Gordon v. Steele

376 F.Supp. 575
United States District Court, W.D. Pennsylvania.

Susan E. GORDON
v.
James R. STEELE et al.

May 31, 1974.

Synopsis
Medical malpractice action. Defendants, being Pennsylvania residents, challenged plaintiff's claim of diversity. The District Court, Knox, J., held that it is citizenship at time of filing suit which is controlling in determining diversity jurisdiction, that burden was on plaintiff to show by convincing evidence that diversity jurisdiction existed, that plaintiff's express intention of not returning to Pennsylvania was a strong factor and that plaintiff who was 19 years of age at time action was brought, who had lived in Pennsylvania until she left to attend college in Idaho, who had rented apartment in Idaho and had made return visit to Pennsylvania for Christmas and for medical appointments, was a citizen of Idaho for purposes of diversity jurisdiction.

OPINION

KNOX, District Judge.

The problems of students have lately become numerous with respect to their legal status and the law with respect to them is in a constant state of flux. In recent years, there has been a deluge of litigation with respect to the residence of students for voting purposes. See also *Carrington v. Rash*, 380 U.S. 89, 85 S.Ct. 775, 13 L.Ed.2d 675 (1965) with respect to military personnel in a state. The very size of this problem is shown by the extensive annotation on voting-residence of students in 44 A.L.R.3d 797. The other situation, which is a prolific source of litigation, is the question of tuition fees charged by state colleges and universities to non-resident students where the state is required to set up extensive standards in an endeavor to determine who is a resident and who is a non-resident. It was inevitable that the federal courts would soon feel the impact of this litigation with respect to problems arising under diversity jurisdiction. Thinking of the courts in this area is probably colored by numerous constitutional and statutory provisions in various states to the effect that no one shall be deemed to have gained or lost a residence by attendance at an institution of higher learning.

The thinking is also colored by the traditional rule that the fact that a college student is supposedly maintained by his or her parents is a strong circumstance indicating no gain of residence in the college town. See 44 A.L.R.3d 822 and this is in accord with Restatement of Conflicts of Laws, Section 30, that a minor child has the same domicile as its father. In these days when nearly all the state legislatures have reduced the age of majority to 18, this poses a more pressing problem with respect to college students who can no longer be put off with the explanation that those under 21 are minors and hence continue their residence with their parents.

The plaintiff Susan Gordon is one of those who was benefited by the provisions of the aforesaid emancipation acts of June 16, 1972. She was born November 20, 1953 and hence was 18 years of age at the time the cause of action herein mentioned arose and was 19 at the time this action was brought, April 10, 1973.

The action is one for malpractice against two physicians and an osteopathic hospital in Erie County, Pennsylvania. All of the defendants are citizens of Pennsylvania. There seems little question that prior to August 9, 1972, the plaintiff was also a citizen of Pennsylvania, residing at 227 Goodrich Street, Erie, Pennsylvania, with her parents and if this continued to be her address, her suit must fail for lack of diversity jurisdiction.

She complains that she suffered an injury to her wrist on February 25, 1972, and there was wrongful diagnosis as to the existence of fractures in the bones by the defendants at that time. She claims that they concluded that there were no such fractures and that as a result she endured continuing pain and disability resulting in hospitalization and medical attention and that her wrist and right hand remain at least partly disabled as the result of the alleged malpractice.

On August 9, 1972, plaintiff enrolled in Ricks College at Rexburg, Idaho where she rented an apartment which she has retained ever since. Defendants on January 21, 1974, moved to dismiss for lack of diversity. Briefs have been filed, arguments held and the court postponed decision on the matter until further depositions of the plaintiff could be taken. The matter is now before the court for disposition.

We approach the problem recognizing, of course, that it is citizenship at the time of filing suit, in this case April 10, 1973, which is controlling. Further, the rule is

unquestioned that where plaintiff is challenged on her claim of diversity, the burden is upon her to show by convincing evidence that diversity jurisdiction exists.

As is required in all of such cases, we must reckon up the indicators pointing for and against acquisition of a new domicile for diversity jurisdiction purposes. Defendant claims that the following indicate that plaintiff is still a citizen of Pennsylvania and has not acquired a new residence or citizenship in Idaho:

(1) At the time of application for admission to the college at Rexburg, Idaho, she gave her address as Erie, Pennsylvania.

(2) The college records dated in 1972 show her address as Erie, Pennsylvania. The same is true of the college records dated May 4, 1973.

(3) During summer vacations, she worked in Erie, Pennsylvania.

(4) She held a Pennsylvania Driver's License and had a bank account in Erie.

(5) She came to Erie for Christmas vacations.

(6) While Ricks College is a Mormon Church Institution, the supplemental depositions which were taken at the request of the court indicate that females unlike males are generally not required to participate in the missionary activity of the church and that she has no present intentions of participating in such missionary work which, of course, might take her to any part of the world.
On the other side of the ledger, plaintiff points to the following:

(1) Her expressed intention is not to return to Pennsylvania. This, of course, is a very strong factor in a situation where subjective intent plays a part in determining what is her animo manendi.

(2) She has an apartment in Rexburg which she regards as her residence and this is not sublet during various times of the year but remains hers.

