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Estate Of Incompetent Liable For Torts Of Conservator - Filip v. Gagne

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Estate Of Incompetent Liable For Torts Of Conservator

Filip v. Gagne[1]

In 1958, the plaintiff, a tenant in a tenement building owned by an elderly woman under conservatorship since 1951, was injured by a fall alleged to have been caused by defective construction and maintenance of a common stairway. In suits against both the ward and the conservator, the lower court reserved decision pending determination of questions of law by the Supreme Court of New Hampshire as to the liability of the conservator for defective conditions due to her negligence, and as to the chargeability of the ward and her estate for such negligence. That Court, in a unanimous opinion, held that: (1) a conservator, having the duty to preserve and maintain the estate (in this case, to rent the tenement to produce income) also has a duty of care to prevent injury caused by defective conditions, and is *personally* liable for her own negligence;[2] (2) a ward would be liable under the modern doctrine that

[1] 104 N.H. 14, 177 A. 2d 509 (1962).
[2] *Id.*, 511; RESTATEMENT, TORTS (1934) § 387, p. 1035 and § 383, p. 1022.

an incompetent is liable for compensatory damages for his torts;[3] and (3) the modern tendency[4] is to hold a trust estate responsible for torts committed by the trustee in the administration of the trust, and that a conservator is similar to a trustee, although he has no title to real estate, and the estate should be answerable for neglect of his fiduciary duties.[5]

There is limited authority on the question of the liability of the estate of an incompetent under guardianship for the guardian's torts committed within the scope of his duties. The New Hampshire Court, in imposing liability upon the estate of a ward under conservatorship appears to be contrary to the approach taken by most courts.[6]

A situation very similar to that in the instant case came before a New York court in 1906,[7] and it was there held, by means of an analogy to the principles governing lessor-lessee responsibilities, that the lunatic was not liable.[8] The court reasoned that since a lessor is liable only for defective conditions existing at the time of the demise and is not liable for injuries resulting from negligence of tenants in maintaining the premises,[9] therefore *one who does not select* the person representing him certainly should not be liable.[10] The committee was held not liable in its representative capacity, the court reasoning that even trustees of an express trust in real estate, in whom legal title is vested, are not liable in their representative capacity for negligence in keeping the premises in repair,[11] so that

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[3] Noting that this is a subject upon which there is much disagreement, the Court states that this is the "better" view, which has now received acceptance by the American Law Institute. RESTATEMENT, TORTS, 2d (Tentative Draft No. 4, 1959) § 283B. The Court can find no distinction between the case of an incompetent managing his own affairs and one who is under guardianship. Apparently, the fact that one is under guardianship does not abrogate his duty of care. Query: If the ward is personally liable, why is it necessary to consider whether his estate is chargeable for the conservator's torts?

[4] 3 SCOTT, TRUSTS (2d ed. 1956) § 271A-2, p. 2101.

[5] *Supra*, n. 1, 512.

[6] Anno., 40 A.L.R. 2d 1094 (1954).

[7] Ward v. Rogers, 51 Misc. 299, 100 N.Y.S. 1058 (1906). The only significant difference was that in the Gagne case, the conservatorship was a voluntary arrangement, while in Rogers, the committee was appointed. See *infra*, n. 33.

[8] *Id.*, 1060. The question of personal liability of the committee did not arise in the Rogers case, as the suit was brought against the lunatic or his committee in a representative capacity.

[9] The court states that the lunatic *might* be liable for injuries resulting from conditions existing prior to the guardianship, citing Morain v. Devlin, 132 Mass. 87, 42 Am. Rep. 423 (1882) (see n. 25, *infra*), and took the accepted view that a lunatic is as responsible for his *own* torts as a sane person.

[10] *Supra*, n. 7, 1059.

[11] Moniot v. Jackson, 40 Misc. 197, 81 N.Y.S. 688 (1903).

clearly a committee or guardian, not holding title to land, would not be liable.[12]

In a malicious attachment case in North Carolina,[13] the court, citing *Ward v. Rogers*[14] and the Maryland case of *Gillet v. Shaw*,[15] found it to be the general rule that the estate of an incompetent is not liable for torts of his guardian committed in the management of the estate, and therefore an action will not lie against the guardian in his representative capacity. However, the guardian would be personally liable for his own torts committed in the management of the estate of the ward.[16]

Rooney v. People's Trust Co.,[17] a New York decision handed down only two years after *Rogers*, took issue with that case. Stating that title to property is not the criterion, but that liability rests entirely upon exclusive control and right of management, the court held the committee *individually* liable.[18] The court, however, said that there could be no recovery against the committee *representatively*, since the "estate of the incompetent must not be subjected to a liability for the torts of one who is not his agent in the legal sense."[19]

