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TORTS

I. *WARREN V. DISTRICT OF COLUMBIA*

Traditionally, official police personnel and their government employers are not liable to crime victims for failing to provide adequate police protection.[1] The duty to provide adequate protection has been considered a public duty, to be redressed by public prosecution, and not by a private suit for damages.[2]

Police may be liable in damages, however, if an individual can show that the police owed him a special duty, separate and distinct from a duty to the public at large. Courts consider this an individual wrong that may support a private action for damages.[3] States and municipalities, as well as the District of Columbia, have held police liable for failure to provide adequate police protection if a special duty could be shown to an individual. However, the criteria necessary to establish this duty were left vague. Some sort of affirmative act by the police, unsolicited by the plaintiff, seemed necessary, but no continuity in criteria appeared among the courts.[4]

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1. *See* Rieser v. District of Columbia, 563 F.2d 462 (D.C. Cir. 1977) (*rehearing en banc granted and panel opinion vacated on other grounds; panel opinion reinstated in pertinent part*, 580 F.2d 647 (D.C. Cir. 1978)); Riss v. City of New York, 22 N.Y.2d 579, 240 N.E.2d 860, 293 N.Y.S.2d 897 (1968); Annot., 46 A.L.R.3d 1084 (1972).

2. Warren v. District of Columbia, 444 A.2d 1 (D.C. 1981) (en banc) (Warren II).

3. Chandler v. District of Columbia, 404 A.2d 964 (D.C. 1979); Trautman v. City of Stamford, 32 Conn. Supp. 258, 350 A.2d 782 (Conn. Super. Ct. 1975).

4. Police have been held liable in a number of diverse cases. In Schuster v. City of New York, 5 N.Y.2d 75, 154 N.E.2d 534, 180 N.Y.S.2d 265 (1958), the police solicited information from citizens to track down the notorious gangster, Willie Sutton. When the decedent supplied information to the police which led to Sutton's arrest, his help was widely publicized. Although the decedent notified police of subsequent death threats, the police failed to give him adequate protection and he was shot and killed. The New York Court of Appeals held that the police department had a special duty to protect the decedent and, since it failed to do so, it was liable for damages. The Court stated that a municipality has a special duty to use reasonable care to protect citizens who are endangered by participating in law enforcement, at least where protection is reasonably demanded or sought. *Id.* at 80-81, 154 N.E.2d at 537, 180 N.Y.S.2d at 269.

Similarly, in Gardner v. Village of Chicago Ridge, 71 Ill. App. 2d 373, 219 N.E.2d 147 (1966), the Illinois Appellate Court held that the police had a special duty to protect the plaintiff when he was beaten by suspects who had been captured with his help. The Illinois court held that, once the police asked the plaintiff to come to the place of capture, they owed the plaintiff a duty of protection. *Id.* at 377, 219 N.E.2d at 150.

A special duty was also found to exist in Florence v. Goldberg, 44 N.Y.2d 189, 375 N.E.2d 763, 404 N.Y.S.2d 583 (1978), where a child was injured while crossing an unguarded cross-

The leading case of this type in the District of Columbia is *Reiser v. District of Columbia*,[5] where the District was sued under the doctrine of respondent superior for the negligent behavior of a parole officer. In *Reiser*, the United States Court of Appeals for the District of Columbia Circuit found the District government liable when a parole officer failed to inform an exconvict's potential employer of the man's violent sexual assault background.[6] The exconvict was hired as a maintenance man at the employer's apartment complex where he later sexually assaulted and murdered a young woman. The court found that the parole officer had a general duty to reveal the man's prior history to a potential employer. The breach of this duty could give rise to a specific duty to the woman who was killed because it presented such a grave risk of harm to the female residents of the apartment complex.[7]

In *Warren v. District of Columbia*,[8] the Court of Appeals for the District of Columbia, sitting en banc, recently reversed an earlier decision which had clarified the scope of police liability for failure to provide adequate police protection. In its previous decision, the panel had developed a two-prong test for determining when a special duty is created between the police and a private citizen, effectively applying the tort doctrine of the volunteer to police liability cases:[9] first, there must be privity between the individual and the police which sets the victim apart from the general pub-

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walk on the way home from school. The police department had previously furnished a guard at the intersection and had failed to replace her when she became ill or to notify the school as was required by police regulations. The New York court held that the city could be liable for negligent failure to replace the guard, notify the school or take any action to safeguard the school children. *Id.* at 193, 375 N.E.2d at 765, 404 N.Y.S.2d at 585. Its decision was based upon the voluntary assumption of the guard duty by the police and the subsequent reliance on that guard duty by the parents, forming a special relationship between the police and the parents of the children. *Id.* at 197, 375 N.E.2d at 767, 404 N.Y.S.2d at 587.

