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Recent Cases

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RECENT CASES

CRIMINAL LAW—ARREST WITHOUT A WARRANT—INFORMER'S TIP IS PROBABLE CAUSE—Defendant was arrested by a federal agent acting without a warrant on the tip of a paid informer. A search of his person revealed two envelopes containing heroin and a syringe. This evidence was introduced at his trial and he was convicted under the federal narcotics law. *Held:* the arrest and search were not illegal; conviction affirmed. *Draper v. United States,* 3 L. ed 2d 327 (U.S. 1959).

This much is clear: If the arrest was legal, the search was legal. *Carroll v. United States,* 267 U.S. 132, 158 (1925). Conversely, if the arrest was illegal, the search was "unreasonable" within the meaning of the Fourth Amendment. [*United States v. Di Re,* 332 U.S. 581 (1948)] and the evidence it revealed was not admissible in the federal courts. *Weeks v. United States* 232 U.S. 383 (1914). The arrest must be judged by whether or not there was "probable cause" at the time the arrest was made. The facts creating probable cause need not be legally admissible evidence. *Brinegar v. United States,* 338 U.S. 160 (1949). But nothing discovered during or after the arrest will validate it if probable cause did not previously exist. *United States v. Di Re, supra.*

The only real issue is: What constitutes probable cause? This question has assumed new importance in the wake of the *Mallory* decision. *United States v. Mallory,* 354 U.S. 449 (1957). If prompt arraignment is to be the rule, we must know what magistrates will demand before permitting police to hold their suspect. The doctrinaire requirement is probable cause. Is the right to hold coextensive with the right to arrest? No federal court seems to have distinguished the two, but it is hard to believe that a commissioner would permit police to hold a suspect on a tip like the one which sustained the arrest in the instant case. Should not the quality of evidence necessary to arrest a suspect be different in those cases where the arrest and search may be expected to yield immediate and substantial proof of guilt or innocence than it is in those where the arrest is used to prevent a suspect's escape? Confusion over the nature of "probable cause" may partially explain police reaction to the *Mallory* decision. The term itself seems to have exhausted the judicial imagination and its definition has been standardized over the last 200 years. Blackstone would not have been surprised by the court's definition in the instant case. "Probable cause exists where the facts and circumstances within the arresting officer's knowledge and of which they had reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been committed." *Draper v. United States, supra,* at 332. A note in 46 *Harvard Law Review* on page 1307 attempts to distinguish between probable cause to suspect and probable cause to believe, contending that the former will sustain an arrest. The real problem survives that distinction.

The difficulty does not lie in the definition but in the fact that criminal cases develop in myriad ways. Sometimes the crime and the criminal are identified simultaneously. In other situations suspicion may gather around the criminal gradually over a period of weeks or months. Judge Prettyman discusses this problem in *Trilling v. United States,* [260 F. 2d 677, 697-698 (D.C. Cir. 1958)]. The facts are different in each case but the standard is immutable. Probable cause

is immutable, but not precise. The issues here are similar to those in cases involving proximate cause or the standard of the reasonably prudent man. Indeed, if certain procedural problems were ignored, one might suggest that these too, are issues which a jury is uniquely equipped to settle. The necessary evaluation of facts seems to fall within its province. However, it has been consistently held that the question is one of law to be decided by the courts. *Poldo v. United States,* 55 F. 2d 866 (9th Cir. 1932). Perhaps it was necessary to remove this responsibility from the jury. In that forum zeal for conviction might outweigh more delicate considerations.

The decision has been made. What is important now is recognition that our system of stare decisis is not well adapted to the task assigned to it. Absolutely essential nuances are lost completely in reported opinions so that cases which appear to be identical demand different judgments. Mr. Justice Frankfurter's explanation of the confusion in the due process cases is applicable to this situation. "The real clue to the problem . . . is not to ask where the line is once and for all to be drawn but to recognize that it is for the court to draw it by the gradual and empiric process of 'inclusion and exclusion'." *Wolf v. Colorado,* 338 U.S. 25, 27 (1949). Certain problems are inherent in such a process. The Supreme Court docket is so badly crowded that authoritative decisions are necessarily scarce. Furthermore, because of the double jeopardy doctrine appellate review of marginal cases can be secured only by judgment against the defendant in the first instance. This places the trial court in a serious dilemma if the law is to be perennially unclear. It should be noted also that the three means by which an illegal arrest may be challenged, habeas corpus, an action in tort, or an objection to the introduction of evidence seized during the arrest, are not available or are impractical in the great majority of instances so that the issues usually are not raised at all. In the face of these problems a study of all the pertinent cases is badly needed so that our concept of probable cause can be intensified by distillation.

