Weirum v. RKO General, Inc.

15 Cal.3d 40
Supreme Court of California
August 21, 1975

RONALD A. WEIRUM et al., Plaintiffs and Appellants, v. RKO GENERAL, INC., Defendant and Appellant; MARSHA L. BAIME, Defendant and Respondent. L.A. No. 30452. In Bank. Court below: Superior Court of Ventura County, No. 53135, Marvin H. Lewis, Judge. In this court: Opinion by Mosk, J., expressing the unanimous view of the court. Wright, C. J., McComb, J., Tobriner, J., Sullivan, J., Clark, J., and Richardson, J., concurred. Counsel: Hollister, Brace & Angle, Hollister & Brace, Robert O. Angle and Richard C. Monk for Plaintiffs and Appellants. Stearns & Nelson, Stearns, Nelson & LeBerthon, Robert S. Stearns, Lascher & Radar, Edward L. Lascher and Wendy Cole Wilner for Defendant and Appellant. Benton, Orr, Duval & Buckingham and James F. McGahan for Defendant and Respondent.

MOSK, J.

A rock radio station with an extensive teenage audience conducted a contest which rewarded the first contestant to locate a peripatetic disc jockey. Two minors driving in separate automobiles attempted to follow the disc jockey's automobile to its next stop. In the course of their pursuit, one of the minors negligently forced a car off the highway, killing its sole occupant. In a suit filed by the surviving wife and children of the decedent, the jury rendered a verdict against the radio station. We now must determine whether the station owed decedent a duty of due care.

The facts are not disputed. Radio station KHJ is a successful Los Angeles broadcaster with a large teenage following. At the time of the accident, KHJ commanded a 48 percent plurality of the teenage audience in the Los Angeles area. In contrast, its nearest rival during the same period was able to capture only 13 percent of the teenage listeners. In order to attract an even larger portion of the available audience and thus increase advertising revenue, KHJ inaugurated in July of 1970 a promotion entitled "The Super Summer Spectacular." The "spectacular," with a budget of approximately $40,000 for the month, was specifically designed to make the radio station "more exciting." Among the programs included in the "spectacular" was a contest broadcast on July 16, 1970, the date of the accident.

On that day, Donald Steele Revert, known professionally as "The Real Don Steele," a KHJ disc jockey and television personality, traveled in a conspicuous red automobile to a number of locations in the Los Angeles metropolitan area. Periodically, he apprised KHJ of his whereabouts and his intended destination, and the station broadcast the information to its listeners. The first person to physically locate Steele and fulfill a specified condition received a cash prize.[11] In addition, the winning contestant participated in a brief interview on the air with "The Real Don Steele." The following excerpts from the July 16 broadcast illustrate the tenor of the contest announcements:

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[11] The conditions varied from the giving of a correct response to a question to the possession of particular items of clothing.

> 9:30 and The Real Don Steele is back on his feet again with some money and he is headed for the Valley. Thought I would give you a warning so that you can get your kids out of the street.
>
> The Real Don Steele is out driving on – could be in your neighborhood at any time and he's got bread to spread, so be on the lookout for him.
>
> The Real Don Steele is moving into Canoga Park – so be on the lookout for him. I'll tell you what will happen if you get to The Real Don Steele. He's got twenty-five dollars to give away if you can get it ... and baby, all signed and sealed and delivered and wrapped up.
>
> 10:54 – The Real Don Steele is in the Valley near the intersection of Topanga and Roscoe Boulevard, right by the Loew's Holiday Theater – you know where that is at, and he's standing there with a little money he would like to give away to the first person to arrive and tell him what type car I helped Robert W. Morgan give away yesterday morning at KHJ. What was the make of the car. If you know that, split. Intersection of Topanga and Roscoe Boulevard – right nearby the Loew's Holiday Theater – you will find The Real Don Steele. Tell him and pick up the bread.

In Van Nuys, 17-year-old Robert Sentner was listening to KHJ in his car while searching for "The Real Don Steele." Upon hearing that "The Real Don Steele" was proceeding to Canoga Park, he immediately drove to that vicinity. Meanwhile, in Northridge, 19-year-old Marsha Baime heard and responded to the same information. Both of them arrived at the Holiday Theater in Canoga Park to find that someone had already claimed the prize. Without knowledge of the other, each decided to follow the Steele vehicle to its next stop and thus be the first to arrive when the next contest question or condition was announced.

For the next few miles the Sentner and Baime cars jockeyed for position closest to the Steele vehicle, reaching speeds up to 80 miles an hour.[12] About a mile and a half from the Westlake offramp the two teenagers heard the following broadcast: "11:13 – The Real Don Steele with bread is heading for Thousand Oaks to give it away. Keep listening to KHJ .... The Real Don Steele out on the highway – with bread to give away – be on the lookout, he may stop in Thousand Oaks and may stop along the way .... Looks like it may be a good stop Steele – drop some bread to those folks."

The Steele vehicle left the freeway at the Westlake offramp. Either Baime or Sentner, in attempting to follow, forced decedent's car onto the center divider, where it overturned. Baime stopped to report the accident. Sentner, after pausing momentarily to relate the tragedy to a passing peace officer, continued to pursue Steele, successfully located him and collected a cash prize.

Decedent's wife and children brought an action for wrongful death against Sentner, Baime, RKO General, Inc. as owner of KHJ, and the maker of decedent's car. Sentner settled prior to the commencement of trial for the limits of his insurance policy. The jury returned a verdict against Baime and KHJ in the

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[12] It is not contended that the Steele vehicle at any time exceeded the speed limit.

amount of $300,000 and found in favor of the manufacturer of decedent's car. KHJ appeals from the ensuing judgment and from an order denying its motion for judgment notwithstanding the verdict. Baime did not appeal.[13]

The primary question for our determination is whether defendant owed a duty to decedent arising out of its broadcast of the giveaway contest. The determination of duty is primarily a question of law.^ It is the court's "expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection." (Prosser, Law of Torts (4th ed. 1971) pp. 325-326.) Any number of considerations may justify the imposition of duty in particular circumstances, including the guidance of history, our continually refined concepts of morals and justice, the convenience of the rule, and social judgment as to where the loss should fall. (Prosser, Palsgraf Revisited (1953) 52 Mich.L.Rev. 1, 15.) While the question whether one owes a duty to another must be decided on a case-by-case basis,[14] every case is governed by the rule of general application that all persons are required to use ordinary care to prevent others from being injured as the result of their conduct.^ However, foreseeability of the risk is a primary consideration in establishing the element of duty.^ Defendant asserts that the record here does not support a conclusion that a risk of harm to decedent was foreseeable.

While duty is a question of law, foreseeability is a question of fact for the jury.^ The verdict in plaintiffs' favor here necessarily embraced a finding that decedent was exposed to a foreseeable risk of harm. It is elementary that our review of this finding is limited to the determination whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion reached by the jury.

We conclude that the record amply supports the finding of foreseeability. These tragic events unfolded in the middle of a Los Angeles summer, a time when young people were free from the constraints of school and responsive to relief from vacation tedium. Seeking to attract new listeners, KHJ devised an "exciting" promotion. Money and a small measure of momentary notoriety awaited the swiftest response. It was foreseeable that defendant's youthful listeners, finding the prize had eluded them at one location, would race to arrive first at the next site and in their haste would disregard the demands of highway safety.