5. 563 F.2d 462 (D.C. Cir. 1977).

6. *Id.* at 479.

7. *Id.*

8. *Warren II*, 444 A.2d 1 (D.C. 1981). Because of the similarity of issues, *Warren* was consolidated with Nichol v. District of Columbia on appeal to the District of Columbia Court of Appeals. In *Nichol*, a man who was injured in an auto accident relied on the promise of a policeman to obtain vital information about the party responsible for the accident and was subsequently unable to sue the party when the policeman failed to fulfill his promise. The court originally found that *Nichol* met the criteria established in *Warren*, but reversed en banc, holding that Nichol was owed no special duty by the police.

9. This concept is best explained by Judge Cardozo in the classic case of H.R. Moch Co. v. Rensselaer Water Co., 247 N.Y. 160, 159 N.E. 896 (1928), where he stated:

> 'It is ancient learning that one who assumes to act, even though gratuitously, may thereby become subject to the duty of acting carefully, if he acts at all' . . . . The hand once set to a task may not always be withdrawn with impunity though liability would fail if it had never been applied at all. . . . If conduct has gone forward to such a stage that inaction would commonly result, not negatively merely in with-

lic, making the victim a reasonably foreseeable plaintiff; and second, the police must give specific assurances of police services that create justifiable reliance by the victim.[10] The court's en banc decision, however, negated this test.

In *Warren*, two men broke into the plaintiffs' house and while they were raping Miriam Douglas, plaintiffs Warren and Taliaferro called the police, reported the break-in, and requested assistance. A few minutes later, a police car drove through the alley behind the house. Its occupants did not follow the standard District of Columbia procedure of stopping the car and checking the back entrance to the house. One officer did knock on the front door, but left when he received no answer. Warren's second call to the police was never dispatched by the police operator. The intruders subsequently discovered Warren and Taliaferro and took them at knifepoint to their own apartment where they sexually assaulted them for the next fourteen hours.[11]

The appellants sued the District of Columbia, the policemen who investigated the call, and the dispatchers. Their claims of negligence included the police officers' failure to investigate properly the call and the failure of the dispatcher to relay the second call.[12]

The trial court granted the appellees' motion to dismiss for failure to state a claim upon which relief could be granted. The court held that the police owed no special duty to the women; thus the women had no basis upon which to sue.[13]

On appeal, the District of Columbia Court of Appeals reversed, holding that the police owed a special duty to appellants Warren and Taliaferro, and thus the victims could sue the city for damages caused by the police department's failure to respond properly to the call. In its decision, the court developed a two-prong test for determining when the police owe a special duty to a private citizen. The court found that Warren and Taliaferro's urgent telephone calls to the police removed them from the broad class of the general public and that any duties which the officers then as-

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holding a benefit, but positively or actively in working an injury, there exists a relation out of which arises a duty to go forward.

Id. at 167, 159 N.E. at 898.

10. *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS, § 56 (4th ed. 1971); Warren v. District of Columbia, No. 79-6, slip op. at 2352 (D.C. Dec. 24, 1980) (*Warren I*), *vacated*, 444 A.2d 1 (D.C. 1981); Sapp v. City of Tallahasee, 348 So. 2d 363 (Fla. Dist. Ct. App. 1977).

11. *Warren II*, 444 A.2d at 2. The men were later caught and pleaded guilty to rape charges. Each received a prison sentence of ten to thirty years.

