Torts – Supplemental Materials

Part I

Professor Gregory Dolin
Section 608-329

Fall 2013

Columbus Dispatch (Ohio)

December 20, 1999, Monday

SECTION: SPORTS, Pg. 1D

LENGTH: 800 words

HEADLINE: 'ZEUS' PUSHES REPUTATION LOWER SHOVING REF AFTER FLAG HITS HIM WILL BE COSTLY

BYLINE: Bill Rabinowitz, Dispatch Sports Reporter

DATELINE: CLEVELAND -

BODY:

When Chris Palmer saw Orlando Brown return toward the huddle, the Browns coach thought he was seeing the admirable side of the offensive right tackle, the fierce competitor who wouldn't let an eye injury sideline him.

Instead, Brown showed a much less pleasant side, one that will no doubt leave him lighter in his wallet and very possibly suspended.

Early in the second quarter yesterday, referee Jeff Triplette accidentally hit Brown in the right eye while throwing a penalty flag for a false start on Cleveland center Jim Bundren.

Brown staggered off the field, then came back.

"I just thought he was courageously going back out on the field to go into the huddle," Palmer said.

Rather than rejoin his teammates, however, an enraged Brown approached Triplette, put both hands on the referee's chest and pushed him to the ground.

Running back Karim Abdul-Jabbar and tackle Chris Ruhman immediately tried to restrain the 6-foot-7, 350-pound Brown, who was ejected from the game. Triplette was unhurt.

On the sideline, several teammates tried with little success to calm Brown, and Palmer had a heated exchange with him. When Brown finally was escorted off the field, the player known as Zeus kicked over two sideline yard markers on his way out.

"I think everybody's embarrassed about the situation," Palmer said. "I think Jeff is embarrassed because he threw the flag (and hit Brown), but hey, those things happen. I'm embarrassed. Hopefully, Zeus is embarrassed."

Throughout Brown's seven-year NFL career with the Browns and Baltimore Ravens, he has struggled to harness his temper.

Earlier this season, he proudly declared himself "one of the top dirtiest players" in the league.

Fearing that Brown would make inflammatory comments before a rematch with the Baltimore Ravens in November, Palmer put him on a gag order.

"He's a guy that's very emotional, very physical," Palmer said. "Another man hurt him and he wanted to retaliate. That doesn't make it right."

Brown's eye was injured, perhaps seri-

ously, Palmer said. Triplette's flag was actually a pouch filled with BB's, and it hit Brown flush in the face. His eye was nearly swollen shut, and he was taken to Cleveland Clinic for tests before the game ended.

"Certainly there was every effort to apologize (to Brown) because it was totally unintentional and inadvertent," Triplette said to a pool reporter. " I have been in officiating almost 30 years and never had anything like that happen."

Nor could he recall ever being pushed by an athlete.

Cleveland players understood Brown's reaction, though they stopped short of condoning it.

"I think he was very upset and very heated," Ruhman said. "I think he has a right to be. I don't think it was the right action, but I understand."

Asked if he believed Brown needed some kind of psychiatric help, defensive end Derrick Alexander replied, "Well, if that's the case, all of us need help on Sundays. We're out there trying to kill each other.

"When we play football, we're supposed to be psycho. It's a violent game. We're supposed to be wild, crazy, out of control, trying to do whatever our job is out on the field. When he's outside of those lines, he is not that (kind of) person."

Fellow lineman Scott Rehberg agreed.

Three weeks ago, Brown chastised Rehberg for not playing with the flu, saying he let down his teammates.

Yesterday, Brown's ejection left Cleveland with no backup linemen. But Rehberg did his best to vouch for Brown's character.

"I'm very surprised (he pushed Triplette)," he said. "People get this perception that he's this crazy, out-of- control guy. He has a burning fire inside of him and he's a competitor, but he's a smart guy, too. He's not out of control by any means. Maybe he lost it a little today, I don't know."

Rehberg made no effort to intervene.

"To be honest with you, I stayed as far away as I could," he said. "I know Zeus. When he gets like that, you don't even mess with him."

Brown signed a six-year, $ 27 million free-agent contract with Cleveland.

Asked about whether Brown's actions might jeopardize his future with the team, Palmer said, "I'm not even ready to address that."

Browns president Carmen Policy, who did not attend the game because of illness, did not return a phone call seeking comment but did release a statement.

"There is no question that we agree with the officials' response in ejecting Orlando Brown," the statement read. "It is unfortunate that he was injured by the official's flag, perhaps even seriously.

"We will be discussing the responsibilities of the club and ramifications of the incident with league officials (today) and will comment further once those discussions are conducted."

* More comments on incident / 5D

GRAPHIC: Phot, (1) Tony Dejak / Associated Press Browns tackle Orlando Brown (77) is restrained by teammates after shoving referee Jeff Triplette, left. (2) Orlando "Zeus" Brown suffered swelling around his right eye after being hit with a penalty flag

LOAD-DATE: May 19, 2000

The Boston Globe

December 25, 1999, Saturday ,THIRD EDITION

SECTION: SPORTS; Pg. D2

LENGTH: 2002 words

HEADLINE: WILL MCDONOUGH;
HASSELBECK: HIS RED FLAG WAS IGNORED

BYLINE: BY WILL MCDONOUGH, GLOBE STAFF

BODY:

It was 20 years ago, when he was playing tight end for the New England Patriots, that Don Hasselbeck cautioned the National Football League.

"I told them they should change," said Hasselbeck. "I called the league office a couple of times when the season was over, but I guess no one ever paid attention to me. Nothing changed. Now this happened." On Dec. 16, 1979, during the final game of the season in Foxborough, Hasselbeck was cut in the face with a flag thrown by an official and needed six stitches. "I thought I was shot," said Hasselbeck. "It knocked me right to the ground. I was in tremendous pain. I put my hand up to my mouth and there was blood all over the place. I looked down, and there was this metal sinker, like you fish with, on the ground right in front of me. That's what the official had in his flag."

Fast forward 20 years and three days to Dec. 19, 1999. In Cleveland, referee Jeff Triplette threw a flag and hit Browns offensive lineman Orlando Brown in the eye. Brown responded by knocking Triplette to the ground, and has been suspended indefinitely. He is still hospitalized with potentially permanent eye damage.

Triplette's flag contained small BBs to give it weight, as opposed to the sinker that dropped Hasselbeck.

"We were playing the Minnesota Vikings and going in for a score. I was blocking Jim Marshall. He was 41 years old, and I still held him," said Hasselbeck, laughing at himself. "I saw the official [field judge] at the back of the end zone throw the flag in my direction. I didn't pay any attention to it except that I was mad for getting caught holding. Next thing I knew it hit me.

"They took me into the locker room. My lip was split from the bottom of my nose down. If I didn't have a mouthpiece in, I would have had my teeth knocked out. As it was, my teeth were a little loose. They stitched me up and I played the second half.

"A couple of months later, during the offseason, I called the NFL office and asked them what was going to be done about it. I never got a straight answer."

At times, there are "spot penalties" in football, and the officials are supposed to throw their flag to the spot where the foul occurred. A flag with no weight to it would not reach the spot, or blow away. So officials are told to put their own weight in the flag.

"We recommend popcorn [kernels]," says Jerry Seeman, head of officials, "and small BBs like Jeff used in this case. It was an unfortunate accident. The right guard moved on the play before the snap so Jeff threw his flag toward the right guard and Brown [at right tackle] was going in that direction when he got hit."

Despite the spin the Browns are trying to put on the incident, Brown is described by former teammates and coaches as a violent person with a quick trigger. They are not surprised he went off on the official. In Baltimore, he had to be prevented by his teammates from trying to attack a sportswriter on the practice field.

Of course, if he really wanted to, he could have hurt Triplette, because Brown is one of the strongest guys in the league, which is why he has the nickname "Zeus." Brown originally was a free agent nobody wanted. He was ready to sign on with World Wrestling Federation when the Browns signed him for $100. During his first workout, he hit the blocking sled so hard, the guy holding it flew through the air and separated a shoulder.

Those feeling sorry for Brown should remember there have been probably hundreds of officials who have been run over and injured by NFL players in accidents during games, and not one yet has sued a player.<

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GRAPHIC: PHOTO, Cleveland Browns offensive tackle Orlando Brown might have permanent eye damage after being hit by a referee's BB-weighted flag last Sunday. / AP PHOTO

LOAD-DATE: December 28, 1999

The Washington Times

December 26, 1999, Sunday, Final Edition

SECTION: PART A; SPORTS; ROUNDUP; Pg. A9

LENGTH: 644 words

BODY:

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FOOTBALL

Cleveland Browns offensive tackle Orlando Brown was released from a hospital Friday, five days after he pushed a referee who injured the player when he threw a BB-laden penalty flag into Brown's eye, the Plain Dealer reported. Brown had been in the Cleveland Clinic Hospital since Sunday's game against the Jacksonville Jaguars, bothered by bleeding in his right eye. He was hurt when referee Jeff Triplette inadvertently threw a penalty flag into his eye. The newspaper quoted a hospital police officer, who said the 6-foot-7, 350-pound Brown was released late Friday afternoon.

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LOAD-DATE: December 26, 1999

September 20, 2000, Wednesday, Home Edition

SECTION: Sports; Part D; Page 1; Sports Desk

LENGTH: 605 words

HEADLINE: BROWN, STILL INJURED, IS RELEASED;
PRO FOOTBALL: CLEVELAND WAIVES LINEMAN, WHOSE VISION REMAINS BLURRED AFTER BEING HIT WITH REFEREE'S FLAG LAST SEASON.

BYLINE: STEVE SPRINGER, TIMES STAFF WRITER

BODY:

It has become the stiffest and cruelest penalty in NFL history.

On Tuesday, nine months after he was inadvertently hit in the right eye by a flag thrown by referee Jeff Triplette, offensive lineman Orlando Brown was released by the Cleveland Browns.

And Brown isn't done paying the penalty for Triplette's mistake.

The vision in Brown's eye remains blurred, there is swelling behind the eye, and the 29-year-old, eight-year veteran also continues to struggle with his fear of future damage. Brown's father lost his sight because of glaucoma.

Brown's physical activity these days is limited to riding a stationary bike and walking.

"The symptoms have not subsided and we do not think he's close to being approved by the doctors to return to play," Brown President Carmen Policy said. "We are convinced that there is absolutely no light at the end of the tunnel in terms of Orlando returning to the playing field in 2000."

Brown, who was told of the release Tuesday, had no comment.

"I think he knew it was coming," Policy said.

Triplette's flag struck Brown in a game against the Jacksonville Jaguars last Dec. 19 when the BB-weighted object somehow got through Brown's facemask. With a combination of fear and rage surging through him, Brown, who had stumbled toward the sideline, returned to shove Triplette.

When that move was seen by league officials, Brown was viewed as the villain as much as the victim, resulting in an indefinite suspension.

It soon became obvious that Brown was justified in his fear this was no glancing blow, but a potentially career-ending injury.

NFL Commissioner Paul Tagliabue lifted the suspension in February, but that hasn't moved Brown any closer to the field.

He hasn't played since he was injured, having sat out the final game of last season while he spent six days in a hospital with bleeding in the eye, then missing training camp and the first three games of this season.

The 6-foot-7, 350-pound lineman wasn't accustomed to missing any games. He started 15 for Cleveland last season before the injury, giving him 84 starts in 90 career games.

An undrafted rookie from South Carolina State, Brown signed a six-year, $ 27-million contract before last season.

He has been paid $ 374,000 of his $ 2.1-million base salary for the first three games of this season because he was on the list of players physically unable to perform.

The release doesn't affect the $ 7.5-million signing bonus Brown received last year.

"It the release is going to give him an opportunity to pursue other options that are available to him," Policy said.

The only opportunity available to Brown at this point appears to be legal action against the league, a course Brown is exploring through the services of attorney Johnnie Cochran.

Cochran was unavailable for comment.

"I'm worried about him, and everybody connected to the Cleveland Browns is worried about him," Policy said. "We want the best for him, and ultimately, I'd like to think the National Football League would want the best for him as well."

As a result of the tragedy, NFL officials have removed the metal pellets from penalty flags and replaced them with corn kernels.

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The Associated Press contributed to this story.

Orlando Brown at a Glance

* Not drafted by an NFL team.

* Signed by the Cleveland Browns as a free agent in February 1999, agreeing to a six-year, $ 27-million contract.

* Started 84 of 90 games in his seven NFL seasons and was the only player on Cleveland's roster who played for the Browns before former owner Art Modell took the team to Baltimore in 1996.

GRAPHIC: PHOTO: Orlando Brown

LOAD-DATE: September 20, 2000

Arkansas Democrat-Gazette (Little Rock, AR)

November 13, 2000, Monday

SECTION: SPORTS; Pg. C4

LENGTH: 989 words

HEADLINE: Flutie's run as starter up -- at least for now

BYLINE: Compiled by David Holzman

BODY:
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Cleveland Browns President Carmen Policy also responded to criticism from former Browns lineman Orlando Brown, who contends team doctors and the Cleveland Clinic hid information about the severity of the eye injury that led to his release.
Brown told The News-Herald of Willoughby, Ohio, the Browns did not properly respond when referee Jeff Triplette's BB-weighted penalty flag hit his right eye during a Dec. 19 game against Jacksonville.
"I'm a professional athlete. I should have been taken to the hospital in an ambulance right away," Brown said.
He said fellow offensive lineman Lomas Brown drove him there.
He said he was told at the hospital that if he had continued to play, increased pressure on his eye would have caused him to lose it. Brown was ejected from the game after shoving Triplette to the ground.
"In a way, I'm lucky I pushed the referee because I would have kept playing," he said.
Policy called Brown's accusations "absurd." Policy said the Browns did everything they could to help Brown.
"He's either severely misinformed, or his version of the facts are definitely clouded," Policy said.
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LOAD-DATE: November 14, 2000

Telegraph Herald (Dubuque, IA)

November 13, 2000, Monday

SECTION: Pg. b2

LENGTH: 757 words

HEADLINE: Sports Briefs

BYLINE: ASSOCIATED PRESS

DATELINE: HOMESTEAD, Fla. (AP)

BODY:

<B> Orlando Brown blames team, doctors

</B> WILLOUGHBY, Ohio - Former Cleveland Browns lineman Orlando Brown contends team doctors and the Cleveland Clinic hid information about the severity of the eye injury that led to his release.

Brown also told The (Willoughby) News-Herald that the Browns did not properly respond when referee Jeff Triplette's BB-weighted penalty flag hit his right eye during a Dec. 19 game against Jacksonville.

"I'm a professional athlete. I should have been taken to the hospital in an ambulance right away," Brown said.

He said fellow offensive lineman Lomas Brown drove him there.

"I guess they didn't think I was hurt that bad," Orlando Brown said.

He said he was told at the hospital that if he had continued to play, increased pressure on his eye would have caused him to lose it. Brown was ejected from the game after shoving Triplette to the ground.

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LOAD-DATE: November 14, 2000

Found on Philly.com
Philadelphia Daily News

APRIL 27, 2000 Thursday LATE SPORTS EDITION

SECTION: SPORTS; Pg. 99

LENGTH: 615 words

HEADLINE: BROWNS LINEMAN HIRES COCHRAN

BYLINE: Daily News Wire Services

BODY:

Cleveland Browns offensive tackle Orlando Brown, struck in the right eye by an official's weighted penalty flag last season, has hired Johnnie Cochran as his attorney in a possible lawsuit against the NFL.

"Johnnie is going to be working with Orlando. We just don't know in which capacity yet," Cochran's publicist, Rachel Noerdlinger, said yesterday.

Cochran and Brown have talked several times about a possible lawsuit against the NFL but didn't meet until Tuesday night when Brown visited the attorney's New York law firm.

They haven't decided whether to file a lawsuit, she said.

"We're going to be doing research. We're still investigating," she said.

Brown's agent, Tom Condon, said through a spokeswoman that he was unaware of Brown hiring Cochran. Browns spokesman Todd Stewart refused to comment, saying it was "a personal matter for the player."

Brown's career is in jeopardy because of injuries sustained when a BB-weighted penalty flag thrown by referee Jeff Triplette hit him in the right eye during a game against Jacksonville on Dec. 19.

Browns coach Chris Palmer said three weeks ago that the team's medical staff estimated that it would take an additional six to eight months for Brown's vision to clear.

Brown, whose father is blind from glaucoma, said concern for his eyesight caused him to storm back on the field and shove Triplette. Brown was hospitalized for six days with bleeding behind the eye.

The league suspended Brown indefinitely, but lifted the penalty in late February after he missed the last two weeks of the 1999 season. Triplette has not been reprimanded for his errant toss.

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LOAD-DATE: January 29, 2002

Columbus Dispatch (Ohio)

September 13, 2003 Saturday, Home Final Edition

SECTION: SPORTS; Browns Notebook; Pg. 16D

LENGTH: 570 words

HEADLINE: BROWN RESTARTS HIS CAREER WITH RAVENS ;
Ex-Cleveland tackle back after serious eye injury

BYLINE: Bill Rabinowitz, THE COLUMBUS DISPATCH

BODY:

Football is at the center of most NFL players' lives. For Orlando Brown, it was even more than that.

Coming from a tough section of Washington, Brown clasped onto football almost as a life preserver. It may not have been everything to Brown, but it was close.

He went from being the rawest of undrafted rookies with the old Cleveland Browns to a starting right tackle who broke the bank when he left the Baltimore Ravens to sign a free-agent deal with the reborn Browns in 1999.

But everything changed in that one instant late that season when referee Jeff Triplette's BB-weighted penalty flag hit Brown in the eye. He pushed Triplette to the ground -- Brown has said he was trying to return to the huddle and the referee was in his way -- and then everything faded to black for the man known as Zeus. His vision, his career, his life.

Now he's back, reunited with the Ravens and ready for his first meeting against the Browns on Sunday.

"When I see the orange and white, (the incident) might run through my head," Brown told reporters in Baltimore this week. "But it's not going to be anything serious that's going to throw me off my game plan."

Brown had hoped to return to play for Cleveland in 2000, but the vision problems prevented that and the team cut him. He became bitter toward the Browns, especially team president Carmen Policy, who Brown said wanted him to sign a waiver absolving the Browns of responsibility. Brown sued the NFL and settled out of court.

Money couldn't salve his psyche. He and his wife split, and many who knew him worried about his future.

But gradually his vision improved, and he turned down a bigger offer from Minnesota to sign a one-year, $1 million deal with the Ravens.

A thigh injury slowed the 32-year-old Brown during training camp, and he is sharing time with Ethan Brooks at right tackle. In Sunday's 34-15 loss to Pittsburgh, Brown played 50 plays to 29 for Brooks.

"We were going to rotate series, and it just turned out the series he was in extended beyond Ethan Brooks'," Ravens coach Brian Billick said. "That was good for him, to get into that kind of extended play in a league game. Whether he's ready to go in and be the starter for a 60- or 70-play game . . . if he's not, he's not far away."

He'll face an intriguing test against the Browns. He'll likely line up against defensive end Courtney Brown, his polar opposite in temperament.

"Early in the year, I was kind of (upset) how they did me, and I still am, but I can't get in a big trash-talking (mode)," Brown said of the Browns. "I'm going to play with emotion. That's just me. But I'm not going to play out of rage, like trying to hurt guys and stuff like that. I'm just going to go play ball."

For three years, that's all he has wanted to do.

"He's been a joy to have around," Billick said. "He's been the case study for someone who's had something he loves and cherishes taken away from him and now has the opportunity to have it back again."

Mitchell gone

Qasim Mitchell, who was regarded as a potential Orlando Brown-like mauler for Cleveland, was cut from the practice squad yesterday. The guard had a disappointing training camp after being expected to compete for a starting spot.

The Browns signed defensive back David Young as Mitchell's replacement on the practice squad. Jacksonville took Mitchell in the sixth round of this year's draft.

brabinowitz@dispatch.com

LOAD-DATE: September 13, 2003

PATRICIA K. COHEN and JOE COHEN, Plaintiffs-Appellants, v. ROGER SMITH, Defendant-Appellee.

NOS. 5-94-0203 & 5-94-0204

APPELLATE COURT OF ILLINOIS, FIFTH DISTRICT

269 Ill. App. 3d 1087*; *648 N.E.2d 329*; *1995 Ill. App. LEXIS 185*; *207 Ill. Dec. 873

March 24, 1995, FILED

OPINION

JUSTICE CHAPMAN delivered the opinion of the court:

Patricia Cohen was admitted to St. Joseph Memorial Hospital ("Hospital") to deliver her baby. After an examination, Cohen was informed that it would be necessary for her to have a cesarean section. Cohen and her husband allegedly informed her physician, who in turn advised the Hospital staff, that the couple's religious beliefs prohibited Cohen from being seen unclothed by a male. Cohen's doctor assured her husband that their religious convictions would be respected.

During Cohen's cesarean section, Roger Smith, a male nurse on staff at the Hospital, allegedly observed and touched Cohen's naked body. Cohen and her husband filed suit against Nurse Smith and the Hospital. The trial court allowed defendants' motions to dismiss. We reverse.

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The Restatement (Second) of Torts provides that an actor commits a battery if:

> "(a) he acts intending to cause a harmful or offensive contact with the person of the other or a third person, or an imminent apprehension of such a contact, and
>
> (b) a harmful contact with the person of the other directly or indirectly results." (*Restatement (Second) of Torts, § 13* (1965).)

Liability for battery emphasizes the plaintiff's lack of consent to the touching. "Offensive contact" is said to occur when the contact "offends a reasonable sense of personal dignity." *Restatement (Second) of Torts § 19* (1965).

Historically, battery was first and foremost a systematic substitution for private retribution. Protecting personal integrity has always been viewed as an important basis for battery. "Consequently, the defendant is liable not only for contacts which do actual physical harm, but also for those relatively trivial ones which are merely offensive. This application of battery to remedy offensive and insulting conduct is deeply ingrained in our legal history.

