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Published in:
Environmental Hazards

DOI:
10.1080/17477891.2019.1651687

Publication date:
2021

Document version
Peer reviewed version

Citation for published version (APA):
Causing Wrong While Doing Good: On the Question of Liability for Volunteers in Emergencies

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Abstract

Disaster response has always involved emergent activities by those immediately affected and volunteers converging on the scene. Although issues concerning responsibility and liability for volunteers in emergencies have been noted, in-depth discussions of the topic have been limited in disaster research. This article raises the following questions: What happens when people commit wrongs while trying to do good in disaster situations? How do legal and political systems balance encouraging citizens to help one another while holding people responsible for wrongdoings? By discussing the existing research literature and legal cases pertaining to the question of liability for, what we define as, volunteers, we argue that current understandings of liability are inadequate given recent calls for communities and citizens to become more disaster resilient and take on a larger role in response and preparedness work. We conclude by pointing towards three issues that ought to attract the attention of legal and social scholars in the future.

Keywords: disaster, liability, responsibility, volunteers, Good Samaritans

1. Introduction

Intuitively, it might seem wrong to assign liability for good deeds. Obviously, we do not want to deter the bypassing medical doctor from helping in a large-scale emergency, or, for that matter, the average citizen from saving a neighbour, out of fear of prosecution. Accordingly, most societies in the world have a long legal and moral tradition for shielding benevolent acts from liability.

On the other hand, however, not anything goes in the name of ‘doing good’. No matter how admirable the intentions of your neighbour is, it seems counterintuitive that she is not liable if she burns your house to the ground in response to a leaking copper pipe. Thus, as in all other aspects of life, in disaster situations, individuals and/or groups risk facing liability for injurious acts. Here, a delicate governance challenge presents itself: how do we balance the moral and societal interest in encouraging citizens to help each other in disaster situations, with the societal and moral interest in reducing potentially harmful actions against life or property?
In this article, we will address questions concerning the potential liability of volunteers in disasters and emergencies. From a general perspective, a volunteer can be defined as “a person who does something, especially helping other people, willingly and without being forced or paid to do it” (Cambridge Dictionary).¹ When using the word “volunteers” in the context of disasters and emergencies, we refer to essentially all disaster responders who are not bound by a contractual or statutory obligation, but who act out of their own free will. Obviously, this confined definition comes at odds with well-established uses of the word ‘volunteer’ in contemporary social theory (Smith & Puyvelde, 2016), for instance with regards to how the notion of free will in the execution of altruistic acts is perhaps more nuanced than traditionally believed (Harms et al. 2017). Thus, our definition does not include volunteer firefighters (who is acting on behalf of the State, even if they are not paid to do so)² or people under a duty to rescue (e.g. under civil law in case of immediate distress)³ in our definition. A particular grey zone brought on by the strict definition of volunteers, regards people (such as doctors) who have an ethical vocational duty to help others in harm (Thomas, 2017).

Despite a strong tradition for research looking at the behavior of people during disaster events (as we will discuss in the following sections) a limited amount of research has addressed the question of liability and responsibility for volunteers during emergencies. As Whittaker, McLennan & Handmer (2015) note in a recent review of informal volunteering, more research is needed to understand “how associated legal liabilities and safety concerns are being managed” (Whittaker et al. 2015, p. 366). Similarly, Twigg & Mosel (2017, p. 452) note that “[t]here may be uncertainty about legal liability of volunteer responders (or official organizations they assist) for deaths, injuries or damages suffered by volunteers, or by disaster-affected people as a result of their actions.” Questions of liability and responsibility of these actors have, in other words, received little attention outside of legal scholarship, in which nuanced theoretical and empirical understandings of disasters and emergencies in turn are not often in focus. This article is an attempt to bridge the gap between disaster studies and tort law.