(3) She states she came back to Erie only one summer in 1973 because of her eye problems and that she took eye treatment in Erie and Cleveland.

(4) She claims that her purpose in visiting at Christmas 1973 was to be deposed and for medical appointments. She has not returned to Erie during Spring or Thanksgiving vacations.

(5) Her religious desires as a sincere Mormon are to further her faith and insure that she marries in a Mormon Temple to someone of her faith. At the present time, she has no present plans of marrying anyone but she does desire to marry in her faith and claims that the opportunities for such a marriage in Erie are very small and that she would be unable to marry in a Temple here.

(6) She has introduced exhibits showing that she is a member of the Blue Cross of Idaho, becoming a subscriber in 1972.

(7) She claims she may locate after graduation in any other of the 49 states or abroad. She may, of course, return to Pennsylvania. She, like many other females, has vague intentions of marrying someday but does not know to whom and in such case it is likely that she would follow her husband where his work may take him.

We recognize that the problem of students' residence is not altogether a new one but has concerned the federal courts since *Chicago and Northwestern Railway Company v. Ohle*, 117 U.S. 123, 6 S.Ct. 632, 29 L.Ed. 837 (1886) where the court held that determinations of a domicile were a matter to be determined by the trier of fact.

The most recent exposition of the law on this subject for our edification by the Third Circuit is found in *Krasnov v. Dinan*, 465 F.2d 1298 (3d Cir. 1972) from which we quote at length:

'It is the citizenship of the parties at the time the action is commenced which is controlling. One domiciled in a state when a suit is begun is 'a citizen of that state within the meaning of the Constitution, art. 3, § 2, and the Judicial Code . . ..'' 'The fact of residency must be coupled with a finding of intent to remain indefinitely. Proof of intent to remain permanently is not the test. 'If the new state is to be one's home for an indefinite period of time, he has acquired a new domicile.' Where jurisdictional allegations are traversed, as here, 'the burden of showing . . . that the federal court has jurisdiction rests upon the complainants.' 'In determining whether a party has intended to establish a domicile in the state to which he has moved, the factfinder will look to such circumstances as his declarations, exercise of political rights, payment of personal taxes, house of residence, and place of business.'

'Applying these principles to the evidence before the factfinder, we cannot construe, as clearly erroneous, its finding that the defendant 'intended to remain in the Commonwealth for an indefinite period of time.' Because animo manendi is at best a subjective manifestation, Dinan's own declarations of intent are important, as were

his explanations of the lack of compulsion in religious order assignments and his failure to obtain a Pennsylvania driver's license.'

We also have further instruction on this subject in the case in Judge Hastie's opinion in *Gallagher v. Philadelphia Transportation Company*, 185 F.2d 543 (3d Cir. 1950) in which the lower court was criticized as putting too much emphasis on permanence of the attachment to a given state. We also quote at length from this decision.

'The emphasis of the court on the permanence of the anticipated attachment to a state, in our opinion, required too much of the plaintiff. 'It is enough to intend to make the new state one's home. It is not important if there is within contemplation a vague possibility of eventually going elsewhere, or even of returning whence one came. If the new state is to be one's home for an indefinite period of time, he has acquired a new domicile. Finally, it is the intention at the time of arrival which is important. The fact that the plaintiff may later have acquired doubts about remaining in her new home or may have been called upon to leave it is not relevant, so long as the subsequent doubt or the circumstance of the leaving does not indicate that the intention to make the place the plaintiff's home never existed.'

In the light of the foregoing and in view of the current tendency to treat students 18 years of age and above as emancipated and particularly in view of fact that in this case the plaintiff has rented an apartment in Rexburg and with due regard for Judge Goodrich's statement from his Handbook of the Conflict of Laws that the possibility of eventually going elsewhere or even returning whence one came does not defeat the acquisition of a new domicile, we conclude upon the facts of this case considering the student's connection with Idaho and her subjective intention of not returning to Pennsylvania in the foreseeable future that she is a citizen of Idaho for the purpose of diversity jurisdiction and the motion to dismiss must be denied.

Fisher v. Carrousel Motor Hotel
424 S.W.2d 627
Supreme Court of Texas.

Emmit E. FISHER, Petitioner,
v.
CARROUSEL MOTOR HOTEL, INC., et al.,
Respondents.

Dec. 27, 1967.

Opinion

GREENHILL, Justice. This is a suit for actual and exemplary damages growing out of an alleged assault and battery. The plaintiff Fisher was a mathematician with the Data Processing Division of the Manned Spacecraft Center, an agency of the National Aeronautics and Space Agency, commonly called NASA, near Houston. The defendants were the Carrousel Motor Hotel, Inc., located in Houston, the Brass Ring Club, which is located in the Carrousel, and Robert W. Flynn, who as an employee of the Carrousel was the manager of the Brass Ring Club. Flynn died before the trial, and the suit proceeded as to the Carrousel and the Brass Ring. Trial was to a jury which found for the plaintiff Fisher. The trial court rendered judgment for the defendants notwithstanding the verdict. The Court of Civil Appeals affirmed. The questions before this Court are whether there was evidence that an actionable battery was committed, and, if so, whether the two corporate defendants must respond in exemplary as well as actual damages for the malicious conduct of Flynn.