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[13] Plaintiffs filed a cross-appeal from an order entered after judgment denying them certain costs against Baime and KHJ. They do not assert before this court that the order was erroneous, and we shall therefore affirm the order on the cross-appeal.

[14] Defendant urges that we apply the factors enumerated in *Connor v. Great Western Sav. & Loan Assn.* (1968) 69 Cal.2d 850, 865, in determining whether it owed a duty to decedent. In that case, however, the primary issue was whether a duty was to be imposed upon the defendant notwithstanding the absence of privity, and we therefore examined considerations appropriate to that contractual framework. For example, the first of the enumerated elements was the extent to which the transaction was intended to affect the plaintiff. Such a consideration manifestly fails to illuminate our inquiry in the present case. Generally speaking, standards relevant to the determination of duty in one particular situation may not be applied mechanically to other cases.

Indeed, "The Real Don Steele" testified that he had in the past noticed vehicles following him from location to location. He was further aware that the same contestants sometimes appeared at consecutive stops. This knowledge is not rendered irrelevant, as defendant suggests, by the absence of any prior injury. Such an argument confuses foreseeability with hindsight, and amounts to a contention that the injuries of the first victim are not compensable. "The mere fact that a particular kind of an accident has not happened before does not ... show that such accident is one which might not reasonably have been anticipated." (*Ridley v. Grifall Trucking Co*. (1955) 136 Cal.App.2d 682, 686.) Thus, the fortuitous absence of prior injury does not justify relieving defendant from responsibility for the foreseeable consequences of its acts.

It is of no consequence that the harm to decedent was inflicted by third parties acting negligently. Defendant invokes the maxim that an actor is entitled to assume that others will not act negligently.^ This concept is valid, however, only to the extent the intervening conduct was not to be anticipated.^ If the likelihood that a third person may react in a particular manner is a hazard which makes the actor negligent, such reaction whether innocent or negligent does not prevent the actor from being liable for the harm caused thereby.^ Here, reckless conduct by youthful contestants, stimulated by defendant's broadcast, constituted the hazard to which decedent was exposed.

It is true, of course, that virtually every act involves some conceivable danger. Liability is imposed only if the risk of harm resulting from the act is deemed unreasonable – i.e., if the gravity and likelihood of the danger outweigh the utility of the conduct involved. (See Prosser, Law of Torts (4th ed. 1971) pp. 146-149.)

We need not belabor the grave danger inherent in the contest broadcast by defendant. The risk of a high speed automobile chase is the risk of death or serious injury. Obviously, neither the entertainment afforded by the contest nor its commercial rewards can justify the creation of such a grave risk. Defendant could have accomplished its objectives of entertaining its listeners and increasing advertising revenues by adopting a contest format which would have avoided danger to the motoring public.

Defendant's contention that the giveaway contest must be afforded the deference due society's interest in the First Amendment is clearly without merit. The issue here is civil accountability for the foreseeable results of a broadcast which created an undue risk of harm to decedent. The First Amendment does not sanction the infliction of physical injury merely because achieved by word, rather than act.

We are not persuaded that the imposition of a duty here will lead to unwarranted extensions of liability. Defendant is fearful that entrepreneurs will henceforth be burdened with an avalanche of obligations: an athletic department will owe a duty to an ardent sports fan injured while hastening to purchase one of a limited number of tickets; a department store will be liable for injuries incurred in response to a "while-they-last" sale. This argument, however, suffers from a myopic view of the facts presented here. The giveaway contest was no commonplace invitation to an attraction available on a limited basis. It was a competitive scramble in which the thrill of the chase to be the one and only victor was intensified by the live broadcasts which accompanied the pursuit. In the

assertedly analogous situations described by defendant, any haste involved in the purchase of the commodity is an incidental and unavoidable result of the scarcity of the commodity itself. In such situations there is no attempt, as here, to generate a competitive pursuit on public streets, accelerated by repeated importuning by radio to be the very first to arrive at a particular destination. Manifestly the "spectacular" bears little resemblance to daily commercial activities.

Defendant, relying upon the rule stated in section 315 of the Restatement Second of Torts, urges that it owed no duty of care to decedent. The section provides that, absent a special relationship, an actor is under no duty to control the conduct of third parties. As explained hereinafter, this rule has no application if the plaintiff's complaint, as here, is grounded upon an affirmative act of defendant which created an undue risk of harm.

The rule stated in section 315 is merely a refinement of the general principle embodied in section 314[15] that one is not obligated to act as a "good samaritan." (Rest.2d Torts, § 314, com. (a); James, Scope of Duty in Negligence Cases (1953) 47 Nw.U.L.Rev. 778, 803.) This doctrine is rooted in the common law distinction between action and inaction, or misfeasance and nonfeasance. Misfeasance exists when the defendant is responsible for making the plaintiff's position worse, i.e., defendant has created a risk. Conversely, nonfeasance is found when the defendant has failed to aid plaintiff through beneficial intervention. As section 315 illustrates, liability for nonfeasance is largely limited to those circumstances in which some special relationship can be established. If, on the other hand, the act complained of is one of misfeasance, the question of duty is governed by the standards of ordinary care discussed above.

Here, there can be little doubt that we review an act of misfeasance to which section 315 is inapplicable. Liability is not predicated upon defendant's failure to intervene for the benefit of decedent but rather upon its creation of an unreasonable risk of harm to him.[16]

The judgment and the orders appealed from are affirmed.

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[15] Section 314, states: "The fact that the actor realizes or should realize that action on his part is necessary for another's aid or protection does not of itself impose upon him a duty to take such action."

[16] In Shafer defendant entered a float in a commercial parade and as the float traveled down the street, employees threw candy to the crowd. Children running to collect the candy injured a spectator. The court distinguished cases in which the conduct of the person who immediately caused the accident was not set in motion by any act of the defendant on the ground that the defendant, in throwing the candy, induced the response of the children which resulted in the plaintiff's injuries.

Contrary to defendant's assertion, Shafer is not distinguishable because there the defendant had actual knowledge children were following the float and scrambling for candy. Such knowledge only obviated the need for a determination that the acts of the children were foreseeable. In the present case, as we have seen, the jury's determination that the accident was foreseeable is supported by the evidence.

DeFilippo v. NBC

446 A.2d 1036, 8 Media L. Rep. 1872
Supreme Court of Rhode Island
June 15, 1982

Shirley DeFILIPPO v. NATIONAL BROADCASTING CO., INC. et al. No. 80-318-Appeal. The Superior Court, Providence and Bristol Counties, Cochran, J., granted judgment for defendants, and parents appealed. Affirmed and remanded. Thomas W. Pearlman, Morton J. Marks, William A. Gosz, Providence, for plaintiffs. Edwards & Angell, Knight Edwards, Providence, Coudert Brothers, Carleton G. Eldridge, Jr., June A. Eichbaum, New York City, for defendants. BEVILACQUA, C. J., did not participate.

MURRAY, Justice.

