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## Developments in the District of Columbia Case Law

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# SURVEY

## DEVELOPMENTS IN DISTRICT OF COLUMBIA CASE LAW

### I. CRIMINAL LAW AND PROCEDURE

#### A. Park Police Jurisdiction

The District of Columbia Court of Appeals recently decided a case of first impression concerning park police jurisdiction.<sup>1</sup> In *Richardson v. United States*,<sup>2</sup> United States Park Police officers arrested the appellant for possession of a controlled substance.<sup>3</sup> The appellant contested jurisdiction because neither the alleged illegal activity nor the arrest occurred in the vicinity of a park.<sup>4</sup> The trial court denied the appellant's motion to suppress evidence that park police seized in a search.<sup>5</sup>

On appeal, the court examined the statutes and legislative history of the laws creating park police jurisdiction and concluded that Congress intended to confer concurrent jurisdiction to park police and metropolitan police.<sup>6</sup>

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1. Although the United States District Court for the District of Columbia ruled that the park police have jurisdiction throughout the District of Columbia, *United States v. Alatishe*, 616 F. Supp. 1406, 1410 (D.D.C. 1985), the District of Columbia Court of Appeals first addressed the issue in *Richardson v. United States*, 520 A.2d 692, 694 (D.C.), *cert. denied*, 108 S. Ct. 267 (1987).

2. 520 A.2d 692 (D.C. 1987).

3. *Id.* at 693. Police charged the appellant with possession of dilaudid, in violation of § 33-541(d) of the District of Columbia Code. *Id.*; see also D.C. CODE ANN. § 33-541(d) (Supp. 1987).

4. *Richardson*, 520 A.2d at 693.

5. *Id.* at 693-94. The park police seized a pill box containing dilaudid. *Id.* at 693.

6. *Id.* at 694-96. The court first examined an early statute that did not explicitly extend park police jurisdiction beyond "public squares and reservations in the District of Columbia." Act of Aug. 5, 1882, ch. 389, 22 Stat. 219, 243 (codified as amended at D.C. CODE ANN. § 4-201 (1981 & Supp. 1987)). However, a later enactment, which created authority for "special policemen," limited the jurisdiction of the "special policemen" to parks, but did not explicitly limit the jurisdiction of the regular park police. Act of May 27, 1924, ch. 199, §§ 4, 9, 43 Stat. 174, 175-76 (codified as amended at D.C. CODE ANN. §§ 4-201-205 (1981 & Supp. 1987)). Because of Congress' failure to limit park police jurisdiction, the court interpreted such inaction as giving park police concurrent jurisdiction with the metropolitan police. *Richardson*, 520 A.2d at 695-96. The court also considered that Congress had notice that the Department of the Interior, the federal agency to which the United States Park Police belong, took the position that park police officers had city-wide jurisdiction. *Id.* at 695.

Thus, the court held that United States Park Police jurisdiction to arrest extends beyond federal parks or reservations and encompasses all areas of the District of Columbia.<sup>7</sup>

### B. Searches and Seizures

The fourth amendment was the subject of a significant case that the District of Columbia Court of Appeals recently decided. In *Smith v. United States*,<sup>8</sup> the court loosely applied the articulable suspicion requirement of *Terry v. Ohio*.<sup>9</sup> In accord with their suspicion, the police observed the appellant talking to two persons who sold drugs to an undercover agent only minutes before.<sup>10</sup> When uniformed police officers approached the three, the appellant quickly walked away.<sup>11</sup> An officer followed the appellant, identified himself as a police officer, and asked the appellant to stop.<sup>12</sup> The appellant replied that he had nothing to do with the others and continued to walk away.<sup>13</sup> When the police officer placed his hand on the appellant's shoulder, the appellant reacted violently.<sup>14</sup> The ensuing scuffle resulted in the discovery of a pistol in the appellant's vest pocket and the arrest of the appellant for carrying a pistol without a license.<sup>15</sup> At trial the appellant moved to suppress the evidence, characterizing as unlawful the stop and the subsequent seizure.<sup>16</sup> The appellant argued that the circumstances did not provide a sufficient basis for a stop.<sup>17</sup> The trial court denied the appellant's motion to suppress.<sup>18</sup>

On appeal, the appellant reasserted his argument that the circumstances did not warrant a *Terry* stop.<sup>19</sup> With little discussion, the District of Columbia Court of Appeals found that the officer's observations and experience provided sufficient articulable suspicion to justify the stop.<sup>20</sup> The court cited

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7. *Richardson*, 520 A.2d at 693. However, in *United States v. Edelen*, 529 A.2d 774 (D.C. 1987), the District of Columbia Court of Appeals held that the District of Columbia Superior Court does not have authority pursuant to district law to issue search warrants to park police. *Id.* at 775.

8. 525 A.2d 200 (D.C. 1987).

9. *Id.* at 201-02; see also *Terry v. Ohio*, 392 U.S. 1 (1968).

10. *Smith*, 525 A.2d at 201.

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.* The appellant "swung his hand at [the police officer's] face." *Id.*

15. *Id.* The .22 caliber pistol was loaded. *Id.*

16. *Id.*

17. *Id.* Furthermore, the appellant argued that sufficient evidence to uphold a conviction did not exist. *Id.*

18. *Id.* (citing *Terry v. Ohio*, 392 U.S. 1 (1968)).

19. *Id.*

20. *Id.*

*United States v. Bennett*,<sup>21</sup> where it previously held that the court must look to the totality of police observations when determining whether a basis for a stop exists.<sup>22</sup> Applying *Bennett* to the instant case, the court found that the "totality of circumstances" provided sufficient articulable suspicion to stop the appellant.<sup>23</sup> The circumstances the court emphasized were the appellant's conversation with two men suspected of a recent drug sale to an undercover officer, the absence of any other persons in the area of the suspects, the police officer's knowledge that drug sales are often made by teams, and the high incidence of drug trafficking in the area.<sup>24</sup> The court also considered the appellant's attempt to leave, stating that it implied a "consciousness of guilt" that "weighs significantly in justifying the Fourth Amendment seizure."<sup>25</sup>

In a dissenting opinion, Judge Newman argued that the "articulable suspicion" in this case amounted to the police officer's observation of the appellant talking to individuals who fit the description of persons who had sold drugs to an undercover officer.<sup>26</sup> He maintained that guilt by association should have no "foothold in our Fourth Amendment jurisprudence."<sup>27</sup> Judge Newman cited two cases, *Sibron v. New York*<sup>28</sup> and *Ybarra v. Illinois*,<sup>29</sup> which ruled that conversing with or being near other criminal suspects does not, in itself, provide probable cause to search a person.<sup>30</sup> Judge Newman also disagreed with the majority's heavy reliance on the "consciousness of guilt" factor.<sup>31</sup> He argued that a person may have a legitimate

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21. 514 A.2d 414 (D.C. 1986).

22. *Smith v. United States*, 525 A.2d 200, 201 (D.C. 1987) (citing *United States v. Bennett*, 514 A.2d 414, 416 (D.C. 1986)).

23. *Id.* at 201-02.

24. *Id.* at 201.

25. *Id.* at 202. The court concluded, however, that "the matter is close." *Id.*

26. *Id.* (Newman, J., dissenting). He called the other facts cited by the majority "make-weight" factors. *Id.* (Newman, J., dissenting).

27. *Id.* at 202 (Newman, J., dissenting).

28. *Id.* at 202-03 (Newman, J., dissenting) (referring to *Sibron v. New York*, 392 U.S. 40 (1968)). *Sibron* was the companion case to *Terry v. Ohio*, 392 U.S. 1 (1968).

29. *Smith*, 525 A.2d at 203 (Newman, J., dissenting) (referring to *Ybarra v. Illinois*, 444 U.S. 85 (1979)).

30. *Id.* at 202-03 (Newman, J., dissenting) (citing *Sibron v. New York*, 392 U.S. 40, 62 (1968); *Ybarra v. Illinois*, 444 U.S. 85, 91 (1979)). The dissenting opinion in *Smith* noted that the officer had not seen the appellant and the other suspects pass any money or make any suspicious gestures. Thus, the arresting officer's asserted suspicion that the appellant constituted part of a distribution team proved inadequate because anyone in the proximity of the other suspects could have evoked the same suspicion. *Id.* at 204-05 (Newman, J., dissenting).

31. *Id.* at 205-06 (Newman, J., dissenting). On several occasions the District of Columbia Court of Appeals emphasized attempted flight to find "consciousness of guilt" and reasonable suspicion. See *United States v. Johnson*, 496 A.2d 592, 595-97 (D.C. 1985); *United States v. McCarthy*, 448 A.2d 267, 270 (D.C. 1982); *Franklin v. United States*, 382 A.2d 20, 22 (D.C.

desire to avoid police contact and that an innocent fear of such contact can motivate flight.<sup>32</sup> He further noted that the trial judge found that the government had not sufficiently shown that the appellant even knew that the person who asked him to stop was a police officer, enhancing his argument that the attempted flight by the appellant did not indicate consciousness of guilt.<sup>33</sup>

### C. Missing Witness Argument

In another case, the District of Columbia Court of Appeals recently clarified the permissible use of the "missing witness" argument.<sup>34</sup> In *Arnold v. United States*,<sup>35</sup> the court convicted the appellant of armed robbery of three patrons of a Connecticut Avenue drinking establishment.<sup>36</sup> The appellant's girlfriend and her sister testified at trial that the appellant was present at a

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1978); *Tobias v. United States*, 375 A.2d 491, 494 (D.C. 1977); *Stephenson v. United States*, 296 A.2d 606, 610 (D.C. 1972); *Smith v. United States*, 295 A.2d 64, 66 (D.C. 1972). However, in each case, other significant suspicious circumstances, or some other overt act by the suspect helped justify a stop or seizure. For example, in *United States v. Bennett*, 514 A.2d 414 (D.C. 1986), upon which the *Smith* court relied in part for its decision, the court found a reasonable basis for a stop because, in addition to the suspect's flight, police had seen him exchange money and stick his hand into his waistband. *Id.* at 414-15; see also *Johnson*, 496 A.2d at 594 (damaged car at late hour in high crime area); *McCarthy*, 448 A.2d at 268, 270 (suspicious handling of contents in auto ashtray and littering); *Franklin*, 382 A.2d at 22 (suspicious use of automobile); *Tobias*, 375 A.2d at 494 (exchanges of money for small objects); *Stephenson*, 296 A.2d at 610 (presence and suspicious activity in a normally deserted area in early morning); *Smith*, 295 A.2d at 65-66 (suspects searching automobiles).

