

2000

A Survey of Recent Developments in the Law: Tort Law

Kevin M. Decker

Follow this and additional works at: <http://open.mitchellhamline.edu/wmlr>

Recommended Citation

Decker, Kevin M. (2000) "A Survey of Recent Developments in the Law: Tort Law," *William Mitchell Law Review*: Vol. 26: Iss. 4, Article 18.

Available at: <http://open.mitchellhamline.edu/wmlr/vol26/iss4/18>

This Article is brought to you for free and open access by the Law Reviews and Journals at Mitchell Hamline Open Access. It has been accepted for inclusion in William Mitchell Law Review by an authorized administrator of Mitchell Hamline Open Access. For more information, please contact sean.felhofer@mitchellhamline.edu.

© Mitchell Hamline School of Law

TORT LAW

A. *Invasion of Privacy*

The Minnesota Supreme Court made great strides in recognizing the tort of invasion of privacy in *Lake v. Wal-Mart Stores, Inc.*,¹ but it left other courts with the task of determining the scope of the doctrine. In *C.L.D. v. Wal-Mart Stores, Inc.*,² the United States District Court for the District of Minnesota interpreted the “publication of private facts,”³ which is one of three distinct causes of action falling within Minnesota’s invasion of privacy tort. The court construed the tort’s breadth narrowly, adhering to Minnesota cases preceding *Lake*.⁴

In *C.L.D.*, the plaintiff began working in August of 1995 as a cashier at one of defendant’s Wal-Mart stores in Mankato, Minnesota.⁵ When she began her employment, plaintiff read and signed two standard documents setting forth Wal-Mart’s employment policies: The New Associate Form and The Associate Handbook.⁶ The former document outlined the defendant’s policies and practices with regard to new employees, while the latter document covered Wal-Mart’s history, employee training,⁷ employee evaluations, personnel records, and company goals.⁷ Both documents included statements of the defendant’s “Open Door Policy,” which was described in the New Associate Form as

1. 582 N.W.2d 231 (Minn. 1998). The court recognized three of the four causes of action found in the Restatement (Second) of Torts section 652A, including: intrusion upon seclusion, appropriation of name or likeness, and publication of private facts. *See id.* at 236.

2. 79 F. Supp.2d (D. Minn. 1999).

3. *See id.* at 1083-86.

4. *See id.* at 1084-85. The court cited the Restatement (Second) of Torts that “provides that the term publicity should be construed narrowly.” *Id.* at 1084. In addition, the court stated that “the majority of state and federal courts to consider the issue have [done so with a narrow scope].” *Id.* Finally, the court cited previous Minnesota cases that considered the tort in dicta and concluded that the state courts would adopt a narrow definition of the tort, perhaps even narrower than the Restatement. *See id.*

5. *See id.* at 1081.

6. *See id.*

7. *See id.*

follows: "Wal-Mart has an Open Door Policy which encourages associates to discuss any matter freely, openly, and in confidence with their Store manager or other levels of Management. We encourage you to use this at anytime."⁸

In addition, the Associate Handbook stated that none of the policies described in the manual were terms of employment nor did they result in a contract.⁹ Plaintiff signed both the New Associate Form and the Associate Handbook on August 29, 1995, "thereby acknowledging that she had read and understood them."¹⁰

In September 1997, plaintiff learned that she was pregnant and decided to have an abortion in early October 1996.¹¹ Plaintiff sought medical leave from work to have the procedure.¹² Specifically, plaintiff requested medical leave from assistant manager John Enright.¹³ Enright granted the permission and plaintiff then "volunteered the fact that she was pregnant and 'losing the baby.'"¹⁴ Plaintiff stated that she divulged the circumstances because "she felt psychological pressure from Enright to legitimize her request."¹⁵

Plaintiff contends that when she returned to work three of her co-workers knew of her pregnancy and abortion.¹⁶ Plaintiff alleged that the three employees knew because Enright told them; although she had no direct evidence to support her contention.¹⁷ In December of 1996, plaintiff voluntarily disclosed her situation to other employees because she felt the need "to defend herself against rumors."¹⁸ Soon thereafter in February of 1997 plaintiff quit her job.¹⁹

Plaintiff filed suit for, *inter alia*, tortious invasion of privacy.²⁰ The Minnesota federal district court, "[l]acking instruction on this issue from the courts of Minnesota . . . look[ed] to other sources

8. *Id.* The Associate Handbook provided substantially the same description. *See id.*

9. *See id.* at 1082.

