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Recent Developments

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LANDLORD AND TENANT — Constructive Eviction In A Multi-Apartment Complex. *Buckner v. Azulai,* 251 Cal. App. 2d 857, 59 Cal. Rptr. 806 (App. Dept., Super. Ct. 1967). The plaintiff, a tenant in a multi-apartment building, brought suit against the defendant landlord for a deposit of one month's rent, claiming that he had been constructively evicted from his apartment as a result of vermin infestation.[1] In finding for the plaintiff, the court continued a recent trend toward imposing increasing responsibility for the upkeep of multiple tenant buildings on the landlord.[2]

At common law a construtive eviction was defined as, "[A]n intentional act or omission of the landlord, permanently depriving the tenant without his consent of the use and beneficial enjoyment of the demised premises, or any substantial part thereof, so that the tenant abandons the premises."[3] Early decisions, observing that a lease of realty carried with it no implied warranty of habitability at common law, held that vermin infestation was not a ground for a constructive eviction in the absence of active wrongdoing on the part of the landlord.[4] Judicial inroads on this rule began with the appearance of cases holding that short term leases did include an implied warranty of fitness for habitation.[5] These cases were based on judicial recognition of the fact that a tenant leasing realty for a short term was in no position to cope with a serious vermin problem and that for all practical

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1. "[T]o-wit psocids." 251 Cal. App. 2d 857, 59 Cal. Rptr. at 807. According to Webster psocidae are, "[a] family of small, soft-bodied, winged insects (order Corrodentia), related to the book lice. They are widely distributed, feeding upon lichens, fungi, and decaying vegetation." *Webster's New International Dictionary* 2001 (2d ed. 1942).

The *Buckner* case represents a liberalization of the older concepts of what type of vermin were a serious enough problem to justify the tenant's leaving. Rats and bedbugs have generally been held to be sufficient. Barnard Realty Co. v. Bonwit, 155 App. Div. 182, 139 N.Y.S. 1050 (App. Div. 1913) (rats); Young v. Povich, 121 Me. 141, 116 A. 26 (1922) (bedbugs). However, vermin of lesser destructive capabilities have usually been held to be mere nuisances and not a serious enough problem to justify vacating the premises. Davenport v. Squibb, 320 Mass. 629, 70 N.E.2d 793 (1947) (beetles); Leo v. Santagada, 45 Misc. 2d 309, 256 N.Y.S.2d 511 (City Ct. of Newberg, Orange Co. 1964) (twelve cockroaches); Golstein v. Totman, 163 Misc. 114, 297 N.Y.S. 135 (1937) (fleas); Ben Har Holding Corp. v. Fox, 147 Misc. 300, 263 N.Y.S. 695 (Mun. Ct. of N.Y.C. 1933) (crickets).

2. The court also held that an apparent waiver in the lease of the statutory requirement that apartments be in a habitable condition when rented was not enforceable for two reasons. First, when construed strictly, the waiver was held to apply only to the plaintiff's individual apartment and not to the apartment building as a whole, and the vermin infested plaintiff's apartment from other parts of the building. Second, the waiver was held to be void in the face of public health statutes requiring landlords to keep their buildings in a sanitary condition. 251 Cal. App. 2d 857, 50 Cal. Rptr. at 807.

3. G. W. Thompson, Thompson on Real Property § 1132 (1924). *See generally* Rhynhart, *Notes on the Law of Landlord and Tenant,* 20 Md. L. Rev. 1, 23 (1960).

4. Griffin v. Freeborn, 181 Mo. App. 203, 168 S.W. 219 (1914); Madden v. Bullock, 115 N.Y.S. 723, 724 (App. T. 1909) (dissenting opinion); Jacobs v. Morand, 110 N.Y.S. 208 (App. T. 1908).

5. *E.g.,* Davenport v. Squibb, 320 Mass. 629, 70 N.E.2d 793 (1947).

purposes the landlord was still in control of the premises. Accordingly, in *Young v. Povich*[6] the highest court of Maine held that the presence of great numbers of bedbugs in a seaside cottage leased for eight months constituted a constructive eviction of the tenant.

The same reasoning was extended further in cases where the tenant leased an apartment in a building in which the landlord also resided. Control over the premises was held to remain with the landlord, and he was therefore held to be responsible for the habitability of the building.[7]

With the advent of modern apartment complexes, application of the common law rule seems even more unjustified. Obviously a single lessee in a multi-apartment structure has little if any control over the sanitation of the whole premises. For this reason the courts have come under increasing pressure to hold the landlord responsible for the general condition of the building.[8] As a result, the presence of rats and other vermin in an apartment building in such numbers that the dwelling is rendered uninhabitable was held to be a constructive eviction.[9] This rule signifies a realization that the tenant has no practicable way of protecting himself from vermin that breed in parts of the apartment building other than his own single apartment and that due to the fact that the landlord retains control over those parts of the building common to all tenants, such as halls, stairways, and basements,[10] he is in the best position to prevent the accumulation of garbage and other substances which attract vermin.[11]

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6. 121 Me. 141, 116 A. 26 (1922).

7. Johnson v. Snyder, 99 Cal. App. 2d 86, 221 P.2d 164 (1950).

8. *See* Sax and Hiestand, *Slumlordism as a Tort*, 65 MICH. L. REV. 869 (1967). The suggestions found in this article offer the most radical solution to the problem presented to date. It is interesting to note that eleven months prior to the decision in *Buckner* an article appeared in the Stanford Law Review advocating the steps subsequently taken by the court in *Buckner*:

> As a minimum, the landlord should be required to rent housing that is tenantable, as defined by state or local housing regulations or by the courts. A minimum standard of habitability would comport with the reasonable expectations of the parties, since both the landlord and the tenant know they are bargaining about a dwelling.