The plaintiff Fisher had been invited by Ampex Corporation and Defense Electronics to a one day's meeting regarding telemetry equipment at the Carrousel. The invitation included a luncheon. The guests were asked to reply by telephone whether they could attend the luncheon, and Fisher called in his acceptance. After the morning session, the group of 25 or 30 guests adjourned to the Brass Ring Club for lunch. The luncheon was buffet style, and Fisher stood in line with others and just ahead of a graduate student of Rice University who testified at the trial. As Fisher was about to be served, he was approached by Flynn, who snatched the plate from Fisher's hand and shouted that he, a Negro, could not be served in the club. Fisher testified that he was not actually touched, and did not testify that he suffered fear or apprehension of physical injury; but he did testify that he was highly embarrassed and hurt by Flynn's conduct in the presence of his associates.

The jury found that Flynn 'forceably dispossessed plaintiff of his dinner plate' and 'shouted in a loud and offensive manner' that Fisher could not be served there, thus subjecting Fisher to humiliation and indignity. It was stipulated that Flynn was an employee of the Carrousel Hotel and, as such, managed the Brass Ring Club. The jury also found that Flynn acted maliciously and awarded Fisher $400 actual damages for his humiliation and indignity and $500 exemplary damages for Flynn's malicious conduct.

The Court of Civil Appeals held that there was no assault because there was no physical contact and no evidence of fear or apprehension of physical contact. However, it has long been settled that there can be a battery without an assault, and that actual physical contact is not necessary to constitute a battery, so long as there is contact with clothing or an object closely identified with the body. 1 Harper & James, The Law of Torts 216 (1956); Restatement of Torts 2d, ss 18 and 19. In Prosser, Law of Torts 32 (3d Ed. 1964), it is said:

> 'The interest in freedom from intentional and unpermitted contacts with the plaintiff's person is protected by an action for the tort commonly called battery. The protection extends to any part of the body, or to anything which is attached to it and practically identified with it. Thus, contact with the plaintiff's clothing, or with a cane, a paper, or any other object held in his hand will be sufficient; * * * The plaintiff's interest in the integrity of his person includes all those things which are in contact or connected with it.'

Under the facts of this case, we have no difficulty in holding that the intentional grabbing of plaintiff's plate constituted a battery. The intentional snatching of an object from one's hand is as clearly an offensive invasion of his person as would be an actual contact with the body. 'To constitute an assault and battery, it is not necessary to touch the plaintiff's body or even his clothing; knocking or snatching anything from plaintiff's hand or touching anything connected with his person, when, done is an offensive manner, is sufficient.' *Morgan v. Loyacomo*, 1 So.2d 510 (Miss. 1941).

Such holding is not unique to the jurisprudence of this State. In *S. H. Kress & Co. v. Brashier*, 50 S.W.2d 922 (Tex.Civ.App.1932, no writ), the defendant was held to have committed 'an assault or trespass upon the person' by snatching a book from the plaintiff's hand. The jury findings in that case were that the defendant 'dispossessed plaintiff of the book' and caused her to suffer 'humiliation and indignity.'

The rationale for holding an offensive contact with such an object to be a battery is explained in 1 Restatement of Torts 2d s 18 (Comment p. 31) as follows:

> 'Since the essence of the plaintiff's grievance consists in the offense to the dignity involved in the unpermitted and intentional invasion of the inviolability of his person and not in any physical harm done to his body, it is not necessary that the plaintiff's actual body be disturbed. Unpermitted and intentional contacts with anything so connected with the body as to be customarily regarded as part of the other's person and therefore as partaking of its inviolability is actionable as an offensive contact with his person. There are some things such as clothing or a cane or, indeed, anything directly grasped by the hand which are so intimately connected with one's body as to be universally regarded as part of the person.'

We hold, therefore, that the forceful dispossession of plaintiff Fisher's plate in an offensive manner was sufficient to constitute a battery, and the trial court erred in granting judgment notwithstanding the verdict on the issue of actual damages.

In *Harned v. E-Z Finance Co*., 254 S.W.2d 81 (Tex. 1953), this Court refused to adopt the 'new tort' of intentional interference with peace of mind which permits recovery for mental suffering in the absence of resulting physical injury or an assault and battery. This cause of action has long been advocated by respectable writers and legal scholars. However, it is not necessary to adopt such a cause of action in order to sustain the verdict of the jury in this case. The *Harned* case recognized the well-established rule that mental suffering is compensable in suits for willful torts 'which are recognized as torts and actionable independently and separately from mental suffering or other injury.' Damages for mental suffering are recoverable without the necessity for showing actual physical injury in a case of willful battery because the basis of that action is the unpermitted and intentional invasion of the plaintiff's person and not the actual harm done to the plaintiff's body.

Personal indignity is the essence of an action for battery; and consequently, the defendant is liable not only for contacts which do actual physical harm, but also for those which are offensive and insulting. We hold, therefore, that plaintiff was entitled to actual damages for mental suffering due to the willful battery, even in the absence of any physical injury.

