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Third Party Plaintiffs In Civil Rights Damage Actions

Robert M. Didrick*

IN A RECENT LAW REVIEW article the problem of selective law enforcement by police is discussed, with a view to the use of the equal protection clause of the fourteenth amendment as a defense by one being prosecuted for the violation of law which others disregard with impunity. The author's conclusion was that the doctrine of equal protection as a bar to such convictions will rarely, if ever, be recognized by the courts.

In a case decided in 1965, the year of publication of the above article, a father and mother attempted a converse approach to the problem. They found themselves in a situation in which they felt that police officers were wantonly negligent in the investigation of an accident in which their son was killed. The action was brought under New York's civil rights law instead of the federal law, which gives original jurisdiction over civil rights damage actions to the federal district courts. The complaint alleged that police officers of two neighboring towns in New York performed their investigation of the motor vehicle accident in such a manner that the true circumstances surrounding the accident were either concealed or distorted.

The son, John Napolitano, was walking along a highway at about 8 o'clock on a November evening when he was struck by a car from behind. Each of the parents, separately and as individuals, alleged two identical causes of action. The first was that "he(she) has been deprived of her rights by reason of the misconduct of the agents, servants and employees of the defendants." The second was that they had been forced to witness and endure the denial of rights to their deceased son and consequently suffered extreme mental anguish and disturbance with resulting physical manifestation. The defendants moved for judgment dismissing the complaint for failure to state a cause of action.

The court granted the motions to dismiss, citing authority on the second cause but without a mention of previous cases or other authority dealing with the first. Motions to dismiss two more causes of action, alleged by the father as Administrator of the estate of his son, were denied. The question of the liability of a municipality for the negligence

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2 U.S. Const. amend. XIV, sec. 1.


4 See notes 11-16, infra.
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of its agents was answered in the affirmative, citing several New York cases. No report of further action on the merits of these causes was found.

This article will discuss the question of whether third parties may bring an action for damages against those who deprive another of his civil rights. The related question, resulting from the second cause of action in the Napolitano case, of whether one may recover for the mental anguish caused by the denial of another's civil rights will also be considered. Although the question is concerned with damage actions, cases in which injunctive relief was asked are helpful in studying the principle involved. Relief has been granted in these cases much more readily than in damage actions, possibly because the equitable relief is easier to apply. 5

The case upon which nearly all of the later cases ultimately rely is McCabe v. Atchison, T.&S.F.Ry., 6 decided in 1914. McCabe and several other Negroes attempted to get an injunction against the railroad company's refusal to furnish Negroes the same accommodations as those given to whites. No allegation was made that any of the complainants had ever requested the accommodations. Justice Hughes said

"it is an elementary principle that in order to justify the granting of this extraordinary relief, the complainant's need of it, and the absence of an adequate remedy at law must clearly appear. The complaint cannot succeed because someone else may be hurt. Nor does it make any difference that other persons who may be injured are persons of the same race or occupation. It is the fact, clearly established, of injury to the complainant—not to others—which justifies judicial intervention." 7 (Emphasis added.)

Later in the opinion, the Justice said, "The desire to obtain a sweeping injunction cannot be accepted as a substitute for compliance with the general rule that the complainant must present facts sufficient to show that his individual need requires the remedy which he asks." 8

The plaintiff in Brown v. Bd. of Trustees of LaGrange Indep. School Dist. et al. 9 appealed to the circuit court on another point only to have his standing denied in that court after it was upheld in the trial court. The rule of McCabe was condensed to "...it is elementary that he has no standing to sue for the deprivation of the civil rights of others."

Williams v. Kansas City, Mo. 10 and Armstrong v. Bd. of Educ. of

6 235 U.S. 151 (1914).
7 Id. at 162.
8 Id. at 164.
9 187 F. 2d 20 (5th Cir., 1951).
Birmingham\textsuperscript{11} were both decided in part upon the rule of McCabe. As recently as 1962 the Supreme Court has relied on McCabe when it stated that the appellants lacked standing since they did not allege that they had been prosecuted under the statute being challenged as unconstitutional.\textsuperscript{12}

The federal district courts have original jurisdiction of civil actions commenced by any person to recover damages for injury to his person or property because of the deprivation of any right, privilege or immunity secured by the Constitution of the United States.\textsuperscript{13} Neither the amount in controversy\textsuperscript{14} nor diversity of citizenship\textsuperscript{15} are material to an action of this type in district court.

Statutes authorizing a civil action for redress of injuries suffered because of a deprivation of civil rights are found in Title 42 of the United States Code. Section 1983 of this title provides that:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

A strict constructionist might say that the language of this section would indicate that the "party injured" does not have to be the same person whose rights were deprived.

Paragraph 3 of Section 1985 of Title 42 is directed to actions against two or more persons who conspire to deprive another of his rights.

Section 1988 of this title provides that, where the laws of the United States are not adapted to the object of the action or are deficient in the provisions necessary to furnish suitable remedies, the common law, as modified by the constitution and statutes applicable in the forum wherein the cause is tried shall govern the courts in the trial and disposition of the cause.