10. *See id.*

11. *See id.*

12. *See id.*

13. *See id.*

14. *Id.*

15. *Id.*

16. *See id.*

17. *See id.*

18. *Id.*

19. *See id.*

20. *See id.*

for guidance.”²¹ After looking to the Restatements, other jurisdictions, and any tendencies from the Minnesota courts, the court found that plaintiff failed to present a case for invasion of privacy and therefore granted defendant’s summary judgment motion.²² In finding that plaintiff did not present an invasion of privacy case, the court determined that there was an insufficient number of people with knowledge to constitute publication, and that even if there were enough people with knowledge to establish publication, there was insufficient evidence to prove the defendant publicized the facts.²³

First, the district court looked to see if the private facts were known by enough people to constitute publication.²⁴ In determining what would be enough publicity, the court looked to the Restatement of Torts, which requires that the facts be dispersed to enough people “that the matter must be regarded as substantially certain to become one of public knowledge.”²⁵ Further, the Restatement’s comments state “it is not an invasion of the right of privacy . . . to communicate a fact concerning the plaintiff’s private life to a single person or even a small group of persons.”²⁶ The court went on to state that the majority of other jurisdictions have adopted a substantially similar narrow standard and that it was thus likely that this would be the standard adopted by the Minnesota courts.²⁷ Indeed, the court pointed to Minnesota’s pre-*Lake* decisions that also imply a narrow definition of publicity.²⁸ Thus, the court concluded that the standard of publicity in Minnesota is a narrow one, requiring more than “disclosure to a few individuals” of private facts.²⁹ As a result, the court held that because only a few people had knowledge of the plaintiff’s abortion, there was no publicity and therefore no invasion of privacy.³⁰

Even if the number of persons in the case were sufficient to

21. *Id.* at 1083.

22. *See id.* at 1083-85.

23. *See id.* at 1085.

24. *See id.* at 1084.

25. *Id.* (quoting RESTATEMENT (SECOND) OF TORTS § 652D cmt. a (1977)).

26. RESTATEMENT (SECOND) OF TORTS § 652D cmt. a (1977).

27. *See C.L.D.*, 79 F. Supp.2d at 1084.

28. *See id.* at 1084-85. The court cited *Hendry v. Conner*, 226 N.W.2d 921, 923 (Minn. 1975), which states that communication to a small number of people is insufficient to trigger an invasion of privacy tort. *See id.*

29. *See C.L.D.*, 79 F. Supp.2d at 1085.

30. *See id.*

constitute publicity, the court found that there was insufficient evidence that the defendant disclosed the private facts to others.³¹ In doing so, the court noted the lack of direct evidence and pointed to several possible alternatives as to how the private information could have leaked out.³² Thus, the court held that the mere possibility that the defendant dispersed the information was not enough to withstand summary judgment.³³

B. Negligence—Property Owners and Trespassing Children

In *Croaker v. Mackenhausen*,³⁴ the Minnesota Supreme Court reversed the Minnesota Court of Appeal's decision and strictly construed the Restatement (Second) of Torts section 339 requirement that "the possessor of land know or have reason to know that children are likely to trespass."³⁵ In doing so, the Minnesota Supreme Court applied a more stringent standard, requiring that the possessor of land must "have reason to anticipate the presence of the child at the place of danger."³⁶

In *Croaker*, tragedy struck when five children were playing in a van on the defendant's land and they lit a fire in a gasoline canister that caused an explosion resulting in the death of a three-year-old and badly burning a five-year-old and eight-year-old.³⁷ The children were locals who frequently visited the defendant's resort, as did many other children.³⁸ On the day in question, the children went to the resort and, finding the lodge closed, happened upon a van parked next to a shed.³⁹ After playing in the van awhile, one of the children slid under the shed's locked door, found a small red

31. *See id.* "Plaintiff lacks direct evidence that Enright disclosed her pregnancy and abortion to other Wal-Mart employees, and he flatly denies this allegation." *See id.*

32. *See id.* The court noted that one of plaintiff's roommates, also a co-worker, could have inferred the plaintiff's circumstances because the plaintiff "experienced frequent nausea during her pregnancy" and her roommates were aware of that condition. *See id.* The court also considered the plaintiff's indiscreet use of home pregnancy tests, her roommate's interaction with other Wal-Mart employees, and the fact that plaintiff's medical leave generated rumors. *See id.*

33. *See id.*

34. 592 N.W.2d 857 (Minn. 1999).

