



1983

Casenotes: Torts — Private Citizen Attempting to Arrest Felon Liable for Negligent Acts toward Innocent Third Parties. *Giant Food, Inc. v. Scherry*, 51 Md. App. 586, 444 A.2d 483 (1982)

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Recommended Citation

McCoy, Nicholas F. (1983) "Casenotes: Torts — Private Citizen Attempting to Arrest Felon Liable for Negligent Acts toward Innocent Third Parties. *Giant Food, Inc. v. Scherry*, 51 Md. App. 586, 444 A.2d 483 (1982)," *University of Baltimore Law Review*: Vol. 12: Iss. 3, Article 10.

Available at: <http://scholarworks.law.ubalt.edu/ublr/vol12/iss3/10>

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TORTS — PRIVATE CITIZEN ATTEMPTING TO ARREST FELON LIABLE FOR NEGLIGENT ACTS TOWARD INNOCENT THIRD PARTIES. *Giant Food, Inc. v. Scherry*, 51 Md. App. 586, 444 A.2d 483 (1982).

A security guard employed by Giant Food, Inc. (Giant) witnessed an armed robbery in a supermarket.<sup>1</sup> The guard pursued the suspect to a parking lot and ordered him to stop. The suspect responded by waving a gun into the air. When the guard repeated his warning to stop, the suspect lowered his weapon and jumped into a car. As the vehicle pulled away, the armed security guard fired two shots. The first bullet, aimed at the driver's window, hit the rear panel of the car. The second bullet, aimed at the back windshield, hit the living room window of a fifth floor apartment across the street. The apartment's occupant, Geraldine Scherry, had entered the living room at the precise moment the glass shattered. In a civil suit brought in the Circuit Court for Montgomery County, Scherry contended that Giant was vicariously liable due to the negligence of its guard in firing the second shot. The jury agreed, and awarded the plaintiff compensatory damages for the physical and emotional trauma she suffered as a result of the incident.<sup>2</sup>

On appeal, Giant contested its liability on several grounds. First, Giant claimed that the trial court should have granted a directed verdict in its favor because the security guard was privileged to use deadly force while apprehending the criminal suspect, thereby insulating Giant from claims by third persons.<sup>3</sup> Second, Giant argued that, even if the case was properly before the jury, the lower court should have instructed the jury that the guard was privileged to use deadly force if the court found the guard was preventing the commission or consummation of a felony.<sup>4</sup> The Court of Special Appeals of Maryland rejected these arguments in *Giant Food, Inc. v. Scherry*<sup>5</sup> and held that even if the security guard was privileged to shoot at the fleeing suspect, he was still liable to the plaintiff because the circumstances surrounding the firing of the second shot raised inferences of negligence from which the jury could rationally conclude that the guard created an unreasonable risk of harm to innocent bystanders.<sup>6</sup>

The rule delineating a private citizen's or law enforcement person-

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1. *Giant Food, Inc. v. Scherry*, 51 Md. App. 586, 587, 444 A.2d 483, 484 (1982).
  2. Although Scherry was not actually hit by either the bullet or the glass, she did suffer nausea, insomnia, headaches, and general mental and emotional distress because she feared someone was attempting to kill her. *Id.* at 587, 444 A.2d at 485.
  3. *Id.* at 588, 444 A.2d at 485.
  4. *Id.* Giant also claimed that the trial court erred when it allowed an expert witness to answer a hypothetical question without sufficient facts to support it. In addition, Giant contended that the trial court gave a faulty instruction concerning damages. The appellate court dismissed both of these arguments. *Id.* at 595-96, 444 A.2d at 489.
  5. 51 Md. App. 586, 444 A.2d 483 (1982).
  6. *Id.* at 594, 444 A.2d at 488.

nel's liability when his actions result in unintentional injury to third persons is fairly uniform.<sup>7</sup> For example, one early case indicates that the right to arrest a suspect "would not necessarily relieve the [arrestor] of liability if he were guilty of failing to exercise due care for the safety of bystanders."<sup>8</sup> Similarly, courts have reasoned that the arrestor's duty to protect society cannot be ignored merely because of the privilege to make an arrest.<sup>9</sup> The first *Restatement of Torts* comports with these early cases. It states that an actor privileged to make an arrest is only liable for injuries to third persons if he realizes or should realize that his act creates an unreasonable risk of causing injury.<sup>10</sup> The *Restatement* suggests that in determining the actor's awareness of the unreasonable risk he has created, the fact-finder should consider all the surrounding circumstances.<sup>11</sup>

Courts have emphasized several important factors which should be considered in determining the reasonableness of the arrestor's acts, but the underlying theme in every case is that the utility of the arrest must outweigh the risk of harm to the public.<sup>12</sup> For instance, some cases have indicated that when the nature of the crime justifying the arrest presents little immediate danger to society, the arrestor should exercise great caution.<sup>13</sup> Similarly, when the attempted arrest occurs at a time or place when injury to the public is likely, the arrestor must

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7. Many of the cases involve injuries caused by the negligent acts of police officers. See Greenstone, *Liability of Police Officers for Misuse of Their Weapons*, 16 CLEV.-MAR. L. REV. 397 (1967). But see *infra* note 29 for the minimal effect this rule has on police officers in Maryland.