Mosher v. Beirne\textsuperscript{16} is the only other case found aside from Napolitano in which one person was attempting to sue as an individual for damages because of the denial of another's rights under 42 U.S.C. 1983. In this case the plaintiff was denied a license to operate a teen-age club, and the police closed the club after he operated without a license. Mosher contended his right to equal protection of the law had been de-


\textsuperscript{12} Bailey v. Patterson, 369 U.S. 31 (1962).

\textsuperscript{13} 28 U.S.C. § 1343.

\textsuperscript{14} 28 U.S.C.A. § 1331, note 270.

\textsuperscript{15} 28 U.S.C.A. § 1332, note 767.

nied because of the mayor's arbitrary action under color of law, alleging that the mayor's purpose was to prevent the employment of colored persons as entertainers in the club. The court said that the plaintiff's allegations were not such as would create a cause of action in him. Relying upon McCabe, the court said that the plaintiff cannot seek to correct wrongs allegedly done to others for "... it is elementary in civil rights litigation that one cannot sue over the deprivation of another's civil rights."

The rule was used in Krum v. Sheppard\(^{17}\) to bring a civil rights damage action within Michigan's statute of limitations governing actions to recover damages for injuries to person. The Williams case\(^{18}\) was cited for authority.

In another case, a father brought suit against police officers who retrieved his children while he was attempting to transport them to another state away from his estranged wife. He had no cause of action because "... he, himself, had [not] been deprived of any right."\(^{19}\)

Whereas the courts in all of the above cases looked upon the rule of the McCabe case as an elementary principle, the court in Brewer v. Hoxie School Dist.\(^{20}\) said, "Although, generally speaking, the right to equal protection is a personal right of the individual, this is only a rule of practice which will not be followed where the identity of interests between the party asserting the right and the party in whose favor the right directly exists is sufficiently close." The party asserting the right was, in this case, the school district. It had been granted an injunction against Brewer and his group which was attempting to force the school board to drop its desegregation program. In denying Brewer's appeal, the circuit court said that the board had the duty to afford the children equal protection, and its right to protection in performing this duty is identified with the children's rights. The court cited Barrows v. Jackson,\(^{21}\) in which the Supreme Court used the phrase "rule of practice" when it chose not to follow the rule on standing to sue and permitted the defendant to challenge the enforcement of a racially restrictive covenant, the breach of which was the subject of an action for damages against him.

An identity of interests—the key which must be possessed in order to pass through the barrier of the standing to sue rule—might well be a synthesis of the rulings in Brewer and Barrow and the decision in


\(^{18}\) Supra, note 10.

\(^{19}\) Denman v. Wertz, 372 F. 2d 135 (3rd Cir., 1967); cert. den. 389 U.S. 941, 83 S. Ct. 300 (1967).

\(^{20}\) 238 F. 2d 91 (8th Cir., 1956).

\(^{21}\) 346 U.S. 249 (1953).
Truax v. Raich.\textsuperscript{22} Certainly, the plaintiff in Truax, who was an alien, had an interest identified with that of his employer who was subject to the statute being challenged, which restricted the number of aliens an employer could hire. The question of standing was resolved in favor of the employee and the statute was declared invalid under the fourteenth amendment.

Thus, if an "identity of interests" can be shown in a case like that of Napolitano, the plaintiff may at least have his case heard on its merits. As will be shown later, a parent, as the administrator of the deceased child's estate, has been held to have a cause of action under 42 U.S.C. 1983 through 42 U.S.C. 1988 which has been construed as providing for the application of a state's survival of actions statute.\textsuperscript{23} However, the amount to be recovered as damages has also been limited by the same statute.\textsuperscript{24} To overcome this limitation it will be most valuable to the bereaved parents to have a cause of action in themselves for the deprivation of their civil rights.

The case referred to in which an administrator was allowed to invoke the Federal Civil Rights Act was thought to be unusual by the court. Nevertheless, the court did cite Brazier v. Cherry,\textsuperscript{25} wherein the court struck down defendant's attempt to show that the precise wording of 42 U.S.C. 1983 and 1985 indicated that Congress purposefully confined the sanctions of a civil damage suit to the immediate physical victim of violations. The court could not believe Congress had intended to assure the living of their constitutional rights but to withdraw such protection when a deprivation of those rights resulted in death. Pritchard v. Smith\textsuperscript{26} was cited by the Brazier court as giving an equivalent reach to 42 U.S.C. 1988, when Brazier held that state survival of actions statutes were among the laws which were to be used to effectuate 42 U.S.C. 1983 and 1985.