The Duty of Maintenance of Multiple Dwellings in California, 18 STAN. L. REV. 1397, 1398 (1966).

9. In Barnard Realty Co. v. Bonwit, 155 App. Div. 182, 139 N.Y.S. 1050, 1051 (1913), the court stated:

> Very large numbers of people live in tenement houses, apartment houses, and apartment hotels in this city. Such tenants have, and can have, control only of the inside of their own limited demised premises. Conditions unknown to the ancient common law are thus created. This requires elasticity in the application of the principles thereof. An intolerable condition, which the tenant neither causes nor can remedy, seems to me warrants the application of the doctrine of constructive eviction.

Accord, Building Ass'n of Duluth Odd Fellows v. Van Nispen, 220 Minn. 504, 20 N.W.2d 90 (1945); Delamater v. Foreman, 184 Minn. 428, 239 N.W. 148 (1931). *See also* Schiff v. Peck, 288 Ill. App. 625, 6 N.E.2d 509 (1937).

10. For a good discussion of this point, see Moskowitz, *Landlord's Retention of Power to Control Premises*, 15 CLEV.-MAR. L. REV. 579 (1966).

11. The evidence showed that the infestation came from wall, floors, ceilings and other sections of the building and was present in other apartments. The tenant could not by her actions in apartment 305 cure said infestations or prevent reintroduction into the premises from these outside sources. Conditions allowed to exist in a portion of the building other than the demised premises may cause a constructive eviction.

Buckner v. Azulai, 251 Cal. App. 2d 857, ___ P.2d ___, 59 Cal. Rptr. 806, 807 (1967)

The development of this portion of the law of landlord and tenant has not been accomplished without theoretical difficulties. A mere extension of the rule of warranty of habitability found in *Young v. Povich*[12] could not solve the pressing problem of initially habitable buildings allowed to deteriorate.[13] As a result, the courts began seeking legal justification for holding landlords responsible for the general sanitation of apartment buildings for as long as the tenant occupies the premises. The resulting legal theories have been varied.

In *Delamater v. Foreman*,[14] the tenant leased an apartment on the third floor of a modern apartment building. After moving in, the tenant was invaded by a host of bedbugs which swarmed out of cracks in the floor. Admitting that the rule might be different had the tenant been able to control the problem, the court ruled that in this instance there had been a constructive eviction of the tenant. The court held that the landlord's failure to keep the premises free from vermin violated an "implied covenant that the premises will be habitable."[15]

Similarly, in *Washington Chocolate Co. v. Kent*,[16] the court was presented with a case in which the tenant leased a portion of a warehouse in which to store chocolate. Some months later rats entered his part of the building from other parts of the premises and contaminated some of the chocolate. Despite extermination efforts, the rats continued to flourish and finally caused the tenant to leave. The court held that the tenant had been constructively evicted as a result of the landlord's initial failure to keep the building free from vermin. The rather unusual justification given for this holding was that the landlord had breached an implied covenant of quiet enjoyment.[17]

In a number of other cases the courts have failed to decide on any particular covenant or implied agreement, but have held the landlord responsible for the condition of the building because of an unspecified "duty" to keep the premises sanitary.[18]

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12. 121 Me. 141, 116 A. 26 (1922).

13. As the court recognized in Davenport v. Squibb, 320 Mass. 629, 70 N.E.2d 793, 795 (1947):

> The burden was upon the tenant to show that the condition of the premises at the time the tenancy began was such as to render them unfit for occupancy. . . . It was said in Bolieau v. Traiser . . . a condition that the premises are fit for habitation "[i]s implied only with regard to the state of the premises at the beginning of the tenancy and does not cover defects which arise later."

14. 184 Minn. 428, 239 N.W. 148 (1931). There is no implied warranty of habitability recognized in the State of Maryland. Manor Real Estate & Trust Co., 176 F.2d 414, 417 (4th Cir. 1949) (applying Maryland law).

15. 239 N.W. at 149, Annot., 4 A.L.R. 1453 (1919).

16. 28 Wash. 2d 448, 183 P.2d 514 (1947).

17. *Id.* at 516. Using an implied covenant of quiet enjoyment as the basis of the decision is unusual because of the peculiar definition of this covenant. Normally a covenant of quiet enjoyment is held to mean " . . . that the lessee will be protected by the lessor from any interference with his possession by one claiming a paramount title or any acts of the lessor. . . . " W. E. Stephens Mfg. Co. v. Buntin, 27 Tenn. App. 411, 181 S.W.2d 634, 636 (1944). Apparently the court in the *Washington Chocolate* case decided to extend this covenant to cover the omissions of the landlord as well as his acts.

18. The failure of the courts to specify in these cases the exact duty owed by a landlord makes it difficult to precisely define its limits. It appears to be a general duty to keep the premises habitable. Building Ass'n of Duluth Odd Fellows v. Van Nispen, 220 Minn. 504, 20 N.W.2d 90 (1945); Ben Har Holding Co. v. Fox, 147 Misc. 300, 263 N.Y.S. 695 (1933); Barnard Realty v. Bonwit, 155 App. Div. 182,

The development of this legal responsibility of apartment landlords has required some modification of the common law elements of constructive eviction. In all of these recent cases the courts have reached their decisions without mentioning the old, oft referred to, requirement of an intent on the part of the landlord to evict his tenant. Apparently, the courts have decided either that an intent to evict is no longer required or that a landlord will be presumed to intend the reasonably predictable results of his acts or omissions.[19]

In Maryland there have been only five cases dealing with the law of constructive eviction, and in only one of these cases has the tenant been successful.[20] The only Maryland case relevant to the particular problem under discussion is *Biggs v. McCurley*.[21] In that case a tenant sued his landlord for failing to make repairs on the leased house as the terms of the lease required. The court held that a mere refusal to make repairs on the house did not constitute a constructive eviction.