32. *Smith*, 295 A.2d at 205-06 (Newman, J., dissenting).

33. *Id.* at 206 (Newman, J., dissenting). Judge Newman also argued that in cases where the court found "consciousness of guilt," the suspects ran from the scene when police arrived. *Id.* (Newman, J., dissenting) (citing *United States v. Bennett*, 514 A.2d 414, 414 (D.C. 1986); *Tobias v. United States*, 375 A.2d 491, 492 (D.C. 1977); *Lawrence v. United States*, 509 A.2d 614, 615 (D.C. 1968)).

34. The prosecution makes a missing witness argument when, in its closing statement, it argues that the defendant failed to produce a witness who could verify the defendant's testimony or alibi. The prosecutor attempts to draw an inference that the reason the defendant has not produced a witness is either because no witness exists or, if a witness is available, he would produce testimony unfavorable to the defendant. See *Graves v. United States*, 150 U.S. 118, 120-21 (1893).

In the District of Columbia, an attorney must obtain the court's permission before making a missing witness argument. The court, before granting permission, must determine (1) that the missing witness would be able to clarify the story and (2) that the missing witness is "peculiarly available" to the defendant. *Thomas v. United States*, 447 A.2d 52, 57-58 (D.C. 1982); see also *Graves*, 150 U.S. at 120-21.

35. 511 A.2d 399 (D.C. 1986).

36. *Id.* at 402. The victims were leaving the bar, located on Connecticut Avenue, N.W., when the robbery occurred. *Id.* Shortly after the robbery, police arrested the appellant near Fourteenth and Chapin Streets, N.W., in connection with another incident. *Id.* When police searched the appellant, they found property from the Connecticut Avenue robbery in his possession. *Id.*

house party during the time of the robbery.<sup>37</sup> Without asking permission from the court, the prosecution, in its closing statement, argued that the defendant failed to produce witnesses present at the party to verify his alibi.<sup>38</sup> According to the prosecution, the girlfriend and her sister had biased motives to testify on the defendant's behalf.<sup>39</sup> The trial court sustained the defense counsel's objection to the prosecution's line of argument but refused to give a correcting instruction to the jury.<sup>40</sup> On appeal of his conviction, the appellant sought reversal of his conviction by characterizing the missing witness argument as improper and substantially prejudicial to his defense.<sup>41</sup>

The District of Columbia Court of Appeals first examined the prosecutor's address to the jury and labelled it an "incomplete" missing witness argument.<sup>42</sup> The court called the argument "incomplete" because the prosecutor simply noted the absence of witnesses and did not directly ask the jury to draw an inference from the testimony that would prove damaging to the defendant.<sup>43</sup> Next, the court examined conflicting case law on the issue of whether or not the prosecution must obtain the trial court's permission prior to making an incomplete missing witness argument.<sup>44</sup> The court re-

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37. *Id.* at 415.

38. *Id.*

39. *Id.*

40. *Id.* A second attempt by the prosecution to advance the missing witness argument resulted in the court cautioning the prosecutor. *Id.* Thus the court prevented the prosecution from explicitly asking the jury to draw an inference that either the defendant did not attend the party and therefore his alibi was false, or, if he did attend the party, the reason the defendant did not call other witnesses was because their testimony would damage his case, i.e., that the defendant was not at the party at the time he had testified. *Id.*

41. *Id.* at 402.

42. *Id.* at 415-16.

43. *Id.* However, if the defense had not objected, the government might have continued its argument and directly asked the jury to infer that if the defendant could produce any other witnesses, their testimony would damage the defendant's case. If the prosecution actually asked the jury to make such an inference, the trial court would have ruled the prosecution's actions improper. The District of Columbia Court of Appeals previously ruled that, in this type situation, the party making the argument must first obtain the court's permission to do so. *Thomas v. United States*, 447 A.2d 52, 58 (D.C. 1982).

44. *Arnold*, 511 A.2d at 416. The court cited several cases decided by the District of Columbia Court of Appeals where prosecutors advanced "incomplete" missing witness arguments without the trial courts' permission. *Logan v. United States*, 489 A.2d 485, 490 (D.C. 1985) (no misconduct where the prosecution did not explicitly ask the jury to make an inference); *Parks v. United States*, 451 A.2d 591, 614 (D.C. 1982), *cert. denied*, 461 U.S. 945 (1983) (reference "did not constitute grave misconduct"); *Harvey v. United States*, 395 A.2d 92, 98 (D.C. 1978) (error, but not reversible error, because the prosecution did not advance a direct implication), *cert. denied*, 441 U.S. 936 (1979); *Fleming v. United States*, 310 A.2d 214, 220 (D.C. 1973) (failure to seek court's permission to make missing witness reference was harmless error); *Conyers v. United States*, 309 A.2d 309, 313 (D.C. 1973) (harmless error because of a curative instruction).

solved the conflict by holding that the judge must grant permission before counsel may make *any* missing witness argument, whether complete or not.<sup>45</sup> The court reasoned that this rule would help prevent improper inferences and thus avoid prejudicial error.<sup>46</sup> Applying the rule to this case, the court held the argument improper, but found the misconduct harmless because it lacked such severity as to substantially sway the jury.<sup>47</sup>

#### D. Sentencing Under Youth Rehabilitation Act

The District of Columbia Superior Court recently considered the legality of imposing sentences under the Youth Rehabilitation Amendment Act of 1985<sup>48</sup> (Youth Act) that are more lengthy than the originally imposed sentences.<sup>49</sup> In *United States v. Wheeler*,<sup>50</sup> the defendant received concurrent one year adult sentences for destruction of property and attempted unauthorized use of a motor vehicle.<sup>51</sup> The court suspended all but thirty days of each sentence and placed defendant on six months of supervised probation.<sup>52</sup> Three months later, the prosecutor charged the defendant in a second case with two counts of possession of a controlled substance.<sup>53</sup> After the defendant's conviction on those counts, the superior court revoked his probation on the earlier offenses. The court then sentenced the defendant to consecutive sentences under the Youth Act—six months for the destruction of property and twelve months for attempted unauthorized use of a motor vehicle.<sup>54</sup> The defendant moved to vacate the sentences on the ground that the judge, by imposing a maximum eighteen month Youth Act sentence, unlawfully increased the original twelve month concurrent sentences.<sup>55</sup>

The superior court first examined district law governing sentencing after revocation of probation.<sup>56</sup> The law allows the court to impose either the

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45. *Arnold*, 511 A.2d at 416.

46. *Id.*

47. *Id.* The court found that the prosecutor's initial statements about the missing witness were proper "because the law was uncertain." *Id.* Although the prosecution improperly continued the argument after the court sustained the defendant's objection, *id.* at 415, the court nonetheless decided that the jury "was not substantially swayed by the error." *Id.* at 416 (quoting *Kotteakos v. United States*, 328 U.S. 750, 765 (1946)).

48. D.C. CODE ANN. §§ 24-801 to -807 (1981 & Supp. 1987) [hereinafter Youth Act].

49. *United States v. Wheeler*, 115 Daily Wash. L. Rep. 2025, 2025 (D.C. Super. Ct., Sept. 25, 1987).

50. *Id.*

51. *Id.*; see also D.C. CODE ANN. §§ 22-103, 22-403 (1981 & Supp. 1987).

52. *Wheeler*, 115 Daily Wash. L. Rep. at 2025.

53. *Id.* at 2025, 2029.

54. *Id.* at 2029.

55. *Id.*

56. *Id.*

original sentence or any lesser one.<sup>57</sup> The District of Columbia Court of Appeals interpreted this provision to mean that the court could impose any sentence no more severe than the sentence originally imposed.<sup>58</sup> Thus, the modified maximum eighteen month Youth Act sentence would be appropriate only if it was punishment "no more severe than the original" twelve month maximum sentence.<sup>59</sup>

Because the District of Columbia Court of Appeals had not ruled on the specific aspect of the Youth Act at issue in *Wheeler*, the District of Columbia Superior Court examined *Moore v. United States*,<sup>60</sup> where the District of Columbia Court of Appeals previously ruled on the legality of imposing a Federal Youth Correction Act (FYCA)<sup>61</sup> sentence longer than the standard sentence for the same crime. In *Moore*, the District of Columbia Court of Appeals refused to find a more lengthy sentence under the FYCA "more severe" because youth offender treatment under FYCA provided less punishment and more rehabilitation than adult imprisonment.<sup>62</sup> The court reasoned, therefore, that the length of the sentence alone does not determine the sentence's severity.<sup>63</sup>

The superior court next found that the Youth Act had the same purposes and effects as the FYCA<sup>64</sup> and therefore the "more severe" standard set forth by the District of Columbia Court of Appeals in *Moore* applied.<sup>65</sup> Following this line of reasoning, the court found defendant's eighteen month maximum Youth Act sentence no more severe than the twelve month adult sentence.<sup>66</sup>

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57. *Id.*; D.C. CODE ANN. § 24-104 (1981 & Supp. 1987). That section reads, in part: "At any time during the probationary term . . . the court may revoke the order of probation and cause the rearrest of the probationer and impose a sentence and require him to serve the sentence . . . originally imposed . . . or any lesser sentence." *Id.*

58. *Mulky v. United States*, 451 A.2d 855, 856 (D.C. 1982). The provision interpreted in *Mulky* did not include the words "or any lesser sentence." Compare D.C. CODE ANN. § 24-104 (1981) (court may require probationer to serve the sentence originally imposed) with D.C. CODE ANN. § 24-104 (1981 & Supp. 1987) (court may require probationer to serve sentence originally imposed, or any lesser sentence).

