

# Recent Developments in the Law

---

**Vol. No. XXVII**

July 2000

In order to keep you abreast of the recent developments in the law, we are reporting the substance of several current decisions of major import in the jurisdictions of Maryland, the District of Columbia and Virginia.

*This material is being provided for your general information only, and is not a substitute for obtaining legal advice. The information provided is not provided as legal advice, or in the course of an attorney-client relationship. You should always consult an attorney for advice about the specific circumstances of your case.*

## **AN INTENTIONAL TORT IS AN "ACCIDENT" UNDER THE TERMS OF AUTOMOBILE INSURANCE IF THE VICTIM COULD NOT FORESEE THE OCCURRENCE OF THE TORT**

In *Cole v. State Farm Mutual Ins. Co.*, the Court of Appeals of Maryland held that an accident is an event that is unexpected or not foreseen, and the court should view the event through the eyes of the victim in an intentional tort case to determine whether or not the incident is an accident.

Eddie Jackson Cole and Sharyn Cole were shot by William Dawson Cave, who was the father of Mr. Cole's first wife. Ms. Cole was shot in the family van with the engine idling, and later died from her injuries. Mr. Cole filed a claim with his insurance company to pay for the death of Ms. Cole under their automobile insurance policy. State Farm refused coverage stating that the Ms. Cole's death was caused by the independent acts of Mr. Cave and did not fall within the meaning of "accident" under the policy.

Mr. Cole filed suit for breach of contract against State Farm. Mr. Cole later filed a Motion for Summary Judgment stating that coverage was proper because his wife did not expect to be shot while seated in the van and, thereby, was an accident. In opposition to the motion State Farm argued that a causal connection must exist between use of the van and Ms. Cole's death. The trial court granted summary judgment in favor of State Farm ruling that the event was not an accident.

The Court of Special Appeals affirmed the ruling and held that the cause of Ms. Cole's injuries must be related to the use of the automobile to recover under the policy. The Court of Special Appeals further held that unforeseeability must be determined through Mr. Cave's eyes to determine if the incident was an accident.

The Court of Appeals reversed the decision of the Court of Special Appeals. The Court held that the commission of an intentional tort does not bar an act from being an accident if it was unforeseen or unexpected. The Court stated that unforeseeability should be judged from Ms. Cole's point of view.

A two part test was applied by the court to determine if Ms. Cole had foreseen the incident. The first question was whether the insured expected an attack or not. The second question is whether a reasonable person with the same knowledge and experience would have expected an attack. The Court of Appeals answered both questions in the negative and held that Ms. Cole's death was caused by an accident. *Cole v. State Farm Mutual Insurance Co.*, 2000 WL 764759 (Md. 2000).

## **SUPREME COURT HOLDS THAT, IN AN EMPLOYMENT DISCRIMINATION CASE, THE EMPLOYEE NEED ONLY PRESENT EVIDENCE TO PROVIDE JURY WITH A RATIONAL BASIS FOR DISBELIEVING THE EMPLOYERS RATIONALE FOR TERMINATION.**

In *Reeves v. Sanderson Plumbing Products, Inc.*, the United States Supreme Court held that a plaintiff,

who alleges age discrimination by his employer under Age Discrimination in Employment Act of 1967 (ADEA), need only present a prima facie case of discrimination and evidence that provides the jury with a rational basis to refute the employers justification for termination.

This case arose out of a complaint by Roger Reeves that his employment was terminated at Sanderson Plumbing Products, Inc. based on his age in violation of the ADEA. Mr. Reeves was a supervisor for the regular line in the Hinge Department and he reported directly to Russell Caldwell. Mr. Caldwell reported to the company management that production was behind due to irregular attendance of employees and disciplinary action could not be taken because attendance reports had been altered to hide tardiness and early departures. The company investigated the matter. It was recommended that Mr. Reeves and Mr. Caldwell be terminated and both were terminated.

Mr. Reeves brought suit for violation of the ADEA based on statements made by Powe Chestnut, who made the termination recommendation to his wife, who was company president. Mr. Chestnut made comments at different times regarding Mr. Reeves' age. The company defended its actions by stating the reason for Mr. Reeves termination was improper attendance record keeping. Mr. Reeves presented evidence that his records were accurate and that Mr. Chestnut had been unfair to him and other employees. The trial court refused to grant the defendants' two motions for judgement as a matter of law. The jury found in favor of the plaintiff.

