

1976

Awareness of Confinement for False Imprisonment: A Brief Critical Comment

Sheldon H. Nahmod

Follow this and additional works at: <https://dsc.duq.edu/dlr>



Part of the [Law Commons](#)

Recommended Citation

Sheldon H. Nahmod, *Awareness of Confinement for False Imprisonment: A Brief Critical Comment*, 15
Duq. L. Rev. 31 (1976).

Available at: <https://dsc.duq.edu/dlr/vol15/iss1/4>

This Article is brought to you for free and open access by Duquesne Scholarship Collection. It has been accepted for inclusion in Duquesne Law Review by an authorized editor of Duquesne Scholarship Collection.

Awareness of Confinement for False Imprisonment: A Brief Critical Comment

*Sheldon H. Nahmod**

Over twenty years ago, Prosser, in an article as influential as it was brief,¹ criticized section 42 of the First Restatement of Torts.² This section made plaintiff's awareness of confinement a condition of defendant's liability for false imprisonment. Prosser argued that there ought at least to be liability for false imprisonment where imprisonment of an unaware plaintiff results in serious harm. He acknowledged the precedent supporting the First Restatement's position, particularly *Herring v. Boyle*,³ an English case involving the alleged imprisonment in school of a ten year old boy. Prosser, however, characterized a later decision, *Meering v. Grahame-White Aviation Co.*,⁴ which involved the detention of an employee suspected of theft, as casting "considerable doubt" on *Herring*. He also

* A.B., University of Chicago; L.L.B., L.L.M., Harvard Law School; Teaching Fellow, Harvard Law School 1969-71; Professor of Law, Duquesne Law School.

1. Prosser, *False Imprisonment: Consciousness of Confinement*, 55 COLUM. L. REV. 847 (1955) [hereinafter cited as Prosser]. Prosser's article is a little over three pages long; I have tried to emulate his brevity.

2. The section reads in relevant part:

Under the rule stated in § 35 [which imposes liability for false imprisonment as defined therein], there is no liability for intentionally confining another unless the person physically restrained knows of the confinement.

RESTATEMENT OF TORTS § 42 (1934).

3. 149 Eng. Rep. 1126 (Ex. 1834). It was agreed by Barons Ballard, Alderson and Gurney that the defendant could not be liable for false imprisonment in the absence of the boy's consciousness of confinement. There was, however, no discussion of the issue beyond this consensus.

4. 122 L.T.R. (n.s.) 44 (C.A. 1919). Here, Lord Justice Atkin stated:

[I]t is perfectly possible for a person to be imprisoned in law without his knowing the fact and appreciating that he is imprisoned.

It appears to me that a person could be imprisoned without his knowing it. I think a person can be imprisoned while he is asleep, while he is in a state of drunkenness, while he is unconscious, and while he is a lunatic. Those are cases where it seems to me that the person might properly complain if he were imprisoned, though the imprisonment began and ceased while he was in that state. Of course, the damages might be diminished and would be affected by the question whether he was conscious of it or not.

Id. at 53-54.

discussed three American decisions in which the courts had found false imprisonment; two of the cases involved children, the other, a mental incompetent. Prosser emphasized that "[i]n none of them appears any mention of the plaintiff's consciousness of the imprisonment."⁵

The policy underlying the First Restatement rule, as Prosser noted, was that "American courts are properly averse to recognizing rights for whose violation without more an action lies and for which therefore nominal damages are recoverable."⁶ Prosser responded that there may be situations where imprisonment of an unaware plaintiff results in serious harm, bodily or otherwise; accordingly, there ought to be liability. He concluded:

Section 42 of the Restatement of Torts is wrong. On the scant authority the rule could go either way; but eventually cases will arise in which small children, idiots, lunatics, intoxicated people, delirious people, or sick and unconscious people are imprisoned without knowing it, and consequently a tort of real gravity has occurred. As in the case of battery, the cost of redress for such genuine torts may be that in a few instances, where the invasion of the plaintiff's interests is wholly inconsequential, nominal damages may be recovered. But the greater outweighs the less, and thus the rule should be changed.⁷

It is not coincidental that section 42 of the Second Restatement of Torts changed the earlier rule: Prosser was the Reporter for the Second Restatement of Torts. Indeed, the very examples he used in his article are set out as illustrations in the Second Restatement. Section 42 now provides that "there is no liability for intentionally confining another unless the person physically restrained knows of

5. Prosser, *supra* note 1, at 848. The cases cited by Prosser are: *Robalina v. Armstrong*, 15 Barb. 247 (N.Y. Sup. Ct., Gen. T. 1852); *Commonwealth v. Nickerson*, 87 Mass. (5 Allen) 518 (1862); and *Barker v. Washburn*, 200 N.Y. 280, 93 N.E. 958 (1911). These cases could be technically distinguished from cases involving adults on the ground that they involve plaintiffs considered incapable of expressing their will.