We now turn to the question of the liability of the corporations for exemplary damages. In this regard, the jury found that Flynn was acting within the course and scope of his employment on the occasion in question; that Flynn acted maliciously and with a wanton disregard of the rights and feelings of plaintiff on the occasion in question. There is no attack upon these jury findings. The jury further found that the defendant Carrousel did not authorize or approve the conduct of Flynn. It is argued that there is no evidence to support this finding. The jury verdict concluded with a finding that $500 would 'reasonably compensate plaintiff for the malicious act and wanton disregard of plaintiff's feelings and rights. * * *'

The rule in Texas is that a principal or master is liable for exemplary or punitive damages because of the acts of his agent, but only if:
(a) the principal authorized the doing and the manner of the act, or

(b) the agent was unfit and the principal was reckless in employing him, or

(c) the agent was employed in a managerial capacity and was acting in the scope of employment, or

(d) the employer or a manager of the employer ratified or approved the act.

The above test is set out in the Restatement of Torts s 909 and was adopted in *King v. McGuff*, 234 S.W.2d 403 (Tex. 1950). At the trial of this case, the following stipulation was made in open court:

> 'It is further stipulated and agreed to by all parties that as an employee of the Carrousel Motor Hotel the said Robert W. Flynn was manager of the Brass Ring Club.'

We think this stipulation brings the case squarely within part (c) of the rule announced in the King case as to Flynn's managerial capacity. It is undisputed that Flynn was acting in the scope of employment at the time of the incident; he was attempting to enforce the Club rules by depriving Fisher of service.

The rule of the Restatement of Torts adopted in the King case set out above has four separate and disjunctive categories as a basis of liability. They are separated by the word 'or.' As applicable here, there is liability if (a) the act is authorized, or (d) the act is ratified or approved, or (c) the agent was employed in a managerial capacity and was acting in the scope of his employment. Since it was established that the agent was employed in a managerial

capacity and was in the scope of his employment, the finding of the jury that the Carrousel did not authorize or approve Flynn's conduct became immaterial.

The King case also cited and relied upon *Ft. Worth Elevator Co. v. Russell*, 123 Tex. 128, 70 S.W.2d 397 (1934). In that case, it was held not to be material that the employer did not authorize or ratify the particular conduct of the employee; and the right to exemplary damages was supported under what is section (b) of the Restatement of King rule: The agent was unfit, and the principal was reckless in employing (or retaining) him.

After the jury verdict in this case, counsel for the plaintiff moved that the trial court disregard the answer to issue number eight (no authorization or approval of Flynn's conduct on the occasion in question) and for judgment upon the verdict. The trial court erred in overruling that motion and in entering judgment for the defendants notwithstanding the verdict; and the Court of Civil Appeals erred in affirming that judgment.

The judgments of the courts below are reversed, and judgment is here rendered for the plaintiff for $900 with interest from the date of the trial court's judgment, and for costs of this suit.

Parvi v. City of Kingston
41 N.Y.2d 553
Court of Appeals of New York.

Donald C. PARVI, Appellant,
v.
CITY OF KINGSTON, Respondent, et al.,
Defendants.

April 5, 1977.

Synopsis
After plaintiff, while intoxicated, was transported by police officers to a spot which was only a short distance away from a busy thruway, he was struck and injured by an automobile as he attempted to cross the thruway. In his subsequent action against the city for negligence and false imprisonment, the Supreme Court, Ulster County, John T. Casey, J., dismissed the complaint at the close of plaintiff's case. After the Supreme Court, Appellate Division, Third Department, affirmed, the Court of Appeals, Fuchsberg, J., held, inter alia, that causes of action in negligence and false imprisonment were stated by plaintiff's complaint.

Breitel, C. J., dissented and filed opinion in which Jasen, J., concurred.

Opinion

FUCHSBERG, Justice. This appeal brings up for review the dismissal, at the end of the plaintiff's case, of two causes of action, both of which arise out of the same somewhat unusual train of events. One is for false imprisonment and the other for negligence. The issue before us, as to each count, is whether a prima facie case was made out. We believe it was.

Sometime after 9:00 p.m. on the evening of May 28, 1972, a date which occurred during the Memorial Day weekend, two police officers employed by the defendant City of Kingston responded in a radio patrol car to the rear of a commercial building in that city where they had been informed some individuals were acting in a boisterous manner. Upon their arrival, they found three men, one Raymond Dugan, his brother Dixie Dugan and the plaintiff, Donald C. Parvi. According to the police, it was the Dugan brothers who alone were then engaged in a noisy quarrel. When the two uniformed officers informed the three they would have to move on or be locked up, Raymond Dugan ran away; Dixie Dugan chased after him unsuccessfully and then returned to the scene in a minute or two; Parvi, who the police testimony shows had been trying to calm the Dugans, remained where he was.

In the course of their examinations before trial, read into evidence by Parvi's counsel, the officers described all three as exhibiting, in an unspecified manner, evidence that they "had been drinking" and showed "the effects of alcohol". They went on to relate how, when Parvi and Dixie Dugan said they had no place to go, the officers ordered them into the police car and, pursuing a then prevailing police "standard operating procedure", transported the two men outside the city limits to an abandoned golf course located in an unlit and isolated area known as Coleman Hill. Thereupon the officers drove off, leaving Parvi and Dugan to "dry out". This was the first time Parvi had ever been there. En route they had asked to be left off at another place, but the police refused to do so.