12. *Id.*

13. *Warren I*, No. 79-6, slip op. at 2348.

sumed were duties to the appellants as individuals, not general duties to the public.[14] Thus, the victims could be regarded as reasonably foreseeable plaintiffs. The second prong of the test was satisfied because Warren and Taliaferro received specific assurances of help from the police that may have created justifiable reliance on their part.[15]

Upon rehearing, en banc, the court of appeals vacated the panel's decision. It adopted the relevant portions of the trial court's opinion, holding that the duty to provide adequate police protection is a duty owed to the general public and that no special relationship existed between the appellants and the police to create a specific legal duty upon which the appellants could sue.[16] The court held that a request for aid is not by itself sufficient to create a special duty,[17] and that the argument that once the police began to act, they became personally liable for damages, misconstrued both the tort doctrine of the volunteer and the legal status of the police officer.[18] The court stated that the concept of the volunteer could not be applied to a police officer because, unlike the volunteer, he was not able to assess each emergency situation and determine whether or not to act, and that "the creation of direct, personal accountability between each government employee and every member of the community would effectively bring the business of government to a speedy halt . . . ."[19]

Judge Kelly, concurring and dissenting in part, rejected the notion that the two-prong test would create a direct personal accountability between public servants and the public that would halt the wheels of government.[20] The two part test earlier set out by the court would not impose strict liability upon police. Both prongs of the test would have to be met and courts would make such a determination by application of the general tort principles of foreseeability, proximate cause, and fault.[21]

In the final analysis, Judge Kelley's view seems more sound. The police, or any public servant who is negligent should not be allowed to hide behind a cloak of immunity. As the first *Warren* court aptly stated, "one who

14. *Warren I*, No. 79-6, slip op. at 2355. *See also* W. PROSSER, *supra* note 10, § 56.

15. *Warren I*, No. 79-6, slip op. at 2355. The court decided that Ms. Douglas did not meet these criteria. Even if she were a reasonably foreseeable plaintiff, she did not know that the police had been called and had promised immediate assistance and, therefore, could not have reasonably relied upon the police's assurances.

16. *Warren II*, 444 A.2d at 3.

17. *Id.* at 6.

18. *Id.* at 7.

19. *Id.* at 8-9.

20. *Id.* at 9.

21. *Id.* at 12 (quoting *Riss*, 22 N.Y.2d at 586, 240 N.E.2d at 863, 293 N.Y.S.2d at 902) (Keating, J., dissenting).

begins to perform a service to another, whether gratuitously or not, must perform with reasonable care; thus, he subjects himself to liability for any harm suffered because the other reasonably and foreseeably relied upon the actor's performance."[22] The courts are able to apply the tort principles incorporated in the two-prong test to the negligent behavior of police personnel. "No one is contending that the police must be at the scene of every potential crime. . . . They need only act as a reasonable man would under the circumstances."[23] Thus, the *Warren* decision, by rejecting the two-prong test, hinders the development of what seems to be a justifiable standard of accountability.

II. *HOLLAND V. BALTIMORE & OHIO RAILROAD CO.*

Under the common law, a landowner's liability to an entrant who suffered harm from a dangerous condition on his property was determined by the entrant's status as an invitee, licensee, or trespasser.[24] The landowner, under the traditional rule, was least liable to a trespasser, defined as one who enters on land without the owner's consent.[25] This liability was limited to injuries sustained by the trespasser due to the owner's wilful or wanton conduct.[26] The landowner owed a greater responsibility to a licensee, defined as one privileged to enter the land because he had the owner's consent.[27] Although under no obligation to make the property safe for the licensee, the landowner was liable for injuries to the licensee from dangerous conditions on the property that were not reasonably discoverable.[28] The landowner was most liable to an invitee, owing the duty to exercise reasonable care for his safety because the invitee's presence on the property was not only desired but often induced for economic purposes.[29]

The modern approach, followed by many jurisdictions, is to abolish these class distinctions altogether, measuring landowner's liability according to a "reasonable care under the circumstances" standard.[30] Other juris-

22. *Warren I*, No. 79-6, slip op. at 2353. *See also* W. PROSSER, *supra* note 10, § 56; 2 F. HARPER & F. JAMES, THE LAW OF TORTS § 18.16 (1956); 2 RESTATEMENT (SECOND) OF TORTS § 323 (1965).

23. *Riss*, 22 N.Y.2d at 586, 240 N.E.2d at 863, 293 N.Y.S.2d at 902 (Keating, J., dissenting).

24. *See* RESTATEMENT (SECOND) OF TORTS §§ 329-332 (1965), 62 AM. JUR. 2D *Premises Liability* § 96 (1972).

25. RESTATEMENT (SECOND) OF TORTS § 329 (1965).

26. *See* 62 AM. JUR. 2D *Premises Liability* §§ 89, 90 (1972).