It appears to be widely recognized that illegal arrests are commonplace today. The very questionable round-up or dragnet has become an accepted practice. Some assert that a liberal right to detain, question, and search is a necessary adjunct to police activity in an urban society. Such rights are granted by the Uniform Arrest Act which has been adopted by Rhode Island, New Hampshire and Delaware. See Warner, *The Uniform Arrest Act,* 28 VA. L. REV. 315 (1942). New proposals are being drafted by the American Law Institute for its Model Penal Code. Perhaps the policy questions which surround the problem of arrest are better settled by legislators than by judges. In either case it is a dangerous fact that the layers of society so insulate both forums from the impact of their decisions that they are apt to be insensitive to the real threat of intrusion which is involved. Whether right or wrong, Mr. Justice Whittaker wrote the opinion in the instant case secure in the knowledge that he was unlikely to be either searched or seized. As our population increases, those who are entrusted with responsibility grown ever farther from intimate contact with those whom their decisions affect. For this reason actions touching our citizens' historical immunity from police interference must be viewed with increasing skeptcism.

HUGH G. WADE

TORTS—ATTRACTIVE NUISANCE—KNOWLEDGE NOT IMPUTED FROM BRIEF OWNERSHIP—A four year old boy wandered onto an unenclosed vacant lot. He stumbled on some junk which was burning on the premises and was injured by the fire. The property had been purchased by the defendant only 21 days before the accident. The defendant's equipment was being moved to the premises, but business was not commenced there until after the accident. The fire had not been started by any of the defendant's employees, but there was evidence that they knew that the lot was used as a dump by the city and by private individuals who set fires there almost daily. The trial court charged the jury on the basis of imputed knowledge of the condition by the defendant based on the lapse of time the property had been in the defendant's possession. The jury returned a verdict in favor of the infant plaintiff. *Held,* judgment reversed and remanded: the defendant cannot be held for imputed knowledge of the condition created by a third party unrelated to him but there are sufficient facts for the jury to find actual knowledge. *Simmel v. New Jersey Coop. Co.,* 143 A. 2d 521 (N. J. 1958).

It is a well recognized principle of law that an owner or possessor of land owes no duty to a trespasser other than to refrain from wilful or wanton conduct. However, an exception has evolved for trespassing infants known as the attractive nuisance doctrine. Today all the states have adopted some form of this doctrine, but its application varies considerably from jurisdiction to jurisdiction. Some courts have restricted its effect to dangerous agencies such as high explosives or dilapidated buildings. *Trudo v. Lazarus,* 116 Vt. 221, 73 A. 2d 306 (1950). Others have applied the doctrine to any artificial or injurious condition where the owner can foresee the presence of infant intruders and when there is an unreasonable risk in the infants' being harmed. *Republic Steel Corp. v. Tillery,* 261 Ala. 34, 72 So. 2d 719 (1954). Before 1952 New Jersey maintained the dangerous agency theory, but since then it has assigned liability where the presence of infants and their consequential injury was reasonably foreseeable. *Harris v. Mentres-Williams* 11 N. J. 559, 95 A. 2d 338 (1953). At present the main consideration in New Jersey is with the necessary precautions which must be taken by the owner or possessor in order to safeguard the attraction. *Diglio v. Jersey Central Power & Light Co.,* 39 N. J. Super. 140, 120 A. 2d 650 (1956); *Wytupeck v. Camden,* 25 N. J. 450, 135 A. 2d 887 (1957). In the District of Columbia there is little case law. The courts have been influenced by the invitation theory of an early case. *United Zinc & Chemical Company v. Van Britt,* 258 U.S. 268 (1922). The infant must be attracted to the premises by some artificial condition. *Best v. District of Columbia,* 291 U.S. 411 (1934); *Eastburn v. Leven,* 72 App. D. C. 190, 113 F. 2d 176 (1940).

The problem of whether imputed knowledge is sufficient to create liability seldom arises because the injurious condition is usually created by the owner or his agents. Imputed knowledge becomes an issue only when a third party has created the condition. However, the liability of the owner or possessor would seem to exist when he has knowledge of the condition on the vacant lot created by the third person. *Kotowski v. Taylor,* 1 Harr. 430, 114 Atl. 861 (Del. 1921). The court in the instant case reached this conclusion by holding that not only does such a result conform to the underlying rationale of the *Restatement of Torts,* (Section 339) but also by defining "maintain" from the *Restatement* as "toleration or sufference of, or acquiescence in" the acts of third parties.

The obligation is not apparent where the owner or possessor has no actual knowledge of the condition created by a third party. The court here considers actual knowledge the *sine qua non* for liability since "toleration or sufference of, or acquiescence in" acts of others necessitates actual knowledge. However, the few cases on this point do not indicate a strong policy. *McFarland, Jr., v. Martin & Glover,* 90 Pa. Super. Ct. 151 (1926); *Cooper v. Overton,* 102 Tenn. 211, 52 S.W. 183 (1899); *Kotowski v. Taylor,* 1 Harr. 430, 141 Atl. 861 (Del. 1921). Where, in *Cooper v. Overton, supra,* there are regular inspections and the condition did not exist when last inspected, knowledge should not be imputed. But *Kotowski v. Taylor, supra,* recognizes a possible flexible area where imputed knowledge can be found if there is a long period of time during which the injurious condition existed on the vacant lot. The case does not specify the length of time which was present, but it was not sufficient to impute knowledge to the owner. Twenty-one days of ownership as in the principal case may not be enough to create imputed knowledge, but to require actual knowledge in all such cases is equally harsh. Differences in degree can be resolved better through a jury's verdict than by rules of law.