59. *Wheeler*, 115 Wash. Daily L. Rep. at 2029 (citing *Mulky v. United States*, 456 A.2d 885, 856 (D.C. 1982)).

60. *Id.* at 2029, 2031; see also *Moore v. United States*, 468 A.2d 1331 (D.C. 1983).

61. 18 U.S.C. §§ 5005-5026 (1982 & Supp. IV 1986) (repealed 1984) [hereinafter FYCA].

62. *Moore*, 468 A.2d at 1334-35.

63. *Id.*

64. *Wheeler*, 115 Daily Wash. L. Rep. at 2031-32.

65. *Id.*

66. *Id.* at 2032. The court pointed to several factors in reaching its decision: the Youth Act's goal of rehabilitation, not simply punishment; youth offenders segregation from hardened adult criminals; less infliction of psychological trauma; and the expungement of records of conviction. *Id.*



### E. The Castle Doctrine

The District of Columbia Court of Appeals recently limited the application of the "castle doctrine"<sup>67</sup> in the District of Columbia. In *Cooper v. United States*,<sup>68</sup> the defendant shot and killed his brother during a quarrel at their home.<sup>69</sup> Defendant asserted a claim of self-defense, arguing that his brother attacked him.<sup>70</sup> At trial, the court gave the jury a standard self-defense instruction, explaining that the defendant could justify use of deadly force for self-defense purposes only if the circumstances reasonably required protection against imminent danger of death or serious bodily injury.<sup>71</sup> The instruction did not impose a duty to retreat, but called a failure to retreat a factor that the jury may consider "together with all the other circumstances in determining whether he went further in repelling the danger"<sup>72</sup> than justified. The defendant objected and requested a castle doctrine instruction to the effect that "a person has no duty whatsoever to retreat when attacked in his own home."<sup>73</sup>

The trial court ruled that the castle doctrine applied to a person in his home attacked by a stranger, but not to altercations between co-occupants of the abode.<sup>74</sup> Therefore, the trial court refused the defendant's request for a castle doctrine instruction.<sup>75</sup> The jury found the defendant guilty of armed

67. The castle doctrine provides an exception to the duty to retreat before using deadly force to defend oneself. The doctrine applies when the defendant repels an attack in his own home. See *Alberty v. United States*, 162 U.S. 499, 507-08 (1896); *Beard v. United States*, 158 U.S. 550, 559-63 (1895).

Some states have codified this exception. See, e.g., N.Y. PENAL LAW § 35.15(2)(a) (McKinney 1987) ("[E]xcept that he is under no duty to retreat if he is: (i) in his dwelling . . ."). The District of Columbia Code contains no provision concerning the duty to retreat. See *Cooper v. United States*, 512 A.2d 1002, 1004-06 (D.C. 1986) (the court reviewed case law to determine the duty to retreat).

68. 512 A.2d 1002 (D.C. 1986).

69. *Id.* at 1003.

70. *Id.*

71. The instruction closely followed the language of a standardized jury instruction. CRIMINAL JURY INSTRUCTIONS FOR THE DISTRICT OF COLUMBIA, Instruction 5.16B (13th ed. 1978). The trial judge instructed the jury to determine whether the defendant, considering his failure to retreat, exceeded the allowable response, under the circumstances, in repelling the danger. *Cooper*, 512 A.2d at 1003. The judge explained that a person must attempt to retreat and avoid the taking of life unless he actually fears imminent danger of death or serious bodily injury. *Id.*

72. *Cooper*, 512 A.2d at 1003. This instruction follows the holding in *Gillis v. United States*, 400 A.2d 311 (D.C. 1979). The *Gillis* court imposed no duty to retreat on the defendant, but allowed the jury to consider whether the defendant could have avoided further confrontation by retreating, and therefore have eliminated the need for using deadly force. *Id.* at 313.

73. *Cooper*, 512 A.2d at 1004.

74. *Id.*

75. *Id.*

voluntary manslaughter.<sup>76</sup> The defendant appealed, claiming that the trial court erred in refusing to give the jury a castle doctrine instruction.<sup>77</sup>

In *Cooper*, the District of Columbia Court of Appeals addressed, for the first time, the question of an occupant's duty to retreat when assaulted by a co-occupant.<sup>78</sup> The court examined cases from other jurisdictions and found that the majority rule allows a castle doctrine instruction when a defendant, claiming self-defense, is attacked in his home by a co-occupant.<sup>79</sup> The court, however, adopted the reasoning of a minority of courts that hold the castle doctrine does not apply in such circumstances, because co-occupants "have a heightened obligation to treat each other with a degree of tolerance and respect" and that such individuals must "attempt to defuse the situation."<sup>80</sup> The court noted that this rule does not leave victims completely vulnerable because a person could use deadly force to protect himself when an attempt to retreat would prove futile.<sup>81</sup>

## II. EVIDENCE

The District of Columbia Court of Appeals clarified the proper use of convictions for impeachment purposes in *Langley v. United States*.<sup>82</sup> In *Langley*, a trial for assault with intent to commit rape, the defendant brought a motion in limine to preclude reference to two earlier jury verdicts finding him guilty of assault and rape.<sup>83</sup> The defendant contended that the prosecution could not utilize the verdicts for impeachment purposes because sentencing for those crimes had not occurred.<sup>84</sup> The trial court ruled that the prosecution could impeach the defendant's credibility as a witness by questioning him about the existence of prior convictions, but the prosecution could not elicit from him the precise nature of the offenses.<sup>85</sup> As a result of

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76. *Id.*

77. *Id.*

78. *Id.* at 1005. The court addressed only this narrow question, and pointed out that "the status of the castle doctrine in the District of Columbia has never been squarely decided." *Id.* (citing *United States v. Peterson*, 483 F.2d 1222, 1237 (D.C. Cir.), *cert. denied*, 414 U.S. 1007 (1973)).

79. *Id.* at 1005-06. The court also noted that some jurisdictions follow the American rule which holds that "one can stand one's ground regardless of where one is assaulted, or by whom." *Id.* The castle doctrine would have no bearing in those jurisdictions. *Id.* Because the court rejected the application of the American rule for the District of Columbia in *Gillis v. United States*, 400 A.2d 311, 313 (D.C. 1979), jurisdictions following that rule could provide no guidance. *Cooper*, 512 A.2d at 1005.

80. *Cooper*, 512 A.2d at 1006.

81. *Id.* (citing *Conner v. State*, 361 So. 2d 774, 776 (Fla. Dist. Ct. App. 1978)).

82. 515 A.2d 729 (D.C. 1986).

83. *Id.* at 733.

84. *Id.* at 734.

85. *Id.*

this ruling, the defendant chose not to testify at trial.<sup>86</sup>

The District of Columbia Court of Appeals held that the prosecution could not use prior guilty verdicts for impeachment purposes until the trial court had imposed a sentence.<sup>87</sup> The court concluded that the trial court's ruling contravened the statutory intent of section 14-305 of the District of Columbia Code,<sup>88</sup> which defines the permissible scope of impeachment of a witness with a prior conviction, and thus constituted reversible error.<sup>89</sup> The court based its holding upon the traditional view that a conviction does not become final and appealable until the defendant receives a sentence.<sup>90</sup> The District of Columbia Court of Appeals recognized that several of the federal circuit courts of appeals had admitted guilty verdicts for impeachment pur-

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86. *Id.* The District of Columbia Court of Appeals declined to apply the rule pronounced by the Supreme Court in *Luce v. United States*, 469 U.S. 38 (1984). *Langley*, 515 A.2d at 733. The *Luce* Court held that a defendant must testify at trial in order to preserve the issue of improper impeachment for appeal. 469 U.S. at 43. The court of appeals determined that *Luce* would have prospective effect, and because *Luce* was decided after defendant's trial, its holding would not apply in the instant case. *Langley*, 515 A.2d at 733. Therefore, the court declined to address the applicability of the *Luce* decision to the defendant's case. *Id.*

87. *Langley*, 515 A.2d at 734. Although the District of Columbia courts deemed a "conviction" to constitute a final judgment after the rendering of a sentence, they never expressly addressed the use of a guilty verdict as a conviction for impeachment purposes. *Id.* at 733-34; see also *McDonald v. United States*, 415 A.2d 538, 541 (D.C. 1980) (for purposes of appeal, defendant's placement on probation after conviction held to be the "functional equivalent" of sentencing); *Thomas v. United States*, 121 F.2d 905, 907 (D.C. Cir. 1941) (for impeachment purposes a conviction is equivalent to a plea or guilty verdict and "in addition, a judgment and sentence pronounced by the court"); *Crawford v. United States*, 41 F.2d 979, 980 (D.C. Cir. 1930) (a guilty plea or verdict "must be followed by a judgment and sentence of the court" to constitute a conviction). In *Godfrey v. United States*, 454 A.2d 293 (D.C. 1982), the District of Columbia Court of Appeals held that a prior guilty plea would not constitute a "conviction" for impeachment purposes but did not discuss the effect of a prior guilty verdict. *Id.* at 305.