Analyzing the tensions between volunteering and liability in disasters is challenging because law is inherently jurisdictional. Different law traditions have dealt with volunteers in different ways, and thus one has to be careful with respect to assuming similarities between legal systems, not least across common and civil law systems. Thus, rather than presenting a systematic comparison of cases across legal contexts, our analysis and discussion will explore how the present and traditional states of law might be need to be put under revision in light of the changing role of volunteers in disaster situations given the turn to resilience, not through a

¹ See also Michael Eburn’s analysis of Good Samaritan regulation in four Australian States, defining a Good Samaritan as a person “acting ‘without expectation of payment or other reward’” (Eburn 2003: 8).
² For an analysis of the liability of volunteer firefighters see Loh (2009).
³ In this context, an important difference between common law and civil law systems surface. Thus, the question on whether such moral duty to aid others can, or should be, made into a legal duty of rescue (and thereby an issue of legal scrutiny), is solved differently within these overall legal systems. Civil law systems seem to favour a formalized legal duty of rescue and common law systems favouring not to set out such general duty. For more on the duty to rescue see publications by Weinrib (1980), McIntyre (1994), and Tomlinson (2000).
legal systems comparison, but by way of asking how the underlying principles of different law systems see the duties and responsibilities of volunteers as being in conflict. As such, our analysis aims to show that that as the line between volunteers and disaster professionals blur within disaster management theory – new legal questions of theoretical and practical importance arise.

The article is structured as follows: In the first section, we briefly outline a few of the underlying principles for how legal systems have understood benevolent actions during emergencies in tort law. In the subsequent section, we present a few legal cases that illustrate the complex nature of the ways in which tort law and emergency law systems intersect. In the discussion section that follows, we explore how calls for more resilient societies and communities is turning liability into a defining question for whether or not volunteers will continue to contribute in disaster response and recovery. Finally, we offer our conclusions, pointing towards three issues that social and legal scholars ought to pursue in future research on volunteers in crises, emergencies and disasters.

Methodologically, the article provides a review of cases in relevant legal databases, as well as a review of existing analyses on volunteer liability in scientific databases. Additionally, we have surveyed a selection of the most recent works in sociology and related social science disciplines on disaster and emergencies, exploring whether these discuss questions of liability and responsibility for volunteers. Publications dealing with liability and responsibility in disasters cover a range of issues that are not addressed in this article, such as the liability of private corporations or states. Very few examples of negligence of responsibility and liability of volunteers exist for post disaster situations at a scale that go beyond contained accident events, and no court cases, to our knowledge, can be found. Indeed, litigation against volunteers seems to be commonly feared, but very uncommon in practice. The lion’s share of cases referring to volunteers in disasters refer to rescuers suffering injuries during interventions. These cases will not be included in this article, nor will cases discussing the liability of governments to adequately provide for the safety of citizens in disaster prevention (Raikes & McBean, 2016; Lauta, 2017). The stringent focus in this article on people doing morally good, but committing legal wrongs that harm others than themselves, thus limits the number of cases that can be mentioned. None-the-less, as already stated, the purpose of this article is not to conduct a legal review nor to provide a systematic comparison of liability cases, but rather to use available cases as a starting ground for asking what kinds of issues might be at stake with the potentially increasingly important role of volunteers in disaster management. This, we argue is a relevant aim in light of the popularity of the idea of societal and community resilience, which is fast becoming the dominant conceptual anchor point in international disaster risk management and governance strategies (UNISDR, 2015).

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4 These cases are often solved with rejecting the doctrine of volenti, cf. e.g. the leading English case Ogwo v. Taylor [1988] AC 431. As stated in Wagner v. International Railway Co (1921) 232 Ny Rep 176: “the cry of danger is the summons to relief”.
2. Law and responsibility: A taste of torts

The Roman jurist Gaius is accredited for having proposed that any legal obligation arises from either a contract (or as thought from a contract) or a wrong (or as thought from a wrong). While traditional emergency responders act as agents of the state, and thereby are included in the traditional discussions about responsibility of the State or their employers, volunteers, as defined in this article, fall outside of the scope of this protection. Thus, the subject of this article, liability for volunteers without a contractual or statutory obligation, cannot not solved by reference to statutory or contractual law - it requires a wrong to be committed.