No more than 350 feet from the spot where they were dropped off, one of the boundaries of the property adjoins the New York State Thruway. There were no intervening fences or barriers other than the low Thruway guardrail intended to keep vehicular traffic on the road. Before they left, it is undisputed that the police made no effort to learn whether Parvi was oriented to his whereabouts, to instruct him as to the route back to Kingston, where Parvi had then lived for 12 years, or to ascertain where he would go from there. From where the men were dropped, the "humming and buzzing" of fast-traveling, holiday-bound automobile traffic was clearly audible from the Thruway; in their befuddled state, which later left Parvi with very little memory of the events, the men lost little time in responding to its siren song. For, in an apparent effort to get back, by 10:00 p.m. Parvi and Dugan had wandered onto the Thruway, where they were struck by an automobile operated by one David R. Darling. Parvi was severely injured, Dugan was killed. (Parvi elected not to appeal from the dismissal of his cause of action against Darling, who originally had been joined as an additional defendant.)

The cause of action for false imprisonment

With these facts before us, we initially direct our attention to Parvi's cause of action for false imprisonment. Only recently, we had occasion to set out the four elements of that tort in *Broughton v. State of New York*, 335 N.E.2d 310, 314, where we said that "the plaintiff must show that: (1) the defendant intended to confine him, (2) the plaintiff was conscious of the confinement, (3) the plaintiff did not consent to the confinement and (4) the confinement was not otherwise privileged".

Elements (1) and (3) present no problem here. When the plaintiff stated he had no place to go, he was faced with but

one alternative arrest. This was hardly the stuff of which consent is formed, especially in light of the fact that Parvi was, in a degree to be measured by the jury, then under the influence of alcohol. It is also of no small moment in this regard that the men's request to be released at a place they designated was refused. Moreover, one of the policemen testified that his fellow officer alone selected the location to which Parvi was taken; indeed, this was a place to which the police had had prior occasion to bring others who were being "run out of town" because they evidenced signs of intoxication. Further, putting aside for the time being the question of whether such an arrest would have been privileged, it can hardly be contended that, in view of the direct and willful nature of their actions, there was no proof that the police officers intended to confine Parvi.

[The element of] consciousness of confinement, is a more subtle and more interesting subissue in this case. On that subject, we note that, while respected authorities have divided on whether awareness of confinement by one who has been falsely imprisoned should be a sine qua non for making out a case has laid that question to rest in this State. Its holding gives recognition to the fact that false imprisonment, as a dignitary tort, is not suffered unless its victim knows of the dignitary invasion. Interestingly, the Restatement of Torts 2d (s 42 too has taken the position that there is no liability for intentionally confining another unless the person physically restrained knows of the confinement or is harmed by it.

However, though correctly proceeding on that premise, the Appellate Division, in affirming the dismissal of the cause of action for false imprisonment, erroneously relied on the fact that Parvi, after having provided additional testimony in his own behalf on direct examination, had agreed on cross that he no longer had any recollection of his confinement. In so doing, that court failed to distinguish between a later recollection of consciousness and the existence of that consciousness at the time when the imprisonment itself took place. The latter, of course, is capable of being proved though one who suffers the consciousness can no longer personally describe it, whether by reason of lapse of memory, incompetency, death or other cause. Specifically, in this case, while it may well be that the alcohol Parvi had imbibed or the injuries he sustained, or both, had had the effect of wiping out his recollection of being in the police car against his will, that is a far cry from saying that he was not conscious of his confinement at the time when it was actually taking place. And, even if plaintiff's sentient state at the time of his imprisonment was something less than total sobriety, that does not mean that he had no conscious sense of what was then happening to him. To the contrary, there is much in the record to support a finding that the plaintiff indeed was aware of his arrest at the time it took place. By way of illustration, the officers described Parvi's responsiveness to their command that he get into the car, his colloquy while being driven to Coleman Hill and his request to be let off elsewhere. At the very least, then, it was for the jury, in the first instance, to weigh credibility, evaluate inconsistencies and determine whether the burden of proof had been met.

The Restatement of Torts 2d (s 10, Comment d) states it well: "Where the privilege is based upon the value attached to the interest to be protected or advanced by its exercise, the privilege protects the actor from liability only if the acts are done for the purpose of protecting or advancing the interest in question. Such privileges are often called conditional, because the act is privileged only on condition that it is done for the purpose of protecting or advancing the particular interest. They are sometimes called 'defeasible', to indicate the fact that the privilege is destroyed if the act is done for any purpose other than the protection or advancement of the interest in question." It follows that, if the conduct of the officers indeed is found to have been motivated by the desire to run the plaintiff out of town, the action for false imprisonment would not have been rebutted by the defense of legal justification. For, under plaintiff's theory, the false imprisonment count does not rest on the reasonableness of the police officers' action, but on whether the unwilling confinement of the plaintiff was the result of an arrest for a nonjustified purpose.