27. RESTATEMENT (SECOND) OF TORTS § 330 (1965).

28. *Id.* § 341.

29. *See* 62 AM. JUR. 2D *Premises Liability* §§ 37, 65 (1972).

30. Annot., 32 A.L.R.3d 508 (1970).

dictions have abolished only the distinction between invitees and licensees, maintaining the traditional rule for trespassers. In *Holland v. Baltimore & Ohio Railroad Co.*,[31] the District of Columbia Court of Appeals has now made clear, despite previous contrary indications, that the District will follow the latter approach.

In *Holland*, a nine year old child sued the railroad after he fell under a train while trespassing on defendant's land. Plaintiff claimed that the railroad was an attractive nuisance. The trial court, however, dismissed plaintiff's complaint for failure to state a claim upon which relief could be granted. First, plaintiff's attractive nuisance theory failed because "the doctrine of attractive nuisance 'does not extend to things which become dangerous only when adults set them in motion,' such as a moving railroad car . . . ."[32] Second, the court cited *Firfer v. United States*,[33] to deny plaintiff any alternative relief. In *Firfer*, the United States Court of Appeals for the District of Columbia Circuit had established that a landowner in the District of Columbia need only refrain from inflicting wilful, wanton, or intentional injury on a trespasser. Thus, because the plaintiff in *Holland* was a trespasser and because, as a matter of law, the railroad had not inflicted wilful, wanton, or intentional injury upon him, the court held that his complaint had failed to state a claim and dismissed it.

After a panel initially affirmed, the District of Columbia Court of Appeals agreed to rehear plaintiff's case en banc "to decide whether the *Firfer* rule should be abandoned, and if it is not, whether the attractive nuisance exception is available to [plaintiff]."[34] In a split decision, the court concluded that *Firfer* "continues to represent the general rule of landowner liability in this jurisdiction,"[35] and refused to abandon this standard in favor of a "reasonable care under the circumstances" standard as was adopted by the United States Court of Appeals for the District of Columbia Circuit in *Smith v. Arbaugh's Restaurant, Inc.*[36]

Although the court noted some movement toward abolishing the distinctions between invitee and licensee for the purposes of the landowner's duty of care, the majority of jurisdictions, including the District of Columbia, have not changed the landowner's duty of care to trespassers.[37] The court

31. 431 A.2d 597 (D.C. 1981).

32. *Id.* at 598, *citing* Harris v. Roberson, 139 F.2d 529 (D.C. Cir. 1943).

33. 208 F.2d 524 (D.C. Cir. 1953).

34. *Holland*, 431 A.2d at 599.

35. *Id.*

36. 469 F.2d 97 (D.C. Cir. 1972), *cert. denied*, 412 U.S. 939 (1973).

37. 431 A.2d at 599. The court cited Alston v. Baltimore & O.R.R. Co., 433 F. Supp. 553 (D.D.C. 1977) & W. PROSSER, *supra* note 10, § 62, at 398.

stated that its decisions in *Blumenthal v. Cairo Hotel Corp.*,[38] and *D.C. Transit System, Inc. v. Carney*,[39] had abolished any distinction in the standard of care owed by a landowner to invitees or licensees and had instead established a duty of reasonable care under all circumstances.[40] In *Holland*, however, the court refused to abolish the distinction as to trespassers, and rejected the single standard of reasonable care suggested in *Smith v. Arbaugh's Restaurant, Inc.*[41]

In *Arbaugh's Restaurant*, a health inspector sought recovery for a back injury he incurred when he slipped on a restaurant stairway while making an inspection. Although it denied plaintiff recovery, the District of Columbia Circuit discarded the common law distinctions for determining a landowner's duty of care. The circuit court concluded "[a] landowner must act as a reasonable man in maintaining his property in a reasonably safe condition in view of all the circumstances . . . ."[42]

The Court of Appeals in *Holland*, however, refused to adopt this standard. Because *Arbaugh's Restaurant* had been handed down at a time when the circuit court was no longer the expositor of District of Columbia law, the decision had no precedential value. And, because the court could "find no other compelling reason to abandon *Firfer*," it ruled that this decision should remain the law of the District with regard to trespassers on land.[43]

