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Recent Decisions

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Admiralty — Recent Extensions Of The Ryan Indemnity Doctrine. *Italia Societa per Azioni di Navigazione v. Oregon Stevedoring Co.*, ... U.S. ....., 84 S. Ct. 748 (1964) and *American Export Lines v. Norfolk Shipbuilding & Drydock Corp.*, ... F. 2d ..... (4th Cir. 1964). In *Ryan Stevedoring Co. v. Pan Atlantic S.S. Corp.*, 350 U.S. 124 (1955), a stevedoring contractor was held liable to indemnify a shipowner for damages the shipowner was required to pay to a longshoreman for injuries resulting from stevedore's improper stowage of cargo rendering the ship unseaworthy. Although there were no express warranties in the service contract, the Court stated that the contractual undertaking to perform "properly and safely" is the stevedore's "warranty of workmanlike service that is comparable to a manufacturer's warranty of the soundness of it's manufactured product." *Id.* at 1334. See Note, *The Ryan Doctrine: Present Stature and Future Delevopment*, 37 TUL. L. REV. 786 (1963).

The stevedore's warranty of workmanlike service was extended in *Oregon* to latent defects in equipment which he provides. The stevedore had contracted with the shipowner to furnish equipment and supervision and to be responsible for damage caused by its negligence. A longshoreman recovered from the shipowner for personal injuries caused by a defective rope supplied by the stevedore which had created a condition of unseaworthiness. The shipowner sued the stevedore for indemnification upon the breach of its implied warranty of workmanlike service. Negligence was not proved since the rope's defect was latent, and the district court held that the contract provision which specifically provided for indemnity by the stevedore in case of negligence negated the inference of implied warranty of workmanlike performance. The Ninth Circuit Court of Appeals affirmed for the defendant, not on the theory of a negation of implied warranty, but on the basis that the implied warranty did not extend to non-negligent conduct. Only the latter issue was before the Supreme Court which reversed and *held* that the stevedore's implied warranty of workmanlike service is breached when the stevedore non-negligently supplies defective equipment which injures one of its employees during the course of stevedoring operations. The court based its conclusion on the policy that liability should fall upon the

party best situated to adopt preventive measures. See *Reid v. the Yoka,* 377 U.S. 410 (1963); see generally Stover, *Longshoreman-Shipowner-Stevedore; The Circle of Liability,* 61 MICH L. REV. 539 (1963); Note, *Shipowner or Stevedore: Liability to Injured Longshoreman,* 67 DICK L. REV. 391 (1963).

The Ryan doctrine was further extended in *American Export Lines* to allow indemnity for attorney fees and litigation expenses incurred by the shipowner in successfully defending a suit brought by an employee of defendant shipyard for injuries sustained while working on the ship. The shipowner requested that the shipyard defend the suit, and when defendant refused, the shipowner filed a third party complaint. A verdict absolved the shipowner from all liability; the shipyard was held to be solely responsible for the employee's injuries, and, immediately thereafter, the shipowner sought indemnity from the defendant for legal expenses. Equating the shipyard's warranty with that of the stevedore, the Fourth Circuit Court of Appeals, by Judge Sobeloff, affirmed the district court's award of indemnity and *held* that the shipowner was entitled to indemnification for legal expenses incurred as a result of the shipyard's breach of warranty causing injury for which the shipowner was potentially liable. See *Strachan Shipping Co. v. Koninklyke Nederlandsche S.M.N.V.,* 324 F. 2d 746 (5th Cir. 1963); *Massa v. C.A. Venezuelan Navigacion,* 332 F. 2d 779 (2d Cir. 1964). The court reasoned that it would be placing a premium on losing law suits to deny indemnity when a ship successfully defends a suit. For further reference see *Rederi A/B Dalen v. Maher,* 303 F. 2d 565 (4th Cir. 1962); *Bielawski v. American Export Line,* 220 F. Supp. 265, 270 (E.D. Va. 1963), the lower court decision in the principal case, for a discussion of "potential liability".

