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Gregory L. Hellrung

Michael F. O'Donnell

Thomas A. Rothwell Jr.

Bert H. Weinrich

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Case Notes /

Obscenity—Evidence—Contemporary Community Standards—Prurient Interest—Literary Merit—*Yudkin v. State*,—Md.—, 182 A. 2d 798 (1962).

A COPY OF HENRY MILLER'S *Tropic of Cancer* was purchased by two police officers from defendant bookseller, who was arrested for violating the Maryland obscenity statute, MD. CODE ANN. (1957), art. 27, §418. At the jury trial, Circuit Judge James H. Pugh gave copies of the book to the jury to read, and allowed the defendant to submit in evidence only one favorable book review and the defendant's own testimony. The judge refused to admit the testimony of expert witnesses, exhibits of contemporary books on sale in the area, or evidence that the Post Office Department had cleared the book asailable. The Maryland Court of Appeals *reversing*, held that all relevant evidence concerning contemporary community standards and prurient interest as well as interest bearing on literary merit was admissible to show either obscenity or lack of it, *Yudkin v. State*,—Md.—, 182 A. 2d 798 (1962).

The court reaffirmed *Monfred v. State*, 226 Md. 312, 173 A. 2d 173 (1961), *cert. denied*, 368 U.S. 953 (1962), which applied the test of obscenity set down by the Supreme Court of the United States in *Roth v. United States* (and *Alberts v. California*) 354 U.S. 476, 489 (1957), "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."

The *Roth* case, the turning point in the law of obscenity, completely changed the *Hicklin* rule, *Regina v. Hicklin*, (1868) L.R. 3 Q.B. 360, which allowed material to be judged merely by the effect of an isolated excerpt upon particularly susceptible persons. In its place a vacuum was created. The build-up of case law on the admission of evidence under the *Hicklin* rule was no longer applicable to the *Roth* test.

In *Yudkin*, a case of novel impression in Maryland, the Court of Appeals treats a problem left unsolved by *Roth*—what evidence is admissible to show obscenity or the lack of it?

The *Monfred* case, *supra*, did not present this problem because the material involved was deemed "hard-core pornography." However, the court in *Yudkin* appears

to have corrected the main objection expressed by Judge Hammond in his dissent in *Monfred* that "there was no testimony as to contemporary community standards . . . or as to what effect the [material] . . . would have on the average person." (173 A. 2d at 179).

In *Yudkin*, the court has held that expert testimony as to contemporary community standards, literary merit and the effect of the material on the average person should be admissible, subject to the one limitation that the witnesses qualify as experts under the rule of *Turner v. State Road Comm.*, 213 Md. 428, 132 A. 2d 455 (1957). The actual qualifying of experts is left to the determination of the trial court.

The decision to admit expert testimony is supported by the argument of Mr. Justice Frankfurter in his concurring opinion in *Smith v. California*, 361 U.S. 147, 165 (1959), "to exclude . . . expert testimony is in effect to exclude as irrelevant evidence that goes to the very essence of the defense and therefore to the constitutional safeguards of due process." See also *Hartman v. Morris* (decided Feb. 21, 1962, by the Superior Court of Cook County, Illinois) and *Commonwealth v. Robbin* (decided April 17, 1962, by the Court of Common Pleas No. 2 in the county of Philadelphia, Pennsylvania), both of which involved *Tropic of Cancer* and permitted introduction of expert testimony.

For discussion on admission of expert testimony to show literary merit and its effect on various courts, see Lockhart & McClure, *Literature, The Law of Obscenity, and the Constitution*, 38 MINN. L. REV. 295, 347-50 (1954) (especially the pre-Roth cases cited therein); Lockhart & McClure, *Censorship of Obscenity: The Developing Constitutional Standards*, 45 MINN. L. REV. 5, 95-99 (1961). See also *United States v. Two Obscene Books*, 99 F. Supp. 760 (N.D. Cal. 1951), *aff'd sub nom., Besig v. United States*, 208 F. 2d 142 (9th Cir. 1953), which prior to the Roth case held Henry Miller's *Tropic of Cancer* and *Tropic of Capricorn* to be obscene, but while saying that opinions of "so-called" experts were immaterial, did admit book reviews, letters and affidavits from critics as relevant evidence.

Lockhart & McClure, *op. cit. supra*, 45 MINN. L. REV. 5, at 83, suggest that evidence of the type of books sold by the defendant and of the type of clientele who buy from defendant is relevant. Also, it is suggested that a book might be obscene if directed at a sexually immature audience and not be obscene when directed at a mature audience. However, these points are not considered by the Maryland Court of Appeals.

To support its ruling that psychiatrists might qualify as expert witnesses, the Maryland court cites Justice Frankfurter's opinion in the *Smith* case, *supra*, "the psychological or physiological consequences of questioned literature can as a matter of fact hardly be established except through experts." (361 U.S. at 165). But, in *Womack v. United States*, 294 F. 2d 204 (D.C. Cir. 1961), such evidence was inadmissible, because "there was no showing or proffer to show that these witnesses did in fact know or had reliable means of learning what those standards were." (*id.* at 206). See A.L.I. MODEL PENAL CODE, Proposed Official Draft (May 4, 1962), Sec. 251.4 (4), where "expert testimony . . . relating to factors entering into the determination of the issue of obscenity shall be admissible."