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Causing actual physical harm is not an element of battery. "A plaintiff is entitled to demand that the defendant refrain from the offensive touching, although the contact results in no visible injury."

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The only reason there is some hesitancy over the issue of whether a battery occurred in this case is because the contact took place in a hospital between a medical professional and a patient. If Patricia Cohen had been struck in the nose by Nurse Smith on a public street, everyone would agree that a battery occurred, and under those limited facts, there would be no defense to the battery. In contrast, medical professionals are allowed to touch patients during the course of medical treatment because patients consent, either explicitly or implicitly, to the touching. The violation of a plaintiff's right to bod-

ily and personal integrity by an unconsented-to touching is the essence of a claim for battery.

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The allegation that both Nurse Smith and the Hospital were informed in advance of plaintiffs' religious beliefs is important in this case, because the religious convictions of plaintiffs might not be those of most people who enter the hospital to give birth. As a matter of fact, plaintiffs' counsel candidly conceded that there would be no cause of action for battery if Patricia Cohen had been placed in Nurse Smith's and the Hospital's care in an emergency situation in which Patricia had been unable to inform the Hospital or its agents of her beliefs. Plaintiffs' attorney acknowledged that his clients' moral and religious views are not widely held in the community and, because of this, plaintiffs could state a claim against defendants only if the plaintiffs plead that the defendants had knowledge of those beliefs. But, he contends, the defendants' knowledge of the plaintiffs' religious beliefs was pleaded in their complaint. Specifically, plaintiffs contend that defendants' knowledge is clearly illustrated by an allegation in the plaintiffs' amended complaint that Nurse Smith requested the presence of the Murphysboro City Police at the Hospital to prevent Mr. Cohen from objecting to Nurse Smith's presence in the operating room while Mrs. Cohen was naked, and to physically restrain Mr. Cohen if necessary.

The fact that the plaintiffs hold deeply ingrained religious beliefs which are not shared by the majority of society does not mean that those beliefs deserve less protection than more mainstream religious beliefs. The plaintiffs were not trying to force their religion on other people; they were only insisting that their beliefs be respected by the Hospital and the Hospital staff.

As we have stated previously, Patricia Cohen was not trying to, and was not entitled to, impose her religious beliefs on others. When she informed the Hospital of her moral and religious beliefs against being viewed and touched by males, the Hospital was free to refuse to accede to those demands. But, according to her complaint, when Cohen made her wishes known to the Hospital, it, at least implicitly, agreed to provide her with treatment within the restrictions placed by her beliefs.

Although most people in modern society have come to accept the necessity of being seen unclothed and being touched by members of the opposite sex during medical treatment, the plaintiffs had not accepted these procedures and, according to their complaint, had informed defendants of their convictions. This case is similar to cases involving Jehovah's Witnesses who were unwilling to accept blood transfusions because of religious convictions. Although most people do not share the Jehovah's Witnesses' beliefs about blood transfusions, our society, and our courts, accept their right to have that belief. Similarly, the courts have consistently recognized individuals' rights to refuse medical treatment even if such a refusal would result in an increased likelihood of the individual's death.

A person's right to refuse or accept medical care is not one to be interfered with lightly. As Justice Cardozo stated, "Every human being of adult years and sound mind has a right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient's consent commits an assault, for which he is liable in damages."

Knowing interference with the right of determination is battery.

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Based on the information found in the Cohens' complaint against Nurse Smith and the Cohens' complaint against the Hospital, we find that the trial court erred in dismissing both complaints.

Reversed and remanded.

No. 5-94-0204, Reversed and remanded.

LEXSEE 59 NW 656

Charles Talmage, By his Next Friend, v. Charles Smith.

[NO NUMBER IN ORIGINAL]

SUPREME COURT OF MICHIGAN

101 Mich. 370*; *59 N.W. 656*; *1894 Mich. LEXIS 938

June 7, 1894, Submitted on briefs
July 5, 1894, Decided

PROCEDURAL POSTURE: Defendant appealed from a judgment of the trial court (Michigan) entered in favor of plaintiff in his action of trespass

OPINION BY: Montgomery

The plaintiff recovered in an action of trespass. The case made by plaintiff's proofs was substantially as follows: On the evening of September 17, 1891, some lime-kilns were burning a short distance from defendant's premises, in Portland, Ionia county. Defendant had on his premises certain sheds. He came up to the vicinity of the sheds, and saw six or eight boys on the roof of one of them. He claims that he ordered the boys to get down, and they at once did so. He then passed around to where he had a view of the roof of another shed, and saw two boys on the roof. The defendant claims that he did not see the plaintiff, and the proof is not very clear that he did, although there was some testimony from which it might have been found that plaintiff was within his view. Defendant ordered the boys in sight to get down, and there was testimony tending to show that the two boys in defendant's view started to get down at once. Before they succeeded in doing so, however, defendant took a stick, which is described as being two inches in width and of about the same thickness and about 16 inches long, and threw it in the direction of the boys; and there was testimony tending to show that it was thrown at one of the boys in view of the defendant. The stick missed him, and hit the plaintiff just above the eye with such force as to inflict an injury which resulted in the total loss of the sight of the eye.

Counsel for the defendant contends that the undisputed testimony shows that defendant threw the stick without intending to hit anybody, and that under the circumstances, if it in fact hit the plaintiff,--defendant not knowing that he was on the shed,--he was not liable. We cannot understand why these statements should find a place in the brief of defendant's counsel. George Talmage, the plaintiff's father, testifies that defendant said to him that he threw the stick, intending it for Byron Smith,-- one of the boys on the roof,--and this is fully supported by the circumstances of the case. It is hardly conceivable that this testimony escaped the attention of defendant's counsel.

The circuit judge charged the jury as follows:

"If you conclude that Smith did not know the Talmage boy was on the shed, and that he did not intend to hit Smith, or the young man that was with him, but simply, by throwing the stick, intended to frighten Smith and the other young man that was there, and the club hit Talmage, and injured him, as claimed, then the plaintiff could not recover. If you conclude that Smith threw the stick or club at Smith, or the young man that was with Smith,--intended to hit one or the other of them,--and you also conclude that the throwing of the stick or club was, under the circumstances, reasonable, and not excessive, force to use towards Smith and the other young man, then there would be no recovery by this plaintiff. But if you conclude from the evidence in the case that he threw the stick, intending to hit Smith, or the young man with him,--to hit one of them,--and that that force was unreasonable force, under all the circumstances, then Smith, you see (the defendant), would be doing an unlawful act, if the force was unreasonable, because he had no right to use it; then he would be doing an unlawful act. He would be liable, then, for the injury done to this boy with the stick, if he threw it intending to hit the young man Smith, or the young man that was with Smith on the roof, and the force that he was using, by the throwing of the club, was excessive and unreasonable, under all the circumstances of the case; if it was, and then the stick went on and hit the boy, as it seems to have hit him, if it was unreasonable and excessive, then he would be liable for the consequences of it, because he was doing an unlawful act in the outset; that is, he was using unreasonable and unnecessary force--excessive force--against Smith and the young man, to get them off the shed."

We think the charge a very fair statement of the law of the case. . . . The right of the plaintiff to recover was made to depend upon an intention on the part of the defendant to hit somebody, and to inflict an unwarranted injury upon some one. Under these circumstances, the fact that the injury resulted to another than was intended does not relieve the defendant from responsibility.

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The judgment will be affirmed, with costs.

DAN R. CULLISON, Appellant, (Plaintiff Below) v. ERNEST W. MEDLEY, DORIS MEDLEY, RON MEDLEY, SANDY MEDLEY, and TERRY SIMMONS, Appellees. (Defendants Below)

Supreme Court No. 84 Sol 9104 CV 32

SUPREME COURT OF INDIANA

570 N.E.2d 27*; *1991 Ind. LEXIS 78

April 23, 1991, Filed

PROCEDURAL POSTURE: Plaintiff litigant filed a complaint against defendants, daughter, father, and three family members, alleging trespass, assault, harassment, and intentional infliction of emotional distress and sought to recover damages for his emotional and psychological injury. The Court of Appeals (Indiana) affirmed the entry of summary judgment for the daughter, father, and three family members. The litigant sought transfer of the cause for review.

OPINION BY: KRAHULIK

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According to Cullison's deposition testimony, on February 2, 1986, he encountered Sandy, the 16-year-old daughter of Ernest, in a Linton, Indiana, grocery store parking lot. They exchanged pleasantries and Cullison invited her to have a Coke with him and to come to his home to talk further. A few hours later, someone knocked on the door of his mobile home. Cullison got out of bed and answered the door. He testified that he saw a person standing in the darkness who said that she wanted to talk to him. Cullison answered that he would have to get dressed because he had been in bed. Cullison went back to his bedroom, dressed, and returned to the darkened living room of his trailer. When he entered the living room and turned the lights on, he was confronted by Sandy Medley, as well as by father Ernest, brother Ron, mother Doris, and brother-in-law Terry Simmons. Ernest was on crutches due to knee surgery and had a revolver in a holster strapped to his thigh. Cullison testified that Sandy called him a "pervert" and told him he was "sick", mother Doris berated him while keeping her hand in her pocket, convincing Cullison that she also was carrying a pistol. Ron and Terry said nothing to Cullison, but their presence in his trailer home further intimidated him. Primarily, however, Cullison's attention was riveted to the gun carried by Ernest. Cullison testified that, while Ernest never withdrew the gun from his holster, he "grabbed for the gun a few times and shook the gun" at plaintiff while threatening to "jump astraddle" of Cullison if he did not leave Sandy alone. Cullison testified that Ernest "kept grabbing at it with his hand, like he was going to take it out", and "took it to mean he was going to shoot me" when Ernest threatened to "jump astraddle" of Cullison. Although no one actually touched Cullison, his testimony was that he feared he was about to be shot throughout the episode because Ernest kept moving his hand toward the gun as if to draw the revolver from the holster while threatening Cullison to leave Sandy alone.

As the Medleys were leaving, Cullison suffered chest pains and feared that he was having a heart attack. Approximately two months later, Cullison testified that Ernest glared at him in a menacing manner while again armed with a handgun at a restaurant in Linton. On one of these occasions, Ernest stood next to the booth where Cullison was seated while wearing a pistol and a holster approximately one foot from Cullison's face. Shortly after the incident at his home, Cullison learned that Ernest had previously shot a man. This added greatly to his fear and apprehension of Ernest on the later occasions when Ernest glared at him and stood next to the booth at which he was seated while armed with a handgun in a holster.

Cullison testified that as a result of the incident, he sought psychological counseling and therapy and continued to see a therapist for approximately 18 months. Additionally, Cullison sought psychiatric help and received prescription medication which prevented him from oper-

ating power tools or driving an automobile, thus injuring Cullison in his sole proprietorship construction business. Additionally, Cullison testified that he suffered from nervousness, depression, sleeplessness, inability to concentrate and impotency following his run-in with the Medleys.

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II. Assault

In count two of his complaint, Cullison alleged an assault. The Court of Appeals decided that, because Ernest never removed his gun from the holster, his threat that he was going to "jump astraddle" of Cullison constituted conditional language which did not express any present intent to harm Cullison and, therefore, was not an assault. Further, the Court of Appeals decided that even if it were to find an assault, summary judgment was still appropriate because Cullison alleged only emotional distress and made no showing that the Medleys' actions were malicious, callous, or willful or that the alleged injuries he suffered were a foreseeable result of the Medleys' conduct. We disagree.

It is axiomatic that assault, unlike battery, is effectuated when one acts intending to cause a harmful or offensive contact with the person of the other or an imminent apprehension of such contact. It is the right to be free from the apprehension of a battery which is protected by the tort action which we call an assault. As this Court held approximately 90 years ago in *Kline v. Kline (1901), 158 Ind. 602, 64 N.E. 9*, an assault constitutes "a touching of the mind, if not of the body." Because it is a touching of the mind, as opposed to the body, the damages which are recoverable for an assault are damages for mental trauma and distress. "Any act of such a nature as to excite an apprehension of a battery may constitute an assault. It is an assault to shake a fist under another's nose, to aim or strike at him with a weapon, or to hold it in a threatening position, to rise or advance to strike another, to surround him with a display of force. . . ." Additionally, the apprehension must be one which would normally be aroused in the mind of a reasonable person. Id. Finally, the tort is complete with the invasion of the plaintiff's mental peace.

The facts alleged and testified to by Cullison could, if believed, entitle him to recover for an assault against the Medleys. A jury could reasonably conclude that the Medleys intended to frighten Cullison by surrounding him in his trailer and threatening him with bodily harm while one of them was armed with a revolver, even if that revolver was not removed from the its holster. Cullison testified that Ernest kept grabbing at the pistol as if he were going to take it out, and that Cullison thought Ernest was going to shoot him. It is for the jury to determine whether Cullison's apprehension of being shot or otherwise injured was one which would normally be aroused in the mind of a reasonable person. It was error for the trial court to enter summary judgment on the count two allegation of assault.

[The Court remanded the case for trial].

Restatement (2d) of Torts – False Imprisonment

§ 35 False Imprisonment

(1) An actor is subject to liability to another for false imprisonment if

(a) he acts intending to confine the other or a third person within boundaries fixed by the actor, and

(b) his act directly or indirectly results in such a confinement of the other, and

(c) the other is conscious of the confinement or is harmed by it.

(2) An act which is not done with the intention stated in Subsection (1, a) does not make the actor liable to the other for a merely transitory or otherwise harmless confinement, although the act involves an unreasonable risk of imposing it and therefore would be negligent or reckless if the risk threatened bodily harm.

§ 42 Knowledge of Confinement

Under the rule stated in § 35, there is no liability for intentionally confining another unless the person physically restrained knows of the confinement or is harmed by it.

JoAnn Brandon, Personal Representative of the Estate of Teena Brandon, deceased, appellant and cross-appellee, v. The County of Richardson, Nebraska, and Charles B. Laux, Richardson County Sheriff, appellees and cross-appellants.

No. S-00-022.

SUPREME COURT OF NEBRASKA

261 Neb. 636*; *624 N.W.2d 604*; *2001 Neb. LEXIS 74

April 20, 2001, Filed

PROCEDURAL POSTURE: Appellant brought an action against appellees for negligence, wrongful death, and intentional infliction of emotional distress. The District Court for Richardson County (Nebraska) found appellee county negligent and awarded economic and noneconomic damages. The court then reduced the damage award, and denied recovery on the intentional tort claim. Appellant sought review, and appellees filed a cross-appeal.

Hendry, C.J.

INTRODUCTION

On December 31, 1993, Teena Brandon (Brandon), Lisa Lambert, and Phillip Devine were found murdered in Lambert's rural Humboldt farmhouse in Richardson County, Nebraska. John L. Lotter and Thomas M. Nissen, also known as Marvin T. Nissen, were convicted of the murders. Brandon's mother, JoAnn Brandon (JoAnn), brought an action against Richardson County and Sheriff Charles B. Laux for negligence, wrongful death, and intentional infliction of emotional distress in connection with Brandon's murder and the events leading up to her death.

The district court … denied recovery on the intentional infliction of emotional distress claim …. JoAnn appeals ….

FACTUAL BACKGROUND

Brandon had been sexually abused as a child, and in her late teens, developed gender identity disorder, a condition in which one develops a strong dislike for one's own gender and assumes the characteristics, both behaviorally and emotionally, of the other gender. In November 1993, Brandon came to Richardson County after leaving Lincoln due to legal troubles. Brandon had been convicted of forgery in Lancaster County and had violated the terms of her probation. While in Richardson County, Brandon presented herself as a man. Brandon had obtained a driver's license identifying Brandon as a male by the name of Charles Brayman.

In December 1993, Brandon met Lana Tisdel, a young woman who resided in Falls City. Tisdel, believing Brandon to be a male, dated Brandon for approximately 1 month. After moving to Richardson County, Brandon also became acquainted with Lotter and Nissen. On December 15, Brandon was booked into the Richardson County jail on forgery charges for forging checks in Richardson County. Brandon was placed in an area of the jail where females are usually held. While Brandon was being held at the jail, Laux referred to Brandon as an "it" during a conversation with Tisdel which took place in Brandon's presence. A few days later, Nissen secured Brandon's release from jail by posting bail with money Tisdel gave to Nissen. Thereafter, Lotter and Nissen became suspicious of Brandon's sexual identity.

On December 24, 1993, several people, including Brandon and Tisdel, attended a party at Nissen's home. In the early morning hours of December 25, in an attempt to prove to Tisdel that Brandon was a female, Lotter and Nissen pulled Brandon's pants down in Tisdel's presence.

Later that same morning, Lotter and Nissen beat Brandon, hitting her in the head, kicking her in the ribs, and stepping on her back. Lotter and Nissen then drove Brandon to a remote location where both Lotter and Nissen sexually assaulted Brandon. After the sexual assaults, Nissen beat Brandon again. When they returned to Nissen's house, Brandon escaped by kicking out a bathroom

window and ran to the home of Linda Gutierres, Tisdel's mother.

When Brandon arrived at Gutierres' home at approximately 6 a.m., Brandon had a swollen, bloody lip, scratches, and a "shoe print" on her back, and she was crying. An ambulance was called, and Brandon was transported to the local hospital, where Brandon reported that she had been beaten and sexually assaulted. A rape examination was performed at the hospital, and the results, which showed that Brandon had been sexually penetrated, were turned over to law enforcement.

Around noon that same day, Brandon provided a written statement to the Falls City Police Department regarding the rapes. Later that day, Laux and Deputy Tom Olberding of the Richardson County sheriff's office conducted a tape-recorded interview with Brandon. Prior to the interview, Laux had been informed by the hospital staff that Brandon had been beaten and sexually penetrated. Olberding conducted the initial interview, during which Brandon described the rapes, including the location where the rapes occurred, and that Lotter and Nissen had used condoms during the rapes. Brandon also indicated that she had a pair of rolled-up socks in her pants at the time of the rapes. Laux was present in the interview room the entire time Olberding was questioning Brandon.

After Brandon had initially related the details of the rapes to Olberding and Laux, Laux began questioning Brandon regarding the details of the rapes a second time, beginning at approximately 3:40 p.m. on December 25, 1993. Shortly after Laux began questioning Brandon, Olberding left the room. At that time, Olberding had a brief conversation with Keith Hayes, an investigator with the Falls City Police Department, who was present outside the interview room. Olberding indicated that he left the room because he "didn't like the way [the interview] was going." Olberding returned to the interview room a short time later. (All quotations from the December 25 interview appearing in this opinion are taken from the tape-recorded version of the interview.)

While questioning Brandon about the incident that occurred at Nissen's house during which Lotter and Nissen pulled down Brandon's pants, the following exchange took place:

> Q. After he pulled your pants down and seen you was a girl, what did he do? Did he fondle you any?
>
> A. No.
>
> Q. He didn't fondle you any, huh. Didn't that kind of amaze you? . . . Doesn't that kind of, ah, get your attention somehow that he would've put his hands in your pants and play with you a little bit?
>
> . . . .
>
> Q. You were all half-ass drunk . . . . I can't believe that if he pulled your pants down and you are a female that he didn't stick his hand in you or his finger in you.
>
> A. Well, he didn't.
>
> Q. I can't believe he didn't.

While interviewing Brandon regarding the rapes, Laux's statements and questions included the following: "So they got ready to poke you"; "they tried sinking it in your vagina"; "So then after he couldn't stick it in your vagina he stuck it in your box or in your buttocks, is that right?"; "Did it feel like he stuck it in very far or not?"; "Did he tell you anything about this is how they do it in the penitentiary?"; "Was he enjoying it?"; "Did he think it was funny?"; "Did he play with your breasts or anything?"; and "Well, was he fingering you?"

Laux confronted Brandon regarding the position of her legs during the sexual assault by Nissen in the following manner:

> Q. How did you have your legs when he was trying to do that?
>
> A. He had them positioned on each side and he was positioned in between my legs.
>
> Q. You had your legs, ah, your feet up around his back or did you just have them off to the sides or what?
>
> A. I had one foot on the floor and the other on the seat.
>
> . . . .
>
> Q. He had you on the back seat and you had one leg on the seat the one leg up over the front seat or where?
>
> A. One leg on the floor and the other just laying [sic] on the seat not on top of the guy.
>
> Q. You had one leg on the back seat and one leg laying [sic] on the floor. Now just earlier when I asked you, you said you had one leg up around him and one leg over the seat.

A. No, I didn't.

Q. Yeah, because I can play it back for you.

A. Then play it back because I don't understand it.

After the above exchange took place, Laux asked Brandon no further questions about the position of her legs. The tape-recorded interview shows that Brandon's description of the position of her legs during the rapes was in fact consistent.

The following exchange occurred when Laux questioned Brandon about Lotter's sexually assaulting her:

Q. After he got his pants down he got a spread of you, or had spread you out, and he got a spread of you then, then what happened?

A. When he finished he got out of the car and got back in the driver's door.

Q. Well, how did, ah, let's back up here for a second. First of all you didn't say anything about him getting it up. Did he have a hard on when he got back there or what?

A. I don't know. I didn't look.

Q. You didn't look. Did he take a little time working it up, or what? Did you work it up for him?

A. No, I didn't.

Q. You didn't work it up for him?

A. No.

Q. Then you think he had it worked up on his own, or what?

A. I guess so, I don't know.

Q. You don't know. . . . Did, when he got in the back seat you were already spread out back there ready for him, waiting on him.

A. No, I was sitting up when he got back there.

Laux questioned Brandon about her prior sexual experience in the following manner:

Q. And you have never had any sex before?

A. No.

Q. How old are you?

A. 21.

Q. And if you're 21, you think you'd have, you'd have, trouble getting it in?

A. Who me?

Q. Yeah.

A. I guess so. He was.

Laux further asked questions regarding Brandon's gender identity crisis such as, "Do you run around once in a while with a sock in your pants to make you look like a boy?" At one point during the interview, the following exchange took place:

Q. Why do you run around with girls instead of, ah, guys being you are a girl yourself?

A. Why do I what?

Q. Why do you run around with girls instead of guys beings you're a girl yourself? Why do you make girls think you're a guy?

