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Court of Appeals
Division III
State of Washington

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.

Appellee.

Appellants' Supplemental Briefing

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I. INTRODUCTION.

Appellants¹ submit this supplemental briefing pursuant to the letter dated April 3, 2013 in which the Court requested supplemental briefing regarding the application of the Supreme Court's March 15, 2013 Opinion in **Robb v. City of Seattle** to this matter. As set forth below and as set forth in Garcia's previous briefing, the **Robb** decision illustrates that the public duty doctrine does not bar Garcia's claims and therefore a trier of fact must determine the factual issues presented in this matter. Namely, a trier of fact must determine whether the Pasco Police's affirmative acts which created a duty to Tiairra Garcia were negligent and therefore partially to blame for Tiairra. Accordingly, reversal the lower court's dismissal of Garcia's claims pursuant to CR 56 is proper.

II. ISSUES PRESENTED.

Did the Trial Court err when it dismissed Appellant's claims as subject to the public duty doctrine when **Robb** definitively established that Restatement § 302(B) comment e creates a duty between an officer and victim of a violent crime such that the public duty doctrine does not bar a negligence claim against the City of Pasco?

¹ Hereinafter "Garcia".

III. OVERVIEW OF THE ROBB V. CITY OF SEATTLE DECISION.

In **Robb v. City of Seattle**, the Washington Supreme Court was asked to decide whether the doctrine discussed in the RESTATEMENT (SECOND) OF TORTS §302(B) comment e creates a duty between law enforcement and a victim of a crime to protect against the criminal acts of a third party where the law enforcement agency's own affirmative act creates or exposes another to a recognizable high degree of risk of harm. **Robb v. City of Seattle**, 176 Wn.2d 427, 429, 295 P.3d 212 (2013). In finding that RESTATEMENT § 302B does create a duty, the Supreme Court noted that the act must be one of misfeasance, as opposed to nonfeasance. **Id.** Citing RESTATEMENT § 302B comment e, the Court referred to situations where “the actor’s own affirmative act has created or exposed the other to a recognizable high risk of harm through such misconduct, which a reasonable man would take into account.” **Id.** at 434(citing RESTATEMENT (SECOND) OF TORTS § 302B, comment e) This language, the Court determined, may give rise to liability by an officer for her misfeasance.

In its ruling, the Court focused on the distinction between misfeasance and nonfeasance. Comment e, the Court concluded, creates a duty through the misfeasance of a government actor. **Id.** at 436-37. More

specifically, the duty arises when the government actions either increase the risk to the victim or introduce a new risk. **Id.** at 437. Through nonfeasance, in contrast, “the risk is merely made no worse.” **Id.**(citing **Lewis v. Krussel**, 101 Wn. App. 178, 184 P.3d 486 (2000)). Therefore, no duty is created.

Given the particular circumstances surrounding Robb’s death, the Court found that the negligent acts by the officer amounted to nonfeasance as opposed to misfeasance. **Id.** at 437-38. The officers in **Robb** did not create a new risk and/or increase an existing risk. Instead, they simply failed to act to prevent, what was ultimately determined to be an attenuated and rather unforeseeable, risk of harm to Robb. **Id.** at 438. As the court noted “law enforcement only failed to eliminate a situation of peril, but did not increase the danger by an affirmative act.” **Id.**

While the court ultimately reversed the lower court’s ruling based upon the specific facts of **Robb**, the court affirmatively stated that RESTATEMENT (SECOND) OF TORTS 302B, comment e allows for a duty to arise between an officer and an individual absent a purported “special relationship”. However, the duty may only arise absent a special relationship if it results from the government agent’s affirmative actions (e.g. misfeasance), not merely the failure to act.