*Tort* literally means wrong, and is the legal doctrine of civil wrongs (Owen, 1995). While there are obvious national differences as well as differences between legal traditions i.e. between common and civil law, tort law is one of the most transgressive disciplines of law, as it relies, to a wide extend, on the establishment of a standard of reasonable behaviour (a duty of care). Torts are often, though not necessarily, sanctioned by compensation.

Historically, we have seen relatively few torts cases post disasters pertaining to wrongs committed by volunteers. However, a sea change seems to be underway. Hurricane Katrina was a horrifying event. It was caused by the third-worst tropical hurricane to ever make landfall in the southern part of the United States, which resulted in one of the most expensive disasters on record. Almost by definition, disasters and large-scale emergencies have been considered as unusual or exceptional events. Within law, this means that responsibility was, per definition, attributed to external forces and legally categorized as acts of God or Force majeure. In the case of Katrina, it was the super-category hurricane. Accordingly, many stakeholders in the aftermath of the disaster claimed that they could not be held liable for losses, as Katrina’s damages was the result of an ‘act of God’. Surprisingly, however the defence largely failed to shield from litigation (Kaplan, 2007; Kristl, 2010; Mercante, 2005-2006). Thus, Katrina, in spite of the overwhelming natural forces in play, was not an act of God under law.

This reflects a dramatic change within law (Lauta, 2017). Today, disasters are no longer *per se* considered exceptional events, exempted from human agency and thereby responsibility, but the result of social processes inherent in the normal structures of societies (Tierney, 2014; Wisner, Blaikie, Canon & David, 2004). This turn towards the historically produced patterns of vulnerability in society (Oliver-Smith, 1999) as the causes of disasters, means questions of responsibility and liability cannot be assigned to a divine creator or to nature alone. Disasters are today arenas for struggles over justice, for better or worse.

Another essential change relevant for volunteer liability seems to be underway. The fundamental principle of a wrong or a negligent act to have been committed seems to be subtle, but central element, traditionally shielding volunteers from responsibility in disasters. When people inadvertently causes harm in spite of their undisputed intention of aiding, this without a doubt makes the argument that a wrong has been committed more complicated. In fewer words, how can a morally good deed be a legal wrong? Obviously, this shielding works both on the level of the individual, and in the larger societal interest in promoting and

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protecting the moral impetus to encourage good deeds in society. However, like in the case of our understanding of disasters, the preconditions for these discussions are changing these years. As argued above, liability cases post disasters are becoming more common, but adding to this, volunteers are bestowed a larger and more important role in some contexts of disaster management today. Accordingly, the risk of liability increases. There is a two-fold explanation for this: first, the legal basis of liability increases with the expectation to perform a certain function in a system, and, second, the moral shielding provided by the altruistic motivation decreases as, or if, motivations for helping from the perspective of the individual slowly changes from the domain of voluntarism to that of expectation.

An important element of tort law is that it is inherently contextual. In order to assign liability for a tort, one must document culpability, causality and foreseeability of damages, all three of which can be difficult to ascertain post disasters. However, while, causality is a standard aspiring toward objectivity: aiming to document a causal relationship between the injury and the tortious act, both culpability and foreseeability of damages are inherently “subjective” standards, relying on the abilities, duty, position and experience of the injurer. Thus, when assessing whether a failed attempt by a random by-passer to amputate a leg, is culpable, and the damages foreseeable, it is essential whether the by-passer has a professional background as a surgeon or as an auto mechanic. All volunteers are in other words not the same. As such, any discussion about responsibility and liability need to start by distinguishing implications for the individual volunteer. Nonetheless, in order to discuss the issue of volunteers in disaster situations within torts en bloc, we will in the following section provide a few examples of tort cases against volunteers.