A. I haven't the slightest idea.

Q. You haven't the slightest idea? You go around kissing other girls? . . . . The girls that don't know about you, thinks [sic] you are a guy. Do you kiss them?

A. What does this have to do with what happened last night?

Q. Because I'm trying to get some answers so I know exactly what's going on. Now, do you want to answer that question for me or not?

A. I don't see why I have to.

Q. Huh?

A. I don't see why I have to.

Olberding: You, you don't have to answer. It's, this is all voluntary information.

Laux: The only thing is if it goes to court, that answer, that question is going to come up in court and I'm going to want an answer for it before it goes to court. See what I'm saying? I'm trying to have

the answer there so we can try to avoid that question if it's not the answer I want to hear.

Brandon: 'Cause I have a sexual identity crisis.

Q. Your what?

A. I have a sexual identity crisis.

Q. You want to explain that?

A. I don't know if I can even talk about it . . . .

Brandon agreed to file complaints against Lotter and Nissen and agreed to testify against them. At the conclusion of the interview, Laux told Brandon, "I'm not trying to make it rough on you, but I've got to have the information that we need and the only way by getting that is asking some very personal questions."

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At the time Brandon reported the rapes, Laux was aware that Lotter and Nissen had criminal records. He was aware that Lotter had once escaped from custody in the middle of the day wearing an orange prison uniform and had had to be chased down by deputies. He knew that Lotter had been involved in a scuffle with a Missouri Highway Patrol officer, which resulted in the officer's drawing his gun on Lotter. Laux knew that people in the community were afraid of Lotter. Laux also knew that Nissen had been incarcerated in the penitentiary.

The sheriff's office was also aware that Lotter and Nissen had threatened to harm Brandon if she reported the rapes. Gutierres informed Laux that Lotter and Nissen had threatened Brandon's life if she reported the rapes. Before the interview with Brandon was conducted, Gutierres told Laux that Brandon was "afraid," "feared for her life," and was "scared to death" because Lotter and Nissen had threatened Brandon's life. Tammy Schweitzer, Brandon's sister, called Laux on December 27, 1993, and informed him that Brandon was afraid that Lotter and Nissen would kill Brandon for reporting the rapes.

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On December 31, 1993, Brandon, Lambert, and Devine, another friend, were found murdered in Lambert's house. That same day, Lotter and Nissen were arrested for the December 25 sexual assaults on Brandon. Lotter and Nissen were later charged with and convicted of the three murders.

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ANALYSIS

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Intentional Infliction of Emotional Distress

JoAnn next claims the trial court erred in denying recovery for intentional infliction of emotional distress. JoAnn claims the trial court erred in determining that Laux's conduct during the December 25, 1993, interview was not extreme and outrageous and in finding that JoAnn failed to prove that Brandon suffered as a result of Laux's conduct.

This court has long held that three elements must be alleged and proved before a plaintiff can recover on a cause of action for intentional infliction of emotional distress. To recover for intentional infliction of emotional distress, a plaintiff must prove the following: (1) that there has been intentional or reckless conduct, (2) that the conduct was so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency and is to be regarded as atrocious and utterly intolerable in a civilized community, and (3) that the conduct caused emotional distress so severe that no reasonable person should be expected to endure it. … The dispute is to the second and third elements.

Regarding the second element of the tort, it is for the court to determine, in the first instance, whether the defendant's conduct may reasonably be regarded as so extreme and outrageous to permit recovery or whether it is necessarily so. Only if reasonable minds may differ does the fact finder then determine whether the conduct in a particular case is sufficiently extreme and outrageous to result in liability. The district court in the present case determined that Laux's conduct during the December 25, 1993, interview was not extreme and outrageous, stating that "the evidence does not reach such high status." The district court further stated that Laux's conduct was "reasonable and necessary to prepare [Brandon] to testify at public trial in the face of confrontation by and on behalf of Nissen and Lotter."

It is unclear whether the district court found the evidence of outrageous conduct to be insufficient as a matter of fact or as a matter of law. However, we determine, as set forth below, that the material facts are undisputed and that Laux's conduct was extreme and outrageous as a matter of law.

Whether conduct is extreme and outrageous is judged on an objective standard based on all the facts and circumstances of the particular case. In determining whether certain conduct is extreme and outrageous, the relationship between the parties and the susceptibility of the plaintiff to emotional distress are important factors to consider. Mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities that result from

living in society do not rise to the level of extreme and outrageous conduct. However, conduct which might otherwise be considered merely rude or abusive may be deemed outrageous when the defendant knows that the plaintiff is particularly susceptible to emotional distress.

The extreme and outrageous character of conduct may also arise from the abuse of a position of power. The Restatement specifically mentions police officers among those who may be held liable for intentional infliction of emotional distress due to abuse of their position.

In considering the relationship between the parties in the present case, the record shows that prior to conducting the interview, Laux had developed a negative attitude toward Brandon because of her gender identity disorder. Laux's reference to Brandon as an "it" when Brandon was housed in the jail on December 15, 1993, reflects this negative attitude. Laux again referred to Brandon as an "it" on the very day the interview was conducted. Laux's comment to Schweitzer, asking her "what kind of sister did [you] have?" reflects that this attitude continued even after Brandon's death. The record further reflects that Laux, as a law enforcement official, was in a position of power in relation to Brandon, the victim of a crime who sought assistance from law enforcement.

Furthermore, Brandon was in a particularly vulnerable emotional state at the time the interview was conducted, having been beaten and raped earlier that day. See *Drejza, supra* (being victim of rape, standing alone, is enough to demonstrate particularly vulnerable emotional condition). At the time the interview was conducted, Laux knew that Brandon had been beaten as the results of the beating were readily visible on Brandon's face. Laux knew that the hospital examination showed that Brandon had been sexually penetrated. Laux was informed prior to conducting the interview that Brandon was "afraid," "feared for her life," and was "scared to death" because Lotter and Nissen had threatened Brandon. Laux was also aware that Brandon was upset and crying during the interview.

Despite this knowledge, Laux proceeded to use crude and dehumanizing language during the entire interview. Examples of such language include statements such as "they got ready to poke you," "sinking it in your vagina," "stuck it in your box or in your buttocks," "he got a spread of you," "had spread you out," and "was he fingering you?"

At several points during the interview, Laux expressed disbelief at what Brandon was telling him, through both verbal statements and his tone of voice. Laux told Brandon that he "can't believe" that Lotter did not "stick his hand in you or his finger in you" during the incident in which Lotter and Nissen pulled down Brandon's pants. He accused Brandon of giving differing accounts regarding the position of her legs during the rapes when in fact Brandon's accounts were consistent. He expressed disbelief that Brandon could be 21 years old and yet the rapists would have "trouble getting it in."

Some of Laux's statements indicate a belief that Brandon willingly participated in the sexual acts, such as "did you work it up for him?" (referring to the rapist's penis) and "you were already spread out back there ready for him, waiting on him." Laux asked other questions which expressed simply a prurient interest in the rapes, including: "Did it feel like he stuck it in very far or not?"; "Did he have a hard on when he got back there or what?"; "Did he take a little time working it up . . . ?"; and "Did he play with your breasts or anything?"

Laux also asked questions that were entirely irrelevant as to whether Brandon had been raped, such as "Did he tell you anything about this is how they do it in the penitentiary?" and "Was he enjoying it? Did he think it was funny?" Laux proceeded to question Brandon about her gender identity disorder, asking her if she had kissed other girls, which had nothing to do with the situation under investigation. Olberding even interjected at this point, telling Brandon that she did not have to answer the questions Laux was asking about her gender identity disorder. Laux himself admitted at trial that Brandon's gender identity disorder had nothing to do with whether Brandon had been raped.

The tone used during the interview is also something to be considered in determining the outrageousness of Laux's conduct. The tape recording reveals that Laux's tone throughout the interview was demeaning, accusatory, and intimidating. The tone in which many of the questions were asked expressed Laux's disbelief of what Brandon was telling him and that Laux was not taking Brandon seriously.

The above-discussed facts are not in dispute. There is no question that Laux was in a position of authority in relation to Brandon and that Laux knew Brandon was in a particularly vulnerable emotional state prior to conducting the interview. The facts of what happened during the actual interview itself are also not subject to dispute because the tape recording provides a record of exactly what was said during the interview and the manner in which those words were said.

The county does not dispute these facts, but attempts to justify Laux's conduct, claiming that Laux was pursuing the legitimate objectives of clarifying inconsistencies in Brandon's account, fact finding, and preparing Brandon to testify against Lotter and Nissen at trial. Laux also claimed that his manner of questioning Brandon was due, in part, to the fact the Brandon was taking a long time to answer questions. However, these justifications do not

withstand scrutiny. A review of the tape recording reveals that Brandon's answers were spontaneous and were given without hesitation. Having listened to the tape-recorded interview, we also find no instances in which Laux attempted to clarify any actual inconsistencies in Brandon's account. Furthermore, the questions Laux asked which were entirely irrelevant to whether the rapes had occurred and that expressed simply a prurient interest in the rapes can hardly be said to constitute legitimate "fact finding."

Any claim that Laux was preparing Brandon to testify at trial is also not persuasive. The interview in the present case occurred only hours after Brandon was beaten and raped. The alleged perpetrators had not yet been arrested and there was no imminent trial to prepare for at that point. As stated in *Drejza, 650 A.2d at 1315 n.18*:

> As a matter of common sense, an interview with a distraught rape victim an hour or so after her ordeal ended was hardly the occasion for a detective . . . to question her like a defense attorney or a prosecutor, to try to assess her ability to withstand potential humiliating aspects of a criminal trial, or to challenge her intention to press charges. Such an inquiry could be conducted at a later date, preferably by a prosecutor, after the victim had been given a reasonable amount of time to regain control over her emotion and faculties. . . . It would surely be reasonable for her not to expect to be challenged or belittled, almost as soon as she arrived, by the very authorities whose assistance she was requesting.

Not only do the justifications offered by the county for Laux's conduct not withstand scrutiny, such justifications do not change the undisputed facts regarding the circumstances under which the interview was conducted or what occurred during the interview as revealed by the tape recording. These justifications are simply the county's interpretation of the undisputed facts.

***

Based upon the undisputed facts in this case, we determine as a matter of law that Laux's conduct was extreme and outrageous, beyond all possible bounds of decency, and is to be regarded as atrocious and utterly intolerable in a civilized community. The district court erred in not so holding.

Although the district court determined that Laux's conduct was not extreme and outrageous, the district court nevertheless went on to find that JoAnn had failed to prove the third element of intentional infliction of emotional distress-that Brandon suffered as a result of Laux's conduct. Liability arises for intentional infliction of emotional distress only when emotional distress has in fact resulted and is severe. Whether severe emotional distress can be found is a question of law; whether it existed in a particular case is a question of fact.

[The Court then remanded the case for trial on the issue of whether Brandon did in fact have severe distress.]

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CONCLUSION

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We therefore remand this cause to the district court … to award damages for intentional infliction of emotional distress if JoAnn has proved both that Brandon suffered severe emotional distress and that Laux's conduct was a proximate cause of that distress ….

School of Visual Arts et al., Plaintiffs, v. Diane Kuprewicz et al., Defendants.

Index No. 115172-03

SUPREME COURT OF NEW YORK, NEW YORK COUNTY

3 Misc. 3d 278*; *771 N.Y.S.2d 804*; *2003 N.Y. Misc. LEXIS 1668*; *20 I.E.R. Cas. (BNA) 1488

December 22, 2003, Decided

PROCEDURAL POSTURE: Plaintiffs, a school and its human resources director, filed an action against defendant former employee alleging false designation of origin and dilution under the Lanham Act, *15 U.S.C.S. §§ 1051-1127*; defamation and trade libel; violation of N.Y. Civ. Rights Law §§ 50-51; trespass to chattels; and intentional interference with a prospective economic advantage. The employee moved to dismiss the complaint pursuant to *N.Y. C.P.L.R. 3211(a)(7).*

Rosalyn Richter, J.

In this action, plaintiffs School of Visual Arts (SVA) and Laurie Pearlberg, SVA's Director of Human Resources, contend that defendant Diane Kuprewicz, a former employee at SVA, engaged in a campaign of unlawful harassment against plaintiffs. Specifically, plaintiffs allege that Kuprewicz posted two false job listings on www.craigslist.com, an Internet Web site, stating that SVA was seeking applications for Pearlberg's position, which was not in fact vacant. These job postings, which contain accurate contact information for the purported position and otherwise appear legitimate, direct applicants to send a resume and cover letter to Pearlberg's supervisor at SVA. Plaintiffs further contend that Kuprewicz sent an e-mail to SVA's Human Resources Department's e-mail address containing a similar job listing for Pearlberg's position, formatted to appear as if it were posted at www.monster.com, a legitimate Web site for employment listings. [1]

1 It is conceded that no such job posting ever appeared on www.monster.com.

Plaintiffs also allege that Kuprewicz provided Pearlberg's SVA e-mail address to various pornographic Web sites which resulted in Pearlberg's receipt of large volumes of unwanted sexually explicit e-mails. Similarly, plaintiffs maintain that Kuprewicz was responsible for Pearlberg's receipt, by regular mail at her work address, of unwanted catalogs offering pornographic materials. Finally, plaintiffs contend that Kuprewicz sent Pearlberg a number of "electronic cards" at her SVA e-mail address. Several of these cards were pornographic in nature, and one was purportedly sent by SVA's Associate Human Resources Director. Plaintiffs' complaint contains six causes of action: false designation of origin under the *Lanham Act* (*15 USC* [*281] *§ 1051 et seq.*), dilution under the *Lanham Act*, defamation [***3] and trade libel, violation of *Civil Rights Law §§ 50* and *51*, trespass to chattels, and intentional interference with prospective economic advantage.

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Judged by these standards, the court concludes that the only viable cause of action pleaded in the complaint is defendant SVA's claim for common-law trespass to chattels. To establish a trespass to chattels, SVA must prove that Kuprewicz intentionally, and without justification or consent, physically interfered with the use and enjoyment of personal property in SVA's possession, and that SVA was harmed thereby. Thus, one who intentionally interferes with another's chattel is liable only if the interference results in harm to "the [owner's] materially valuable interest in the physical condition, quality, or value of the chattel, or if the [owner] is deprived of the use of the chattel for a substantial time." Furthermore, to sustain this cause of action, the defendant must act with the intention of interfering with the property or with knowledge that such interference is substantially certain to result.

In its complaint, SVA alleges that Kuprewicz caused "large volumes" of unsolicited job applications and pornographic e-mails to be sent to SVA and Pearlberg by way of SVA's computer system, without their consent. The complaint further alleges that these unsolicited e-mails have "depleted hard disk space, drained processing power, and adversely affected other system resources on SVA's computer system." The court concludes that, accepting these factual allegations as true, SVA has sufficiently stated a cause of action for trespass to chattels, and has alleged facts constituting each element of this claim. Thus, Kuprewicz's motion to dismiss SVA's claim for common-law trespass to chattels must be denied.

Intel Corp. v Hamidi (30 Cal. 4th 1342, 1 Cal. Rptr. 3d 32, 71 P.3d 296 [2003]), upon which Kuprewicz relies, does not require a contrary result. In that case, the defendant's e-mail communications "caused neither physical damage nor functional disruption to the [plaintiff's] computers, nor did they at any time deprive [the plaintiff] of the use of its computers." Thus, the court held that, in the absence of any actual damage, the tort of trespass to chattels did not lie. Here, to the contrary, SVA's complaint alleges that such physical damage occurred so as to sustain the trespass claim. [3]

3 Kuprewicz argues that any effect these e-mails may have had on SVA's computer systems was not substantial or significant enough to cause the requisite damage. However, that is an issue for a future motion after discovery has taken place.

SVA maintains that Kuprewicz's conduct is "particularly intrusive" because of the substance, content and nature of the unsolicited e-mails, i.e., pornographic material. However, this court's decision to sustain the trespass to chattels claim is not based upon the content of the e-mails, but rather, is predicated upon plaintiffs' allegation that its receipt of large volumes of e-mails have caused significant detrimental effects on SVA's computer systems. It is important to note that, by this decision, the court does not hold that the mere sending of unsolicited e-mail communications will automatically subject the sender to tort liability. The court merely concludes that, at this early stage in the litigation, accepting SVA's factual allegations of damage to its computer systems, the complaint states a valid cause of action for trespass to chattels.

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LEXSEE 580 SO.2D 273

EDGAR ANICET, Appellant, v. PRESTON GANT, Appellee

Case No. 90-547

COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

580 So. 2d 273*; *1991 Fla. App. LEXIS 4587*; *16 Fla. L. Weekly D 1305

May 14, 1991, Filed

PROCEDURAL POSTURE: Appellant lunatic challenged the final judgment of the Circuit Court for Dade County (Florida), which had granted summary judgment in favor of appellee psychiatric attendant in his claim for damages for the intentional torts of assault and battery.

OPINION BY: SCHWARTZ

This case comes straight from a difficult exam question in Torts I. We must decide whether a violently insane person confined to a mental institution is liable to one of his attendants for injuries caused by his violent act. Contrary to the result below, we hold that there is no such liability.

The legal problem comes to us on an undisputed factual record which imposes no tangential impediment to resolving it as a matter of law. The defendant-appellant, Edgar Anicet, is a twenty-three year old man, who has suffered from irremediable mental difficulties all his life. After intermittent treatment and hospitalizations both in this country and his native Haiti, he was involuntarily committed in 1986 to the South Florida State Hospital, where he has remained ever since. Among the most severe features of his illness, manifested both before and during his hospitalizations, is an inability to control himself from acts of violence which specifically included throwing rocks, chairs and other objects at persons nearby. Largely because of that tendency, Anicet was confined to the hospital ward designed for the lowest functioning and most dangerous patients. On the day of the incident in question, January 15, 1988, he was present in a locked "day room" with some fifteen to twenty other patients on that ward.

The plaintiff-appellee, Preston Gant, was then an attendant, formally called a "unit treatment specialist," assigned by the hospital to Anicet's unit. His duties specifically included the treatment and, if possible, the control of patients like Anicet, of whose dangerous tendencies he was well aware. Indeed, the present incident began when, through a window of the day room, Gant saw Anicet throw a chair at a fellow patient. Gant went inside, tried to calm Anicet down, and warned him that if he did not do so, he would be confined to a "quiet room" in isolation. As Gant began to leave the day room, Anicet threw a heavy ashtray at his head and he was severely injured in twisting to avoid it.

In Gant's action for the resulting damages against Anicet, both sides moved for summary judgment on the issue of liability for the intentional torts of assault and battery. The trial judge denied the defendant's motion but granted Gant's. After the jury fixed the amount of damages, Anicet has taken this appeal from the final judgment. We reverse with directions to enter judgment for the appellant.

Few areas of the law of torts are so interesting, and therefore have proved so challenging, as the responsibility of insane persons for acts which would clearly be tortious if committed by the competent. It has become well-settled, both in Florida and elsewhere that, as a rule, a lunatic is liable in the same generalized way as is an ordinary person for both "intentional" acts and "negligent" ones. The expression "generalized way" and the quotation marks which surround the words

"intentional" and "negligent," have been employed advisedly. This is because, as the authorities uniformly recognize, it is impossible to ascribe either the volition implicit in an intentional tort, the departure from the standard of a "reasonable" person which defines an act of ordinary negligence, or indeed any concept of "fault" at all to one who, like Anicet, is by definition unable to control his own actions through any exercise of reason.

Instead, the conclusion that liability exists is founded squarely and acknowledgedly upon principles of good public policy which, it is held, are furthered by that conclusion. Almost invariably these considerations are stated to be:

(1) the notion that as between an innocent injured person and an incompetent injuring one, the latter should bear the loss; [2] and

(2) the view that the imposition of liability would encourage the utmost restriction of the insane person so that he may cause no unnecessary damage to the innocent. [3]

Because the circumstances of this case totally negate both of these asserted reasons for the rule, we conclude that the rule should not apply. We may approach our reasons for this conclusion in terms respectively of each of the two actors in this real life parable.

> 2 "Where one of two innocent persons must suffer a loss, it should be borne by the one who occasioned it." *Seals, 123 Kan. at 90, 254 P. at 349.*
>
> 3 The burden of injury should be borne by that class of persons who had some power initially to prevent the injury suffered. This latter 'class' would include . . . those interested in an insane person's estate who would be in a position to gain economically by taking steps to protect society from such insane persons.
>
> * * *
>
> Liability without subjective fault, under some circumstances, is one price men pay for membership in society.
>
> *Jolley, 299 So.2d at 647-48.*

1. *Gant* The basic idea underlying the view that insane persons should pay for their own intentional acts even though they can form no intention to commit them and thus could not be deemed "guilty" of wrong in the normal sense is the belief that justice demands that, as between two human beings of equal moral responsibility and ability to protect themselves from a wrong, the one which at least causes it -- who might be called the active damagefeasor -- should be responsible. Our leading case of Kaczer v. Marrero, which upheld the right of an innocent workman to recover from an unconfined insane person who stabbed him, is based upon just this consideration. It obviously does not apply to this case because unlike Marrero, Gant was not an innocent member of the public unable to anticipate or safeguard himself against the intrusions of a lunatic. In all meaningful respects, his position was directly to the contrary: he was employed to encounter, and knowingly did encounter, just the dangers which injured him. Importantly, any economic loss caused by damage from one of those dangers is invariably borne, as it was in this case, by workers' compensation coverage. In these circumstances, we think that ordinary concerns of fundamental justice, far from indicating that Gant should be reimbursed for his loss by the tort system, require the opposite result.

