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Recent Decisions

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Damages — Wife Entitled To Recover For Loss Of Consortium Of Husband Injured Through Defendant's Negligence. *Acuff v. Schmit, 78 N. W. 2d 480 (Iowa, 1956).* Plaintiff sued for damages, alleging that due to defendant's negligent operation of an automobile her husband was permanently injured and that she had thereby been deprived " 'of the aid, services, support, affection, society, companionship, and consortium, including sexual relations of her said husband'." The trial court sustained a motion to dismiss on the ground that the petition failed to state a cause of action. On appeal, *held,* reversed. Since the law recognizes the husband's right of consortium and since a married woman is no longer under the common law restrictions of coverture but stands as an equal of her husband in the eyes of the law, she also is entitled to recover for loss of consortium. The principal precedent cited was *Hitaffer v. Argonne Co.,* 183 F. 2d 811, 23 A. L. R. 2d 1366 (C. A. D. C. 1950), *cert. den.* 340 U. S. 852 (1950), the logic and reasoning of which the court felt was sound "in the light of present day standards and ideals".

Maryland first passed upon this question in *Emerson v. Taylor,* 133 Md. 192, 104 A. 538, 5 A. L. R. 1045 (1918), in which much the same arguments were made to the Court of Appeals as were made in the *Acuff* case. In refusing to allow recovery, the Court distinguished between intentional torts, such as alienation of affection, *Wolf v. Frank,* 92 Md. 138, 48 A. 132 (1900) [an action since abolished by statute, Md. Code (1951), Art. 75C, Sec. 2] and acts of negligence. The Court also rejected the attempt to draw a parallel to the husband's right to recover for loss of consortium, relying simply on its construction of the reported cases and COOLEY [COOLEY, TORTS (3rd Ed.) 474]. The question was again presented to the Court of Appeals in *Coastal Tank Lines, Inc. v. Canoles,* 207 Md. 37, 113 A. 2d 82 (1955), five years subsequent to the decision of the *Hitaffer* case. After defining consortium as including " 'society, affection, assistance, and conjugal fellowship'," the court stated at pages 46 and 47, "It has been held in a number of jurisdictions that a husband may recover for loss of consortium in a negligence action, and while not expressly adjudicated in Maryland, this has been the accepted practice." In re-

fusing to extend such a right to the wife, the Court pointed out that the *Hitaffer* case had not at that time been followed by any court of last resort, and, though acknowledging it to be a questionable decision, refused to overrule the *Emerson* case. Perhaps the most cogent reason advanced by the Court for denying recovery in these cases was that "the duty owed by a negligent defendant does not extend to remote consequences, affecting third persons," (49), but this should also apply to the husband's right of recovery which, in the dictum quoted above, the Court had just recognized. To bolster the decision it was noted that the right of consortium of the husband is probably a vestigial remnant of his right of servitium and, being somewhat an anachronism, should not be extended. The cases are collected in the annotation to the *Hitaffer* case in 23 A. L. R. 2d 1378.

Due Process — Notice To Known Incompetent Without Protection Of Guardian Does Not Satisfy Due Process. *Covey v. Town of Somers, 351 U. S. 141 (1956).* By Article VII A, Title 3, New York Tax Law (McK. Consol. Laws, Ch. 60; 10 C. L. S., Sec. 165-b) notice of tax lien foreclosures is given by publication, posting, and mailing, and the statute purports to apply to all defendants including infants and incompetents. Judgment foreclosing a tax lien was entered under this procedure against the property of one Brainard whom the town authorities knew to be an incompetent. Five days after the execution of a deed under this judgment conveying title to the town, Brainard was certified by the county court as a person of unsound mind. Appellant was appointed as committee of her person and property and moved to set aside the deed. Appellant contended that the taking of property under these circumstances was a denial of due process under the Fourteenth Amendment, and on appeal from an adverse decision of the New York Court of Appeals, the United States Supreme Court reversed. It is a fundamental requirement of due process that the notice of the proceeding be reasonably calculated under all circumstances to apprise interested parties of the pendency of the action and afford them an opportunity to defend. [*Mullane v. Central Hanover Tr. Co.*, 339 U. S. 306 (1950)]. Notice to a person known to be incompetent who is without the protection of a guardian does not satisfy this requirement.