3. Analysis: Liability for volunteers

For decades, sociologists, psychologists and anthropologists have been interested in understanding and studying the dynamics of emergent groups and spontaneous volunteering during disasters and emergencies (Fritz and Williams, 1957). Over the years, this has developed into a field of research within disaster studies, in which studies consistently report the same types of patterns: despite some initial sense of disorder, people in the vicinity of a disaster event organize and form groups that provide vital first response to victims and affected individuals (Drabek & McEntire, 2003; Dynes, 1970; Rodriguez, Trainor & Quarantelli, 2006). Despite a widespread public and elitist perception that disasters result in panic and chaos (Clarke & Chess, 2008), the self-appointed task for disaster researchers has been to show that there is a great and often untapped potential in utilizing ordinary people in emergencies (Scanlon, Helsloot & Groenendaal, 2014). Researchers have also sought to understand how the traditional military model, or the command-and-control model of professional emergency response, clashes with the bottom-up, improvised, creative and emergent form of response that ordinary citizens are most often engaged in (Kendra & Wachtendorf, 2016; Dynes, 1994).

Building upon such research interests, social scientists have addressed several different issues pertaining to both unaffiliated, unorganized volunteers (Whittaker et al. 2015) as well as affiliated, organized volunteers (Alexander 2010). In Russell Dynes’ (1970) traditional, typology of emergency responders, a distinction is made between existing,
extending, expanding, and emergent groups, all of whom might operate during the course of an unfolding emergency.

In the following, we will analyse issues pertaining to these groups, before moving on to a discussion of what the implications of previous liability cases for volunteers might be for integrating these groups into disaster response and risk reduction.

3.1 One size fits all?
In contrast to “ordinary” volunteer, particularly skilled people (like doctors) are scrutinized on a higher standard. Professional, trained and skilled people acting as volunteers will in cases of liability be assessed in relation to their abilities (e.g. that a fire fighter is expected how to act in a fire emergency), their duties (e.g. the Hippocratic oath taken by medical doctors), and their experience (e.g. whether the person in question is a junior or senior professional). All of these factors will essential inform their duty of care, and thereby the subjective standard against which a potential tort case would be decided. Most cases in legal history that concern the liability of skilled professional volunteers do not occur in a general state of urgency or emergency such as a disaster. Instead, they tend to concern one party aiding another during an individual accident (e.g. Groble & Brudney, 2015). Thus, the case law relevant to this group is embedded in a broader discussion on a duty to rescue. In particular, the question of medical professionals’ non-rescue in common law jurisdictions is widely discussed (Agulnick & Rivkin, 1998; Benditt, 1982; Kift, 1997). Here the dysfunctional situation arises when a professional is exculpated from omissions to aid, while potentially being held liable for mistakes committed during an intervention - essentially dis-incentivizing professionals from aiding a fellow human being in urgent distress. This argument would obviously not apply in the many civil code jurisdictions, where a clear duty to rescue or assist exists (Vranken 1998). It has traditionally been the case that no such duty exists under common law.

But even around such clear-cut distinctions, exceptions exist. In the Australian case, *Lowns v. Woods* (Crowley-Smith 1996), a medical officer was held liable for refusing to aid a boy during an epileptic seizure (see also Eburn 1999). The question of liability in large-scale emergencies however remains largely undiscussed in part because the legal cases are few. This might also indicate that the risk of being liable for wrong doings resulting from good intentions does not act as a deterrence for skilled, professional volunteers.

In contrast to volunteers who retain specialized expert skills, most volunteers in disaster situations are what is usually called spontaneous, unaffiliated or simply ‘ordinary people’ (Scanlon et al. 2014). Expectation of doing right while doing good, might not adhere to as high standards for this group as for professional volunteers. However, due to this same fact, how legal systems interpret the roles of ordinary spontaneous volunteers is blurry.