In permitting introduction of comparable books on sale in the community, the Maryland court in the *Yudkin* case was supported by the *Monfred* case where the

record showed "that publications of a similar type had been on display and sold in the city for at least five years prior to the arrest of the appellants." (173 A. 2d at 174). See also *Smith v. California*, *supra*, (where such evidence was introduced); *In Re Harris*, 56 Cal. 2d 879, 366 P. 2d 305 (1961) (where exclusion of comparable writings and publications was a denial of due process).

Finally, in the *Yudkin* case, the court permits a ruling of the Post Office Department to be introduced as relevant evidence. This conclusion can only be based on Judge Hammond's theory in his dissent in *Monfred* that "there can be little doubt . . . that 'community standards' means not state or local communities but rather the standards of society as a whole." (173 A. 2d at 181). Recent support for this theory can be seen in *Times Film Corp. v. City of Chicago*, 355 U.S. 35 (1957), reversing 244 F. 2d 432 (7th Cir. 1957) (where the application of restrictive local standards in the censorship of obscenity was overruled). See also, *Kingsley Int'l Pictures Corp. v. Regents of the Univ. of the State of New York*, 360 U.S. 684 (1959); Lockhart & McClure, *op cit. supra*, 45 MINN. L. REV 5, 108-14.

If the standards refer to society as a whole, some problems arise. While the Post Office Department's ruling would certainly be relevant, ought not the Postmaster General be made to qualify as an expert before the introduction of such evidence, as in the case of other witnesses? Also, what is to prevent the introduction of administrative or judicial decisions of other jurisdictions as to the obscenity of the same material, if the evidence does not offend the hearsay rule? Finally, is there any reason for limiting the introduction of comparable books and publications to those on sale in the community where the books on trial were sold?

When the Supreme Court of the United States laid down the *Roth* test, it created a problem which it neglected to solve; and, until it does, state and lower federal courts must attempt independent solutions. There are many difficulties involved in making a determination of this kind and the *Yudkin* case is not a final solution, but it is a beginning upon which the case law involving submission of specific evidence under the *Roth* test can be built.

GREGORY L. HELLRUNG

Criminal Law—Federal Rules of Criminal Procedure—Inadmissibility of Reaffirmed Confession—*Killough v. United States*, U.S. App. D.C.,—F. 2d—(1962).

APPELLANT WAS INDICTED for first-degree murder in the death of his wife and was convicted of manslaughter. He was held in custody by the police for thirty-four hours after his arrest, and during this period he was repeatedly questioned. Eventually, he signed a written confession. He was then brought before a magistrate for a preliminary hearing pursuant to Rule 5(a), FED. R. CRIM. P. The next day, while the accused

was in District jail and before he had obtained counsel, the same police officer who had been the primary interrogator at the pre-hearing questionings obtained an oral reaffirmation of the earlier confession. The trial judge excluded the written confession as required by the *McNabb-Mallory* rule but admitted the later confession as voluntary and made by appellant after judicial warning as to his rights. The appellant assigns this as reversible error and appeals. *Held*, that the judgment of conviction be reversed and the accused granted a new trial; the later confession was inadmissible as the fruit of the earlier illegal confession. *Killough v. United States*, No. 16398 U.S. App. D.C., —F. 2d—(1962).

Rule 5(a), FED. R. CRIM. P., requires that an arrested person be brought before the nearest available magistrate without unnecessary delay, in order to be warned of his rights, to be given an opportunity to retain counsel, and to be admitted to bail. The *McNabb-Mallory* rule establishes the inadmissibility as evidence of a confession obtained by police during a detention which violates Rule 5(a). *McNabb v. United States*, 318 U.S. 332 (1943), *Mallory v. United States*, 354 U.S. 449 (1957). An unnecessary delay, standing alone, and unaccompanied by proof of actual coercion, is enough to render the confession inadmissible. A delay is unnecessary when the accused is held by police for any reason except brief police administrative work after a hearing before a magistrate would have been convenient. *Mallory v. United States*, *supra*.

Police quickly devised a new practice to avoid the effect of the exclusionary rule while still retaining the benefits of pre-hearing interrogations. An accused person could be held illegally, questioned, and after a confession was obtained, taken before a magistrate for the required hearing. Confronted by his previously signed confession, the accused would frequently reaffirm it. This reaffirmation could, the police hoped, be received in evidence at the trial.

The instant case is the fifth case involving reaffirmed confessions to reach the D.C. Court of Appeals in less than three years. The earlier four were considered by three-judge divisions, and produced a sharp cleavage of opinion.

The first *Jackson* case ruled the later confession inadmissible as the direct result of the earlier confession. *Jackson v. United States*, 106 U.S. App. D.C. 396, 273 F. 2d 521 (1959). A year later, a majority of the judges found that the same confession had been properly admitted at Jackson's second trial, since the government had demonstrated that the accused had acted voluntarily and with advice of counsel in reaffirming the confession. *Jackson v. United States*, 109 U.S. App. D.C. 233, 285 F. 2d 675 (1960), *cert. denied*, 366 U.S. 941 (1960).

The *Goldsmith* case also affirmed a District Court conviction based largely upon admission in evidence of a reaffirmed confession. Here, the defendant had the advice of counsel, had enlarged upon his earlier confession, and had reenacted the crime prior to reaffirming his pre-hearing confession. *Goldsmith v. United States*, 107 U.S. App. D.C. 305, 277 F. 2d 335 (1960), *cert. denied*, 364 U.S. 863 (1960).