There continues to be a remarkable dearth of case law on this question. The various editions of Restatement in the Courts show no cases at all decided under § 42 of either the First or Second Restatements of Torts. The subject is discussed in two student notes which take different positions. See Note, *Is Knowledge of the Fact of Imprisonment by the Plaintiff a Necessary Element in False Imprisonment?*, 32 Ky. L.J. 212 (1944); Note, *A New Conception of Restraint in False Imprisonment*, 68 U. Pa. L. Rev. 360 (1920).

6. RESTATEMENT OF TORTS, Treatise No. 1(a) § 59, at 128, 130 (Draft No. 1, 1925).

7. Prosser, *supra* note 1, at 850.

the confinement *or is harmed by it.*"⁸ According to section 42's comment b and its illustrations, actual harm includes not only bodily harm directly resulting from the confinement, but also "serious illness" resulting from "emotional distress" attendant to "great humiliation," as well as an incompetent plaintiff's deprivation of the custody and care of his relatives.⁹

The present section 42 does not go as far as Prosser would have preferred. Prosser seemed willing to discard entirely the First Restatement's requirement of awareness of confinement and to accept as a cost of its removal those "few" situations where the invasion of the plaintiff's interests is wholly inconsequential and nominal damages may be recovered. The present section 42, however, retains the awareness requirement, except in those cases where the person unaware of his confinement is harmed by it.

Despite his preference for a broader approach, the Second Restatement's section 42 is directly responsive to Prosser's argument that liability should be imposed in cases involving harm. The rationale of the earlier section 42, according to Prosser, was that "the mere dignitary interest in freedom from unconscious confinement is not worthy of redress."¹⁰ Therefore, he argued, where there is more than a mere dignitary interest affected—in short, some *harm* to the

8. RESTATEMENT (SECOND) OF TORTS § 42 (1965) (emphasis added).

9. Comment b and the relevant illustrations read as follows:

b. There may, however, be situations in which actual harm may result from a confinement of which the plaintiff is unaware at the time. In such a case more than the mere dignitary interest, and more than nominal damages, are involved, and the invasion becomes sufficiently important for the law to afford redress.

Illustrations:

3. A locks B, a child six days old, in the vault of a bank. B is not conscious of the confinement, but the vault cannot be opened for two days, and during that time B suffers from hunger and thirst, and his health is affected. A is subject to liability to B for false imprisonment.

4. A kidnaps B, a wealthy idiot, locks him up, and holds him for ransom. B is found and released by the police without ever being aware that he has been confined. B has been deprived of the custody and care of his relatives. A is subject to liability to B for false imprisonment.

5. A, a diabetic, is suffering from shock brought on by an overdose of insulin. B believes A to be drunk, and without any legal authority to do so arrests A and locks him up over night in jail. In the morning A is released while still unconscious and unaware that he has been confined. On learning what has occurred A is greatly humiliated, and suffers emotional distress, with resulting serious illness. B is subject to liability to A for false imprisonment.

Id. comment b.

10. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 11, at 42-43 (4th ed. 1971). This assumption is echoed in RESTATEMENT (SECOND) OF TORTS § 42, comment a (1965).

plaintiff—awareness of confinement should be unnecessary. Obviously, section 42 of the Second Restatement was drafted precisely to deal with this contention.

I believe that Prosser's argument, which provided the basis for the change in section 42, misses an essential point and consequently does not go far enough. Even if a plaintiff is unaware of his confinement and suffers no harm of the sort discussed in section 42 of the Second Restatement, nevertheless, he has suffered harm—the affront which results once he discovers someone has interfered with his personal mobility. Such a plaintiff should be entitled to redress, even if the damages awarded are nominal.

