

State of New York Court of Appeals

Summaries of cases before the Court of Appeals are prepared by the Public Information Office for background purposes only. The summaries are based on briefs filed with the Court. For further information contact Gary Spencer at (518) 455-7711.

To be argued Monday, January 5, 2015

No. 1 People v Michael Diack

Michael Diack was convicted in 2001 of possessing an obscene sexual performance of a child and, after serving 22 months in prison, he was classified as a level one sex offender under the Sex Offender Registration Act (SORA). After he was discharged from parole, Diack moved into a Nassau County apartment located about 500 feet from a school. He was notified that he was in violation of the County's sex offender residency law, Local Law No. 4-2006, which prohibits all registered sex offenders from residing within 1,000 feet of a school, among other things. When he failed to relocate, he was charged in 2010 with violating the residency restrictions, a Class A misdemeanor. Diack moved to dismiss the charge on the ground that Local Law No. 4-2006 is preempted by state law.

District Court dismissed the charge, finding the local law was preempted by the state's "comprehensive statutory scheme for sex offenders." Noting that local governments throughout the state have enacted similar restrictions, it said, "By the sheer number of these local laws and the rapidity with which they have been enacted, it is evident that it has been and remains a high priority of local legislatures to enact severely restrictive residency ordinances in order to satisfy the 'not in my backyard' concerns of their constituencies. However, where challenged, these laws have consistently been found preempted...." The Court said, "[W]hile there is no express preemption of Local Law 4 by New York State law, there is implied preemption inasmuch as Local Law 4 is inconsistent and conflicts with the objective of New York State's statutory scheme for sex offenders. Local Law 4 essentially usurps New York State's articulated function of protecting vulnerable populations from sex offenders and puts in its stead local legislation which ... improperly places local interests above the interests of a wider constituency."

The Appellate Term, Ninth and Tenth Judicial Districts, reversed and reinstated the charge, finding no express or implied preemption. It said the Nassau County law did not conflict with Penal Law § 65.10 (4-a)(a), which imposes residency restrictions on level three sex offenders and some others as a condition of probation, since Diack is a level one offender and he was not on probation when he moved into the apartment. Regarding express preemption, it said, "The legislature recognized that the 'proliferation of local ordinances imposing residency restrictions upon sex offenders, while well-intentioned, have [sic] made it more challenging for the state and local authorities to address the difficulties in finding secure and appropriate housing for sex offenders'..., and directed [state agencies] to 'promulgate regulations to provide guidance'" for the placement of certain offenders. But it said, "In our opinion, the legislature has chosen to limit its regulations over sex offenders and not to enact a comprehensive legislative scheme in the area of law concerning the residency restrictions of sex offenders who are not on parole, probation, subject to conditional discharge or seeking public assistance. While the legislature has adopted a scheme with respect to registering sex offenders and notifying the public about sex offenders in their communities, we discern no express or implied sentiment by the legislature to occupy the entire area so as to prohibit localities from adopting" residency restrictions.

For appellant Diack: Kathy Manley, Albany (518) 434-1493

For respondent Nassau County: Kenneth L. Gartner, Mineola (516) 742-6200

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No. 2 Shipley v City of New York

On January 10, 2005, one day after 17-year-old Jesse Shipley was killed in an automobile accident in Staten Island, an autopsy was performed, with the consent of his father, by Dr. Stephen de Roux of the Medical Examiner's Office. Dr. de Roux removed organ tissue samples and the brain, which was preserved for later neuropathologic examination. Jesse's body was released the same day, but his parents were not told that his brain had been retained. They held a funeral and buried him on January 13. About two months later, students from Jesse's high school saw his brain in a jar, labeled with his name, during a field trip to the Staten Island office of the medical examiner. The field trip was cut short and Jesse's sister, a student at the school, soon learned of the situation and informed the parents, Andre and Korisha Shipley, who had thought Jesse's brain was buried with his body. Neuropathologists conducted their examination of the brain a few days later. In October 2005, the brain was returned to the Shipleys, who held a second funeral service and burial. Dr. de Roux later testified that the two-month interval between the autopsy and the examination of Jesse's brain was not uncommon because "I wait months, until I have six brains," before summoning a neuropathologist from Manhattan to examine them.

