FILED

JUL 29 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By_____

CASE NO. 29725-0-III

COURT OF APPEALS, DIVISION III
STATE OF WASHINGTON

DONNA GARCIA, A Washington Resident; CONCEPCION GARCIA, an Individual; PATRICIA JANE LEIKAM, as the Administrator of the Estate of Tiairra Garcia, A Deceased Person,

Appellants,

v.

THE CITY OF PASCO, WASHINGTON, A Municipal City, et al.

Respondent.

Appellants' Brief on Appeal

Mark D. Kimball, WSBA No. 13146
Mark@mdklaw.com
James P. Ware, WSBA No. 36799
James@mdklaw.com
MDK Law Associates
10900 NE 4th St., Suite 2030
Bellevue, WA 98004
(425) 455-9610

Attorneys for Appellants

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James P. Ware, WSBA No. 36799
James@mdklaw.com
MDK Law Associates
10900 NE 4th St., Suite 2030
Bellevue, WA 98004
(425) 455-9610

Attorneys for Appellants

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I. ASSIGNMENT OF ERROR.

The Trial Court erred when it granted summary judgment dismissing Appellants' (collectively referred to as "Garcia") claims of negligence against the City of Pasco because it stated they were barred by the Public Duty Doctrine.

II. ISSUES PRESENTED.

Should the Trial Court's ruling be reversed because **Robb v. City of Seattle**, 159 Wn. App. 133, 245 P.3d 242 (2010) states that the Public Duty Doctrine does not apply to claims based upon an affirmative, but negligent, act of a government agent that exposes the Plaintiff to third-party criminal activity that is reasonably foreseeable? [1]

Did the Trial Court err when it dismissed Garcia's claims against Pasco as barred by the Public Duty Doctrine because it found that "gratuitous promises" were not made to bystanders who would have acted further but for the promises made to them and therefore the exception to the Public Duty Doctrine known as the "Voluntary Rescue Doctrine" did not apply?

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[1] By asserting that **Robb v. City of Seattle**, 159 Wn. App. 133, 245 P.3d 242 (2010) is dispositive of this matter Garcia is not raising a new issue at the appellate level in violation of RAP 2.5(a). Rather, Garcia is applying a change in law that occurred after the trial court made its oral ruling but before the order was filed, which does not violate RAP 2.5(a). **Brundridge v. Fluor Federal Services, Inc.**, 164 Wn.2d 432, 191 P.3d 879 (2008).

III. STATEMENT OF THE CASE.

A. Substantive Facts.

This case stems from the death of Tiairra Garcia from a gunshot wound on June 22, 2008 at 1911 Parkview, Pasco, Washington as the Pasco Police stood outside (there in response to numerous 911 calls) questioning the residence's occupant about a van wrecked and abandoned on the property. The officers treated the scene as a hit and run despite the fact that a neighbor had contacted 911 and informed it that the occupants of the van were dragging an obviously injured person into the back of the home, that a domestic dispute had occurred there days early, and that something other than a simple hit and run was transpiring.

Although Tiairra Garcia's life ended at 1911 Parkview near midnight, her night began innocently enough with Marnicus "Pooh" Lockhard and Ashone Hollinquest picking her up to go out for the evening. (CP 176-178) The two drove with Tiairra Garcia to a local tavern, Joey's 1983. (CP 180) There, Tiairra Garcia sat in the van outside until Lockhard and Hollinquest were ejected for fighting approximately half and hour to one hour later. (CP 183-6)

After being ejected from the tavern, Tiairra then drove the parties to another location. (CP 186) While in the parking lot of another tavern, Hollinquest and Lockhard exchanged a gun. The gun discharged and the bullet struck Tiairra. (CP 187, 192-4)

Lockhard then pushed Tiairra aside, as she was in the driver's seat at the time, and began to drive the van from the passenger's seat to 1911 Parkview. (CP 195-6) In route Lockhard struck numerous vehicles which resulted in significant damage to the van. (CP 200-10) Numerous 911 callers report that the van was sparking because it was driving on its rims. Upon arriving at 1911 Parkview, the van careened onto the lawn and struck a fence. (Id.) The resulting noise alerted a neighbor Melissa Genett and she instructed her fiancé, John Gorton, to contact 911. (CP 313-5) In his 911 call, Mr. Gorton described to 911 the state of the van, that it had been on fire and was smoking, and that two individuals were dragging a person into 1911 Parkview. (CP 332-4; 347-9) Mr. Gorton also stated that a domestic dispute had occurred at the house the day prior and that the police needed to get there because it was clear "something was going on" since the men clearly dragged an unconscious person into the back of the house. (CP 348) 911 conveyed that police were on their way and continued to request information related to the incident. (Id.) Mr. Gorton's call concluded when the police arrived at 1911 Parkview.

Based on John Gorton's conversation with 911, he and Ms. Genett got the impression that 911 was there to respond to their specific concerns. (CP 99-103) Mr. Gorton stated that someone was being dragged into the house, that he had witnessed a domestic dispute the night before, that something was going on and that police needed to go to the house immediately. (CP 38-40) Importantly, the 911 operator led Mr. Gorton to believe that the police were there to address his concerns specifically (Tiairra Garcia being dragged into the house) and not simply in response to a hit-and-run. (Id.) Neither Mr. Gorton nor Ms. Genett gave any further assistance because they were led to believe that the officers were there to investigate whether someone had been injured and needed assistance. (CP 38-9; 99-107)

Upon arrival at 1911 Parkview the police spoke to the renter of 1911 Parkview. (CP 381-2) Then, after a cursory view of the van, the responding officer made arrangements for it to be towed and left. (Id.) Inside 1911 though, Tiairra Garcia lay unconscious in a room adjacent to the living room. (CP 214-6) While the police were present and talking to the resident of the home (she is referred to as "Granny"), Hollinquest was in the room with Tiairra Garcia. (Id.) He left periodically to speak to Marnicus Lockhard who, at some point in time, instructed Hollinquest to change clothes so that they could discard the ones they were wearing.