In a field manual for spontaneous community volunteers, Lisa Orloff (2011) notes that the liability issue from the perspective of emergency management agencies is generally two-pronged. On the one hand, liability risks arise in situations where volunteers or their families might file lawsuits against agencies for injuries or death occurring as a result of activities carried out by them as volunteers. The second liability risk, is that those who receive help might sue agencies as a result of unintended consequences of the actions of volunteers. As Orloff furthermore notes, because of a widespread confusion about the liability of volunteers,
non-transparent laws and the sometimes-multiple affiliations of volunteers, understanding and navigating volunteer liability for organizations that rely on volunteers and opt to register them and give them an official mandate is problematic.

When looking at how legal cases have interpreted the wrong doings or non-professional volunteers in emergencies, a substantial margin for the actual behavioral standard seems to apply across the jurisprudences (Thomas, 2017). This does not include situations in which the responders own property or interest is in play (Wynn, 2004), as this question is most often addressed within the legal question of necessity.

An English fire-case from 1912, Cope v. Sharpe, might illustrate the behavioural standard applied. The plaintiff was a landowner, and sued the defendant who had hunting rights to the property. A heath fire on the plaintiff’s property made the defendant’s gamekeeper start a backfire, convinced that it would help effectively put out the fire. Unfortunately, contrary to the belief of the gamekeeper, the backfire severely damaged the plaintiff’s property, and had no effect in stopping the main fire, which was put out shortly thereafter. Though a Jury found that the actions were not necessary to avert the loss of a greater good, the Appellate Court found in favour of the defendant after applying the test: “whether his acts were reasonably necessary in the sense of acts which a reasonable man would properly do to meet a real danger.”

While the above example shows how good intentions were made liable due to the lack of reasonable necessity, damages to property or goods might be exculpated if they are proportional. In other words, if it is necessary to break the window in order to save a child from a burning house – to use a hypothetical but realistic example – no compensation for the damage done is needed. The issue of compensation for acts of necessity is interesting on its own, because legal systems traditionally see the person holding the interest being liable for the damages. In other words, even in the exculpatory state of emergency where a right to infringe on others’ property is given, damages occurring as a consequence of volunteers’ actions are still treated as a wrong from a legal standpoint.

3.2 Good Samaritans
In many preparedness systems, volunteers already constitute part of the well-established emergency procedures, even if their roles might not be officially recognized, as is often the case (Hodge, Calves, Gable, Meltzer & Kraner, 2006, 62ff). For instance, after Hurricane Katrina, volunteer medical staff played a substantial role at the overrun hospitals of Louisiana (Rodriguez et al., 2006). Such activity in turn creates a different set of questions of liability for the organisation hosting such professional volunteers.

For more details of how law solves this dilemma, see Lauta (2017) or Finn (2016, pp. 100-116)
See for instance the case McDonald v. Massachusetts General Hospitals (Commonwealth of Massachusetts, 1876), where it was stated that “A corporation, established for the maintenance of a public charitable hospital, which has exercised due care in the selection of its agents, is not liable for injury to a patient caused by their negligence, nor for the unauthorized assumption of one of the hospital attendants to act as a surgeon.”
Given the societal interest in not deterring people from volunteering, many jurisdictions have made so-called Good Samaritan clauses, explicitly exculpating damages resulting from a benevolent intervention. Variations on the Good Samaritan clause exist in e.g. Australia, Canada, China, Finland, Germany, Ireland, Israel and the United States. Thus, such skilled volunteers are often shielded from liability by specific laws, or general doctrines, like the Charitable Immunity Doctrine. In the US, for instance, the Federal Volunteer Protection Act shields volunteers (a person that performs a service for a non-profit or government without compensation) from third-party liability (see Groble & Brudney, 2015). This act, however, does not cover some groups like health professionals if these work for for-profit hospitals or health institutions, and neither for professionals not performing a ‘service’.