Constitutional Law — Involuntary Line-Up Of Accuseds Unable To Furnish Bail Violates The Fourteenth Amendment. *Butler v. Crumlish,* 229 F. Supp. 565 (E.D. Pa. 1964). Plaintiffs, confined in a Philadelphia detention center for want of bail, were ordered brought before a police line-up for possible identification by victims of other crimes. Plaintiffs brought suit under the Civil Rights Act, 14 Stat. 27 (1866), 42 U.S.C. § 1983 (1958); 28 U.S.C. § 1343 (1958), to enjoin the police from requiring them to appear in the line-up, claiming that the involuntary line-up would constitute an invidious discrimination depriving them of equal

protection of the laws guaranteed by the Fourteenth Amendment since they would be forced to appear in the line-up, while accuseds out on bail could only be requested to appear. The district court granted a preliminary injunction on the basis that there was a meritorious claim of constitutional right. The court reasoned that differences naturally arising between imprisonment due to inability to furnish bail and freedom on bail cannot be made the basis of a constitutional objection because of discrimination since that distinction is constitutionally recognized. U.S. CONST. amend. XIV, § 1; PA. CONST. art. 1, § 14. See also *Stack v. Boyle,* 342 U.S. 1, 4 (1951). However, the constitutional authority for such a distinction does not provide justification for any additional inequality which is not inherent in the confinement itself. To treat the accuseds, who are not convicts and are presumably innocent, not only as objects of custodial care but also as active but involuntary participants in police investigation amounts to a material distinction, not justified by constitutional authority, between those who enter bail and those who do not. Therefore, the court *held* that there was merit in the plaintiffs' claim that they would be deprived of the equal protection of the laws as guaranteed by the Fourteenth Amendment if required to appear in the line-up. In support of their decision the court cited only one case, *Commonwealth v. Brines,* 29 Pa. Dist. 1091 (1920).

In Maryland, a person being held in custody for want of bail for one crime may be *required* to appear for observation by victims of similar crimes if the police have reasonable cause to believe that the accused committed the similar crime. An accused who is free on bail in relation to one crime may not be required to appear in a line-up as a suspect in another similar crime; the police must obtain sufficient evidence to constitute probable cause for arrest on the new charge and must make such arrest before the accused may be required to so appear. A person confined in jail as a suspect in a crime, but not yet charged with such crime, is required absolutely to appear in a line-up. It is a practice in Maryland for an officer to tell accuseds being held for want of bail to appear in a line-up as a fill-in. There have been no strenuous objections by any accused to this "apparent mild coercion" on the part of the police officer in order to test whether one is *required* to so appear. Telephone Conversation with Charles Moylan, Jr., State's Attorney (October 29, 1964). For further information as to other inequalities arising under the bail

system see: Foote, *The Bail System and Equal Justice*, 23 FED. PROB. 43 (Sept. 1959); Foote, *Forward: Comment on the New York Bail Study*, 106 U. PA. L. REV. 685 (1958); Comment, *Compelling Appearances in Court: Administration of Bail in Philadelphia*, 102 U. PA. L. REV. 1031-79 (1954). See generally 4 WHARTON, CRIMINAL LAW AND PROCEDURE §§ 1807-23 (Anderson ed. 1957).

Constitutional Law — Mapp v. Ohio Applied Retrospectively. *United States ex rel. Eastman v. Fay*, 225 F. Supp. 677 (S.D.N.Y. 1963). On March 14, 1956 petitioner was convicted of the felony of possession of narcotics with intent to sell. The conviction was obtained through the use of evidence which was the fruit of an illegal search and seizure. The state court, in 1962, denied petitioner's writ of coram nobis stating that *Mapp v. Ohio*, 367 U.S. 643 (1961), which prohibited in state trials the introduction of evidence seized in violation of the Fourth Amendment, was prospective in operation and, therefore, did not apply to petitioner's conviction which antedated that decision. *People v. Eastman*, 33 Misc. 2d 583, 228 N.Y.S. 2d 156 (King's Co. Court 1962). Petitioner then filed an application for a writ of habeas corpus on the grounds that his Fourteenth Amendment rights had been violated. The district court, in granting the writ, *held* that *Mapp* is retrospective in application and applies to a prisoner who has been convicted and has exhausted his appeals prior to *Mapp*, but subsequent to *Wolf v. Colorado*, 338 U.S. 25 (1949), which "espoused the doctrine that there was a constitutional right to be free from unreasonable state intrusion upon privacy . . . but left the specific means of vindication open." The petitioner, therefore, at the time of his arrest, had a constitutional right to be free from arbitrary intrusion by the police, and that right was violated by the illegal search and seizure. The court reasoned that the violation of a constitutional right is a continuing one and, therefore, the exclusionary rule of the *Mapp* case was applicable to vindicate the petitioner's right even though he had exhausted his appeals prior to that decision. 225 F. Supp. at 679, 681.