The United States Court of Appeals for the Fifth Circuit reversed the trial court's ruling. The court held that Mr. Reeves' evidence may show that the company's explanation for his termination was a pretext to discrimination; however, he did not prove that there was discrimination because Mr. Chestnut's comments were not made in connection with Mr. Reeves' termination.

The Supreme Court reversed the Court of Appeals decision. The Court held that the same framework for proving Title VII claims under the Civil Rights Act of 1964 would apply to ADEA claims. The Title VII framework requires that a plaintiff prove a prima facie case of intentional discrimination, then the defendant must present evidence to show a nondiscriminatory basis for the termination.

The Court found that Mr. Reeves met his burden by showing that he fell into the class that was protected by the ADEA, he was qualified for his position, he was discharged by the company, and three younger individuals filled his position. Sanderson satisfied its burden by showing that the reason for Mr. Reeves' termination was his failure to maintain accurate attendance records.

The Court further held that, although the employer satisfies its burden to disprove the presumption of discrimination, the jury can consider evidence that was presented by the plaintiff and draw inferences from that evidence that the defendant's explanation for its action is false. The Court held that, in this case, Mr. Reeves had presented evidence to provide a reasonable jury a basis to believe Sanderson's justification for the termination was false. *Reeves v. Sanderson Plumbing Products, Inc*, 2000 WL 743663 (U.S. June 12, 2000)

#### **BALTIMORE CITY HOUSING IMPLIES A WARRANTY OF HABITABILITY THAT ALLOWS THE CONSUMER PROTECTION ACT TO BE USED IN LEAD PAINT CASES**

In *Benick v. Hatcher*, the Court of Appeals of Maryland held that a landlord's implied obligation to make representations as to the condition of an apartment prior to a lease places a duty on the landlord to be aware of the existence of lead paint in that apartment.

The Hatcher family moved into an apartment in a building owned by Joseph Benick in January 1990. In October of that year, Brandon Hatcher was diagnosed with lead poisoning. The family moved out of the apartment and notified the Baltimore City Health Department. Upon investigation of the apartment, the

Health Department found sixteen areas containing lead paint. Brandon's parents filed suit on his behalf.

The trial judge instructed the jury that Mr. Benik would be liable under the Consumer Protection Act (CPA) if he had prior knowledge that there was chipping or flaking lead-based paint or the condition posed an unreasonable risk to Brandon. The jury found for Benik. The Court of Special Appeals affirmed the instruction but reversed the judgment.

The Court of Appeals affirmed the Court of Special Appeals' ruling that the Baltimore City Housing Code implies a warranty of habitability. That warranty imposes several duties on the landlord including representing to a prospective tenant that the apartment is suitable for living. In making that representation, it implies the landlord possesses knowledge of the existence of lead-based paint that satisfies the notice requirement.

This case was distinguished from other lead paint cases where the Court of Appeals has held the CPA does not apply. The difference being that in those other cases the CPA violation was alleged to a condition of peeling paint occurred after the lease was signed. Prior to the lease, the landlord has responsibility to know if a lead paint danger exists. The CPA applies if it is shown that the landlord made misstatements or failed to disclose to mislead the tenant and the tenant was in fact misled. *Benik v. Hatcher*, 358 Md. 507, 750 A.2d 10 (2000).

#### **ADMISSIBLE EVIDENCE MUST BE IDENTIFIED TO SHOW THAT THE LANDLORD HAD NOTICE OF CHIPPING, FLAKING OR PEELING LEAD PAINT**

In *Holmes v. Mid-Atlantic Funding Co.*, the Maryland Court of Special Appeals held that summary judgment was proper where the plaintiff failed to show that the landlords had received notice that the paint was deteriorating.

The Holmes family rented an apartment in a building owned by Peter and Julia Ben Ezra and Phillip Hanson and was managed by Consumer Management Corp. Ms. Holmes filed suit against the landlords claiming that her children had received lead poisoning from the paint in her apartment.

The trial court granted the defendants' summary judgment motion because the plaintiff failed to show that the landlord was aware of any dangerous conditions. The Court of Special Appeals affirmed the trial court ruling holding that, in a negligence case for lead-based paint injuries, a plaintiff must show that the landlord knew or had reason to know that the paint was chipping flaking or peeling. *Holmes v. Mid-Atlantic Funding Company*, 131 Md. App. 614, 750 A.2d 638 (2000).