88. *Langley*, 515 A.2d at 734; see also D.C. CODE ANN. § 14-305 (1981). Section 14-305 is analogous to rule 609 of the Federal Rules of Evidence. Compare FED. R. EVID. 609 (impeachment by evidence of conviction of crime) with D.C. CODE ANN. § 14-305 (1981) (competency of witnesses; impeachment by evidence of conviction of crime). The pertinent language of § 14-305 provides that a witness' credibility may be impeached by introducing a prior criminal conviction of a witness where the underlying offense "was punishable by death or imprisonment in excess of one year under the law under which he or she was convicted, or . . . involved dishonesty or false statement (regardless of punishment)." D.C. CODE ANN. § 14-305(b)(1) (1981).

89. *Langley*, 515 A.2d at 734-35. The court reasoned that the language of the statute itself, as well as its historical interpretation by District of Columbia courts, supported the court's definition of a "conviction" for impeachment purposes. *Id.* at 734.

90. *Id.* The court also noted that the statutory language of § 14-305 reinforced this position by referring to the effect an appeal from a conviction would have upon the admissibility of a conviction for impeachment purposes. *Id.* The court found that § 14-305 implicitly assumed that the defendant had already received a sentence, because a defendant cannot appeal a conviction until that time. *Id.*

poses under rule 609 of the Federal Rules of Evidence.<sup>91</sup> The court observed, however, that significant differences existed between rule 609 and section 14-305 of the District of Columbia Code.<sup>92</sup> Under rule 609, the court noted, a trial court has the discretion to exclude evidence of a prior felony conviction if it determines that the prejudicial effect of the evidence upon the defendant significantly outweighs its probative value for the government.<sup>93</sup> In contrast, the District of Columbia Court of Appeals emphasized that section 14-305 is an inclusionary rule that mandates the admission of all prior felony convictions introduced for impeachment purposes and allows the judge no discretion.<sup>94</sup> The court reasoned that because the judge could not consider the prejudicial impact of the guilty verdicts, counsel could not introduce them for impeachment purposes until they were final.<sup>95</sup>

*McAdoo v. United States*<sup>96</sup> presented a second question regarding the permissible scope of impeachment.<sup>97</sup> In *McAdoo*, the jury convicted the defendant of first-degree murder.<sup>98</sup> On appeal, the defendant claimed that the prosecutor's use of his juvenile record to impeach his only character witness constituted reversible error.<sup>99</sup> The character witness testified at trial that the defendant's reputation for peacefulness in the community was that of "a very fine young man."<sup>100</sup> On cross-examination, the prosecutor questioned the witness as to whether he had heard of the defendant's juvenile record for burglary, armed robbery, and attempted armed robbery.<sup>101</sup> The witness stated that he had not heard of these adjudications before.<sup>102</sup>

Upon review, the District of Columbia Court of Appeals considered, for the first time, the propriety of using a defendant's juvenile adjudications to

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91. *Id.*

92. *Id.*

93. *Id.* at 734-35. The wording of rule 609(a)(1) of the Federal Rules of Evidence, however, is not discretionary as the court intimated. Rule 609 requires the trial court to balance the probative value of the conviction against its prejudicial effect upon the defendant in criminal cases. FED. R. EVID. 609. The rule only applies to felonies and further requires that the court determine "that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant." FED. R. EVID. 609(a)(1). *But cf.* FED. R. EVID. 609(a)(2) (convictions involving dishonesty are always admissible).

94. *Langley*, 515 A.2d at 735.

95. *Id.*

96. 515 A.2d 412 (D.C. 1986).

97. *Id.*

98. *Id.* at 414.

99. *Id.* The defendant also contended that he did not receive effective assistance of counsel, in violation of his sixth amendment right. *Id.* at 419. Although the court did find defense counsel's performance deficient in several respects, it concluded that these transgressions did not amount to a denial of a fair and reliable trial. *Id.* at 419-20.

100. *Id.* at 417.

101. *Id.*

102. *Id.*

impeach the defendant's character witnesses.<sup>103</sup> The court held such impeachment impermissible in the District of Columbia Superior Court.<sup>104</sup> Although the court acknowledged impeachment as the goal behind cross-examination of a defendant's character witnesses about a defendant's juvenile adjudications,<sup>105</sup> the court reasoned that the likelihood of prejudice to the defendant in admitting juvenile adjudications outweighed the slight probative value of such adjudications to the credibility of character witnesses.<sup>106</sup> The court noted that local statutes mandate the confidentiality of juvenile records,<sup>107</sup> increasing the likelihood that a witness would have had little, if any, opportunity to hear others talk about the defendant's prior record.<sup>108</sup>

Although *McAdoo* flatly forbade the use of a defendant's juvenile adjudications to impeach the defendant's character witnesses, the subsequent case of *Devore v. United States*<sup>109</sup> weakened the force of this prohibition with its holding that counsel may question a character witness about the *wrongful acts* underlying a juvenile adjudication.<sup>110</sup> The court interpreted *McAdoo* as signifying that the "traditional assumption" of community awareness of a defendant's prior convictions did not apply with juvenile adjudications because of their confidentiality.<sup>111</sup> However, the court recognized the higher probability of community awareness of the wrongful acts underlying a juvenile arrest or adjudication, because the court considered it more likely that

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103. *Id.* at 418. The court noted that other jurisdictions disagree on this issue. *Id.* To illustrate this division, the court compared *State v. Holzworth*, 201 Mont. 54, 56-57, 651 P.2d 1255, 1256 (1982), where the Montana Supreme Court absolutely forbade the prosecution from referring to juvenile adjudications in cross-examining character witnesses, with *Lineback v. State*, 260 Ind. 503, 511, 301 N.E.2d 636, 637 (1973), *cert. denied*, 415 U.S. 929 (1974), where the Indiana Supreme Court permitted such inquiry. *McAdoo*, 515 A.2d at 418.

104. *McAdoo*, 515 A.2d at 418. The court noted that generally, a witness may not be impeached with his own juvenile record because a juvenile adjudication does not carry the same connotations as the criminal conviction of an adult offender. *Id.*; *see also* *Smith v. United States*, 392 A.2d 990, 993 (D.C. 1978); *cf.* *Tabron v. United States*, 410 A.2d 209, 212 (D.C. 1979). Therefore, a juvenile adjudication is not as probative of the reliability of a witness as is a criminal conviction. *McAdoo*, 515 A.2d at 418; *see also* *Brown v. United States*, 338 F.2d 543, 547 (D.C. Cir. 1964).

105. *McAdoo*, 515 A.2d at 418.

106. *Id.*

107. *Id.*

108. *Id.* at 418-19. The District of Columbia statute which prescribes the confidentiality of juvenile case records is § 16-2331. D.C. CODE ANN. § 16-2331 (1981); *see also id.* § 16-2316(e) (requiring juvenile hearings closed to the general public); *id.* §§ 16-2316(e), 16-2335 (requiring the sealing of juvenile records).

109. 530 A.2d 1173 (D.C. 1987).

110. *Id.* at 1175.

111. *Id.* Writing for the court, Judge Steadman maintained that the court's holding would not indirectly defeat the purpose of mandating confidentiality for juvenile adjudications because there are exceptions to this rule, and because the defendant himself elects to put on character witnesses thereby running the risk of their impeachment. *Id.* at 1175-76.

members of the community would have heard of the commission of the acts themselves.<sup>112</sup> The court, however, emphasized that the trial court must continue to weigh carefully the probative value and the prejudicial effect of permitting questions regarding a defendant's juvenile conduct.<sup>113</sup>

The District of Columbia Court of Appeals examined a third claim of improper impeachment in the case of *Brown v. United States*.<sup>114</sup> The defendant in *Brown* appealed her conviction for assault with a deadly weapon on the grounds that the prosecution improperly impeached her testimony as a witness at trial with two prior convictions for solicitation of prostitution.<sup>115</sup> The District of Columbia Court of Appeals held these convictions admissible under the provision of section 14-305 of the District of Columbia Code which allows impeachment of a witness by prior convictions involving "dishonesty or false statement."<sup>116</sup> The court explained that Congress intended section 14-305 to exclude offenses involving "passion and short temper" from those properly employed to impeach a witness.<sup>117</sup> The court stated that it had previously held convictions for such crimes as attempted larceny<sup>118</sup> and narcotics possession<sup>119</sup> admissible under section 14-305<sup>120</sup> and could find no rational basis to distinguish solicitation of prostitution from these offenses because none of those offenses involved "passion and short temper."<sup>121</sup> Thus, the court added prostitution to its list of crimes involving "dishonesty or false statement."

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112. *Id.* at 1175. The court concluded that the trial judge had not abused his discretion in ruling that the prosecutor could question the character witness about the defendant's actions as a juvenile. *Id.* at 1176. However, the court vacated one of the two convictions on double jeopardy grounds. *Id.* at 1176-77.

113. *Id.*

114. 518 A.2d 446 (D.C. 1986).

115. *Id.* at 447.