The cause of action for negligence

The Appellate Division upheld the dismissal of the negligence cause on the ground that it was not reasonably foreseeable that a person who is under the influence of alcohol will walk approximately 350 feet in the dead of night and climb over a guardrail onto the New York Thruway. Before treating with that issue, we prefer to give our attention to the more fundamental question of the basic duty owed by the city to the plaintiff in this situation, a question somewhat obscured by the jargon of negligence terminology.

In that connection, we do not believe it aids our analysis of the negligence count to speculate on the duty of a police officer to arrest or not to arrest intoxicated persons. Instead, we confront directly the duty of police officers to persons under the influence of alcohol who are already in their custody, as was the case here once Parvi was compelled to enter the police car. The case law is clear that even when no original duty is owed to the plaintiff to undertake affirmative action, once it is voluntarily undertaken, it must be performed with due care. As Restatement of Torts 2d (s 324) puts it, "One who, being under no duty to do so, takes

charge of another who is helpless adequately to aid or protect himself is subject to liability to the other for any bodily harm caused to him by (a) the failure of the actor to exercise reasonable care to secure the safety of the other while within the actor's charge or (b) the actor's discontinuing his aid or protection, if by so doing, he leaves the other in a worse position than when the actor took charge of him".

[It is] evident that this duty cannot be fulfilled by placing the helpless person in a position of peril equal to that from which he was rescued. So it tells us that "if the actor has succeeded in removing the other from a position of danger to one of safety, he cannot change his position for the worse by unreasonably putting him back into the same peril, or into a new one."

We return now to the question of whether it was reasonably foreseeable that Parvi, who appeared sufficiently intoxicated for the police to take action, when set down in the dead of night in a lonely rural setting within 350 feet of a superhighway, whose traffic noises were sure to make its presence known, might wander onto the road. To state the question is to answer it. To be sure, much has to depend on what the jury finds to have been the state of his sobriety and the nature of the surrounding physical and other circumstances. But traditionally these are the kind of matters suitable for jury determination rather than for the direction of a verdict

Finally, a word of clarification may be in order as to the legal role of plaintiff's voluntary intoxication. To accept the defendant's argument, that the intoxication was itself the proximate cause of Parvi's injury as a matter of law, would be to negate the very duty imposed on the police officers when they took Parvi and Dugan into custody. The clear duty imposed on the officers interdicts such a result if, as the jury may find, their conduct was unreasonable For it is the very fact of plaintiff's drunkenness which precipitated the duty once the officers made the decision to act.

Accordingly, the order of the Appellate Division should be reversed, both causes of action reinstated and a new trial ordered, with leave to the defendant, if so advised, to move at Trial Term for leave to amend its answer to affirmatively plead a defense of justification to the cause of action for false imprisonment.

BREITEL, Chief Judge (dissenting).

I dissent. On no view of the facts should plaintiff, brought to causing his own serious injury by his voluntary intoxication, be allowed to recover from the City of Kingston for damages suffered when he wandered onto the New York State Thruway and was struck by an automobile. His attack is the familiar one on the good Samaritan, in the persons of two police officers, for not having, in retrospect, done enough.

The order of the Appellate Division should be affirmed, and the action stand dismissed.

On the night in question, the Kingston city police, responding to a complaint, found plaintiff Parvi and his companions in the midst of an uproarious argument behind a commercial establishment located on Broadway, in Kingston. Close by were railroad tracks, still in use by locomotives and freight trains. Plaintiff and his companion Dugan, both intoxicated, were asked if they had any place to go, and they said not. They were then taken to the police car, and informed that they would not be placed in jail on this holiday weekend, but, in accordance with their wishes, would instead be transported to a point out of the area where they could "sleep it off" without getting into further trouble. Dugan and Parvi repeatedly expressed their appreciation and gratitude at the option given them.

As the drive out of town proceeded, one of the men suggested a place where they might be left. The police officers, however, solicitous of the safety of their charges, declined this request, noting that the area suggested provided no shelter and, significantly, that the Thruway was "right there". As an alternative, the officers, with the consent of plaintiff and Dugan, dropped the men off at "Coleman Hill", the site of a former golf course, a spot often used by campers and equipped with several "lean-to" shelters. From the relative safety of this sheltered area, the two men, some time later, managed to wander onto the Thruway, over 350 feet away, where Dugan was killed and Parvi injured by passing automobiles.

On these facts, Parvi contends both that he was falsely imprisoned and that the city, through its police officers, was negligent. Neither claim withstands analysis, and both should fall.

This court enumerated the elements necessary to sustain a false imprisonment claim: (1) intention to confine, (2) consciousness of confinement, (3) lack of consent to confinement, and (4) lack of privilege. But before those factors may even be reached, there must be evidence of a confinement. In this case, there was none, but, instead,

merely an exclusion from one particular area and activity.

So long as Parvi did not remain out in public, intoxicated, creating a public nuisance, and endangering his own life, the officers had no wish to interfere with Parvi's freedom of movement. Since Parvi could suggest no suitable place where the officers might take him, the officers chose another site. Apparently, Parvi and Dugan were pleased with the choice. And it should not matter that Parvi testified, although he could recall nothing else, that he was ordered into a police car "against (his) will". Parvi's "will" was to stay where he was, intoxicated, in public. In order to deprive him of that one choice, which the officers could do without subjecting themselves to liability for false imprisonment, the officers had to transport Parvi some-place else. He was given a choice as to destination. He declined it, except for his later suggestion of an unsafe place, and the officers made the choice for him. There was no confinement, and hence no false imprisonment.

