

DO PARK RANGERS HAVE DUTY TO TAKE INTOXICATED DRIVER INTO CUSTODY?

James C. Kozlowski, J.D., Ph.D.

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Generally, public entities are immune from liability for negligent or inadequate general police protection. On the other hand, public liability may be imposed for negligent special police protection. Unlike general police protection, special police protection provides an individual with a level of security over and above that provided to the general citizenry. A police officer's responsibility to remove drunk drivers from the road is ordinarily a duty owed to public at large, not a specific individual. As a result, a police officer's unreasonable failure to arrest a visibly intoxicated driver would usually be construed as negligent general police protection and, therefore, immune from liability.

The *Crider* case described herein caused quite a bit of consternation among some folks in the park law enforcement community when the federal district court awarded a \$7.5 million judgment to plaintiff. The lower court had held that the government was liable for injuries caused by negligent law enforcement, i.e. failing to take a visibly intoxicated driver into custody. Unfortunately, the fear of liability generated by such a decision could prompt some over-reaction among park law enforcement interests. Specifically, those responsible for training park rangers may feel that the *Crider* judgment dictated the arrest of all intoxicated park users when discovered, lest the public agency be liable for these inebriated individuals who later cause injury.

In my opinion, the perceived threat of liability for park law enforcement based upon the lower court judgment in *Crider* was unfounded. The judgment of the trial court certainly did not represent the majority rule in such situations. As a result, I eagerly awaited the review of this \$7.5 million judgment by the federal circuit court of appeals. For park law enforcement, it was worth the wait. As indicated in the following paragraphs, the doom and gloom rhetoric prompted by the initial multi-million dollar judgment was unwarranted.

Public Duty Immunity

In the case of *Crider v. United States*, 885 F.2d 294 (5th Cir. 1989), plaintiff Randy Crider was injured "in a collision between his motorcycle and an automobile driven by an intoxicated driver." Crider alleged that "his injuries were proximately caused by the negligence of the United States Park Rangers who failed to take the intoxicated driver into custody when they stopped him ten hours before the accident." The federal district court awarded Crider \$7.5 million in damages. The United States appealed. As described by the federal circuit court of appeals, the facts of the case were as follows:

At approximately 3:40 p.m. on July 23, 1983, two park rangers of the United States Park Service stopped a car driven by eighteen year old John Landry. The rangers had observed Landry speeding along the beach at the Padre Island National Seashore [Texas] with two teenage girls hanging onto the hood of his car. Upon stopping Landry, the rangers detected the aroma of alcohol on his breath and searched the car. They discovered approximately four ounces of marijuana butts and leaves, a homemade pipe

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for smoking marijuana, a partially-empty bottle of whiskey, and eight bottles of beer. One of the rangers testified that Landry had extremely red eyes, a symptom of marijuana smoking.

Though the district court found that Landry was intoxicated at the time he was stopped, the rangers did not charge him with driving while intoxicated or arrest him. Instead, the rangers issued Landry citations for possession of a controlled substance, possession of alcohol by a minor, speeding, and failure to have mandatory liability insurance. The citations required Landry to appear before a United States Magistrate the following Monday. One of the rangers instructed Landry not to drive for an hour and a half so that he could sober up. The rangers then left to take the two girls back to their station and arrange other transportation for them.

Ignoring the ranger's instructions, Landry left the scene immediately after the rangers did. Later that day he picked up a friend, James Wallace, illegally purchased more whiskey, and went home to "drink it up" with his friends. Throughout the evening and into the early morning Landry continued to drink alcohol and smoke marijuana. Sometime after midnight, Landry took Wallace home. On his way back he collided with the motorcycle ridden by Randy Crider. The accident occurred at 1:40 a.m., as Landry attempted to pass three cars while driving 80 miles per hour. Crider suffered a severed left arm as a result of the collision, and his left leg was later amputated above the knee because of its severe mutilation.

As noted by the appeals court, the Federal Tort Claims Act (FTCA) provides that "the United States is liable for the negligence of its employees in the same manner and to the same extent as a private individual under like circumstances." (28 U.S.C. § 2674 (1982)). Consequently, the appeals court stated that "principles of Texas tort law... govern the question of the United States' liability in this case." In considering the question of negligence liability, the issue before the appeals court was "whether the defendants, the park rangers, owed a duty to the plaintiff" under Texas law. Specifically, the appeals court considered whether the Texas "law of municipal corporations or of a private special relationship was the proper vehicle for assessing FTCA liability." Although the FTCA holds the United States liable "like a private individual," the appeals court found that "municipal liability principles were controlling" in this particular instance.

The circumstances here involve government employees in a law enforcement function. Questions as to the power and authority to arrest, to maintain custody, and to lawfully restrict a person's liberty are unique to the law enforcement function. Because private persons do not wield such police powers, the inquiry into the government's liability in this situation must include an examination of the liability of state and municipal entities "under like circumstances."

As noted by the appeals court, the Texas courts have adopted the majority rule in governmental liability and declined to impose a legal duty on police officers "to protect the public from acts of a criminal suspect." Specifically, the appeals court found that "Texas courts have rejected the proposition that a law enforcement officer may owe a duty to arrest or restrain a suspect in order to prevent third-party injuries."