116. *Id.* Under § 22-2701 of the District of Columbia Code an offender may not be sentenced to more than ninety days of imprisonment for the solicitation of prostitution. D.C. CODE ANN. § 22-2701 (1981). Therefore, impeachment was impossible under § 14-305(b)(1)(A), because it is restricted to offenses punishable by death or imprisonment for more than one year. D.C. CODE ANN. § 14-305(b)(1)(A) (1981). Consequently, the prosecutor's only recourse was to attempt impeachment under § 14-305(b)(1)(B), which encompasses any offense involving dishonesty or false statement, regardless of the possible punishment. *Id.* § 14-305(b)(1)(B); see also *supra* note 88.

117. *Brown*, 518 A.2d at 447; see *Bates v. United States*, 403 A.2d 1159, 1160-62 (D.C. 1979).

118. *Baptist v. United States*, 466 A.2d 452, 458-59 (D.C. 1983).

119. *Durant v. United States*, 292 A.2d 157, 161 (D.C. 1972), *cert. denied*, 409 U.S. 1127 (1973).

120. *Brown*, 518 A.2d at 446. The court also listed the offenses of attempted housebreaking, *Hampton v. United States*, 340 A.2d 813, 816-17 (D.C. 1975), and carrying a pistol without a license, *Williams v. United States*, 337 A.2d 772, 775-76 (D.C. 1975).

121. *Brown*, 518 A.2d at 447.

The District of Columbia Court of Appeals scrutinized the sufficiency of a proffer of bias evidence in *Jones v. United States*.<sup>122</sup> In *Jones*, the defendant intended to illustrate at trial a government witness' bias against the defendant as a result of a previous drug transaction between the two.<sup>123</sup> The defendant intended to elicit testimony from the witness revealing that the witness had once sold the defendant marijuana for which the defendant failed to pay.<sup>124</sup> At trial, the prosecutor objected when the defense counsel questioned the government witness as to his involvement with the sale of marijuana.<sup>125</sup> The defense counsel informed the judge in his proffer that the defendant and the witness once engaged in a drug transaction with which the witness had been "dissatisfied."<sup>126</sup> The judge, however, sustained the objection.<sup>127</sup>

On appeal of his conviction, the defendant argued that the trial court violated his sixth amendment right of confrontation when the judge limited his cross-examination of the government's witness.<sup>128</sup> The District of Columbia Court of Appeals upheld the trial judge's determination that the defense counsel's proffer did not provide a sufficient basis for the judge to determine whether or not the proposed line of questioning might elicit testimony probative of bias.<sup>129</sup> While the court did not require an exhaustive proffer of facts, the court found the defense counsel's mere mention of a "dissatisfying" drug transaction too vague to survive objection.<sup>130</sup> The court thought the proffer deficient absent an explanation as to how the witness' bias resulted from a drug transaction.<sup>131</sup> The District of Columbia Court of Appeals suggested that a sufficient proffer would include specific information as

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122. 516 A.2d 513 (D.C. 1986).

123. *Id.* at 516-17.

124. *Id.* at 517.

125. *Id.* at 516. Defense counsel asked the witness, "And it's also a fact that on occasion you have also sold marijuana, isn't that correct?" *Id.*

126. *Id.* In his proffer to the court, defense counsel stated, "Your Honor, the good faith basis of that question is that Mr. Jones told me that Mr. Jackson has sold him marijuana on previous occasions and that that is a motive for why he is testifying. It is bias, Your Honor." *Id.* The court then questioned defense counsel as to why the transaction would cause the witness to be biased and counsel replied, "As I understand it, Your Honor, there was something that at one point in time, there was something wrong with one of the transactions. I think it was only one transaction. And Mr. Jackson was dissatisfied with it. The way I understand it from Mr. Jones." *Id.*

127. *Id.* at 517.

128. *Id.* at 516.

129. *Id.* at 517. The court indicated that the trial judge has sound discretion over the subjects and extent of cross-examination, *id.* (citing *In re C.B.N.*, 499 A.2d 1215, 1218 (D.C. 1985)), although it conceded that "bias is always a proper subject of cross-examination." *Id.* (quoting *Springer v. United States*, 388 A.2d 846, 855 (D.C. 1978)).

130. *Id.*

131. *Id.*

to what exactly transpired, the parties involved, when the event occurred, and where it took place.<sup>132</sup>

Judge Burgess dissented from the majority opinion and maintained that a sufficient proffer requires only good faith and an illustration of the relevant bias.<sup>133</sup> In this case, he concluded that the trial judge abused his discretion in forbidding the defense counsel's line of questioning because it adequately met these criteria.<sup>134</sup> Judge Burgess criticized the majority's desire for an explanation of the witness' dissatisfaction with the transaction.<sup>135</sup> Such a requirement, he submitted, conflicted with the established standard of good faith which only prohibits a proffer from being "inherently incredible" and knowingly false.<sup>136</sup>

### III. CIVIL LAW AND PROCEDURE

#### A. Discovery

The District of Columbia Court of Appeals narrowed the scope of discovery in *Plough, Inc. v. National Academy of Sciences*.<sup>137</sup> In *Plough*, the trial judge issued a protective order allowing the National Academy of Sciences (NAS) to withhold from discovery confidential documents.<sup>138</sup> *Plough* arose

132. *Id.* at 518. The court referred to the case of *Best v. United States*, 328 A.2d 378 (D.C. 1974), as an example where the defense counsel's proffer was sufficient because it met these criteria. *Brown*, 516 A.2d at 518. In *Best*, the prosecutor questioned the relevancy of defense counsel's cross-examination of the arresting police officer. *Best*, 328 A.2d at 380. The defense counsel proffered the following statement:

Your Honor, on the day of the incident this officer struck Mr. Best and put him in the hospital and he was taken to the hospital that evening. There is evidence of police brutality and it is admissible to show bias on the part of the police officer. . . . It's perfectly admissible to show bias.

*Id.*

133. *Jones*, 516 A.2d at 523 (Burgess, J., dissenting). Judge Burgess determined that the proffer adequately met the test for relevance as it need only possess the "potential" to illustrate bias. *Id.* at 521 (Burgess, J., dissenting) (quoting *Flecher v. United States*, 358 A.2d 322, 324 (D.C.), *cert. denied*, 429 U.S. 977 (1976)). He further assumed that defense counsel made the proffer in good faith. *Id.* (Burgess, J., dissenting).

134. *Id.* (Burgess, J., dissenting).

135. *Id.* at 521-22 (Burgess, J., dissenting); *see also* *United States v. Pugh*, 436 F.2d 222, 225 (D.C. Cir. 1970) (no factual foundation is required to support a line of questioning on cross-examination, only a "well reasoned suspicion" that a circumstance might be true); *Collins v. United States*, 491 A.2d 480, 487 (D.C. 1985) (follows the "well-reasoned suspicion" standard articulated in *United States v. Pugh*, 436 F.2d 222, 225 (D.C. Cir. 1970) (regarding questions as to credibility), *cert. denied*, 475 U.S. 1124 (1986)); *Hazel v. United States*, 319 A.2d 136, 139 (D.C. 1974) (proper for attorney to present witness on cross-examination with a hypothetical which was "neither known by counsel to be false, nor inherently incredible").

136. *Jones*, 516 A.2d at 520 (Burgess, J., dissenting) (quoting *Hazel v. United States*, 319 A.2d 136, 139 (D.C. 1974)).

137. 530 A.2d 1152 (D.C. 1987).

138. *Id.* at 1155.



out of a separate products liability case in which the plaintiff, Bunch, alleged that the aspirin produced by defendant Plough caused him to develop Reye Syndrome.<sup>139</sup> The plaintiff based his claim on NAS studies that linked aspirin to the disease.<sup>140</sup> During discovery, Plough subpoenaed NAS documents relating to the study,<sup>141</sup> which included preliminary reports and documents containing confidential deliberations from closed NAS committee meetings.<sup>142</sup> When the NAS refused to comply with Plough's discovery request, Plough moved to compel discovery.<sup>143</sup>

The trial judge initially denied NAS's motion for a protective order and directed the NAS to produce the documents, concluding that Plough's right to view the documents outweighed NAS's right to confidentiality.<sup>144</sup> However, the judge entered a superseding order granting the NAS's motion for a protective order in light of a letter received from the plaintiff that he would not introduce the report into evidence at trial.<sup>145</sup> The letter weakened Plough's argument that the documents were necessary and thus, the trial court concluded that the NAS's interest in confidentiality outweighed Plough's need for the documents.<sup>146</sup>

The District of Columbia Court of Appeals affirmed the decision of the trial judge denying the plaintiff's request to view the documents.<sup>147</sup> First, the court stated that the party seeking to withhold materials on the basis of confidentiality has the burden of demonstrating the harm involved in the

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139. *Id.* at 1154.

140. *Id.* The United States Department of Health and Human Services together with a private contractor conducted a Pilot Study that linked aspirin to Reye Syndrome. *Id.* The National Academy of Sciences (NAS), a nonprofit organization, was retained to critique the Pilot Study. *Id.* NAS issued several reports approving of the study methodology, agreeing with its conclusions, and recommending the release of the study to the public. *Id.* The *New England Journal of Medicine* subsequently published the Pilot Study. *Public Health Service Study on Reye Syndrome and Medications, Report of the Pilot Phase*, 313 *NEW ENG. J. MED.* 849 (1985).

141. 530 A.2d at 1154.

142. Plough requested documents that the court listed in three categories: those outlining the committee's confidential discussions concerning the methodology of the Pilot Study; early drafts of the committee's reports; and documents pertaining to the NAS's confidential internal review of the reports. *Id.*

143. *Id.*

144. *Id.* at 1155.

