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TORTS-FALSE IMPRISONMENT-PUBLIC NUISANCE-LIABILITY FOR DOUBLE PARKING

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TORTS—FALSE IMPRISONMENT—PUBLIC NUISANCE—LIABILITY FOR DOUBLE PARKING—Defendant had unlawfully double parked his car,[1] thereby blocking plaintiffs' car which was parked at the curb. Plaintiffs sued for $25, alleging only discomfort and inconvenience as their damage. Defendant moved for judgment on the pleading. *Held,* the complaint states a good cause of action on a public nuisance theory. *Harnik v. Levine,* Municipal Court of City of New York, 106 N.Y.S. (2d) 460 (1951).

Most motorists would agree that defendant in the principal case should be held liable for the inconvenience his thoughtless behavior has caused the plaintiffs. Legally, however, it is difficult to determine a theory upon which such liability can be predicated. The court in the principal case says by way of dictum that an action for false imprisonment would lie,[2] except for the fact that the municipal court has no jurisdiction over such suits.[3] This dictum is of doubtful validity. The action of false imprisonment is based on the individual's freedom of movement,[4] requiring an unlawful and involuntary restraint on that freedom imposed by force or a reasonable apprehension of the use of force.[5] Although neither malice nor lack of probable cause in imposing the restraint are elements of the tort,[6] there must be an actual intent to confine.[7] Moreover,

[1] New York City Traffic Regulations, art. 2, §10(o).

[2] Principal case at 462.

[3] New York City Municipal Court Code, §6.

[4] PROSSER, TORTS 67 (1941); 1 TORTS RESTATEMENT §35 (1934); Great Atlantic & Pacific Tea Co. v. Smith, 281 Ky. 583, 136 S.W. (2d) 759 (1939).

[5] Sinclair Refining Co. v. Meek, 62 Ga. App. 850, 10 S.E. (2d) 76 (1940); Powell v. Champion Fiber Co., 150 N.C. 12, 63 S.E. 159 (1908); Whitman v. Atchison, T. & S.F. Ry. Co., 85 Kan. 150, 116 P. 234 (1911). On the question of public humiliation as sufficient restraint, see: Fenn v. Kroger Grocery & Baking Co., (Mo. 1919) 209 S.W. 885; Jacques v. Childs Dining Hall Co., 244 Mass. 438, 138 N.E. 843 (1923), and the later Massachusetts case greatly weakening the Jacques decision, Sweeney v. F. W. Woolworth Co., 247 Mass. 277, 142 N.E. 50 (1924).

[6] Meints v. Huntington, (8th Cir. 1921) 276 F. 245; 137 A.L.R. 495 (1942); Johnson v. Norfolk & W. Ry. Co., 82 W.Va. 692, 97 S.E. 189 (1918). But malice and probable cause are admissible on the question of punitive damages. Lindquist v. Friedman's, Inc., 366 Ill. 232, 8 N.E. (2d) 625 (1937); Garnier v. Squires, 62 Kan. 321, 62 P. 1005 (1900).

[7] 1 TORTS RESTATEMENT §35(1)(a) (1934); Wood v. Cummings, 197 Mass. 80, 83

there can be no false imprisonment unless the restraint is total with no reasonable means of egress.[8] In the principal case, the only restraint on the plaintiffs was as to one means of locomotion, their car. Plaintiffs themselves were free to go where they wished.[9] Thus the element of total restraint necessary to establish an action for false imprisonment would appear to be lacking.[10]

The court ultimately sustained plaintiffs' complaint on a public nuisance theory.[11] The primary purpose of the public streets is for the free passage of the public,[12] and any unauthorized obstruction which makes that passage dangerous or inconvenient is a common law public nuisance.[13] It is not necessary that the entire width of the street be obstructed,[14] nor that every member of the public be inconvenienced, so long as those persons coming in contact with the obstruction are inconvenienced.[15] It seems proper, therefore, to characterize defendant's conduct in the principal case as creating a public nuisance. But it was not proper to uphold the complaint on that ground, for there was no allegation that

N.E. 318 (1908). In the principal case we can predicate an intent to restrain on the proposition that the defendant intended the natural consequences of his act.

[8] Bird v. Jones, 7 Q.B. 742, 115 Eng. Rep. 668 (1845); Davis & Allcott Co. v. Boozer, 215 Ala. 116, 110 S. 28 (1926). Cf. Hawk v. Ridgway, 33 Ill. 473 (1864); Cullen v. Dickinson, 33 S.D. 27, 144 N.W. 656 (1913). There will be a complete confinement even though there is a means of egress if it is unknown to plaintiff, Talcott v. National Exhibition Co., 144 App. Div. 337, 128 N.Y.S. 1059 (1911), or if the way open is unreasonably dangerous, Cieplinski v. Severn, 260 Mass. 261, 168 N.E. 722 (1929). This does not mean that plaintiff must be actually incarcerated. Fotheringham v. Adams Express Co., (C.C. Mo. 1888) 36 F. 252; Allen v. Fromme, 141 App. Div. 362, 126 N.Y.S. 520 (1910).