#### **A PEDIATRICIAN WAS ALLOWED TO USE A REPORT BY PSYCHOLOGIST, WHO CLAIMED TO BE A NEURO-PSYCHOLOGIST AND WAS NOT, TO SHOW PERMANENT INJURY CAUSED BY LEAD PAINT**

In *Askins v. Polakoff*, the Maryland Court of Special Appeals held that a trial judge erred in not allowing a pediatrician to use a report prepared by a psychologist in his testimony regarding the severity of the plaintiff's injury.

Tanya Queen brought suit on behalf of her child Latonya Askins against Lawrence Polakoff, the building owner, and Michael Matz, the building manager, alleging injuries caused by lead paint exposure in their apartment. At trial, the credentials of Dr. Morris Lasson were challenged. Dr. Lasson claimed to be a neuro-psychologist; however, he had never received any formal training or special licensing in the field. The trial court ruled that Dr. Lasson could testify as an expert in psychology but not in neuro-psychology.

Dr. Howard Klein, a pediatrician, used Dr. Lasson's report to form his expert opinion that the injuries sustained by Latonya were permanent. The trial judge would not allow any testimony by Dr. Klein that

was based on information from Dr. Lasson's report.

The Court of Special Appeals affirmed the trial court's ruling to allow Dr. Lasson to testify regarding the tests he performed on Latonya because he was qualified to administer those tests. However, the Court of Special Appeals reversed the trial court's ruling that Dr. Klein could not use Dr. Lasson's report. The Court stated that the trial court focused on the title of the report as neuro-psychological and did not review the substance to see if Dr. Lasson's conclusions were within his qualifications. *Askins v. Polakoff*, CSA No. 389, Spet. Term 1998. Opinion by Adkins, J. Filed January 15, 1999. Unreported. RecordFax No. 9-0115-00.

#### **EXCULPATORY CLAUSES ARE ENFORCEABLE IF THE INTENTIONS OF THE PARTIES ARE CLEAR**

In *Seigneur v. National Fitness Institute*, the Maryland Court of Special Appeals held that an exculpatory clause, where the contract contains a clear expression of the parties to release the health club from injuries caused by its negligence, is enforceable.

Ms. Seigneur enrolled in a fitness program with NFI after reviewing the programs of other fitness facilities. As part of the registration process, Ms. Seigneur was asked to sign a Participation Agreement, which contained a clause stating that Ms. Seigneur released NFI from liability for negligent acts committed by its employees. During her initial evaluation with one of NFI's employees, Ms. Seigneur injured her shoulder when she lifted a 90-pound weight on the torso machine. The employee urged Ms. Seigneur to continue with the evaluation.

Ms. Seigneur and her husband brought suit against NFI for its employee's negligence and NFI's negligence for failing to properly train its employees. NFI moved for summary judgment arguing that the exculpatory clause in Participation Agreement was a waiver of the plaintiffs' rights. The trial court granted summary judgment.

The Court of Special Appeals affirmed the trial court's ruling. The Court held that if the intentions are clear and specific, then the courts will not interfere with the parties' ability to contract. However, an exculpatory clause may be found invalid for public policy reasons if (1) the protected party intentionally, recklessly, wantonly or with gross negligence caused the harm; (2) the bargaining power of one of the parties is unequal to the other such that the party is at the mercy of the other party; or (3) the transaction is of public interest. The clause stands unless it is patently offensive. *Seigneur v. National Fitness Institute*, 2000 WL 694761 (Md. App. May 31, 2000).

#### **FEDERAL MARITIME LAW APPLIES TO OWNERS OF PLEASURE BOATS**

In *Matthews v. Howell*, the Court of Appeals of Maryland held that maritime law should be applied to a wrongful death case when the pleasure boat is being used for traditional maritime activities.

Kimberly Matthews drowned while on a boating excursion with Stephen Howell and Mr. and Mrs. Parks. Although the stories of what happened conflict, it appears that at some point during a trip on the Chesapeake Bay, Mr. Howell dove off the boat for a swim. Prior to his swim Mr. Howell, the owner of the vessel, was at the helm. The accounts differ as to whether Mr. Howell had shifted the boat into neutral or turned the engines off or neither, but all agree that the boat was left adrift and not anchored.

Ms. Matthews fell or dove into the water some time after Mr. Howell. It was not known whether she entered the water voluntarily or not because Mr. and Mrs. Parks, who were still on the boat but in different sections, did not see her go into the water.

