INTENTIONAL TORTS

GARRATT v. DAILEY

Supreme Court of Washington (1955)

HILL, Justice.

The liability of an infant for an alleged battery is presented to this court for the first time. Brian Dailey (age five years, nine months) was visiting with Naomi Garratt, an adult and a sister of the plaintiff, Ruth Garratt, likewise an adult, in the back yard of the plaintiff's home, on July 16, 1951. It is plaintiff's contention that she came out into the back yard to talk with Naomi and that, as she started to sit down in a wood and canvas lawn chair, Brian deliberately pulled it out from under her. The only one of the three persons present so testifying was Naomi Garratt. (Ruth Garratt did not testify as to how or why she fell.) The trial court, unwilling to accept this testimony, adopted Brian Dailey's version of what happened, and made the following findings:

> 'III. * * * that while Naomi Garratt and Brian Dailey were in the back yard the plaintiff, Ruth Garratt, came out of her house into the back yard. Some time subsequent thereto defendant, Brian Dailey, picked up a lightly built wood and canvas lawn chair which was located in the back yard, moved it sideways a few feet and seated himself therein, at which time he discovered the plaintiff, Ruth Garratt, about to sit down at the place where the lawn chair had formerly been, at which time he hurriedly got up from the chair and attempted to move it toward Ruth Garratt to aid her in sitting down in the chair; that due to the defendant's small size and lack of dexterity he was unable to get the lawn chair under the plaintiff in time to prevent her from falling to the ground. That plaintiff fell to the ground and sustained a fracture of her hip, and other injuries as hereinafter set forth.
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> IV. That the preponderance of the evidence in this case establishes that when the defendant, Brian Dailey, moved the chair in question he did not have any wilful or unlawful purpose in doing so; that he did not have any intent to injure the plaintiff, or any intent to bring about any unauthorized or offensive contact with her person or any objects appurtenant thereto; that the circumstances which immediately preceded the fall of the plaintiff established that the defendant did not have purpose, intent or design to perform a prank or to effect an assault and battery upon the person of the plaintiff.

It is conceded that Ruth Garratt's fall resulted in a fractured hip and other painful and serious injuries. To obviate the necessity of a retrial in the event this court determines that she was entitled to a judgment against Brian Dailey, the amount of her damage was found to be $11,000. Plaintiff appeals from a judgment dismissing the action and asks for the entry of a judgment in that amount or a new trial.

The authorities generally state that when a minor has committed a tort with force he is liable to be proceeded against as any other person would be. In our analysis of the applicable law, we start

with the basis premise that Brian, whether five or fifty-five, must have committed some wrongful act before he could be liable for appellant's injuries.

It is urged that Brian's action in moving the chair constituted a battery. A definition of a battery is the intentional infliction of a harmful bodily contact upon another. The rule that determines liability for battery is given in 1 Restatement, Torts, 29, § 13, as:

'An act which, directly or indirectly, is the legal cause of a harmful contact with another's person makes the actor liable to the other, if
'(a) the act is done with the intention of bringing about a harmful or offensive contact or an apprehension thereof to the other or a third person, and
'(b) the contact is not consented to by the other or the other's consent thereto is procured by fraud or duress, and
'(c) the contact is not otherwise privileged.'

We have in this case no question of consent or privilege. We therefore proceed to an immediate consideration of intent and its place in the law of battery. In the comment on clause (a), the Restatement says:

'Character of actor's intention. In order that an act may be done with the intention of bringing about a harmful or offensive contact or an apprehension thereof to a particular person, either the other or a third person, the act must be done for the purpose of causing the contact or apprehension or with knowledge on the part of the actor that such contact or apprehension is substantially certain to be produced.'

We have here the conceded volitional act of Brian, i. e., the moving of a chair. Had the plaintiff proved to the satisfaction of the trial court that Brian moved the chair while she was in the act of sitting down, Brian's action would patently have been for the purpose or with the intent of causing the plaintiff's bodily contact with the ground, and she would be entitled to a judgment against him for the resulting damages.