145. *Id.* Concerning the letter the court said, "[t]his letter stated that counsel had read five NAS reports and had 'no intention of relying on these reports at trial for any purpose.'" *Id.* Plough argued that even if the court did not admit the reports into evidence at trial, the reports had received a great deal of publicity and the plaintiff's experts would inevitably refer to the reports. *Id.* at 1159. Therefore, to rebut the validity of the NAS reports, Plough argued the necessity of the documents. *Id.*

146. *Id.* at 1155.

147. *Id.* at 1160-61.

disclosure.<sup>148</sup> If the party seeking to withhold meets its burden, the other party must then establish the relevance and necessity of the disclosure.<sup>149</sup> If both sides meet their burdens, the trial judge balances the parties' interests.<sup>150</sup> The court then concluded that no real necessity existed and that the NAS's need for confidentiality outweighed Plough's need for the documents.<sup>151</sup>

The court agreed with the NAS that, "[c]riticism would be less than frank if subject to disclosure" to outside parties, even if the court limited the disclosure through a protective order.<sup>152</sup> Plough argued the necessity of obtaining the deliberative documents in order to rebut the NAS evaluation of the Pilot Report, the government report linking aspirin to Reye Syndrome.<sup>153</sup> While the court conceded the relevance of the documents, it disputed Plough's claim of necessity,<sup>154</sup> particularly because Plough had obtained access to the raw data.<sup>155</sup> The court recognized this information, together with expert testimony, as sufficient to rebut the validity of the Pilot Report.<sup>156</sup>

The court presented two reasons for supporting the nondisclosure of institutional review panel deliberations.<sup>157</sup> First, the court reasoned that disclosure would have a "chilling" effect on the deliberative process.<sup>158</sup> Further, the court recognized a principle that extends a "qualified privilege" to insti-

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148. *Id.* at 1155 (citing *Centurian Indus. v. Warren Steurer & Assoc.*, 665 F.2d 323, 325 (10th Cir. 1981); C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2043, at 301 (1970)).

149. *Id.* (citing *Centurian Indus. v. Warren Steurer & Assoc.*, 655 F.2d 323, 325 (10th Cir. 1981); *Coca-Cola Bottling Co. v. Coca-Cola Co.*, 107 F.R.D. 288, 292 (D. Del. 1985)).

150. *Id.* at 1156 (citing C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2043, at 301-02 (1970)).

151. *Id.* at 1160.

152. *Id.* at 1158.

153. *Id.* at 1160. The United States Department of Health and Human Services and Westat, Inc. conducted the pilot study to determine the relationship between aspirin and Reye Syndrome. *Id.* The result of the study indicated a "strong association" between aspirin and Reye Syndrome. *Id.*

154. *Id.* at 1159-60. The court stated that "Plough is, at bottom, grounding its claim of the necessity of these documents on its desire to rebut NAS's prestige." *Id.* at 1160.

155. *Id.* The Court stated that because Plough had access to the raw material, he was not faced with the risk of "being presented at trial with a study which it cannot challenge for lack of data," but concerned with "rebutting an *evaluation* of a scientific study." *Id.* at 1159.

156. *Id.* at 1159-60.

157. *Id.* at 1157-58.

158. *Id.* at 1157. The court cited *Dow Chemical Co. v. Allen*, 672 F.2d 1262 (7th Cir. 1982), in which the judge refused to enforce the subpoena, concluding that doing so would have a chilling effect by leaving researchers "with the knowledge throughout continuation of their studies that the fruits of their labors had been appropriated by and were being scrutinized by a not-unbiased third party whose interests were arguably antithetical to theirs." *Id.* at 1276.

tutional review panels.<sup>159</sup> This privilege acts to shield internal panels from inquisitive outsiders.<sup>160</sup> The court concluded that the interest in “unimpeded criticism and self-analysis supporting confidentiality of the deliberations of the NAS review panels” outweighed Plough’s interest in obtaining the documents.<sup>161</sup>

*B. The District of Columbia: A Stateless Entity Not Subject to Diversity Jurisdiction*

In *Long v. District of Columbia*<sup>162</sup> the United States Court of Appeals for the District of Columbia Circuit rendered it impossible for parties in a diversity case to sue the District of Columbia in federal court.<sup>163</sup> The plaintiff filed suit against the District of Columbia and the Potomac Electric Power Company (PEPCO),<sup>164</sup> after an accident at a district intersection resulted in the death of her husband.<sup>165</sup> The accident occurred at an intersection with nonoperational traffic signals.<sup>166</sup> The jury returned a verdict in favor of the plaintiff against both the District and PEPCO.<sup>167</sup>

On appeal, the District contended that the lower court lacked subject matter jurisdiction.<sup>168</sup> The court of appeals first considered whether a party could sue the District in diversity. The court answered in the negative because while the diversity statute<sup>169</sup> requires that the matter in controversy involve “citizens of different states,” the District does not have the characteristics of a citizen of a state under the diversity statute.<sup>170</sup> The court noted that the Supreme Court has held that the diversity statute “impliedly re-

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159. *Plough*, 530 A.2d at 1158. The court noted that the concept of a “qualified privilege” has been extended to hospital staff committees that review clinical work performed at the hospital. *Id.*

160. *Id.*

161. *Id.* at 1158-60. The court went on to state that “[t]he review process is a critical element in the publication of an Academy report, guaranteeing that each report is technically sound and that it creditably represents the institution.” *Id.* at 1158.

162. 820 F.2d 409 (D.C. Cir. 1987).

163. *Id.* at 414.

164. *Id.* at 410.

165. *Id.* at 411-12.

166. *Id.* at 411.

167. *Id.* at 412.

168. *Id.* at 412-17. PEPCO, on the other hand, argued that substantive tort law principles entitled it to a judgment notwithstanding the verdict. *Id.* at 417. The power company argued that it owed no duty to the public to maintain traffic signals in accordance with its contract with the District. *Id.* In the alternative, PEPCO argued that even if it owed a duty to motorists, no PEPCO employee breached that duty. *Id.*

169. *Id.* at 412 (citing 28 U.S.C. § 1332 (1982)).

170. *Id.* at 416. The court stated that “the District is indeed a “stateless” entity. *Id.*

jected the exercise of jurisdiction over the particular nonfederal claim."<sup>171</sup> The court stated that the District's status as a "stateless entity" compelled a finding that the District was neither subject to diversity jurisdiction nor pendent party jurisdiction in a case based on diversity jurisdiction.<sup>172</sup>

### C. Tort Liability for Suicide

The District of Columbia Court of Appeals recently established the standard for deciding when a plaintiff may recover damages for the suicide of another.<sup>173</sup> In *District of Columbia v. Peters*,<sup>174</sup> the decedent, Peters, assaulted a police officer, prompting the officer to shoot him.<sup>175</sup> The gunshot wound paralyzed Peters from the chest down.<sup>176</sup> Consequently, Peters and his wife filed suit against the officer alleging use of excessive force and against the District for failing to provide the police with adequate training.<sup>177</sup> After the filing of the complaint the husband committed suicide.<sup>178</sup> The wife amended her complaint to include a wrongful death and survival action.<sup>179</sup> The jury awarded the plaintiff a verdict of \$400,000.<sup>180</sup>

The District of Columbia Court of Appeals reversed the jury's award of damages for the wrongful death action and remanded the case to the trial court to determine damages for the survival action.<sup>181</sup> The court held that as a general rule "one may not recover damages in negligence for the suicide of another."<sup>182</sup> The court considered suicide an intervening act that came between the alleged negligence and the wrongful death.<sup>183</sup>

Significantly, the court in *Peters* adopted an exception to the general rule

171. *Id.* at 415 (citing *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365 (1978)).

172. *Id.* at 416. The court stated that, "The diversity statute, by speaking directly to the kinds of parties who can use it to enter federal court, impliedly prohibits courts from exercising pendent party jurisdiction to hear claims against persons or entities falling outside of the statute's scope in suits based on diversity." *Id.*

173. *District of Columbia v. Peters*, 527 A.2d 1269 (D.C. 1987).

174. *Id.*

175. *Id.* at 1271.

176. *Id.*

177. *Id.* More specifically, the plaintiff claimed that the police did not have sufficient training to handle suspects who are mentally disturbed or act in a drug-induced state. *Id.*

178. *Id.*

179. *Id.*

180. *Id.* The jury awarded the wife a lump sum of \$349,000 for her survival and wrongful death claims and \$51,000 for her loss of consortium. *Id.* at 1272.

181. *Id.* at 1277. The court affirmed the \$51,000 jury verdict for loss of consortium, but vacated the remainder of the jury's award because the jury did not separate the damages for the wrongful death and survival actions. *Id.*

182. *Id.* at 1275. The court went on to say that the "act of suicide generally is considered to be a deliberate, intentional, and intervening act which precludes a finding that a given defendant is, in fact, responsible for the decedent's death." *Id.*

183. *Id.*

concerning tort liability for suicides.<sup>184</sup> The court established the principle that in order to recover damages in tort for the suicide of another, plaintiff must show that the defendant's action caused the victim to have an "irresistible impulse" to commit suicide.<sup>185</sup> The court noted that several courts and the *Restatement (Second) of Torts* have adopted the "irresistible impulse" test.<sup>186</sup>

The court found sufficient evidence present to show that Peters had a mental condition. However, expert testimony did not indicate that the shooting caused Peters to have an uncontrollable impulse to commit suicide.<sup>187</sup> Thus, the court found no irresistible impulse and, therefore, no basis for awarding damages on the wrongful death claim.<sup>188</sup>

#### D. Tavern Owner Liability

In *Rong Yao Zhou v. Jennifer Mall Restaurant*,<sup>189</sup> the District of Columbia Court of Appeals faced a case of first impression<sup>190</sup> concerning the liability of tavern owners whose intoxicated patrons subsequently cause injuries to third parties.<sup>191</sup> This decision significantly broadened the potential scope of liability of tavern owners.

