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Admiralty — Helmsman Of Tug — A Proper Lookout?

Anthony v. International Paper Company, 289 F. 2d 574 (4th Cir. 1961). Defendant’s 70 foot tug was proceeding at top speed along the Inland Waterway in South Carolina waters at a point where and a time when small boats frequented the area. The captain was alone at the helm, the rest of the crew being at dinner. He first observed the small boat of the plaintiffs’ decedents a little ahead of him and approximately 250 feet off his port bow. As their paths crossed the small boat capsized in the tug’s wake, drowning four persons. The decedents’ administrators brought this consolidated action under the South Carolina Wrongful Death Statute. The principles of maritime law were applied in the absence of any contrary indication under the law of South Carolina. [See Hess v. United States, 361 U.S. 314 (1960); Goett v. Union Carbide Corp., 361 U.S. 340 (1960). See also 11 Md. L. Rev. 125 (1950)]. The jury found for the defendant. On appeal, the Circuit Court of Appeals held that it was not error for the judge to refuse to instruct the jury that “the master of a vessel cannot, as a matter of law, act as both helmsman and lookout,” and that if the failure to have an independent lookout was the proximate cause of the accident, then the defendant was liable. The Court reasoned that the question of sufficiency of the lookout under Art. 29, Inland Rules, 33 U.S.C.A. (1957) § 221, requiring “a proper lookout” in any instance is a question of fact to be realistically resolved under the attendant circumstances. However, the case was remanded for other prejudicial errors in the instructions concerning lookouts.

Unlike the instant case, most opinions, make no express exception to the rule requiring a crew member to act solely as a lookout, regardless of the size of the vessel, if it is capable of committing injury. The Marion, 56 F. 271 (N.D. Wash. 1893). Nor can the captain or the helmsman in the pilot house be considered lookouts within the meaning of the maritime law. Dahlmer v. Bay State Dredging & Contracting Co., 26 F. 2d 603 (1st Cir. 1928). See cases cited in 33 U.S.C.A. (1957) § 221, n. 54. See also The Ottawa, 70 U.S. (3 Wall.) 268 (1865), and cases cited in 10 Am. Dig. (Cent. Ed.) 434, Collision, § 143, for early statements of the rule. The Propeller Genesee Chief v. Fitzhugh, 12 How. 443 (U.S. 1851), holds that failure to have a constant lookout
besides the helmsman is *prima facie* evidence of fault. However, in *The Pocomoke*, 150 F. 193 (E.D. Va. 1906), where there was a deckhand forward and one aft, the court said that the navigator on a 61 foot launch was a sufficient lookout where he had visibility all around. See *La Inter-

The Maryland Court of Appeals in *Philadelphia, Wilming-
ton and Baltimore R.R. Co. v. Kerr*, et al., 33 Md. 331 (1870), indicated that there is a duty to have a competent lookout in addition to the helmsman. In *U.S. v. Holland*, 151 F. Supp. 772 (D.C. Md. 1957), involving a 408 foot motor ship, the Court said that it is not safe to depend on the pilot or others on the bridge who are charged with other duties and that a crew member should be assigned whose sole duty is to be a lookout.

*Griffin on Collision* (1949) § 109, p. 277, states that "on vessels of any size, the rule is definite that the lookout must have no other duty." However, *Griffin* says at page 278 that the rule must be "reasonably applied." See also 48 Am. Jur. 179, Shipping, § 268, 15 C.J.S. 112, Collision, § 108b and for application of the rule as to lookouts on motorboats, see 63 A.L.R. 2d 343 (1959).

**Contracts — Mutual Mistake As To Extent Of Injuries Avoids Release Of Claims.** *Reed v. Harvey*, .... Ia. ...., 110 N.W. 2d 442 (1961). Plaintiff instituted an action against defendant dog owner to recover for injuries resulting from an attack by his dog. In attempting to avoid the attack, the plaintiff wrenched her knee. Her doctor treated her for cuts, but he felt that the injury to the knee was only a sprain which would disappear in a short time, and discharged her. She entered into a release with the defendant's insurance company for all "known and unknown, forseen and unforseen" bodily and personal injuries resulting from the dog bite. The consideration paid by the insurance company for the release was $16.42 to the plaintiff for her torn clothes and trouble and $19.00 to her doctor. Five months later, due to the wrenching of the knee, it was necessary to remove certain ligaments and a cystic area from the left knee causing medical expense of $824.47 and leaving the plaintiff with a 7% permanent partial dis-
ability. At the trial the defendant relied on the release as one of its defenses. The Court submitted to the jury the issue of whether there was here mutual mistake which
went to the essence of the contract. They found for the plaintiff and the defendant appealed. The Supreme Court of Iowa in affirming the judgment held that a general release of claims for personal injury may be avoided if the parties are acting under a mutual mistake as to the existence of an injury and this question was properly submitted to the jury.