In *Washington Metropolitan Area Transit Authority v. Ward*,[44] the District of Columbia Court of Appeals reversed an award of damages for injuries sustained when the plaintiff slipped on an oil-absorbing compound while delivering a set of work-clothes to her employee son. The court remanded for a determination of whether she was a trespasser and thus was owed no reasonable standard of care.[45]

Although Judge Ferren concurred in the *Ward* result, because the trial

38. 256 A.2d 400 (D.C. 1969).
39. 254 A.2d 402 (D.C. 1969).
40. *Holland*, 431 A.2d at 599.
41. 469 F.2d 97 (D.C. Cir. 1972), *cert. denied*, 412 U.S. 939 (1973).
42. *Id.* at 100.
43. *Holland*, 431 A.2d at 600. Specifically, the court noted that as applied to trespassers, the single standard of care imposed in *Arbaugh's Restaurant* was dicta as the landowner's duty toward a trespasser was not before the court. Further, the *Arbaugh's Restaurant* decision was handed down after February 1, 1971, the effective date of court reorganization, thus, the District of Columbia Circuit decision lacked binding precedential effect on District of Columbia courts. Finally, the court concluded that Erie Railroad v. Tompkins, 304 U.S. 64 (1938), required the District of Columbia Court of Appeals to adhere to the *Firfer* standard since it was substantive legal precedent from the highest court of the jurisdiction.
44. 433 A.2d 1072 (D.C. 1981).
45. *Id.* at 1073.

court had incorrectly relied on *Arbaugh's Restaurant* as controlling law, he nevertheless urged "a single standard of reasonable care under the circumstances," irrespective of the status of the entrant upon the land (trespasser, licensee, invitee).[46] According to Judge Ferren, *Blumenthal v. Cairo Hotel Corp.*,[47] which established a duty of reasonable care as to invitees and licensees, should be extended to all entrants. The foreseeability of the entrant's presence should bear on the question whether the landowner acted with "reasonable care."[48] Judge Ferren noted that

> status distinctions clutter the analysis. . . . The question whether [plaintiff] was an invitee, licensee, or trespasser is a most difficult, even impressionistic one. A digression into that thicket gets in the way of the only straightforward—and proper—question for the jury: Did [the landowner] exercise reasonable care to protect [plaintiff] from injury, given all the circumstances including the extent to which [the landowner] indulged her presence on the premises?[49]

The *Holland* decision thus clarified the District of Columbia Court of Appeals' position on the duty of care owed to trespassers by landowners. The closeness of this decision, however, indicates that this clarification may last only temporarily. Judge Ferren's dissent in *Holland* and concurring opinion in *Ward* demonstrate the appeal of the single standard of care as applied by the District of Columbia Circuit in *Arbaugh's Restaurant*. The equitable flexibility of this latter standard, may soon lead the court to reexamine the issue and impose a single standard of care on landowners in the District of Columbia.[50]

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46. *Id.* at 1074. Judge Ferren cited the following as authority for his position: Smith v. Arbaugh's Restaurant, Inc., 469 F.2d 97, 107 (D.C. Cir. 972), *cert. denied*, 412 U.S. 939 (1973); Rowland v. Christian, 69 Cal. 2d 108, 117, 443 P.2d 561, 568, 70 Cal. Rptr. 97, 104 (1968) (en banc); Mile High Fence Co. v. Radovich, 175 Colo. 537, 548, 489 P.2d 308, 314 (1971) (en banc); Pickard v. City & County of Honolulu, 51 Haw. 134-35, 452 P.2d 445-46 (1969); Ouellette v. Blanchard, 116 N.H. 552, 557, 364 A.2d 631, 634 (1976); Basso v. Miller, 40 N.Y.2d 233, 241, 386 N.Y.S.2d 564, 568, 852 N.E.2d 868, 872 (1976); Mariorenzi v. Joseph DiPonte, Inc., 114 R.I. 294, 307, 333 A.2d 127, 133 (1975). *See generally* Comment, *The Common Law Tort Liability of Owners and Occupiers of Land: A Trap for the Unwary?*, 36 MD. L. REV. 816 (1977).

47. 256 A.2d 400 (D.C. 1969).

48. *Ward*, 433 A.2d at 1074.

49. *Id.* at 1075.

50. For further analysis of *Holland*, see Note, *Holland v. Baltimore & Ohio R.R.: Defining the Duty Owed to Trespassers in the District of Columbia*, 31 CATH. U.L. REV. 591 (1982).