It should be noted that the Maryland Court of Appeals was not presented with the problem of a landlord's duty to repair a building occupied by several tenants. In *Biggs,* a single family dwelling was involved, and the court's holding is therefore not inconsistent with the decisions which have recognized a duty on the part of a landlord to keep an apartment building sanitary.[22]

The need for protecting innocent tenants in apartment complexes from the deterioration of the whole building has never been more pressing than at the present time. In urban areas the apartment house is rapidly replacing single family dwellings as the principal form of housing. Unfortunately, the ironic fact is that the belated judicial

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139 N.Y.S. 1050 (1913). *Cf.* State v. Manor Real Estate & Trust Co., 176 F.2d 414 (4th Cir. 1949) (applying Maryland law). *See also* Pierce v. Nash, 126 Cal. App. 2d 606, 272 P.2d 938 (1954).

19. For a good discussion of this point, see *Constructive Eviction of a Tenant,* 13 BAYLOR L. REV. 62 (1961).

20. In Grabenherst v. Nicodemus, 42 Md. 236 (1875), the tenant leased property on which a distillery was located for the purpose of running the distillery and producing liquor. The landlord knew of the tenant's intention to operate the distillery prior to entry, but subsequently refused to give the tenant written consent as required by the internal revenue statutes. As a result, the tenant was unable to lawfully operate the distillery. The court held that the obligation to give consent was implied under the lease and, hence, the landlord's refusal was a "constructive eviction."

In Standard Brewing Co. v. Weil, 129 Md. 487, 99 A. 661 (1916), a landlord was held not to have constructively evicted his tenant whose saloon license was not renewed by the Liquor License Commissioners. There was no evidence showing that the landlord procured or instigated the refusal of the license.

In Jackson v. Birgfeld, 189 Md. 552, 56 A.2d 793 (1948), a tenant leased a building and its equipment. The court held that an excavation by the landlord at the rear of the building was not such an interference with the beneficial enjoyment of the premises as to constructively evict the tenant (even though the tenant had used the land excavated for burning trash).

In McNally v. Moser, 210 Md. 127, 122 A.2d 555 (1956), a landlord was held not responsible for a ruling by the zoning authorities which prevented his tenant from using the leased premises as an office. The court pointed out that the tenant had procured the zoning ruling himself as an attempt to break the lease.

21. 76 Md. 409, 25 A. 466 (1892).

22. Most of the courts holding a landlord responsible for the sanitation of his apartment house have specifically limited their rulings to multi-tenant dwellings. *See, e.g.,* Delamater v. Foreman, 184 Minn. 428, 239 N.W. 148, 149 (1931), in which the court, while finding a constructive eviction of an apartment house tenant, stated: "The rule at common law was that the law did not impliedly impose any such duty upon the landlord. This rule still prevails as to the leasing of an unfurnished dwelling house."

recognition of landlord responsibility in this area has taken a form that fails to significantly aid a large portion of apartment dwellers. In order to claim a constructive eviction, the tenant must actually vacate the premises. The low income tenant living in the type of building most likely to suffer from lack of sanitation and landlord neglect is usually in no position financially, or otherwise, to vacate his apartment and move to other quarters — assuming that he can find better facilities. Hence those tenants who most need protection have been given a remedy that is illusory in most cases.

There is still one logical step that needs to be taken by the courts. In the Maryland case of *Biggs v. McCurley,* the court of appeals rejected the tenant's claim of constructive eviction based on the landlord's failure to repair. However, it did find that the landlord had breached a covenant in the lease requiring him to make repairs, and, consequently, the court stated that the tenant was entitled to recover the difference between the rent he agreed to pay and the fair rental value of the property minus the agreed upon repairs.[23] The court in that case was dealing with an express covenant in the lease. Yet if an implied covenant of habitability or of quiet enjoyment is recognized, a breach of either of these covenants should afford the tenant a similar remedy to that granted in *Biggs.* The value of such a rule in the case of lower income housing is obvious.

Despite the fact that some courts have used the concept of implied covenants in reaching their decisions, it seems unlikely that they will so rigidly apply this concept as to declare that a breach of these covenants will constructively evict his tenant in a case where the landlord has not been at fault in regard to the arising of the pestilent condition. The basic principles underlying the doctrine of constructive eviction should properly be concerned with the presence of fault on the part of the landlord. The courts in all of the cases cited above were wrestling primarily with a determination of the proper scope of a landlord's responsibility. However, the presence of improper acts or omissions on the part of the landlord whether amounting to negligence or some other degree of misconduct was discussed as if an integral element in the decisions rendered above, and for this reason, the use by some courts of the implied covenant concept is perhaps a bit misleading.

The appearance of statutory regulation of housing is one recent development which will lift the ultimate resolution of this area of the law out of the exclusive hands of the courts. In the last analysis, the *Buckner* case may well be best explained on the basis of the public health statutes of the state of California.[24] Although it is difficult to predict the future course of the law in this area, the most likely development appears to be, as the *Buckner* case suggests, a blending of statutory guidelines and common law remedies. The one thing that is clear, however, is the determination of most courts to protect an innocent tenant in a multi-apartment complex from the deterioration of the premises due to his landlord's neglect.

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23. 25 A. at 468.