It is well settled that a mutual mistake as to a material fact inducing the execution of a contract may be a ground for relief from its enforcement. *Sherwood v. Walker*, 66 Mich. 568, 33 N.W. 919 (1887). This principle has been applied to a contract for the release of any and all claims for personal injuries where there was a mutual mistake as to the nature and extent of the releasing party's injuries. *Fraser v. Glass*, 311 Ill. App. 336, 35 N.E. 2d 953 (1941). But see *James v. Tarply*, 209 Ga. 421, 73 S.E. 2d 188 (1952) [held: a release would not be rescinded because the parties had bargained by contract as to future liability arising from the accident and the plaintiff should have ascertained the extent of his injuries before agreeing to a settlement].

In *Yehle v. New York Cent. R. Co.*, 267 App. Div. 301, 46 N.Y.S. 2d 5 (1943) the Court upheld a release as valid reasoning that where the consideration for the release was in excess of the expenses for the known injuries, the parties had intended to compromise as to future injuries. In *England v. Universal Finance Co.*, 186 Md. 432, 47 A. 2d 389 (1946) defendant had sold to complainant a 1940 automobile which he asserted was a 1941 model. Complainant accepted a refund in exchange for granting a release to defendant of any past, present or future claims regarding the car. It was later learned the car was stolen. In an equity suit to rescind or reform the release because of a mutual mistake, the defendant's demurrer was sustained on the ground that the complainant had an adequate remedy at law. The Court of Appeals reversed, reasoning the complaint alleged mutual mistake and that the theory of mutual mistake was not available to the complainant in an action at law but was a proper basis to afford relief in an equitable action for reformation of the release. See also *Dyson v. Pen Mar Co., Inc.*, 195 Md. 107, 73 A. 2d 4 (1950) [possibility of avoiding a personal injury release entered into under a mutual mistake in equity] (dictum). For a thorough discussion see Annotation, Personal Injury — Release — Avoidance, 71 A.L.R. 2d 82 (1960). See also 76 C.J.S. 645, Release, § 25; 12 Am. Jur. 618, Contracts, § 125; 45 Am. Jur. 685, Release, § 20.
Criminal Law — Insanity: M’Naghten-Durham Conflict, A Recent Approach. *U.S. v. Currens*, 290 F. 2d 751 (3d Cir. 1961). The defendant was indicted for violation of the National Motor Vehicle Theft Act, 18 U.S.C.A. (1951) § 2312. At the Court’s direction, the defendant underwent psychiatric examination which resulted in his being classified as having a basic sociopathic personality disturbance with schizophrenic tendencies. The defendant then entered a plea of not guilty by reason of insanity. A psychiatrist testified that although the defendant knew the difference between right and wrong, his mental condition invariably caused him to take the wrong path. After a motion for directed verdict of acquittal had been denied, the defendant submitted two jury instructions; one based on the M’Naghten Rule and the other based on the Durham Rule. The Court rejected the Durham instruction and gave an instruction based on the M’Naghten Rule and an “irresistible impulse” test. The defendant excepted to the Court’s instruction. The jury returned a verdict of guilty, and the defendant moved for a judgment of acquittal or in the alternative for a new trial, which was denied, and the present appeal ensued. The Third Circuit Court of Appeals in a 2-1 decision held that the instruction concerning criminal responsibility and insanity was prejudicial to the defendant in that it was confined to the outmoded M’Naghten Rule coupled with an equally insufficient “irresistible impulse” test, and remanded the case for a new trial. The Court went on to lay down its formula for determining insanity: “The jury must be satisfied that at the time of committing the prohibited act the defendant, as a result of mental disease or defect, lacked substantial capacity to conform his conduct to the requirements of the law which he is alleged to have violated.” (p. 774). In presenting its new test for insanity, the court expressed its view that the impractical and outmoded principles surrounding the distinction between right and wrong as set out in the M’Naghten Rule provided valid grounds for support for a change, but that the Durham Rule was not a sufficiently clear test by which a jury could determine criminal responsibility. The majority of the Court reasoned that its own test of insanity more readily resolved the conflict between mental disorder and criminal responsibility.