The instant case is the first consideration of the problem by the D.C. Court of Appeals sitting *en banc*. Judge Fahy based the majority opinion upon the ground that the later confession was the fruit of the earlier one, which had been obtained illegally. The opinion does not overrule the *Jackson* and *Goldsmith* cases, but distinguishes

them because the defendants therein had the benefit of counsel before reaffirming their confessions. If this distinction were not possible, Judge Fahy states that the majority would be ready to reconsider those cases.

Unfortunately, the opinion of the court gives little with which to work in determining when a reaffirmation is the fruit of an earlier and illegally obtained confession. A concurring opinion by Judge Wright devotes itself primarily to this matter. The criteria he proposes are logical and workable.

Judge Wright's basic premise is that the police have taken an unfair and illegal psychological advantage over the accused by violating his right to a prompt hearing and thereby obtaining a confession from him. Reasoning by analogy from the doctrine that proven coercion in obtaining a confession is presumed to taint all subsequent confessions, *Leyra v. Denno*, 347 U.S. 556 (1954). *Fikes v. Alabama*, 352 U.S. 191 (1957), *Rech v. Pate*, 367 U.S. 433 (1961), he suggests that a similar presumption of dependency should attach to these reaffirmed confessions. His reasoning is strong. In both situations the prosecution has wrongfully invaded the rights of the accused and should bear the burden of proving that the evidence it seeks to introduce is not the fruit of its wrongdoing.

Such a presumption would, of course, be rebuttable by proof that the second confession was independent of the illegally obtained one. The elements of lapse of time before reaffirmation, *United States v. Bayer*, 331 U.S. 532 (1947), and advice of counsel to the accused before reaffirmation are important in such a rebuttal. Other relevant factors are discussed in Note, 70 YALE L.J. 298, 306 (1961).

The conviction in the instant case was reversed by a bare majority of the court. The four dissenters based their opinion upon two grounds: first, that Rule 5(a) and the exclusionary rule should be applied only to pre-hearing statements; and, secondly, that the facts in the present case indicate that the later confession was voluntary and independent.

The position of the majority is the sounder of the two. It is essential that civil rights be protected from infringement by the police, and it is incontrovertible that the accused herein was deprived of his right to a prompt judicial hearing. The connection between the two confessions follows as a matter of human experience. The best way, if not the only way, to prevent such infringements is to make the benefit of them unavailable to the prosecution at the trial.

The right which Rule 5(a) and the *McNabb-Mallory* rule gives to accused persons is of little value if it can be vitiated by a transparent ruse of the type here employed. The court has taken a necessary step to preserve the integrity of the *McNabb-Mallory* doctrine, and to force the police to abandon their disregard of the clear mandate of Rule 5(a).

MICHAEL F. O'DONNELL

Torts—Sovereign Immunity—Legislative Role—*Holytz v. City of Milwaukee*,
17 Wis. 2d 26, 115 N.W. 2d 618 (1962).

A THREE-AND-A-HALF YEAR OLD CHILD, playing in one of Milwaukee's city playgrounds, had her hand seriously injured by a steel trap door covering a water meter pit, negligently left open by city employees. Her father, as guardian *ad litem*, brought suit against the city for medical expenses and loss of society of the child. He alleged that the city was negligent in one of its proprietary functions, by its failure to maintain the property correctly. The city's demurrer was sustained by the Circuit Court of Milwaukee County on the ground that plaintiff's complaint stated no cause of action because the city has sovereign immunity from suit.

On appeal, the Supreme Court of Wisconsin reversed this ruling and *held*, by reason of the rule of *respondeat superior*, a public body shall be liable for damages for the torts of its officers, agents and employees, whether by omission or commission, occurring in the course of business of such public body, to be effective July 15, 1962, *Holytz v. City of Milwaukee*, 17 Wis. 2d 26, 115 N.W. 2d 618 (1962).

The decision, although involving a municipal corporation's liability, was to apply prospectively to all government bodies in the state. The court concluded that, in the final analysis, it is the prerogative of the Wisconsin state legislature, either to reimpose governmental immunity, or to give governmental consent to suit, since under §27, art. IV of the Wisconsin Constitution, the legislature shall direct how suits are to be brought against the state.

Few doctrines in American jurisprudence have encountered such harsh and universal criticism as governmental immunity, but even in the face of violent attack, the doctrine grew and became firmly established in the common law of the original colonies and spread throughout the United States as the country expanded. In practically all jurisdictions this common law rule has been reduced to statute.

There have been a number of inroads made in the original rule of absolute immunity of government bodies from suit. The principal limitation on the operation of the rule is the distinction in most jurisdictions between governmental and proprietary functions of government. See, *e.g.*, *Houston v. Wolverton*, 154 Tex. 325, 277 S.W. 2d 101 (1955). A governmental function is one generally conceded to grow from the relationship of the governor to the governed, *i.e.*, police forces, fire departments and similar agencies. The latter functions of government have universally been held to be immune from tort liability. But those operations which are done for the special benefit or profit of the governmental entity are usually considered suable, *i.e.*, the ownership of a ball park or an airport. In applying the abstract tests above to the concrete situation, discrepancies between and within jurisdictions have resulted. See, *e.g.*, Annot., 60 A.L.R. 2d 1203, 1205 (1958). See generally, Borchard, *Governmental Liability in Tort*, 34 YALE L.J. 1 (1924).