Upon entering the water, Ms. Matthews began having trouble swimming. All of the depositions taken of boat occupants differ as to who attempted to rescue Ms. Matthews. However, no one's attempt was

successful and they lost sight of Ms. Matthews. The Coast Guard and the Maryland Department of Natural Resources searches failed to find her that night. Her body was found two days later by a passing boater.

The estate of Ms. Matthews filed suit against Mr. Howell for survivor negligence and wrongful death. Mr. Howell filed a motion for summary judgment arguing that maritime law did not apply in this case and he had no duty to save Ms. Matthews when she fell into the bay. The trial court granted his motion for summary judgment. The plaintiffs filed an appeal with the Court of Special Appeals, but the Court of Appeals granted certiorari prior to a proceeding before the Court of Special Appeals.

The Court of Appeals reversed the trial court ruling holding that maritime law did apply in this case because it satisfied the tests established by the United States Supreme Court. The locality test was satisfied because the Chesapeake Bay is a navigable waterway of the United States.

The Court then applied a two-prong test to determine whether the activity was connected to federal maritime jurisdiction. Under the first prong, the activity must pose a hazard to commercial activity in the waterway. The Court of Appeals held that the Mr. Howell's drifting boat and the Coast Guard closing part of the area to conduct a search posed a potential hazard and satisfied the first prong. The second prong is satisfied if the activity related to a traditional maritime activity. The Court held that a disruption of commerce satisfies this prong whether the boat is engaged in a commercial activity or not. The Court held that Mr. Howell's conduct represents a lack of proper navigation and falls under federal maritime laws. *Matthews v. Hawell*, 2000 WL 739258 (Md. June 8, 2000).

#### **VIRGINIA'S MEDICAL MALPRACTICE CAP ON DAMAGES IS CONSTITUTIONAL**

In *Pulliam v. Emergency Servs. of Richmond Inc.*, the Supreme Court of Virginia held the \$1 million cap on medical malpractice damages did not violate the Virginia or the United States Constitutions.

A man filed a suit against the emergency room and the doctor, who treated his wife for pneumonia, after she later died. He was awarded \$2, 045,000.00 by a jury, and the trial court reduced his damages to \$1 million in accordance with the damage cap statute. The husband appealed the reduction of damages citing the reduction requirement violated Virginia Constitution Article I, § 11, which guarantees the right to receive the amount of damages awarded by the jury, and special legislation violation of Article IV, § 14. The husband also claimed that the verdict reduction constituted a taking prohibited by the 5th Amendment of the United States Constitution.

The Supreme Court held that the cap did not violate the Federal or Virginia Constitutions. The Court stated that the medical cap fell under the General Assembly's expressed power to protect the public's health and welfare because it ensured the availability of healthcare providers in Virginia. Further, the Court held that the right to jury trial in the Virginia Constitution did not extend the right past what existed in common law. Under common law full recovery for a tort was not guaranteed. Additionally, the statute was in place prior to the civil suit and does not represent a taking under the 5th Amendment of the United States Constitution. *Pulliam v. Emergency Servs. of Richmond Inc.*, 257 Va. 1, 509 S.E.2d 307 (1999).

#### **UNDER RESPONDEAT SUPERIOR, SUMMARY JUDGMENT WILL BE GRANTED IN THE ABSENCE OF AN ESTABLISHED EMPLOYER-EMPLOYEE RELATIONSHIP**

In *Judah v. Reiner*, the D.C. Court of Appeals held that a plaintiff must show that the wrongdoer is an agent or employee of the plaintiff in order to sustain an action under respondeat superior.

Allison Judah and Tiara Dews were being harassed by two men with pit bulls. The two girls sought refuge in an apartment building. William Ragsdale, who claimed to be the resident manager of the building, ordered the girls to leave. The girls left the building and were attacked by the two men and their

dogs.

Judah brought suit against Burton Reiner, the owner of the building, and Morris Management Co. but not William Ragsdale. The trial court dismissed the complaint counts alleging that the defendants were liable for the assault and battery committed by the two men, and, later, the court dismissed the remaining counts of negligence and assault by Ragsdale. The plaintiff appealed both rulings.

The D.C. Court of Appeals affirmed the lower court ruling holding that the plaintiff failed to establish that the defendants had an agency relationship with Ragsdale. The plaintiff never produced any evidence that showed that the defendants knew that Ragsdale was holding himself out to be the building manager. The evidence only showed that Ragsdale was an independent contractor that the Morris Management Co. hired from time to time. Ragsdale did live in the apartment given to his father by Morris as part of his father's compensation. However, the Court ruled that the evidence did not show a relationship because it would be understandable for a father to share his compensation with his children. *Judah v. Reiner*, 744 A.2d 1037 (D.C. 2000).