A test similar to the instant one has been proposed by a Committee under the chairmanship of Dr. Manfred Guttmacher which was appointed in 1957 by the Legislative
Council of Maryland. It reads in part: "... if, as a result of mental disease or deficiency of intelligence at the time of such conduct, he lacks sufficient capacity either to understand and appreciate the criminality of his conduct or to conform his conduct to the requirements of law. * * * "


Criminal Law — Murder Defendant's Right To Consult Counsel At Pre-Indictment Questioning By State Officers. People v. Noble, 9 N.Y. 2d 571, 175 N.E. 2d 451 (1961). The defendants, a woman and her paramour, were brought in for questioning concerning the murder of the woman's "common law husband." While being interrogated prior to indictment, one defendant asked several times whether he had to answer any questions before consulting legal counsel. After the assistant district attorney repeatedly ignored the defendant's questions, the defendant confessed in writing. The jury found the defendant's confession to be voluntary and convicted both defendants of first-degree murder. The New York Court of Appeals in a 5-2 decision reversed the convictions, reasoning that: (1) the use of the confession "violated the fundamental fairness essential
to the concept of justice”; (2) there is a distinction “between a mere failure to warn and a flat refusal to answer a proper inquiry” as to defendant’s rights, and; (3) the confession as thus procured was “an invasion of defendant’s privilege against self-incrimination.” Two of the judges concurred in the result on the basis that the state had not substantiated the voluntariness of the confession beyond a reasonable doubt. The dissenters, on the other hand, reasoned that since the state is under no duty to advise a criminal defendant of his right to counsel prior to indictment, People v. Randazzio, 194 N.Y. 147, 87 N.E. 112 (1909), mere failure to answer the defendant’s inquiry, absent any affirmative denial of his right to counsel, was not a deprivation of due process.

The United States Supreme Court in Crooker v. California, 357 U.S. 433 (1958) and Cicenia v. LaGay, 357 U.S. 504 (1958), by a 5-4 and 5-3 decisions respectively, held that refusal by state officers of a murder defendant’s request for counsel at pre-trial questioning did not of itself vitiate a confession following the refusal, but reasoned that such a refusal violates due process if defendant “is so prejudiced thereby as to infect his subsequent trial with an absence of ‘that fundamental fairness essential to the very concept of justice,’” 357 U.S. 433, 439. The 4-justice minority of the Court in Crooker v. California stated that the Due Process Clause requires that an accused have the right to consult counsel at any time after the moment of arrest, id., 448, (see Hamilton v. Alabama, 30 U.S. L. Week 1005, November 14, 1961, where the Supreme Court of the United States reversed a conviction where defendant, convicted of a capital offense, had been denied counsel at arraignment at which time it was required by state law that certain defenses be raised.) The Maryland Court of Appeals in Day v. State, 196 Md. 384, 397, 76 A. 2d 729 (1950) affirmed the defendant’s murder convictions, stating, “The failure to have counsel present, or to permit the accused to consult counsel, is not of itself a reason for denying the admission of a confession, provided such confession is shown otherwise to have been given voluntarily.” In accord, Hall v. State, 223 Md. 158, 162 A. 2d 751 (1960); Andler v. Kriss, 197 Md. 362, 79 A. 2d 391 (1951); Cox v. State, 192 Md. 525, 64 A. 2d 732 (1949). See also, 3 A.L.R. 2d 1003 (1949); Annotation, 2 L. Ed. 2d 1644 (1958); 7 M.L.E. 286, Criminal Law, § 243; 9 Kan. L. Rev. 464 (1961); 7 U.C.L.A. L. Rev. 511 (1960); 10 Am. U. L. Rev. 53 (1961).
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Domestic Relations — Conduct Related To Mental Deficiency Not Constructive Desertion. Stecher v. Stecher, 226 Md. 155, 172 A. 2d 515 (1961). A wife brought an action for award of permanent alimony without divorce, alleging desertion on the part of the husband. The husband answered the complaint, contending that he had just cause in leaving the marital home due to the wife’s misconduct. 2 Md. Code (1957) Art. 16, §§ 24, 25. Some time after the birth of their two children the wife became increasingly moody, neglected her children and household chores and exhibited an antagonistic attitude toward her husband. Her condition was analyzed by a psychiatrist as paranoid schizophrenia. At the husband’s direction she was hospitalized, and in 1959, upon her removal, the hospital records noted her diagnosis as “improved” and her prognosis as “poor.” The husband left the marital home immediately upon her release and never returned. The lower court awarded permanent alimony to the wife, rejecting the husband’s contention of constructive desertion. The Court of Appeals, in upholding the lower court’s determination, reasoned that the wife’s conduct did not constitute constructive desertion since it was not such as to put the husband in fear of his life or render it impossible for him to continue marital cohabitation with health, safety, and self respect, and further, that it was his duty in the instant case to bear and forebear, and cherish in sickness and in health.