Good Samaritan clauses have however been noted to function very differently across contexts. With respect to the United States, Thomas (2017, p.150) notes that the lack of uniformity between Good Samaritan laws across states result in barriers of interpretation, and are often in conflict with “legislative intent and public health initiatives.” This, one could argue, relates to the fact that Good Samaritan clauses are deliberately constructed to be a flexible mechanism reflecting the moral and ethical maxim to help others in times of need, and while this is undoubtedly admirable and practical, it hardly provides cross-jurisdictional clarity as to its applicability. Furthermore, Good Samaritan clauses tend to lower the expected standard of care and performance that would apply under normal states of affairs thereby potentially making the question of liability harder to ascertain after the fact.

3.3 From pragmatic justice to legal uncertainty

In sum, the way law addresses damages inflicted by people while doing good, is with substantial flexibility: allowing for considerations of individual knowledge and skills, moral impetus, and the milieu of the situation to be weighted-in. This is reflected within torts by an overall hesitance to set out a general doctrine, and within regulation (like the good Samaritan clauses) by leaving a substantial margin of interpretation for the judge. This makes perfect sense. These cases have traditionally been, and are still, highly controversial and exceptional. Providing the judge with the most flexible legal setup, simultaneously provides her with the best platform to settle the matter in a manner satisfactory to the parties or communities involved. However, this legal pragmatism is challenged as the phenomenon become more common. Most obviously, because flexibility when multiplied translates into lack of foreseeability and uncertainty about individuals’ legal status rather than justice. In the following, we will explore how the role of volunteers have changed, and how that might challenge the present state of law.

4. Discussion: Changing response structures and volunteer roles

As noted, disaster response has always involved emergent rescue and recovery activities by those immediately affected and individuals converging on the scene. At the same time, a strong impetus from social scientists to see emergent groups and volunteers as a source of untapped value for emergency response has emerged over the years. As Scanlon et al. (2014, p. 44) emblematically note:
“By highlighting the way ordinary people, existing groups and organizations, and emergent groups are self-reliant in emergencies and able to help others and assist professional emergency agencies, our goal is to demonstrate that their involvement cannot only be of value but—with improvements in planning—can and should be integrated into emergency planning and response.” (emphasis in italics added)

As calls for the creation of ‘resilient communities’ worldwide – a discourse emerging in the mid-2000s (see e.g. UNISDR 2007) and rising to prominence with the Sendai Framework (UNISDR 2015) – means that such calls by scholars in disasters might materialize sooner than expected. We might even make the conjecture that volunteers and non-disaster professionals will be assigned more substantial responsibility in the disaster response and management structures in the future. Thus, if the basic idea of building resilience is to equip and educate local communities increasingly to partake in the first line response during disasters, then this implies a delegation of responsibility, and consequently one of liability. In some cases, this would trigger state authorities to take responsibility for residual liability, thus also exculpating volunteers if these perform a service for the state.

However, signs of transformations of the traditional response structures in disaster emergencies that might impact how volunteer liability is managed are already detectable, although not conclusive. Superstorm Sandy is a case in point. Famously, after Sandy had battered the US East Coast, local communities were overwhelmingly successful in orchestrating the disaster response and immediate recovery efforts. The success of bottom-up grass roots volunteer response, most notably through the Occupy Sandy movement – even suggested to experts from Homeland Security (2013) that civil society actors should take a stronger role in future emergencies, with government playing a lesser role. This might prompt one to ask whether a focus on resilience and emergent volunteer groups would mean a retraction of the state in disaster response as has been suggested in the case of Superstorm Sandy (Illner, 2018), and in relation to critiques of the neo-liberal underpinnings of resilience (Chandler & Reid, 2016).

While we do not wish to argue against the potential value of integrating volunteers more closely into emergency response planning, what we have already highlighted in this article shows that there are some fundamental issues from a legal and ethical perspective that need to be taken into account in addition to the political question around delegating authority to volunteers as emergency response actors.

In the following, we will zoom in on two different issues we think are particularly crucial to discuss and address in light of present developments, and in light of the overall issues we identified in the previous section. The first thing is that calls for people to become resilient will have implications for the moral impetus traditionally shielding volunteers within law. Secondly, if liability increases for volunteers, and the will to engage in such activities dwindles, there is a need to re-examine existing duties to rescue and aid those in need under present law.

