

No. 31274 – Kevin Neiswonger and Taunia Neiswonger v. Officer B. K. Hennessey, individually and as a member of the Morgantown City Police Department, and Morgantown City Police Department

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SUPREME COURT OF APPEALS

OF WEST VIRGINIA

Starcher, J., concurring:

Sometimes police officers unintentionally injure entirely innocent people. Of course, we want to encourage and enable police officers to use the utmost care and caution in any use of force, but even so, incidents resulting in injury can occur.

I fully concur in the reasoning of the majority opinion. I write separately to briefly suggest a somewhat different approach to the legal issues in the instant case. Imposing legal liability can encourage public officials to demand training for law enforcement, to reduce the risk of negligence, injury, and liability. In the future, litigants and this Court might consider looking in this direction.

Some aspects of law enforcement work are inherently dangerous to police officers and to third parties and their property. The instant case is a prime example.

Police officers sometimes necessarily make “snap judgments” about the dangerousness of a situation, about whether to use force – even deadly force – to respond to actual or perceived threats and criminal conduct. Not even the best-trained police officer, using the best judgment possible, will choose “correctly” one hundred percent of the time.

The possibility of serious injury to innocent people is an inherent part of police work.

And the consequences of such force can be severe. In the instant case, the plaintiff suffered a broken leg. He could just as easily have suffered a brain injury if he had fallen another way.

Sometimes an injury to an innocent third party or their property will be the result of normal law enforcement action. Other times, such injury may result from negligent conduct by law enforcement, but conduct that is still not demonstrably outside the “standard of care.”

Does this situation sound familiar? Of course it does – it is quite similar to the case of the explosives operator – the classic person engaged in an *abnormally dangerous or ultra-hazardous activity*. (It is also somewhat like the maker of an unreasonably dangerous product.)

It seems logical to me that we should apply to injuries for innocent victims of police conduct the same principles of strict liability that we apply to the innocent victims of people who set off dynamite.

Applying strict liability to innocent victims would keep police officers out of wasteful trials that second-guess their snap judgments. Non-innocent plaintiffs would still have to prove negligence by law enforcement.

For an interesting theoretical discussion of tort law and strict liability, *see* Geistfeld, Mark, “Should Enterprise Liability Replace the Rule of Strict Liability for Abnormally Dangerous Activities?”, 45 U.C.L.A. L.Rev. 611 (1998).

No one has suggested that the plaintiff in the instant case was anything other than an innocent bystander. Under our current law, he probably deserves to be compensated for his injuries, and it seems close to certain that he has the right to ask a jury from his community (who are, after all, the people who employ the police officer) to make that judgment. *See Bowers v. Wurzburg*, 207 W.Va. 28, 528 S.E.2d 475 (1999); *Foster v. City of Keyser*, 202 W.Va. 1, 501, S.E.2d 165 (1997); *King v. Tens Creek Ltd. Partnership*, 199 W.Va. 136, 483 S.E.2d 265 (1996).

Accordingly, I concur.