Although there is some out-of-state authority to the contrary, Schreiber v. Schreiber, 139 A. 2d 278 (D.C. Mun. App. 1958), violent and outrageous conduct making life unbearable may constitute constructive desertion even when it does not justify divorce a mensa on the ground of cruelty. 8 M.L.E. 376-379, Divorce, § 20. This may be true even though the unbearable conduct is the result of mental illness. In Kruse v. Kruse, 179 Md. 657, 22 A. 2d 475 (1941), a wife became mentally ill six years after marriage, and a year after the birth of their child she was committed to a hospital, her condition being diagnosed as paranoid with depressive features. Her condition was not expected to improve. The wife interfered with the husband at work, made physical attacks on him, and publicly accused him of having immoral relations with other women. The decree awarding the husband a limited divorce was sustained by the Court of Appeals. The Court reasoned that the wife’s conduct was violent and outrageous and constituted sufficient grounds for constructive desertion. The Court
went on to state that conduct of one spouse which forces
the other to leave may justify a divorce to the other spouse
on the ground of constructive desertion, even though the
conduct may not justify a divorce on the ground of cruelty.
However, such conduct must render impossible the con-
tinuation of matrimonial cohabitation with safety, health,
and self-respect. See also Schwartzman v. Schwartzman,
204 Md. 125, 102 A. 2d 810 (1954). In the instant case, the
court distinguished the Kruse case on the ground that the
wife's conduct was not violent or outrageous. Cf. Ritz v.
Ritz, 188 Md. 336, 52 A. 2d 729 (1947).

For further reference see Smith v. Smith, 225 Md. 282,
170 A. 2d 195 (1961); Pohzehl v. Pohzehl, 205 Md. 395, 109
A. 2d 58 (1954); Myerberg, Constructive Desertion in
Maryland, 10 Md. L. Rev. 193 (1949); 27A C.J.S. 107 ff.,
Divorce, § 36(3); 19 A.L.R. 2d 144; 19 A.L.R. 2d 1428 (1951).

Homicide — Defendant's Unlawful Or Reckless Con-
duct Must Be Direct Cause Of Death To Constitute Invol-
571, 170 A. 2d 310 (1961) (for prior Law Review treat-
ment of the case in the intermediate appellate court see
20 Md. L. Rev. 299). The defendant and deceased were
engaged in an auto race at speeds between 70 and 90 miles
per hour in a 50 mile zone. While attempting to pass the
defendant on the left of a two lane highway, the deceased
collided with a truck coming from the opposite direction,
and died as a result of the collision. Defendant was tried
and convicted of involuntary manslaughter. When his mo-
tion in arrest of judgment was denied, he appealed to the
Superior Court which affirmed his conviction. On further
appeal, the Supreme Court of Pennsylvania, in a 6-1 de-
cision, reversed and held that in order for one to be guilty
of involuntary homicide his conduct must be unlawful or
reckless and in addition such conduct must be the " . . .
direct cause of the death in issue." The court reasoned
that, "When proximate cause was first borrowed from the
field of tort law and applied to homicide prosecution in
Pennsylvania, it connoted a much more direct causal rela-
tion in producing the alleged culpable result than it does
today." (p. 311), and that the present day concept of proxi-
mate cause has no applicability to homicide. See 3 Md.
Code (1957) Art. 27, § 388 (manslaughter by automobile
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Interrogatories — Defendant Required To Answer Interrogatories Respecting Existence And Amount Of Liability Insurance. Johanek v. Aberle, 27 F.R.D. 272 (D.C. Mont. 1961). Plaintiff brought an action for damages for personal injuries sustained in an automobile accident in which plaintiff was riding as a gratuitous passenger in an automobile driven by the defendant. Plaintiff submitted interrogatories pursuant to Fed. R. Civ. P. 33, 28 U.S.C.A. (1958) seeking to ascertain whether the defendant was covered by a policy of liability insurance at the time of the accident; and if so, the monetary limits of liability thereunder. Defendant objected to the interrogatories upon the ground that the information sought was immaterial and irrelevant. The court overruled the defendant's objection reasoning that the test is not whether the information sought would be admissible in evidence or relevant to the precise issues in the case, but whether it is "relevant to the subject matter" involved in the action. In the instant case the court found "subject matter" to include the right of the plaintiff to be apprised fully of the merits of the suit and the true defendant in interest. Fed. R. Civ. P. 26(b), 28 U.S.C.A. (1958).