Advances have been made in the legislative area by which legislatures have given governmental agreement to be sued in situations involving motor vehicle accidents, safe place statutes, nuisance and attractive nuisance. See, *e.g.*, Repko, *American Legal*

Commentary on the Doctrines of Municipal Tort Liability, 9 LAW & CONTEMP. PROB. 214 (1942). See generally, 38 AM. JUR. *Municipal Corporations* §585.

Some states permit positive defenses to be used by persons sued by the state. In a recent Oregon case, *State v. Shenkle*, 373 P. 2d 674 (Ore. 1962), the court held that, even though it could not abolish governmental immunity because of an express constitutional provision, it allowed the defendant in a suit by the state to raise the affirmative defense of contributory negligence in answer to the complaint.

Some cases have advanced the argument that the abolition of sovereign immunity is solely a legislative prerogative. This is the argument in the Washington state case, *Kilbourn v. Seattle*, 43 Wash. 2d 373, 261 P. 2d 407 (1953), in which it was stated that the doctrine has become fixed as a matter of public policy, and that any change therein must come from the legislature. The *Holytz* case escaped that objection by saying that since the doctrine was engrafted onto the state's body of law by judicial decisions, it could as easily be abolished.

Since 1957, four jurisdictions, California, Florida, Illinois and Michigan, have decided that the principle of sovereign immunity from suits in tort is in effect rescinded. But the broad principles laid down in each of these cases have been seriously curtailed and limited by subsequent judicial decisions and legislative action.

Williams v. Detroit, 364 Mich. 231, 111 N.W. 2d 1 (1961) held that immunity from suit would not be disturbed in the case under decision, but that prospectively, immunity was to be abolished extending to all governmental bodies. The case of *McDowell v. Mackie*, 365 Mich. 268, 112 N.W. 2d 491 (1961) strictly construed the decision to apply only to cases involving the situation in the *Williams* case. Non-immunity to suit is restricted only to municipal corporations and not to state bodies in Michigan.

Similar limitations were placed on the generalizations of the decision in *Hargrove v. Cocoa Beach*, 96 So. 2d 130 (Fla. 1957). The court in that case lashed out violently against the anachronistic doctrine on all levels of government, but in the subsequent case of *Thompson v. City of Jacksonville*, 130 So. 2d 105 (Fla. 1961), the decision was again limited to municipal corporations, and then only to the unintentional torts of the city's agents.

Some judicial and a number of legislative restrictions plagued the liability principles of *Molitor v. Kaneland Community District*, 18 Ill. 2d 11, 163 N.E. 2d 89 (1959). Hickman, in his article, *Municipal Tort Liability in Illinois*, 54 NW. U.L. REV. 588 (1959), states that within forty days after the decision in the *Molitor* case, the legislature passed five bills restoring immunity to local agencies, ILL. REV. STAT., ch. 105 (1959). Two subsequent cases in Illinois, *Garrison v. Community Consolidated School District*, 34 Ill. App. 2d 322, 181 N.E. 2d 360 (1962), and *List v. O'Connor*, 19 Ill. 2d 337, 167 N.E. 2d 188 (1960), were hesitant to discuss the effect of the *Molitor* decision beyond the level of municipalities and school districts. With all factors considered, the *Molitor* case has seen the greatest success in the field of governmental liability because there has not been a case which has explicitly limited its operation to municipalities.

Dubious success has followed in the wake of the California case, *Muskopf v. Corning Hospital District*, 55 Cal. 2d 211, 359 P. 2d 457 (1961). The legislature, on the

fifteenth of September, 1961, reinstated governmental immunity from suit [WEST'S CALIF. ANN. CIV. CODE §22.3 (1961)] until 1963 in order that the community could prepare for the unexpected legal burden of absorbing tort claims. Even before the legislature could act upon the sweeping *Muskopf* decision, *Lipman v. Brisbane*, 55 Cal. 2d 224, 359 P. 2d 465 (1961), limited the decision to ministerial duties as distinguished from proprietary duties of government. It stated that only those organs of government performing the former could be sued in tort. This would lead one to believe that the law applicable in 1963 would still be saddled with the conflicting distinctions on what constituted governmental and proprietary functions.

It can be seen from the histories of the four cases most often discussed as milestones in the war against governmental immunity that limited success has been met. Courts seem hesitant to abrogate a principal so deeply entrenched in the American judicial system. Legislatures understandably are reluctant to put into statute the reforms demanded in the four cases because of the massive problems of devising an administrative system whereby claims against the government on the state level can be administered. See, e.g., David and French, *Public Tort Liability Administration: Organization, Methods and Expense*, 9 LAW & CONTEMP. PROB. 348-362 (1942).

The sweeping decision in the principle case should have considerably more success than its predecessors. The court announced that the decision was to provide substantive liability in tort against all governmental bodies within the state, but that it was up to the legislature to provide the administrative framework for the specific execution of the decision. The next step is up to the Wisconsin legislature. Will it exercise its right to reinstate sovereign immunity, or will it accept the judicial opinion of the state's Supreme Court and provide the administrative machinery to process valid claims against the state? The wiser choice is the latter.