24. CAL. ANN. HEALTH & SAFETY CODE § 17811 (West 1955). There are no corresponding statutory provisions in Maryland.

RIGHT TO COUNSEL — An Indigent Is Entitled To Court-Appointed Counsel In A Habeas Corpus Proceeding Under The Uniform Criminal Extradition Act. *People ex rel. Harris v. Ogilvie,* 35 Ill. 2d 512, 221 N.E.2d 265 (1966). The accused was arrested in Illinois pursuant to a rendition warrant issued by the Governor of Illinois at the request of the Governor of Texas. He was brought before the circuit court where he asserted he wished to contest his detention by filing a writ of habeas corpus as provided by the Illinois Uniform Criminal Extradition Act.[1] He further stated that he was an indigent and requested court-appointed counsel. The trial court refused to appoint counsel, quashed the writ, and remanded the accused for extradition to Texas. On appeal the Illinois Supreme Court reversed, holding "that section 10 of the Illinois Uniform Criminal Extradition Act, which grants to persons arrested under the act the right to demand and procure counsel, requires that counsel be appointed to represent indigent persons who do not have the means to procure counsel for themselves."[2] In reaching this conclusion, which appears to be consistent with the plain meaning of the language of the statute, the court indicated that though habeas corpus proceedings are generally held to be civil in nature,[3] the fact that the outcome of an extradition proceeding is of great consequence to the petitioner and that legal expertise is necessary to properly protect the rights of the petitioner required appointment of counsel for indigents.

In deciding the case, the Illinois Supreme Court rejected two Arizona decisions[4] holding that an indigent has no right to have counsel appointed to represent him in extradition proceedings, because neither involved a construction of the Uniform Criminal Extradition Act. The court evidently did not consider as persuasive a recent Alabama decision[5] interpreting section 10 of the Uniform Criminal Extradition

1. ILL. REV. STAT. Ch. 60, ¶ 27 (1965):

> No person arrested upon such warrant shall be delivered over to the agent whom the Executive Authority demanding him shall have appointed to receive him unless he shall first be taken forthwith before a judge of the circuit court of the county wherein he is arrested who shall inform him of the demand made for his surrender and of the crime with which he is charged, and that he has the right to demand and procure within a reasonable time and opportunity, not less than 24 hours, legal counsel; and if the prisoner or his counsel shall state that he or they desire to test the legality of his arrest, the judge of such court shall fix a reasonable time to be allowed him within which to apply for a writ of habeas corpus.

This section is identical in all pertinent respects to section 10 of the UNIFORM CRIMINAL EXTRADITION ACT. (9 ULA, UNIFORM CRIMINAL EXTRADITION ACT, ¶ 10).

2. 221 N.E.2d at 267. The court stated further that:

> [T]he statute clearly recognizes that the assistance of counsel in such proceedings is not only important but is a "right" of the accused person. The legislature obviously did not consider the assistance of counsel to be unimportant or non-essential.

3. *See, e.g.,* United States v. Wilkins, 281 F.2d 707 (2d Cir. 1960) and cases cited in Cohen v. Warden, 252 F. Supp. 666 (D. Md. 1966).

4. Rugg v. Burr, 1 Ariz. App. 280, 402 P.2d 28 (1965); Oppenheimer v. Boies, 95 Ariz. 292, 389 P.2d 696 (1964). *Contra, In re* Ross, 410 S.W.2d 639 (Tex. Crim. App. 1967), a decision rendered subsequent to the principal case.

5. Sullivan v. State, 181 So. 2d 518 (Ala. 1965) (case not referred to in the opinion of principal case). Alabama has adopted section 10 of the UNIFORM CRIMINAL EXTRADITION ACT in CODE OF ALA. tit. 15, § 57 (1940) with a slight change, *i.e.,* "right to demand legal counsel," omitting the word "procure." In this case petitioner

Act, as adopted by that state, holding that a defendant who sought a writ of habeas corpus in extradition proceedings did not have a statutory right to court-appointed counsel and was denied no constitutional right to counsel by the court's failure to appoint counsel.

Maryland adopted the Uniform Criminal Extradition Act in 1937[6] and has recognized that an accused held under an extradition warrant is entitled to a writ of habeas corpus to establish, if he can, that he is not a fugitive from justice.[7] Although never facing the narrow question in this case,[8] the Maryland Court of Appeals has held that there is no statutory requirement that counsel be appointed for an indigent defendant in an application for habeas corpus.[9]

In the majority of jurisdictions the appointment of counsel in habeas corpus proceedings is left to the discretion of the trial court.[10] Presently, however, debate rages over the potential extension of the constitutional right to appointed counsel to a variety of quasi-criminal proceedings.[11] There has been no Supreme Court case specifically holding that an indigent petitioner has a constitutional right to appointed counsel in a habeas corpus hearing. Those who argue against

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challenged the denial of the writ of habeas corpus on grounds that he was not informed of his right to demand counsel and that the court did not appoint counsel to represent him. Although he did not demand counsel at the hearing, the court stated that even if petitioner had requested court-appointed counsel they would have reached the same conclusion.

6. MD. CODE ANN. art. 41, §§ 16–42 (1957). Section 25 gives the accused the right "to demand and procure legal counsel."

7. Koprivich v. Warden of the Baltimore City Jail, 234 Md. 465, 200 A.2d 49 (1964). *See also* Willin v. Sheriff of Wicomico County, 201 Md. 667, 95 A.2d 87 (1953); Audler v. Kriss, 197 Md. 362, 79 A.2d 391 (1951).

8. *But see* Bagley v. Warden, Maryland Penitentiary (Crim. Ct. Baltimore City, Jan. 8, 1964), in 152 Daily Record, Baltimore, vol. 41, at 3 (1964), where the judge indicated that petitioner in a habeas corpus proceeding contesting extradition might successfully contend he had the right to demand and procure counsel and possibly a right to appointed counsel.