The conflict which exists in many of the federal and state courts on the issue presented in the instant case is only partially explained by varying statutes and rules. The courts, as represented by the one above, that permit pre-trial discovery of insurance coverage and the amount thereof do so on the grounds that injured plaintiffs are thereby apprised of knowledge otherwise unobtainable, which allows for a more realistic appraisal of the defendant and of the ultimate merits of the case, and affords a more objective basis for the settlement of disputes. People v. Fisher, 12 Ill. 2d 231, 145 N.E. 2d 588 (1957); Brackett v. Woodall Food Products, 12 F.R.D. 4 (D.C. Tenn. 1951). Those denying such discovery reason that the purpose of discovery is to permit all the facts relevant to the trial to be disclosed in advance thereof, and that insurance coverage has no bearing on the presentation of the plaintiff's case. Roembke v. Wisdom, 22 F.R.D. 197 (S.D. Ill. 1958); Verrastro v. Grecco, 21 Conn. Supp. 165, 149 A. 2d 703.
(1958). In State, Use of Gamber v. Hospital for Women of Maryland, Inc., Superior Court of Baltimore City, Daily Record, November 5, 1960, an action for negligence was instituted against a charitable corporation. The plaintiff made a motion that the Court order the defendant to produce its insurance policy under Rule 419, Maryland Rules of Procedure. In sustaining the motion in part, Chief Judge Niles reasoned that since a charitable corporation is only liable for its torts to the extent of its insurance coverage, the plaintiff was entitled to ascertain the provisions of the policy; however, he was not entitled to know the amount of insurance even though this might aid him in settling his claim. (Note that this is contrary to statements in the two prior decisions referred to in Niles, DISCOVERY DIGEST FOR MARYLAND, 1960, p. 12, under Charitable Corporation).


Negligence — Owner Liable For Allowing Building To Become A Fire Hazard Regardless Of Actual Cause Of Fire. Chicago, Milwaukee, St. Paul and Pacific R. Co. v. Poarch, 292 F. 2d 449 (9th Cir. 1961). Plaintiff sought to recover damages for the alleged negligent destruction of his grain elevator which was destroyed by a fire of unknown cause which spread 50 feet from the defendant's adjacent ice house. The fire had broken out in an unused portion of the ice house which was accessible to itinerants and children, and destroyed both of the buildings in question along with their contents. There was evidence that the ice house was a fire hazard due to the accumulation of inflammable materials within it. The trial court instructed the jury that it was not necessary for them to determine the exact cause of the fire in order to hold the defendant liable but rather whether the state of disrepair of the defendant's building caused the fire to spread. The jury returned a verdict for the plaintiff and the defendant appealed. The Circuit Court of Appeals, applying the law of Washington, affirmed the judgment reasoning that if "... the owner of a building has negligently allowed it to become a fire hazard and a fire does start the actual cause — whether deliberate, accidental, or an act of God — is immaterial. The negligence is not in the ignition of the fire but rather it is in allowing a condition to exist which will be reasonably
likely to cause the injury to another if a fire does start.” (451). See Prince v. Chehalis Savings & Loan Ass’n, 186 Wash. 372, 58 P. 2d 290 (1936).