(Id.) After the police left Marnicus and Lockhard dragged Tiairra Garcia into the garage where they discussed dismembering her body in order to dispose of it. Hollinquest apparently protested and the parties placed Tiairra Garcia into a sleeping bag and wrapped it with duct tape. (CP 235-8) The men then proceeded to procure a rental car and drive near Mt. Rainer National Park where they attempted to discard of Tiairra Garcia's body in a ravine. (CP 275-7) Both men then fled the state. The police did not recover Tiairra Garcia's remains until June 2009. (CP 370)

B. Procedural Facts.

As relevant to this appeal, Garcia brought claims against the City of Pasco for negligent acts of the Pasco Police when they responded to the 911 calls. (CP 418-9) Specifically, Garcia alleged that when Pasco Police dispatched an officer to 1911 Parkview, it acted negligently because its actions failed to address the specific information provided to Pasco Police through the 911 calls. (CP 419) In particular, despite the information provided by Gorton and Genett, Pasco Police treated the incident as solely a hit and run. (CP 381-2) There are no facts that Pasco Police treated the incident as anything other than a motor vehicle incident. (Id.)

On December 20, 2010, the City of Pasco moved for Summary Judgment alleging that Garcia's claims are barred by the Public Duty Doctrine. (CP 379-402) As the City of Pasco correctly noted, the Public

Duty Doctrine serves as a threshold test to suit against a government entity for negligent acts. (CP 382-3) In response, Garcia argued that Tiairra Garcia fell within the voluntary rescue exception to the doctrine. In support of the argument, Garcia focused on the fact that but for the City of Pasco's representations made to Gorton and Genett, they would have offered aide. (CP 359-62) Further, Garcia asserted, the promises made to Gorton were gratuitous because the promise was not simply that the police would investigate the scene but rather that the police would respond to the specific information Gorton provided, namely that Hollinquest and Lockhard were dragging Tiairra Garcia into the back of the home and that she was hurt. (Id.)

In granting the City of Pasco's motion, the court stated that the Public Duty Doctrine applied and that Garcia had failed to show that the promise was gratuitous, something that is completely outside of the responsibilities of the police. (RP 29-30)

Garcia appeals the order granting summary judgment.

IV. SUMMARY OF ARGUMENT.

The Trial Court's order dismissing Garcia's claims against the City of Pasco should be reversed because the Public Duty Doctrine does not apply to Garcia's claims and because even if the Public Duty Doctrine did apply, Garcia's claims fall within the voluntary rescue exception.

Shortly after the Trial Court made its oral ruling in this matter, the Court of Appeals ruled in **Robb v. City of Seattle** that the Public Duty Doctrine does not apply to claims for negligence when duty arises out of RESTATEMENT (SECOND) OF TORTS § 302B. Washington law, applying § 302B, holds that where an actor's affirmative act has created or exposed the plaintiff to a recognizable risk of harm, a duty to protect may exist even though the harm results from the illegal activity of a third party. With respect to government actors, **Robb** states that a duty may arise when the agent takes control of a situation (through some affirmative act) and either knew or should have known that absent taking certain action, harm may occur from the illegal acts of a third party unless the government actor guard against the harm.

With regard to Garcia, the responding officer took control of the situation by responding to the 911 call and investigating it. The Pasco Police Department had actual knowledge that Tiairra Garcia had been dragged through the front yard of the subject house and that she had been taken into the back of the house. The Pasco Police Department was also aware that there had been previous domestic disputes and violence at the same house mere days before Tiairra Garcia died. Despite this knowledge, the Department failed to meet its duty because it failed to act based upon that information. The Pasco Police Department took the

affirmative action of responding to the 911 call from John Gorton but did not use reasonable care in so doing. Accordingly, Pasco Police, through its affirmative actions, had a duty to use reasonable care given the knowledge it had. Pasco Police failed to use reasonable care despite the fact that it knew or should have known that absent its fulfillment of this duty, harm may occur from the illegal acts of a third party.

V. ARGUMENT.

A. Standard of Review.

Garcia pursues this appeal from a ruling granting summary judgment. When reviewing a summary judgment, an appellate court engages in the same inquiry as the trial court. **Gossett, v. Farmers Ins. Co. of Washington**, 82 Wn. App. 375, 381, 917 P.2d 1124 (1996) (reversed on other grounds, 133 Wn.2d 954, 948 P.2d 1264 (1997)). Summary judgment is proper if the pleadings, depositions, and affidavits show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Id. "The court must consider the facts submitted and all reasonable inferences from those facts in the light most favorable to the nonmoving party and the motion should be granted only if, from all the evidence, reasonable persons could reach but one conclusion." Id. (emphasis ours) Review is de novo, requiring the

court to step into the shoes of the trial court by engaging in the same inquiry as the trial court. Id.

Here, the Court should reverse the Trial Court's grant of summary judgment because the Public Duty Doctrine does not bar Garcia's claims. In particular, the Public Duty Doctrine does not bar claims that Police failed to act with reasonable care when it responded to the 911 calls because it had specific knowledge that Tiairra Garcia had been dragged into the back of the home and that there was a history of domestic violence at the same home mere days before. Given this information, the criminal activity that transpired while the officers treated the scene as solely a hit and run was reasonably foreseeable and the City failed to use reasonable care when it acted. Further, the Rescue Doctrine excepts the use of the Public Duty Doctrine because gratuitous promises were made to bystanders, which caused them to forbear on their own efforts to rescue Tiairra Garcia.

B. Substantive Authority

1. The Public Duty Doctrine does not bar Claims that Police Failed to Act With Reasonable Care in Responding to 911 Calls Because it Had Specific Knowledge that Tiairra Garcia Had Been Dragged Into the Back of the Residence.

Robb v. City of Seattle, 159 Wn. App. 133, 245 P.3d 242 (2010)[2] is dispositive of this appeal.[3] In **Robb**, Division I was asked to review an order denying the City of Seattle's summary judgment motion to dismiss Robb's claims for negligence against the City for its failure to act with reasonable care. Id. at 135. The factual basis of Robb's claims are analytically identical to those in the present case. Specifically, on June 26, 2005, Samson Berhe was walking along a road in Seattle when he flagged down Michael Robb, who was driving by. Id. When Robb stopped, Berhe pulled out a shotgun and shot Robb, killing him instantly.[4] Id. Approximately two hours before Berhe murdered Robb, two Seattle Police Officers stopped Berhe outside his home and questioned him in response to a report of a burglary near Berhe's home. Id. at 137. At the time of the questioning, the officers noticed shotgun shells near Berhe, that he was acting erratically, and that Berhe was making incoherent statements. Id. Despite the fact the officers saw the ammunition near Berhe, they did not confiscate it. Id. After the officers left, a bystander witnessed Berhe pick up an object from the ground. Id.