This is an unusual and tragic case in which this court is being called upon to fashion a rule of great social import. The issue raised herein is one of first impression in this jurisdiction. The plaintiffs, Shirley and Nicholas DeFilippo, Sr., brought suit pursuant to G.L. 1956 (1969 Reenactment) §§ 10-7-1 through 10-7-13. (Wrongful Death Act) in their roles as co-administrators of the estate of Nicholas DeFilippo, Jr. (Nicky), their thirteen-year-old son, as individuals, and as Nicky's parents. The defendants are the National Broadcasting Co., Inc. (NBC); the Outlet Co., which is the owner-operator of WJAR-TV, the NBC affiliate in Providence; and ten "John Doe" defendants who were not served and have not appeared in this action.[17]

The plaintiffs' claims arise from a broadcast on defendants' television network of "The Tonight Show" on May 23, 1979. "The Tonight Show" is a popular comedy and talk show hosted by Johnny Carson. It is broadcast at 11:30 p. m. in the eastern time zone and is carried locally by WJAR-TV. On the broadcast of May 23, 1979, one of Johnny Carson's guests was Dar Robinson, a professional stuntman. While introducing him, Carson announced that Robinson would "hang" Carson as a stunt later in the broadcast.

Carson and Robinson conversed for a few moments, and photographs and a film clip were shown in which Robinson performed dangerous stunts. Carson then announced that when the program resumed after a commercial break, he would attempt a stunt that involved dropping through a trapdoor with a noose around his neck.

At this point, Robinson said "[b]elieve me, it's not something that you want to go and try. This is a stunt ... ." Thereupon, the audience began to laugh. The following colloquy then took place between Robinson and Carson:

> "Robinson: I've got to laugh-you know, you're all laughing ... .
>
> "Carson: Explain that to me.

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[17] The "John Doe" defendants were the commercial sponsors of the broadcast at issue, and at present their names are unknown to plaintiffs.

> "Robinson: I've seen people try things like this. I really have. I happen to know somebody who did something similar to it, just fooling around, and almost broke his neck ... ."

The program then broke for a commercial.

When the show resumed, Carson was shown standing on a gallows with a noose hanging by his side while Robinson and a third man, "the hangman," stood by. A comic dialogue ensued between Carson and Robinson. A hood was then placed over Carson's head and the noose put on over the hood. The trapdoor was opened, and Carson fell through. To the delight of the audience, he survived the stunt without injury.

The plaintiffs claim that their son, Nicky, regularly watched "The Tonight Show," and they allege that he viewed this particular broadcast. Several hours after the broadcast, the DeFilippos found Nicky hanging from a noose in front of the television set, which was still on and tuned to WJAR-TV.

On October 22, 1979, plaintiffs filed a complaint in the Superior Court. They alleged that Nicky had watched the stunt and then tried to imitate it, thereby accidentally hanging himself. They proposed two theories of recovery. The first was that defendants were negligent in permitting the stunt to be broadcast and that they "negligently failed to adequately warn and inform infant plaintiff * * * of the dangers of this program." The second theory upon which plaintiffs sought to recover was that the broadcast had been intentionally shown with malicious and reckless disregard of plaintiffs' and Nicky's welfare and that defendants "placed their financial interests above those of the plaintiffs and the deceased minor."

Thereafter, on February 15, 1980, defendants filed a motion to dismiss or, in the alternative, for summary judgment.[18] The motion was heard by a justice of the Superior Court on March 25, 1980. On April 10, 1980, plaintiffs filed an amended complaint in which they further clarified their original two theories of recovery by raising four causes of action: negligence; failure to warn; and two novel theories-products liability and intentional tort-trespass. They continued to demand damages in the amount of $10,000,000.

On June 4, 1980, the Superior Court rendered a written decision granting defendants' motion for summary judgment. The trial justice first rejected plaintiffs' product-liability claim, holding that defendants' broadcast was not a product. The trial justice then held as a matter of law that the First Amendment to the United States Constitution barred relief to the DeFilippos. He found that to permit recovery "would create a chilling effect on the first amendment rights of others ... ." On June 9, 1980, judgment was entered for defendants, from which order plaintiffs now appeal.

On appeal, plaintiffs have argued that the First Amendment does not bar recovery and that, therefore, triable issues of fact remain on their theories of

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[18] The motion was styled in this manner because affidavits were attached to the pleadings. See *Palazzo v. Big G Supermarkets, Inc.*, 110 R.I. 242, 292 A.2d 235 (1972); Super.R.Civ.P. 12(b) and 56. The Superior Court considered the motion to be one for summary judgment in accordance with this authority.

negligence and products liability. The plaintiffs have also asked us to overturn the trial justice's finding that the broadcast was not a product. We hold that the First Amendment does indeed bar recovery in such actions; therefore, we do not reach plaintiffs' other contentions.

I

We begin our analysis by noting that it is well-settled law that the First Amendment applies to the states through the Fourteenth Amendment.[19] The First Amendment freedom of speech is not absolute, although it "forbid[s] the States to punish the use of words or language not within 'narrowly limited classes of speech.' " *Gooding v. Wilson*, 405 U.S. 518, 521-22 (1972).

Those classes of speech which states may proscribe within First Amendment guidelines are obscenity, *Miller v. California*, 413 U.S. 15 (1973); "fighting words," *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942); defamatory invasions of privacy, *Beauharnais v. Illinois*, 343 U.S. 250 (1952); and words likely to produce imminent lawless action (incitement), *Brandenburg v. Ohio*, 395 U.S. 444 (1969).[20]

In cases like the one at bar, claims must be weighed against two distinct First Amendment rights that come into play. The more obvious of these is the First Amendment right of the broadcasters. This protection must afford defendants a strong presumption in their favor, a presumption that extends to both entertainment and news. The First Amendment, however, does not provide the broadcast media with unabridgable rights, as is evidenced by the limited governmental control over the broadcast media. See *Federal Communications Commission v. Pacifica Foundation*, 438 U.S. 726 (1978).

The other set of First Amendment rights belongs to the viewers and general public, whose rights are paramount and supersede those of the broadcasters. The public has a right to suitable access to "social, esthetic, moral, and other ideas and experiences ... ." We must seek to balance these two distinct First Amendment protections with the arguments advanced by plaintiffs. Using this balancing test, we find that plaintiffs cannot overcome the right to freedom of expression guaranteed by the First Amendment.

II

The plaintiffs rely in large measure on *Weirum v. RKO General, Inc.*, 15 Cal.3d 40 (1975), in arguing that the First Amendment does not bar recovery. In

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[19] The imposition of tort liability constitutes state action that implicates the First and Fourteenth Amendments. See *New York Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964).

[20] The parameters and protections of the First Amendment are impossible to define precisely. Occasionally, the state may have an interest that outweighs certain First Amendment considerations. For example, this court recently upheld the constitutionality of Rhode Island's Family Court shield law, G.L. 1956 (1981 Reenactment) § 14-1-30, from a claim that it violated the First Amendment. See *Edward A. Sherman Publishing Co. v. Goldberg, R.I.*, 443 A.2d 1252 (1982).

Weirum, the California Supreme Court held that a radio station could be liable for the deaths of two motorists who were killed in an automobile accident with two teenagers who were participating in the station's promotional contest.[21] The court held that there was no First Amendment bar to the radio station's liability "for the foreseeable results of a broadcast which created an undue risk of harm ... . The First Amendment does not sanction the infliction of physical injury merely because achieved by word, rather than act." Id. at 48. The plaintiffs maintain that the broadcast media should be liable for the foreseeable results of their actions and that under the doctrine of *Weirum*, the issue of foreseeability is one of fact for a jury to determine.

III

Having outlined the general First Amendment principles that must guide our analysis and plaintiffs' contentions, we now set forth the reasons for our decision.