The court did not indicate that the knowledge of the owner's incompetence is essential to the result reached; they

merely framed their holding in terms of the specific situation. Maryland tax sales provisions are in Md. Code (1951), Art. 81, Secs. 69-121. The general provisions provide for notice by mail to the last known address of the last owner on the tax rolls and for publication. There is no specific mention of the effect on incompetents. However, an alternative method of foreclosure following a tax sale is provided where the purchaser is Baltimore City (Secs. 115-119), and in Sec. 119 it is specifically provided that the foreclosure shall be binding on all persons including infants and incompetents. For a recent case emphasizing the Supreme Court's view on inadequacy of publication alone to satisfy due process, see *Walker v. City of Hutchinson,* 77 S. Ct. 200 (1956).

Funeral Expenses — Husband May Recover Wife's Funeral And Burial Expenses In A Direct Action. *Moss v. Hirzel Canning Co., 100 Oh. Ap. 509, 137 N. E. 2d 440 (Ohio, 1955).* Plaintiff, as surviving spouse, sued defendant for loss of services and consortium and for $1,970.87 for the funeral and burial expenses of his wife, whose death was allegedly due to defendant's negligence. Defendant's demurrer was sustained, and plaintiff appealed. *Held,* reversed as to the claim for funeral and burial expenses. Plaintiff does not have the legal capacity to sue under the wrongful death statute [Ohio Rev. Code, (Anderson, 1953), Sec. 2125.01 *et seq.*] which provides for suit only by the personal representative of the deceased, and the injuries which he here alleges being to himself and not to the deceased are not covered by the survival statute [Ohio Rev. Code (Anderson, 1953), Sec. 2305.21] which preserves or revives a wrong to the deceased. The demurrer as to the claim for loss of services and consortium was therefore well taken. However, plaintiff's right of action for funeral expenses is a direct action under the common law arising from the husband's duty to provide funeral services and a decent burial for his wife, similar to his duty to provide necessaries during her life. As to this claim the demurrer was properly overruled.

Maryland recognizes that a husband is personally liable for his wife's funeral and burial expenses. The leading case on the subject, *Barnes v. Starr,* 144 Md. 218, 124 A. 922, 34 A. L. R. 809 (1923), annotated p. 812, held the husband liable even where he and the wife have been separated for a number of years. Maryland also recognizes that such expenses are not recoverable under the wrongful death

statute, Md. Code (1951), Article 67; *State v. Cohen,* 166 Md. 682, 172 A. 274, 94 A. L. R. 427 (1934). The cases on common law recovery of funeral expenses by a near relative from a tort feasor are collected and discussed in 3 A. L. R. 2d 932.

Insurance — Insurer Must Consider Interests Of Insureds In Settlement Of Claims. *Radcliffe v. Franklin National Ins. Co. of New York, 298 P. 2d 1002 (Ore. 1956).* Insureds were involved in an automobile accident, and defense of the resulting suits was handled by an attorney employed by the insurer. On the second day of the trial, the opposing counsel offered to settle for $10,000, the limits of the liability insurance coverage. The offer was made to the insurer's attorney, who had no authority to accept it, and was not communicated to the insured. The suits resulted in judgments totaling $21,500, of which insurer paid $11,500 with interest and costs. Insureds paid the remaining $10,000 and sued insurer on the ground that failure to accept the offer and failure to disclose its receipt constituted bad faith and negligence by the insurer. The trial court directed a verdict for the insurer. On appeal, *held,* reversed. The evidence could warrant findings by the jury that: (1) the omission to negotiate for settlement was due to the fact that insurer had no one at the trial with such authority, and that (2) the financial interests of the insureds were not considered when the insurer put aside the offer. Under the policy, the insured commits to the insurer the settlement or defense of claims. Whenever anyone takes custody of something, tangible or intangible, which belongs to another, he owes that other a duty of care. The minimum expected of an insurer is that he employ good faith, which requires consideration of the interests of the insured. While the company has a right to consider its own interests, it has no right to sacrifice those of the insured, and its decision in the matter must be honest, in good faith, and with due consideration for the interests of the insured.

There appear to be no Maryland appellate cases on this point. Of the more than thirty jurisdictions which have ruled on the matter, some, *e.g.,* New Hampshire: *Dumas v. Hartford Accident & Indemnity Co.,* 94 N. H. 484, 56 A. 2d 57 (1947), purport to apply standards of due care, while others, *e.g.,* Wisconsin: *Hilker v. Western Automobile Ins. Co.,* 204 Wis. 1, 231 N. W. 257 (1930), purport to apply standards of good faith, but the trend, as pointed out in the *Radcliffe* case, at 1018, is towards an amalgamation of the

two. The subject is treated in 8 APPLEMAN, INSURANCE (1942), Secs. 4712, 4713; *Keeton, Liability Insurance and Responsibility for Settlement,* 67 Har. L. Rev. 1136 (1954); and 9 Md. L. Rev. 349 (1948). The cases are collected in 40 A. L. R. 2d 168.