Moreover, plaintiff has failed even to make out a prima facie case that he was conscious of his purported confinement, and that he failed to consent to it. His memory of the entire incident had disappeared; at trial, Parvi admitted that he no longer had any independent recollection of what happened on the day of his accident, and that as to the circumstances surrounding his entrance into the police car, he only knew what had been suggested to him by subsequent conversations. In light of this testimony, Parvi's conclusory statement that he was ordered into the car against his will is insufficient, as a matter of law, to establish a prima facie case.

Plaintiff's negligence claim is equally without merit. The police officers had no duty to leave Parvi absolutely free from danger in any form. Instead, they owed plaintiff only a duty to exercise ordinary care. That duty was discharged by leaving plaintiff at a camping ground equipped with "lean-to" shelters and removed from the holiday bustle of the city, where Parvi had been drinking for the past two or three days. Since it was not foreseeable that Parvi, rather than "sleeping off" his intoxication, would wander away, climb over a guardrail, and be struck by an automobile on the New York State Thruway, there was no breach of duty, no negligence, and hence, no liability. If, perchance, he was in search of more drinks, there was no chance of giving him absolute safety except by locking him up. It should not be the rule, common to an era long well past, that every drunkard must be locked up on being observed as intoxicated in public.

In removing Parvi and Dugan from the center of town, the police officers were performing a recognized public function. In his intoxicated state, Parvi, with his companions, was creating a public nuisance. It had been a long-standing practice in Kingston to transport publicly intoxicated people out of the center of town. The practice was followed in this case, and it is not, in a smaller city (population 25,544), an inherently unreasonable way of dealing with public intoxication. It avoids the humiliation and degradation to the offender, of maintaining him in jail. It is a commonplace that it is no longer acceptable, albeit it still continues, to treat the intoxicated and alcoholic in this fashion, as one does criminals.

Moreover, transplanting plaintiff from the center of town to an isolated area on the outskirts was protective of plaintiff himself. While a man in an intoxicated state can always be a hazard to himself, he is much more so when located in the center of town, in the midst of city streets, railroad tracks, molesters, muggers, street vehicles, and without shelter, than he would be in an isolated area. But one may not deprive him of reasonable access, after he recovers his sobriety, to food and other necessities. Had the police placed the two men out of reasonable access to any road, the isolation would have been inhumane. And any road would under some circumstances be dangerous.

Restatement, Torts 2d, defines an act as negligent when it involves a risk of harm "of such magnitude as to outweigh what the law regards as the utility of the act or of the particular manner in which it is done." Here, the risk was slight; the police officers obviously considered safety in choosing the camping site to deposit the two men, and reasonably regarded the site as safe. More significant, by removing Parvi from town, they removed him from a place of greater danger, and halted a public nuisance as well. The police conduct, therefore, was not unreasonable under the Restatement test. The same analysis applies under Section 324 of Restatement, Torts 2d, dealing with the duty of one who takes charge of helpless persons, since the officers materially improved plaintiff's position by removing him from town.

Since, therefore, there was no breach of duty to plaintiff, as a matter of law, the negligence count, too, was properly dismissed.

There is hubris in the bringing of an action of this kind. Parvi is one of a pair of drinkers, derelicts perhaps, engaged in making a public nuisance of themselves in the center of a small city on a holiday weekend. The police of that city, a tiny force, are not sisters of charity or baby-sitters.

Basically, the legal issues in this case are not difficult. And the justice issues are even less so. A drunken man, a pitiable character, is found with his companions in the middle of town. Sympathetic police officers offer to take

the men anywhere they choose, but the poor fellows have no place to go. So, rather than locking them up for a holiday weekend, the officers deposit the men in a suburban setting, where some shelter is available. The officers are thanked for their kindness. But, in the end, the efforts of the officers are to no avail, as the drunken men wander away from safety and into danger. A tragedy, certainly. A miscalculation, perhaps. But even with the aid of hindsight, the facts in this case are not the stuff on which tort liability may be premised.

Accordingly, I dissent, and vote to affirm the order of the Appellate Division.

Order reversed, with costs to abide the event, both causes of action reinstated and a new trial granted, with leave to respondent to move at Trial Term to amend its answer.

Robinson v. Lindsay
92 Wash.2d 410

Supreme Court of Washington, En Banc.

William **ROBINSON**, Guardian Ad Litem of Kelly Ann Robinson, a minor, Respondent,
v.
John **LINDSAY** and Jane Doe Lindsay, husband and wife, Appellants,
Robert Anderson and Jane Doe Anderson, husband and wife, and Billy Anderson, Petitioners.

Aug. 2, 1979.

UTTER, Chief Justice.

An action seeking damages for personal injuries was brought on behalf of Kelly Robinson who lost full use of a thumb in a snowmobile accident when she was 11 years of age. The petitioner, Billy Anderson, 13 years of age at the time of the accident, was the driver of the snowmobile. After a jury verdict in favor of Anderson, the trial court ordered a new trial.