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Again, the employee is deemed not to be entitled to a tort recovery arising from a condition for the encountering and correction of which he is specifically paid. Neither should Gant.

2. *Anicet* We reach the same result upon analysis of the position of the other party to this dispute. It is first self-evident that the idea that imposing liability on an insane person will encourage those acting for him more carefully to safeguard others from his violence has no application whatever to this situation. Anicet, his relatives, and society did as much as they could do along these lines by confining him in the most restricted area of a restricted institution that could be found. Hence, it would serve no salutary purpose to impose the extra financial burden of a tort recovery.

As to the "fairness" issue, it is likewise clear that the imposition of liability would in fact counter our notions of what would be just to Anicet -- who has no control over his actions and is thus innocent of any wrongdoing in the most basic sense of that term. [A]s a member of society or as an employer, one who has "paid" another to encounter a particular danger should not have to, so to speak, pay again for that very danger -- even, as bears repeating, if he has been guilty of fault in creating it. This principle doubly applies to the entirely blameless Anicet.

We are aware that the only cases which have specifically considered the obligation of an insane person to an attendant have reached results opposite to ours. We consider that these cases are decisively distinguishable either factually or doctrinally and, more significant, that they are ultimately unpersuasive. … *McGuire v. Almy, 297 Mass. 323, 8 N.E.2d 760 (1937)* concerns

a private nurse hired to care for the lunatic in her home and thus directly raises the "encouragement of further restriction" principle which is notably absent from this case.

***

While there can be no question of the rule that a lunatic is as responsible for assault and battery as a sane person, nevertheless, there can be no assault and battery where one voluntarily engages in an encounter in which that may inevitably result. Since one of the main reasons for imposing liability upon lunatics for their torts is that such a course tends to make those who should have an interest in the insane person, and so possibly interested in his property, watchful of him, certainly that basis is not present here. It seems harsh to impose upon [a person] confined in an institution for the care of the insane the same rules of liability for his torts as would be imposed upon [that person had he been] allowed, unattended, to roam the streets.

In sum, we revert to the basic rule that where there is no fault, there should be no liability. Since the reasons for the limited exception to this rule which have been adopted as to insane persons do not apply to the present situation, so the exception itself cannot do so. We emphasize that we deliberately do not put the doctrine of this case in terms of "assumption of risk," in the sense of that principle which refers to conduct of the plaintiff which bars reliance upon an otherwise existing tort.

On that holding, the judgment below is

Reversed.

Grace M. Barton, an Infant, by Frank W. Barton, Her Guardian ad Litem, Appellant, v. Bee Line, Inc., Defendant

[NO NUMBER IN ORIGINAL]

Supreme Court of New York, Appellate Division, Second Department

238 A.D. 501*; *265 N.Y.S. 284*; *1933 N.Y. App. Div. LEXIS 9532

June 9, 1933

PROCEDURAL POSTURE: Plaintiff passenger sought review of an order of the Supreme Court in Nassau County (New York) that set aside a verdict in her favor and ordered a new trial in an action against defendant chauffeur alleging that she was raped while in his vehicle.

OPINION BY: LAZANSKY

Plaintiff appeals from an order setting aside the verdict of a jury in her favor and ordering a new trial. Plaintiff, who was fifteen years of age at the time, claimed that while a passenger of the defendant, a common carrier, she was forcibly raped by defendant's chauffeur. The chauffeur testified that she consented to their relations. It was conceded that if the chauffeur assaulted plaintiff while a passenger, defendant became liable in damages for failure to perform its duty as a common carrier to its passenger. The jury was charged that plaintiff was entitled to recover even if the consented, although consent might be considered in mitigation of damages. She had a verdict of $ 3,000.

***

It was error for the trial court to have instructed the jury that plaintiff was entitled to a verdict even if she consented to consort with the chauffeur. By the last paragraph of subdivision 5 of section 2010 of the Penal Law it is provided: "A person who perpetrates an act of sexual intercourse with a female, not his wife, under the age of eighteen years, under circumstances not amounting to rape in the first degree, is guilty of rape in the second degree, and punishable with imprisonment for not more than ten years." Under this subdivision a crime is committed even if the female consents. The effect of the charge of the court was that the provisions of the act are made the basis of a civil liability. The age limitation has been changed from time to time. At first it was ten years, then sixteen, now eighteen. There can be no doubt that the purpose of the legislative enactments was and is to protect the virtue of females and to save society from the ills of promiscuous intercourse. A female over eighteen who is ravished has a cause of action against her assailant. Should a consenting female under the age of eighteen have a cause of action if she has full understanding of the nature of her act? It is one thing to say that society will protect itself by punishing those who consort with females under the age of consent; it is another to hold that, knowing the nature of her act, such female shall be rewarded for her indiscretion. Surely public policy -- to serve which the statute was adopted -- will not be vindicated by recompensing her for willing participation in that against which the law sought to protect her. The very object of the statute will be frustrated if by a material return for her fall "we should unwarily put it in the power of the female sex to become seducers in their turn." Instead of incapacity to consent being a shield to save, it might be a sword to desecrate. The court is of the opinion that a female under the age of eighteen has no cause of action against a male with whom she willingly consorts, if she knows the nature and quality of her act.

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The court is not in accord with the views expressed in *Boyles v. Blankenhorn (168 App. Div. 388*) and *Colly v. Thomas (99 Misc. 158*); or the determination in *Gaither v. Meacham (214 Ala. 343*); *Hough v. Iderhoff (69 Ore. 568*); *Priboth v. Haveron (41 Okla. 692*); *Watson* v. *Taylor* (35 *id.* [***6] *768*); *Altman v. Eckerman (132 S. W. 523*, Texas Ct. of Civil Appeals), and *Bishop v. Liston (112 Neb. 559*).

The order should be affirmed, with costs.

PASCAL SUROCCO et al. v. JOHN W. GEARY

[NO NUMBER IN ORIGINAL]

SUPREME COURT OF CALIFORNIA

3 Cal. 69*; *1853 Cal. LEXIS 8

January 1853

PROCEDURAL POSTURE: Defendant appealed from the Superior Court of San Francisco (California), which found for plaintiffs in plaintiffs' action against defendant for the recovery of damages for the destruction of plaintiffs' house and store.

OPINION BY: MURRAY

This was an action, commenced in the court below, to recover damages for blowing up and destroying the plaintiff's house and property, during the fire of the 24th of December, 1849.

Geary, at that time Alcalde of San Francisco, justified, on the ground that he had authority, by virtue of his office, to destroy said building, and also that it had been blown up by him to stop the progress of the conflagration then raging.

It was in proof, that the fire passed over and burned beyond the building of the plaintiffs, and that at the time said building was destroyed, they were engaged in removing their property, and could had they not been prevented have succeeded in removing more, if not all of their goods.

The cause was tried by the Court sitting as a jury, and a verdict rendered for the plaintiffs, from which the defendant prosecutes this appeal under the Practice Act of 1850.

The only question for our consideration is, whether the person who tears down or destroys the house of another, in good faith, and under apparent necessity, during the time of a conflagration, for the purpose of saving the buildings adjacent, and stopping its progress, can be held personally liable in an action by the owner of the property destroyed.

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The right to destroy property, to prevent the spread of a conflagration, has been traced to the highest law of necessity, and the natural rights of man, independent of society or civil government. "It is referred by moralists and jurists to the same great principle which justifies the exclusive appropriation of a plank in a shipwreck, though the life of another be sacrificed; with the throwing overboard goods in a tempest, for the safety of a vessel; with the trespassing upon the lands of another, to escape death by an enemy. It rests upon the maxim, *Necessitas inducit privilegium quod jura privata*." [necessity provides a privilege for private rights]

The common law adopts the principles of the natural law, and places the justification of an act otherwise tortious precisely on the same ground of necessity.

This principle has been familiarly recognized by the books from the time of the saltpetre case, and the instances of tearing down houses to prevent a conflagration, or to raise bulwarks for the defence of a city, are made use of as illustrations, rather than as abstract cases, in which its exercise is permitted. At such times, the individual rights of property give way to the higher laws of impending necessity.

A house on fire, or those in its immediate vicinity which serve to communicate the flames, becomes a nuisance, which it is lawful to abate, and the private rights of the individual yield to the considerations of general convenience and the interests of society. Were it otherwise, one stubborn person might involve a whole city in ruin, by refusing to allow the destruction of a building which would cut off the flames and check the progress of the fire, and that, too, when it was perfectly evident that his building must be consumed.

***

The evidence in this case clearly establishes, the fact, that the blowing up of the house was necessary, as it would have been consumed had it been left standing. The plaintiffs cannot recover for the value of the goods which they might have saved: they were as much subject to the necessities of the occasion as the house in which they were situate; and if in such cases a party was held liable, it would too frequently happen, that the delay caused by the removal of the goods would render the destruction of the house useless.

The Court below clearly erred as to the law applicable to the facts of this case. The testimony will not warrant a verdict against the defendant.

Judgment reversed.

Harriet G. Wegner, petitioner, Appellant, v. Milwaukee Mutual Insurance Company, petitioner, Respondent, The City of Minneapolis, Respondent.

C6-90-1400

SUPREME COURT OF MINNESOTA

479 N.W.2d 38*; *1991 Minn. LEXIS 300*; *23 A.L.R.5th 954

December 13, 1991, Filed

PROCEDURAL POSTURE: Appellant homeowner challenged a judgment of the Court of Appeals (Minnesota), which affirmed a trial court grant of summary judgment to respondent city in the homeowner's action for damages caused to her house when city police flushed out a criminal suspect hiding in the house.

TOMLJANOVICH, Justice.

The Minneapolis police department severely damaged a house owned by Harriet G. Wegner while attempting to apprehend an armed suspect. Wegner sought compensation from the City of Minneapolis on trespass and constitutional "taking" theories. The district court granted the City's motion for summary judgment on the "taking" issue. The court of appeals affirmed, reasoning that although there was a "taking" within the meaning of the Minnesota Constitution, the "taking" was noncompensable under the doctrine of public necessity. We reverse.

The salient facts are not in dispute. Around 6:30 p.m. on August 27, 1986, Minneapolis police were staking out an address in Northeast Minneapolis in the hope of apprehending two suspected felons who were believed to be coming to that address to sell stolen narcotics. The suspects arrived at the address with the stolen narcotics. Before arrests could be made, however, the suspects spotted the police and fled in their car at a high rate of speed with the police in pursuit. Eventually, the suspects abandoned their vehicle, separated and fled on foot. The police exchanged gunfire with one suspect as he fled. This suspect later entered the house of Harriet G. Wegner (Wegner) and hid in the front closet. Wegner's granddaughter, who was living at the house, and her fiance then fled the premises and notified the police.

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The police fired at least 25 rounds of chemical munitions or "tear gas" into the house in an attempt to expel the suspect. The police delivered the tear gas to every level of the house, breaking virtually every window in the process. In addition to the tear gas, the police cast three concussion or "flash-bang" grenades into the house to confuse the suspect. The police then entered the home and apprehended the suspect crawling out of a basement window.

The tear gas and flash-bang grenades caused extensive damage to the Wegner house. For example: a pink film from the tear gas covered the walls and furniture; some walls were dented from the impact of the tear gas canisters; one tear gas canister went through one of the upstairs walls. Wegner alleges damages of $ 71,000. The City denied Wegner's request for reimbursement, so she turned to her insurance carrier, Milwaukee Mutual Insurance Company (Milwaukee Mutual) for coverage. Milwaukee Mutual paid Wegner $ 26,595.88 for structural damage, $ 1,410.06 for emergency board and glass repair and denied coverage for the rest of the claim. Milwaukee Mutual is subrogated to the claims of Wegner against the City to the extent of its payments under the policy.

Wegner commenced an action against both the City of Minneapolis and Milwaukee Mutual to recover the remaining damages. In conjunction with a trespass claim against the City, Wegner asserted that the police department's actions constituted a compensable taking under *Minn. Const. art. I, § 13*. Milwaukee Mutual cross-claimed against the City for its subrogation interest and

any additional amounts the insurer may be found liable for in the future.

Milwaukee Mutual and the City both brought motions for summary judgment on all claims. The district court granted partial summary judgment in favor of the City on the "taking" issue, holding that "Eminent domain is not intended as a limitation on [the] police power." Both Wegner and Milwaukee Mutual appealed the trial court's determination.

The court of appeals affirmed the trial court, reasoning that although there was a "taking" within the meaning of *Minn. Const. art. I, § 13*, the "taking" was non-compensable under the doctrine of public necessity.

I.

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The City argues that the destruction of the property as a means to apprehend escapees is a classic instance of police power exercised for the safety of the public. We do not hold that the police officers wrongfully ordered the destruction of the dwelling; we hold that the innocent third parties are entitled by the Constitution to compensation for their property.

It is unnecessary to remand this case for a determination of whether the police intentionally damaged the Wegner house for a public use. It is undisputed the police intentionally fired tear gas and concussion grenades into the Wegner house. Similarly, it is clear that the damage inflicted by the police in the course of capturing a dangerous suspect was for a public use within the meaning of the constitution.

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II.

We briefly address the application of the doctrine of public necessity to these facts. The *Restatement (Second) of Torts § 196* describes the doctrine as follows:

One is privileged to enter land in the possession of another if it is, or if the actor reasonably believes it to be, necessary for the purpose of averting an imminent public disaster. [6]

Prosser, apparently somewhat troubled by the potential harsh outcomes of this doctrine, states:

It would seem that the moral obligation upon the group affected to make compensation in such a case should be recognized by the law, but recovery usually has been denied.

Here, the police were attempting to apprehend a dangerous felon who had fired shots at pursuing officers. The capture of this individual most certainly was beneficial to the whole community. In such circumstances, an individual in Wegner's position should not be forced to bear the entire cost of a benefit conferred on the community as a whole.

6 Prosser explains:

> Where the danger affects the entire community, or so many people that the public interest is involved, that interest serves as a complete justification to the defendant who acts to avert the peril to all. Thus, one who dynamites a house to stop the spread of a conflagration that threatens a town, or shoots a mad dog in the street, or burns clothing infected with smallpox germs, or in time of war, destroys property which should not be allowed to fall into the hands of the enemy, is not liable to the owner, so long as the emergency is great enough, and he has acted reasonably under the circumstances. This notion does not require the "champion of the public" to pay for the general salvation out of his own pocket. The number of persons who must be endangered in order to create a public necessity has not been determined by the courts.

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We are not inclined to allow the city to defend its actions on the grounds of public necessity under the facts of this case. We believe the better rule, in situations where an innocent third party's property is taken, damaged or destroyed by the police in the course of apprehending a suspect, is for the municipality to compensate the innocent party for the resulting damages. The policy considerations in this case center around the basic notions of fairness and justice. At its most basic level, the issue is whether it is fair to allocate the entire risk of loss to an innocent homeowner for the good of the public. We do not believe the imposition of such a burden on the innocent citizens of this state would square with the underlying principles of our system of justice. Therefore, the City must reimburse Wegner for the losses sustained.

As a final note, we hold that the individual police officers, who were acting in the public interest, cannot be held personally liable. Instead, the citizens of the City should all bear the cost of the benefit conferred.

The judgments of the courts below are reversed and the cause remanded for trial on the issue of damages.

Affirmed in part, reversed in part and remanded.

MARVIN KATKO, Appellee v. EDWARD BRINEY and BERTHA L. BRINEY, Appellants

No. 54169

Supreme Court of Iowa

183 N.W.2d 657*; *1971 Iowa Sup. LEXIS 717*; *47 A.L.R.3d 624

February 9, 1971, Filed

PRIOR HISTORY: Appeal from Mahaska District Court. Harold Fleck. Action at law for damages resulting from injuries suffered by trespassing plaintiff when he triggered a spring gun placed in an uninhabited house by defendant owners. From judgment for both actual and punitive damages, defendants appeal.

OPINION BY: MOORE

The primary issue presented here is whether an owner may protect personal property in an unoccupied boarded-up farm house against trespassers and thieves by a spring gun capable of inflicting death or serious injury.

We are not here concerned with a man's right to protect his home and members of his family. Defendants' home was several miles from the scene of the incident to which we refer infra.

Plaintiff's action is for damages resulting from serious injury caused by a shot from a 20-gauge spring shotgun set by defendants in a bedroom of an old farm house which had been uninhabited for several years. Plaintiff and his companion, Marvin McDonough, had broken and entered the house to find and steal old bottles and dated fruit jars which they considered antiques.

At defendants' request plaintiff's action was tried to a jury consisting of residents of the community where defendants' property was located. The jury returned a verdict for plaintiff and against defendants for $20,000 actual and $10,000 punitive damages.

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II. Most of the facts are not disputed. In 1957 defendant Bertha L. Briney inherited her parents' farm land in Mahaska and Monroe Counties. Included was an 80-acre tract in southwest Mahaska County where her grandparents and parents had lived. No one occupied the house thereafter. Her husband, Edward, attempted to care for the land. He kept no farm machinery thereon. The outbuildings became dilapidated.

For about 10 years, 1957 to 1967, there occurred a series of trespassing and housebreaking events with loss of some household items, the breaking of windows and "messing up of the property in general". The latest occurred June 8, 1967, prior to the event on July 16, 1967 herein involved.

Defendants through the years boarded up the windows and doors in an attempt to stop the intrusions. They had posted "no trespass" signs on the land several years before 1967. The nearest one was 35 feet from the house. On June 11, 1967 defendants set "a shotgun trap" in the north bedroom. After Mr. Briney cleaned and oiled his 20-gauge shotgun, the power of which he was well aware, defendants took it to the old house where they secured it to an iron bed with the barrel pointed at the bedroom door. It was rigged with wire from the doorknob to the gun's trigger so it would fire when the door was opened. Briney first pointed the gun so an intruder would be hit in the stomach but at Mrs. Briney's suggestion it was lowered to hit the legs. He admitted he did so "because I was mad and tired of being tormented" but "he did not intend to injure anyone". He gave no explanation of why he used a loaded shell and set it to hit a person already in the house. Tin was nailed over the bedroom window. The spring gun could not be

seen from the outside. No warning of its presence was posted.

Plaintiff lived with his wife and worked regularly as a gasoline station attendant in Eddyville, seven miles from the old house. He had observed it for several years while hunting in the area and considered it as being abandoned. He knew it had long been uninhabited. In 1967 the area around the house was covered with high weeds. Prior to July 16, 1967 plaintiff and McDonough had been to the premises and found several old bottles and fruit jars which they took and added to their collection of antiques. On the latter date about 9:30 p.m. they made a second trip to the Briney property. They entered the old house by removing a board from a porch window which was without glass. While McDonough was looking around the kitchen area plaintiff went to another part of the house. As he started to open the north bedroom door the shotgun went off striking him in the right leg above the ankle bone. Much of his leg, including part of the tibia, was blown away. Only by McDonough's assistance was plaintiff able to get out of the house and after crawling some distance was put in his vehicle and rushed to a doctor and then to a hospital. He remained in the hospital 40 days.

Plaintiff's doctor testified he seriously considered amputation but eventually the healing process was successful. Some weeks after his release from the hospital plaintiff returned to work on crutches. He was required to keep the injured leg in a cast for approximately a year and wear a special brace for another year. He continued to suffer pain during this period.

There was undenied medical testimony plaintiff had a permanent deformity, a loss of tissue, and a shortening of the leg.

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III. Plaintiff testified he knew he had no right to break and enter the house with intent to steal bottles and fruit jars therefrom. He further testified he had entered a plea of guilty to larceny in the nighttime of property of less than $20 value from a private building. He stated he had been fined $50 and costs and paroled during good behavior from a 60-day jail sentence. Other than minor traffic charges this was plaintiff's first brush with the law. On this civil case appeal it is not our prerogative to review the disposition made of the criminal charge against him.

IV. The main thrust of defendants' defense in the trial court and on this appeal is that "the law permits use of a spring gun in a dwelling or warehouse for the purpose of preventing the unlawful entry of a burglar or thief". They repeated this contention in their exceptions to the trial court's instructions 2, 5 and 6. They took no exception to the trial court's statement of the issues or to other instructions.

In the statement of issues the trial court stated plaintiff and his companion committed a felony when they broke and entered defendants' house.

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The overwhelming weight of authority, both textbook and case law, supports the trial court's statement of the applicable principles of law.

Prosser on Torts, Third Edition, pages 116-118, states:

"the law has always placed a higher value upon human safety than upon mere rights in property, it is the accepted rule that there is no privilege to use any force calculated to cause death or serious bodily injury to repel the threat to land or chattels, unless there is also such a threat to the defendant's personal safety as to justify self-defense. * * * spring guns and other man-killing devices are not justifiable against a mere trespasser, or even a petty thief. They are privileged only against those upon whom the landowner, if he were present in person would be free to inflict injury of the same kind."

Restatement of Torts, section 85, page 180, states: "The value of human life and limb, not only to the individual concerned but also to society, so outweighs the interest of a possessor of land in excluding from it those whom he is not willing to admit thereto that a possessor of land has, as is stated in § 79, no privilege to use force intended or likely to cause death or serious harm against another whom the possessor sees about to enter his premises or meddle with his chattel, unless the intrusion threatens death or serious bodily harm to the occupiers or users of the premises. * * * A possessor of land cannot do indirectly and by a mechanical device that which, were he present, he could not do immediately and in person. Therefore, he cannot gain a privilege to install, for the purpose of protecting his land from intrusions harmless to the lives and limbs of the occupiers or users of it, a mechanical device whose only purpose is to inflict death or serious harm upon such as may intrude, by giving notice of his intention to

inflict, by mechanical means and indirectly, harm which he could not, even after request, inflict directly were he present."