4.1 Implications for Liability 1: Decreasing moral shielding of volunteers

Increasing institutionalization of volunteers as part of disaster responses have many benefits: the ability to utilize local knowledge and the potential savings for expenses
that would go to hiring more professional personnel and technical equipment, are but two. However, as stated above, it arguably also moves the volunteers further away from the moral impetus that presently shields them from liability. The increasing reliance on volunteers in a public disaster management structure means that volunteers are increasingly performing tasks that professionals would otherwise do, as was the case during Sandy.

While this a great testimony of the abilities of a strong community working together, it raises a potentially poisonous hypothetical legal question: if the volunteers de facto prevent professionals from exerting their duty, how does that affect their culpability in case of damages? While volunteers are not known to outright prevent the work of professionals in disaster emergencies, it is common to see volunteers taking on tasks that state professionals do not prioritize or have the time or resources to handle. If state emergency professionals would come to rely on such citizen-based, emergent volunteer activities more in the future, then one might ask what then happens if volunteers execute their good intentions in ways that put other citizens or material properties at risk (e.g. building a sandbag dike to prevent flooding in the wrong way)?

Moreover, one is left to speculate whether maintaining such special status for volunteers might in light of the above, be a moral hazard for disaster managers – that is, if volunteers are always exempted from liability, they could be sent to perform the job with highest risk of liability for those that might be hurt because of the actions of volunteers. Or, conversely, that delegating liability towards volunteers might pre-emptively exculpate authorities from taking responsibility.

The case of how citizens responded to the 2013 Central European Floods in the city of Dresden, Germany, is illustrative of this problem. Here, thousands of volunteers converged on sites at risk of being flooded by the Elbe River by filling sandbags and using these to build provisory dikes. The authorities were ambivalent towards these efforts, both praising the solidarity of the people and criticizing their dilettantism (Albris, 2018). Yet as Kuhlicke and colleagues have argued in relation to the debate that followed regarding the public’s role in flood emergencies, the authorities also seemed to exploit the possibility of delegating “responsibility and blame to those stakeholders participating in risk management in case “something goes wrong!”” (Kuhlicke, Callsen & Begg, 2015, p. 318).

With such cases in mind, we might speculate about what the consequence of a decrease in moral shielding of volunteers will be, if bottom-up responses to disaster are increasingly officially recognized as legitimate, on par with the work of fire fighters and emergency professionals? As indicated above, there seems to be a range of unanswered questions, of which liability is but one. However, for both professional and non-professional volunteers, the challenge is clear: with the turn to resilience there is a lesser degree of moral protection of good deeds, if such deeds become expected to play a central rather than an auxiliary role in emergencies.

4.2 Implications for Liability 2: Damned if you do, damned if you don’t?
In studies done on the organization of volunteers in disaster situations, liability is considered an obstacle for these groups’ involvement in disaster response operations (Whittaker et al.,
2016, p. 165). That is, the risk of liability is framed as an obstacle for doing good. In this sense, if volunteers are aware of the possible risk of liability in performing a rescue action, it might deter them from acting. Interestingly, however, within the literature on compensation it is often questioned whether torts can function as deterrence at all (Owen, 1995). That is, if anyone in a dangerous situation would ever consider the potential liability, before engaging in a rescue operation. This is in part tied to the fact that within existing clauses, there is not merely a protection of volunteers who commit wrong in coming to the aid of others, but also an imperative to aid.

The parable of the Good Samaritan aims to set out a duty to help: go and do alike, Jesus said. And such duty to help actually exist in several jurisdictions across the globe. According to the French Criminal Code Art 223-6 “Whoever voluntarily fails to provide to a person in danger the assistance that, without risk for himself or a third party, he could provide, either by his own actions, or by initiating a rescue may be punished by up to five years imprisonment and a fine of up to 75,000 Euro”. Similarly, § 323c of the German criminal Code, the “Strafgesetzbuch”, states:

Who fails to provide help in cases of disaster or imminent danger or distress, although this [help] is necessary and reasonable under the circumstances, [and is] especially without considerable danger for his own and without violation of other important duties possible, will be penalized with imprisonment up to one year or fined.