Of the four classes of speech which may legitimately be proscribed, it is obvious that the only one under which plaintiffs can maintain this action is incitement to immediate harmful conduct under *Brandenburg v. Ohio*.

The trial justice found that "the question of whether a broadcast falls within any category of unprotected speech is a question of law, if the material facts are not in dispute." We agree with this holding.[22] The trial justice then held that as a matter of law the broadcast "contain[ed] no incitement ... ."

This decision finds support in *Zamora v. Columbia Broadcasting System*, 480 F.Supp. 199 (S.D.Fla.1979). In *Zamora* the plaintiff, after having been convicted of murder, sued the three commercial television networks "for failing to use ordinary care to prevent [plaintiff] from being 'impermissibly stimulated, incited and instigated' to duplicate the atrocities he viewed on television." Id. at 200. The District Court found that the First Amendment barred the suit, and it dismissed the complaint. The plaintiffs maintain that the holding in *Zamora* is inapposite because there the plaintiff was not referring to one specific incident but to television broadcasting in general. While plaintiffs are correct in pointing out the differences between *Zamora* and the instant case, we do not accept their

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[21] In *Weirum v. RKO General, Inc.*, 15 Cal.3d 40 (1975), the defendant's radio station had sponsored a contest to reward the first listener who located one of the station's disk jockeys who was driving around the Los Angeles area broadcasting clues to his whereabouts. The teenagers, in their haste to locate the disk jockey, forced a car off the road killing its occupants. The victims' heirs then sued the radio station.

[22] In constitutional adjudication, particularly in respect to matters affecting the First Amendment, it is frequently necessary for courts, including the Supreme Court of the United States, to enter the fact-finding area. As the Court stated in *Rosenbloom v. Metromedia*, 403 U.S. 29, 54 (1971): "[T]his Court has an 'obligation to test challenged judgments against the guarantees of the First and Fourteenth Amendments,' and in doing so 'this Court cannot avoid making an independent constitutional judgment on the facts of the case.' " As a consequence, trial justices and state appellate courts must draw independent conclusions upon issues of constitutional fact. This duty may be performed upon a motion for summary judgment where, as here, there is no genuine issue of material fact on the question of incitement.

characterization of that case as inapposite. In both cases the plaintiffs tried to establish negligence and recklessness by the broadcasters. We are therefore persuaded by the District Court's holding that the First Amendment bars this type of suit.

The main problem in permitting relief to the DeFilippos is that incitement cannot be measured precisely, and this difficulty lies at the core of our holding. Nicky was, as far as we are aware, the only person who is alleged to have emulated the action portrayed in the "hanging" on the May 23, 1979 broadcast of "The Johnny Carson Show." In such a case, we cannot say that the broadcast constituted an incitement. Indeed, Robinson stressed the dangers of performing the stunt, saying, "it's not something that you want to go and try."[23] It appears that despite these warnings, Nicky felt encouraged to emulate the stunt; because of these warnings, however, others may have avoided attempting to duplicate the stunt. To permit plaintiffs to recover on the basis of one minor's actions would invariably lead to self-censorship by broadcasters in order to remove any matter that may be emulated and lead to a law suit.[24]

This self-censorship would not only violate defendants' limited right to make their own programming decisions, but would also violate the paramount rights of the viewers to suitable access to "social, esthetic, moral, and other ideas and experiences ... ." *Columbia Broadcasting System v. Democratic National Committee*, 412 U.S. 94, 102 (1973).

Under the facts of this case, we see no basis for a finding that the broadcast in any way could be construed as incitement. Consequently, the exception set forth in *Brandenburg v. Ohio*, supra, is inapplicable to the case at bar. In any event, the incitement exception must be applied with extreme care since the criteria underlying its application are vague. Further, allowing recovery under such an exception would inevitably lead to self-censorship on the part of broadcasters, thus depriving both broadcasters and viewers of freedom and choice, for "above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter or its content." *Police Department of Chicago v. Mosley*, 408 U.S. 92, 95 (1972).

On the bases of the criteria set forth and of our analysis of this case, we find that the awarding of summary judgment to the defendants was proper. The plaintiffs' appeal is denied and dismissed, the judgment appealed from is affirmed, and the case is remanded to the Superior Court.

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[23] On the basis of Robinson's warnings, the trial justice distinguished this case from *Weirum v. RKO General, Inc*., supra, in which there was explicit incitement. We have viewed a video tape of Robinson's segment on "The Johnny Carson Show," and we agree that *Weirum* is inapposite to the case at bar. Therefore, our analysis herein applies only to the facts of the instant case and not to situations in which there was explicit incitement.

[24] As the Supreme Court has acknowledged, fear of the expense of defending defamation suits also spurs self-censorship. See *Rosenbloom v. Metromedia*, 403 U.S. 29, 52-53 (1971).

McCollum v. CBS

202 Cal.App.3d 989
Court of Appeals of California, Second Appellate District, Division Three
July 12, 1988

JACK McCOLLUM et al., Plaintiffs and Appellants, v. CBS, INC., et al., Defendants and Respondents. No. B025565. Court of Appeals of California, Second Appellate District, Division Three. July 12, 1988. Counsel: Anderson, Parkinson, Weinberg & Miller, Thomas T. Anderson, De Goff & Sherman, Victoria J. De Goff and Richard I. Sherman for Plaintiffs and Appellants. Wyman, Bautzer, Christensen, Kuchel & Silbert, Howard L. Weitzman, Michael J. O'Connor, Allison Weiner Fechter, O'Melveny & Myers, William W. Vaughn and Douglas W. Abendroth for Defendants and Respondents. Fred J. Hiestand and Paul N. Halvonik as Amici Curiae. McCollum v. CBS, Inc. No. B025565. Court of Appeals of California, Second Appellate District, Division Three. July 12, 1988.

CROSKEY, J.

Plaintiffs, Jack McCollum, Geraldine Lugenbuehl, Estate of John Daniel McCollum, Jack McCollum, administrator (hereinafter plaintiffs) appeal from an order of dismissal following the sustaining of a demurrer without leave to amend. The defendants John "Ozzy" Osbourne (Osbourne), CBS Records and CBS, Incorporated (hereinafter collectively CBS), Jet Records, Bob Daisley, Randy Rhoads, Essex Music International, Ltd., and Essex Music International Incorporated,[25] composed, performed, produced and distributed certain recorded music which plaintiffs claim proximately resulted in the suicide of their decedent. As we conclude that plaintiffs' pleading (1) fails to allege any basis for overcoming the bar of the First Amendment's guarantee of free speech and expression[26] and, in any event, (2) fails to allege sufficient facts to show any intentional or negligent invasion of plaintiffs' rights, we affirm.

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[25] The defendants Bob Daisley and Randy Rhoads (composers and musicians), Essex Music International, Ltd., and Essex Music International, Incorporated (owners of the publication rights to the record albums which are the subject of this action) and Jet Records (a distributor of the record albums) did not appear herein. The record does not disclose whether or not they were ever served. The attack on plaintiffs' pleading was made by, and the order of dismissal issued only in favor of, the defendants Osbourne and CBS. Unless the context otherwise indicates, the term "defendants" shall hereafter refer just to these defendants.