9. Plater v. Warden, Md. House of Correction, 220 Md. 673, 154 A.2d 811 (1959), *cert. denied*, 362 U.S. 955 (1959). *See generally* Manning v. State, 237 Md. 349, 206 A.2d 563 (1965) and MD. R.P. 719(b)(2).

10. Sanders v. United States, 373 U.S. 1 (1962); Dillon v. United States, 307 F.2d 445 (9th Cir. 1962). *But cf.* Comment, *Right to Counsel In Federal Collateral Attack Proceedings: Section 2255*, 30 U. CHI. L. REV. 583, 591 (1963), where this view is expressed:

> The drawback inherent in leaving appointment of counsel within the discretion of the trial court, without saying more, is that no standards are advanced by which the trial court can employ its discretion. Similarly, the appellate courts are left without criteria for considering the possible abuse of the trial court's discretion.

11. *See In re* Gault, 387 U.S. 1 (1967), where due process guarantees extended to juvenile proceedings in which commitment may result; People v. Breese, 34 Ill. 2d 61, 213 N.E.2d 500 (1966), where it was held that defendant had a right to court-appointed counsel in a "sexually dangerous person proceeding" which resulted in civil commitment; People v. Olmstead, 32 Ill. 2d 306, 205 N.E.2d 625 (1965), where it was held that an indigent petitioner, upon filing an application for discharge from commitment, should have the benefits of court-appointed counsel because the proceedings might result in a deprivation of liberty; People *ex rel.* Rogers v. Stanley, 17 N.Y.2d 256, 217 N.E.2d 636, 270 N.Y.S.2d 573 (1966), where it was held that an indigent mental patient who was committed to an institution was entitled, in a habeas corpus proceeding brought to establish his sanity, to assignment of counsel as a matter of constitutional right; People v. Letterio, 16 N.Y.2d 307, 213 N.E.2d 670, 266 N.Y.S.2d 368 (1965), where the court held that a defendant charged with a traffic infraction, a petty offense, had no statutory or constitutional rights to appointment of counsel. The court expressed the view that the practical result of assigning counsel to a defendant in traffic cases would be chaotic.

such an extension stress that the constitutional guarantee to the assistance of counsel as provided in the sixth amendment does not apply to such proceedings[12] because habeas corpus hearings have been classified as civil rather than criminal in nature, and, therefore, standards of fair criminal procedure are said not to apply.[13] Perhaps the strongest argument against extension of the right is that an overwhelming number of habeas corpus petitions are frivolous and the burden of free legal aid would be substantial.[14] However, the current practice in both the federal and state courts is to appoint counsel, especially where the issues presented require an ability to organize factual data or to elicit testimony in a logical and orderly fashion, and thus the constitutional question is likely to remain unresolved by the Supreme Court, at least for the present.[15]

TORTS — Passenger's Failure To Use Available Seat Belt Not Contributory Negligence. *Cierpisz v. Singleton,* 247 Md. 215, 230 A.2d 629 (1967). The plaintiff, a guest in the defendant's car, sued to recover for injuries sustained in a collision. The plaintiff claimed she had been thrown into the air, had broken the rear view mirror with her forehead, and had cut her cheek on the dashboard on the glass which had fallen there. Although the car contained a seat belt, the plaintiff was not using it at the time of the accident. The defendant offered no expert testimony or other proof that the plaintiff's injuries were either caused or aggravated by her failure to use the seat belt. The trial court refused to charge the jury that if they found that the plaintiff was not using an available seat belt at the time of the accident and that its use would have prevented the resulting injuries, then the plaintiff would be guilty of contributory negligence which would preclude recovery. In requesting this instruction, the defendant was apparently relying on a Maryland statute which required installation of seat belts in front seats of cars after June 1, 1963.[1] The trial judge made no mention of seat belts in his charge and instructed the jury that "as a matter of law" there was no evidence in the case "legally sufficient to prove that . . . (the plaintiff) . . . was guilty of any negligence con-

12. La Clair v. United States, 35 U.S.L.W. 2423 (C.A. 7 Jan. 11, 1967). This argument ignores the possible guarantee of counsel embodied in the due process provision of the fifth amendment.

13. United States v. Wilkins, 281 F.2d 707, 715 (2d Cir. 1960). *But see* Smith v. Bennett, 365 U.S. 708, 712 (1961), where the Court rejected the "civil classification" of habeas corpus proceedings as determinative of the petitioner's rights in those proceedings: "The availability of a procedure to retain liberty lost through criminal process cannot be made contingent upon a choice of labels."

14. *See generally Application for Writs of Habeas Corpus and Post Conviction Review of Sentences in the United States Courts,* 33 F.R.D. 363 (1963).

15. Commonwealth *ex rel.* Bell v. Russell, 422 Pa. 232, 220 A.2d 632 (1966); *accord,* United States v. Wilkins, 281 F.2d 707, 715 (2d Cir. 1960). *See* R. SOKOL, A HANDBOOK OF FEDERAL HABEAS CORPUS 71-73 (1965).