In Volume 2, Harper and James, The Law of Torts, section 27.3, pages 1440, 1441, this is found: "The possessor of land may not arrange his premises intentionally so as to cause death or serious bodily harm to a trespasser. The possessor may of course take some steps to repel a trespass. If he is present he may use force to do so, but only that amount which is reasonably necessary to effect the repulse. Moreover if the trespass threatens harm to property only - even a theft of property - the possessor would not be privileged to use deadly force, he may not arrange his premises so that such force will be inflicted by mechanical means. If he does, he will be liable even to a thief who is injured by such device."

***

Affirmed.

Restatement (2d) of Torts: Use of Force in Defense of Property

§ 77 Defense of Possession by Force Not Threatening Death or Serious Bodily Harm

An actor is privileged to use reasonable force, not intended or likely to cause death or serious bodily harm, to prevent or terminate another's intrusion upon the actor's land or chattels, if

(a) the intrusion is not privileged or the other intentionally or negligently causes the actor to believe that it is not privileged, and

(b) the actor reasonably believes that the intrusion can be prevented or terminated only by the force used, and

(c) the actor has first requested the other to desist and the other has disregarded the request, or the actor reasonably believes that a request will be useless or that substantial harm will be done before it can be made.

§ 79 Defense of Possession by Force Threatening Death or Serious Bodily Harm

The intentional infliction upon another of a harmful or offensive contact or other bodily harm by a means which is intended or likely to cause death or serious bodily harm, for the purpose of preventing or terminating the other's intrusion upon the actor's possession of land or chattels, is privileged if, but only if, the actor reasonably believes that the intruder, unless expelled or excluded, is likely to cause death or serious bodily harm to the actor or to a third person whom the actor is privileged to protect.

LEXSEE 164 OHIO ST. 595

LEHMAN, APPELLEE, v. HAYNAM, APPELLANT

No. 34416

Supreme Court of Ohio

164 Ohio St. 595*; *133 N.E.2d 97*; *1956 Ohio LEXIS 607*; *59 Ohio Op. 5

February 29, 1956, Decided

PROCEDURAL POSTURE: Defendant appealed a decision from the Court of Appeals for Stark County (Ohio) that dismissed defendant's appeal of an order granting plaintiff's motion for a new trial and affirmed a trial court ruling to strike defendant's motion for judgment on the pleadings as untimely. The court of appeals also remanded defendant's motions for judgment on the evidence, directed verdict, and reinstatement of the original judgment in defendant's favor.

OPINION BY: STEWART

If defendant was conscious during his driving, up to the point of the collision, he was without question guilty of negligence as a matter of law since he unquestionably violated a specific safety statute in driving his automobile over onto his wrong side of the road. The only difference between negligence as a matter of law or per se and negligence as a matter of fact is that the former is the violation of a specific requirement of a statute, whereas the latter must be determined by a comparison with the conduct of an ordinarily prudent person under the same or similar circumstances as those from which negligence is claimed.

In the case of negligence per se, the court charges the jury that if it finds that the specific requirement of a statute was violated, it must find negligence, whereas in ordinary negligence the jury must do the comparing with the conduct of an ordinarily prudent person.

In order to base a recovery upon either kind of negligence, it must be shown that it was the proximate cause of the injury, and any contributory negligence directly contributing to such injury will defeat such recovery.

Defendant claims, likewise, that if a person driving an automobile with due care becomes unconscious from an unforeseen cause, and during such unconsciousness his automobile collides with another, causing injury or damage, he is absolved from liability and the burden of proof is upon the one seeking recovery for such injury or damage to show negligence and that the driver was conscious. Furthermore, defendant claims that because his testimony as to his unconscious condition and the corroborating testimony of his witnesses on that point was uncontradicted, he was entitled to a directed verdict; that, therefore, the trial court was guilty of an abuse of discretion in granting plaintiff a new trial; and that the Court of Appeals should have passed upon his motions for judgment instead of remanding them to the Common Pleas Court for consideration.

***

The rule with reference to unconsciousness being a defense against a claim of negligence is well stated as follows in *28 A. L. R. (2d), 35*:

"By the great weight of authority, an operator of a motor vehicle who, while driving, becomes suddenly stricken by a fainting spell or loses consciousness from an unforeseen cause, and is unable to control the vehicle, is not chargeable with negligence or gross negligence. Stated differently, fainting or momentary loss of consciousness while driving is a complete defense to an action based on negligence (and a fortiori to an action based on gross negligence) if such loss of consciousness was not foreseeable."

***

In our opinion, if one was guilty of what would be negligence as to a conscious person and claims not to have been negligent because of an unforeseen unconsciousness, he should have the burden of proving his condition by the preponderance of the evidence.

***

Where the driver of an automobile is suddenly stricken by an illness which he has no reason to anticipate and which renders it impossible for him to control the car, he is not chargeable with negligence."

The case holds further that irregular movements of a car, evidencing negligent action of its driver and being the sole cause of a collision, are actionable "unless it were shown that a sudden unforeseen illness caused him to lose control of the car," "and the burden of such proof, in explanation of his conduct, rested upon the defendants."

***

Judgment modified and, as modified, affirmed and cause remanded.

LEXSEE 661 P2D 1032

Larry B. CERVELLI, Appellant (Plaintiff), v. Kenneth H. GRAVES and DeBernardi Brothers, Inc., Appellees (Defendants)

No. 5801

Supreme Court of Wyoming

661 P.2d 1032; 1983 Wyo. LEXIS 300

April 6, 1983

PROCEDURAL POSTURE: Appellant injured party challenged a ruling from the District Court of Sweetwater County (Wyoming), which found that appellees, a driver and his employer, were not negligent in entering a judgment in their favor. Appellant had filed a personal injury action for negligence against appellees to recover for the injuries he had sustained when a cement truck driven by the driver and appellant's pickup truck collided while on an icy and slick road.

OPINION BY: RAPER

This case arose when Larry B. Cervelli (appellant) filed a personal injury suit for injuries he sustained when a pickup truck driven by him collided with a cement truck owned by DeBernardi Brothers, Inc. (appellee). The cement truck was driven by DeBernardi's employee, Kenneth H. Graves (appellee) while acting in the course of his employment. After trial, a jury found no negligence on the part of appellees. Appellant argues the jury was incorrectly instructed and, as a result, found as it did thereby prejudicing him. He raises the following issues on appeal:

> "A. Did the court err in instructing the jury that it was not to consider a person's skills in determining whether that person is negligent?
>
> "B. Did the court err in not instructing that defendant, Kenneth H. Graves, is held to a more specific standard of care since he was a professional truck driver and plaintiff, Larry B. Cervelli, was not?

***

We will reverse and remand.

Around 7:30 a.m., February 22, 1980, a collision occurred approximately nine miles west of Rock Springs, Wyoming in the westbound lane of Interstate Highway 80 involving a pickup driven by appellant and appellee's cement truck. At the time of the accident, the road was icy and very slick; witnesses described it as covered with "black ice." Just prior to the accident appellant had difficulty controlling his vehicle and began to "fishtail" on the ice. He eventually lost control of his vehicle and started to slide. Appellee Graves, who had been approaching appellant from behind at a speed of 35-40 m.p.h., attempted to pass appellant's swerving vehicle first on the left side, then the right. He too, thereafter, lost control of his cement truck and the two vehicles collided. It was from that accident that appellant brought suit to recover damages for the numerous injuries he suffered.

By his own admission, appellee Graves at the time of the accident was an experienced, professional truck driver with over ten years of truck driving experience. He possessed a class "A" driver's license which entitled him to drive most types of vehicles including heavy trucks. He had attended the Wyoming Highway Patrol's defensive driver course and had kept up-to-date with various driving safety literature. He was the senior driver employed by appellee DeBernardi Brothers, Inc.

The suit was tried to a jury on the issues of appellee's negligence as well as the degree, if any, of appellant's own negligence. After a four-day trial, the jury was instructed and received the case for their consideration. They found no negligence on the part of appel-

lees. Judgment was entered on the jury verdict and appellant moved for a new trial claiming the jury was improperly instructed. The district court took no action on the motion; it was deemed denied in sixty days. This appeal followed.

Appellant calls our attention to and alleges as error the district court's jury instructions 5 and 10. Instruction 5 instructed the jury that:

> "Negligence is the lack of ordinary care. It is the failure of a person to do something a reasonable, careful person would do, or the act of a person in doing something a reasonable, careful person would not do, under circumstances the same or similar to those shown by the evidence. The law does not say how a reasonable, careful person would act under those circumstances, as that is for the Jury to decide.
>
> "A reasonable, careful person, whose conduct is set up as a standard, is not the extraordinarily cautious person, nor the exceptionally skillful one, but rather a person of reasonable and ordinary prudence.
>
> "Negligence is actionable only when it appears that it was a direct cause of any injury and damages complained of. A direct cause is a cause which directly brings about the injury either immediately or through happenings which follow one after another.
>
> "There may be more than one direct cause in that an accident may result from one or more separate and distinct acts by different persons."

***

Appellant's counsel stated distinctly that he objected to the second paragraph of instruction 5 because he argued appellee Graves was a professional truck driver and should be "held to a higher duty of care." In the alternative, counsel argued if appellee Graves is not held to a higher standard by virtue of his occupation, the jury is at least allowed to take cognizance of any knowledge and skill he possesses; therefore, the instruction's second paragraph should be deleted. Instruction 10, in its entirety, was objected to as incorrectly applying the doctrine of known and obvious danger, as it pertains to slip and fall cases, to this highway collision case; appellant argued that it had no application to the case at bar. [2]

***

Appellant's proposed instruction 24 dealing with appellee Graves' duty of care provided:

> "The evidence in this case shows that Defendant Kenneth Graves was employed by Defendant, DeBarnardi [DeBernardi] Brothers, Inc., as a professional truck driver. As such, Defendant Kenneth Graves was under a duty to exercise the skill, diligence and knowledge and must apply the means and methods which would be reasonably exercised and applied by members of his occupation in good standing and in the same line of practice."

2 Because of the nature of appellant's objection to instruction 10, no substitute instruction was proposed nor was one necessary.

***

I

We begin our discussion of the issues by reviewing instruction 5 given by the trial court. Appellant argues that the second paragraph of that instruction is an incorrect statement of the law. We agree.

The complained of portion of that instruction states:

> "A reasonable, careful person, whose conduct is set up as a standard, is not the extraordinarily cautious person, nor the exceptionally skillful one, but rather a person of reasonable and ordinary prudence."

That language is an apparent attempt to enlarge upon the reasonable man standard. In that attempt to explain the reasonable man concept, however, the instruction goes too far. It contradicts the correct statement of the law contained in the first paragraph of the instruction. Simply put, the first paragraph of the instruction correctly states that negligence is the failure to exercise ordinary care where ordinary care is that degree of care which a reasonable person is expected to exercise un-

der the same or similar circumstances. The trial court's instruction first allows the jury to consider the parties' acts as compared to how the reasonable person would act in similar circumstances and then limits the circumstances the jury can consider by taking out of their purview the circumstances of exceptional skill or knowledge which are a part of the totality of circumstances.

Our view that negligence should be determined in view of the circumstances is in accord with the general view. The *Restatement, Torts 2d § 283* (1965) defines the standard of conduct in negligence actions in terms of the reasonable man under like circumstances. Professor Prosser, discussing the reasonable man, likewise said that "negligence is a failure to do what the reasonable man would do 'under the same or similar circumstances.'" He contended a jury must be instructed to take the circumstances into account. Prosser also went on to note that under the latitude of the phrase "under the same or similar circumstances," courts have made allowance not only for external facts but for many of the characteristics of the actor himself.

It has been said that "circumstances are the index to the reasonable man's conduct. His degree of diligence varies not only with standard of ordinary care, but also with his ability to avoid injuries to others, as well as the consequences of his conduct." It was aptly put many years ago when it was said:

> "'It seems plain also that the degree of vigilance which the law will exact as implied by the requirement of ordinary care, must vary with the probable consequences of negligence and also with the command of means to avoid injuring others possessed by the person on whom the obligation is imposed. * * * * Under some circumstances a very high degree of vigilance is demanded by the requirement of ordinary care. Where the consequence of negligence will probably be serious injury to others, and where the means of avoiding the infliction of injury upon others are completely within the party's power, ordinary care requires almost the utmost degree of human vigilance and foresight.'"

At a minimum, as Justice Holmes once said, the reasonable man is required to know what every person in the community knows. In a similar vein, Professor Prosser notes there is, at least, a minimum standard of knowledge attributable to the reasonable man based upon what is common to the community. Prosser went on to say, however, that although the reasonable man standard provides a minimum standard below which an individual's conduct will not be permitted to fall, the existence of knowledge, skill, or even intelligence superior to that of an ordinary man will demand conduct consistent therewith. Along that same line, *Restatement, Torts 2d § 289* (1965) provides:

> "The actor is required to recognize that his conduct involves a risk of causing an invasion of another's interest if a reasonable man would do so while exercising
>
> "(a) such attention, perception of the circumstances, memory, knowledge of other pertinent matters, intelligence, and judgment as a reasonable man would have; and
>
> "(b) such superior attention, perception, memory, knowledge, intelligence, and judgment as the actor himself has."

Section 289 comment m expands further on the effect of superior qualities of an individual when it states:

> *"m. Superior qualities of actor.* The standard of the reasonable man requires only a minimum of attention, perception, memory, knowledge, intelligence, and judgment in order to recognize the existence of the risk. If the actor has in fact more [**13] than the minimum of these qualities, he is required to exercise the superior qualities that he has in a manner reasonable under the circumstances. The standard becomes, in other words, that of a reasonable man with such superior attributes."

***

In determining negligence the jury must be allowed to consider all of the circumstances surrounding an occurrence, including the characteristics of the actors in reaching their decision. Where, as here, there was evidence from which the jury could have concluded appellee Graves was more skillful than others as a result of his experience as a driver, they should be allowed to consider that as one of the circumstances in reaching their decision.

II

Although we hold that the trial court erred when it in effect instructed the jury to disregard exceptional characteristics of either of the parties in determining negligence, we cannot extend that holding to rule favorably on appellant's second issue. Appellant would have us hold that the trial court erred in failing to instruct that, as a matter of law, appellee Graves was held to a higher standard of care because he was a professional truck driver. It is one thing to say that, if so found, a jury can take account of an individual's exceptional knowledge or skill in determining negligence; it is quite another to say that as a matter of law, because he is a truck driver, an individual is held to a higher standard of care than other drivers. Appellant would, in his own words, have us treat this as a professional truck driver's driver malpractice case. That we will not do.

.

***

Reversed and remanded for a new trial

David G. Robinson, Appellant, v. Pioche, Bayerque & Co., Respondents

[NO NUMBER IN ORIGINAL]

SUPREME COURT OF CALIFORNIA

5 Cal. 460*; *1855 Cal. LEXIS 184

October 1855

PRIOR HISTORY: Appeal from the Superior Court of the City of San Francisco.

Action for damages sustained by the plaintiff in falling into an uncovered hole, dug in the sidewalk in front of defendants' premises.

OPINION BY: HEYDENFELDT

The Court below erred in giving the third, fourth and fifth instructions. If the defendants were at fault in leaving an uncovered hole in the sidewalk of a public street, the intoxication of the plaintiff cannot excuse such gross negligence. A drunken man is as much entitled to a safe street, as a sober one, and much more in need of it.

The judgment is reversed, and the cause remanded.

Roxie SHEPHERD v. GARDNER WHOLESALE, INC

6 Div. 831

Supreme Court of Alabama

288 Ala. 43*; *256 So. 2d 877*; *1972 Ala. LEXIS 1174

January 13, 1972

PROCEDURAL POSTURE: Appellant pedestrian filed a complaint against appellee corporation for alleged serious physical injuries that she suffered in a fall. The jury returned a verdict in favor of the corporation and the trial court (Alabama) entered judgment in favor of the corporation. The pedestrian appealed from the judgment and from the judgment of the court denying and overruling her motion to set aside the verdict and grant her a new trial.

McCALL, Justice.

The appellant, Roxie Shepherd's action against the appellee, Gardner Wholesale, Inc., an Alabama corporation, is in simple negligence for alleged serious physical injuries that she suffered in a fall. While a pedestrian on a public sidewalk, she tripped on a raised concrete slab that formed the foundation of a business building of the appellee Gardner Wholesale, Inc., that abutted the sidewalk at a street corner. The evidence is in dispute as to whether or not the raised slab extended onto the public sidewalk.

The jury returned a verdict in favor of the appellee Gardner Wholesale, Inc., and the court duly entered judgment thereon. The plaintiff-appellant appeals from this judgment and from the judgment of the court denying and overruling her motion to set aside the verdict and grant her a new trial.

This slab over which the plaintiff stumbled was raised perpendicular to and three or four inches above the level of the sidewalk. Its apex fitted with and joined into the angle formed by the intersecting sidewalks at the street corner.

***

The written charge which was given at the request of the appellee and is the basis of the appellant's sixth assignment of error reads as follows:

"I charge you, members of the Jury, that a person walking upon a sidewalk is under a duty to make reasonable use of the sense of sight and see what ordinary vision would disclose."

***

In the instant case, the evidence is to the effect that the appellant was suffering from failing vision with cataracts in her eyes, out of which she had 20/100 with her right eye and 20/80 with her left eye. While the law requires a pedestrian to make reasonable use of his sense of sight, a person with impaired vision is not required to see what a person with normal vision could see. Such would be impossible, and one is not guilty of negligence by using the public sidewalks with the physical inability to see what a person with normal vision can see. A person laboring under a physical disability such as defective vision is not required to exercise a higher degree of care to avoid injury than is required of a person under no disability. Ordinary care to protect himself from injury is all that is required of him. Ordinary care in the case of such a person is such care as an ordinarily prudent person with a like infirmity would have exercised under the same or similar circumstances. We think the charge in question instructs the jury that a pedestrian on a public sidewalk owes a duty to himself to exercise ordinary care for his own safety by the reasonable use of his sense of sight, and that this duty requires such a person to look ahead with his eyes open, and to see what his ordinary vision would necessarily see, unless his attention is distracted for good cause. The charge was given without error.

[Finding error with other jury instructions, the Court reversed the judgment below and remanded for a new trial]

FRANK and LESLIE O'GUIN, husband and wife, individually, and in their capacity as parents and legal guardians of FRANK O'GUIN, JR., a minor, Plaintiffs-Appellants, v. BINGHAM COUNTY; BINGHAM COUNTY COMMISSIONERS; and BINGHAM COUNTY PUBLIC WORKS, a political subdivision, Defendants-Respondents.

Docket No. 30344, 2005 Opinion No. 106

SUPREME COURT OF IDAHO

142 Idaho 49*; *122 P.3d 308*; *2005 Ida. LEXIS 154

October 3, 2005, Filed

TROUT, Justice

Frank and Leslie O'Guin, acting as individuals and as legal guardians of Frank O'Guin Jr. (the O'Guins), appeal the district court's grant of summary judgment in favor of Bingham County, Bingham County Commissioners and Bingham County Public Works, (collectively the County). Because the district court erred in its determinations regarding the negligence *per se* claim, we reverse the grant of summary judgment.

I.

FACTUAL AND PROCEDURAL BACKGROUND

On July 7, 1999, Shaun and Alex O'Guin were killed while playing at the Bingham County landfill. Apparently, a section of the pit wall collapsed and crushed the children. Their older brother, Frank Jr., initially discovered their bodies at the bottom of the pit. Earlier that day, the children had been eating lunch at Ridgecrest Elementary School as part of a summer lunch program. As they started walking home, the children went through an unlocked gate at the back of the schoolyard and through a privately owned empty field. The empty field is situated between the landfill and the schoolyard. The border between the empty field and the landfill was unobstructed. At the time of the children's death, the landfill was open to the public one day a week. It was closed on the day the children were killed and no landfill employees were present on the site.

The O'Guins filed an action alleging … that the County breached certain legal duties to control access to the landfill. … Upon remand, the County renewed its motion for summary judgment on the negligence *per se* claim and the district court granted the motion. The O'Guins again appealed.

****

III.

ANALYSIS

A. Negligence *Per Se* Claim

***

"The elements of a common law negligence action are (1) a duty, recognized by law, requiring the defendant to conform to a certain standard of conduct; (2) a breach of that duty; (3) a causal connection between the defendant's conduct and the resulting injury; and (4) actual loss or damage."

***

Negligence*Per se*

"In Idaho, it is well established that statutes and administrative regulations may define the applicable standard of care owed, and that violations of such statutes and regulations may constitute negligence *per se*." "A court may adopt 'as the standard of conduct of a reasonable man the requirements of a legislative enactment or an administrative regulation....'" "The effect of establishing negligence *per se* through violation of a statute is to conclusively establish the first two elements of a cause of action in negligence. ..." "Negligence *per se* lessens the plaintiff's burden only on the issue of the 'actor's depar-

ture from the standard of conduct required of a reasonable man.'" "Thus, the elements of duty and breach are 'taken away from the jury.'"

In order to replace a common law duty of care with a duty of care from a statute or regulation, the following elements must be met: (1) the statute or regulation must clearly define the required standard of conduct; (2) the statute or regulation must have been intended to prevent the type of harm the defendant's act or omission caused; (3) the plaintiff must be a member of the class of persons the statute or regulation was designed to protect; and (4) the violation must have been the proximate cause of the injury.

As to the first element, the district court found, and we agree, that the statute and regulations in this case clearly define the County's standard of conduct. Idaho Code Title 39, Chapters 1 and 74 grant authority to the Board of Environmental Quality to adopt solid waste management rules and standards. Those rules require municipal solid waste landfill units to block access by unauthorized persons. The rule in effect at the time of the boys' deaths provided in pertinent part:

> Solid waste management sites shall comply with the following:
>
> ...
>
> e. Access to the site shall be limited to those times when an attendant is on duty.
>
> > i. Hours of operation and other limitations shall be prominently displayed at the entrance.
> >
> > ii. The site shall be fenced or otherwise blocked to access when an attendant is not on duty.
> >
> > iii. Unauthorized vehicles and persons shall be prohibited access to the site.