[2] The Opinion was filed December 27, 2010, seven days after the Court rendered its oral ruling in this matter but before the Order Granting Summary Judgment was entered.
[3] Because this case was pending when the Court of Appeals filed the **Robb** opinion, its holding applies to this matter. **Lunsford v. Saberhagen Holdings, Inc.**, 166 Wn.2d 264, 208 P.3d 1092 (2009)(holding that a new rule of law announced appellate courts applied retroactively to parties whose actions are not procedurally barred)
[4] Behre was 17 at the time and ultimately found not guilty because he was found not fit to stand trial. Before the incident occurred, Behre had a history of mental illness and appeared to be schizophrenic.

Berhe later showed his neighbor a handful of shotgun shells and bragged about how he would be "popping off rounds all night." Id. 138. Berhe shot Robb later that night with the ammunition the officers had seen when they questioned him earlier. Id.

In response to the murder, Robb's wife brought a claim on behalf of Robb's estate claiming, among other things, that the officers who stopped Berhe prior to the murder failed to act with reasonable care because they did not confiscate the shotgun shells and/or detain Behre. Id.

With these facts, the City of Seattle moved for summary judgment alleging that, among other things, the Public Duty Doctrine barred Robb's claims. Id. As a basis for its argument, the City of Seattle argued that because Robb could not fit into any of the four exceptions to the Public Duty Doctrine, the City of Seattle owed no duty to Robb. The City's argument, that a duty to all is a duty to none, was rejected by the Court. Robb, 159 Wn. App. at 138-9. In denying the City of Seattle's motion, the court noted:

> The question presented by the defendants' Motion for Summary Judgment is whether the allegedly negligent actions of the officers who contacted Samson Berhe and Raymond Valencia on 6/26/05 were affirmative acts negligently performed or more appropriately considered as failures to act. If the latter, then the public duty doctrine bars this action. *Coffel v. Clallam County*, 47 Wn. App.

> 397, 403, 735 P.2d 686 (1987). If the former, then Restatement (Second) of Torts § 302B (1965) and comment "a" thereto is applicable and may provide a remedy. It is undisputed that none of the recognized exceptions to the public duty doctrine apply here to allow its use in this negligence action. *Cummins v. Lewis County*, 156 Wn.2d 844, 852-53, 133 P.3d 458 (2006).
>
> Applying the summary judgment standard, the plaintiff has produced sufficient evidence of affirmative acts negligently performed by defendants that a duty may be found to exist as a matter of law pursuant to Restatement (Second) of Torts § 302B.

Id. The City of Seattle sought discretionary review by Division I, which was granted. Id.

In affirming the Trial Court's decision, Division I noted that three prior cases have already established that § 302B[5], comment e[6], is recognized in Washington as a source of duty for private individuals. **Robb**, 159 Wn. App. at 145. Importantly, the Court noted that "if a private actor can owe a duty under section 302B, as a consequence of the abolition of sovereign immunity the same must be true of a government

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[5] RESTATEMENT (SECOND) OF TORTS § 302B states " An act or an omission may be negligent if the actor realizes or should realize that it involves an unreasonable risk of harm to another through the conduct of the other or a third person which is intended to cause harm, even though such conduct is criminal."

[6] Comment e states "There are, however, situations in which the actor, as a reasonable man, is required to anticipate and guard against the intentional, or even criminal, misconduct of others. In general, these situations arise where the actor is under a special responsibility toward the one who suffers the harm, which includes the duty to protect him against such intentional misconduct; or where the actor's own affirmative act has created or exposed the other to a recognizable high degree of risk of harm through such misconduct, which a reasonable man would take into account. The following are examples of such situations. The list is not an exclusive one, and there may be other situations in which the actor is required to take precautions."

actor." Id. at 145. Further, the Court reasoned that the limitations set forth in § 302B are sufficient to focus the duty owed by a government actor to avoid an "unlimited spectre of governmental liability", which the City of Seattle argued that the § 302B standard would create. Id.

The Court also noted that its ruling, that a police officer's affirmative acts may give rise to liability outside the confines of the Public Duty Doctrine, is simply a continuation of the ruling in **Coffel v. Clallam County**, 47 Wn. App. 397, 735 P.2d 686 (1987). In **Coffel**, the plaintiff filed suit against Clallam County for vandalism by a former business partner, Clinton Caldwell, of the commercial property and business Coffel owned. Id. at 398. After the first incident of vandalism, Coffel notified the police and county sheriffs of the incident. Id.

The night after Coffel notified authorities, Caldwell returned and began dismantling the property. **Coffel**, 47 Wn. App. at 399. When the authorities arrived, Caldwell stated he was the property's owner and was simply doing demolition for a remodeling project. Id. As a result, the authorities did not stop him. When Coffel arrived, he stated he was the owner of the property and attempted to stop Caldwell but authorities prevented Coffel from intervening and told him to leave. Id. at 400.

Coffel brought suit against the authorities for, among other things, negligence. His claims were dismissed at summary judgment. Id. at 402.

In affirming the lower court's ruling in part, the Court noted that with regard to the inaction of authorities, Coffel did not fit into one of the exceptions to the Public Duty Doctrine. **Coffel**, 47 Wn. App. at 403. With regard to the officers who restrained Coffel when he attempted to stop Caldwell though, the court found liability did exist, stating "the [Public Duty Doctrine] provides only that an individual has no cause of action against law enforcement officials for a failure to act. Certainly if the officers do act, they have a duty to act with reasonable care." Id. at 403-4 (emphasis ours). Accordingly, Coffel had valid claims against the officers who took affirmative action, restraining Coffel, and in so doing, failed to use reasonable care.[7]

With respect to a duty arising out of Comment e to § 302B, the Robb Court analogized **Parrilla v. King County**, 138 Wn. App. 427, 435-38, 157 P.3d 879 (2007) to Robb's claims. **Robb**, 159 Wn. App. at 147. In **Parrilla**, after an altercation arose on a county bus, the driver stopped the vehicle and ordered everyone off the bus. **Parrilla**, 138 Wn. App. at 430-1. The driver and all the passengers exited the bus except for Courvoisier Carpenter who was left on the still idling bus. Id. at 431.

[7] Although not cited to in the Coffel Court's opinion, the basis for its holding appears to be RESTATEMENT (SECOND) OF TORTS § 302 cmt. a which states "In general, anyone who does an affirmative act is under a duty to others to exercise the care of a reasonable man to protect them against an unreasonable risk of harm to them arising out of the act. The duties of one who merely omits to act are more restricted."