Plaintiffs suffered serious injuries in an automobile accident caused by the defendant who was intoxicated at the time of the accident.<sup>192</sup> In their suit seeking \$3.5 million in damages from the Jennifer Mall Restaurant,<sup>193</sup> the plaintiffs claimed that the restaurant violated the Beverage Control Act by

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184. *Id.* The court called the newly-adopted rule the "Restatement exception":

If the actor's negligent conduct so brings about the delirium or insanity of another as to make the actor liable for it, the actor is also liable for harm done by the other to himself while delirious or insane, if his delirium or insanity . . . makes it impossible for him to resist an impulse caused by his insanity which deprives him of his capacity to govern his conduct in accordance with reason.

RESTATEMENT (SECOND) OF TORTS § 455 (1977).

185. *Peters*, 527 A.2d at 1276.

186. See *McLoughlin v. Sullivan*, 123 N.H. 335, 338, 461 A.2d 123, 124 (1983); *Fuller v. Preis*, 35 N.Y.2d 425, 429, 322 N.E.2d 263, 265, 363 N.Y.S.2d 568, 572 (1974); *Baxter v. Safeway Stores Inc.*, 13 Wash. App. 229, 232-33, 534 P.2d 585, 588 (1975); RESTATEMENT (SECOND) OF TORTS § 455 (1977).

187. *Peters*, 527 A.2d at 1276-77. The court noted that the psychiatrist who examined Peters testified that the shooting was a "powerful contributor" to Peters' sense of helplessness and put into motion the events that eventually led to the suicide. *Id.* at 1277. Nevertheless, the court stated that the testimony is "a far cry" from establishing that the decedent felt an "irresistible impulse" to commit suicide. *Id.*

188. *Id.* at 1277.

189. 534 A.2d 1268 (D.C. 1987).

190. *Id.* at 1269.

191. *Id.*

192. *Id.* at 1269-70.

193. *Id.* at 1270.

serving alcoholic beverages to the defendant while he was, or appeared to be, intoxicated.<sup>194</sup> At trial, the District of Columbia Superior Court granted the defendant's motion to dismiss on the ground that the complaint failed to state a claim upon which relief could be granted.<sup>195</sup>

The District of Columbia Court of Appeals held that the restaurant owner's violation of the Alcoholic Beverage Control Act rendered the tavern owner negligent per se<sup>196</sup> and potentially liable for injuries proximately caused to the public.<sup>197</sup> The court maintained that an individual who violates an ordinance intended to protect public safety faces liability for negligence.<sup>198</sup> Finding that the Alcohol Beverage Control Act had a public safety purpose,<sup>199</sup> the court recognized Congress' aim to regulate alcohol, in order to prevent the hazards associated with its abuse,<sup>200</sup> including the operation of mechanical devices, such as automobiles.<sup>201</sup> The court noted that the violation of state statutes prohibiting the sale of alcohol to intoxicated persons often form the "basis upon which courts have found breach of the duty of care that is necessary for imposing tort liability on tavern keepers for resulting injuries."<sup>202</sup> The court concluded that the violation by the restauranteur constituted negligence per se and, thus, found the restaurant owner liable for damages.<sup>203</sup>

#### IV. LANDLORD-TENANT LAW

Three issues concerning notices to quit presented the District of Columbia Court of Appeals with cases of first impression. In a decision concerning

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194. *Id.* at 1271-72. The Alcoholic Beverage Control Act, D.C. CODE ANN. §§ 25-101 to -139 (1981), prohibits tavern owners from "permit[ting] on the licensed premises . . . the consumption of any beverage by any intoxicated person, or any person of notoriously intemperate habits, or any person who appears to be intoxicated . . . ." *Rong Yao Zhou*, 534 A.2d at 1271.

195. *Rong Yao Zhou*, 534 A.2d at 1270.

196. *Id.* at 1276.

197. *Id.*

198. *Id.* at 1273 (citing *Ross v. Hartman*, 139 F.2d 14, 15 (D.C. Cir. 1943), *cert. denied*, 321 U.S. 790 (1944)). The court stated that, "[o]ur courts have recognized that a variety of statutes have a public safety purpose justifying the application of the rule that their violation constitutes negligence." *Id.* at 1274.

199. *Id.* at 1275. In reviewing the legislative history of the Alcohol Beverage Control Act, the court stated that, "Congress in 1934 clearly was aware of the public safety hazards associated with alcohol abuse and incorporated safety concerns as an integral part of its comprehensive scheme to regulate the sale and use of alcohol in the nation's capital." *Id.*

200. *Id.*

201. *Id.*

202. *Id.* at 1276; *see also* *Klingerman v. SOL Corp.*, 505 A.2d 474, 478 (Me. 1986); *Ramsey v. Anctil*, 106 N.H. 375, 211 A.2d 900, 901 (1965); *Rappaport v. Nichols*, 31 N.J. 188, 200-05, 156 A.2d. 1, 8-9 (1959).

203. *Rong Yao Zhou*, 534 A.2d at 1277.

notices to vacate a residential leasehold, the court construed a 1984 amendment<sup>204</sup> to the Rental Housing Act of 1980<sup>205</sup> requiring the landlord to personally serve the tenant with notice to quit.<sup>206</sup> *Graham v. Bernstein*<sup>207</sup> resulted from the opposition of a group of tenants to a proposed rent increase for apartments in a building subject to rent control.<sup>208</sup> When the District of Columbia Rental Accommodations Office denied the landlord's petition, the landlord decided to remove the building from the rental market.<sup>209</sup> The landlord then notified each of the tenants by first class mail that he or she must vacate the premises within 180 days. Relying on section 45-1595 of the District of Columbia Code, pertaining to service of "any information or document,"<sup>210</sup> the landlord attempted no other method of service.<sup>211</sup>

The District of Columbia Court of Appeals applied section 45-1406 of the District of Columbia Code,<sup>212</sup> which specifically addressed the process for serving a notice to vacate. The court reasoned that when a general statutory provision varies from a specific enactment, the specific provision controls.<sup>213</sup> Further, the court found that the legislative purpose of rent control provisions supported the more stringent notice requirement.<sup>214</sup> Consequently, the court held that service of a notice to vacate by mail is inadequate.<sup>215</sup>

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204. D.C. CODE ANN. § 45-1406 (1986).

205. *Id.*

206. *Id.*

207. 527 A.2d 736 (D.C. 1987).

208. *Id.* at 736. The court noted the friction existing between the tenants and landlords that began in 1980 when the landlords filed a hardship petition to increase rents with the District Rental Accommodations Office. *Id.*

209. *Id.*

210. D.C. CODE ANN. § 45-1595 (1981) (replaced by D.C. CODE ANN. § 45-2594 (1986)). Section 45-1595 allows for service "[b]y mail, or deposit with the United States Postal Service properly stamped and addressed." *Id.*

211. *Graham*, 527 A.2d at 737.

212. The court noted that Congress enacted § 45-1406 in 1901 and amended it only once, in 1984, to add the words "English and Spanish" after the words "shall be served." *Id.* The statute now reads: "Every notice to the tenant to quit shall be served in English and Spanish upon him personally . . ." D.C. CODE ANN. § 45-1406 (1986).

213. *Graham*, 527 A.2d at 739.

214. *Id.* at 738. The District of Columbia Court of Appeals noted in *Wolf v. District of Columbia Rental Accommodations Comm'n*, 414 A.2d 878 (D.C. 1980), that "[t]he primary legislative purpose in promulgating rent controls was to alleviate the exploitation of tenants that resulted from the tight housing market in the District." *Id.* at 880.

215. *Graham*, 527 A.2d at 739. This result concurs with the court's earlier ruling in *Jones v. Brawner Co.*, 435 A.2d 54 (D.C. 1981), which invalidated service of notice to vacate by slipping the notice under the door of an apartment. *Id.* at 56. The *Jones* decision foreshadowed the Supreme Court's decision in *Greene v. Lindsey*, 456 U.S. 444 (1982), that service of process by posting on the door of the tenant's apartment does not satisfy federal due process requirements. *Id.* at 454.

The court construed another provision of section 45-1406 of the District of Columbia Code in *Ontell v. Capitol Hill E.W. Limited Partnership*.<sup>216</sup> A commercial tenant, who leased office space in a mixed use building, remained in possession as a month-to-month tenant after his lease expired.<sup>217</sup> Although the building management served a thirty day notice to vacate, the tenant remained in possession, alleging defective service of process under section 45-1406 because the notice did not include a Spanish translation.<sup>218</sup> Section 45-1406 requires that landlords provide both Spanish and English versions of such notices.<sup>219</sup> The tenant admittedly neither read nor understood Spanish.<sup>220</sup>

The District of Columbia Court of Appeals conceded that the statute applied to both residential and commercial leases<sup>221</sup> and recognized the general judicial policy to invalidate a notice to quit in the event of defective service. However, the court refused to extend this policy's protection to a commercial tenant who alleges no prejudice from the defect.<sup>222</sup> Resorting again to the legislative history of the statute, the court found that the purpose underlying the bilingual requirement reflected a due process concern for the housing rights of Spanish-speaking residents.<sup>223</sup> Thus, the court refused to invalidate defective notice in a commercial setting absent some showing of prejudice.