Motor Vehicles — Automobile Procured By False Pretenses Is "Stolen" Within The Proscription Of The Dyer Act. *Boone v. United States, 235 F. 2d 939 (4th Cir., 1956).* Defendant purchased an automobile with a check which he represented to be good but knew to be worthless and transported the vehicle across state lines. He was convicted under the Dyer Act [18 U. S. C. A. Sec. 2312 (1951)] which imposes criminal penalties on interstate transportation of a motor vehicle "knowing the same to have been stolen". He appealed, contending that the word "stolen" refers only to a vehicle obtained by larceny and not to one obtained by false pretenses. *Held,* affirmed. The word "stolen" is used in the statute in its well known and accepted meaning of unlawfully taking the personal property of another for one's own use with the intent to deprive the owner of it permanently.

By this decision the Fourth Circuit aligned itself with the Second, Sixth, and Ninth Circuits [*United States v. Sicurella,* 187 F. 2d 533 (2nd Cir. 1951); *Collier v. United States,* 190 F. 2d 473 (6th Cir. 1951); *Smith v. United States,* 233 F. 2d 744 (9th Cir. 1956)]. The decision overrules District Court decisions in Maryland, *United States v. Turley,* 141 F. Supp. 527 (D. C. Md. 1956), [probable jurisdiction noted and transferred to summary calendar, 352 U. S. 816 (1956)], and South Carolina, *Ex parte Atkinson,* 84 F. Supp. 300 (D. C. E. D. S. C., 1949), and is *contra* to decisions in the Fifth, Eighth, and Tenth Circuits. [*Murphy v. United States,* 206 F. 2d 571 (5th Cir. 1953); *Ackerson v. United States,* 185 F. 2d 485 (8th Cir. 1950); *Hite v. United States,* 168 F. 2d 973 (10th Cir. 1948)].

Negligence — Architect Who Designs A Dangerous Or Hazardous Structure May Be Liable For Injuries Suffered By Users Thereof. *Inman v. Binghamton Housing Authority, 1 A. D. 2d 559, 152 N. Y. Supp. 2d 79 (1956).* Infant plaintiff fell from the back porch or steps of an apartment leased by his parents and suffered severe injuries. The infant through a guardian *ad litem* brought action against the landlord, the builder, and also the architect who designed the apartment building. The lower court dismissed

the complaint as to the architect, requiring privity between the injured party and the architect. The New York Supreme Court, Appellate Division, reversed. There is no requirement for privity where an action is brought by a stranger against a manufacturer of an article the use of which, if the item is defective, probably will cause injury [MacPherson v. Buick Motor Co., 217 N. Y. 382, 111 N. E. 1051 (1916)], and there is no good reason for not extending the doctrine to real property. The imminence of danger should be the test and not the classification of the object from which the danger emanates.

Architects are governed by the same rules of law in this area as contractors, and the general rule as to liability of a contractor to third persons injured as a result of his negligent performance is that the contractor is given immunity as to actions by third parties once he has completed the building and it has been accepted by the owner. The general rule was applied in New York and recognized in Maryland and most other states, and was based upon the theory that no privity of contract existed between the contractor and the third person and that no duty was owed by the contractor except to his contractee. Numerous exceptions to this general rule were created and they occupy some ninteen pages in 13 A. L. R. 2d 191, 233. Maryland has recognized an exception and held the contractor liable to third persons where the work is inherently dangerous and has created a public nuisance; *E. Coast Fr. Lines v. Cons. Gas. Co.*, 187 Md. 385, 397, 50 A. 2d 246 (1946). Also, as acknowledged in *Walker v. Vail*, 203 Md. 321, 328, 101 A. 2d 201 (1953), Maryland has given qualified recognition to the *MacPherson* doctrine. The apparent trend in this area is indicated by the action of the Court of Appeals of the District of Columbia in a recent case, *Hanna v. Fletcher*, 231 F. 2d 469 (C. A. D. C. 1956), overruling an earlier case, *Ford v. Sturgis*, 14 F. 2d 253, 52 A. L. R. 619 (C. A. D. C. 1926) [and thereby the companion case of *Geare v. Sturgis*, 14 F. 2d 256 (C. A. D. C. 1926), involving an architect] on the ground that they considered it at variance with the accepted doctrine of the *MacPherson* case. Compare *Tort Liability to Third Parties Arising From Breach of Contract*, 14 Md. L. Rev. 77 (1954).