IV. APPLICATION OF THE ROBB DECISION TO THIS MATTER BEFORE THE COURT.

The lower court dismissed Garcia's claims against the City of Pasco because "clearly the public duty doctrine applies" and because the trial court found that "[t]he special relationship exception, the elements simply have not been shown."² In effect, the Court found that there was no gratuitous promise to rescue Tiairra Garcia because the responding officer was acting within the duties of the Pasco Police Department.³ Therefore, the legal basis of the trial court's dismissal of Garcia's claims was the absence of a special duty that would cause the City of Pasco to owe Tiairra Garcia an individual duty.

However, **Robb** has now affirmatively established that when a government agent commits misfeasance, RESTATEMENT 302B, comment e creates a duty between the government agent and the victim of a crime outside the scrutiny of a Special Duty Doctrine. Application of the **Robb** holding to this matter clearly shows that the trial court erred when it dismissed Garcia's claims on summary judgment. When the Pasco Police represented that they would investigate the specific information provided by Gorton, the Pasco police took affirmative acts that increased the risk to

² VR 29:11-13

³ VR 29:23-30:8

Tiairra Garcia. Because this matter is not per se barred by the Public Duty Doctrine, the lower court's decision should be reversed and further proceedings should be ordered in light of the **Robb** ruling.

A. When the Pasco Police Department Indicated that They Would Investigate This Matter Consistent With the Information Provided by Gorton and did not, the Pasco Police Took an Affirmative Action that Increased the Danger Faced by Tiairra Garcia.

Reversal is proper because the Pasco Police committed affirmative acts that are contemplated by RESTATEMENT § 302B, comment e and the **Robb** decision. Therefore Pasco owed a duty to Tiairra Garcia.⁴ Importantly, Pasco's actions contrast to the actions of the officers in **Robb**. In **Robb**, the Court found that the officers' actions were mere nonfeasance: their failure to take possession of the shotgun shells only failed to remove an existing threat, the officers did nothing to make the situation worse. **Robb**, 176 Wn.2d at 437-8. Here, Pasco increased the risk to Tiairra Garcia because it made representations that it was responding to the specific information provided by Gorton but failed to do so. These representations blocked aid from other sources that would have assisted Tiairra Garcia.

⁴ The basic elements for a claim in tort are duty, breach of the duty, and damages that are proximately caused by the breach. **Reynolds v. Hicks**, 134 Wn.2d 491, 495, 951 P.2d 761 (1998). Whether a duty is owed is a matter of law that is reviewed de novo. **Parrilla v. King County**, 138 Wn. App. 427, 432, 157 P.3d 879 (2007). To determine whether a duty is owed, the court may consider public policy. Id.

In his call to 911, Gorton stated that Tiairra Garcia was being dragged out of the van into the back of 1611 Parkview.⁵ Further, Gorton stated that “there’s something going on over there. You need to get somebody over here.”⁶ Gorton further indicated that the night before a large altercation had occurred outside of 1611 Parkview. Gorton and Gennet have indicated that they ceased to render aide because they understood that the responding officer was going to investigate the scene based upon the specific information that Gorton relayed to the 911 operator.⁷ Importantly, the affirmative act by Pasco (i.e. representations that it would respond to the scene based upon Gorton’s statement that Tiairra Garcia was being dragged into the back of the house) caused Gorton and Genett to do nothing further. The result was that the peril faced by Tiairra Garcia was made worse because the parties who were willing to render aide and had knowledge that she had been dragged into the back of 1611 Parkview, Gorton and Genett, ceased any further action. They understood, reasonably so, that the responding officer would investigate the scene based upon the fact that Tiairra Garcia was injured and not simply as a hit and run scene. Because the actions of law

⁵ CP 348

⁶ Id.

⁷ CP 99-103. The Court should note that the trial court did not consider these affidavits nor did it allow for a continuance to have the affidavits signed or, in the alternative, deposition Gorton and Gennet. (See VR 29:23-30:11)

enforcement increased the harm faced by Tiairra Garcia, a duty arose under RESTATEMENT (SECOND) OF TORTS 302B and reversal of the lower court's decision is proper.