35. *See id.* at 860.

36. *See id.* at 862 (quoting William L. Prosser, *Trespassing Children*, 47 CAL. L. REV. 427, 448 (1959)).

37. *See id.* at 859.

38. *See id.*

39. *See id.*

plastic gas tank, and decided to bring it into the van.⁴⁰ The child stuck a piece of paper into the neck of the tank and lit it.⁴¹ The paper burned for a short time, then the explosion occurred.⁴² Plaintiffs brought the instant suit to recover damages for the burns.⁴³

At the trial court, the jury found the defendant sixty percent responsible.⁴⁴ The defendants appealed and the court of appeals affirmed, stating that all five elements of the law at issue were supported by the evidence.⁴⁵ In so holding, the court of appeals continued its practice of applying a looser standard to Restatement section 339(a), merely requiring the possessor to know of the children to be in the vicinity of the dangerous condition.⁴⁶ The defendants appealed claiming that the court of appeal's standard does not comport with the law because it did not require the defendants to know or have reason to know that children might trespass at the place of the dangerous condition.⁴⁷ The Minnesota Supreme Court agreed with the defendants.⁴⁸

In its analysis, the court noted generally that possessors of land owe no duty to trespassers.⁴⁹ The narrow exception to this rule

40. *See id.*

41. *See id.*

42. *See id.*

43. *See id.*

44. *See id.*

45. *See id.* at 860. The Restatement (Second) Of Torts section 339 reads:

A possessor of land is subject to liability for physical harm to children trespassing thereon caused by an artificial condition upon the land if: (a) the place where the condition exists is one upon which the possessor knows or has reason to know that children are likely to trespass, and (b) the condition is one of which the possessor knows or has reason to know and which he realizes or should realize will involve an unreasonable risk of death or serious bodily harm to such children, and (c) the children because of their youth do not discover the condition or realize the risk involved in intermeddling with it or in coming within the area made dangerous by it, and (d) the utility to the possessor of maintaining the condition and the burden of eliminating the danger are slight as compared with the risk to children involved, and (e) the possessor fails to exercise reasonable care to eliminate the danger or otherwise to protect the children.

RESTATEMENT (SECOND) OF TORTS § 339 (1977).

46. *See Croaker*, 592 N.W.2d at 862.

47. *See id.* at 861.

48. *See id.*

49. *See id.*

requires that five specific conditions must be met before a duty arises.⁵⁰ The court held that “[o]ur past decisions make it clear that we strictly construe the requirement that the possessor of land know or have reason to know that children are likely to trespass.”⁵¹ As a result, the Minnesota Supreme Court reversed the court of appeal’s holding.⁵² Instead, the Minnesota Supreme Court strictly applied the language of section 339(a), thereby requiring the defendant’s knowledge or reason to have knowledge that the children were likely to trespass on the defendant’s property.⁵³ Therefore, the defendants owed the plaintiffs no duty simply because the defendants knew children to be “in the vicinity” of the dangerous condition.⁵⁴

C. *Legal Malpractice Statute of Limitations*

The occurrence-based statute of limitations for legal malpractice claims is alive and well after *Herrmann v. McMenemy & Severson*.⁵⁵ Resisting a nudge from the court of appeals to adopt a “discovery rule” statute of limitations,⁵⁶ the Minnesota Supreme Court continued its long history of ruling that the statute of limitations for legal malpractice begins to run “at the time of the first prohibited transaction” made by the plaintiffs upon the attorney’s advice.⁵⁷

In *Herrmann*, plaintiff sued after he incurred significant federal excise taxes and interest from a prohibited transaction recommended to him by the defendants, a law firm.⁵⁸ Plaintiff entered into the prohibited transaction on October 7, 1987, and became aware of its prohibited nature in May of 1993.⁵⁹ On May 10, 1996, the IRS assessed the penalties and on October 31, 1996, the client filed suit.⁶⁰

50. *See id.* at 862.

51. *Id.*

52. *See id.* at 862 n.4.

53. *See id.* at 862-63.

54. *See id.*

55. 590 N.W.2d 641 (Minn. 1999).

56. “Under the discovery rule, the statute of limitations begins to run on the date when the plaintiff knew or should have know of the existence of the cause of action.” *Id.* at 643 n.16.

57. *See id.* at 644.

58. *See id.* at 642.