[9] The court in the principal case, at 462, cites as authority, National Bond & Investment Co. v. Whithorn, 276 Ky. 204, 123 S.W. (2d) 263 (1938), and Cordell v. Standard Oil Co., 131 Kan. 221, 289 P. 472 (1930). Both cases are distinguishable: in the former plaintiff was constrained to remain with his car for fear of losing it, and in the latter there was some apprehension of the use of force if plaintiff tried to leave. 1 TORTS RESTATEMENT §36, comment *a* (1934), would give support to the court's position, but only if there is a "risk of harm . . . to his chattels." Several courts have carried this idea to tenuous extremes. Griffin v. Clark, 55 Idaho 364, 42 P. (2d) 297 (1935); Ashland Dry Goods Co. v. Wages, 302 Ky. 577, 195 S.W. (2d) 312 (1946).

[10] But a partial restraint on an individual's freedom of movement may give rise to some other cause of action, even though not satisfying the technical requirements of false imprisonment. Bird v. Jones, supra note 8; Cullen v. Dickinson, supra note 8. To the effect that double parking in violation of an ordinance is negligence, see, Lucke v. Pacific Electric Ry. Co., 129 Cal. App. 707, 19 P. (2d) 263 (1933); Marchl v. Dowling & Co., 157 Pa. Super. 91, 41 A. (2d) 427 (1945). However, actual damages, which are not necessary to support an action for false imprisonment, would now have to be shown. PROSSER, TORTS 68 (1941); Miller v. Ashcraft, 98 Ky. 314, 32 S.W. 1085 (1895).

[11] Principal case at 463.

[12] JOYCE, NUISANCES §212 (1906); Cohen v. Mayor, etc., of New York, 113 N.Y. 532, 21 N.E. 700 (1889); Thompson v. Smith, 155 Va. 367, 154 S.E. 579 (1930).

[13] 5 BLASHFIELD, AUTOMOBILE LAW, perm. ed., §3252 (1935); Carson v. Baldwin, 346 Mo. 984, 144 S.W. (2d) 134 (1940).

[14] Miller v. Pennsylvania-Reading Seashore Lines, 120 N.J.L. 172, 198 A. 848 (1938); People v. Henderson, 85 Cal. App. (2d) 653, 194 P. (2d) 91 (1948).

[15] PROSSER, TORTS 568 (1941); Commonwealth v. South Covington & C. St. Ry. Co., 181 Ky. 459, 205 S.W. 581 (1918).

plaintiffs had suffered actual damages.[16] The universal rule is that an individual can not maintain a suit for injury caused by him by a public nuisance unless he can show "special damages."[17] Although there is a divergence of opinion as to what constitutes "special damages," no interpretation of that term contemplates less than a showing of actual pecuniary loss resulting from the nuisance.[18] Unless we require the plaintiff to show actual damages, there would be liability to everyone coming in contact with a public nuisance. If an individual has suffered pecuniary damages because of a public nuisance, it is exigent that he should be compensated; if there is no such individual, the punishment of the malefactor should be left in the hands of the public officials.

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[16] Principal case at 461, the court saying that the plaintiffs ". . . would be entitled to nominal damages even though they adduced no proof as to damages at the trial."

[17] Rose v. Miles, 4 M. & S. 101, 105 Eng. Rep. 773 (1815); Mehrhof Bros. Brick Mfg. Co. v. Delaware L. & W. R. Co., 51 N.J.L. 56, 16 A. 12 (1888); note, 2 MINN L. REV. 210 (1918).

[18] The majority approach interprets "special damages" as those differing in kind, rather than merely in degree, from those suffered by the public at large. Houck v. Wachter, 34 Md. 265 (1870); Davis v. Hampshire County, 153 Mass. 218, 26 N.E. 848 (1891). A strong minority of the courts accept a showing that plaintiff suffered actual damages, and do not follow the kind-degree distinction. Brown v. Watson, 47 Me. 161 (1859); Piscataqua Nav. Co. v. New York, N.H. & H.R. Co., (D.C. Mass. 1898) 89 F. 362. New York follows the minority view: Lansing v. Smith, 4 Wend. (N.Y.) 9, 25 (1829); Wakeman v. Wilbur, 147 N.Y. 657, 42 N.E. 341 (1895). The rationale usually put forth in support of the majority view is that without such a strict requirement the creator of a public nuisance would be subjected to unlimited liability, and therefore it is better to keep the remedies for a public nuisance in the hands of the public officials. The obvious answer to this is that defendant will be held liable only to those members of the public that have suffered actual damage from his conduct; the majority rule leaves these injured persons uncompensated and protects the wrongdoer from liability. Piscataqua Nav. Co. v. New York, supra; Smith, "Private Action for Obstructions to Public Right of Passage," 15 COL. L. REV. 1 (1915).