When the driver realized Carpenter was still on the bus, he stepped onto the bus and ordered Carpenter to exit. Id. Carpenter was acting irrationally and the driver again exited the bus. Id. Carpenter proceeded to drive the bus down a busy Seattle street striking multiple vehicles including the Parrillas' vehicle. Id. The Parrillas filed suit claiming, among other things, that the driver acted negligently when he allowed the bus to remain idling with Carpenter on it because the driver either knew or should have known that his affirmative acts exposed the Parrillas to a high degree of risk. Id. at 433-4.

Similar to the arguments presented by Clallam County in **Coffel**, King County asserted that it could only be liable for negligence if the Parrillas could assert one of the four exceptions to the Public Duty Doctrine, in particular the special relationship exception. **Parrilla**, 138 Wn. App. at 135-6. The County asserted that because no special relationship exited between either the Parrillas (the victims of the criminal conduct) or Carpenter (the perpetrator of the crime), the County owed no duty to the Parrillas. Id. Rejecting this argument, the Court noted that Washington law recognizes that when a party takes affirmative action, a duty may exist to avoid actions that expose others to reasonably foreseeable criminal acts of a third-party. Id. at 437. This duty, the Court noted, arises "only when the risk of harm is recognizable, and only when a

reasonable person would have taken the risk into account." Id. at 437. With the **Parrilla** holding in mind, the Court in **Robb** stated that "a jury could find that the affirmative ats of the officers in connection with the burglary stop created a risk of Berhe coming back for the shells and using them intentionally to harm someone, a risk that was recognizable and extremely high." **Robb**, 159 Wn. App. at 147. As a result, the City owed a duty in tort to protect Robb against the criminal activities of Behre.

In summary, the Robb Court held that because governmental immunity was abolished, government agents, including police officers, can be found to have a duty of care owed under § 302B when the agent takes an affirmative act, has knowledge that a third-party's actions, including illegal actions, are reasonably foreseeable, and fails to act with reasonable care to safeguard against the criminal activity. Accordingly, because the basis of the duty is an affirmative act and not a failure to act, the Public Duty Doctrine does not apply and the aggrieved party need not show that she fits into one of the four exceptions to the doctrine.

Given the holding in **Robb**, the Trial Court's dismissal of Garcia's claims should be reversed.

2. The City of Pasco Took Affirmative Action when it Responded to the 911 Calls and its Failure to Act with Reasonable Care Exposed Tiairra Garcia to Foreseeable Harm.

As both the trial court and appellate court noted in **Robb**, whether the government actor has a duty under § 302B or one of the four exceptions to the Public Duty Doctrine rests on if the complained of activity is affirmative action or a failure to act. **Robb**, 159 Wn. App. at 139; **Coffel v. Clallam County**, 47 Wn. App. 397, 403-4, 735 P.2d 686 (1987). In **Robb**, the affirmative action was the "Terry Stop" and questioning of Behre. In **Coffel**, the affirmative action was the restraint of the property owner. **Coffel**, 47 Wn. App. at 404. Importantly, in both situations, the affirmative action the police took was within the course of their duties. The officers in **Robb** were responding to a burglary report when they questioned Behre. **Robb**, 159 Wn. App. 137. That questioning of Behre served as the basis for Robb's claims. In **Coffel**, the officers appeared to be responding to a 911 call when they restrained Coffel from protecting his property. **Coffel**, 47 Wn. App. 399. Their actions in responding to the call served as the basis for Coffel's claims.

Similar to both Robb and Coffel, Garcia's claims stem from Pasco Police's response to 911 calls regarding the van. The police took the affirmative action when they arrived at 1911 in response to multiple reports of the van striking vehicles and crashing into the resident's fence, and the neighbors' report that Marnicus and Lochart were dragging Tiairra Garcia into the back of the house. When the officer arrived, he had notice

from Gorton's 911 call that someone was hurt and had been dragged into the back of the home. The officers also had knowledge that a prior domestic fight occurred at the home mere days before Tiairra Garcia's death. The affirmative action taken by the Pasco Police, responding to the 911 call, was within their scope of work. (CP 145) However, simply because the police took affirmative action within the scope of their duties does not excuse the City of Pasco from liability under § 302(B) and the Court's decision in **Robb**.

Importantly, Garcia's claims are not based upon assertions that the Pasco Police failed to act. Rather, Garcia alleges that when the Pasco Police took the affirmative action of responding to the 911 calls, it failed to use reasonable care because it did not investigate Gorton's report that someone was injured and had been dragged into the back of the home. Garcia's claims are not based upon inaction of the City but rather the negligent performance of affirmative actions they took. (CP 419)

Garcia's claims also do not allege that Pasco Police owed a duty simply because they responded to 1911 Parkview. Such an assertion would, as the City of Seattle alluded to in **Robb**, create an unlimited spectre of governmental liability. Rather, Garcia's claims are based upon the fact that when the officer arrived at the scene, the Pasco Police had specific knowledge that individuals were engaging in criminal activity, that

days prior a domestic dispute had occurred in the front of the home, and that Marnicus and Lockhard had dragged Tiairra Garcia into the back of the home. Pasco Police took control of the scene when it arrived at the home. Pasco Police had specific knowledge that the perpetrators of the illegal activity complained of in the 911 calls dragged Tiairra Garcia into the back of the home. Pasco Police also had knowledge that there had been domestic disputes at this home days before. Despite this knowledge, Pasco Police simply treated the incident as a hit and run. Pasco Police did not act to safeguard the reasonably foreseeable criminal activity that was occurring. Garcia's claims are not that the Pasco Police failed to act; rather Garcia's claims are that when the Pasco Police took affirmative action, it failed to use reasonable care. Accordingly, the Public Duty Doctrine does not bar Garcia's claims.

Applying § 302B and **Robb** to Garcia, it is clear that the City owed a duty to Tiairra Garcia through its affirmative acts and the knowledge it had when officers arrived at the scene. Because Garcia's claims are based upon the affirmative acts of the Pasco Police, the Public Duty Doctrine does not serve as a bar to Garcia's claims. As the Court noted in **Robb**, if a private actor can owe a duty under § 302B so should government agents. Because **Robb** holds that the Public Duty Doctrine does not apply to claims based upon affirmative actions of a government agent, the Trial

Court erred when it dismissed Garcia's claims and this Court should reverse the dismissal and remand this matter for further proceedings.