[26] This refers to the First Amendment to the United States Constitution. The California Constitution has a similar provision. "Article I, section 2 of the state Constitution constitutes '[a] protective provision more definitive and inclusive than the First Amendment.' (*Wilson v. Superior Court* (1975) 13 Cal.3d 652, 658; *Robins v. Pruneyard Shopping Center* (1979) 23 Cal.3d 899, 908.) State action violative of the First Amendment is, therefore, a fortiori violative of the state Constitution. For convenience, we use the term 'First Amendment' in this opinion as a shorthand identification of the free speech guarantees contained in both federal and state Constitutions." (*Bill v. Superior Court* (1982) 137 Cal.App.3d 1002, 1007, fn. 1.)

Factual and Procedural Background

On October 26, 1984, the plaintiffs' decedent, John Daniel McCollum (John), shot and killed himself while lying on his bed listening to Osbourne's recorded music. John was 19 years old at the time, and had a problem with alcohol abuse as well as serious emotional problems. Alleging that Osbourne's music was a proximate cause of John's suicide, plaintiffs filed suit against all of the named defendants.

The original complaint was filed on October 25, 1985, and, before an appearance by any defendant, was followed by the first amended complaint on December 4, 1985. Plaintiffs alleged claims which were based on theories of negligence, product liability and intentional misconduct. On August 7, 1986, the court sustained general demurrers to all causes of action without leave to amend, but granted plaintiffs permission to file, within 60 days, a motion for leave to file a second amended complaint. That motion was made and, on December 19, 1986, was denied. On the same date, the court signed the order of dismissal (based on its ruling of Aug. 7, 1986) from which the plaintiffs now appeal.

In the trial court's view, the First Amendment was an absolute bar to plaintiffs' claims. Nonetheless, the court did invite plaintiffs to seek leave to file a further pleading to see if that hurdle could be overcome. A proposed second amended complaint was submitted and the court made its final decision based on those allegations. For that reason, we here treat such proposed pleading as the operative one before us and assume that it states plaintiffs' case in its strongest light. In accordance with well-settled principles, we likewise assume those allegations to be true. They reflect the following facts.

On Friday night, October 26, 1984, John listened over and over again to certain music recorded by Osbourne. He listened repeatedly to side one of an album called, "Blizzard of Oz" and side two of an album called, "Diary of a Madman." These albums were found the next morning stacked on the turntable of the family stereo in the living room. John preferred to listen there because the sound was more intense. However, he had gone into his bedroom and was using a set of headphones to listen to the final side of the two-record album, "Speak of the Devil" when he placed a .22-caliber handgun next to his right temple and took his own life.[27] When he was found the next morning he was still wearing his headphones and the stereo was still running with the arm and needle riding in the center of the revolving record.

Plaintiffs allege that Osbourne is well known as the "mad man" of rock and roll and has become a cult figure. The words and music of his songs and even the album covers for his records seem to demonstrate a preoccupation with unusual,

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[27] Although a principal thrust of plaintiffs' claims is that the lyrics of Osbourne's music incited John to commit suicide, the pleading focuses on the lyrics of the two albums found on the family stereo ("Blizzard of Oz" and "Diary of a Madman") and expresses no criticism, or even discussion, of any of the songs contained in the album, "Speak of the Devil" to which John was actually listening when he took his life. Moreover, the plaintiffs' pleading does not disclose the actual or even estimated interval between the time John last listened to the records on the family stereo and when he went to his bedroom to listen to "Speak of the Devil."

antisocial and even bizarre attitudes and beliefs often emphasizing such things as satanic worship or emulation, the mocking of religious beliefs and death. The message he has often conveyed is that life is filled with nothing but despair and hopelessness and suicide is not only acceptable, but desirable.[28] Plaintiffs further allege that all of the defendants, through their efforts with the media, press releases and the promotion of Osbourne's records, have sought to cultivate this image and to profit from it.

Osbourne in his music sought to appeal to an audience which included troubled adolescents and young adults who were having a difficult time during this transition period of their life; plaintiffs allege that this specific target group was extremely susceptible to the external influence and directions from a cult figure such as Osbourne who had become a role model and leader for many of them. Osbourne and CBS knew that many of the members of such group were trying to cope with issues involving self-identity, alienation, spiritual confusion and even substance abuse.

Plaintiffs allege that a "special relationship" of kinship existed between Osbourne and his avid fans. This relationship was underscored and characterized by the personal manner in which the lyrics were directed and disseminated to the listeners. He often sings in the first person about himself and about what may be some of the listener's problems, directly addressing the listener as "you." That is, a listener could feel that Osbourne was talking directly to him as he listened to the music.

One of the songs which John had been listening to on the family stereo before he went to his bedroom was called "Suicide Solution" which, plaintiffs allege, preaches that "suicide is the only way out."[29] Included in a 28-second

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[28] It is relevant here to note that this is a theme often seen in literature and music. As the defendant CBS stated in its brief, the philosophical proposition that life is intolerable and suicide preferable has been frequently expressed. Illustrations cited by CBS include such recognized works as "Hamlet's 'to be or not to be' soliloquy, in which he lists human sufferings and declares that suicide is preferable to life [Shakespeare, Hamlet, Act III, Scene 1]; [] the sixteen suicides in Shakespearian drama alone; [] Tolstoy's novel, Anna Karenina, in which Anna, concluding life and love are a 'stupid illusion' and suicide the only way out, throws herself under a train; [] Sylvia Plath's autobiographical The Belljar, in which she presents a passionate, reasoned defense of her own 'rational' suicide; [] Arthur Miller's Pulitzer prize-winning play, Death of a Salesman, where Willy Loman, confronting failure of his dreams, defends his planned suicide as a 'courageous' way finally to achieve something and 'takes more guts than to stand the rest of ... life ringing up zero ...'; [] the operas of Puccini, Menotti and Verdi [Aida]; [and] [] the popular theme from the award-winning movie and later television show 'M*A*S*H', 'Suicide is Painless' ...."

[29] Part of plaintiffs' argument is that Osbourne's music has a cumulative impact on the susceptible listener. For example, plaintiffs, in their brief, describe side one of the album "Blizzard of Oz," which concludes with the "Suicide Solution," as consisting "of a progression of songs which lead down the path of emptiness to suicide." The first song, "I Don't Know," reflects chaos and confusion in life. The second song, "Crazy Train," suggests that insanity is the inevitable result of the inability to resolve psychological conflict or to explain life's contradictions. It ends without hope. They are followed by "Goodbye to Romance," which suggests that the only way to be free is to cut one's ties to the past. The last song, "Suicide Solution" preaches that "suicide is the only way out" for a person who is involved in excessive drinking:

instrumental break in the song are some "masked" lyrics (which are not included in the lyrics printed on the album cover):

> "Ah know people
>
> You really know where it's at
>
> You got it
>
> Why try, why try
>
> Get the gun and try it
>
> Shoot, shoot, shoot" (this line was repeated for about 10 seconds).

These lyrics are sung at one and one-half times the normal rate of speech and (in the words of plaintiffs' allegations) "are not immediately intelligible. They are perceptible enough to be heard and understood when the listener concentrates on the music and lyrics being played during this 28-second interval." In addition to the lyrics, plaintiffs also allege that Osbourne's music utilizes a strong, pounding and driving rhythm and, in at least one instance,[30] a "hemisync" process of sound waves which impact the listener's mental state.