This view is supported by the Second Restatement's approach to battery.¹¹ A plaintiff who has suffered bodily harm resulting from intentionally harmful contact by another has a cause of action against the other, even though the plaintiff was not aware of the bodily contact at the time of its infliction.¹² Likewise, a person who receives an intentionally offensive contact need not know of the contact at the time it is inflicted. The underlying basis for allowing a cause of action for battery is that: "This affront is as keenly felt by one who only knows after the event that an indignity has been perpetrated upon him as by one who is conscious of it while it is being perpetrated."¹³ In the same manner, where the mobility of an unaware person has in fact been interfered with, the affront to him should not be minimized simply because it arises subsequent to the confinement. In contrast, assault, which requires contemporaneous apprehension of imminent, harmful, or offensive bodily contact,¹⁴ is distinguishable from both battery and false imprisonment. The tort of assault is concerned essentially with the plaintiff's subjective state of mind, his apprehension, whereas battery and false imprisonment are concerned with his integrity.

The Second Restatement rule and the reasoning on which it is based are unsound for another reason. An important function of tort

11. In fact, RESTATEMENT (SECOND) OF TORTS § 42, comment *a* (1965) reads in part: "False imprisonment resembles battery rather than assault, in that it is possible for a confinement to occur without the plaintiff's being aware of it at the time."

12. See generally RESTATEMENT (SECOND) OF TORTS §§ 13-16 (1965).

13. *Id.* § 18, comment *d*.

14. *Id.* § 22 reads as follows:

An attempt to inflict a harmful or offensive contact or to cause an apprehension of such contact does not make the actor liable for assault if the other does not become aware of the attempt before it is terminated.

liability, in addition to compensation, is the regulation of conduct.¹⁵ We simply do not want people intentionally confining others, even if those restricted are unaware of their confinement. The interest in freedom from confinement is at least as worthy of protection as freedom from harmful or offensive bodily contact. Or, put another way, one's personal mobility is as important as one's bodily integrity; indeed, the two may be inextricably related. It is my judgment that Prosser wrongly characterized the invasion of an unaware plaintiff's interests as "wholly inconsequential;"¹⁶ such invasions are a serious matter and should be discouraged, as well as compensated, by tort liability.¹⁷

Analytically, at issue is the definition of "confinement." If confinement requires awareness, whether some other harm results to an unaware plaintiff should logically be irrelevant. If this is so, the present section 42 is internally inconsistent.¹⁸ If confinement does not require awareness because the interest protected by the tort of false imprisonment is freedom of personal mobility, then resulting harm of the kind described in the Second Restatement is unnecessary to the *prima facie* tort. Under this approach, we would not relieve a defendant simply because the plaintiff, by chance or otherwise, was unaware of his confinement at the time. Our concern should be with rules sensibly governing human conduct and fairly compensating for harm suffered, and not with technical refinements which do not reflect reality.

Professor Bohlen, it is said, once described the intentional torts as "branches which no longer were flowering."¹⁹ Regrettably, with the possible exception of intentional infliction of emotional dis-

15. See generally G. CALABRESI, *THE COSTS OF ACCIDENTS* (1970); Posner, *A Theory of Negligence*, 1 J. LEGAL STUDIES 29 (1972).

16. Prosser, *supra* note 1, at 850.

17. However, I do not mean to suggest that the deterrence function, standing alone, is sufficient to warrant the use of the torts process, as it warrants the use of the criminal process. To the contrary, some individual harm of the sort I discuss in the text is necessary to initiate the torts process.

18. A similar observation was made by Judge Philip Halpern, one of the elected members of the American Law Institute, when he spoke against adopting the present § 42. Judge Halpern stated:

It seems to me lacking in logic and in symmetry to say that causing of actual damage is a substitute for knowledge of confinement. . . . The causing of actual damage is an independent basis of liability and should not be distorted as a substitute for one of the elements of one of these trespass torts.

34 ALI PROCEEDINGS 329 (1957).

19. *Id.* at 330.

trespass,²⁰ this statement is accurate. Courts have certainly been imaginative and creative with respect to duty and proximate cause in both negligence and products liability law. To demonstrate some of the same creativity and imagination for false imprisonment would be a modest but welcome step in the right direction.

20. See RESTATEMENT (SECOND) OF TORTS § 46 (1965), captioned "Outrageous Conduct Causing Severe Emotional Distress." There has also been some imagination shown in connection with "offensive" battery to the effect that even an intentionally offensive touching of something connected with the body can be actionable. See, e.g., *Fisher v. Carrousel Motor Hotel, Inc.*, 424 S.W.2d 627 (Tex. 1967). See generally RESTATEMENT (SECOND) OF TORTS § 18, comment c (1965).