3. Garcia's Claims are Not Barred by the The Public Duty Doctrine Because of the Rescue Doctrine Exception.

Even if the **Robb** case did not apply to Garcia's claims, the Trial Court erred when it dismissed Garcia's claims because Garcia's claim falls within the rescue exception of the Public Duty Doctrine. Generally the Public Duty Doctrine functions as a bar to liability for claims that a governmental agency failed to act. The basic premise of the Public Duty Doctrine can be summarized as a duty to everyone is a duty to no one and liability cannot attach for breaches of a duty owed to the public. See generally **Babcock v. Mason County Fire District**, 144 Wn.2d 77, 30 P.3d 1261 (2001). Yet a significant exception to the Public Duty Doctrine is called the Rescue Doctrine or Voluntary Rescue Doctrine. **Smith v. State**, 59 Wn. App. 808, 802 P.2d 133 (1990); **Brown v. MacPherson**, 86 Wn.2d 293, 545 P.2d 13 (1975). For a state agency to become liable under the Rescue Doctrine three elements are present: (1) The agent must gratuitously assume the duty to warn or render aide to the injured party and (2) the government agent's assumption of the duty causes the injured party or a third party with whom the injured party has privity to refrain from acting; and (3) the government agent breaches the duty it assumed. *Brown*,

86 Wn.2d at 299-300. Accordingly, under the rescue doctrine specific statements and/or representations need not be given to the victim directly; rather statements may be made to a third party who, in reliance on the gratuitous promise, refrains from providing further assistance. *Id.*

Case law construing the Public Duty Doctrine and its exceptions is far from conclusive. In particular, Washington case law rarely addresses the Rescue Doctrine. In fact, the Rescue Doctrine first arose as a limit to the Public Duty Doctrine in 1975 in the **Brown v. MacPherson** case. In adopting the rule with respect to omissions (i.e. failure to act as promised or implied) the *Brown* Court stated that the offer to render aide, even if implicit, can subject the agency to liability if the offer is breached. **Brown**, 86 Wn.2d at 301(holding that even where an offer to seek or render aid is implicit and unspoken, a duty to "make good" on the representation is reasonable). Further, the Court in **Brown** distinguished the Rescue Doctrine from the special relationship doctrine in finding that unlike the special relationship doctrine representations need be made to someone with whom the injured party has privity only and not to the injured party directly. *Id.* at 300. Despite *Brown*'s direction, courts have given little subsequent direction as to what a gratuitous act by a state agent entails. In **Babcock v. Mason County Fire District** Division II of the Court of Appeals noted that integral to the rescue doctrine is that the

agent gratuitously assume the duty. **Babcock**, 101 Wn. App. At 685. Neither **Brown** nor **Babcock** define "gratuitous". Rather, the only indication as to what that means in relation to a government entity is that a gratuitous assumption is the assumption of a duty outside the agency's purpose or duties. In **Babcock** the sole function of the fire department was to fight fires and therefore, no gratuitous representations could have been made.

Here, no party disputes that the role of 911 and Pasco Police Department is to respond to emergencies. Garcia does not dispute that the police were sent to 1911 Parkview. Garcia does not dispute that the reason that dispatch sent officers to 1911 Parkview was because the 911 operator directed police to the house. Rather, the issue is that an assurance was made to John Gorton that police would be sent to the house in response to his description of an unconscious person being dragged into the back of the house. The Pasco Police had a duty to investigate the multiple 911 calls. However, the assurances that the responding officers would address and investigate the scene in response to his specific concerns, was gratuitously assumed.

After Gorton and Genett called "911" they refrained from acting any further based upon the implicit promises and their understanding that 911 conveyed their concerns to the police and the police were going to investigate the information. (CP 99-103) Had Gorton and Genett known that the police would treat the investigation as merely an alleged hit-and-

run, they would have acted further. (Id.) However, they refrained from acting because they understood that 911 summoned police to 1911 Parkview to investigate their specific observations. As the City notes: the role of the police and 911 is to respond to emergencies. However, duties beyond this role were gratuitously assumed and the result was that Mr. Gorton and Ms. Genett refrained from rendering any assistance that would have helped Tiairra Garcia.

Because Mr. Gorton and Ms. Genett relied on assurance that the police were provided all the information they conveyed to 911 and because they relied on the representation that the police were there to investigate their concerns specifically, the government agencies' gratuitous assumption of duties was the proximate cause of Tiairra Garcia's death. Because the gratuitous promises were made outside the role of Pasco Police, the trial Court erred when it stated that the rescue exception to the Public Duty Doctrine did not apply and the Trial Court's decision should be reversed.

VI. CONCLUSION.

This Court should reverse the lower court's grant of summary judgment for two reasons. First, **Robb v. City of Seattle** holds that Garcia's claims are not subject to the Public Duty Doctrine. Garcia's

claims are based upon the affirmative action taken by Pasco Police, which it performed negligently. When the Pasco Police arrived at the home, 911 callers had already informed them that a domestic argument had occurred a couple of days before, that Lockhard and Hollinquest had dragged the injured Tiairra Garcia into the back of the house, and that something was going on beyond a simple hit and run. Despite this knowledge and the foreseeability of the illegal acts that occurred while the Pasco Police were at the house, the Pasco Police Department failed to use reasonable care in the performance of its duties. As a result of its negligence, Ms. Garcia lay dying inside the home with the officers from the Pasco Police Department mere yards away. Garcia's claims are not based upon inaction. Rather, Garcia's claims are based upon Pasco Police's affirmative acts and the (breached) duties that arose as a result.

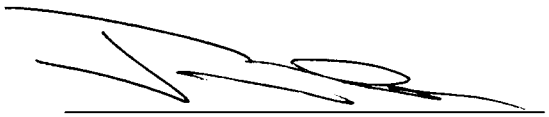
Secondly, the lower court erred when it determined that the Public Duty Doctrine served as a bar to Garcia's claims because Tiairra Garcia fell within the voluntary rescue exception. 1911 Parkview's neighbors witnessed Tiairra Garcia being dragged into the back of the home. Genett stated she would have rendered further aide had she known that the officers of the Pasco Police Department were not going to investigate her specific concerns. This promise was gratuitous and it caused Gorton and

Genett from acting further. Accordingly, the lower court applied the Public Duty Doctrine in error.

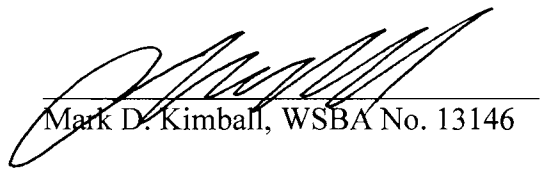
For these reasons and the reasons stated above, this Court should reverse the Trial Court's order dismissing Garcia's claims against the City of Pasco.