VINCENT P. ANDERSON

Criminal Law—Manslaughter—Voluntary Guardian's Negligence Causing

Death of Child—*Jones v. United States*, 308 F. 2d 307 (D.C. Cir. 1962).

ON OCTOBER 21, 1959, Shirley Green gave birth to her second illegitimate child in less than two years. Upon authorization of his mother, the child, Anthony Lee Green, was released from the hospital to the custody of appellant, Mary Jones, a friend of Miss Green's, who had been taking care of the first child, Robert Lee Green, since his birth in August of 1958. Within ten months, Anthony Lee Green was dead of malnutrition. Both Shirley Green and appellant were indicted and tried: (1) for abuse and maltreatment of the dead child and his older brother, D. C. CODE, §22-901 (1961); and (2) for involuntary manslaughter in the death of Anthony Lee Green, D. C. CODE, §22-2405 (1961). The first count was dismissed at the close of evidence. On the second count a jury found Shirley Green not guilty, but appellant was convicted. This conviction has been reversed because of the failure of the trial judge to instruct the jury that, in order to find appellant guilty, they must first find that she

was under a "legal duty" to take care of the child. *Jones v. United States*, 308 F. 2d 307 (D.C. Cir. 1962).

The jury decided the question of causation adverse to appellant; and reviewing the evidence, the Court of Appeals refused to upset this finding. The reversible error lay solely in the absence of any instruction on the question of appellant's "legal duty" to the child and the invalidity of a conviction without a specific finding by the jury that such a duty existed. Says the court, "A finding of legal duty is the critical element of the crime charged, and failure to instruct the jury concerning it was plain error." *Id.* at 311.

Appellant's moral duty to the child is undeniable, but "the conventional way of approaching the duty to care for others is to say that a duty to act in the criminal law can never rest on a moral duty alone but must be supported by some legal expression." Hughes, *Criminal Omissions*, 67 YALE L. J. 590, 620 (1958). See, e.g., *Regina v. Shepherd*, L. & C. 147, 169 Eng. Rep. 1340 (Cr. Cas. Res. 1862); *People v. Beardsley*, 150 Mich. 206, 113 N. W. 1128 (1907). Such a rationale was in keeping with the courts' general reluctance to impose even civil liability on those who failed to care for others, feeling that to do so was some sort of compulsion of one man to serve another, a form of slavery. Note, 52 COLUM. L. REV. 631, 641 (1952). In one area, however, when the care of children was involved, the protective cloak of a limited concept of "legal duty" fell away.

In England, duties to care were imposed by statute in the first instance on parents, Poor Law Amendment Act, 1868, 31 & 32 Vict., c. 122., then on any person having the custody of any child under the age of sixteen. Act of 1889, 52 & 53 Vict., c. 44; Children & Young Persons Act, 1933, 23 & 24 Geo. 5, c. 12. Understandably, there are few reported cases of child neglect leading to death, but in the United States both parents and grandparents have been convicted of manslaughter when their negligence has been so gross as to infer criminal intent. *Stehr v. State*, 92 Neb. 755, 139 N. W. 676 (1913); *Mitchell v. State*, 39 Ga. App. 100, 146 S. E. 333 (1929). Moreover, a family friend has been convicted of murder where she starved and beat to death a nine year old boy left in her care by his dying mother. *Lewis v. State*, 72 Ga. 164 (1883). The court failed even to consider whether the defendant in that case had a *legal* duty to maintain and support the child. She undertook the task and wilfully failed to carry it out. This was enough to justify the jury's verdict.

Duties to care for others must be plain, imposed by law or contract as opposed to a sense of "humanity or justice and propriety." 26 AM. JUR. *Homicide* §205 (1940). This is still the theory found in the encyclopedias and a few modern decisions: witness the case at hand. Legislatively, too, the common-law countries lag behind European nations. Italy (1930), France (1941), Yugoslavia (1952) and West Germany (1953)—all have statutes imposing liability for failure to aid those in peril. Hughes, *op. cit. supra* at 631. Some of these are directed specifically at the care of children or other helpless persons, but most of them are concerned with the general duty of one man to aid another, whether that duty be called "legal" or "moral."

There is no scarcity of legal expressions with which we can describe the relationship between appellant, Mary Jones, and the dead infant. "One can be held criminally liable . . . where one has assumed a contractual duty to care for another." *Jones*

v. United States, supra at 310. Perhaps a contract or a quasi-contract can be thought of as existing between appellant and Shirley Green with the child as a third-party beneficiary, and criminal liability imposed on appellant for her breach of that duty. *Rex v. Jones*, 19 Cox Crim. Cases 678 (1901). Another theory: a mother is the natural guardian of her illegitimate child. *Bell v. Leonard*, 251 F. 2d 890 (D. C. Cir. 1958). For all intents and purposes Shirley Green had forfeited this guardianship by abandonment, and appellant had taken it up with all its rights and duties. *Beall v. Bibb*, 19 App. D. C. 311 (1902). Certainly she can be held responsible for her failure to fill this role. So there are at least two traditional, legalistic conceptions to express the plain fact that Mary Jones voluntarily assumed the office of guardian for the helpless infant and negligently declined to carry out the obligations which accompanied it. It is unlikely that on retrial, the jury could fail to find as a fact that at least one of these two situations was present in the case.