Following these general allegations, plaintiffs allege that the defendants knew, or should have known, that it was foreseeable that the music, lyrics and hemisync tones of Osbourne's music would influence the emotions and behavior of individual listeners such as John who, because of their emotional instability, were peculiarly susceptible to such music, lyrics and tones and that such

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"Wine is fine but whiskey's quicker
Suicide is slow with liquor
Take a bottle drown your sorrows
Then it floods away tomorrows
"Evil thoughts and evil doings
Cold, alone you hand in ruins
Thought that you'd escape the reaper
You can't escape the Master Keeper
"Cause you feel life's unreal and you're living a lie
Such a shame who's to blame and you're wondering why
Then you ask from your cask is there life after birth
What you sow can mean Hell on this earth
"Now you live inside a bottle
The reaper's travelling at full throttle
"It's catching you but you don't see
The reaper is you and the reaper is me
"Breaking law, knocking doors
But there's no one at home
Made your bed, rest your head
But you lie there and moan
Where to hide, Suicide is the only way out
Don't you know what it's really about."

[30] That is, during the aforesaid 28-second instrumental break of the song, "Suicide Solution."

individuals might be influenced to act in a manner destructive to their person or body. Plaintiffs further allege that defendants negligently disseminated Osbourne's music to the public and thereby (1) aided, advised or encouraged John to commit suicide (count I) or (2) created "an uncontrollable impulse" in him to commit suicide (count II); and that John, as a proximate result of listening to such music did commit suicide on October 26, 1984.

In the remaining two counts, plaintiffs allege, respectively, that defendants' conduct constituted (1) an incitement of John to commit suicide (count III) and (2) an intentional aiding, advising or encouraging of suicide in violation of Penal Code section 401 (count IV). In all four counts plaintiffs allege that defendants acted maliciously and oppressively and thus are liable for punitive damages.

Contentions of the Parties

Plaintiffs argue that Osbourne's music and lyrics were the proximate cause of John's suicide and are not entitled to protection under the First Amendment. They seek recovery here on three separate theories. They claim that Osbourne and CBS (1) were negligent in the dissemination of Osbourne's recorded music, (2) intentionally disseminated that music with knowledge that it would produce an uncontrollable impulse to self-destruction in persons like John and (3) intentionally aided, advised or encouraged John's suicide in violation of Penal Code section 401, thus giving plaintiffs, as members of a group intended to be protected by that statute, a right of action for civil damages.

Defendants' initial and primary response is that plaintiffs' entire action, irrespective of the theory of recovery, is barred by the First Amendment's guarantee of free speech. In addition, they argue that the public dissemination of Osbourne's recorded music did not, as a matter of law, negligently or intentionally invade any right of plaintiffs or constitute a violation of Penal Code section 401.

Discussion

1. The First Amendment Bars Plaintiffs' Action

Our consideration of plaintiffs' novel attempt to seek postpublication damages for the general public dissemination of recorded music and lyrics must commence "with [the] recognition of the overriding constitutional principle that material communicated by the public media ... [including artistic expressions such as the music and lyrics here involved], is generally to be accorded protection under the First Amendment to the Constitution of the United States. (*Joseph Burstyn, Inc. v. Wilson* (1952) 343 U.S. 495, 501[^,~]

However, the freedom of speech guaranteed by the First Amendment is not absolute. There are certain limited classes of speech which may be prevented or punished by the state consistent with the principles of the First Amendment: (1) obscene speech is not protected by the First Amendment. (*Miller v. California* (1973) 413 U.S. 15, 23, 34-35); (2) "libel, slander, misrepresentation, obscenity, perjury, false advertising, solicitation of crime, complicity by encouragement, conspiracy, and the like" are also outside the scope of constitutional protection.

(*Konigsberg v. State Bar* (1961) 366 U.S. 36, 49, fn. 10); (3) the constitutional freedom for speech and press does not immunize "speech or writing used as an integral part of conduct in violation of a valid criminal statute." (*Giboney v. Empire Storage Co.* (1949) 336 U.S. 490, 498); and finally, (4) speech which is directed to inciting or producing imminent lawless action, and which is likely to incite or produce such action, is outside the scope of First Amendment protection. (*Brandenburg v. Ohio* (1969) 395 U.S. 444, 447-448.)

Plaintiffs argue that it is the last of these exceptions, relating to culpable incitement, which removes Osbourne's music from the protection of the First Amendment. This issue is properly addressed on demurrer since the question of whether his music falls within the category of unprotected speech is one of law where, as is the case here, the facts are undisputed.

It is settled that "... the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." (*Brandenburg v. Ohio*, supra, 395 U.S. 444, 447. Thus, to justify a claim that speech should be restrained or punished because it is (or was) an incitement to lawless action, the court must be satisfied that the speech (1) was directed or intended toward the goal of producing imminent lawless conduct and (2) was likely to produce such imminent conduct. Speech directed to action at some indefinite time in the future will not satisfy this test. (*Hess v. Indiana* (1973) 414 U.S. 105, 108.)

In the context of this case we must conclude, in order to find a culpable incitement, (1) that Osbourne's music was directed and intended toward the goal of bringing about the imminent suicide of listeners and (2) that it was likely to produce such a result. It is not enough that John's suicide may have been the result of an unreasonable reaction to the music; it must have been a specifically intended consequence. (*Braxton v. Municipal Court* (1973) 10 Cal.3d 138, 148.)

We can find no such intent or likelihood here. Apart from the "unintelligible" lyrics quoted above from "Suicide Solution," to which John admittedly was not even listening at the time of his death,[31] there is nothing in any of Osbourne's songs which could be characterized as a command to an immediate suicidal act. None of the lyrics relied upon by plaintiffs, even accepting their literal interpretation of the words, purport to order or command anyone to any concrete action at any specific time, much less immediately. Moreover, as defendants point out, the lyrics of the song on which plaintiffs focus their primary objection can as easily be viewed as a poetic device, such as a play on words, to convey meanings entirely contrary to those asserted by plaintiffs.[32] We note this here not

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[31] Indeed, plaintiffs have not alleged, nor do they argue here, that John ever actually heard and understood these lyrics. They allege only that the lyrics could be heard and understood with sufficient concentration.

[32] For example, the defendant CBS's analysis of "Suicide Solution" argues that "... the vocalist casts his remarks to a hypothetical alcohol abuser. The song expresses the abuser's anxiety, discordant thoughts, and self-destructive behavior: He is alienated and despondent ['cause you feel life's unreal and you're living a lie ...']; he drinks to 'drown [his] sorrows' and now is given over

to suggest a reliance upon a construction which is contrary to plaintiffs' allegations, but to illuminate the very serious problems which can arise when litigants seek to cast judges in the role of censor.

Merely because art may evoke a mood of depression as it figuratively depicts the darker side of human nature does not mean that it constitutes a direct "incitement to imminent violence." The lyrics sung by Osbourne may well express a philosophical view that suicide is an acceptable alternative to a life that has become unendurable -- an idea which, however unorthodox, has a long intellectual tradition.[33] If that is the view expressed, as plaintiffs apparently contend, then defendants are constitutionally free to advocate it. Plaintiffs' argument that speech may be punished on the ground it has a tendency to lead to suicide or other violence is precisely the doctrine rejected by the Supreme Court in *Hess v. Indiana*, supra, 414 U.S. at pp. 107-109 (the words "We'll take the f___g street again (or later)," shouted to a crowd at an antiwar demonstration, amounted to "nothing more than advocacy of illegal action at some indefinite future time"; words could not be punished as "incitement" on the ground that they had a """tendency to lead to violence""").