#### **GAS LINE REPAIR TEAM FOREMAN ASSUMED RISK OF INJURY**

In *Crews v. Hollenbach*, the Court of Appeals of Maryland held that, when the plaintiff accepted his job as a gas line repairman, he accepted the evident risks attributed to the position.

This case arose out of an explosion of a leaking gas line that injured Mr. Crews, the Washington Gas Repair team foreman. The leak was caused by Honcho & Sons, who was laying cable for Excalibur Cable Communications. Mr. Crews brought suit against Honcho & Sons, Mr. Hollenbach, an employee of Honcho & Sons, Byers Engineering, Excalibur Cable Communications and Maryland Cable.

The trial court dismissed all claims. The Court of Special Appeals affirmed the lower court ruling. On appeal, Mr. Crews argued that he knew of the possibility of an explosion but did not know what the specific dangers were and that he did not voluntarily assume the risk.

The Court of Appeals also affirmed and held that the risks involved with repairing gas leaks would be appreciated by any adult and that Mr. Crews voluntarily accepted these risk when chose to work for Washington Gas. *Crews v. Hollenbach*, 2000 WL 567025 (Md. May 11, 2000).

#### **A SURGEON CANNOT DELEGATE TASKS CONTRACTED FOR BY THE PATIENT**

The Court of Appeals of Maryland held, in *Dingle v. Belin*, that a surgeon breaches the contract he or she has with the patient if that physician delegates duties that were assigned to him or her by the contract to another physician.

Dr. Lenox Dingle was hired by Deborah Belin to perform laparoscopic cholecystectomy. Dr. Dingle was assisted by a resident and a medical student. During the surgery, the resident accidentally nicked a bile duct and extensive surgery was required to repair the damage.

Ms. Belin sued the two doctors and the hospital for negligence, lack of informed consent, battery, breach of contract, and negligent performance in surgery. The trial court dismissed the battery and breach of contract claims. The jury found for the defendants on remaining claims.

The Court of Special Appeals reversed the trial court's ruling that dismissed the breach of contract claim. The Court of Appeals affirmed the Court of Special Appeals decision.

The Court of Appeals held that the relationship between doctor and patient is contractual. As part of the contractual relationship, the physician is bound to perform services agreed to, and, should the physician allow another person to perform those services, the physician is liable for breach of contract. *Dingle v.*

Belin, 358 Md. 354, 749 A.2d 157 (2000).

## MARYLAND COURT OF APPEALS

**Civil Procedure, Improper Service:** Chapman v. Kamara, 356 Md. 426, 739 A.2d 387 (1999). If an attorney enters an authorized appearance in court representing an individual or the individual files an Answer without objecting to service of process, then the individual has submitted to the jurisdiction of the court. However, where a party has not been personally served and is not aware of the attorney's representation on his or her behalf, personal jurisdiction is not established.

**Civil Procedure, Time Limit for a Consent Agreement:** Jones v. Hubbard, 356 Md. 513, 740 A.2d 1004 (2000). If a trial court accepts a consent agreement as part of the judgement, then Maryland Civil Rule 1-203 applies and extends the deadline to Monday when that deadline falls on a Saturday.

**Civil Procedure, Satisfaction of a Foreign Judgment:** Mike Smith Pontiac, GMC v. Mercedes-Benz of North America, 356 Md. 542, 741 A.2d 462 (2000). A judgment creditor, who files a judgment in Maryland to be enforced under the Uniform Enforcement of Foreign Judgments Act, will not be allowed to collect greater relief in Maryland than the creditor would have collected under the local law of the location where the judgment was made originally.

**Evidence, Inquiry as to Expert Witness' Income:** Wroblewski v. de Lara, 353 Md. 509, 727 A.2d 930 (1999). An expert witness may be questioned on cross-examination as to the amount of income the witness has earned in the recent past as an expert witness, as well as to the approximate portion of the expert's total income that is derived from providing expert witness testimony.

**Insurance, Intentional Torts:** Lititz Mutual Ins. Co. v. Bell, 352 Md. 102, 724 A.2d 102 (1999). Where a person, who has an aggressive impulse disorder, intended to commit a battery against another, an insurer does not have a duty to defend the alleged tortfeasor or pay for damages.