B. Reversal of the Lower Court's Ruling will not Lead to an Overly Expansive Class of Individuals to Whom Law Enforcement Would Owe a Duty.

A finding that Pasco owed a duty to Tiairra Garcia because of its affirmative actions will not result in an unrealistic expansion of persons to whom law enforcement owes a duty.⁸ Here, the affirmative act is not simply responding to the scene of a crime. Rather, the affirmative act was the representation that Pasco would respond to the scene based upon Gorton's statement that someone was being dragged into the back of the house. The affirmative act was the representation that Pasco would be responding to the scene not as an incident of property crime but rather as a scene with injured persons. A duty is owed when two events occur: (1) law enforcement has specific knowledge that a victim is injured and (2) law enforcement represents that it will respond to the scene based upon the specific knowledge regarding the victim.⁹ Given the peculiar facts of this matter, finding a duty was owed to Tiairra Garcia will not result in

⁸ It should be noted that at this juncture in the litigation the only issue before the Court is whether a legal duty was owed. The factual issues, whether Pasco's actions breached the duty and causation, have yet to be decided.

⁹ Importantly the issue before the Court is only whether a duty was owed. The factual issues of whether a duty was breached and whether said breach proximately caused Tiairra Garcia's death are not before this court.

expansive liability to law enforcement when they respond to 911 calls. Rather, reversal of the lower court's decision will only require that law enforcement to investigate crime scenes based upon the specific information relayed to it by witnesses that notify 911. Such a duty is neither unreasonable, against public policy, nor does it impose unrealistic obligations upon law enforcement. Unlike the situation in **Robb**, the duty that arose to protect Tairra Garcia did not require that they predict future acts of suspects or that law enforcement commandeer instrumentalities that have the potential to be used to cause harm. Rather, reversal of the lower court's decision will simply acknowledge that law enforcement has a duty to use information provided to it via witnesses calling 911 when they investigate a scene where it is known that a person is injured. Because reversal of the lower court's decision will not result in expansive liability by law enforcement responding to a scene of a crime, reversal and remand of the lower court's dismissal of Garcia's claims consistent with the ruling in **Robb v. City of Seattle** is both proper and required.

V. CONCLUSION.

Under the Supreme Court's decision in **Robb**, reversal of the lower court's dismissal of Garcia's claims is required. The public duty doctrine does not function as a per se bar to Garcia's claims. When it was

conveyed to Gorton and Genett that Pasco Police would investigate the specific information that Tiairra Garcia was being dragged into the back of the house, Pasco took affirmative acts that they should have known placed Tiairra Garcia in greater harm if they failed to act. Pasco failed to act in accordance with its representations and, as a result, Tiairra Garcia was placed in greater harm because Gorton and Genett did not act further. Gorton and Genett reasonably understood Pasco was going to investigate the scene based upon the fact that Tiairra Garcia was injured. Importantly, finding that Pasco owed a duty to Tiairra Garcia will not contravene public policy nor will it impose unrealistic expectations upon law enforcement. Here, the duty was created when representations were made that Pasco would respond to specific facts provided by Gorton, not simply because they responded to the crime scene. The duty was created not when Pasco agreed to respond to the 911 calls in general but when it represented to Gorton that it would respond to the specific facts he conveyed. For these reasons and the reasons set forth in Appellants' briefing in this matter, reversal and remand is proper.

Respectfully submitted this 3rd day of May 2013.

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DECLARATION OF SERVICE

I certify that on May 3, 2013 I caused a true and correct copy of Appellants' Supplemental Briefing to be served on the following in the manner indicated below:

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RESTATEMENT (SECOND) OF TORTS 302B

Restat 2d of Torts, § 302B

Restatement 2d, Torts - Rule Sections > Division 2- > Chapter 12- > Topic 4-

§ 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.

Cross Reference

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)

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 recogniz-

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able 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.

REPORTER'S 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. Kinscl, 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).

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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 Glasse 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).

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