Moreover, musical lyrics and poetry cannot be construed to contain the requisite "call to action" for the elementary reason that they simply are not intended to be and should not be read literally on their face, nor judged by a standard of prose oratory. Reasonable persons understand musical lyrics and poetic conventions as the figurative expressions which they are. No rational person would or could believe otherwise nor would they mistake musical lyrics and poetry for literal commands or directives to immediate action.[34] To do so would indulge a fiction which neither common sense nor the First Amendment will permit.

While we have found no California case dealing directly with recorded music and lyrics, the claim that certain fictional depictions in the film or electronic media have incited unlawful conduct, and should result in the imposition of tort liability, is by no means novel. However, all such claims have been rejected on First Amendment grounds. (See Olivia I and Olivia II (plaintiff was attacked and "artificially raped" with a bottle by persons who had recently seen and discussed similar scenes in the television film, "Born Innocent"); *Bill v. Superior Court*,

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alcohol ['now you live inside a bottle ...] [sic]. But he refuses to see that he is killing himself by drinking ['The reaper's traveling at full throttle, It's catching you but you don't see, The reaper is you and the reaper is me ...']. The abuser will not help himself and only feels hopeless ['But you lie there and moan, where to hide, suicide is the only way out ...'] [sic]. Finally, the song asks: 'Don't you know what it's really about?' [¶] The theme is symbolized by the title, a play on words: The alcohol abuser uses alcohol (a liquid solution) as a 'solution' to his anxiety, but because it will kill him in the end, it is a 'suicide solution.'"

[33] See footnote 4.

[34] This is particularly true when the artist's performance of such musical lyrics and poetry was physically and temporally remote from the listener who only subsequently hears such performance by means of an electronic recording. The circumstances and conditions under which the listener might receive such performance are infinitely variable and totally beyond both the control and the anticipation of the performing artists and the producers and distributors of the recording.

supra 137 Cal.App.3d 1002 (plaintiff shot outside a theater showing a violent movie made by defendants which allegedly attracted violence-prone individuals who were likely to injure members of the general public at or near the theater); *DeFilippo v. National Broadcasting Co. Inc.* (R.I. 1982) 446 A.2d 1036 (plaintiffs' son died attempting to imitate a "hanging stunt" which he saw on television); *Walt Disney Productions Inc. v. Shannon* (1981) 247 Ga. 402 (plaintiff partially blinded when he attempted to reproduce some sound effects demonstrated on television by rotating a lead pellet around in an inflated balloon); *Zamora v. Columbia Broadcasting System* (S.D.Fla. 1979) 480 F.Supp. 199 (minor plaintiff had become so addicted to and desensitized by television violence that he developed a sociopathic personality and as a result shot and killed an 83-year-old neighbor).

Plaintiffs, recognizing the dearth of case authority which would support their incitement theory, make essentially a procedural argument. They contend that the court cannot determine the question of whether Osbourne's music and lyrics constituted an incitement but rather the issue should be left to a jury. They rely on Olivia I, 74 Cal.App.3d 383, 389-390, where the court, in the first of two appellate decisions dealing with the film "Born Innocent," held that the trial judge, on the day assigned for jury trial and without any summary judgment motion pending, should not have viewed the film himself and made fact findings that the film did not advocate or encourage violent or depraved acts. The plaintiff had requested a trial by jury and was entitled to one.

However, plaintiffs' reliance on this case is misplaced. We view it as strictly a procedural decision dealing with the technical rights of a party after a proper request for a jury trial has been made. The First Amendment issue was never reached and the appellate opinion itself acknowledged that the court could have accomplished the same result if a properly noticed summary judgment motion had been before it. To the extent that any broader interpretation is given to Olivia I, we respectfully decline to follow it in this case.

In our view, the plaintiffs have fully pleaded the facts which will be presented on the issue of incitement and we conclude that, as a matter of law, they fail to meet the Brandenburg standard for incitement and that therefore Osbourne's music is speech protected by the First Amendment.

The scope of such protection is not limited to merely serving as a bar to the prior restraint of such speech, but also prevents the assertion of a claim for civil damages. "[T]he fear of damage awards ... may be markedly more inhibiting than the fear of prosecution under a criminal statute." (*New York Times Co. v. Sullivan* (1964) 376 U.S. 254, 277.) Musical composers and performers, as well as record producers and distributors, would become significantly more inhibited in the selection of controversial materials if liability for civil damages were a risk to be endured for publication of protected speech. The deterrent effect of subjecting the music and recording industry to such liability because of their programming choices would lead to a self-censorship which would dampen the vigor and limit the variety of artistic expression. Thus, the imposition here of postpublication civil damages, in the absence of an incitement to imminent lawless action, would be just as violative of the First Amendment as a prior restraint.

2. The First Amendment Bar Aside, Plaintiffs Have Alleged No Basis for Recovery of Damages

a. Defendants Cannot Be Liable in Negligence as They Owed No Duty to Plaintiffs

The threshold and, in this case, dispositive question with respect to the assertion of a claim for negligence is whether any duty was owed to the plaintiffs. This is primarily a question of law (*Weirum v. RKO General, Inc.* (1975) 15 Cal.3d 40, 46) which is determined by an examination of several factors. Those factors include "the foreseeability of harm to the plaintiff, the degree of certainty that plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and the consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved." (*Rowland v. Christian* (1968) 69 Cal.2d 108, 113.)

Foreseeability is one of several factors to be weighed in determining whether a duty is owed in a particular case. (*Isaacs v. Huntington Memorial Hospital* (1985) 38 Cal.3d 112, 125.) "'In this balancing process, foreseeability is an elastic factor. The degree of foreseeability necessary to warrant the finding of a duty will thus vary from case to case. For example, in cases where the burden of preventing future harm is great, a high degree of foreseeability may be required. On the other hand, in cases where there are strong policy reasons for preventing the harm, or the harm can be prevented by simple means, a lesser degree of foreseeability may be required.'" (Id., at p. 125.) Here, a very high degree of foreseeability would be required because of the great burden on society of preventing the kind of "harm" of which plaintiffs complain by restraining or punishing artistic expression. The "countervailing policies" which arise out of the First Amendment "have substantial bearing upon the issue whether there should be imposed upon [defendants] the exposure to liability of the kind for which plaintiffs contend." (*Bill v. Superior Court*, supra 137 Cal.App.3d 1002, 1013.)

Plaintiffs rely on Weirum for the proposition that harm to John from listening to Osbourne's music was foreseeable. In that case, a radio station was held liable for the wrongful death of a motorist killed by two speeding teenagers participating in the station's promotional giveaway contest. In live periodic announcements the station advised its mobile listeners that one of its disc jockeys, "the Real Don Steele," was traveling from location to location in a conspicuous red automobile and advised the audience of his intended destinations. The first listener to meet Steele at each location would get a prize. While following Steele's car, the two teenagers forced a motorist into the center divider where his car overturned resulting in his death. (*Weirum v. RKO General Inc.*, supra, 15 Cal.3d at pp. 44-45.)