There was no question in this case but that Anthony Lee Green's death was the direct result of the negligence of Mary Jones. Nor was there any issue as to her financial ability to provide what the child needed for his maintenance. *Jones v. United States, supra* at 309, n. 5. The Court of Appeals requires, however, that appellant's obvious moral duty be cast into some formal, legal framework before any criminal responsibility can be imposed, and reverses her conviction because the jury was not required to do so by the trial judge. The practical inevitability of another conviction upon retrial makes it difficult to see how appellant was prejudiced by the technically erroneous instruction given the jury. There was a trial on the merits and the error urged by appellant did not affect her substantial rights; a reversal under these circumstances appears unwarranted. 5a C. J. S. *Appeal & Error* §1763 (1958); *Mitchell v. State, supra*. As far back as 1874, an English court enunciated the common-sense rule which should govern cases like the one at hand. "If a grown-up person chooses to undertake the charge of a human creature helpless . . . from infancy . . . , he is bound to execute that charge without wicked negligence; and if a person who has chosen to take charge of a helpless creature lets it die by wicked negligence, that person is guilty of manslaughter." *Regina v. Nicholls*, 13 Cox Crim. Cases 75 (1874). This is the thought that will determine the jury's verdict on retrial, but it will still be necessary to frame the idea in one of the old concepts of "legal duty." More direct justice will be done when such formalistic criteria are discarded.

JOSEPH M. SHORTALL

Admiralty—Maintenance and Cure—Attorney's Contingent Fee Recoverable as Damages—*Vaughan v. Atkinson*, 369 U.S. 527 (1962).

CLIFFORD VAUGHAN, A SEAMAN, served on the American Waterways Corporation vessel, the "S. S. National Liberty," for approximately three months in 1957. Upon termination of the voyage, he requested and was furnished a certificate to enter the hos-

pital, where he was treated for tuberculosis for eleven weeks. He was then discharged and treated as an outpatient for two years, and in compliance with regulations, an abstract of Vaughan's clinical record was furnished the shipowner. After being advised by the master of the ship and the chief engineer that Vaughan had never complained of any illness during his service, the shipowner stopped his investigation and refused to pay "maintenance and cure." (In admiralty, "maintenance and cure" is the equivalent of disability compensation, "cure" means medical care and maintenance means subsistence during the disability). The seaman initiated suit against the shipowner to recover "maintenance and cure" and damages for failure to pay medical expenses and subsistence. He claimed as part of his damages a fifty per cent attorney's contingent fee.

The District Court disallowed the claim for the attorney's fee on the grounds that there was no authority which would justify such reimbursement. 200 F. Supp. 802 (E.D. Va. 1960). The Court of Appeals, against a vigorous dissent by Chief Judge Sobeloff, affirmed. 291 F.2d 813 (4th Cir. 1961). On certiorari, the Supreme Court reversed and held *inter alia* that counsel fees were part of the necessary expenses of the seaman, and were recoverable as an item of damages in a suit for "maintenance and cure." *Vaughan v. Atkinson*, 369 U.S. 527 (1962).

The significance of this case stems from the fact that never before has any court authorized reimbursement for reasonable counsel fees in suits for "maintenance and cure." As a general rule, in the absence of any contractual or statutory liability, attorney's fees incurred in litigation are not recoverable, either in an action *ex contractu* or in an action *ex delictu*. See 15 AM. JUR. *Damages* §142 (1938).

It has long been a matter of dispute as to whether the payment of "maintenance and cure" is a contractual duty, a delictual duty, or is in a separate classification. The duty has been treated as arising from the employment contract and not resting upon the negligence of the shipowner or master. *Calmar S. S. Corp. v. Taylor*, 303 U. S. 525 (1938). It has been held to lie on the borderline between contract and quasi-contract. *Wilson v. U.S.*, 229 F.2d 277 (2d Cir. 1956). The majority of cases consider the duty as an incident annexed to the very nature of the employment. *The Osceola*, 189 U.S. 158 (1903); *Cortes v. Baltimore Insular Line*, 287 U.S. 367 (1932). Assent of the parties is unnecessary and any agreement to abrogate the duty is invalid as against public policy. *DeZon v. American President Lines*, 318 U.S. 660 (1943). The duty is considered as annexed by law to the relationship, and annexed as an inseparable incident. *Sims v. United States of America War Shipping Adm'n*, 186 F.2d 972 (3rd Cir. 1951). It is said to be analogous to the obligation of a husband to support his wife, since each arises out of a relationship voluntarily entered into but whose duties are imposed by the law as an incident to the relationship, not as a matter of contract. *Sims v. United States of America War Shipping Adm'n*, *supra*, at 974. In the instant case, the majority opinion, following this type of reasoning, concluded that the usual rules of damages for breach of contract are not applicable to "maintenance and cure."