Respectfully submitted this 28th day of July, 2011.

MDK Law Associates:
MARK DOUGLAS KIMBALL, P.S.
Attorneys for Appellants



James P. Ware, WSBA No. 36799



Mark D. Kimball, WSBA No. 13146

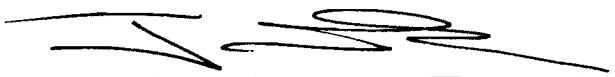
DECLARATION OF SERVICE

I certify that on July 28, 2011 I caused a true and correct copy of Appellants' Brief on Appeal to be served on the following in the manner indicated below:

George Fearing
Andrea J. Clare
Leavy, Schultz, Davis & Fearing, P.S.
2415 W. Falls Avenue
Kennewick, WA 99336
Fearing@tricitylaw.com
Clare@tricitylaw.com

FedEx Overnight Express Mail
PDF Attachment to Counsel's Email Address of Record

Dated: July 28, 2011



James P. Ware, WSBA # 36799
MDK Law Associates
(425) 455-9610

SECOND (RESTATEMENT) TORTS § 302B

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Case Citations

Rules and Principles

Division 2 - Negligence

Chapter 12 - General Principles

Topic 4 - Types of Negligent Acts

Restat 2d of Torts, § 302B

§ 302B Risk of Intentional or Criminal Conduct

An act or an omission may be negligent if the actor realizes or should realize that it involves an unreasonable risk of harm to another through the conduct of the other or a third person which is intended to cause harm, even though such conduct is criminal.

COMMENTS & ILLUSTRATIONS: Comment:

a. This Section is a special application of the rule stated in Clause (b) of § 302. Comment *a* to that Section is equally applicable here.

b. As to the meaning of "intended," see § 8 A. The intentional conduct with which this Section is concerned may be intended to cause harm to the person or property of the actor himself, the other, or even a third person.

c. Where the intentional misconduct is that of the person who suffers the harm, his recovery ordinarily is barred by his own assumption of the risk (see Chapter 17 A) or his contributory negligence (see Chapter 17). This does not mean, however, that the original actor is not negligent, but merely that the injured plaintiff is precluded from recovery by his own misconduct. There may still be situations in which, because of his immaturity or ignorance, the plaintiff is not subject to either defense; and in such cases the actor's negligence may subject him to liability.

Illustration:

1. A leaves dynamite caps in an open box next to a playground in which small children are playing. B, a child too young to understand the risk involved, finds the caps, hammers one of them with a rock, and is injured by the explosion. A may be found to be negligent toward B.

d. Normally the actor has much less reason to anticipate intentional misconduct than he has to anticipate negligence. In the ordinary case he may reasonably proceed upon the assumption that others will not interfere in a manner intended to cause harm to anyone. This is true particularly where the intentional conduct is a crime, since under ordinary circumstances it may reasonably be assumed that no one will violate the criminal law. Even where there is a recognizable possibility of the intentional interference, the possibility may be so slight, or there may be so slight a risk of foreseeable harm to another as a result of the interference, that a reasonable man in the position of the actor would disregard it.

Illustration:

2. A leaves his automobile unlocked, with the key in the ignition switch, while he steps into a drugstore to buy a pack of cigarettes. The time is noon, the neighborhood peaceable and respectable, and no suspicious persons are about. B, a thief, steals the car while A is in the drugstore, and in his haste to get away drives it in a negligent manner and injures C. A is not negligent toward C.

e. There are, however, situations in which the actor, as a reasonable man, is required to anticipate and guard against the intentional, or even criminal, misconduct of others. In general, these situations arise where the actor is under a special responsibility toward the one who suffers the harm, which includes the duty to protect him against such intentional misconduct; or where the actor's own affirmative act has created or exposed the other to a recognizable high degree of risk of harm through such misconduct, which a reasonable man would take into account. The following are examples of such situations. The list is not an exclusive one, and there may be other situations in which the actor is required to take precautions.

A. Where, by contract or otherwise, the actor has undertaken a duty to protect the other against such misconduct. Normally such a duty arises out of a contract between the parties, in which such protection is an express or an implied term of the agreement.

Illustration:

3. The A Company makes a business of conducting tourists through the slums of the city. It employs guards to accompany all parties to protect them during such tours. B goes upon such a tour. While in a particularly dangerous part of the slums the guards abandon the party. B is attacked and robbed. The A Company may be found to be negligent toward B.

B. Where the actor stands in such a relation to the other that he is under a duty to protect him against such misconduct. Among such relations are those of carrier and passenger, innkeeper and guest, employer and employee, possessor of land and invitee, and bailee and bailor.

Illustrations:

4. The A company operates a hotel, in which B is a guest. C, another guest, approaches B in the hotel lobby, threatening to knock him down. There are a number of hotel employees on the spot, but, although B appeals to them for protection, they do nothing, and C knocks B down. The A Company may be found to be negligent toward B.

5. A rents an automobile from B. A keeps the automobile in his garage, but fails to lock either the car or the garage. The car is stolen. A may be found to be negligent toward B.

C. Where the actor's affirmative act is intended or likely to defeat a protection which the other has placed around his person or property for the purpose of guarding them from intentional interference. This includes situations where the actor is privileged to remove such a protection, but fails to take reasonable steps to replace it or to provide a substitute.

Illustrations:

6. A leases floor space in B's shop. On a holiday, A goes to the shop, and on leaving it forgets to take the key from the door. A thief enters the shop through the door and steals B's goods. A may be found to be negligent toward B.

7. A negligently operated train of the A Railroad runs down the carefully driven truck of B at a crossing, and so injures the driver as to leave him unconscious. While he is unconscious the contents of the truck are stolen by bystanders. The A Company may be found to be negligent toward B with respect to the loss of the stolen goods.

8. The A Company has a legislative authority to excavate a subway, and in so doing to remove a part of the wall of the basement of B's store. The workmen employed by the company remove a part of the wall, leaving an opening sufficient to admit a man. They leave the opening unguarded. During the night a thief enters the store through the opening, and steals B's goods. The A Company may be found to be negligent toward B.

D. Where the actor has brought into contact or association with the other a person whom the actor knows or should know to be peculiarly likely to commit intentional misconduct, under circumstances which afford a peculiar opportunity or temptation for such misconduct.