Some cases have reasoned that even though the facts permit the inference that the defendant allowed a fire hazard to exist on his property, he would not be liable for the spread of fire unless he is shown to have been guilty of some negligence in its origin or escape, although it should be noted that in some of these cases the fire was known (or believed) to have originated from a cause other than the fire hazard; O’Brien Bros. v. New York, 36 F. 2d 102 (E.D. N.Y. 1928); Moody v. Gulf Refining Co., 142 Tenn. 280, 218 S.W. 817 (1920); Stone v. Boston & A. R. Co., 171 Mass. 536, 51 N.E. 1 (1898). The instant case supports the view that the defendant is liable if he permits a fire hazard to exist on his premises and it is reasonably probable that if a fire started it would spread to the adjacent property regardless of the cause of the fire, although, in many of the cases supporting this view (as in the instant case) the exact cause of the fire was not shown. Arneil v. Schnitzer, 173 Ore. 179, 144 P. 2d 707 (1944); Menth v. Breeze Corporation, Inc., 4 N.J. 428, 73 A. 2d 183, 18 A.L.R. 2d 1071 (1950); Texas & N. O. R. Co. v. Bellar, 51 Tex. Civ. App. 154, 112 S.W. 323 (1908). For further information see 18 A.L.R. 2d 1081 (1951). Prosser on Torts (2d ed. 1955) § 58, p. 326; 65 C.J.S. 563, Negligence, § 72; 38 Am. Jur. 728, Negligence, §§ 71 and 72; 37 Am. Jur. 942, Mun. Corp., § 297; 22 Am. Jur. 602, Fires, §§ 11, 12. See also 42 A.L.R. 783 (1926) and 111 A.L.R. 1140 (1937).

Res Judicata — Wrongful Death Suit Bars Beneficiary’s Later Suit. Brinkman v. Baltimore and Ohio Railroad Co., 111 Ohio App. 317, 172 N.E. 2d 154 (1960). Plaintiff and her mother were passengers in an automobile which was struck by defendant’s train. The mother was killed. The mother’s administrator brought suit under the Ohio Wrongful Death Statute on behalf of plaintiff and other designated beneficiaries, but failed to recover as defendant was found not to have been negligent. Plaintiff later brought a separate suit for her personal injuries resulting from the accident and defendant pleaded res judicata. Plaintiff contended that res judicata was not applicable because there was not such an identity of parties in the two suits that would bring into operation the principle of res judicata to bar recovery. The Court of Appeals of Ohio held for de-
fendant, stating that plaintiff, in addition to the other beneficiaries, was the real party in interest in the wrongful death action, thereby creating an identity of parties in both suits sufficient to preclude recovery.

The weight of authority is that a matter is not res judicata if there is no identity of persons and parties in the respective actions. Garrison v. Bonham, 207 Okla. 599, 251 P. 2d 790 (1952); Keith v. Willers Truck Service, 64 S.D. 274, 266 N.W. 256 (1936). In Gleaton v. Southern Ry. Co., 212 S.C. 186, 46 S.E. 2d 879 (1948), a case dealing with a prior survival action as distinguished from a prior action for wrongful death, plaintiff sued defendant railroad for damages to her car resulting from a collision at a train crossing, in which plaintiff's husband was killed. The court, in granting plaintiff a right to bring suit, said that she was not barred from re-litigating the issue of defendant's negligence, although in a prior action under the survival statute brought by the executor of decedent's estate, defendant was found not negligent. The court reasoned that plaintiff was not a real party in interest to the survival action, in as much as the proceeds of any recovery in such a suit would go, under the applicable law, to the estate of decedent to pay claims and other expenses, with only the surplus, if any, distributed to the legatees, including plaintiff.

The Maryland Wrongful Death Statute, 6 Md. Code (1957), Art. 67, § 4 states: "Every such action shall be for the benefit of the wife, husband, parent and child of the person whose death shall have been so caused. . . ." Res judicata in Maryland applies where there is identity of parties or their privies, the latter including all those who have a direct interest in the subject matter of the suit. Ugast v. La Fontaine, 189 Md. 227, 55 A. 2d 705 (1947). See also State, Use of Boshe v. Boyce, 72 Md. 140, 19 A. 366 (1890); Deford v. The State, Use of Keyser, et al., 30 Md. 179 (1869). Cases are collected in 125 A.L.R. 908 (1940). See Restatement, Judgments (1942) § 85, 402.