The Maryland Court of Appeals was faced with a similar question in *Gillet v. Shaw*,[20] decided in 1912. In that case, an automobile operated by a chauffeur employed by the guardian of an adjudged lunatic[21] ran into and injured the plaintiff. It was held that neither the lunatic, who was not at the scene of the accident, nor his estate could be rendered liable by the tort of his guardian's servant, and by dicta, the court's reasoning was extended to torts of the guardian himself.[22] The court recognized that a lunatic is liable for his own tortious negligence and is subject to the same degree of care as a fully competent person, in order that there may be redress for injuries.[23] However, this rule was held to have no application where an employee of the guardian, not under the direction of the lunatic, committed the tort. The reasoning is that an *adjudged lunatic* has no

[12] *Supra*, n. 7, 1060.
[13] Brown v. Guaranty Estates Corp., 239 N.C. 595, 80 S.E. 2d 645, 40 A.L.R. 2d 1094 (1954).
[14] *Supra*, n. 7.
[15] 117 Md. 508, 83 A. 394 (1912).
[16] *Supra*, n. 13, 652.
[17] 61 Misc. 159, 114 N.Y.S. 612 (1908).
[18] *Id.*, 613.
[19] *Id.*, 614. This is dictum, the suit having been brought against the committee individually.
[20] 117 Md. 508, 83 A. 394 (1912).
[21] Adjudged insane by a Massachusetts court.
[22] *Supra*, n. 20, 514.
[23] *Supra*, n. 20, 512. Cross v. Kent, 32 Md. 581, 583 (1870).

capacity to contract and cannot appoint an agent as long as his lunacy continues.[24]

Morain v. Devlin[25] is a frequently cited American case taking the minority view that the estate of the incompetent is liable. The basis of that decision is that there is no reason to exempt the lunatic from the responsibilities of having an estate when he receives the benefits of the property. This case has been distinguished (although not by the instant case) because it may have involved pre-existing defective conditions.[26] In a 1918 California case,[27] involving defective operation of an elevator in a building owned by the lunatic defendant, the court found the estate liable, making an analogy to the responsibilities of a receiver of a railroad in conducting its business as a carrier of passengers for hire, pointing out that judgments against the receiver are payable only from funds in his hands.[28] The court emphasized that the lunatic was benefiting from the operation of the elevator, distinguishing *Gillet* where no service was performed for the lunatic.[29] "If an insane . . . owner and manager of a business building . . . would be responsible . . . there seems no good reason . . . that he should be exempt . . . because . . . his property was being operated for him by an agent appointed by the court."[30]

The cases finding no liability, including *Gillet v. Shaw*,[31] appear to be grounded on concepts borrowed from the law of agency and hold that one who does not have the capacity to appoint a manager or to control the management of his estate should not be held responsible for the negligence of one acting in his stead without his authority.[32] This argument would seem to lose some of its force under the facts existing in the instant case. Under the New Hampshire

[24] *Id.*, 513. Here the court cites numerous authorities on the inability of a lunatic to appoint an agent. Reams v. Taylor, 31 Utah 288, 87 P. 1089, 1090 (1906) supports the view that the doctrine of principal and agent does not apply where an incompetent had no capacity to appoint an agent.

[25] 132 Mass. 87, 42 Am. Rep. 423 (1882).

[26] See *supra*, n. 9.

[27] Campbell v. Bradbury, 179 Cal. 364, 176 P. 685 (1918).

[28] *Id.*, 687. The guardian here was held not personally liable.

[29] Ward v. Rogers was distinguished as growing out of property and not involving the conduct of a business in the nature of a common carrier of passengers for hire. *Ibid.*

[30] *Id.*, 688. *Cf.* 2 HARPER & JAMES, TORTS (1956) § 26.12, p. 1413, discussing the vicarious liability of infants.

[31] 117 Md. 508, 83 A. 394 (1912).

[32] Query: Would not the particular factual situation in the Gagne case preclude this argument, since the landlord's duty of care to keep common approaches in a reasonable condition is non-delegable? HARPER & JAMES, *op. cit. supra*, n. 30, § 26.11, pp. 1406-1407; PROSSER, TORTS (2d ed. 1955) § 80, p. 476.

statute,[33] the appointment of a conservator differs from that of a guardian in that conservatorship is a *voluntary* arrangement, initiated by petition of one physically or mentally "infirm," but not mentally incompetent, and subject to termination upon petition by the ward. Prior to the 1962 session of the General Assembly, Maryland had in force a statute almost identical in effect to that of New Hampshire.[34] The voluntary nature of conservatorship under these statutes would appear to greatly weaken the application of the view of the majority cases in respect to such situations. However, in the instant case, while recognizing this difference, the court did not place any significance upon it.[35] It may be that the existence of a statutory provision equating the authority of conservators with that of guardians impairs a distinction.[36] It is arguable that the conservator, although appointed voluntarily, is not an "agent," inasmuch as his actions are not subject to direction by the ward,[37] save for the possibility of a petition for termination of the conservatorship. However, an argument can be made that a ward who is competent, upon observing defective conditions, owes a duty of care to third persons to see that defects are remedied, even if this requires a petition for termination.[38]

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[33] 4 N.H.R.S.A. (1955) c. 464:17: "Whenever any person shall deem himself unfitted by reason of infirmities of age, or by other mental or physical disability, for the management of his affairs with prudence and understanding, he may apply to the probate court for the appointment of a conservator of his property, and thereupon the judge . . . may . . . appoint some suitable person. . . ." § 20: "[T]he conservator shall have the same powers and authority as the guardian of the property of a minor or incompetent and shall be considered as an officer or arm of the court." Section 18 provides that the conservator will be subject to all provisions relating to guardians in so far as they apply to estates. Section 21 provides for termination of the conservatorship upon petition of the ward at any time.