The question of the retroactive application of the *Mapp* decision has given rise to a conflict of decisions. Comment, 62 MICH. L. REV. 1250, 1251 (1964). Some courts have held that *Mapp* is to be applied only prospectively. *United States ex rel. Linkletter v. Walker*, 323 F. 2d 11 (5th Cir. 1963); *Gaitan v. United States*, 317 F. 2d 494 (10th Cir.

1963); *Taylor v. People*, ... Colo. ....., 392 P. 2d 294 (1964). The courts that support prospective application rely upon a deterrent theory as the purpose behind the law in *Mapp*. Bender, *The Retroactive Effect of an Overruling Constitutional Decision, Mapp v. Ohio*, 110 U. PA. L. REV. 650, 660 *et seq.* (1962). Those courts which have held *Mapp* to be retroactive in application have done so on the basis that the right of an individual to be free from arbitrary state intrusion has existed since the *Wolf* decision. In *Hall v. Warden*, 313 F. 2d 483, 495-6 (4th Cir. 1963), the court held that exclusion of illegally seized evidence was an essential part of the right of privacy recognized in the *Wolf* case and that *Mapp* should be applied retroactively to vindicate that right which existed in defendant at the time of his arrest. See also *Walker v. Pepersack*, 316 F. 2d 119 (4th Cir. 1963); *Reeves v. Warden*, 226 F. Supp. 953, 960 (D. Md. 1964); *Presley v. Pepersack*, 228 F. Supp. 95, 104 (D. Md. 1964); *Hurst v. People*, 211 F. Supp. 387 (N.D. Cal. 1962). The principal case, however, treats exclusion as a constitutional procedure for enforcing the right to privacy. See Morris, *The End of an Experiment in Federalism — A Note on Mapp v. Ohio*, 36 WASH. L. REV. 407, 435 (1961). For further reference see Bender, *supra*, 110 U. PA. L. REV. 650 (1962); Traynor, *Mapp v. Ohio at Large in the Fifty States*, 1962 DUKE L. J. 319 (1962); Note, 16 RUTGERS L. REV. 587 (1962).

Constitutional Law — Statute Requiring Belief In A Supreme Being For Conscientious Objection Exemption Violates The Fifth Amendment. *United States v. Seeger*, 326 F. 2d 846 (2d Cir. 1964). Defendant had sought an exemption from military service as a conscientious objector because he felt that he could not "participate in actions which betray the cause of freedom and humanity." However, because defendant's belief was based upon a moral concern with the dignity and "worth of the individual" and not upon "a belief in relation to a Supreme Being" as required by Section 6(j) of the Universal Military Training and Service Act, 62 Stat. 612 (1948), as amended, 50 U.S.C. *Appendix* § 456(j) (1958), the draft board denied the exemption. Thereafter, defendant was convicted by the district court of refusing to submit to induction under 62 Stat. 622 (1948), 50 U.S.C. *Appendix* § 462 (1958). The Second Circuit Court of Appeals reversed the district court and *held* that the requirement of a belief in a Supreme Being, no matter how broadly defined, constitutes

a discriminatory classification which is violative of the due process clause of the Fifth Amendment. The court stated that such a classification cannot embrace all faiths validly called "religions", for the term "religion" also comprehends "a pervading commitment to a moral ideal" rather than to a supernatural power. 326 F. 2d at 853.

The right to exemption from combat service is a privilege which Congress can grant or deny at will, *George v. United States,* 196 F. 2d 445 (9th Cir.), *cert. denied,* 344 U.S. 843 (1952), but such a privilege cannot be granted on unconstitutional conditions. *Speiser v. Randall,* 357 U.S. 513 (1958). In 1948 Congress included the requirement of a "belief in a Supreme Being" in the conscientious objector clause. For a history of the conscientious objector provision see: *United States v. Jakobson,* 325 F. 2d 409 (2d Cir. 1963) and Conklin, *Conscientious Objector Provisions: A View in the Light of Torcaso v. Watkins,* 51 GEO. L. J. 252 (1963). The court's decision in the principal case is in conflict with previous cases in which the Ninth Circuit Court of Appeals upheld the constitutionality of the provision in question. *Etcheverry v. United States,* 320 F. 2d 873 (9th Cir.), *cert. denied,* 375 U.S. 930 (1963), *Clark v. United States,* 236 F. 2d 13 (9th Cir.), *cert. denied,* 352 U.S. 882 (1956); *George v. United States, supra.* See Note, 50 GEO. L.J. 618 (1964). However, the court's decision is in accord with the recent Supreme Court decisions concerning the establishment clause. In *Sicurella v. United States,* 348 U.S. 385 (1955), the Supreme Court stated that the exemption authorized by Section 6(j) is based upon the religious beliefs of the particular individual, not upon the religious tenets of an organization. The federal government cannot "pass laws or impose requirements which aid all religions as against nonbelievers, and neither can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs." *Torcaso v. Watkins,* 367 U.S. 488, 495 (1961). By "religion" the Supreme Court now seems to mean "man's belief or disbelief in the verity of some transcendental idea and man's expression in action of the belief or disbelief." *School District of Abington Township v. Schempp,* 374 U.S. 203, 234 (1963) (concurring opinion of Brennan, J.), *citing McGowan v. Maryland,* 366 U.S. 420, 466 (1961) (opinion of Frankfurter, J.). The Supreme Court has granted certiorari in the *Seeger* and *Jakobson* cases. For a discussion of the cases see 36 AM. JUR. *Military* § 23 (1963 Supp.); Comment, 48 MINN. L. REV. 771 (1964).