The plaintiff based her case on that theory, and the trial court held that she failed in her proof and accepted Brian's version of the facts rather than that given by the eyewitness who testified for the plaintiff. After the trial court determined that the plaintiff had not established her theory of a battery (i. e., that Brian had pulled the chair out from under the plaintiff while she was in the act of sitting down), it then became concerned with whether a battery was established under the facts as it found them to be.

In this connection, we quote another portion of the comment on the 'Character of actor's intention,' relating to clause (a) of the rule from the Restatement heretofore set forth:
'It is not enough that the act itself is intentionally done and this, even though the actor realizes or should realize that it contains a very grave risk of bringing about the contact or apprehension. Such realization may make the actor's conduct negligent or even reckless but unless he realizes

that to a substantial certainty, the contact or apprehension will result, the actor has not that intention which is necessary to make him liable under the rule stated in this section.'

A battery would be established if, in addition to plaintiff's fall, it was proved that, when Brian moved the chair, he knew with substantial certainty that the plaintiff would attempt to sit down where the chair had been. If Brian had any of the intents which the trial court found that he did not have, he would of course have had the knowledge to which we have referred. The mere absence of any intent to injure the plaintiff or to play a prank on her or to embarrass her, or to commit an assault and battery on her would not absolve him from liability if in fact he had such knowledge. Without such knowledge, there would be nothing wrongful about Brian's act in moving the chair and, there being no wrongful act, there would be no liability.

While a finding that Brian had no such knowledge can be inferred from the findings made, we believe that before the plaintiff's action in such a case should be dismissed there should be no question but that the trial court had passed upon that issue; hence, the case should be remanded for clarification of the findings to specifically cover the question of Brian's knowledge, because intent could be inferred therefrom. If the court finds that he had such knowledge the necessary intent will be established and the plaintiff will be entitled to recover, even though there was no purpose to injure or embarrass the plaintiff. Vosburg v. Putney. If Brian did not have such knowledge, there was no wrongful act by him and the basic premise of liability on the theory of a battery was not established.

It will be noted that the law of battery as we have discussed it is the law applicable to adults, and no significance has been attached to the fact that Brian was a child less than six years of age when the alleged battery occurred. The only circumstance where Brian's age is of any consequence is in determining what he knew, and there his experience, capacity, and understanding are of course material.

The remand gives the plaintiff an opportunity to secure a judgment even though the trial court did not accept her version of the facts, if from all the evidence, the trial court can find that Brian knew with substantial certainty that the plaintiff intended to sit down where the chair had been before he moved it.

The cause is remanded for clarification, with instructions to make definite findings on the issue of whether Brian Dailey knew with substantial certainty that the plaintiff would attempt to sit down where the chair which he moved had been, and to change the judgment if the findings warrant it.

GARRATT v. DAILEY
The Supreme Court of Washington (1956)

ROSELLINI, J.

This is an action for damages resulting from an alleged battery perpetrated upon the plaintiff by the defendant, who was five years and nine months of age at the time of the occurrence. The judgment of the superior court of Pierce county in favor of the defendant, was reviewed by this court in Garratt v. Dailey, 46 Wn. 2d 197 (1955).

Upon remand for clarification on the issue of the defendant's knowledge, the superior court reviewed the evidence, listened to additional arguments and studied briefs of counsel, and entered a finding to the effect that the defendant knew, with substantial certainty, at the time he removed the chair, that the plaintiff would attempt to sit down where the chair had been, since she was in the act of seating herself when he removed the chair. Judgment was entered for the plaintiff in the amount of eleven thousand dollars, plus costs, and the defendant has appealed.

Seven of the defendant's assignments of error raise a single question, whether the superior court acted contrary to the mandate of this court when it made a finding that the plaintiff was in the act of sitting down when the chair was removed. It is the contention of the defendant that this finding contradicts the findings originally entered, which were approved by this court.

If the superior court proceeds contrary to the mandate of this court, it interferes with this court's jurisdiction. The proper procedure for the aggrieved party to pursue is to apply to this court for an appropriate writ requiring the superior court to conform to the mandate. Having failed to take appropriate action, the appellant is foreclosed from objecting to the judgment on this ground.