1. MD. CODE ANN. art. 66½, § 296(a) (1967).

tributing to her injuries."[2] From a verdict and judgment for the plaintiff, the defendant appealed. The Court of Appeals of Maryland affirmed, holding that it is not negligence per se to fail to use a seat belt where the statute requires only its installation in the vehicle and that failure to use the seat belt, standing alone, is not sufficient to support a finding of contributory negligence. The meaning of its second holding was indicated by the court's statement that it might later be required to consider whether the issue should be submitted to the jury in a case "in which the availability of the belt will be known to the plaintiff and in which there will be evidence indicating that failure to use it was a substantial factor in producing or aggravating the plaintiff's injuries."[3]

Defendant's argument on appeal was not that failure to use seat belts was per se negligence, but rather that the Maryland statute, which requires installation, though not use, of seat belts, indicates a legislative opinion that they are " a worthwhile safety device" and that failure to use them is "some evidence of contributory negligence."[4] The court has apparently rejected even this argument and indicated that the statute should not be submitted to the jury as evidence of the standard of care. The court quoted extensively from a recent Wisconsin case, *Bentzler v. Braun.*[5] While the Wisconsin court agreed on the significance of the statute, it went on to say that independent of any statutory mandate, "there is a duty, based on the common law standard of ordinary care, to use available seat belts."[6] The Maryland court refused to go that far, reasoning that mere statistical proof of the effectiveness of seat belts in reducing injuries does not justify a court's imposition of a legal duty to use them in the absence of knowledge and acceptance of those statistics by the ordinary reasonable man. The court indicated that it was not convinced that such knowledge and acceptance exist at the present time.[7] The court was quite explicit

2. Cierpisz v. Singleton, 247 Md. 215, 230 A.2d 629, 631 (1967).

3. *Id.* at 227, 230 A.2d at 635.

4. *Id.* at 221, 230 A.2d at 632.

5. 34 Wis. 2d 362, 149 N.W.2d 626, 639 (1967), in which the plaintiff passenger, injured while not wearing an available seat belt, was found not contributorily negligent because there was no evidence with respect to the effect of her failure to wear a seat belt. The Wisconsin court agreed that a study of the legislative history and the fact that the legislation required seat belts only in the front seats indicated that the statute did not require use by implication. *See* Note, *Seat Belt Negligence in Automobile Accidents,* 1967 WIS. L. REV. 288 (1967). The Maryland court quoted the discussion of this point from the Wisconsin court's decision. 247 Md. at 223–26, 230 A.2d at 633–34.

6. 34 Wis. 2d 362, 149 N.W.2d 626, 639 (1967). In support of its conclusion, the Wisconsin court referred, at 639–40, to the statistics collected in *Defense Memo,* 7 FOR THE DEFENSE (Feb. 1966), as well as other publications. The former included a study by the San Diego, California, police department indicating that "in a period when 282 motorists were injured and eight killed: Seat belts would have *saved* five lives. They would have *prevented* 49% (139) of the injuries, *lessened* 21% (60), and lessened or prevented 9% (26). In 6% (14), they would have had an unknown effect, and no effect in 15% (43) of the cases."

The Wisconsin court found it obvious that "on the average, persons using seat belts are less likely to sustain injury, and, if injured, the injuries are likely to be less serious," and said that "as a matter of common knowledge, an occupant of an automobile either knows or should know of the additional safety factor produced by the use of seat belts."

7. The court refused to adopt the Wisconsin court's view that an occupant of a car either knows or should know of the value of safety belts. It preferred the view,

in stating that the instant case did not require a holding on whether failure to wear a seat belt should have been submitted to the jury on the issue of contributory negligence.[8]

Over the past few years, with the increase in legislation requiring installation of seat belts[9] and mounting statistical proof of their effectiveness,[10] defendants have begun to press the courts to recognize the failure to use available seat belts as a defense in negligence cases. Three appellate decisions considered the question in 1966,[11] which was the first year that cases raising the question were decided on that level.[12] In 1967, as of this writing, there have been at least three

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expressed in a recent law review note, that "in spite of overwhelming scientific evidence supporting the beneficial results of seat belt use, acceptance of the safety belt by the public has not been achieved. *The social utility of wearing a seat belt must be established in the mind of the public before failure to use a seat belt can be held to be negligence. Otherwise the court would be imposing a standard of conduct rather than applying a standard accepted by society.*" 247 Md. at 226, 230 A.2d at 635, quoting Note, *Seat Belt Negligence in Automobile Accidents,* 1967 WIS. L. REV. 288, 297 (1967) (emphasis supplied by the court).

To the extent that use is an indication of knowledge and acceptance, recent statistics support the view of the Maryland court. It is estimated that, on the average, seat belts available to occupants are being used less than half of the time. National Safety Council, *Accident Facts* 53 (1967). *See also* 16 AM. JUR. PROOF OF FACTS 355, 366 (1965).

8. 247 Md. at 227, 230 A.2d at 635. The court said:

> Some future case in which the availability of the belt will be known to the plaintiff and in which there will be evidence indicating the failure to use it was a substantial factor in producing or aggravating the plaintiff's injuries may require us to consider holding that the issue, with proper instructions, ought to be submitted to a jury. This case does not require it and we do not so hold.

9. In 1964, according to Nolan, *Motor Vehicles — A Comparative Analysis of Seat Belt Legislation,* 14 DE PAUL L. REV. 152 (1964), there were 23 state statutes. By 1966, 33 states had enacted legislation. *See* 16 DE PAUL L. REV. 521 (1966). The National Traffic Motor Vehicle Safety Act, 15 U.S.C. § 1381, providing, in § 1392, for the setting up of appropriate federal safety standards by the Secretary of Commerce, was enacted in 1966. For a tabulation of state statutes, see Walker & Beck, *Seat Belts and the Second Accident,* 34 INS. COUNSEL J. 349 (1967).