In *Burns v. Harvey*,<sup>224</sup> the court held that a tenant's oral notice of intent to quit a rental unit did not constitute a waiver of the statutory requirement of a written notice to quit, nor entitle the landlord to possession.<sup>225</sup> In *Burns*, the tenants orally informed their landlord they would vacate their apartment one month before expiration of the lease.<sup>226</sup> The tenants later decided to

216. 527 A.2d 1292 (D.C. 1987).

217. *Id.* at 1293. The defendant joined a tenants' association in an effort to purchase the building from his original landlord. *Id.* at 1294. Shortly after purchasing the building, the association informed the defendant that as a commercial tenant, his continued membership was at the discretion of the association's members. *Id.* The members of the association later voted not to continue his membership. *Id.*

218. *Id.*

219. D.C. CODE ANN. § 45-1406 (1986).

220. *Ontell*, 527 A.2d at 1296. The court concluded that because the defendant read and understood English, he could not dispute that his actual notice had sufficiently satisfied the statute. *Id.*

221. *Id.* at 1294.

222. *Id.* at 1295.

223. *Id.* (citing Committee on Consumer Regulatory Affairs, Testimony Before the District of Columbia City Council in Support of Proposed Bill 5-134 *passim* (Apr. 12, 1983)).

224. 524 A.2d 35 (D.C. 1987).

225. *Id.* at 38.

226. *Id.* at 36.



remain in the apartment.<sup>227</sup> The landlord, however, rented the apartment in the interim and brought suit for possession.<sup>228</sup> Because none of the communications between the parties satisfied the written format mandated by sections 45-1402 to -1404 of the District of Columbia Code,<sup>229</sup> the court found that the tenants did not waive their right to a written notice to quit nor did they give their landlord notice effective to permit the landlord to recover possession.<sup>230</sup> After examining the situation in light of the overall statutory scheme and the problems inherent in oral notices, the court found the landlord not entitled to possession.<sup>231</sup>

*Duncan v. G.E.W., Inc.*<sup>232</sup> involved a series of commercial leases for fourteen Little Tavern hamburger shops in and around the Washington area.<sup>233</sup> The three year leases provided the tenant with two consecutive renewal options and the option to purchase each shop.<sup>234</sup> The leases allowed the tenant to exercise the options by giving the landlord three months' written notice.<sup>235</sup> G.E.W., the chain tenant, obtained a \$400,000 loan which it spent fully on improvements to the restaurants.<sup>236</sup> The landlord knew of the loan and improvements, and the tenant orally informed the landlord that it would renew the options. The District of Columbia Court of Appeals underscored the close contact between the parties by noting that the landlord also shared office space with the tenant.<sup>237</sup> However, ambiguous language in the lease<sup>238</sup> led to a misunderstanding as to when the option deadline would fall. The

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227. *Id.* at 37.

228. *Id.* The landlord also sought double rent for the period the tenants occupied the apartment after the oral notice period expired. *Id.* at 37.

229. D.C. CODE ANN. §§ 45-1402 to -1405 (1986). Each of the statutes, relating to periodic tenancies, tenancies at will, and tenancies by sufferance, require thirty days' written notice for a notice to quit to be valid. *Id.*

230. *Burns*, 524 A.2d at 39. Each of these provisions specifically requires that any such notices must be "in writing," and these provisions make no reference to oral notification. D.C. CODE ANN. §§ 45-1402 to -1405 (1986).

231. *Burns*, 524 A.2d at 39.

232. 526 A.2d 1358 (D.C. 1987).

233. *Id.* at 1359.

234. *Id.*

235. *Id.*

236. *Id.* at 1360.

237. *Id.*

238. *Id.* Article 18 of each lease contained the following language: "These options shall be exercised by written notice given to lessor or delivered or mailed to lessor, at the address at which the rent is then payable, at least three (3) months before the expiration of the initial term hereof or first renewal term hereof." *Id.*

The tenant "concluded that the use of the plural 'these options,' followed by the disjunctive 'or,' meant that the remainder of the sentence did not require three months' advanced notice unless [the tenant] wished to exercise both options before the end of the initial term." *Id.* at 1361. A linguistics expert testified that the tenant's interpretation of the language was reasonable. *Id.* at 1361.

tenant consequently did not deliver a written notice renewing the options until twenty-three days after the actual deadline.<sup>239</sup>

At trial, the Superior Court found G.E.W. made an "honest mistake" and allowed renewal of the options as a matter of equity.<sup>240</sup> The District of Columbia Court of Appeals affirmed, giving weight to the landlord's knowledge of the substantial amounts expended on improvements in the restaurants and inconsequential length of the delay.<sup>241</sup> The court also noted that the landlord consented to the assignment of the leases as collateral for the loan and that the landlord did not rely to his detriment on the failure to give timely notice.<sup>242</sup> The District of Columbia Court of Appeals noted that although generally the court will strictly enforce property options according to their terms, a judgment for the landlord in this case would signify a "regression to the days when hypertechnical legal arguments were relied upon to prevent fair and just results."<sup>243</sup>

An earlier ruling in the Small Claims Branch of the Superior Court<sup>244</sup> remains especially significant because it is the first instance of a District of Columbia court awarding punitive damages in a landlord-tenant dispute.<sup>245</sup> Although decided in the context of a tenant's action for recovery of moneys tendered to a landlord in the Small Claims Branch of the Superior Court, *Gyebi v. Friedman*,<sup>246</sup> potentially affords tenants a potent weapon against landlords who willfully rent property on which known, egregious housing code violations exist. The unreported 1985 case remains noteworthy because it represents the first instance in which a District of Columbia court awarded punitive damages in a landlord-tenant dispute.

In *Gyebi*, the small claims judge awarded the tenant \$475 in actual damages and \$1,000 in punitive damages due to the landlord's "wanton, willful, fraudulent and malicious conduct."<sup>247</sup>

Despite the existence of more than eighty housing code violations, most of which were not evident during the tenant's initial inspection due to poor lighting conditions,<sup>248</sup> the landlord accepted \$275 as a security deposit and

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239. *Id.* at 1359.

240. *Id.* at 1362.

241. *Id.* at 1364.

242. *Id.* at 1364-65. At trial, the defendants testified they "took no action whatsoever in reliance upon the delay." *Id.* at 1362.

243. *Id.* at 1365.

244. *Gyebi v. Friedman*, C.A. No. SC-4594-85, slip op. (D.C. Super. Ct. Small Claims Branch, May 14, 1985) (Memorandum Opinion and Order).

245. *Id.* at 5.

246. C.A. No. SC-4594-85, slip op. (D.C. Super. Ct. Small Claims Branch, May 14, 1985) (Memorandum Opinion and Order).

247. *Id.* at 7.

248. *Id.* at 1-2.

an additional \$200 for the first month's rent from the tenant.<sup>249</sup> Upon later visiting the apartment in preparation for her move, the tenant realized its uninhabitable condition.<sup>250</sup> Despite numerous telephone calls from the tenant, the landlord failed to make any of the necessary repairs.<sup>251</sup>

The defective condition of the premises for which she had paid \$475 prevented her from moving into that apartment. Because she was an expectant mother subsisting on welfare assistance, the tenant was financially unable to secure another apartment.<sup>252</sup> She was, therefore, "relegated to remain in her one room apartment . . . with her two young children and newborn baby."<sup>253</sup> Consequently, the tenant brought an action in the Small Claims Branch to recover the \$475 as well as punitive damages.

Although confronted with a simple breach of contract claim, the judge began by noting that rules of District of Columbia landlord-tenant procedure governing assertion of defenses in suits for possession initiated by the landlord did not provide for the award of punitive damages.<sup>254</sup> However, the court acknowledged that it may order punitive damages in breach of contract cases where the "acts of the breaching party are malicious, wanton, oppressive, or with criminal indifference to civil obligations . . . [and] merge with and assume the character of a willful tort."<sup>255</sup> Strongly indicating that this logic may apply with equal force in the context of a landlord's suit for possession, the court cited with approval New York and Vermont opinions allowing recovery of punitive damages in landlord-tenant cases.<sup>256</sup>

While defenses to a landlord's action for possession are significantly circumscribed by District of Columbia rules of landlord-tenant procedure,<sup>257</sup> *Gyebi* suggests that punitive damages may be awarded to tenants in cases of

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249. *Id.* at 2. The tenant noticed broken windows and problems with the bathroom sink. The landlord agreed to allow the tenant to apply the \$50 balance owing for the first month's rent toward these repairs. *Id.*

250. *Id.* at 2-3.

251. *Id.* at 3.

252. *Id.* at 3-4.

253. *Id.* at 4.

254. *Id.* at 5.

255. *Id.* (citing *Den v. Den*, 222 A.2d 647, 648 (D.C. 1966)).

256. See, e.g., *Davis v. Williams*, 92 Misc. 2d 1051, 402 N.Y.S.2d 92 (Civ. Ct. 1977); *Hilder v. St. Peter*, 144 Vt. 150, 478 A.2d 202 (1984).

257. See D.C. SUPER. CT. LANDLORD-TENANT BRANCH R. 5(b). See generally Comment, *Defensively Pleading Commercial Landlords' Breaches In Summary Actions for Possession in the District of Columbia: A Retrospective and Proposal*, 37 CATH. U.L. REV. 705 (1988) (discussing limitations on tenants' ability to assert defenses based on landlords' breach of covenants imposed by the District of Columbia landlord-tenant rules of procedure).

a landlord's egregious disregard for the health and safety of his tenants.<sup>258</sup>

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*Brian Yoklavich*

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258. *Gyebi*, C.A. No. SC-4594-85, slip op. at 7 (D.C. Super. Ct. Small Claims Branch, May 15, 1985) (mem.).