Property — Joint Tenant Who Kills Co-Tenant By Reason Of Insanity Takes Property By Survivorship. *Anderson v. Grasberg, 78 N. W. 2d 450 (Minn. 1956).* H, afflicted with a serious mental disease, killed W, with whom

he jointly owned certain real estate. H was indicted for murder and, following a preliminary hearing, found insane by the court and committed to an asylum. The administratrix and heirs of W sued H to impose a constructive trust upon one-half of the jointly owned real estate. The civil court, upon the facts and exhibits from the criminal proceedings stipulated by counsel, applied the McNaghten test [embodied in Minn. St. (1949) Sec. 610.10] and found H legally sane at the time of the killing. The court then presumed that had H not feloniously killed W they would have died simultaneously and accordingly divided the property among the heirs of each. On appeal, *held,* reversed. It is unrealistic in the light of present medical knowledge of mental diseases to apply the arbitrary right-and-wrong test in a case such as this. If the killer is insane at the time of the act, the principle that he may not profit from his wrong does not apply, and the slayer will not be barred from taking the property if his unlawful act was the product of mental disease. Two justices dissented on the ground that the case had been briefed and argued on the McNaghten test and there was not sufficient evidence to warrant reversal of the lower court's finding on the fact of insanity.

The case is interesting in that the court adopted the "product" approach in a civil case in a state where by statute (cited *supra*) the McNaghten test was applicable in criminal cases. This case appears to be one of first impression in the United States. For discussions of the tests as applied in criminal cases, see Sobeloff, *From McNaghten to Durham, and Beyond — A Discussion of Insanity and the Criminal Law,* 15 Md. L. Rev. 93 (1955), and DeVito, *Insanity as a Defense — McNaghten Rule Repudiated by District of Columbia* and *Varying Tests for Insanity,* 15 Md. L. Rev. 44 and 255 (1955). The latter note points out that other tests may be used in determining whether people should be confined to or released from mental institutions.

Torts — Child May Recover For Tortious Prenatal Injuries Received At Any Time After Conception. *Hornbuckle v. Plantation Pipe Line Company, 212 Ga. 504, 93 S. E. 2d 727 (1956).* Infant plaintiff alleged that she received prenatal injuries caused by defendant's negligence which resulted in physical deformity. The alleged acts of negligence occurred about six weeks after she was conceived. The trial court entered judgment for the child, but the Court of Appeals reversed, (93 Ga. App. 391, 91 S. E. 2d 773), holding that a born child cannot maintain such an

action if it was not quick in its mother's womb at the time of the injury. On certiorari to the Georgia Supreme Court, *held,* reversed. A child has a right to recover for tortious injury sustained at any period of its prenatal life. Two justices dissented on the grounds that a child is not in being until it quickens and that to hold otherwise opens the courts to uncertainty and possibly fraud.

No Maryland holding has gone this far; but the possibility of such recovery was foreshadowed by the three-judge opinion of the Court in *Damasiewicz v. Gorsuch,* 197 Md. 417, 79 A. 2d 550 (1951), noted 12 Md. L. Rev. 223 (1951), which, with two judges (of the then six judge court) dissenting, permitted a child suffering prenatal injuries inflicted through the negligence of others to recover damages. Judge Henderson, in a concurring opinion agreeing with the result, would have restricted the possibility of recovery to an embryo that "has acquired a human personality and become viable". But, Chief Judge Marbury, with Judges Delaplaine and Grason concurring, stated for the Court that if the child is " 'able to stir in the mother's womb' there would seem to be just as logical a basis for allowing it to recover, as if it were injured after it had reached the period in its growth when it could be removed from the mother and live" (438). In dismissing the argument that its decision might result in the Court's being overwhelmed with faked or fraudulent claims, on which the dissent in the principal case was based, the court noted at page 437: "Fraud can be dealt with in this class of cases, just as in others, and the detection and the elimination of faked contentions present no novel question to judicial bodies. Here again, modern medical knowledge will do away with much of the difficulty." The REVIEW [12 Md. L. Rev. 223, 227 (1951)], noting *Damasiewicz,* stated: "This would seem to be the first indication by any court that recovery *might* be had for an injury to a child not yet viable, or capable of separate existence. But if recovery should be given to protect an unborn viable child it would seem that it should be extended to protect a non-viable child also." This still seems sound. Liability should not be tied to the technical and difficult medical fact of viability but should result, as Chief Judge Marbury said, because: "By the negligence or the willful misconduct of someone an unborn child has to go through life, crippled, blind, subject to fits, an imbecile, or otherwise changed from a normal human being" (438). For other cases, see annotation, Prenatal Injury as ground of action, 10 A. L. R. 2d 1059.