The substance of the remaining assignments is that the evidence does not support the additional finding. The record was carefully reviewed by this court in Garratt v. Dailey. Had there been no evidence to support a finding of knowledge on the part of the defendant, the remanding of the case for clarification on that issue would have been a futile gesture on the part of the court. As we stated in that opinion, the testimony of the two witnesses to the occurrence was in direct conflict. We assumed, since the trial court made a specific finding that the defendant did not intend to harm the plaintiff, that the court had accepted the testimony of the defendant and rejected that of the plaintiff's witness. However, on remand, the judge who heard the case stated that his findings had been made in the light of his understanding of the law, i.e., that the doctrine of constructive intent does not apply to infants, who are not chargeable with knowledge of the normal consequences of their acts.

In order to determine whether the defendant knew that the plaintiff would sit in the place where the chair had been, it was necessary for him to consider carefully the time sequence, as he had not done before; and this resulted in his finding that the arthritic woman had begun the slow process of being seated when the defendant quickly removed the chair and seated himself upon it,

and that he knew, with substantial certainty, at that time that she would attempt to sit in the place where the chair had been. Such a conclusion, he stated, was the only reasonable one possible. It finds ample support in the record. Such knowledge is sufficient to charge the defendant with intent to commit a battery. The judgment is affirmed.

Vosberg v. Putney
50 N.W. 403 (Wisconsin 1891)

Opinion

The facts of this case are briefly as follows: The plaintiff was about 14 years of age, and the defendant about 11 years of age. On the 20th day of February, 1889, they were sitting opposite to each other across an aisle in the high school of the village of Waukesha. The defendant reached across the aisle with his foot, and hit with his toe the shin of the right leg of the plaintiff. The touch was slight. The plaintiff did not feel it, either on account of its being so slight or of loss of sensation produced by the shock. In a few moments he felt a violent pain in that place, which caused him to cry out loudly. The next day he was sick, and had to be helped to school. On the fourth day he was vomiting, and Dr. Bacon was sent for, but could not come, and he sent medicine to stop the vomiting, and came to see him the next day, on the 25th. There was a slight discoloration of the skin entirely over the inner surface of the tibia an inch below the bend of the knee. The doctor applied fomentations, and gave him anodynes to quiet the pain. This treatment was continued, and the swelling so increased by the 5th day of March that counsel was called, and on the 8th of March an operation was performed on the limb by making an incision, and a moderate amount of pus escaped. A drainage tube was inserted, and an iodoform dressing put on. On the sixth day after this, another incision was made to the bone, and it was found that destruction was going on in the bone, and so it has continued exfoliating pieces of bone. He will never recover the use of his limb. There were black and blue spots on the shin bone, indicating that there had been a blow. On the 1st day of January before, the plaintiff received an injury just above the knee of the same leg by coasting, which appeared to be healing up and drying down at the time of the last injury. The theory of at least one of the medical witnesses was that the limb was in a diseased condition when this touch or kick was given, caused by microbes entering in through the wound above the knee, and which were revivified by the touch, and that the touch was the exciting or remote cause of the destruction of the bone, or of the plaintiff's injury. It does not appear that there was any visible mark made or left by this touch or kick of the defendant's foot, or any appearance of injury until the black and blue spots were discovered by the physician several days afterwards, and then there were more spots than one. There was no proof of any other hurt, and the medical testimony seems to have been agreed that this touch or kick was the exciting cause of the injury to the plaintiff. The jury rendered a verdict for the plaintiff of $2,800.

The learned circuit judge said to the jury: “It is a peculiar case, an unfortunate case, a case, I think I am at liberty to say that ought not to have come into court. The parents of these children ought, in some way, if possible, to have adjusted it between themselves.” We have much of the

same feeling about the case. It is a very strange and extraordinary case. The cause would seem to be very slight for so great and serious a consequence. And yet the plaintiff's limb might have been in just that condition when such a slight blow would excite and cause such a result, according to the medical testimony. That there is great uncertainty about the case cannot be denied. But perfect certainty is not required. It is sufficient that it is the opinion of the medical witnesses that such a cause even might produce such a result under the peculiar circumstances, and that the jury had the right to find, from the evidence and reasonable inferences therefrom, that it did.