The Shipleys brought this action for emotional distress against the City and Medical Examiner's Office based, in part, on alleged violation of their common-law right of sepulcher, which gives the next of kin the right to possession of a decedent's body for preservation and burial. Supreme Court denied the City's motion to dismiss the claim, finding there were unresolved questions regarding whether the defendants' failure to inform the Shipleys that their son's brain was not returned with his body interfered with their right of sepulcher.

The Appellate Division, Second Department affirmed that portion of the order. While the Medical Examiner's Office had authority to perform the autopsy and retain the brain for further testing, it said, the office "also has the mandated obligation" under the right of sepulcher and Public Health Law § 4215(1) "to turn over the decedent's remains to the next of kin for preservation and proper burial once the legitimate purposes for the retention of those remains have been fulfilled," a duty that "is clearly for the benefit of, and is owed directly to, the next of kin. Furthermore, it may be satisfied in the present context by the simple act of notifying the next of kin that, while the body is available for burial, one or more organs have been removed for further examination.... This requirement, hardly onerous in nature, strikes an appropriate balance between the fulfillment of the legitimate scientific and investigative duties of the Medical Examiner's Office and the recognition of the long-established rights of next of kin to receive and provide final repose to the remains of their loved ones." After trial, a jury awarded the Shipleys \$1 million in damages. The Second Department reduced the award to \$600,000.

The City argues that neither the right of sepulcher nor Public Health Law § 4215(1) apply to "those parts of a body that have appropriately been removed during the course of an authorized autopsy. It follows that neither requires the New York City Medical Examiner to turn over such parts to the decedent's next of kin once the legitimate purposes for the retention of the parts have been fulfilled." It says the office satisfied its obligations when it returned Jesse's body to the Shipleys after the autopsy but, even if the office had a duty to return all organs, the Appellate Division had "no basis in statute or common law" for "imposing an additional, newly found duty" to notify the next of kin when any organs are removed for further examination. In any event, the City argues it cannot be held liable because the Shipleys did not demonstrate the existence of a special relationship.

For appellant City: Assistant Corporation Counsel Ronald E. Sternberg (212) 356-0840
For respondent Shipleys: Marvin Ben-Aron, Staten Island (718) 442-9000

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No. 3 Elmaliach v Bank of China Limited

The plaintiffs are 50 citizens and residents of Israel who were injured or the survivors of persons killed in terrorist bombings and rocket attacks carried out in Israel by Hamas and Palestine Islamic Jihad from 2005 to 2007. They claim Bank of China Limited (BOC) knowingly facilitated the transfer of millions of dollars from leaders of the terrorist organizations to their operatives in Israel, enabling them to plan and conduct the attacks. The wire transfers were routed through BOC's branches in Manhattan. The plaintiffs allege that representatives of the Israeli prime minister warned officials of China's central bank and Ministry of Public Security in April 2005 that the transfers were being used in support of terrorism and demanded that they prevent BOC from executing further transfers. The plaintiffs allege that the Chinese officials conveyed the Israeli warnings and demands to BOC in April 2005, but the bank continued to carry out the wire transfers at least through January 2007.

The plaintiffs allege that BOC's actions in handling the wire transfers were a proximate cause of their injuries. Arguing that Israeli law governs the case, they seek damages for negligence under Israel's Civil Wrongs Ordinance and for breach of statutory duty, based on alleged violations of Israeli statutes that prohibit the provision of material support or services to terrorist organizations. BOC argues the case is governed by the law of New York or China and, thus, it has no duty to protect non-customers from torts committed by its banking customers. Supreme Court denied BOC's pre-answer motion to dismiss under CPLR 3211(a)(7) for failure to state a cause of action.