8. Shaw v. Lord, 41 Okla. 347, 353, 137 P. 885, 887 (1914); see also Edgin v. Talley, 169 Ark. 662, 276 S.W. 591 (1925); Askay v. Maloney, 85 Or. 333, 166 P. 29 (1917), *rev'd on other grounds*, 92 Or. 566, 179 P. 899 (1919), *rev'd on other grounds sub nom.* Anderson v. Maloney, 111 Or. 84, 225 P. 318 (1924).

9. Edgin v. Talley, 169 Ark. 662, 671, 276 S.W. 591, 594 (1925); Shaw v. Lord, 41 Okla. 347, 351, 137 P. 885, 887 (1914); Askay v. Maloney, 85 Or. 333, 339, 166 P. 29, 31 (1917), *rev'd on other grounds*, 92 Or. 566, 179 P. 899 (1919), *rev'd on other grounds sub nom.* Anderson v. Maloney, 111 Or. 84, 225 P. 318 (1924).

10. The RESTATEMENT provides:

An act which is privileged for the purpose of protecting the actor from a harmful or offensive contact or other invasion of his interests of personality does not subject the actor to liability to a third party for any harm unintentionally done to him unless the actor realizes or should realize that his act creates an unreasonable risk of causing such harm.

RESTATEMENT OF TORTS § 75 comment b (1934). This comment is incorporated by reference into section 137 of the RESTATEMENT.

11. RESTATEMENT OF TORTS § 137 comment c (1934).

12. Cerri v. United States, 80 F. Supp. 831, 834 (N.D. Cal. 1948); Davis v. Hellwig, 21 N.J. 412, 416, 122 A.2d 497, 501 (1956). See generally Annot., 60 A.L.R.2d 873 (1958).

13. See, e.g., Cerri v. United States, 80 F. Supp. 831, 834 (N.D. Cal. 1948) (military guard negligent in shooting at a civilian trespasser and injuring innocent third person); Heidbreder v. Northampton Township Trustees, 64 Ohio App. 2d 95, 99, 411 N.E.2d 825, 828 (1979) (police officer negligent for firing at fleeing felon when danger not imminent).

display greater care.<sup>14</sup> A lower standard of care is permitted, however, when the arrestor is confronted with an emergency situation.<sup>15</sup> Acts performed under stress should not be judged by an inflexible standard; instead, the defendant should be entitled to a jury instruction that will account for this stress. However, an actor may not benefit from this instruction if, through his negligence, he created the emergency.<sup>16</sup>

In *Giant Food, Inc. v. Scherry*,<sup>17</sup> a case of first impression, the Maryland court of special appeals delineated the standard that should apply in determining an arrestor's liability when his negligent acts injure an innocent party. The court considered the security guard to be a private citizen attempting a citizen's arrest.<sup>18</sup> After noting that the guard enjoyed the right to make the arrest,<sup>19</sup> the appellate court examined whether excessive force was used. The court suggested that an inference could be raised that the guard was not justified in using deadly force since the felony suspect was fleeing, and therefore presented little immediate danger to either the guard or the surrounding public.<sup>20</sup> However, the court did not rest its decision on this inference alone. The court believed that even if the guard had been justified in using deadly force against the suspect, further inquiry into the guard's liability was necessary.<sup>21</sup> The *Giant* court adopted section 137 of the *Restatement (Second) of Torts* as the proper standard in determining the guard's liability.<sup>22</sup> This section indicates that when making an arrest, the actor has a dual responsibility of not using excessive force against the prospective arrestee and not endangering the nearby public through negligent conduct.<sup>23</sup> The court concluded that this standard of