10. *See* National Safety Council, *Accident Facts* 53 (1967), which states: "Additional information on the value of seat belts . . . indicates that if all passenger cars occupants used seat belts all the time, such use would save 8,000 to 10,000 lives annually." For a summary of studies which have been made on seat belts, see Note, *Seat Belt Negligence in Automobile Accidents,* 1967 WIS. L. REV. 288, 292-93 (1967). Included are studies on ejection (ratio of persons ejected is five times greater than those who stayed in car), on effectiveness of seat belts in all types of accidents (reduce fatalities about 35% and all types of injuries 60%), on proportion of fire and submersion accidents in which seat belts might increase the danger (very slight), and on the extent to which seat belts cause abdominal and other such injuries (seat belt not significant cause of such injuries). *See also* note 5 *supra.*

11. All of these cases were actions by guest passengers. In Sams v. Sams, 247 S.C. 467, 148 S.E.2d 154 (1966), the court reversed the trial court's order which struck that part of the answer alleging contributory negligence. In Brown v. Kendrick, 192 So. 2d 49 (Fla. 1966), on the other hand, the court affirmed the trial court's upholding of a motion to strike that part of defendant's answer which raised as a defense the failure to use a seat belt. In Kavanagh v. Butorac, 221 N.E.2d 824 (Ind. 1966), an action for loss of an eye and other injuries suffered when the plaintiff struck the rear view mirror, the court sustained a judgment for the plaintiff, rejecting defendant's theory of avoidable consequences on the facts of that case. The court reasoned that it was up to the trial court, which had heard the case without a jury, to decide how much weight to give the testimony of defendant's safety expert on causation.

12. Prior to that year there were some significant lower court decisions. *See, e.g.,* Stockinger v. Dunisch, Circ. Ct. Sheboygan Co., Wisconsin, 1964, reported in 5 FOR THE DEFENSE 79 (1964), in which a jury found that the plaintiff was negligent in not wearing a seat belt and deducted 10% from her damages.

more.[13] In none of these cases did the court regard failure to wear a seat belt as negligence per se based on a statutory standard of use by implication, nor has any court gone so far as to call it negligence as a matter of law based on a court-imposed duty.[14] On the question of failure to wear a seat belt as evidence of negligence, the courts are divided. The Wisconsin court, in *Bentzler v. Braun,*[15] concluded that there is a duty to use a seat belt and that in cases where a causal relationship has been shown it is proper and necessary to instruct the jury in that regard.[16] Three of the courts left the question open for the present. The Indiana court, in *Kavanagh v. Butorac,*[17] and the Maryland court in the instant case have decided to postpone consideration of the question and to await a case in which proof of causation will be present, thereby making it necessary to reach the question of negligence. The South Carolina court, in *Sams v. Sams,*[18] refused to strike a part of an answer alleging seat belt contributory negligence, reasoning that the question should be considered and decided at the trial in the light of all the attendant facts and circumstances. Two courts have clearly refused to consider failure to use seat belts as evidence of negligence. The Delaware court refused to admit evidence on the question in *Lipscomb v. Diamiani,*[19] thereby following the reasoning of the Florida court in *Brown v. Kendrick*[20] that the question

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13. Cierpisz v. Singleton, 247 Md. 215, 230 A.2d 629 (1967); Bentzler v. Braun, 34 Wis. 2d 362, 149 N.W.2d 626 (1967). In Lipscomb v. Diamiani, 226 A.2d 914 (Del. 1967), the court ruled that the testimony of an accident expert, which tended to prove that if the plaintiff had used the available seat belt she would not have been injured to as great an extent, was inadmissible. For a recent annotation on the seat belt cases, see Annot., 15 A.L.R.3d 1428 (1967).

14. The negligence per se argument was expressly rejected in Bentzler v. Braun, 34 Wis. 2d 362, 149 N.W.2d 626 (1967) and in the instant case, Cierpisz v. Singleton, 247 Md. 215, 230 A.2d 629 (1967). Negligence as a matter of law was rejected in Kavanagh v. Butorac, 221 N.E.2d 824 (Ind. 1966).

15. 34 Wis. 2d 362, 149 N.W.2d 626 (1967).

16. In concluding that there is a duty to use a seat belt, it should be pointed out the question of contributory negligence continues to be a jury question. The following instruction is now used in Wisconsin:

> In passing on the question as to whether or not _____ _____ was negligent, you may take into consideration the facts that the automobile was equipped with safety belts and that they were available for use by him.
>
> You will determine, under all the credible evidence and reasonable inferences from the evidence in this case whether the failure of _____ _____ to use the safety belt was an omission to take a precaution for his safety, and amounted, under the circumstances, to a failure on his part to exercise ordinary care for his own safety.

The above instructions were quoted in Lipscomb v. Diamiani, 226 A.2d 914, 917 (Del. 1967).

Prior to the Wisconsin decision, a California appellate court had already decided that failure to equip vehicles with seat belts (at a time when it was not required by statute) could be a violation of the common law standard of care. In Mortensen v. Southern Pacific Co., 53 Cal. Rptr. 851 (1966), an action under the Federal Employers' Liability Act to recover for the death of an employee who was thrown from a railroad truck which was not equipped with seat belts, the court said that a jury question was presented.

17. 221 N.E.2d 824 (Ind. 1966).

18. 247 S.C. 467, 148 S.E.2d 154 (1966).

19. 226 A.2d 914 (Del. 1967).

20. 192 So. 2d 49 (Fla. 1966).

is one of a highly controversial nature and therefore should be resolved by the legislature.[21]

Even if it is decided by a jury or a court that reasonable care requires use of seat belts, the cases suggest that the showing of causation may be difficult. In none of the appellate cases involving seat belt contributory negligence has the required causal connection been adequately proved. In these and other seat belt cases, however, the courts have indicated the type of proof which would satisfy the requirement. The defendant should call upon an expert witness to testify on the effectiveness of seat belts in general and on the effect which the wearing of a seat belt would have had in the instant case,[22] and the expert should be a person who has actually participated in seat belt or accident research.[23]

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21. Both courts gave other reasons for their rejection, among them the view that seat belts are still controversial and that proof of their effectiveness in particular cases would necessarily be "conjectural." In addition, Delaware viewed the Wisconsin standard in which the failure to use a seat belt is to be considered in connection with the particular circumstances as too indefinite and difficult to apply.

