritan and fix the wounds of a stranger who is bleeding to death." *Allen v. Hixson*, 111 Ga. 460, 360 S.E. 810 (1900), as cited by Professor Prosser in PROSSER, TORTS 184 (2d ed. 1955). Professor Prosser follows with this statement: "Moral revulsion against the general rule may eventually result in the legal imposition of a legal duty on one to come to the aid of a fellow human in peril, so long as little personal inconvenience is involved." If this type of legal philosophy should continue to develop, it would certainly have some influence on the court when they pass on the necessity of a "Good Samaritan" law.