59. *See id.*

60. *See id.*

The district court granted the defendant's summary judgment motion finding that the action accrued in 1987 and thus was time-barred due to Minnesota's six-year statute of limitations for legal malpractice claims.⁶¹ The court of appeals reversed, finding that the action did not accrue until 1993 because "the statute of limitations does not begin to run until the harm manifests itself in some form or the client otherwise suffers pecuniary loss."⁶²

On appeal, the Minnesota Supreme Court refused the Minnesota Court of Appeals "adopt[ion of a] discovery rule for determining when the statute of limitations begins to run for legal malpractice action based on negligent advice."⁶³ The plaintiff argued "that it would be unfair to commence the running of that statute of limitations before 1993 . . . because [he] did not have any knowledge of the illegality of the transactions"⁶⁴ Nonetheless, the Minnesota Supreme Court stated it has a long history of "declining to adopt the discovery rule . . . and neither [the plaintiff's] argument nor the court of appeal's decision provide any justification for [adopting a discovery rule] now."⁶⁵

D. Negligence—Duty to Protect

In *Gilbertson v. Leininger*,⁶⁶ the Minnesota Supreme Court held that hosts did not have a special relationship with a houseguest and owed no duty to protect her from harm.⁶⁷ In *Gilbertson*, three friends (the plaintiff and two defendants) had a Thanksgiving dinner at the defendants' home.⁶⁸ Over the course of the evening, the plaintiff consumed one bottle of wine and one beer.⁶⁹ The plaintiff stayed overnight on the defendants' couch and in the morning the defendants noticed that the plaintiff had some dried blood under her nose.⁷⁰ In addition, the defendants noticed that

61. *See id.*

62. *See Herrmann v. McMenemy & Severson*, 583 N.W.2d 283, 292 (Minn. Ct. App. 1998), *rev'd*, 590 N.W.2d 641 (Minn. 1991).

63. *Herrmann*, 590 N.W.2d at 643.

64. *Id.*

65. *Id.*

66. 599 N.W.2d 127 (Minn. 1999).

67. *See id.* at 130-32. The court implied that if the injury were apparent and the defendants were not reasonable in their care, then a legal duty would arise. *See id.* at 131-32 n.2.

68. *See id.* at 128.

69. *See id.* at 129.

70. *See id.*

the plaintiff had both urinated and defecated in her pants.⁷¹ A few hours later the defendants noticed some blood on the pillow and blanket that the plaintiff had used.⁷² Another few hours passed and the plaintiff had still not cleaned herself.⁷³ At this time the defendants began to worry that something was wrong and called a nurse.⁷⁴ The nurse told them not to worry, but the defendants called 911 a short time later.⁷⁵ The plaintiff was diagnosed with a subdural hematoma and a skull fracture.⁷⁶

The plaintiff filed suit against the defendants, claiming that they owed her a duty of protection after she was injured.⁷⁷ A jury agreed and the court of appeals affirmed.⁷⁸ On appeal, the court found that the defendants did not have a special relationship with the plaintiff and, therefore, owed her no duty.⁷⁹ The court noted that “[a] person generally has no duty to act for the protection of another [and t]he existence of a legal duty to act depends on two factors: (1) the relationship of the parties, and (2) the foreseeability of the risk involved.”⁸⁰ In order to find a relationship satisfying the first element, “it must be assumed that the harm to be prevented by the defendant is one that ‘the defendant is in a position to protect against and should be expected to protect against.’”⁸¹

The plaintiff claimed that she placed herself in the defendants’ custody and thus was deprived of normal opportunities for self-protection.⁸² The court disagreed, finding that the defendants did not have physical custody of plaintiff nor did they accept responsibility for plaintiff’s health.⁸³ In addition, the court stated that the defendants could not be expected to detect the seriousness of the problem and thus call for help much sooner because they had no medical training.⁸⁴ As a result, the court held

71. *See id.*

72. *See id.*

73. *See id.*

74. *See id.*

75. *See id.* at 129-30.

76. *See id.* at 130.

77. *See id.* at 128.

78. *See id.*

79. *See id.*

80. *Id.* at 130.

81. *See id.* at 131 (quoting *Erickson v. Curtis Inv. Co.*, 447 N.W.2d 165, 168 (Minn. 1989)).

82. *See id.* at 131.

83. *See id.*

84. *See id.*

that no special relationship existed to give rise to a duty to protect.⁸⁵

Kevin M. Decker

85. *See id.* at 132.