The Appellate Division, First Department affirmed, ruling that Israeli law applies. While New York, Israel and China all have significant contacts, it said, "Israel has a very strong interest in protecting its citizens and residents, who were the intended targets of the terrorist attacks inside Israeli territory.... [W]e hold that Israel, the location of the plaintiffs' injuries, has the greater interest in seeing its laws enforced, and Israeli law should govern this action." This does not violate public policy, although New York does not generally recognize a duty of banks to protect non-customers, it said. In light of allegations that "BOC knowingly facilitated acts of terrorism against innocent civilians, and did so after being put on notice" by Chinese and Israeli officials, "BOC's argument that it was doing nothing more than 'routine' banking services is unpersuasive."

BOC argues the law of China or New York should apply. Under a proper application of the "greatest interest" test, it says, the choice of law depends on where the challenged conduct occurred, not the place of injury. The plaintiffs' "claims are centered on BOC's alleged banking conduct in China, where key meetings and decisions allegedly transpired, where the wire transfers at issue were received.... BOC's alleged banking conduct also occurred to a lesser degree in New York, when wired funds passed through a BOC branch on their way to the customer's accounts in China.... Because BOC does business in China and New York and is subject to the regulatory oversight of those jurisdictions, China and New York are best able to oversee and prevent bank conduct of the type described in Plaintiffs' Complaint."

For appellant Bank of China: Mitchell R. Berger, Washington, DC (202) 457-5601
For respondents Elmaliach et al: Robert J. Tolchin, Brooklyn (718) 855-3627

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No. 4 People v Terrance Williams

(papers sealed)

Terrance Williams entered into a sexual relationship with a coworker (complainant) in Syracuse in August 2010. Williams did not disclose that he had human immunodeficiency virus (HIV), telling the complainant that it was "okay" to have anal intercourse without a condom. The complainant later testified before a grand jury that they had unprotected sex four or five times, ending in October 2010. At that time, Williams told him a previous sexual partner had been diagnosed with HIV and suggested he should be tested. Williams said, "I never got tested so I think maybe you should just in case." In April 2011, after learning the complainant had tested positive for HIV, Williams apologized to him and admitted he had been diagnosed with HIV in 2009, before their relationship began. The complainant reported the matter to the police, and Williams was indicted for first-degree reckless endangerment.

Supreme Court reduced the charge to second-degree reckless endangerment, finding the evidence was legally insufficient to establish two elements required by Penal Law § 120.25, which states that a defendant "is guilty of reckless endangerment in the first degree when, under circumstances evincing a depraved indifference to human life, he recklessly engages in conduct which creates a grave risk of death to another person." The court said there was insufficient proof that Williams acted with depraved indifference or caused a grave risk of death.

The Appellate Division, Fourth Department affirmed, saying, "[A]lthough defendant may have acted with indifference to the victim's health, his conduct lacked the 'wanton cruelty, brutality, or callousness' required for a finding of depraved indifference toward a single victim.... Defendant told the police that he did not disclose his HIV positive status ... because he was 'afraid [the victim] would not want to be with' him, and that he 'loved [the victim] so very much'.... The fact that defendant encouraged the victim to be tested for HIV indicates that defendant 'was trying, however weakly and ineffectively,' to prevent any grave risk that might result from his conduct.... We thus conclude that, 'while the evidence certainly shows that defendant cared much too little about [the victim's] safety, it cannot support a finding that [he] did not care at all.'" Finding insufficient evidence that William's conduct posed a grave risk of death, it cited testimony of the victim's physician that, due to dramatic advances in the treatment of HIV, "the prognosis today is 'outstanding.'"

The prosecution argues it presented sufficient evidence to support the charge of first-degree reckless endangerment. "Defendant exhibited depraved indifference by selfishly putting his own immediate desire for sexual gratification above the risk of the victim contracting HIV, which is incurable and life-threatening.... Before engaging in the first instance of unprotected anal sexual conduct..., the victim specifically asked defendant four times if it was okay not to use protection and defendant said yes." The lower courts "focused on what defendant did after the fact, but ignored defendant's failure to reveal his HIV positive status when he convinced the victim to engage in unprotected sexual conduct.... [D]espite defendant's post-crime regret, the proof shows his depraved indifference at the time of his actions." The prosecution says, "Despite medical advancements, HIV infection can lead to AIDS and cause death. Thus, defendant's actions exposed his victim to a grave risk of death."

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