Illustrations:

9. A is the landlord of an apartment house. He employs B as a janitor, knowing that B is a man of violent and uncontrollable temper, and on past occasions has attacked those who argue with him. C, a tenant of one of the apartments, complains to B of inadequate heat. B becomes furiously angry and attacks C, seriously injuring him. A may be found to be negligent toward C.

10. A, a young girl, is a passenger on B Railroad. She falls asleep and is carried beyond her station. The conductor puts her off of the train in an unprotected spot, immediately adjacent to a "jungle" in which hoboes are camped. It is notorious that many of these hoboes are criminals, or men of rough and violent character. A is raped by one of the hoboes. B Railroad may be found to be negligent toward A.

E. Where the actor entrusts an instrumentality capable of doing serious harm if misused, to one whom he knows, or has strong reason to believe, to intend or to be likely to misuse it to inflict intentional harm.

Illustration:

11. A gives an air rifle to B, a boy six years old. B intentionally shoots C, putting out C's eye. A may be found to be negligent toward C.

F. Where the actor has taken charge or assumed control of a person whom he knows to be peculiarly likely to inflict intentional harm upon others.

Illustration:

12. A, who operates a private sanitarium for the insane, receives for treatment and custody B, a homicidal maniac. Through the carelessness of one of the guards employed by A, B escapes, and attacks and seriously injures C. A may be found to be negligent toward C.

G. Where property of which the actor has possession or control affords a peculiar temptation or opportunity for intentional interference likely to cause harm.

Illustrations:

13. The same facts as in Illustration 1, except that the explosion injures C, a companion of B. A may be found to be negligent toward C.

14. In a neighborhood where young people habitually commit depredations on the night of Halloween, A leaves at the top of a hill a large reel of wire cable which requires a considerable effort to set it in motion. A group of boys, on that night, succeed in moving it, and in rolling it down the hill, where it injures B. A may be found to be negligent toward B, although A might not have been negligent if the reel had been left on any other night.

H. Where the actor acts with knowledge of peculiar conditions which create a high degree of risk of intentional misconduct.

Illustration:

15. The employees of the A Railroad are on strike. They or their sympathizers have torn up tracks, misplaced switches, and otherwise attempted to wreck trains. A fails to guard its switches, and runs a train, which is derailed by an unguarded switch intentionally thrown by strikers for the purpose of wrecking the train. B, a passenger on the train, and C, a traveler upon an adjacent highway, are injured by the wreck. A Company may be found to be negligent toward B and C.

f. It is not possible to state definite rules as to when the actor is required to take precautions against intentional or criminal misconduct. As in other cases of negligence (see §§ 291-293), it is a matter of balancing the magnitude of the risk against the utility of the actor's conduct. Factors to be considered are the known character, past conduct, and tendencies of the person whose intentional conduct causes the harm, the temptation or opportunity which the situation may afford him for such misconduct, the gravity of the harm which may result, and the possibility that some other person will assume the responsibility for preventing the conduct or the harm, together with the burden of the precautions which the actor would be required to take. Where the risk is relatively slight in comparison with the utility of the actor's conduct, he may be under no obligation to protect the other against it.

Illustration:

16. A, a convict, is confined in a state prison for forging a check. His conduct while in prison exhibits no tendency toward violence, and prison tests show that he is mentally normal. In company with other prisoners, A is permitted to do outside work on the prison farm, in accordance with the prison system. While at work he is not properly guarded, and escapes. In endeavoring to get away, A stops B, an automobile driver, threatens him with a knife, and takes B's car. B suffers severe emotional distress, and an apoplectic stroke from the excitement. The State is not negligent toward B.

REPORTERS NOTES: This Section has been added to the first Restatement. The Comments and Illustrations are in large part transferred from the original § 302.

Illustration 1 is based on Vills v. City of Cloquet, 119 Minn. 277, 138 N.W. 33 (1912); Fehrs v. McKeesport, 318 Pa. 279, 178 A. 380 (1935); City of Tulsa v. McIntosh, 90 Okla. 50, 215 P. 624 (1923); Luhman v. Hoover, 100 F.2d 127, 4 N.C.C.A. N.S. 615 (6 Cir. 1938). Otherwise where the caps are left where it is not reasonably to be expected that children will interfere with them. Vining v. Amos D. Bridges Sons Co., 142 A. 773 (Me. 1929); Perry v. Rochester Lime Co., 219 N.Y. 60, 113 N.E. 529, L.R.A.1917B, 1058 (1916). Past experience of meddling is to be taken into account. Katz v. Helbing, 215 Cal. 449, 10 P.2d 1001 (1932).

Illustration 2 is based on Richards v. Stanley, 43 Cal. 2d 60, 271 P.2d 23 (1954). In accord are Curtis v. Jacobson, 142 Me. 351, 54 A.2d 520 (1947); Lustbader v Traders Delivery Co., 193 Md. 433, 67 A.2d 237 (1949); Roberts v. Lundy, 301 Mich. 726, 4 N.W.2d 74 (1942); Gower v. Lamb, 282 S.W.2d 867 (Mo. App 1955); Saracco v. Lyttle, 11 N.J. Super. 254, 78 A.2d 288 (1951); Castay v. Katz & Besthoff, 148 So. 76 (La. App. 1933); Walter v. Bond, 267 App. Div. 779, 45 N.Y.S.2d 378 (1943), affirmed, 292 N.Y. 574, 54 N.E.2d 691 (1944); Wagner v. Arthur, 11 Ohio Op. 2d 403, 73 Ohio L. Abs. 16, 134 N.E.2d 409 (Ohio C.P. 1956); Rapczynski v. W. T. Cowan, Inc., 138 Pa. Super. 392, 10 A.2d 810 (1940); Teague v Pritchard, 38 Tenn. App. 686, 279 S.W.2d 706 (1955). Contra, Schaff v. R. W. Claxton, Inc., 79 App. D.C. 207, 144 F.2d 532 (1944). See Notes, 1951 Wis. L. Rev. 740; 24 Tenn. L. Rev. 395 (1956); 43 Calif. L. Rev. 140 (1955); 21 Mo. L. Rev. 197 (1956).

Special circumstances may impose the duty. Compare Illustration 14.

Illustration 3: Compare Silverblatt v. Brooklyn Tel. & Messenger Co., 73 Misc. 38, 132 N.Y. Supp. 253 (1911), reversed, 150 App. Div. 268, 134 N.Y.Supp. 765.