Although the plaintiff in Brazier did not invoke 42 U.S.C. 1986, the court said that the complaint was sufficient to do so. This section of Title 42 gives a right to recover damages against one who has knowledge of a conspiracy as set out in section 1985 and neglects to prevents its function when having the power to do so. In Galindo v. Brownell,\textsuperscript{27} a district court in California referred to dicta in Brazier to the effect that an action would be proper under sections 1983 and 1985, whether the recovery sought was for damages to the decedent or for damages sustained by the survivors. The decedent's mother was said to have standing, as

\begin{itemize}
    \item \textsuperscript{22} 239 U.S. 33 (1915).
    \item \textsuperscript{24} Id. at 224.
    \item \textsuperscript{25} 293 F. 2d 401 (5th Cir. 1961), \textit{cert. denied} 368 U.S. 921 (1961).
    \item \textsuperscript{26} 289 F. 2d 153 (8th Cir. 1961).
    \item \textsuperscript{27} 255 F. Supp. 930 (D.C.S.D. Cal. 1966).
\end{itemize}
an heir of the decedent, to sue for damages for his wrongful death. The
decedent, a minor, had been shot by a Los Angeles County deputy sheriff
and Brownell was a representative of a surety for the county under em-
ployee performance bonds.

No doubt, the courts allowing an action under the federal statutes
upon the theory of a wrongful death action would also limit the recov-
er-y to that provided by the forum state's wrongful death statute,28 just
as the District Court of Colorado did in the Brazier case.

How, then, can the parents, widow, children or others having an
"identity of interest" with the decedent overcome those statutory lim-
itations?

Do parents, such as the Napolitanos, have sufficient legal interest
in the investigation of the accidental death of their children, and in the
apprehension and prosecution of those apparently responsible for the
death, so that they may complain in a court of law of unequal protection
of the law if the investigation is done negligently? Or is it a general
interest, in common with the public at large, in the safety from harm as
we go about our business in the normal course of our daily lives? If the
latter, the interest would not be actionable if the interpretation of 42
U.S.C. 1983 by the seventh circuit in Manion v. Holzman29 were fol-
lowed. The facts in this case are far removed from situations considered
here, but section 1983 was invoked. Where the conduct complained of,
the court said, constitutes a public wrong in transgression of a constitu-
tionally protected right but the only impact therefrom is shared by all
members of the public, there can be no personal redress under section
1983.

In Hurlburt v. Graham,30 the court found that the investigating offi-
cers in an accident case did not become liable under the Civil Rights Act
by virtue of their investigation and ticketing of the plaintiff. What took
place at the trial was not the officer's responsibility, the court said. But
the court went further in saying that even if the police had given a false
version of the accident, as was charged, the case would not come under
the Civil Rights Act. If the rule were otherwise, the court said, it would
be an invitation to every disgruntled litigant to retry his case in a federal
court by alleging that a false account was given by his opponent.

Still, there is the problem of undue favor and privilege which many
people feel taint accident investigation and enforcement of gambling and
morals charges. The Supreme Court, in a case involving the right to
picket,31 said the fourteenth amendment's guaranty of equal protection
was aimed at undue favor and individual or class privilege. The deci-

28 Truax v. Raich, supra note 22.
29 379 F. 2d 843 (7th Cir. 1967); cert. den. 389 U.S. 976, 88 S. Ct. 479 (1967).
30 323 F. 2d 723 (6th Cir. 1963).
sion, which was hostile to the right of mass picketing, runs counter to later legislation and case law, but the interpretation of the equal protection clause should still ring true. Public authorities, however, should not be denied a measure of discretion, and an arbitrary abuse of power is not to be presumed. Essential facts showing discrimination in the administration of law must be shown.

Where municipal officers fail systematically to enforce an ordinance against all affected by it, the equal protection clause is violated. Where police power is exercised at all, it must be done in an undiscriminating manner in relation to those falling within the same circumstances.

A federal district court in Illinois insisted that it is essential for a plaintiff to show facts which indicate that the defendant knew or should have known that his acts would deprive the plaintiff of his civil rights. A police officer searched a suspect a second time after his partner had found nothing suspicious. A package of heroin was found and at the trial the evidence was admitted. Alleging that the second search was illegal, the defendant appealed the point and his conviction was vacated. Then the released suspect charged the searching officer under 42 U.S.C. 1983. The court said that the Civil Rights Act had created a type of tort, but that a standard of care must be enunciated by the courts and until a standard has been set a potential defendant cannot be expected to conform his conduct to it. The measure of a citizen's constitutional rights is not to be left to the determination of the community at large, in this court's view. How the standard can ever be set if defendants are to be let off for lack of a standard, the court did not say.

Conclusion

A look into the future of civil rights damage actions was taken in a recent law review article reflecting upon the history of litigation under section 1983 before and after the landmark case of Monroe v. Pape. The author had visions of a "Constitutional Tort," and opined that plaintiff's attorneys will probably explore new areas with recent dicta as a guide. He cited a need for standards and had some to offer.

I believe that one of these new areas to be developed should be the rights of third parties to recovery for damages resulting from the denial

32 McCraney v. City of Leeds, 241 Ala. 198, 1 So. 2d 894 (1941).
36 Hague v. C.I.O., 101 F. 2d 774 (3rd Cir., 1939); modified on other grounds, 307 U.S. 496 (1939).
of the civil rights of one in whom they have a bona fide interest. Perhaps these damages will have to be "parasitic" in nature at first, depending upon an established cause of action, but the urge of civilization toward ideality will create a new basis for this recovery as it has for many established torts.40