[W]hether a police officer owes a special duty to one injured or killed by a person whom the officer had probable cause to arrest, but either elected not to do so or made an inadequate attempt to arrest, is a question of first impression in this state. Other states, however, have uniformly held that the officer's duty is a duty to the public at large to enforce the criminal law and that the officer owes no special duty to the individual injured. Following this "public duty" rationale, the [Texas] court concluded that the officer had breached no actionable duty [to the injured party]... The court's decision rejected a finding of duty in broad terms...

If we were to uphold the finding of liability [for the governmental entity and its police officers for the officer's discretionary decisions as to if, how, and when to arrest a person]... then, to avoid liability, police officers would have to *arrest all persons* stopped by them for whatever reason (be it jaywalking, expired license tags, etc.) lest these persons... cause injury to someone... Sound jurisprudence as well as the public interest could not tolerate such a holding...

Thus, under existing Texas law a police officer owes no duty to a specific plaintiff to arrest a suspect... A clear majority of the states that have considered the exact question whether a police officer can be liable for failing to restrain a drunk driver have applied the same "public duty" rationale... and have concluded that the officer owed no duty to the injured plaintiff.

Having found no duty under Texas municipal law, the appeals court also considered whether Texas law would impose a duty on a private person to restrain an intoxicated person. In so doing, the appeals court acknowledged that the Texas state supreme court had "created a duty resting upon an employer of a visibly intoxicated employee to prudently restrain the employee from causing harm to third parties." However, the appeals court found that such liability was based upon "the employer-employee relationship and the 'affirmative act' in sending a visibly intoxicated employee home." Further, the appeals court noted that Texas courts have not expanded this private duty beyond the employer-employee relationship. As a result, the appeals court concluded that "neither the relationship between Landry and the park rangers nor their 'affirmative acts' should give rise to a legal duty."

[The employer duty to restrain an intoxicated employee] appears to arise from a relationship in which... [the employer] not only had the ability to control its employee, but also stood to profit from his work and continued wellbeing. Their relationship was created voluntarily and mutually...

No serious comparison can be drawn between an employer-employee relationship and that of Landry and the park rangers. The rangers and Landry did not associate voluntarily or mutually. The rangers could in no way profit or benefit from their relation with Landry. Their ability to "control" him was strictly limited within the confines of their responsibilities. To extend their "control" further would conflict with our libertarian views of the police function. Surely, too, it presses the potential liability of law enforcement officers - or of any group - to the extreme to suggest that just by having contact with a potentially dangerous actor they become responsible in tort for his

conduct.... [Texas law] disavows any such intent, stating that a duty would not be based on *mere knowledge* of... intoxication, but would be based on additional factors.

Additional factors are inherent in the employer-employee relationship that starkly distinguish it from the present case. There is ordinarily a workplace and often a nurses' station or quiet area where an employer could sequester an intoxicated worker while he sobers up. Such facilities will rarely be available to the policeman on the beat - unless he drops everything and becomes unavailable for other duty while he handles the drunk... [Texas law] is willing to impose on employers the cost of an interruption in their business while they tend to an intoxicated employee, but that cost is objectively quantifiable and not physically risky. Imposing such a cost on law enforcement is entirely different, however, because of the unpredictability and potential danger of the job and the high risk of imposing artificial priorities on it... [The Texas court] seems to create a unique species of liability premised on the employer-employee relation.

In addition, the appeals court found that the park rangers in this particular instance had not exercised "an affirmative act of control" over Landry to "support the imposition of a tort duty upon the park rangers."

[T]he park rangers merely failed to deny Landry the opportunity to drive while intoxicated by not arresting him or taking away his car keys. One of them told him not to drive for an hour and a half and threatened an arrest warrant if he ignored that advice. Landry was on the beach, with plenty of room to relax and no clear need to travel. Thus, the officers' actions by no means foredoomed that Landry would drive while still seriously intoxicated. The essence of Crider's claim is not an affirmative act of control... but the officers' failure to exercise further control by effecting an arrest.

The appeals court also considered Crider's argument that liability should be imposed based upon § 319 of the Restatement (Second) of Torts which provides as follows:

One who takes charge of a third person whom he knows or should know to be likely to cause bodily harm to others if not controlled is under a duty to exercise reasonable care to control the third person to prevent him from doing such harm.

Specifically, Crider argued that "under this section the rangers owed him a duty to restrain Landry." The appeals court rejected this argument.

This argument, while initially appealing, cannot withstand analysis. Section 319 does not represent Texas law. Moreover, Section 319 imposes a duty on one who "takes charge" of a dangerous person. Here, the entire basis of Crider's lawsuit is his claim that the rangers failed to "take charge" of Landry by failing to arrest him. Section 319 is inapplicable.

Based upon the above analysis, the appeals court concluded that "a 'private individual' would not be liable under 'like circumstances' because Texas law would not impose a duty upon either a police officer or an individual citizen to restrain a drunk driver in a case such as this." Accordingly, the appeals court

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found that "the United States is not subject to liability under 28 U.S.C. § 2674 [the Federal Tort Claims Act] and the decision of the district court imposing liability must be reversed."

Dr. Kozlowski is the associate director of the George Mason University Center for Recreation Resources Policy, Fairfax, Virginia. He is also the author of the Recreation and Parks Law Reporter.