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14. See, e.g., *Sanchez v. Rice*, 40 Colo. App. 481, 82 P.2d 1261, 1262 (1978) (discharging firearm into large crowd); *Davis v. Hellwig*, 21 N.J. 412, 416, 122 A.2d 497, 501 (1956) (shooting at thief on busy streetcorner); *Shaw v. Lord*, 41 Okla. 347, 352-53, 137 P. 885, 886 (1914) (attempting arrest in a restaurant during dinner hour).
  15. E.g., *United States v. Jasper*, 222 F.2d 632, 633 (4th Cir. 1955) (military police surrounded by angry mob); *Cleveland v. City of Miami*, 263 So. 2d 573, 578 (Fla. 1972) (police officers moving through neighborhood after riot); *Graham v. Oden*, 157 So. 2d 365, 367 (La. App. 1963) (deputy attacked by intoxicated individual during attempted arrest).
  16. *Dyson v. Schmidt*, 206 Minn. 129, 136, 109 N.W.2d 262, 268 (1961) (police officer negligently caused shootout in crowded theatre lobby).
  17. 51 Md. App. 586, 444 A.2d 483 (1982).
  18. *Id.* at 589, 444 A.2d at 485.
  19. The security guard had probable cause to make the arrest since he actually witnessed the armed robbery. See *Stevenson v. State*, 287 Md. 504, 520, 413 A.2d 1340, 1349 (1980).
  20. *Giant*, 51 Md. App. at 589, 444 A.2d at 486. If the guard was not privileged to use deadly force against the felon, he would be liable to anyone he might injure. See Note, *The Civil Liability of Peace Officers for Wounding or Killing*, 28 U. CIN. L. REV. 488, 495 (1959).
  21. *Giant*, 51 Md. App. at 589, 444 A.2d at 486.
  22. *Id.* Section 137 of the RESTATEMENT (SECOND) OF TORTS (1965) is similar to section 137 of the first RESTATEMENT OF TORTS (1934). See *supra* note 10.
  23. *Giant*, 51 Md. App. at 590, 444 A.2d at 486.

reasonableness would apply whenever there was some prospect that an innocent party may be hurt.<sup>24</sup>

In its application of the *Restatement's* reasonableness test, the court recognized that it was essential to consider all the circumstances surrounding the incident to determine whether, in the situation "in which [the guard] found himself at the moment he took the second shot, it was reasonable for him to have fired that [second] shot."<sup>25</sup> The court noted several inferences the jury could have raised to hold the guard liable: (1) the suspect presented no immediate danger to anyone; (2) the security guard could have noted the license number and summoned the police; and (3) the guard was shooting in the dark at a rapidly moving target.<sup>26</sup> The court found these inferences to be "clearly ones of negligence" from which the jury could rationally conclude that the security guard did not act reasonably.<sup>27</sup>

By adopting section 137 of *Restatement (Second) of Torts*, the court of special appeals has aligned itself with the states that recognize that the privilege to arrest a suspect does not necessarily protect the arrestor from liability to third persons.<sup>28</sup> Indeed, it would be illogical to offer an arrestor blanket protection. The privilege to make an arrest evolves from the special relationship between the arrestor and the suspect. Because the suspect has violated the law, he should not be protected from force that would otherwise constitute a tort. But this justification does not apply between the actor and an innocent third person. Any breach by the arrestor of the duty owed to the third party should be subject to the same test that is applied in ordinary negligence actions.

While the effect of the rule established by the *Giant* court will be practically negligible in arrests made by police officers,<sup>29</sup> the impact the decision will have on citizen arrests should be substantial. Because of the need to protect society from criminals, Maryland has granted broad

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24. *Id.* at 591, 444 A.2d at 486.

25. *Id.* at 592, 444 A.2d at 487.

26. *Id.* at 594, 444 A.2d at 488.

27. *Id.*

28. *Davis v. Hellwig*, 21 N.J. 412, 416, 122 A.2d 497, 501 (1956); *Heidbreder v. Northampton Township Trustees*, 64 Ohio App. 2d 95, 99, 411 N.E.2d 825, 828 (1979). *See generally* Annot., 76 A.L.R.2d 1176 (1977).

29. Maryland protects police officers by granting them immunity from suits if the injury occurred while the officer was acting in a law enforcement capacity in a nonmalicious manner. *Duncan v. Koustenis*, 260 Md. 98, 106, 271 A.2d 547, 551 (1970). The State of Maryland and its political subdivisions are also protected by sovereign immunity unless there has been an express waiver. *James v. Prince George's County*, 288 Md. 315, 333, 418 A.2d 1173, 1183 (1980). The State of Maryland has waived its immunity for injuries caused by state employees using state property. MD. CTS. & JUD. PROC. CODE ANN. § 5-403(a)(4) (Supp. 1983). Whether this waiver includes a state police officer injuring another with a state issued weapon is an open question.

powers to its citizens<sup>30</sup> and licensed security guards<sup>31</sup> to make arrests. The *Giant* decision tempers this broad power by granting a remedy to those who suffer an injury due to the misuse of the right to arrest. Additionally, the rule may encourage businesses to exercise more care in hiring and training their security personnel.

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30. A private citizen may make a valid arrest when he has probable cause to believe that a felony has been committed and that the person whom he arrests committed it. *Stevenson v. State*, 287 Md. 504, 520, 413 A.2d 1340, 1349 (1980).

31. A special policeman has the same powers as a police officer when acting on his employer's premises or off the premises in connection with property owned by the employer. MD. ANN. CODE art. 41, § 64 (1982).