Torts — Insurance Broker Liable For Failure To Advise Adequate Coverage. Hardt v. Brink, 192 F. Supp. 879 (W.D. Wash. 1961). The defendant, an insurance broker, had procured for the plaintiff the entire insurance coverage for his business. Plaintiff's comprehensive liability insurance excluded damage by fire to property held by the insured as lessee. The plaintiff entered into a lease with advice of counsel which did not have a provision
exempting him from liability to the lessor in case of fire. He notified the defendant of the existence of the lease but did not furnish him a copy, nor did he inquire about necessary insurance. The defendant, however, neither requested a copy of the lease nor sought to ascertain its terms. Subsequently, a fire destroyed the warehouse and the plaintiff was required to pay the lessor's insurer the sum of $41,954.24 for damage to the building. Plaintiff brought this action in tort against the defendant for breach of duty. At trial, plaintiff's witness, an insurance expert, testified that a lease was a "red light" to an expert insurance advisor, which would necessitate an examination to determine possible liability, and the extent of insurance coverage necessary. Applying the law of Washington, the District Court allowed recovery, reasoning that an insurance broker who holds himself out to be a skilled insurance advisor has a duty to those customers he advises and for whom he secures their entire insurance coverage, to examine any leases entered into by such customers and to advise them concerning potential liability thereunder. Failure to do so will render him liable in tort.

Generally an agent or broker who agrees to secure adequate insurance on specific property is liable if he fails to procure an effective and adequate policy. *Hampton Road Carriers v. Boston Insurance Co.*, 150 F. Supp. 338 (D.C. Md. 1957); *Case v. Ewbanks, Ewbanks & Co.*, 194 N.C. 775, 140 S.E. 709 (1927). Cf. *Heaphy v. Kimball*, 293 Mass. 414, 200 N.E. 551 (1936). In *Fries-Breslin Co. v. Bergen*, 176 F. 76 (3d Cir. 1909), cert. den. 215 U.S. 609, the defendant, who had undertaken to secure insurance on insured's business property, and had been notified by insured of a mortgage on the property was held to be under no duty to advise plaintiff that the policy didn't cover mortgaged personalty. For further information see 3 C.J.S. 38, Agency, §§ 160, 161e; 12 M.L.E. 371, Insurance, § 21; Annotation, 29 A.L.R. 2d 171 (1953); 17 Dec. Dig. (6th Dec.) 154, Insurance, Key No. 103; PROSSER, TORTS (2d ed. 1955) § 31, p. 132.

**Torts — No Recovery Allowed Under Federal Tort Claims Act For Injury Arising In Course Of Military Service Even Though Negligence Occurred During Pre-Induction.** *Healy v. U.S.*, 192 F. Supp. 325 (S.D. N.Y. 1961). Plaintiff, while a civilian, was given a pre-induction physical by an Air Force doctor who concluded that he was
physically capable. The plaintiff was, in fact, afflicted by a heart condition that was not discovered due to the doctor's alleged negligence. While the plaintiff was undergoing basic training in the Air Force the heart condition was aggravated and he was hospitalized and, thereafter, discharged from the service. In the present suit for recovery under the Federal Tort Claims Act, the District Court sustained the government's motion to dismiss, reasoning: (1) that even if there were negligence at the pre-induction physical when the plaintiff was a civilian, it is the injury itself which makes the claim compensable; and (2) that, since the injury occurred during basic training while the plaintiff was in the military service, the doctrine of Feres v. United States, 340 U.S. 135 (1950) precluded recovery. In the Feres case, in denying recovery for injuries received by military personnel while in military service, the Supreme Court reasoned that the Federal Tort Claims Act did not apply since there existed a system of adequate compensation by way of pensions, medical services, etc., under the Veteran's Administration; that Congress in passing the Act had shown no intent to give military personnel a right of action under it; and that the government-soldier relationship precluded recovery. However, in United States v. Brown, 348 U.S. 110 (1954) in allowing recovery, the Supreme Court reasoned that the respondent, an honorably discharged veteran, was a civilian and not in the military service when the injury occurred in an operation at a Veteran's hospital after his discharge.