Sales—Liability Of Cigarette Manufacturers For Cancer Resulting From Smoking. *Green v. American Tobacco Co.*, 325 F. 2d 673 (5th Cir. 1963), *cert denied*, 377 U.S. 943 (1964); *Ross v. Phillip Morris & Co.*, 328 F. 2d 3 (8th Cir. 1964). In each of these cases, the action was brought for injuries, the incidence of cancer, allegedly resulting from smoking defendants' cigarettes, but the two courts reached opposite results. In *Green*, the trial court submitted the case to the jury on the theory of implied warranty, instructing that "such implied warranty does not cover substances in the manufactured product, the harmful effects of which no developed human skill or foresight can afford knowledge." 325 F. 2d at 676. The jury returned a verdict for defendant. The Fifth Circuit Court of Appeals certified a question to the Supreme Court of Florida, asking whether Florida law imposed absolute liability on a manufacturer and distributor of cigarettes for cancer resulting from smoking even when the manufacturer and distributor could not have known that users of the cigarettes would be endangered. The Supreme Court of Florida, in *Green v. American Tobacco Company*, ... Fla. ....., 154 So. 2d 169 (1963), answered that such a manufacturer or distributor could be held liable, since his "actual knowledge or opportunity for knowledge of a defective or unwholesome condition is wholly irrelevant to his liability on the theory of implied warranty." The court of appeals then reversed the district court verdict for defendant and remanded the case for a new trial, declining to enter a judgment for plaintiff because "the jury has not made any sufficient finding on the question of reasonableness, that is, as to whether or not the cigarettes were 'reasonably fit and wholesome'." 325 F. 2d at 677.

A direct contrast to this decision is afforded by *Ross*. There, the court rejected plaintiff's contention that the district court erred when it gave exactly the same instructions as the district court in *Green*. The court said that Missouri law did not place defendant cigarette manufacturer under a duty of absolute liability under implied warranty for dangers which could not have been foreseen, but a manufacturer is held as an insurer only against knowable dangers and thus has an incentive to keep abreast of scientific knowledge. In *Lartigue v. R. J. Reynolds Tobacco Co.*, 317 F. 2d 19 (5th Cir. 1963), as in *Ross*, the court ruled that in Louisiana there is strict liability for manufacturers only for a defective condition the harmful consequences of which, based on the state of human knowledge, are fore-

seeable. For other cigarette cancer cases see: *Cooper v. R. J. Reynolds Tobacco Co.*, 234 F. 2d 170 (1st Cir. 1956) and *Pritchard v. Liggett & Myers Tobacco Co.*, 295 F. 2d 292 (3d Cir. 1961).