**Insurance, Accrual of Duty to Defend:** Vigilant Insurance Co. v. Luppino, 352 Md. 481, 723 A.2d 14 (1999). When an insurer denies an insurance claim, the statute of limitations does not begin to run on the insured's breach of duty to defend claim until after the litigation is complete, rather than at the time the insurer denies the claim.

**Insurance, Application of Incontestability Clause:** Mutual Life Insurance Company of New York v. Insurance Commission, 352 Md. 561, 723 A.2d 891 (1999). Where a statutorily-required incontestability clause provides that an insurance company may not deny a disability claim more than two years after the policy is issued, the insurer cannot deny a claim on the ground that the disability manifested itself prior to the effective date of the policy.

**Negligence, Liability of Gun Store:** Valentine v. On Target Inc., 353 Md. 544, 727 A.2d 947 (1999). That it is only generally foreseeable that guns are increasingly used in the commission of crimes does not impose upon gun store owners a duty to third persons to exercise reasonable care in the display and sale of guns.

## MARYLAND COURT OF SPECIAL APPEALS

**Damages, Medical Care Recovery Act:** Piquette v. Stevens, 128 Md. App. 590, 739 A.2d 905 (1999). When the government gratuitously pays the medical expenses incurred by a plaintiff as a result of injury, the plaintiff cannot recover from the defendant those medical expenses using the collateral source rule if the government brings suit to collect for those expenses under the Medical Care Recovery Act.

**Damages, Asbestos Related Liability:** Porter Hayden Co. v. Wyche, 128 Md. App. 382, 738 A.2d 326 (1999). When a plaintiff claims noneconomic damages for asbestos related injuries, the \$350,000

statutory cap for noneconomic damages presumptively applies unless the plaintiff can show that the injuries began developing before the statutory cap took effect.

**Insurance, Duty to Defend:** *Selby v. Hartford Fire Ins. Co.*, CSA No. 6, Sept. Term 1998. Unreported. Opinion by Kenney, J. Filed Dec. 21, 1999. RecordFax No. 8-1221-01 (15 pages). An insurer does not have duty to defend its insured when the insured is sued for the intentional tort of sexually exploiting minors.

**Insurance, Uninsured Motorist Coverage:** *Webster v. Government Employees Ins. Co.*, 130 Md. App. 59, 744 A.2d 578 (1999). If a carjacker is not in control or inside the car, then the injury is not causally connected to use of an uninsured vehicle and insurance benefits for wrongful death are not required.

**Negligence, Contributory Negligence of Automobile Passenger:** *Masset v. Wivell*, CSA No. 7, Sept. Term 1998, Unreported. Opinion by Adkins, J. Filed Sept. 29, 1998. RecordFax No. 8-0929-04 (11 pages). A person who willingly gets in a vehicle with an intoxicated driver and encourages that driver to evade the police is barred from recovery of damages from injuries sustained in an accident caused by the driver because of contributory negligence.

**Negligence, Effect of an Admission of Responsibility:** *Hurt v. Chavis*, 128 Md. App. 626, 739 A.2d 924 (1999). If a defendant concedes responsibility but not injury or damages, he or she is not liable until all of the elements of an action are decided. Granting summary judgment based only on an admission of responsibility is not permitted.

**Negligence, Absence of Proof:** *Holmes v. J.C. Penney*, CSA No. 5, Sept. Term 1998. Unreported. Opinion by Hollander, J. Filed Sept. 21, 1998. Escalators are too complicated for the average person to understand what causes a malfunction, so expert testimony is needed to show negligence caused the incident.

**Negligence, Psychiatrist Liability:** *Falk v. Southern Maryland Hosp.*, 129 Md. App. 402, 742 A.2d 51 (1999). A psychiatrist is not liable for injuries caused by a patient unless the psychiatrist had actual knowledge of the patient's propensity towards violence and that the patient intends to harm a particular person.

**Negligence, Establishing Proximate Cause:** *Bell v. Heitkamp Inc.*, 126 Md. App. 211, 728 A.2d 743 (1999). A plaintiff need not disprove every possibility that defendant's negligence was not the cause of injury, but need only prove that the plaintiff's injuries were more probably than not caused by the defendant's negligence.

**Torts, Immunity of Law Enforcement Officer:** *Williams v. Mayor and City Council of Baltimore*, 128 Md. App. 1, 736 A.2d 1084 (1999). Where a police officer responds to a domestic violence report, the officer owes no special duty to the victim, and enjoys immunity from suit as a public official carrying out official discretionary duties without malice.