THOMAS A. KIEFFER

TORTS—MALPRACTICE—SETTLEMENT WITH FIRST TORTFEASOR NOT ABSOLUTE BAR TO CLAIM FOR DAMAGES FROM NEGLIGENT TREATMENT OF INJURIES—Plaintiff claimed injuries resulting from the negligent treatment in New Jersey by defendant doctors for injuries received in an earlier accident in Ohio. The plaintiff had filed a previous action against the original tortfeasor and, after a mistrial, had settled for $139,000, executing a release. Plaintiff argued that the release to the first tortfeasor did not release the doctors. The trial court granted defendants' motion for summary judgment. On appeal, *held,* summary judgment reversed and remanded for trial. The Supreme Court of New Jersey stated that fact questions, precluding summary judgment for defendants, were presented as to whether the release had been intended to discharge defendants and as to whether plaintiff has been fully compensated. *Daily v. Somberg,* 146 A. 2d 676 (N.J. 1958).

The cases in the different states are in conflict as to the effect to be given a release of the original tortfeasor. One rule states that the release should not be a bar unless there has been full compensation in fact for all injuries. *Wheat v. Carter,* 79 N.H. 150, 106 Atl. 602 (1919). The true question, these courts say, is whether the injured person has already been compensated for his original loss, and not whether the one responsible for the original injury could also have been liable for that loss. The other rule, and by far the majority rule, is stated in *Smith v. Mann,* 184 Minn. 485, 239 N.W. 223 (1931) where the court refused to discuss compensation, and relies simply on the assumption that plaintiff had discharged her whole cause of action. This latter case is followed in *Benesh v. Garvais,* [221 Minn. 1, 20 N.W. 2d 532 (1945)] where the court quoted much from *Mann* to the effect that such a release was conclusive of any action on the injury, including even its aggravation by subsequent treatment. See Annotation, 40 A.L.R. 2d 1075, 1078 (1955).

The instances are few where doctors have been found liable under a theory of malpractice as the instant case indicates may happen. Perhaps the judges in these cases are impressed with the theoretical danger of double recovery, as well as the practical consideration that they are not dealing with plaintiffs who have had no recovery at all. See *Tanner v. Espey,* 128 Ohio St. 82, 190 N.E. 229 (1934); *Knight v. Strong,* 101 Ohio App. 347, 140 N.E. 2d 9 (1955). Generally courts have held that the release of one responsible for an injury constitutes a bar to an action against a physician for his negligent treatment of the injury, at least in the absence of a finding that the negligence of the physician produced an entirely new injury. *Harris v. Brian,* 255 F. 2d 176 (10th Cir. 1958); see also *Borden v. Sneed,* 291 S.W. 2d 485 (Tex. Cir. App. 1956), commenting *inter alia* that forty-four states are in agreement with Texas. However, when courts discuss "full compensation" and "independent and successive acts," [*Ash v. Mortensen,* 24 Cal. 2d 654, 150 P. 2d 876, 877 (1944)] we are put on guard that cases with facts very similar to those cited above will turn out differently. Similar statements and results are found in *Dickow v. Cookinham,* 123 Cal. App. 2d 81, 266 P. 2d 63, 67 (1954)—"The independent and successive acts of the motorist and the doctors produced two separate injuries and gave rise to two distinct causes of action;" see also *Couillard v. Charles T. Miller Hospital, Inc.,* 92 N.W. 2d 96 (Minn. 1958) "but if he has not received full satisfaction, or that which the law considers such, he is not barred until he has received full satisfaction," where the Minnesota court limited *Smith v. Mann, supra,* to instances where the malpractice was a known injury at the time of the release. *Aronovitch v. Levy,* 238 Minn. 237, 56 N.W. 2d 570 (1953).

The court in the instant case seems to be implicitly adopting the minority rule. Disposing of the vast majority of the cases on the ground that the accident occurred in Ohio and the malpractice in New Jersey, the court quotes from the *Mortensen* case, *supra,* stating that "the motorist and doctor were 'independent rather than joint wrongdoers'." It further points out that the incidents differed in "time and place of commission as well as in nature, producing separate injuries and gave rise to distinct causes of action." *Daily v. Somberg,* 146 A. 2d at 681. Terms such as joint wrongdoer, successive acts, and full satisfaction, when used with the traditional concepts of proximate cause and intervening cause, will enable the courts to screen effectively the risks they think physicians should bear.

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