In our view, plaintiffs' reliance on Weirum is not justified. As the court there noted, the issue was "civil accountability for the foreseeable results of a broadcast which created an undue risk of harm to decedent. The First

Amendment does not sanction the infliction of physical injury merely because achieved by word, rather than act." (Id., at p. 48.) Indeed, it would not be inappropriate to view the reckless importuning in Weirum as a specie of incitement to imminent lawless conduct for which no First Amendment protection is justified. What the conduct in Weirum and culpable incitement have in common, when viewed from the perspective of a duty analysis, is a very high degree of foreseeability of undue risk of harm to others. Under such circumstances, imposition of negligence liability does not offend the First Amendment.

The court, in Olivia II, placed Weirum in its proper perspective when it stated, in language equally applicable here, "[a]lthough the language utilized by the Supreme Court was broad, it must be understood in light of the particular facts of that case. The radio station's broadcast was designed to encourage its youthful listeners to be the first to arrive at a particular location in order to win a prize and gain momentary glory. The Weirum broadcasts actively and repeatedly encouraged listeners to speed to announced locations. Liability was imposed on the broadcaster for urging listeners to act in an inherently dangerous manner." That they were very likely to do so was clearly foreseeable. Not so here. Osbourne's music and lyrics had been recorded and produced years before. There was not a "real time" urging of listeners to act in a particular manner. There was no dynamic interaction with, or live importuning of, particular listeners.

While it is true that foreseeability is ordinarily a question of fact, it may be decided as a question of law if "'under the disputed facts there is no room for a reasonable difference of opinion.'" This is such a case. John's tragic self-destruction, while listening to Osbourne's music, was not a reasonably foreseeable risk or consequence of defendants' remote artistic activities.

Plaintiffs' case is not aided by an examination of the other factors which are a part of the duty analysis. It cannot be said that there was a close connection between John's death and defendants' composition, performance, production and distribution years earlier of recorded artistic musical expressions. Likewise, no moral blame for that tragedy may be laid at defendants' door. John's suicide, an admittedly irrational response to Osbourne's music, was not something which any of the defendants intended, planned or had any reason to anticipate. Finally, and perhaps most significantly, it is simply not acceptable to a free and democratic society to impose a duty upon performing artists to limit and restrict their creativity in order to avoid the dissemination of ideas in artistic speech which may adversely affect emotionally troubled individuals. Such a burden would quickly have the effect of reducing and limiting artistic expression to only the broadest standard of taste and acceptance and the lowest level of offense, provocation and controversy.[35] No case has ever gone so far. We find no basis in law or public policy for doing so here.

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[35] As another court observed in a different but clearly relevant context, "It is an unfortunate fact that in our society there are people who will react violently to movies, or other forms of expression, which offend them, whether the subject be gangs, race relations, or the Vietnam War. It may, in fact, be difficult to predict what particular expression will cause such a reaction, and under what circumstances. To impose upon the producers of a motion picture the sort of liability for which

b. There Are No Allegations That Defendants Intended to Cause John's Suicide

The third and fourth alleged causes of action are essentially identical. They each rely upon the proposition that defendants incur intentional tort liability for John's suicide because of their intentional dissemination of Osbourne's recorded music with the alleged knowledge that it would result in self-destructive reactions among certain individuals. The third count characterizes this as an intentional incitement to suicide. We have already discussed in some detail why Osbourne's music and lyrics cannot be condemned as an incitement to imminent lawless action. It is also clear that plaintiffs have not adequately alleged a culpable intent. For example, there are no allegations that defendants actually intended any harm to John or any other listener.

It is not sufficient simply to allege that defendants intentionally did a particular act. It must also be shown that such act was done with the intent to cause injury. (*Tate v. Canonica* (1960) 180 Cal.App.2d 898, 909.) In other words, plaintiffs would have to allege that defendants intended to cause John's (or some other listener's) suicide and made the subject recorded music available for that purpose. It is clear that no such allegation can be made in this case. What plaintiffs have alleged does not demonstrate the requisite intent.[36]

The same analysis applies to plaintiffs' allegations (in count IV) regarding the violation of Penal Code section 401.[37] Our Supreme Court has construed that section as proscribing the direct aiding and abetting of a specific suicidal act. The statute "contemplates some participation in the events leading up to the commission of the final overt act, such as furnishing the means for bringing about the death – the gun, the knife, the poison, or providing the water, for the person who himself commits the act of self-murder." (In re Joseph G. (1983) 34 Cal.3d 429, 436.) While this decision was rendered in the context of distinguishing those circumstances when a criminal defendant should be charged with murder instead of the lesser crime of aiding and abetting a suicide, we see no reason to give less weight here to the court's analysis. Some active and

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plaintiffs contend in this case would, to a significant degree, permit such persons to dictate, in effect, what is shown in the theaters of our land." (*Bill v. Superior Court*, supra, 137 Cal.App.3d 1002, 1008-1009.)

[36] Plaintiffs' allegations in the proposed second amended complaint that defendants "intentionally disseminated to the public music ... which [1] overtly and intentionally intended to ... cause an individual to commit ... suicide [count III] [or] [2] overtly and intentionally aided and/or advised and/or encouraged another person to commit ... suicide ... [count IV]" (italics supplied), are merely general conclusionary allegations and do not adequately allege any intentional conduct on the part of the defendants beyond their intentional composition, performance, production and distribution of certain recorded music. There are no allegations of any kind reflecting that defendants had any knowledge of, or intent with respect to, John himself or any other particular listener.

[37] Penal Code section 401 reads: "Every person who deliberately aids, or advises, or encourages another person to commit suicide, is guilty of a felony."

In view of our conclusion that section 401 has no application to John's suicide, we do not reach or discuss the question of whether its violation by defendants would give plaintiffs a private right of action or even entitle them to a jury instruction on negligence per se (BAJI No. 3.45).

intentional participation in the events leading to the suicide are required in order to establish a violation.

To satisfy the burden of section 401, defendants would have to (1) have specifically intended John's suicide and (2)have had a direct participation in bringing it about. Plaintiffs' allegations that defendants intentionally produced and distributed Osbourne's music do not demonstrate that they intentionally aided or encouraged John's suicide. It is not sufficient to allege, as plaintiffs do here, that defendants "intentionally disseminated" Osbourne's music to the general public although they knew, or should have known, that there were emotionally fragile people who could have an adverse reaction to it.

In the absence of evidence of the requisite intent and participation, Penal Code section 401 cannot be applied to composers, performers, producers and distributors of recorded works of artistic expression disseminated to the general public which allegedly have an adverse emotional impact on some listeners or viewers who thereafter take their own lives.

Conclusion

Absent an incitement, which meets the standards of *Brandenburg v. Ohio*, supra, 395 U.S. 444, 447, the courts have been universally reluctant to impose tort liability upon any public media for self-destructive or tortious acts alleged to have resulted from a publication or broadcast. We share that reluctance and, for all of the reasons discussed above, conclude that the defendants, as a matter of law, have no liability for John's suicide.

The trial court was thus correct in bringing this action to a prompt end. "[B]ecause unnecessarily protracted litigation would have a chilling effect upon the exercise of First Amendment rights, speedy resolution of cases involving free speech is desirable. " (*Good Government Group of Seal Beach, Inc. v. Superior Court* (1978) 22 Cal.3d 672, 685.)

Disposition

The trial court's order of dismissal is affirmed. The defendants shall recover their costs on appeal.

Danielson, Acting P. J., and Arabian, J., concurred.