[34] 2 MD. CODE (1957) Art. 16, § 149 *et seq.* contains provisions as to the appointment and duties of a conservator, and the termination of the conservatorship, very similar to that of New Hampshire. However, by an act of the 1962 legislature (ch. 36, § 15 and § 1) this was repealed, and replaced by a new statute, which will probably have the same effect, although the right of one to petition for his property to be placed under conservatorship is relegated to the status of a rule of procedure (MD. RULE L-70), as was the provision as to discharge (MD. RULE L-73). The new section 150 specifically enumerates the power of the conservator to sue and be sued in his representative capacity.

[35] 104 N.H. 14, 177 A. 2d 509, 510 (1962).

[36] *Supra*, n. 33; In re Anderson's Guardianship, 247 Iowa 1292, 78 N.W. 2d 788, 791 (1956); Anderson v. Schweitzer, 236 Iowa 765, 20 N.W. 2d 67, 69 (1945). The former case holds that the powers and duties of voluntary and involuntary guardians are the same, but admits that a "different situation" is created by a ward who is mentally alert from that of an incompetent.

[37] See the dissent in McCabe v. O'Connor, 4 App. Div. 354, 38 N.Y.S. 572, 575 (1896), aff'd 162 N.Y. 600, 57 N.E. 1116 (1900).

[38] *Cf. supra*, n. 32.

The benefits-responsibilities approach of the instant case and the *Morain* case certainly has merit, inasmuch as it is generally accepted that an incompetent managing his own affairs would be liable for his torts in relation thereto. Certainly there is no reason to shield him from liability (*especially* in a conservatorship case) merely because his estate requires the management of a guardian.[39]

In the instant case, the court finds that the estate of the ward should be chargeable for the conservator's torts, extending what it terms "the modern tendency" in the law of trusts to the guardianship area. The analogy of trusts and guardianships has broad acceptance[40] despite the fact that the guardian has no title to the ward's property. However, the concept of responsibility of a trust estate for torts committed by the trustee in the administration of the trust, as espoused by Professor Scott[41] and supported by the American Law Institute,[42] is accepted only by an apparently small minority of jurisdictions.[43] This view may well be an extension of the principle that a trustee who has become liable when not personally at fault is entitled to indemnity from the trust estate.[44] If a guardian is to be treated as a trustee, then likewise the indemnity principle should be applicable in an appropriate situation.[45]

It is suggested that the distinction between involuntary guardianship and conservatorship be disregarded inasmuch as statutory wording seems to favor this,[46] and the agency approach of the majority is unrealistic.[47]

While the result in the instant case satisfies the primary object of assuring compensation to the wronged party, the question of the ward's right to recover against a conservator or guardian whose mismanagement caused the liability

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[39] 2 HARPER & JAMES, TORTS (1956) § 26.12, p. 1412.

[40] BOGERT, TRUSTS (3d ed. 1952) § 17, p. 39. This was long ago expressed in Maryland. Swan v. Dent and Richards, 2 Md. Ch. 111, 117 (1847).

[41] 3 SCOTT, TRUSTS (2d ed. 1956) § 271A-2, p. 2101.

[42] RESTATEMENT, TRUSTS, 2d, § 271A, p. 23: "A person to whom the trustee has incurred a liability in the course of the administration of the trust may be permitted to obtain satisfaction of his claim out of the trust estate if it is equitable to permit him to do so. . . ." This is based on an analogy to an agent acting within the scope of his authority. Comment a.

[43] BOGERT, *op. cit. supra*, n. 40, § 129, pp. 504-506. For exhaustive consideration of this knotty problem, see Annotations, 44 A.L.R. 637 (1926) and 127 A.L.R. 687 (1940).

[44] 3 SCOTT, TRUSTS (2d ed. 1956) § 268, p. 2071 *et seq.*

[45] For example, see Gillet v. Shaw, 117 Md. 508, 83 A. 394 (1912), discussed *supra*, ns. 20-24, where the guardian could have been held liable under doctrine of respondeat superior for the tort committed by his servant.

[46] *Supra*, n. 33.

[47] *Supra*, n. 37.

remains unanswered.[48] In order to effect an equitable solution, it appears necessary to provide the ward with such a right where the guardian is personally at fault.

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[48] 3 SCOTT, TRUSTS (2d ed. 1956) § 247, p. 1977. That question and the problem of recovery by the ward against the guardian for mismanagement are beyond the scope of this note.