Even though a "maintenance and cure" action is not treated as one of contract or tort, damages have always been restricted to expenses arising from the injury or illness, *Mohamed v. United Fruit Co.*, 12 F. Supp. 1000 (D. Mass. 1935) (where ex-

penses for presenting an expert witness were not allowed). However, Justice Cardozo in *Cortes v. Baltimore Insular Lines*, *supra*, in awarding compensatory damages for a physical injury, held that "necessary expenses" are recoverable when the shipowner fails to provide "maintenance and cure." On the other hand, equity courts, under certain circumstances, have awarded counsel fees. *Rolax v. Atlantic Coast Line R. Co.*, 186 F.2d 473 (4th Cir. 1951) (which was a suit by a Negro against a labor union to prevent discrimination). Although admiralty courts lack full equity jurisdiction, they may apply equitable principles. *Swift & Co. Packers v. Compania Colombiana Del Caribe*, 339 U.S. 684 (1950). Utilizing the equitable relief available in admiralty courts, counsel fees have been awarded as an item of damages in cases other than for "maintenance and cure." See: *The Appollon*, 9 Wheat. (22 U.S.) 362 (1824), where counsel fees were awarded in recovering "demurrage" of a vessel wrongfully seized; *Sprague v. Ticonic Bank*, 307 U.S. 161 (1939), which cited *The Appollon* with apparent approval; but see, *The Baltimore*, 8 Wall. (75 U.S.) 377 (1869), which treated counsel fees as "costs," regulated by statute.

In the case under discussion, the court, employing the equitable principles used in *The Apollon*, *supra*, construed the "necessary expenses" mentioned in the *Cortes* case, *supra*, to include counsel fees. The well-reasoned dissenting opinion of Justice Stewart agrees with the majority that "maintenance and cure" is more than a purely contractual relationship. Concerning the issue of counsel fees, he was of the opinion that the case should be remanded to the district court to better ascertain the circumstances which motivated the shipowner's failure to pay "maintenance and cure." He further suggested that if the defendant's refusal to pay was totally unjustified, exemplary damages should be awarded rather than a direct award of counsel fees.

The obligation of a shipowner, irrespective of fault, to provide "maintenance and cure" to a seaman injured or taken ill while in the ship's service, is of ancient origin. The earliest codifications of the law of the sea provided for medical care and subsistence for seaman injured or falling ill in the ship's service. LAWS OF OLERON, arts. VI-VII (England, 1339), reprinted, 1 NORRIS, THE LAW OF SEAMEN, §537 (1962). It may be considered the forerunner of our present day workman compensation statutes. However, prior to this decision no statutory or judicial penalty was imposed on a shipowner who refused to pay "maintenance and cure." *Clinton v. Joshua Hendy Corp.* 277 F.2d 447 (9th Cir. 1960). The seaman's only recourse was to incur additional expense by securing the services of an attorney, in order to obtain what was rightfully his. Yet, failure to pay seaman's wages [46 U.S.C. §596 (1915)] or withholding benefits under workman's compensation [33 U.S.C. §914(e) (1927)], subjects the offender to a stiff penalty. In the case under discussion, the court was cognizant of this economic injustice which could be forced upon a seaman, without fear of penalty on the shipowner's part. By this decision, the court has corrected an economic imbalance by authorizing a judicial penalty in the form of counsel fees against a shipowner who unjustifiably withholds "maintenance and cure" from a seaman.

THOMAS A. ROTHWELL, JR.

Unconstitutional Taking of Air Easement—Ownership of Airspace—

Legalized Nuisance—*Griggs v. County of Allegheny*, 369 U.S. 84 (1962).

Griggs, a Pittsburgh suburbanite, charged the County of Allegheny, owner of the greater-Pittsburgh airport, with taking a superterranean air easement without paying just compensation. He alleged a substantial interference with the use and enjoyment of his property due to lack of sleep, window-rattling, falling plaster, and fear of personal injury to himself and his family, resulting from commercial aircraft landing and taking off over his home. The Board of Viewers awarded Griggs damages for the taking of an air easement by the County of Allegheny. The county, which had built the airport according to the Master Plan of the Civil Aeronautics Authority (forerunner of the Federal Aviation Agency), filed an exception, contending that if there was a "taking," it was not the taker. The Supreme Court of Pennsylvania agreed, and reversed the Board of Viewers. *Griggs v. County of Allegheny*, 402 Pa. 411, 168 A.2d 123 (1961), noted in 66 DICK. L. REV. 107 (1961). Griggs did not despair, and petitioned the Supreme Court for certiorari. The writ was granted, and the decision, written by Justice Douglas, held that in fact Allegheny County was guilty of taking an air easement without affording the petitioner due compensation. The Court's theory was that the county was the promoter, owner and lessor of the airport, and actually used Grigg's airspace, despite the fact that the airport was fully regulated by the federal government. *Griggs v. County of Allegheny*, 369 U.S. 84 (1962).

The Supreme Court granted certiorari because the decision seemed to be in conflict with *United States v. Causby*, 328 U.S. 256 (1946), which held that the United States, by low flights of its military planes over a chicken farm, had made the property unusable for that purpose; therefore, there had been a taking of an air easement for which compensation must be made. To establish an unconstitutional taking of an air easement, Justice Douglas, in *Causby*, flatly rejected the *ad coelum doctrine* [See Klein, *Cujus Est Solum Ejus Est . . . Quousque Tandem?*, 26 J. AIR L. & COM. 237 (1959) for legal history of the maxim which had its most glorious day in *Portsmouth Co. v. United States*, 260 U.S. 327 (1922) (trespass by artillery projectiles)] but applied the rule of *Hinman v. Pacific Air Transport*, *supra*, "that the landowner owns at least as much of the space above the ground as he can occupy or use in connection with the land," in combination with the theory of eminent domain which does not require an actual physical taking, but only an interference with the legal rights of ownership for which compensation must be made. 29 C.J.S. *Eminent Domain* §110 (1941); see also Harvey, *Landowner's Rights in the Air Age: The Airport Dilemma*, 56 MICH. L. REV. 1313 (1958).