In addition, *Idaho Code § 39-7412(6)* states that owners or operators of all municipal solid waste landfill units shall "provide and control access as provided in *40 CFR 258.25*." That section of the Code of Federal Regulations states:

> Owners or operators of all municipal solid waste landfill units must control public access and prevent unauthorized vehicular traffic and illegal dumping of wastes by using artificial barriers, natural barriers, or both, as appropriate to protect human health and the environment.

These regulations require the County to fence or otherwise block access to the landfill when an attendant is not on duty. The Legislature has specifically declared it to be "unlawful" to fail to comply with the landfill rules. In this case, the record reveals that on July 7, 1999, some of the landfill boundaries were not fenced or blocked. There is also evidence that the landfill was closed and no attendant was on duty on July 7, 1999. Therefore, the district court was correct that the regulations clearly define the County's required standard of conduct, and the County failed to meet that standard.

The second element asks whether the death of the O'Guin children is the type of harm the statute and regulations were intended to prevent. *Idaho Code Section 39-7401(2)* states:

> It is the intent of the legislature to establish a program of solid waste management which complies with 40 CFR 258 and facilitates the incorporation of flexible standards in facility design and operation. The legislature hereby establishes the solid waste disposal standards and procedures outlined herein and a facility approval process [***10] for the state of Idaho, the political subdivisions thereof, and any private solid waste disposal site owner in order to facilitate the development and operation of solid waste disposal sites, to effect timely and responsible completion of statutory duties and to ensure protection of human health and the environment, to protect the air, land and waters of the state of Idaho.

This section demonstrates the legislature's desire to ensure the "protection of human health" in the "development and operation of solid waste disposal sites." It also makes specific reference to 40 C.F.R. § 258. As quoted previously, *Section 258.25 of the Code of Federal Regulations* states "owners or operators of all municipal solid waste landfill units must control public access ... by using artificial barriers, natural barriers, or both, as appropriate to protect human health ...." Further indication of the intent of this section can be found in the Technical

Manual on Solid Waste Disposal Facility Criteria (Manual) promulgated by the United States Environmental Protection Agency. The Manual contains a disclaimer that the policies set forth in the Manual are not intended to create any enforceable rights in litigation and are simply for guidance. However, the Manual can serve to give further insight into the interpretation of the provisions in the CFR. Specifically, Section 3.7.3 entitled "Technical Considerations" relates to the access requirements of *40 CFR § 258.25* and provides in part

> Frequently, unauthorized persons are unfamiliar with the hazards associated with landfill facilities, and consequences of uncontrolled access may include injury and even death. Potential hazards are related to inability of equipment operators to see unauthorized individuals during operation of equipment and haul vehicles; direct exposure to waste (e.g., sharp objects and pathogens); inadvertent or deliberate fires; and earth-moving activities.

This provision indicates a broad definition of what is intended by "protection of human health" and certainly includes possible injury or death to people on the facility grounds. Operators of a landfill have a duty not only to prevent illegal dumping and unauthorized vehicular traffic, but to control public access as well.

The County argues that the intent of these provisions is merely to prevent unauthorized vehicular traffic and illegal dumping. However, the inclusion of physical injury to "unauthorized individuals" by equipment or earth-moving activities, as potential landfill hazards, would indicate otherwise. A similar hazard is presented by a dangerously sloping wall in the landfill. The O'Guin's expert testified that the angle of the slope where the accident occurred "was extremely dangerous" and violative of EPA and OSHA regulations. These statutes and rules demonstrate that the Legislature intended to safeguard both human health and safety. The injury to the safety of the O'Guin children is the type of harm the Idaho statute and regulations were intended to prevent because the children's deaths relate directly to control of public access and protection of human health and safety.

As to the third element, the O'Guin children are members of the class of persons the regulations were designed to protect. The regulations state "unauthorized vehicles and persons shall be prohibited access to the site." As trespassers, the O'Guin children were certainly "unauthorized persons" and the regulations do not differentiate between the unauthorized person who comes to the landfill to dump improper materials and the unauthorized person who comes to the landfill to play. Furthermore, the regulations require the landfill "be fenced or otherwise blocked to access when an attendant is not on duty." This regulation demonstrates the connection between the requirement that the landfill perimeter be fenced or blocked and the protection of persons whose access is unauthorized. Therefore, the regulations controlling access were designed to protect the human health and safety of the unauthorized person who comes to a landfill when an attendant is not on duty and the O'Guin children fit within that category.

Finally, as to the fourth element, there is at least a disputed issue of fact created by an affidavit in the record, as to whether the County's violation of the statute and regulations resulted in the O'Guin children's deaths.

****

IV.

CONCLUSION

The district court erred in determining that the County's violations here were not negligence *per se*

***

Justice EISMANN **BDISSENTING**.

I cannot concur in the majority opinion because the regulations cited therein as supporting a claim of negligence *per se* were clearly not intended to prevent the type of harm involved in this case.

***

The majority opinion relies upon *IDAPA 58.01.06.005.02* and *40 C.F.R. 258.25* as providing the applicable standard of care. Neither of those regulations is intended to prevent trespassers from injuring themselves through an accident at a landfill. They are intended to prevent trespassers from dumping or salvaging materials that may be harmful to health or the environment.

The purpose of the IDAPA rules is stated in *IDAPA 58.01.06.004.01* and .02, which provide:

> **01. Solid Waste Management.** All solid waste shall be managed, whether it be during storage, collection, transfer, transport, processing, separation, incineration, composting, treatment, reuse, recycling, or disposal, to prevent health hazards, public nuisances, or pollution of the environment.
>
> **02. Requirements.** Solid wastes shall be managed such that they shall not:

a. Provide sustenance to rodents or insects which are capable of causing human disease or discomfort.

b. Cause or contribute to the pollution of the air.

c. Cause or contribute to the pollution of surface or underground waters.

d. Cause excessive abuse of land.

e. Cause or contribute to noise pollution.

f. Abuse the natural aesthetic quality of an area.

g. Physically impair the environment to the detriment of man and beneficial plant life, fish, and wildlife.

The regulations are intended to protect against health hazards from pollution and disease. They are not intended to protect against injury from accidents. The same holds for *40 C.F.R. 258.25*, which states:

> Owners or operators of all MSWLF [municipal solid waste landfill] units must control public access and prevent unauthorized vehicular traffic and illegal dumping of wastes by using artificial barriers, natural barriers, or both, as appropriate to protect human health and the environment.

The concern is illegal dumping of wastes that are dangerous to human health and the environment. The word "health" is not normally construed to include freedom from accidents. Rather, it simply means "freedom from disease or abnormality." The majority can reach its conclusion only by redefining the word "health" to include "safety." Such redefinition is not supported either by Idaho law or by the federal regulations.

***

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LEXSEE 189 U.S. 468

TEXAS AND PACIFIC RAILWAY COMPANY v. BEHYMER.

No. 224.

SUPREME COURT OF THE UNITED STATES

189 U.S. 468; 23 S. Ct. 622; 47 L. Ed. 905; 1903 U.S. LEXIS 1375

Argued March 20, April 6, 1903.
April 20, 1903, Decided

PROCEDURAL POSTURE: Defendant employer sought review of a decision of the Circuit Court of Appeals for the Fifth Circuit, which affirmed the trial court's judgment in favor of plaintiff employee in the employee's negligence action to recover damages for injuries he sustained at work.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is an action for personal injuries brought by an employee against a railroad company. It was tried in the Circuit Court, where the plaintiff had a verdict.

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Behymer had been in the employ of the company as a brakeman about three months. On February 7, 1899, at Big Sandy, in Texas, he was ordered by the conductor of a local freight train to get up on some cars standing on a siding and let off the brakes, so that the engine might move them to the main track and add them to the train. The tops of the cars were covered with ice, as all concerned knew. He obeyed orders; the engine picked up the cars, moved to the main track and stopped suddenly. The cars ran forward to the extent of the slack and back again, as they were moving up hill. The jerk upset Behymer's balance, the bottom of his trousers caught in a projecting nail in the running board and he was thrown between the cars.

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Behymer based his claim upon negligence in stopping the cars so suddenly with knowledge of his position and the slippery condition of the roof of the car, and upon the projection of the nail, which increased the danger and contributed to his fall.

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The fundamental error alleged in the exceptions to the charge is that the court declined to rule that the chance of such an accident as happened was one of the risks that the plaintiff assumed, or that the question whether the defendant was liable for it depended on whether the freight train was handled in the usual and ordinary way. Instead of that, the court left it to the jury to say whether the train was handled with ordinary care, that is, the care that a person of ordinary prudence would use under the same circumstances. This exception needs no discussion. The charge embodied one of the commonplaces of the law. What usually is done may be evidence of what ought to be done, but what ought to be done is fixed by a standard of reasonable prudence, whether it usually is complied with or not. No doubt a certain amount of bumping and jerking is to be expected on freight trains, and, under ordinary circumstances, cannot be complained of. Yet it can be avoided if necessary, and when the particular and known condition of the train makes a sudden bump obviously dangerous to those known to be on top of the cars, we are not prepared to say that a jury would not be warranted in finding that an easy stop is a duty. If it was negligent to stop as the train did stop, the risk of it was not assumed by the plaintiff.

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Judgment affirmed

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LEXSEE 519 P.2D 981

Morrison P. Helling et al., Petitioners, v. Thomas F. Carey et al., Respondents

No. 42775

SUPREME COURT OF WASHINGTON

83 Wn.2d 514; 519 P.2d 981; 1974 Wash. LEXIS 928; 67 A.L.R.3d 175

March 14, 1974

PROCEDURAL POSTURE: Plaintiff patient appealed from a judgment of the Court of Appeals (Washington) affirming the judgment of the trial court for defendant ophthalmologists in a medical malpractice action involving the ophthalmologists' failure to timely administer a glaucoma test.

OPINION BY: HUNTER

This case arises from a malpractice action instituted by the plaintiff (petitioner), Barbara Helling.

The plaintiff suffers from primary open angle glaucoma. Primary open angle glaucoma is essentially a condition of the eye in which there is an interference in the ease with which the nourishing fluids can flow out of the eye. Such a condition results in pressure gradually rising above the normal level to such an extent that damage is produced to the optic nerve and its fibers with resultant loss in vision. The first loss usually occurs in the periphery of the field of vision. The disease usually has few symptoms and, in the absence of a pressure test, is often undetected until the damage has become extensive and irreversible.

The defendants (respondents), Dr. Thomas F. Carey and Dr. Robert C. Laughlin, are partners who practice the medical specialty of ophthalmology. Ophthalmology involves the diagnosis and treatment of defects and diseases of the eye.

The plaintiff first consulted the defendants for myopia, nearsightedness, in 1959. At that time she was fitted with contact lenses. She next consulted the defendants in September 1963, concerning irritation caused by the contact lenses. Additional consultations occurred [for a period of 9 years]. Until the October 1968 consultation, the defendants considered the plaintiff's visual problems to be related solely to complications associated with her contact lenses. On that occasion, the defendant, Dr. Carey, tested the plaintiff's eye pressure and field of vision for the first time. This test indicated that the plaintiff had glaucoma. The plaintiff, who was then 32 years of age, had essentially lost her peripheral vision and her central vision was reduced to approximately 5 degrees vertical by 10 degrees horizontal.

Thereafter, in August of 1969, after consulting other physicians, the plaintiff filed a complaint against the defendants alleging, among other things, that she sustained severe and permanent damage to her eyes as a proximate result of the defendants' negligence. During trial, the testimony of the medical experts for both the plaintiff and the defendants established that the standards of the profession for that specialty in the same or similar circumstances do not require routine pressure tests for glaucoma upon patients under 40 years of age. The reason the pressure test for glaucoma is not given as a regular practice to patients under the age of 40 is that the disease rarely occurs in this age group. Testimony indicated, however, that the standards of the profession do require pressure tests if the patient's complaints and symptoms reveal to the physician that glaucoma should be suspected.

The trial court entered judgment for the defendants following a defense verdict. … The plaintiff then petitioned this court for review, which we granted.

In her petition for review, the plaintiff's primary contention is that under the facts of this case the trial judge erred in giving certain instructions to the jury and refusing her proposed instructions defining the standard of care which the law imposes upon an ophthal-

mologist. As a result, the plaintiff contends, in effect, that she was unable to argue her theory of the case to the jury that the standard of care for the specialty of ophthalmology was inadequate to protect the plaintiff from the incidence of glaucoma, and that the defendants, by reason of their special ability, knowledge and information, were negligent in failing to give the pressure test to the plaintiff at an earlier point in time which, if given, would have detected her condition and enabled the defendants to have averted the resulting substantial loss in her vision.

We find this to be a unique case. The testimony of the medical experts is undisputed concerning the standards of the profession for the specialty of ophthalmology. … The issue is whether the defendants' compliance with the standard of the profession of ophthalmology, which does not require the giving of a routine pressure test to persons under 40 years of age, should insulate them from liability under the facts in this case where the plaintiff has lost a substantial amount of her vision due to the failure of the defendants to timely give the pressure test to the plaintiff.

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The incidence of glaucoma in one out of 25,000 persons under the age of 40 may appear quite minimal. However, that one person, the plaintiff in this instance, is entitled to the same protection, as afforded persons over 40, essential for timely detection of the evidence of glaucoma where it can be arrested to avoid the grave and devastating result of this disease. The test is a simple pressure test, relatively inexpensive. There is no judgment factor involved, and there is no doubt that by giving the test the evidence of glaucoma can be detected. The giving of the test is harmless if the physical condition of the eye permits. The testimony indicates that although the condition of the plaintiff's eyes might have at times prevented the defendants from administering the pressure test, there is an absence of evidence in the record that the test could not have been timely given.

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Under the facts of this case reasonable prudence required the timely giving of the pressure test to this plaintiff. The precaution of giving this test to detect the incidence of glaucoma to patients under 40 years of age is so imperative that irrespective of its disregard by the standards of the opthalmology profession, it is the duty of the courts to say what is required to protect patients under 40 from the damaging results of glaucoma.

We therefore hold, as a matter of law, that the reasonable standard that should have been followed under the undisputed facts of this case was the timely giving of this simple, harmless pressure test to this plaintiff and that, in failing to do so, the defendants were negligent, which proximately resulted in the blindness sustained by the plaintiff for which the defendants are liable.

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The judgment of the trial court and the decision of the Court of Appeals is reversed, and the case is remanded for a new trial on the issue of damages only.

KRISTYN PIPHER, Plaintiff Below, Appellant, v. JOHNATHAN PARSELL, Defendant Below, Appellee.

No. 215, 2006

SUPREME COURT OF DELAWARE

930 A.2d 890*; *2007 Del. LEXIS 274

April 4, 2007, Submitted
June 19, 2007, Decided

HOLLAND, Justice:

The plaintiff-appellant, Kristyn Pipher ("Pipher"), appeals from the Superior Court's judgment as a matter of law in favor of the defendant-appellee, Johnathan Parsell ("Parsell"). Pipher argues that the Superior Court erred when it ruled that, as a matter of law, Parsell was not negligent. We agree and hold that the issue of Parsell's negligence should have been submitted to the jury.

Facts

On March 20, 2002, around 6 p.m., Pipher, Parsell and Johnene Beisel ("Beisel"), also a defendant, [3] were traveling south on Delaware Route 1 near Lewes, Delaware, in Parsell's pickup truck. All three were sitting on the front seat. Parsell was driving, Pipher was sitting in the middle, and Beisel was in the passenger seat next to the door. They were all sixteen-years-old at the time.

As they were traveling at 55 mph, Beisel unexpectedly "grabbed the steering wheel causing the truck to veer off onto the shoulder of the road." Parsell testified that Beisel's conduct caused him both shock and surprise. Although Beisel's conduct prompted him to be on his guard, Parsell further testified that he did not expect Beisel to grab the wheel again. Nevertheless, his recognition of how serious Beisel's conduct was, shows he was aware that he now had someone in his car who had engaged in dangerous behavior.

Parsell testified that he did nothing in response to Beisel's initial action. Approximately thirty seconds later, Beisel again yanked the steering wheel, causing Parsell's truck to leave the roadway, slide down an embankment and strike a tree. Pipher was injured as a result of the collision.

Pipher's testimony at trial was for the most part consistent with Parsell's testimony.

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At trial, Parsell acknowledged that he could have taken different steps to try to prevent Beisel from grabbing the steering wheel a second time. First, Parsell acknowledged, he could have admonished Beisel not to touch the steering wheel again. Second, he acknowledged that he could have pulled over to the side of the road and required Beisel to get into the back seat. Third, Parsell acknowledged that he could have warned Beisel that he would put her out of the vehicle.

The trial judge concluded that, as a matter of law, Parsell had no duty to do anything after Beisel yanked the wheel the first time because it would be reasonable for the driver to assume that it would not happen again. The trial judge also ruled that (1) there was no negligence in failing to discharge the dangerous passenger and (2) that failing to admonish the dangerous passenger was not negligence and could not be considered a proximate cause of Pipher's injuries.

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Duty of Driver

A "driver owes a duty of care to her [or his] passengers because it is foreseeable that they may be injured if, through inattention or otherwise, the driver involves the car she [or he] is operating in a collision." Almost forty-five years ago, this Court held that a minor who operates a motor vehicle on the highways of Delaware will be

held to the same standard of care and "must accord his [or her] own passengers the same diligence and protection which is required of an adult motorist under similar circumstances." The following year, this Court recognized an important correlative principle: "One riding as a passenger in a motor vehicle . . . has the right to assume that the driver will exercise reasonable care and caution and is under no duty to supervise [**6] the driving . . . in the absence of knowledge that the driver is unfit or incompetent to drive." [11]

Pipher argues that after Beisel grabbed the steering wheel initially, Parsell was on notice that a dangerous situation could reoccur in the truck. Pipher further argues that once Parsell had notice of a possibly dangerous situation, he had a duty to exercise reasonable care to protect his passengers from that harm. Finally, Pipher concludes that Parsell was negligent when he kept driving without attempting to remove, or at least address, that risk.

In a similar case, the Supreme Court of Vermont held a driver was liable for damages resulting from the passenger seizing the driver's arm. In that case, a drunken passenger known for being a "playful fellow," and having previously attempted to shake hands with the driver of the vehicle over the course of fifteen minutes, then seized the arm of the driver, causing the vehicle to collide with a farm wagon. The Vermont Court held that the knowledge the passenger was "a playful fellow" and had in the course of the ride "persisted in trying to shake hands" with the driver "should have forecast the peril of an accident to an operator of reasonable prudence and vigilance." In such cases, the driver is expected to make a reasonable attempt to prevent the passenger from taking such actions again.

In general, where the actions of a passenger that cause an accident are not foreseeable, there is no negligence attributable to the driver. But, when actions of a passenger that interfere with the driver's safe operation of the motor vehicle are foreseeable, the failure to prevent such conduct may be a breach of the driver's duty to either other passengers or to the public. Under the circumstances of this case, a reasonable jury could find that Parsell breached his duty to protect Pipher from Beisel by preventing Beisel from grabbing the steering wheel a second time.

Conclusion

The issue of Parsell's alleged breach of duty to Pipher, the forseeability of Beisel's repeat conduct, and the proximate cause of Pipher's injuries were all factual determinations that should have been submitted to the jury. Accordingly, the judgment of the Superior Court, that was entered as a matter of law, is reversed. This matter is remanded for further proceedings in accordance with this opinion.

Alvin STINNETT, Jr., Appellant, v. Earl S. BUCHELE, Appellee

[NO NUMBER IN ORIGINAL]

Court of Appeals of Kentucky

598 S.W.2d 469*; *1980 Ky. App. LEXIS 312

April 11, 1980

OPINION BY: BREETZ

This is a tort action filed by an employee against his employer for injuries sustained during the course and scope of his employment. The lower court granted summary judgment to the employer on the ground that there was no showing that the injury was caused by the negligence of the employer. We affirm.

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Earl S. Buchele is a practicing physician in Hardinsburg, Kentucky. He hired Alvin Stinnett as a farm laborer in January 1976. In September of that year Mr. Stinnett undertook to repair the roof on a barn located at one of Dr. Buchele's farms known as the Cloverport Farm. The repairs were to consist of nailing down the edges of the roof that had been loosened by the wind and painting the roof with a coating. Stinnett was severely injured when he fell from the roof while applying the coating with a paint roller.

Stinnett urges in his brief to this court that Dr. Buchele was negligent for failing to comply with occupational and health regulations and also for his failure to provide a safe place to work. Dr. Buchele denies both of those assertions, and, additionally, argues that Stinnett was contributorily negligent as a matter of law. We do not reach the issue of contributory negligence.

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Nor do we find any evidence to be submitted to the jury that Dr. Buchele was negligent in failing to provide Stinnett with a safe place to work. We agree with Stinnett when he states that Dr. Buchele had the obligation to furnish him:

> . . . a place reasonably safe having regard for the character of work and reasonably safe tools and appliances for doing the work. The measure of duty is to exercise ordinary or reasonable care to do so. The standard is the care exercised by prudent employers in similar circumstances.

We also agree with the sentence immediately preceding the quotation from that same opinion: "An employer's obligation to its employee is not the frequently impossible duty of furnishing absolutely safe instrumentalities or place to work."

Although we may consider that painting a barn roof is dangerous work, we cannot say that Dr. Buchele can be held liable for failing to provide a safe place to work solely because he asked Stinnett to work on the roof. We hold, therefore, that there was no showing of any negligence on the part of Dr. Buchele arising solely out of the fact that he had asked Stinnett to paint the barn roof.