In cases involving products for human consumption, strict liabilty has often been imposed on the manufacturer without regard to privity of contract between the litigants for injuries caused by "knowable dangers". Prosser, *The Assault Upon the Citadel*, 69 YALE L. J. 1099 (1960); RESTATEMENT, TORTS § 402A (Tent. Draft No. 7, 1962). This imposition of liability has been on a warranty theory. But see *Greenman v. Yuba Power Products, Inc.*, 27 Cal. Rptr. 697, 377 P. 2d 900 (1962). However, disagreement arises as to the scope of the manufacturers' implied warranty of wholesomeness, Comment, 13 CATHOLIC U. L. REV. 40 (1964), and in the case of an unknown and undiscoverable defect the problem of its scope is a new and troublesome one. Note, 38 TUL. L. REV. 194 (1963). The Florida court, in answering the certified question of *Green*, found actual safety to be the only standard in that state for determining the fitness of a product for human consumption. 154 So. 2d at 172-3. The *Ross* and *Lartigue* courts distinguished between physical impossibility of obtaining knowledge of a harmful condition and scientific inability to obtain such knowledge due to a lack of human skill and determined that injuries caused by unknown and undiscoverable defects are not risks within the scope of the implied warranty. See also U. C. C., 8 MD. CODE Art. 95 B, § 2-314(2)(c) (Cum. Supp. 1964). The recent Report of the Advisory Committee on Smoking and Health to the Surgeon General of the Public Health concludes that cigarette smoking is dangerous to health and contributes substantially to mortality from certain specific diseases, including cancer. Public Health Service Publication No. 1103 (1964). Regulations have been issued providing that as of July 1, 1965 all cigarette packs and cartons shall be required to carry a warning of such health dangers on the label. TRADE REGULATION RULES: 29 Fed. Reg. 8324 (1964) and 29 Fed. Reg. 12626 (1964). See also U. C. C., 8 MD. CODE Art. 95B, § 2-314(2)(e) (Cum. Supp. 1964). However, there is considerable doubt that these regulations will actually go into effect. See ATRR, No. 163 (Aug. 25, 1964).

Tort — Unborn Viable Child Is A "Person" Within Wrongful Death Statute. *Oldham v. Sherman*, 234 Md. 179, 198 A. 2d 71 (1964). Plaintiffs brought suit for the

wrongful death of a child *en ventra sa mere*. The mother of the child suffered serious injuries due to the negligence of the defendants. Her child, a full term viable foetus in the ninth month of pregnancy, was also injured and was delivered stillborn shortly thereafter. The Superior Court of Baltimore City held that plaintiffs, suing as parents and administrator of the child's estate, had no cause of action because a viable child *born dead* was not "a person" within Maryland Code art. 67, §§ 1 and 4 (Lord Campbell's Act), allowing recovery by a parent if the wrongful act "is such as would (if death had not ensued) have entitled the party injured to recover damages," and article 93, §§ 18 and 112, allowing the administrator to recover funeral expenses. The Maryland Court of Appeals, in a 4-3 decision, reversed. Basing its decision on *Damasiewicz v. Gorsuch,* 197 Md. 417, 79 A. 2d 550 (1951), in which the same court held that a cause of action lay for the negligent blinding of a child *en ventra sa mere* when suit was brought for its prenatal injuries *after it was born alive,* the court *held* that a viable child *born dead* was a "person" within Lord Campbell's Act and the statute authorizing actions by administrators. The court reasoned that since the cause of action arose at the time of the injury, there was "no more reason why it should be cut off because of the child's death before birth, than if it died thereafter"; therefore, the action survives, and permits the plaintiffs to recover. Judge Prescott, dissenting, argued that the rationale of *Damasiewicz,* as well as the underlying reason for the rules allowing recovery by unborn children in wills and inheritance cases, is that the right of action is *for the benefit of the child* and a suit by the surviving parents or the administratrix does not fall within this category (234 Md. at 192). See *Tucker v. Howard L. Carmichael & Sons, Inc.,* 208 Ga. 201, 65 S.E. 2d 909 (1951).

The traditional general rule is that "A person who negligently causes harm to an unborn child is not liable to such a child for the harm", RESTATEMENT, TORTS § 869 (1939); 25 C.J.S. *Death* § 24 (1941); PROSSER, TORTS §56 (3d ed. 1964); 16 AM. JUR. *Death* § 75 (1938). The trend is definitely toward allowing recovery if the child is born alive, Annot., 27 A.L.R. 2d 1256 (1953) *supplementing,* Annot., 10 A.L.R. 2d 1059 (1950); Note 12 MD. L. REV. 223; 12 M.L.E. *Infants and Minors* § 16 (1961). As of now, very few courts have gone as far as the Maryland court in allowing recovery if the child is stillborn. See *Rainey v. Horn,* 221 Miss. 269, 72 So. 2d 434 (1954) and *Verkennes*

v. Cornica, 229 Minn. 365, 38 N.W. 2d 838 (1949); Annot., 10 A.L.R. 2d 639 (1950). For a comprehensive article advocating recovery when the child is born dead see Note, *The Impact of Medical Knowledge in the Law Relating to Prenatal Injury*, 110 U. PA. L. REV. 554, 556 (1962).