**Workers Compensation, Collateral Source Rule:** *Suburban Hosp. v. Kirson*, 128 Md. App. 533, 739 A.2d 875 (1999). Where a hospital is both the employer and care-giver, the hospital cannot present evidence showing medical payments made under Workers' Compensation for a slip and fall occurring while the person was being treated by the hospital under the collateral bar rule. The collateral source rule states that a defendant is not allowed to claim credit for payments made to the plaintiff from another source.

**Workers' Compensation, Injury Arising Out of Employment:** *Mulready v. University Research Corp.*, 128 Md. App. 392, 738 A.2d 331 (1999). An employee's injuries that occur during the course of employment are not compensable unless they "arise out of" the employment. In order to "arise out of" the

employment, the employment must be a contributing proximate cause of the injury.

**Labor and Employment, Wrongful Discharge:** *Kramer v. Mayor of Baltimore*, 124 Md. App. 616, 723 A.2d 529 (1999). In order to survive summary judgment, an at-will employee must show that his discharge from employment violated some clear mandate of public policy.

## **D.C. SUPERIOR COURT**

**Insurance, Liability to Unnamed Party:** *Clark Construction Group, Inc. v. Pennsylvania National Mutual Casualty Insurance Co.*, D.C. Super. Ct. No. 96-6107, April 30, 1998, Unreported. An insurer is not liable to a party not named in an insurance policy, even when the unnamed party receives a "certificate of insurance" when the certificate states that it is informational, does not confer any rights and does not alter the terms of the policy.

**Negligence, Regulations:** *Dalgliesh v. Theatre Management Group*, D.C. Super. Ct., 96-CA-3985, May 29, 1999, Unreported. A defendant's violation of the Americans with Disabilities Act may be used by a plaintiff to show some evidence of negligence where the jury is not instructed that a violation of the regulation is negligence per se.

## **D.C. COURT OF APPEALS**

**Civil Procedure, Long-Arm Statute:** *Shoppers Food Warehouse v. Moreno*, 746 A.2d 320 (D.C. 2000) (en banc). A trial court has personal jurisdiction when defendant grocery chain, through its advertising activity in a major District of Columbia newspaper, purposely solicits D.C. residents as customers for Maryland and Virginia stores and therefore conducts business in the District. Further, because plaintiff's claim has a relationship to the advertising, defendant could reasonably expect to be haled into court to defend an action brought by a D.C. resident.

**Contracts, Indemnification:** *N.P.P. Contractors, Inc. v. John Canning & Co.*, 715 A.2d 139 (D.C. 1998). Even where a general contractor's own negligence is the cause of damage, a general contractor is entitled to indemnification from subcontractor for such damage in connection with the work where the indemnification clause is broad and unambiguous.

**Employment Law, Wrongful Discharge:** *Fingerhut v. Children's Nat'l Medical Center*, 738 A.2d 799 (D.C. 1999). The D.C. Court of Appeals held that a wrongful discharge exception in an at will employment exists where an employee is discharged for the employee's refusal to violate a statute or municipal law.

**Evidence, Business Records:** *Clyburn v. District of Columbia*, 741 A.2d 395 (D.C. 1999). To use the business record exception to the hearsay rule, a party must establish that a record was made in the regular course of business and made as memorandum or record of the act at the time it happened or within a reasonable time after it occurred by a person with personal knowledge of the facts or facts were communicated to the recorder in the regular course of business by one with personal knowledge of the facts.

**Negligence, Directed Verdict:** *Cross v. Washington Metropolitan Area Transit Authority*, 740 A.2d 977 (D.C. 1999). Where there are two different versions concerning the circumstances of an accident, a jury acting reasonably is not compelled to draw only one conclusion. In such a case, a trial court, in reviewing a motion for a directed verdict in the light most favorable to the nonmoving party, must deny a motion for directed verdict and submit the case to the jury for determination.

**Negligence, Res Ipsa Loquitur:** *Scott v. James, et al.*, 731 A.2d 399 (D.C. 1999). *Res Ipsa Loquitur* does not apply in a case alleging negligent application of a hair relaxer to plaintiff's hair. Plaintiff must

provide expert testimony to show the standard of care in applying a relaxer when the hair relaxer used contains chemicals because an understanding as to the proper application of a chemical product to the hair is not within the common knowledge of jurors.