22. It is clear that a mere showing of the nature of the injuries and the way in which they occurred will not be enough, even if it appears obvious to the layman that a seat belt would have made a difference. The court required more proof in the *Cierpisz* case even thought the facts in that case were particularly conducive to a finding that failure to wear a seat belt at least aggravated the injuries. The plaintiff had testified as follows in *Cierpisz*:

> Q. Now, can you tell us what, if anything, happened to you in the collision?
> A. Well, yes. As Mr. Bergman's car struck our car, I was thrown up into the air and my, the left side of my forehead struck the rear view mirror and broke it and as I came back down, my face came down on the dashboard where the glass had fallen, and I was on the floor up on my knees on the dashboard like this (indicating).

Brief for Appellant at E. 17, Cierpisz v. Singleton, 247 Md. 215, 230 A.2d 629 (1967). Even the Wisconsin court, which was receptive to the notion of seat belt contributory negligence, required a specific showing of causation where the plaintiff was apparently thrown forward and received severe facial and other injuries. While it is conceivable that the court would accept the testimony of a layman, (the Maryland and Wisconsin courts complained of the lack of expert or *other testimony*), it seems unlikely that such proof would be sufficient in view of the courts' understandable reluctance to speculate in this area. So skeptical are the courts that even expert testimony may not convince them. In Kavanagh v. Butorac, 221 N.E.2d 824 (Ind. 1966), the defendant suffered the loss of an eye when colliding with the rear view mirror. The defendant submitted the testimony of an expert on safety who conducted certain tests on a similar vehicle and testified that in his opinion the plaintiff would not have collided with the rear view mirror if his seat belt had been properly fastened. The court pointed out that the variables in "properly fastened" and the fact that only a few inches separate the head of a seat belt user from the mirror make such opinion testimony speculative; it therefore concluded that "this is an opinion which the trial judge was at liberty to regard favorably or disregard utterly." 221 N.E.2d at 830.

23. Two seat belt cases which do not involve contributory negligence are most helpful in showing what the courts will probably require. In Mortensen v. Southern Pacific Co., 53 Cal. Rptr. 851 (1966), where the plaintiff was thrown from a railroad truck which was not equipped with seat belts, the court found that sufficient evidence had been presented on causation for the case to be submitted to a jury. A physicist with long experience in investigation of auto accidents, along with two experienced highway patrolmen, testified on seat belt effectiveness in general and showed photographs to prove that in this particular accident the cab was not sufficiently crushed to have killed the decedent if he had not been ejected. Also persuasive was the comparison of the injuries of the middle occupant, who remained in the car, with those on the outside. Kapp v. Bob Sullivan Chevrolet Co., 234 Ark. 395, 353 S.W.2d 5 (1962), was an action for personal injuries allegedly resulting from the breaking of a seat belt. The defendant submitted the testimony of a highly qualified expert on safety and protection to the effect that the seat belt had been subjected to a greater impact than it could be expected to sustain. Plaintiff's "expert" was an ordinary civil engineer, and the court was not at all impressed with his qualifications.

As cases arise in which there is adequate proof of proximate cause, the courts will be forced to decide whether failure to use an available seat belt can be contributory negligence. The issue is particularly difficult in jurisdictions such as Maryland where contributory negligence is a complete defense,[24] as opposed to those which, like Wisconsin,[25] have a comparative negligence doctrine. Although the question was not presented in *Cierpisz,* a finding of contributory negligence should only bar or mitigate a recovery for personal injuries and should not bar a recovery for property damage since there is no causal relation between the failure to use a seat belt and the damage to the plaintiff's vehicle.[26] Furthermore, it seems unduly harsh to totally deny recovery for personal injuries to a plaintiff whose failure to wear a seat belt was not a proximate cause of the accident itself and may have merely aggravated injuries that would have been suffered even if he had been wearing a seat belt. Such harshness, it has been suggested, might be avoided by applying the doctrine of avoidable consequences.[27] While this doctrine has ordinarily been applied only to those consequences which could have been avoided by proper conduct *after* the occurrence of the accident,[28] it would seem that justice would be well served by a ruling that the doctrine may also be applied where the plaintiff's negligence took place *before* the accident in cases where a logical basis for apportioning the damages to separate causes can be found.[29]

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24. *E.g.,* Miller v. Mullenix, 227 Md. 229, 176 A.2d 203 (1961); Bull Steamship Lines v. Fisher, 196 Md. 519, 77 A.2d 142 (1950). This consideration may have partially brought about the court's apparent reluctance to accept use of the belts as part of the standard of care.

25. WIS. STAT. ANN. § 331.045 (1958).

26. *See* 12 S.D.L. REV. 130, 134–36 (1967).

27. *Id.* at 139.

28. For an application of the avoidable consequences doctrine to negligence cases in Maryland, see Hendler Creamery Co. v. Miller, 143 Md. 264, 138 A. 1 (1927), in which the plaintiff was not allowed to recover for that part of his suffering and disability which he could have prevented by submitting to a simple operation.

29. W. PROSSER, TORTS § 64 (3d ed. 1964). In Kavanagh v. Butorac, 221 N.E.2d 824, 830 (Ind. 1966), the defendant urged avoidable consequences, but the court rejected the argument, though it did recognize the possibility of the doctrine's application to a fact situation where the causal relationship between some part of the injuries and the failure to use a seat belt would be clearly proven.