Similar penal code provisions exist across the globe, penalizing failures to meet a basic duty to rescue or assist, in particular for professionals.9 While the risk of failing to live up to one’s duty pertains in most part to professionals who are expected to deploy their skills when needed, non-professional volunteers would also be liable to be charged with dereliction of duty, if the act required does not involve specialized skills. Both categories of volunteers could thus easily end up in a situation where not aiding would be dereliction of their professional duty.

While no such duty (for omissions to rescue) is presumed to exist under Common Law10, a duty for misfeasance exists. Accordingly, if you engage in a rescue attempt, it will provide a basis for liability.11 Thus, a dilemma, for in particular professionals, emerges: aid and you will be exposed to civil liability. Fail to aid and you will be exposed to potential criminal liability. This professional volunteer catch-22, sits at the heart of the dilemma of how to regulate volunteers, and needs to be explicitly addressed by regulators in order to be

9 See e.g. Williams (2001) and Hodge (2006).
10 See Osterlind v Hill 160 NE 301 (Supreme Judicial Court of Massachusetts, 1928).
11 See the Canadian case The Ogopogo, 2 Lloyds Rep 410 (Canadian Supreme Court, 1971). A guest at a boat party fell overboard, the host attempted to reverse the boat to pick him up but failed to position it correctly, and a second guest dived in to conduct a rescue. Both guests drowned. Though the Canadian Supreme Court held that while, as their host the defendant did owe a duty of care to his two guests, he had not been negligent in the circumstances in the way he had attempted to conduct the rescue. A duty of care there may have been but the court was reluctant to hold him to a high standard of care.
resolved. Some of these concerns, it should be noted, are beginning to be addressed in Good Samaritan laws.

5. Conclusion

If we are to believe – and hope – that calls for more resilience-based approaches to disaster management will yield more bottom-up activities and organization from communities and individuals, then a range of issues concerning liability will become more pertinent and pressing in the years to come. As several recent works in disaster studies highlight (Whittaker et al., 2015; Twigg and Mosel, 2017), more research on liability and responsibility for volunteers is needed.

In this article, we have highlighted how liability issues for volunteers play out. By way of conclusion, we will provide three points that we believe should be the focus of both research and policy/law making on volunteers in disasters and emergencies in the future.

First, vague Good Samaritan Clauses and volunteer protection acts that do not apply in courts, might be a flexible way to legally govern a complex area wrought with grey zones. Yet in this sense it merely reflects the ambivalent nature of good deeds, and, as has been noted by researchers (Orloff, 2011), such clauses are often in conflict with official disaster management strategies. More research needs to be put into understanding these grey zones, which should aim to support a stronger policy focus on making clearer rules and laws for volunteers.

Second, the lack of awareness of the rights and obligations from the point of view of volunteers needs to be addressed. This might in turn be related to a wide legal illiteracy even in Western countries, and even among many well-educated groups. Research should focus on documenting and comparing cases where volunteers acted without adequate knowledge, which resulted in conflicts. Awareness raising of the act of volunteering during emergencies should be part of the risk and preparedness communication that governments – nationally as well as locally – are carrying out.

Lastly, the paradox of ‘damned if you do, damned if you don’t’, suggests that different law sets – criminal and civil – as well as Good Samaritan clauses and volunteer protection acts need to address simultaneously the liability of acting, and the liability of not acting. At a deeper level, if calls for more bottom-up and community based forms of disaster resilience is the trend of the future, then there will automatically be ethical as well as legal ramifications of the co-existence of the duty to act and the liability of acting. The consequence might be that the whole notion of what constitutes citizenship in terms of rights and obligations during disasters would have to be reconsidered.

References


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