Stinnett next argues from *Louisville & Jefferson Co. Bd. of Health v. Mulkins, Ky., 445 S.W.2d 849 (1969)* that a reasonable and prudent employer would have provided safety devices of some kind even though not required to by force of statute or regulation and that the question whether Dr. Buchele measured up to the standards of an ordinarily careful and prudent employer is one for the jury. We do not consider the *Mulkins* case as requiring a jury to determine whether or not the employer was negligent in every employee-employer suit premised upon an allegation that the employer failed to meet the standards of a reasonable and prudent employer. The liability of the employer:

> . . . rests upon the assumption that the employer has a better and more comprehensive knowledge than the employees,

> and ceases to be applicable where the employees' means of knowledge of the dangers to be incurred is equal to that of the employer.

Stinnett had been in the painting business with his brother-in-law for two years before he began working for Dr. Buchele. Although the record is not clear whether Stinnett, his brother-in-law or both did the painting, they did paint a church steeple and an undetermined number of barn roofs. On occasion safety belts and safety nets had been used while painting the barn roofs. Stinnett was injured on a Sunday. Dr. Buchele was not present and he did not know that Stinnett was going to work on the barn roof on that particular day. Dr. Buchele had, however, purchased the material that Stinnett was applying to the roof when he fell. Stinnett did not ask Dr. Buchele to procure a safety net nor did he check to see if one was available. He admitted he could have used a safety rope around his waist but he did not think any were available.

In *Logan's Adm'r. v. Sherrill-King Mill & Lumber Co., 160 Ky. 295, 169 S.W. 707 (1914)* an employee was walking across logs which were floating in a river when one turned causing him to fall and drown. The court, after noting that he knew that a loose log could turn and throw him into the water, absolved the employers of negligence stating that his death "was the result of an accident and was not in any way the fault of his employers". More recently, in *Skinner v. Smith, 255 S.W.2d 621, 622 (1953)*, we were told:

> Appellee was an experienced miner who had created a dangerous condition and subjected himself to the danger. We find no proof in the record that establishes any negligence on the part of appellant, but, rather, the evidence shows either inevitable accident or negligence on the part of appellee. In *Ward v. Marshall, 293 Ky. 18, 168 S.W.2d 348, 350,* it was said:
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> > 'The employer is not the insurer of the safety of the employee. But the employer is not denied the opportunity of bringing forth evidence to show an absence of negligence on his part and also evidence to the effect that the employee's own negligence caused his injury. Where no negligence of the employer is shown, the evidence of negligence of an employee does not fall in the category of contributory negligence, but rather it shows primary negligence on his part, since there was an absence of negligence on the part of the employer. Contributory negligence implies the existence of negligence on the part of the defendant.'

In short, we find no evidence of negligence on the part of Dr. Buchele to submit to a jury.

LEXSEE 95 N.W.2D 657

Marcella A. Connolly v. The Nicollet Hotel and Others

No. 37,180

Supreme Court of Minnesota

254 Minn. 373*; *95 N.W.2d 657*; *1959 Minn. LEXIS 560*; *74 A.L.R.2d 1227

February 27, 1959

PROCEDURAL POSTURE: Plaintiff appealed an order of the Hennepin County District Court (Minnesota) granting defendant partnership's motion for judgment notwithstanding the verdict in her personal injury action.

OPINION BY: MURPHY

Action by Marcella A. Connolly against The Nicollet Hotel, a copartnership, and Alice Shmikler, as trustee of Joseph Shmikler, and others, doing business as The Nicollet Hotel, for the loss of the sight of her left eye alleged to have been caused by defendants' negligence.

The accident occurred about midnight June 12, 1953, during the course of the 1953 National Junior Chamber of Commerce Convention which had its headquarters at The Nicollet Hotel in Minneapolis. It was occasioned when plaintiff was struck in her left eye by a substance falling from above her as she walked on a public sidewalk on Nicollet Avenue adjacent to the hotel.

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As stated above, the 1953 National Junior Chamber of Commerce Convention occupied a substantial portion of the hotel at the time of the accident. In connection therewith various delegates and firms maintained hospitality centers there where intoxicants, beer, and milk were served to guests and visitors. Two of such centers were located on the Nicollet Avenue side of the building.

The assistant manager of the hotel on duty at the time of the accident and in charge of maintaining order had received notice that water bags had been thrown from the hotel during the previous days of the convention. The night engineer testified that on the Hennepin Avenue side of the hotel he had observed liquor and beer bottles and cans on the sidewalk and described the accumulation in this area as greater than he had ever witnessed during the 18-month period he had been employed at the hotel. He also testified that he had found cans and beer bottles upon the fire escape at the third-floor level during the convention.

Arthur Reinhold, an employee of the garage, had been informed that objects had fallen or been thrown from the hotel and that a window screen had fallen from the building, first striking the barricade covering the sidewalk next to the garage, and then falling upon a pedestrian. He also was advised that ice cubes had been thrown from the hotel and that a bottle had been thrown or had fallen therefrom during the course of the convention.

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We think the authorities relied upon by the defendants may be distinguished. *Larson v. St. Francis Hotel, 83 Cal. App. (2d) 210, 211, 188 P. (2d) 513, 514*, where a pedestrian was injured when a guest of the defendant hotel as "the result of the effervescence and ebullition of San Franciscans in their exuberance of joy on V-J Day" tossed an armchair out of a hotel window, may be distinguished in that [it] deal[s] with instances of sporadic or isolated acts of which the owner did not have notice and in regard to which he had no opportunity to take steps to remove the danger. … These cases do not deal with facts establishing a course of disorderly conduct continuing over a period of days and under circumstances where the defendants admitted that they had lost control of the orderly management of their property and failed to do anything about it.

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We have said many times that the law does not require every fact and circumstance which make up a case of negligence to be proved by [*390] direct and positive evidence or by the testimony of eyewitnesses, and that circumstantial evidence alone may authorize a finding of negligence. Negligence may be inferred from all the facts and surrounding circumstances, and where the evidence of such facts and circumstances is such as to take the case out of the realm of conjecture and into the field of legitimate inference from established facts, a prima facie case is made.

Reversed.

LEXSEE 560 SE2D 333

PERSINGER, et al. v. STEP BY STEP INFANT DEVELOPMENT CENTER.

A01A2001.

COURT OF APPEALS OF GEORGIA, FIRST DIVISION

253 Ga. App. 768*; *560 S.E.2d 333*; *2002 Ga. App. LEXIS 201*; *2002 Fulton County D. Rep. 525

February 15, 2002, Decided

PROCEDURAL POSTURE: Appellant parents filed suit against appellee daycare center for an injury their child sustained while in the custody and care of the center. The Georgia trial court granted summary judgment in favor of the center. The parents appealed.

POPE, Presiding Judge.

James Persinger, an 18-month-old child, broke his left femur while in the custody and care of a day care center called Step By Step Infant Development Center. The child's parents filed suit, but the trial court granted summary judgment in favor of Step By Step. The parents appeal contending that they have presented an issue of fact for the jury as to Step By Step's liability.

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The child's teacher, Wendy Philliber, testified that James was looking out of a window when she called him to join the other children for storytime. She testified, "He turned from the window and he ran towards me. And then he fell down, twisting his leg when he fell." She also testified that the area was carpeted, that there were no toys or other items on the floor where he fell and that he appeared to simply stumble and twist his leg on the carpet. Lana Jamieson, a co-owner and officer of Step By Step, testified that through a glass window in the classroom she saw James go away from the other children then turn and start to go toward them. She then saw him fall and twist his leg. She said that the fall was not extraordinary or unusual. However, in her written statement made shortly after the injury, she did not indicate that the child had twisted his leg in the fall.

The parents offered their affidavits and that of an orthopedic surgeon. The parents testified that James was in good health prior to the accident and that he had never been diagnosed with any type of condition that could make breaking a bone more likely. The orthopedic surgeon, Dr. Anthony Alter, testified that based on his review of the x-rays and medical records, the fracture of James' femur resulted from "a significant twisting, such as the leg being caught in a crib slat, or at minimum, a fall from a height greater than the height of the child." He went on to opine that this injury "would not have reasonably occurred simply by the child walking or running across a floor absent some contact with an external object or the child stepping into a hole." He added that James' foot would have to have been "locked," that is held in place, in order for James' leg to be broken the way it was.

"In Georgia, the essential elements of a cause of action for negligence are: (1) a legal duty; (2) a breach of this duty; (3) an injury; and (4) a causal connection between the breach and the injury."

In this case the legal duty is established and the injury is not disputed. The duty of a child care provider is "to exercise reasonable care for the safety of the child . . . gauged by the standard of the average reasonable parent." A day care provider does not insure the safety of the child "and has no duty to foresee and guard against every possible hazard." Finally, "an injury, without more, does not create the presumption of negligence."

The more problematic aspect of this case is whether there is any evidence that the duty was breached and that the breach caused the injury. The Persingers offer two arguments, the first of which is easily dispatched. They claim that James' teacher, Philliber, failed to prevent James from running. Philliber testified that it was her practice to "try not to allow them to run in the

classroom." But this testimony does not show that allowing a toddler to run under these circumstances was a breach of duty. In fact prudent parents allow their children to run all the time.

Other than the above, the Persingers have not offered any evidence to show how the day care center might have breached its duty of care. Instead, they have offered an expert's opinion that based on the nature of the break, the accident could not have resulted from a fall while running, and that the break indicated a "significant twisting" with the foot locked in place or a fall from a height greater than that of the child. The Persingers contend that this opinion creates an issue of fact concerning whether Step By Step breached its duty of care to James. They imply that the caregivers are actually hiding the true cause of the injury. They therefore argue that a jury could conclude that Step By Step failed to adequately supervise the child or otherwise care for the child and that this failure caused the injury.

Without any evidence of a breach of duty, summary judgment would be warranted unless the doctrine of res ipsa loquitur can be applied to these facts.

Under Georgia law, "in arriving at a verdict, the jury, from facts proved, and sometimes from the absence of counter evidence, may infer the existence of other facts reasonably and logically consequent on those proved." This statute is the basis for the Georgia law of res ipsa loquitur. "The principal basis for application of the rule . . . is that the occurrence involved would not have occurred but for negligence, and this negligence may properly be charged to the person in exclusive control of the instrumentality." "The rule is one of necessity in cases where there is no evidence of consequence showing negligence on the part of the defendant."

"The elements of [the] doctrine are: (1) injury of a kind which ordinarily does not occur in the absence of someone's negligence; (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant; and (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff." Unless the plaintiff can show these elements, he or she is not entitled to present the issue to the jury. The mere fact that the plaintiff sustained an injury does not establish negligence and therefore does not justify a trial.

Res ipsa loquitur is simply a rule of circumstantial evidence that allows an inference of negligence to arise from the happening of an event if the above elements are shown. It "does no more than to allow the jury to decide the case and to make or reject the inference authorized as it sees fit -- it does not create a presumption to that effect for the defendant to overcome." "The sufficiency of the circumstantial evidence, and its consistency or inconsistency with alternative hypotheses, is a question for the jury. . . . Yet before there is, in legal contemplation, any evidence, the circumstances shown must, in some appreciable degree, tend to establish the conclusion claimed."

We find that the doctrine is applicable here and that the case may proceed to the jury. First, there is evidence to support the conclusion that this injury ordinarily does not occur in the absence of someone's negligence. According to the Restatement of Torts, this finding may be based on the common knowledge of the community or on expert testimony "that such an event usually does not occur without negligence."

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Dr. Alter's affidavit is sufficient to make the point. He opined that the injury could not have resulted from a fall while running and that it must have resulted from a fall from a height greater than that of the child or from a significant twisting while the child's foot was locked into place.

Dr. Alter's statement raises the direct inference that the accident did not happen the way the defendants claim it did. And a significant twisting, such as the leg being caught in a crib slat, or a fall from a height greater than the height of the child does not ordinarily occur absent the negligence of others. It is true that the child may have fallen inside his crib, of his own accord, and twisted his leg in the slats without the negligence of others. But, the doctrine of res ipsa loquitur does not require elimination of all other possible occurrences; it must only "render less probable all inconsistent conclusions."

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We are mindful that it is the law in Georgia that res ipsa loquitur "should be applied with caution and only in extreme cases." But, given the expert testimony offered by the plaintiffs, the doctrine is applicable here.

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Judgment reversed.

LEXSEE 21 A. 924

EDWARD SMITHWICK vs. THE HALL & UPSON COMPANY.

[NO NUMBER IN ORIGINAL]

SUPREME COURT OF ERRORS OF CONNECTICUT, NEW HAVEN AND FAIRFIELD COS., APRIL T., 1890

59 Conn. 261*; *21 A. 924*; *1890 Conn. LEXIS 24

April 18, 1890, Argued
July 10, 1890, Decided

PROCEDURAL POSTURE: Defendant employer challenged a default from the Superior Court, New Haven County (Connecticut), which found in favor of plaintiff employee in a personal injury action caused by the employer's negligence. The issue for the court was whether the employee was entitled to a substantial damage award of $ 1,000 or whether he was guilty of contributory negligence and only entitled to nominal damages.

TORRANCE, J.

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The plaintiff was a workman in the service of the defendant, and at the time of the injury complained of was engaged in helping to store ice for the defendant in a certain brick building. In doing this work the plaintiff stood upon a platform about five feet wide and seventeen feet long, raised fifteen feet above the ground, and extending from the west side of the building easterly to a point about two feet east of the door or aperture through which the ice was taken into the building. A stout plank of suitable height and strength extended along the outer side of the platform as far as the west side of the door and served as a protective railing or guard to that portion of the platform. In front of the door and east of it the platform was without guard or railing of any kind. A short time prior to the injury the foreman of the defendant stationed the plaintiff on the platform just west of the door and inside the railing, and showed him what his duties were there, and told him "not to go upon the east end of the platform east of the slide and door, as it was not safe to stand there." He did not tell the plaintiff why it was not safe, but the danger which he had in mind was the narrowness and unrailed condition of the platform and the liability by inadvertence to misstep or fall or slip off, the latter being aggravated by the liability of the platform to become slippery from broken ice. These dangers were all manifest. The peril resulting from the accident which happened to the building was not in contemplation.

After the foreman went away the plaintiff, in spite of the orders so given to him, and for reasons of his own apparently, went over to the east end of the platform and worked there. It is found that there was no sufficient reason or excuse for the change of position. One of his fellow workmen, seeing the plaintiff in that place, told him that "it was not safe, and to stand on the other side," but the plaintiff, notwithstanding such warning, remained at work there.

While so at work the brick wall of the building above the platform, in consequence of the negligence of the defendant, gave way, the brick falling upon the platform and thence to the ground. The plaintiff was struck by portions of the descending mass and fell to the earth. He was either knocked off, or his fall, in the condition in which he stood, was inevitable; indeed, had he not fallen when he did, his injuries, which were very serious, would have been worse. Most of the injuries which he actually sustained were occasioned by the fall.

The plaintiff had no knowledge that the wall would be likely to fall or was in any way unsafe, and it is found that "no fault or negligence can be imputed to him in this regard."

***

If the plaintiff's injuries had resulted from any of the perils and dangers attendant upon the mere fact of his standing and working on the east end of the platform, which were obvious and manifest to any one in his place, which were in the mind of the foreman when he told the plaintiff not to go there, and in view of which his fellow workman warned him, then this claim of the defendant would be a valid one. But upon the facts found it is without foundation.

The injury to the plaintiff was not the result of any such dangers, but was caused through the negligence of the defendant by the falling walls. This was a source of danger of which he had no knowledge whatever. He was justified in supposing that the wall was safe and would not be likely to fall upon him, no matter where he stood on the platform. He had no reason to anticipate even the slightest danger from that source before or after he changed his position. This being so, he could be guilty of no negligence with respect to this source of danger by changing his position contrary to orders; for negligence presupposes a duty of taking care, and this in turn presupposes knowledge or its legal equivalent.

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The plaintiff is entitled to judgment in his favor for one thousand dollars, and the Superior Court is so advised.

In this opinion the other judges concurred.

Clara Padula, as Administratrix of the Estate of Frank Padula, Deceased, Appellant, v. State of New York, Respondent; Paul Modafferi, Appellant, v. State of New York, Respondent

Claim Nos. 54694, 56914

Court of Appeals of New York

48 N.Y.2d 366*; *398 N.E.2d 548*; *422 N.Y.S.2d 943*; *1979 N.Y. LEXIS 2406
October 8, 1979, Argued
November 29, 1979, Decided

PROCEDURAL POSTURE: Plaintiff drug addict's estate (estate) filed a wrongful death action against defendant state hospital. The Appellate Division of the Supreme Court in the Third Judicial Department (New York) reversed the court of claim's decision and dismissed the estate's complaint, holding that the weight of the credible evidence established that the drug addict had sufficient control of his will to resist the temptation of ingesting the fluid.

OPINION BY: MEYER

OPINION OF THE COURT

The question presented by this appeal is whether the State is liable for the death of one and blindness of another certified heroin addict, residents of the Iroquois Narcotic Rehabilitation Center maintained by the State Narcotic Addiction Control Commission, both of whom had been committed to the center pursuant to the provisions of the Mental Hygiene Law. The death in one case and blindness in the other resulted from the drinking of a fluid (Ditto) containing methyl alcohol which had been mixed with an orange preparation called Tang. After a joint but bifurcated trial, the Court of Claims found for each claimant on both negligence and contributory negligence and directed a further trial on the issue of damages. [The State appealed and argued that the plaintiffs were contributorily negligent

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Since the Padula action is for wrongful death, it was the State's burden to establish contributory negligence as a defense . . . .

***

[W]hatever the contributory or comparative negligence rule may ultimately be held to be as to a person under the influence of drugs in a noncustodial situation, as to which we express no opinion, we think that in relation to persons in the custody of the State for treatment of a drug problem, contributory (or comparative) negligence should turn not on whether the drug problem or its effects be categorized as a mental disease nor on whether the injured person understood what he was doing, but on whether based upon the entire testimony presented (including objective behavioral evidence, claimant's subjective testimony and the opinions of experts) the trier of fact concludes that the injured person was able to control his actions.

***

[T]he weight of the evidence in the instant case favors the finding of the Trial Judge that Padula and Modafferi were not guilty of contributory negligence. The evidence shows that the accepted practice in institutions such as that in which they resided was to keep close watch on chemicals such as methyl alcohol because addicts were constantly looking for something to get high on . . . .

***

The testimony of those present at the print shop drinking session was that Joseph Perrone read from the Ditto can, on which there was a skull and crossbones, a warning that it was poisonous and could cause blindness or death, and Modafferi testified that Perrone said "We've got to be crazy to drink this", but that both he and Perrone drank it nevertheless, that he was aware when he drank it that it could cause blindness or death but could not resist doing so because he felt he needed it and wanted to believe it was all right to do so.

Accordingly, the order of the Appellate Division should be reversed and the judgments of the Court of Claims should be reinstated, with cost.

CERTIFICATION FROM THE UNITED STATE DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON IN LESLIE CHRISTENSEN ET AL., *Plaintiffs*, v. ROYAL SCHOOL DISTRICT NO. 160 ET AL., *Defendants*.

No. 75214-1

SUPREME COURT OF WASHINGTON

156 Wn.2d 62*; *124 P.3d 283*; *2005 Wash. LEXIS 985
September 23, 2004, Oral Argument
December 8, 2005, Filed

ALEXANDER, C.J. -- The United States District Court for the Eastern District of Washington has certified the following question to this court:

> May a 13 year old victim of sexual abuse by her teacher on school premises, who brings a negligence action against the school district and her principal for failure to supervise or for negligent hiring of the teacher, have contributory fault assessed against her under the *Washington Tort Reform Act* for her participation in the relationship?

We answer "no" to the question, concluding that, as a matter of law, a child under the age of 16 may not have contributory fault assessed against her for her participation in a relationship such as that posed in the question. This is because she lacks the capacity to consent and is under no legal duty to protect herself from the sexual abuse.

I

The stipulated facts, as set forth in the Certification Order, indicate that Leslie Christensen was born on July 7, 1987. She is the daughter of Gary and Kim Christensen. In early 2001, Leslie was 13 years of age and a student in the eighth grade at the Royal School District's Royal Middle School. During that school year, the District employed 26-year-old Steven Diaz as a teacher at Royal Middle School. The principal of Royal Middle School at that time was Preston Andersen.

On February 12, 13, 22, and March 30, 2001, Diaz engaged in sexual activity with Leslie, who was one of his students. This activity occurred in Diaz's classroom. According to Diaz, Leslie voluntarily participated in a relationship with him and in the aforementioned activity.

Leslie and her parents brought suit against Diaz, the Royal School District (the District), and Principal Andersen in the United States District Court for the Eastern District of Washington. In their complaint, they claimed that Diaz sexually abused Leslie. Damages were also sought against the District and Andersen based on the allegation that the District and its principal, Andersen, were negligent in hiring and supervising Diaz.

In a responsive pleading, the District and Andersen asserted an affirmative defense that Leslie's voluntary participation in the sexual relationship with Diaz constituted contributory fault.

II

***

A showing of negligence requires proof of the following elements: (1) existence of a legal duty, (2) breach of that duty, (3) an injury resulting from the breach, and (4) proximate cause. The existence of a legal duty is a question of law and "'depends on mixed considerations of "logic, common sense, justice, policy, and precedent.'"'

The District and Andersen argue that contributory fault applies in this case because Leslie had a duty to protect herself against sexual abuse by an adult, a duty she allegedly ignored by voluntarily engaging in a sexual relationship with Diaz. We conclude that, as a matter of public policy, contributory fault does not apply in circumstances such as those described in the Certification Order. Our conclusion is compelled by two principal reasons. First, we are satisfied that the societal interests embodied in the criminal laws protecting children from sexual abuse should apply equally in the civil arena when

a child seeks to obtain redress for harm caused to the child by an adult perpetrator of sexual abuse or a third party in a position to control the conduct of the perpetrator. Second, the idea that a student has a duty to protect herself from sexual abuse at; school by her teacher conflicts with the well-established law in Washington that a school district has an enhanced and solemn duty to protect minor students in its care. We elaborate on this reasoning hereafter.