**Negligence, Res Ipsa Loquitur:** *Crenshaw v. Washington Metropolitan Area Transit Authority, et al.*, 731 A.2d 381 (D.C. 1999). The doctrine of res ipsa loquitur does not apply where a plaintiff alleges negligence to recover for injuries sustained as a result of a violently jerking escalator. One can not prove by "common knowledge" that an escalator will not jerk absent the presence of negligence. Therefore, expert testimony or some other evidence of a violation of an established standard of care is necessary to prove such alleged negligence.

**Insurance, Surface Water Exclusions:** *Cameron, et al. v. USAA Property and Casualty Ins. Co.*, 733 A.2d 965 (D.C. 1999). Where an "all-risk" homeowner's insurance policy excludes losses from "surface waters," insured can not recover for damages caused from melting snow and rain that flows from patio into basement.

### **U.S. DISTRICT COURT FOR THE DISTRICT OF D.C.**

**Defamation, Internet:** *Blumenthal, et al. v. Drudge, et al.*, 992 F.Supp. 44 (D.D.C. 1998). A defendant sued for defamation for statements published on Internet is subject to suit in D.C. under long-arm statute because defendant's website was accessible and used by D.C. residents and there were sufficient non-Internet activities in D.C. The court also ruled that the Internet service provider is immune from suit for activity of defendant.

**Insurance, Americans with Disabilities Act:** *Wai v. Allstate*, 76 F. Supp.2d 1 (D.D.C. 1999). In cases of allegations that an insurance company failed to provide or provided at a substantially higher rate landlord insurance to a person who rents property to persons with disabilities, a plaintiff is permitted to allege violation of the Americans with Disabilities Act against the insurance company.

### **U.S. COURT OF APPEALS FOR THE D.C. CIRCUIT**

**Civil Procedure, Personal Jurisdiction and the Internet:** *GTE New Media Services, Inc. v. BellSouth Corp.*, 199 F.3d 1343 (D.C. Cir. 2000). The fact that a defendant's only contact to D.C. is through computer users accessing its website does not satisfy the requirements to establish personal jurisdiction. The requirements are tortious injury within D.C. and a continuous course of conduct or that the defendant derives substantial revenue from the District.

**Insurance, Duty to Defend:** *Interstate Fire & Casualty Co, Inc. v. 1218 Wisconsin, Inc.*, 136 F.3d 830 (D.C. Cir. 1998). Insurer has a duty to defend insured sued by patron injured by another patron despite "assault and battery" and "liquor liability" exclusions in policy where complaint alleges a claim of negligence which would be distinguishable from assault and battery if under D.C. law an intoxicated person does not have the intent to support a cause of action for civil assault.

### **U.S. DISTRICT COURT FOR THE DISTRICT OF MARYLAND**

**Civil Procedure, Personal Jurisdiction and the Internet:** *Atlantech Distribution Inc. v. General Credit Ins. Co.*, 30 F. Supp.2d 534 (D.Md. 1998). A company's website that merely advertises does satisfy "reasonable notions of fair play" as required under the due process test for personal jurisdiction. This decision is similar to other Federal court decisions concerning the Internet that led to the Zippo analysis from the Western District of Pennsylvania. The Zippo analysis evaluates contacts on a continuum consisting of (1) companies that do business over the web including entering into contracts with out-of-state residents; (2) companies that allow information to be requested over the Internet based on the

amount of interaction; and (3) companies that have non-interactive sites for advertisement only.

**Civil Procedure, Statute of Limitations:** Taylor v. Penco Products, USDMD No. JFM-98-549, January 19, 1998, Unpublished. The statute of limitations for a product liability suit runs from the time of the injury, not from when the defective product is discovered when the defect would be obvious to a layperson while undertaking a reasonably diligent investigation at or shortly after the time of injury.

**Constitution, Takings Clause and Fraud:** Hurwitz v. Montgomery Village Foundation, USDMD Civ. No. JFM-98-2293, January 20, 1999, Unpublished. Takings Clause does not recognize the deprivation of such property as pre-printed materials where post office designation and ZIP codes are changed. Further, plaintiffs did not show that private defendants made false representations and without an underlying tort, there can be no cause of action for conspiracy.

### **U.S. DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA**

Torts, Federal Tort Claims Act: Webb v. U.S., 24 F. Supp.2d 608 (W.D.Va. 1998). Under Virginia law, healthcare professionals who wrongfully participate in sexual activity with patients, are engaged in activities outside of the scope of the professional's employment for vicarious liability. If it is outside of the scope of employment, then the United States is not a party and the Federal Torts Claims Act applies to a physician employed by the federal government.