Illustration 4 is based on McFadden v. Bancroft Hotel Corp., 313 Mass. 56, 46 N.E.2d 573 (1943). See also Hillman v. Georgia R.R. & Banking Co. 126 Ga. 814, 56 S.E. 68, 8 Ann. Cas. 222 (1906); Quigley v. Wilson Line, Inc., 338 Mass. 125, 154 N.E.2d 77, 77 A.L.R.2d 499 (1958); Bullock v. Tamiami Trail Tours, Inc., 266 F.2d 326 (5 Cir. 1959); Jones v. Yellow Cab & Baggage Co., 176 Kan. 558, 271 P.2d 249 (1954); Dickson v. Waldron, 135 Ind. 507, 34 N.E. 506, 35 N.E. 1, 24 L.R.A. 483, 41 Am. St. Rep. 440 (1893); Mastad v. Swedish Brethren, 83 Minn. 40, 85 N.W. 913, 53 L.R.A. 803, 85 Am. St. Rep. 446 (1901); Liljegren v. United Railways of St. Louis, 227 S.W. 925 (Mo. App. 1921); Peck v. Gerber, 154 Or. 126, 59 P.2d 675, 106 A.L.R. 996 (1936); Sinn v. Farmers Deposit Savings Bank, 300 Pa. 85, 150 A. 163 (1930).

Compare, as to premises held open to the public: Stotzheim v. Dios, 256 Minn. 316, 98 N.W.2d 129 (1959); Wallace v. Der-Ohanian, 199 Cal. App. 2d 141, 18 Cal. Rptr. 892 (1962); Grasso v. Blue Bell Waffle Shop, Inc., 164 A.2d 475 (D.C. Munic. Ct. App.) (1960); Corcoran v. McNeal, 400 Pa. 14, 161 A.2d 367 (1960). See Note, 9 Vand. L. Rev. 106 (1955).

Illustration 6 is taken from Garceau v. Engel, 169 Minn. 62, 210 N.W. 608 (1926). Cf. Southwestern Bell Tel. Co. v. Adams, 199 Ark. 254, 133 S.W.2d 867 (1939); Jesse French Piano & Organ Co. v. Phelps, 47 Tex. Civ. App. 385, 105 S.W. 225 (1907). Apparently contra are Andrews v. Kinsel, 114 Ga 390, 40 S.E. 300, 88 Am. St. Rep. 25 (1901); Bresnahan v. Hicks, 260 Mich. 32, 244 N.W. 218, 84 A.L.R. 390 (1932).

Illustration 7 is taken from Brower v. New York Central & H. R. R. Co., 91 N.J.L. 190, 103 A. 166, 1 A.L.R. 734 (1918). See also Filson v. Pacific Express Co., 84 Kan. 614, 114 P. 863 (1911); Morse v. Homer's, Inc., 295 Mass. 606, 4 N.E.2d 625 (1936); White-head v. Stringer, 106 Wash. 501, 180 P. 486, 5 A.L.R. 358 (1919); National Ben Franklin Ins. Co. v. Careccta, 21 Misc. 2d 279, 193 N.Y.S.2d 904 (1959).

Illustration 8 is taken from Marshall v. Caledonian Ry., [1899] 1 Fraser 1060.

Illustration 9 is taken from Hall v. Smathers, 240 N.Y. 486, 148 N.E. 654 (1925). See also Kendall v. Gore Properties, 98 App. D.C. 378, 236 F.2d 673 (1956); Note, 42 Va. L. Rev. 842 (1956); Hipp v. Hospital Authority of City of Marietta, 104 Ga. App. 174, 121 S.E.2d 273 (1961); Georgia Bowling Enterprises, Inc. v. Robbins, 103 Ga.

App. 286, 119 S.E.2d 52(1961). Cf. De la Bere v. Pearson, Ltd., [1908] 1 K.B. 483, affirmed, [1908] 1 K.B. 280 (C.A.).

Illustration 10 is taken from Hines v. Garrett, 131 Va. 125, 108 S.E. 690 (1921). See also Neering v. Illinois Central R. Co., 383 Ill. 366, 50 N.E.2d 497, 14 N.C.C.A. N.S. 621 (1943); McLeod v. Grant County School District, 42 Wash. 2d 316, 255 P.2d 360 (1953).

Illustration 11 is based on Dixon v. Bell, 5 M. & S. 198, 105 Eng. Rep. 1023 (1816); Binford v. Johnston, 82 Ind. 426, 42 Am. Rep. 508 (1882); Meers v. McDowell, 110 Ky. 926, 62 S.W. 1013, 53 L.R.A. 789, 96 Am. St. Rep. 475 (1901); Carter v. Towne, 98 Mass. 567, 96 Am. Dec. 682 (1868).

Illustration 12 is taken from Austin W. Jones Co. v. State, 122 Me. 214, 119 A. 577 (1923). In accord are Missouri, K. & T.R. Co. v. Wood, 95 Tex. 223, 66 S.W. 449, 56 L.R.A. 592, 93 Am. St. Rep. 834 (1902), smallpox patient; Finkel v. State, 37 Misc. 2d 757, 237 N.Y.S.2d 66 (1962).

Illustration 14 was suggested by Glassey v. Worcester Consol. St. R. Co., 185 Mass. 315, 70 N.E. 199 (1904), where, however, the meddling was not on Halloween, and it was held there was no liability. In accord with the Illustration are, however, Richardson v. Ham, 44 Cal. 2d 772, 285 P.2d 269 (1955); Zuber v. Clarkson Const. Co., 363 Mo. 352, 251 S.W. 2d 52 (1952).

Illustration 15 is taken from International & G.N. R. Co. v. Johnson, 23 Tex. Civ. App. 160, 203, 55 S.W. 772 (1900). See also St. Louis S. F. R. Co. v. Mills, 3 F.2d 882 (5 Cir. 1924), reversed, 271 U.S. 344, 46 S. Ct. 520, 70 L. Ed. 979; Green v. Atlanta & C. A. L. R. Co., 131 S.C. 124, 126 S.E. 441, 38 A.L.R. 1448 (1925); Harpell v. Public Service Coordinated Transport, 35 N.J. Super. 354, 114 A.2d 295 (1955), affirmed, 20 N.J. 309, 120 A.2d 43.

Illustration 16 is taken from Williams v. State, 308 N.Y. 548, 127 N.E.2d 545 (1955).

CROSS REFERENCES: ALR Annotations:

Liability of carrier to passenger for assault by third person. 77 A.L.R. 2d 504.
Liability for furnishing or leaving gun accessible to child for injury inflicted by child. 68 A.L.R.2d 782.

Digest System Key Numbers:

Negligence 61(2), 62(3)