In the *Griggs* decision, the Supreme Court has for the first time in the sixteen year history of the *Causby* doctrine placed the total financial liability on the non-federal, public-owned airports to acquire sufficient air easements, so that a landowner's right to the peaceful enjoyment of his property below flight glide paths will not be violated. Having placed such a financial burden on state, county, and city-owned airports, could or would the Federal Government pay a portion of the costs? Under the Federal Airport Act of 1958 the Federal Government will share in the construction

costs of national airports sponsored by state, county, and city governments, provided the funds allotted are first used to improve safety in air travel. The remaining funds are to be used in other priority projects in accordance with the approved Master Plan. With the limited funds now available and the low priority given to acquiring air easements, assistance from the Federal Government through the Federal Airport Act of 1958 is negligible. The possibility of Congress appropriating additional funds is also slight because pressure is not being applied today to have sufficient air easements acquired. The courts are reluctant to issue injunctions to abate noise over private property for fear of hampering the development of a national air transit system. *Allegheny Airlines, Inc. v. Village of Cedarhurst*, 132 F. Supp. 871 (E.D.N.Y. 1955), *aff'd*, 238 F.2d 812 (2d Cir. 1956). With the slight possibility of monetary assistance from present or future federal programs, the state, county and city-owned airports will have to look to the courts for possible relief from this enormous financial burden. An excellent argument can be made in these cases that the Federal Government, not the airport, should be the defendant, for in substance the construction of a national airport is controlled by the Master Plan of the Federal Aviation Agency, and this Agency also controls how, when, and where a commercial air carrier will fly.

Having considered possible means available to local airports to have the financial burden of purchasing air easements shared by the Federal Government, consideration should be directed to the remedy made available by the *Griggs* decision which at last provides a remedy for some private landowners who have sustained substantial damage as a result of continual over-flights during landing and take-off. For sixteen years the courts have used the confusing and inadequate "taking" theory to protect some landowners from interference by federal aircraft. The Supreme Court has now adopted this type of proceeding in the *Griggs* decision to balance the rights of the private landowner with the public right to have a national air transit system. Confusion results: frequent flights result in the taking of an air easement of passage, yet courts probably will not accept this suggestion unless a substantial interference has occurred. *Hinman v. Pacific Air Transport*, 84 F.2d 755 (9th Cir. 1936), *cert. denied* 300 U.S. 654 (1937). Inadequacy results: though substantial interference is usually grounds for recovery, a landowner whose rights have been substantially interfered with will be denied relief when his property is not directly below the aircraft's flight path. *Freeman v. United States*, 167 F. Supp. 541 (W.D. Okla. 1958). Should the substantial interference be caused by a private carrier, relief will also be denied—a private carrier can not be liable for a taking because such carriers are not possessed of the power of eminent domain. The courts have allowed these undesirable, inadequate and confusing results by refusing to apply a more liberal doctrine of nuisance. The courts use the analogy of the early twentieth century, that an air transit system, like a railroad system, should not invoke a liberal nuisance doctrine lest the financial burden be too large for the public to bear. *Richards v. Washington Terminal Co.*, 233 U.S. 546 (1914). This same financial over-burden argument was raised, but rejected, in the consideration of limiting the liability of commercial air carriers causing aircraft accidents; yet today there is a very strong national air commerce system with unlimited liability for injuries caused in aircraft accidents.

In failing to apply a liberal nuisance theory to a public-owned or controlled airport, are not the courts forgetting "... that a strong public desire to improve public

conditions is not enough to warrant achieving the desire by a shorter cut than the constitutional way. . .?" *Penna Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922). The courts have not been reluctant to apply the nuisance theory to grant an injunction to abate noise caused by the operation of a private airport. *People v. Dycer Flying Service, Inc.*, 1 Av. L. Rep. 817 (Cal. Super. Ct. 1939). This distinction between a nuisance caused by a public-owned entity and by a private entity does not exist in the more liberal nuisance theory applications. For example, where a school board owned a baseball park which it leased to a professional baseball team, this was found to have created a nuisance, for the professional baseball team, unlike the school teams, caused a "substantial interference" with the adjacent landowner's rights to the peaceful enjoyment of his property as a result of the increased frequency of flying baseballs. *Carter v. Lake City Baseball Club, Inc.* 62 S.E. 2d 470 (S.C. 1950). A city-owned dump created a nuisance for which the court stated that "a city has no more right than an individual to create and maintain a nuisance for such acts are violating its public duty." *Wilson v. City of Portland*, 58 P.2d 257 (Ore. 1936). The Oregon court advocates flexibility of the nuisance doctrine in this area. *Atkinson v. Bernard, Inc.*, 355 P.2d 229 (Ore. 1960). In keeping with our constitutional principles of equity and fairness, the adoption of a liberal nuisance doctrine would balance the private landowner's right to peaceful enjoyment of his property with the public right to efficient air transportation by a doctrine flexible enough to be of use in this age of rapid air travel.

BERT H. WEINRICH