The single issue on appeal is whether a minor operating a snowmobile is to be held to an adult standard of care. The trial court failed to instruct the jury as to that standard and ordered a new trial because it believed the jury should have been so instructed. We agree and affirm the order granting a new trial.

The trial court instructed the jury that:

> In considering the claimed negligence of a child, you are instructed that it is the duty of a child to exercise the same care that a reasonably careful child of the same age, intelligence, maturity, training and experience would exercise under the same or similar circumstances.

Respondent properly excepted to the giving of this instruction and to the court's failure to give an adult standard of care.

The question of what standard of care should apply to acts of children has a long historical background. Traditionally, a flexible standard of care has been used to determine if children's actions were negligent. Under some circumstances, however, courts have developed a rationale for applying an adult standard.

In the courts' search for a uniform standard of behavior to use in determining whether or not a person's conduct has fallen below minimal acceptable standards, the law has developed a fictitious person, the "reasonable man of ordinary prudence." That term was first used in *Vaughan v. Menlove*, 132 Eng. Rep. 490 (1837).

Exceptions to the reasonable person standard developed when the individual whose conduct was alleged to have been negligent suffered from some physical impairment, such as blindness, deafness, or lameness. Courts also found it necessary, as a practical matter, to depart considerably from the objective standard when dealing with children's behavior. Children are traditionally encouraged to pursue childhood activities without the same burdens and responsibilities with which adults must contend. As a result, courts evolved a special standard of care to measure a child's negligence in a particular situation.

In *Roth v. Union Depot Co.*, 13 Wash. 525, 43 P. 641 (1896), Washington joined "the overwhelming weight of authority" in distinguishing between the capacity of a child and that of an adult. As the court then stated, at page 544,

> (I)t would be a monstrous doctrine to hold that a child of inexperience and experience can come only with years should be held to the same degree of care in avoiding danger as a person of mature years and accumulated experience.

The court went on to hold, at page 545:

> The care or caution required is according to the capacity of the child, and this is to be determined, ordinarily, by the age of the child.
>
> ". . . a child is held . . . only to the exercise of such degree of care and discretion as is reasonably to be expected from children of his age."

In the past we have always compared a child's conduct to that expected of a reasonably careful child of the same age, intelligence, maturity, training and experience. This case is the first to consider the question of a child's liability for injuries sustained as a result of his or her operation of a motorized vehicle or participation in an inherently dangerous activity.

Courts in other jurisdictions have created an exception to the special child standard because of the apparent injustice that would occur if a child who caused injury while engaged in certain dangerous activities were permitted to defend himself by saying that other children similarly

situated would not have exercised a degree of care higher than his, and he is, therefore, not liable for his tort. Some courts have couched the exception in terms of children engaging in an activity which is normally one for adults only. See, e.g., *Dellwo v. Pearson*, 107 N.W.2d 859 (Minn. 1961) (operation of a motorboat). We believe a better rationale is that when the activity a child engages in is inherently dangerous, as is the operation of powerful mechanized vehicles, the child should be held to an adult standard of care.

Such a rule protects the need of children to be children but at the same time discourages immature individuals from engaging in inherently dangerous activities. Children will still be free to enjoy traditional childhood activities without being held to an adult standard of care. Although accidents sometimes occur as the result of such activities, they are not activities generally considered capable of resulting in "grave danger to others and to the minor himself if the care used in the course of the activity drops below that care which the reasonable and prudent adult would use . . ." *Daniels v. Evans*, 107 N.H. 407, 408, 224 A.2d 63, 64 (1966).

Other courts adopting the adult standard of care for children engaged in adult activities have emphasized the hazards to the public if the rule is otherwise. We agree with the Minnesota Supreme Court's language in its decision in *Dellwo v. Pearson*, supra, 107 N.W.2d at 863:

> Certainly in the circumstances of modern life, where vehicles moved by powerful motors are readily available and frequently operated by immature individuals, we should be skeptical of a rule that would allow motor vehicles to be operated to the hazard of the public with less than the normal minimum degree of care and competence.

Dellwo applied the adult standard to a 12-year-old defendant operating a motor boat. Other jurisdictions have applied the adult standard to minors engaged in analogous activities. The holding of minors to an adult standard of care when they operate motorized vehicles is gaining approval from an increasing number of courts and commentators. in Nebraska, 46 Neb. L. Rev. 699, 703-05 (1967).

The operation of a snowmobile likewise requires adult care and competence. Currently 2.2 million snowmobiles are in operation in the United States. 9 Envir. Rptr. (BNA) 876 (1978 Current Developments). Studies show that collisions and other snowmobile accidents claim hundreds of casualties each year and that the incidence of accidents is particularly high among inexperienced operators. See Note, Snowmobiles A Legislative Program, 1972 Wis. L. Rev. 477, 489 n. 58.

At the time of the accident, the 13-year-old petitioner had operated snowmobiles for about 2 years. When the injury occurred, petitioner was operating a 30-horsepower snowmobile at speeds of 10-20 miles per hour. The record indicates that the machine itself was capable of 65 miles per hour. Because petitioner was operating a powerful motorized vehicle, he should be held to the standard of care and conduct expected of an adult.

The order granting a new trial is affirmed.