A

Although the District and Andersen contend that a 13-year-old is capable of consenting to sexual relations, the legislature has rejected this notion in the criminal arena by adopting statutes which provide that an adult is guilty of a felony if he or she engages in sexual activity with a minor, even if the child victim "consented" to engage in the sexual conduct. The obvious purpose of these criminal statutes is to protect persons who, by virtue of their youth, are too immature to rationally or legally consent.

While we acknowledge that the cause of action which has generated the instant certified question is a civil case and not a criminal case, the notion that minors are incapable of meaningful consent in a criminal law context should apply in the civil arena and command a consistent result. Our conclusion is in accord with rulings in several other jurisdictions that have addressed an issue similar to the one before us now. It would, in our view, be a peculiar rule that consent by a child could be a viable defense against civil liability when the exact conduct does not provide a defense to a defendant in a criminal case.

The District and Andersen contend that contributory fault applies because "Washington has a long history of holding children responsible for their comparative negligence" and that Leslie had a duty to protect herself against sexual abuse but failed to do so. In support of this contention, they cite several cases where contributory fault has been applied against a child. Although the District and Andersen correctly pointed out that Washington does apply contributory fault and the duty of protecting oneself to children in some instances, the cases that they cite are not germane to our inquiry, as none involve sexual abuse. The act of sexual abuse is key here. As indicated above, our public policy is directed to protecting children from such abuse.

B

***

Our conclusion that the defense of contributory negligence should not be available to the District and Principal Anderson is in accord with the established Washington rule that a school has a "special relationship" with the students in its custody and a duty to protect them "from reasonably anticipated dangers. The rationale for imposing this duty is on the placement of the student in the care of the school with the resulting loss of the student's ability to protect himself or herself. The relationship between a school district and its administrators with a child is not a voluntary relationship, as children are required by law to attend school. Consequently, "the protective custody of teachers is mandatorily substituted for that of the parent."

In sum, because we recognize the vulnerability of children in the school setting, we hold, as a matter of public policy, that children do not have a duty to protect themselves from sexual abuse by their teachers. Moreover, we conclude that contributory fault may not be assessed against a 13-year-old child based on the failure to protect herself from being sexually abused when the defendant or defendants stand in a special relationship to the child and have a duty to protect the child. Andersen and the District had a clear duty to protect students in their custody, and this duty encompassed the obligation to supervise and control Diaz.

In reaching the conclusion that we do, we are not unmindful of the dissent by Justice Sanders in which he says that contributory fault should be assessed against Leslie Christensen because the school district "did take steps to protect the female student [Leslie Christensen]," but that she "lied about her involvement with the teacher, thwarting the school district's efforts to protect her." As the Christensens' counsel points out in a reply brief, that fact is disputed, was not stipulated to by the parties, and is not reflected in the Certification Order. Furthermore, we have not said in this opinion that the school district should be precluded from defending on the basis that it was not negligent. The fact that it may not, under Washington law, assert that the 13-year-old child was contributorily negligent should not bar it from claiming at trial that it was careful in hiring and supervising the child's teacher and, thus, was without negligence. If, indeed, the District was thwarted in its efforts to ascertain if Leslie Christensen was abused by her teacher, that fact would likely be relevant on the issue of its alleged negligence. That, though, is not a question before us. Rather, it is a question to be resolved in federal court.

III

In sum, we hold that contributory fault may not be assessed against a 13-year-old child when that child brings a civil action against a school district and school principal for sexual abuse by her teacher. The child, in our view, lacks the capacity to consent to the sexual abuse and is under no duty to protect himself or herself from being abused. An opposite holding would, in our

judgment, frustrate the overarching goals of prevention and deterrence of child sexual abuse. Accordingly, we answer no to the question propounded to us by the United States District Court.

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SANDERS, J. (dissenting) -- The majority opines a teacher defending a civil liability suit for having sex with a minor cannot raise consent as a defense and further holds a school district which attempts to investigate the incident cannot raise contributory negligence as a defense against the child who undermines the investigation. The majority offers two rationales: first, the criminal code does not allow consent as a defense to prosecution for sex crimes with a minor; and second, schools have a special duty to protect their students.

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Contributory Negligence

Washington law holds minors responsible for contributory negligence in many contexts.

The majority dismisses these cases because they do not involve sexual conduct. I fail to see why a minor can be contributorily negligent for driving a snowmobile but cannot be contributorily negligent in a negligence action relating to sexual misconduct. Generally contributory negligence is a question of fact for the jury.

But under the majority's rule, a 15-year-old girl can seduce a male teacher, and then sue the school district for damages knowing she cannot be found contributorily negligent in the school district suit as a matter of law. As the New York court noted, this provides a powerful incentive to engage in sexual misconduct. We are deceiving ourselves if we think children are unable to understand the risks and potential rewards. Perhaps some are not, but that is why a jury determines this question as a matter of fact in each case. If a minor understands the nature of her action, she should share the responsibility. This does not negate the responsibility of the school district, but merely allows a jury to apportion the liability among the parties. I see no reason to deviate from our standard rule on contributory negligence for minors in negligence cases involving sexual activity.

The majority appeals to a school's duty to protect students. Well and good. However, merely because a school must protect the children in its care does, not relieve the students of any personal responsibility for their own conduct. Children should not be allowed to take advantage of the school's duty by forcing it to pay damages for injuries invited by the student or injuries which the district could have prevented *but for* obstruction by the student. Such a rule is inequitable and excuses all manner of mischief. Today the school district is liable for a teacher's malfeasance; tomorrow it will be liable for another student's sexual advances. In either case the school district is breaching its duty to protect. Under the majority's rule, it does not matter if the "victim" consented to, or even initiated, the sexual activity. And it doesn't matter that the student actively undermined the district's good faith investigation to rectify the problem. A jury should be allowed to determine, in each case, whether the minor had the capacity to understand the nature of her act and apportion liability accordingly.

This school district *did* take steps to protect the female student. School officials met with the girl and her parents to determine if anything untoward was occurring with the teacher. The girl, however, allegedly lied about her involvement with the teacher, thwarting the school district's efforts to protect her. She may be below the age of consent, but not below the age of honesty. Yes, school districts must protect their students, but students must cooperate. If a student undermines school officials' actions to protect her, she must bear at least some of the; fault for resulting injury. If the girl lied, this is contributory negligence on her part and a proper defense for the school district.

The majority is unclear whether its newly found rule is limited to situations involving students and teachers, or if it also applies when there is no special relationship between the parties. If the majority's holding embraces the latter, then it is fraught with disaster. Minor prostitutes could sue for damages without facing affirmative defenses, as could a junior high student having sexual contact with a high school student. The list goes on. If we divorce civil liability from personal responsibility, then the limits of the former are dictated only by the imaginations of the minors perpetrating or participating in these acts.

I would answer the certified question in the affirmative and dissent.

JOSE LUIS AVILA, Plaintiff and Appellant, v. CITRUS COMMUNITY COLLEGE DISTRICT, Defendant and Respondent.

S119575

SUPREME COURT OF CALIFORNIA

38 Cal. 4th 148*; *131 P.3d 383*; *41 Cal. Rptr. 3d 299*; *2006 Cal. LEXIS 4392*; *2006 Cal. Daily Op. Service 2855*; *2006 Daily Journal DAR 4122

April 6, 2006, Filed

WERDEGAR, J.--During an intercollegiate baseball game at a community college, one of the home team's batters is hit by a pitch. In the next half-inning, the home team's pitcher allegedly retaliates with an inside pitch and hits a visiting batter in the head. The visiting batter is injured, he sues, and the courts must umpire the dispute.

We are asked to make calls on two questions: … (2) … does the community college district owe any duty to visiting players that might support liability? We conclude … that on the facts alleged the host school breached no duty of care to the injured batter. We reverse the judgment of the Court of Appeal.

FACTUAL AND PROCEDURAL BACKGROUND

Jose Luis Avila, a Rio Hondo Community College (Rio Hondo) student, played baseball for the Rio Hondo Roadrunners. On January 5, 2001, Rio Hondo was playing a preseason road game against the Citrus Community College Owls (Citrus College). During the game, a Roadrunners pitcher hit a Citrus College batter with a pitch; when Avila came to bat in the top of the next inning, the Citrus College pitcher hit him in the head with a pitch, cracking his batting helmet. Avila alleges the pitch was an intentional "beanball" thrown in retaliation for the previous hit batter or, at a minimum, was thrown negligently.

Avila staggered, felt dizzy, and was in pain. The Rio Hondo manager told him to go to first base. Avila did so, and when he complained to the Rio Hondo first base coach, he was told to stay in the game. At second base, he still felt pain, numbness, and dizziness. A Citrus College player yelled to the Rio Hondo dugout that the Roadrunners needed a pinch runner. Avila walked off the field and went to the Rio Hondo bench. No one tended to his injuries. As a result, Avila suffered unspecified serious personal injuries.

Avila sued both schools, his manager, the helmet manufacturer, and various other entities and organizations. Only the claims against the Citrus Community College District (the District) are before us. Avila alleged that the District was negligent in failing to summon or provide medical care for him when he was obviously in need of it, failing to supervise and control the Citrus College pitcher, failing to provide umpires or other supervisory personnel to control the game and prevent retaliatory or reckless pitching, and failing to provide adequate equipment to safeguard him from serious head injury. Avila also alleged that the District acted negligently by failing to take reasonable steps to train and supervise its managers, trainers, employees, and agents in providing medical care to injured players and by conducting an illegal preseason game in violation of community college baseball rules designed to protect participants such as Avila.

The District demurred … [and] contended that … it owed no duty of care to Avila. The trial court sustained the demurrer and dismissed the action against the District.

A divided Court of Appeal reversed.

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We granted the District's petition for review to … address the extent of a college's duty in these circumstances.

DISCUSSION

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II. *The Duty of Care Owed College Athletes*

A. *Primary Assumption of the Risk and the Duty Not to Increase Risks Inherent in a Sport*

The District asserted as an alternate basis for demurrer that it owed Avila no duty of care. To recover for negligence, Avila must demonstrate, inter alia, that the District breached a duty of care it owed him. Generally, each person has a duty to exercise reasonable care in the circumstances and is liable to those injured by the failure to do so.

***

The existence of "'"[d]uty" is not an immutable fact of nature" 'but only an expression of the sum total of those *considerations of policy* which lead the law to say that the particular plaintiff is entitled to protection."'" Thus, the existence and scope of a defendant's duty is an issue of law, to be decided by a court not a jury. When the injury is to a sporting participant, the considerations of policy and the question of duty necessarily become intertwined with the question of assumption of risk.

The traditional version of the assumption of risk doctrine required proof that the plaintiff voluntarily accepted a specific known and appreciated risk. The doctrine depended on the actual subjective knowledge of the given plaintiff and, where the elements were met, was an absolute defense to liability for injuries arising from the known risk

California's abandonment of the doctrine of contributory negligence in favor of comparative negligenceled to a reconceptualization of the assumption of risk. In a plurality of this court explained that there are in fact two species of assumption of risk: primary and secondary. Primary assumption of the risk arises when, as a matter of law and policy, a defendant owes no duty to protect a plaintiff from particular harms.[6] Applied in the sporting context, it precludes liability for injuries arising from those risks deemed inherent in a sport; as a matter of law, others have no legal duty to eliminate those risks or otherwise protect a sports participant from them. Under this duty approach, a court need not ask what risks a particular plaintiff subjectively knew of and chose to encounter, but instead must evaluate the fundamental nature of the sport and the defendant's role in or relationship to that sport in order to determine whether the defendant owes a duty to protect a plaintiff from the particular risk of harm.

> 6 Secondary assumption of the risk arises when the defendant still owes a duty of care, but the plaintiff knowingly encounters the risks attendant on the defendant's breach of that duty. (*Knight, supra, 3 Cal.4th at p. 308*.) We deal here with an issue of primary, not secondary, assumption of the risk.

Here, the host school's role is a mixed one: its players are coparticipants, its coaches and managers have supervisorial authority over the conduct of the game, and other representatives of the school are responsible for the condition of the playing facility. We have previously established that coparticipants have a duty not to act recklessly, outside the bounds of the sport and coaches and instructors have a duty not to increase the risks inherent in sports participation; we also have noted in dicta that those responsible for maintaining athletic facilities have a similar duty not to increase the inherent risks, albeit in the context of businesses selling recreational opportunities. In contrast, those with no relation to the sport have no such duty. (*Id. at pp. 482-483* [garbage truck operator has no duty not to increase risks inherent in horseback riding].)

In interscholastic and intercollegiate competition, the host school is not a disinterested, uninvolved party vis-à-vis the athletes it invites to compete on its grounds. Without a visiting team, there can be no competition. Intercollegiate competition allows a school to, on the smallest scale, offer its students the benefits of athletic participation and, on the largest scale, reap the economic and marketing benefits that derive from maintenance of a major sports program. These benefits justify removing a host school from the broad class of those with no connection to a sporting contest and no duty to the participants. In light of those benefits, we hold that in interscholastic and intercollegiate competition, the host school and its agents owe a duty to home and visiting players alike to, at a minimum, not increase the risks inherent in the sport. Schools and universities are already vicariously liable for breaches by the coaches they employ, who owe a duty to their own athletes not to increase the risks of sports participation. No reason appears to conclude intercollegiate athletics will be harmed by making visiting players, necessary coparticipants in any game, additional beneficiaries of the limited duty not to increase the risks of participation. Thus, we disagree with the Court of Appeal dissent, which argued that the District is little more than a passive provider of facilities and therefore should have no obligation to visiting players.

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B. *Application*

We consider next whether Avila has alleged facts supporting breach of the duty not to enhance the inherent risks of his sport. Though it numbers them differently, Avila's complaint in essence alleges four ways in

which the District breached a duty to Avila by: (1) conducting the game at all; (2) failing to control the Citrus College pitcher; (3) failing to provide umpires to supervise and control the game; and (4) failing to provide medical care. The District's demurrer was properly sustained if, and only if, each of these alleged breaches, assumed to be true, falls outside any duty owed by the District and within the inherent risks of the sport assumed by Avila.

With respect to the first of these, conducting the game, Avila cites unspecified "community college baseball rules" prohibiting preseason games. But the only consequence of the District's hosting the game was that it exposed Avila, who chose to participate, to the ordinary inherent risks of the sport of baseball. Nothing about the bare fact of the District's hosting the game enhanced those ordinary risks, so its doing so, whether or not in violation of the alleged rules, does not constitute a breach of its duty not to enhance the ordinary risks of baseball. Nor did the District owe any separate duty to Avila not to host the game.

The second alleged breach, the failure to supervise and control the Citrus College pitcher, is barred by primary assumption of the risk. Being hit by a pitch is an inherent risk of baseball. The dangers of being hit by a pitch, often thrown at speeds approaching 100 miles per hour, are apparent and well known: being hit can result in serious injury or, on rare tragic occasions, death.

Being *intentionally* hit is likewise an inherent risk of the sport, so accepted by custom that a pitch intentionally thrown at a batter has its own terminology: "brushback," "beanball," "chin music." In turn, those pitchers notorious for throwing at hitters are "headhunters." Pitchers intentionally throw at batters to disrupt a batter's timing or back him away from home plate, to retaliate after a teammate has been hit, or to punish a batter for having hit a home run. Some of the most respected baseball managers and pitchers have openly discussed the fundamental place throwing at batters has in their sport. In George Will's study of the game, Men at Work, one-time Oakland Athletics and current St. Louis Cardinals manager Tony La Russa details the strategic importance of ordering selective intentional throwing at opposing batters, principally to retaliate for one's own players being hit. As Los Angeles Dodgers Hall of Fame pitcher Don Drysdale and New York Giants All Star pitcher Sal "The Barber" Maglie have explained, intentionally throwing at batters can also be an integral part of pitching tactics, a tool to help get batters out by upsetting their frame of mind. [10] Drysdale and Maglie are not alone; past and future Hall of Famers, from Early Wynn and Bob Gibson to Pedro Martinez and Roger Clemens, have relied on the actual or threatened willingness to throw at batters to aid their pitching.

> 10 As Maglie explained the strategy: " 'You have to make the batter afraid of the ball or, anyway, aware that he can get hurt ... . A good time is when the count is two [balls] and two [strikes]. He's looking to swing. You knock him down then and he gets up shaking. Now [throw a] curve [to] him and you have your out.' " Maglie's nickname is attributed to his propensity for shaving batters' chins with his pitches. Similarly for Drysdale: " '[T]he knockdown pitch upsets a hitter's timing, like a change-up. It's not a weapon. It's a tactic.' "

While these examples relate principally to professional baseball, "[t]here is nothing legally significant ... about the level of play" in this case. The laws of physics that make a thrown baseball dangerous and the strategic benefits that arise from disrupting a batter's timing are only minimally dependent on the skill level of the participants, and we see no reason to distinguish between collegiate and professional baseball in applying primary assumption of the risk.

It is true that intentionally throwing at a batter is forbidden by the rules of baseball. But "even when a participant's conduct violates a rule of the game and may subject the violator to internal sanctions prescribed by the sport itself, imposition of *legal liability* for such conduct might well alter fundamentally the nature of the sport by deterring participants from vigorously engaging in activity that falls close to, but on the permissible side of, a prescribed rule." It is one thing for an umpire to punish a pitcher who hits a batter by ejecting him from the game, or for a league to suspend the pitcher; it is quite another for tort law to chill any pitcher from throwing inside, i.e., close to the batter's body--a permissible and essential part of the sport--for fear of a suit over an errant pitch. For better or worse, being intentionally thrown at is a fundamental part and inherent risk of the sport of baseball. [11] It is not the function of tort law to police such conduct.

> 11 The conclusion that being intentionally hit by a pitch is an inherent risk of baseball extends only to situations such as that alleged here, where the hit batter is at the plate. Allegations that a pitcher intentionally hit a batter who was still in the on deck circle, or elsewhere, would present an entirely different scenario.

In *Knight* we acknowledged that an athlete does not assume the risk of a coparticipant's intentional or reckless conduct "totally outside the range of the ordi-

nary activity involved in the sport." Here, even if the Citrus College pitcher intentionally threw at Avila, his conduct did not fall outside the range of ordinary activity involved in the sport. The District owed no duty to Avila to prevent the Citrus College pitcher from hitting batters, even intentionally. Consequently, the doctrine of primary assumption of the risk bars any claim predicated on the allegation that the Citrus College pitcher negligently or intentionally threw at Avila.

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The third way in which Avila alleges the District breached its duty of care, by failing to provide umpires, likewise did not increase the risks inherent in the game. Baseball may be played with umpires, as between professionals at the World Series, or without, as between children in the sandlot. Avila argues that providing umpires would have made the game safer, because an umpire might have issued a warning and threatened ejections after the first batter was hit. Whatever the likelihood of this happening and the difficulty of showing causation, the argument overlooks a key point. The District owed "a duty not to increase the risks inherent in the sport, not a duty to decrease the risks." While the provision of umpires might--*might*--have reduced the risk of a retaliatory beanball, Avila has alleged no facts supporting imposition of a duty on the District to reduce that risk.

Finally, Avila alleges that the District breached a duty to him by failing to provide medical care after he was injured.

***

In some circumstances, the common law imposes a duty on those who injure others to mitigate the resulting harm. Under the *Restatement Second of Torts, section 322*, an actor who "knows or has reason to know that by his conduct, whether tortious or innocent, he has caused such bodily harm to another as to make him helpless and in danger of further harm ... is under a duty to exercise reasonable care to prevent such further harm." (Boldface omitted.) In *Brooks*, we recognized and applied this principle, holding in the context of a hit-and-run death that "[o]ne who negligently injures another and renders him helpless is bound to use reasonable care to prevent any further harm which the actor realizes or should realize threatens the injured person."

Avila's proposed extension of *Brooks* to this case encounters at least three main difficulties. First, Avila has not alleged a basis on which to conclude the District caused his injury. Universities ordinarily are not vicariously liable for the actions of their student-athletes during competition. While Avila argues the District should be responsible for the Citrus College pitcher's conduct if the Citrus College coaches ordered or condoned a retaliatory pitch, the complaint notably lacks any allegation they did so.

Second, even if Avila might have amended his complaint to add such an allegation, *Brooks* and the common law duty it recognizes are confined to situations where the injured party is helpless. The complaint establishes that Avila was able to make it to first and then second base under his own power, and was able to alert his own first base coach to his condition. These allegations cast serious doubt on whether Avila was sufficiently helpless so as to warrant imposing a *Brooks*/*Restatement Second of Torts, section 322*-type duty on the District.

Third, even if we were to impose a duty, the face of the complaint establishes that Avila's own Rio Hondo coaches and trainers were present. They, not Citrus College's coaches, had exclusive authority to determine whether Avila needed to be removed from the game for a pinch runner in order to receive medical attention. [13] Likewise, to the extent Avila argues a Citrus-College-provided umpire could have insisted Avila receive medical treatment, there is no basis for concluding a home team umpire would have been authorized to overrule the medical judgments of Rio Hondo's trainers. Thus, even if the District were responsible for causing Avila's injury, at most it would have had a duty to ensure that Avila's coaches and trainers were aware he had been injured so they could decide how best to attend to him. The complaint indicates Avila alerted his own first base coach to how he was feeling, and when he arrived at second base, a Citrus College player, recognizing Avila was injured, alerted the Rio Hondo bench, at which point Rio Hondo removed Avila from the game. If the District had a duty, it satisfied that duty. In the possibly apocryphal words of New York Yankees catcher Yogi Berra, "It ain't over till it's over," but this means that for Avila's complaint against Citrus College, it's over.

13 Any departure from this rule would lead to chaos, as teams asserted a legal duty to remove their opponents' "injured" star players from competition in order to evaluate them and provide any necessary medical care.

DISPOSITION

For the foregoing reasons, we reverse the judgment of the Court of Appeal.