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Recent Maryland Decisions

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RECENT MARYLAND DECISIONS

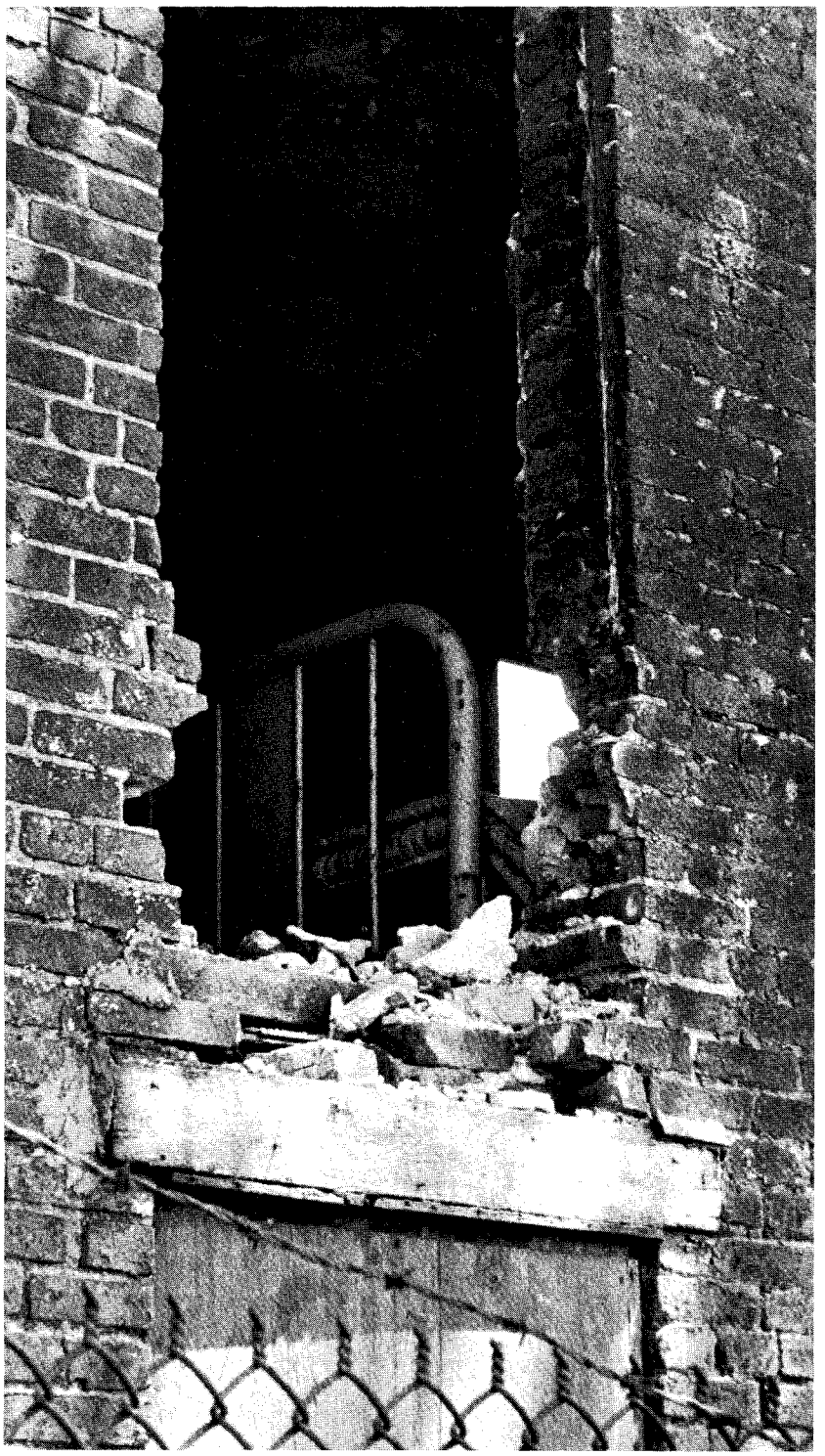

photo by Chris Michael

by Jack Elsby

REBUTTAL EVIDENCE: ORDER OF PROOF

In *Hepple v. State*, 31 Md. App. 525, 358 A.2d 283 (1976), the Maryland Court of Special Appeals carefully defined the scope of the trial judge's discretion concerning that which is admissible as rebuttal evidence.

Chief Judge Orth, speaking for the court, noted that the usual order of proof was for the state to present its evidence in its case in chief, followed by the defense's attempt to establish absence of guilt, and culminating in the state's rebuttal. However, the "mere order of proof and under what circumstances evidence should be admitted or rejected when offered out of proper order" is clearly within the sound discretion of the trial court. In the rebuttal stage of the trial, therefore, the judge enjoys two discretions: (1) to permit the moving party to reopen its case to introduce evidence adducible in chief, and (2) to determine whether evidence offered to rebut is truly rebuttal evidence.

Evidence adducible in chief is evidence essential to a conviction, whereas rebuttal evidence includes " '. . . any competent evidence which explains, or is a direct reply to, or a contradiction of, any *new* matter that has been brought into the case by the defense' " *Id.* at 530, 358 A.2d at 287 (emphasis added). Therefore, statements of evidence adducible in chief are clearly distinct and separable from rebuttal evidence, and while it is within the trial judge's discretion to admit evidence adducible in chief in the rebuttal stage of the trial, the judge cannot admit such evidence "as rebuttal". To do so would be an abuse of the trial judge's discretion as to what consti-

tutes rebuttal evidence and would be grounds for reversal where the admission is manifestly wrong and substantially injurious to the defendant.

NEGLIGENCE: LIABILITY OF LANDLORD FOR CRIMINAL ACTIVITIES OF THIRD PARTIES

In *Scott v. Watson,* 278 Md. 160, 359 A.2d 548 (1976), decedent's widow and personal representative brought a wrongful death action claiming defendant landlord breached a duty owed to decedent tenant Scott to protect him from criminal acts of third parties committed in common areas under the landlord's control, and that such breach was the proximate cause of Scott's death.

Decedent Scott, who was a resident of a two hundred and ninety unit urban apartment complex, was killed by a shotgun blast in the apartment's underground garage. This was the first act of personal harm to come to the landlord's attention, but he knew there was a high incidence of crime in the surrounding area. The landlord also knew that over a one and a half year period some of the tenants' apartments had been burglarized, their automobiles had been stolen from in front of the apartment, and on one occasion an employee of one of the retail shops had been robbed and raped. While the landlord was instituting new security procedures at the time of Scott's murder, he had already installed extensive personnel and mechanical security.

The court considered three questions:

(1) Does Maryland law impose upon the landlord of an urban apartment complex a duty to tenants to protect them from the criminal acts of third parties committed in common areas within the landlord's control, and, if so, what is the extent of such duty?

(2) If no duty exists generally, would such a duty be imposed if the landlord has knowledge of increasing criminal activity on the premises or in the surrounding neighborhood?

(3) Would such a duty be imposed upon a landlord if such landlord has undertaken specific measures to protect his tenants from criminal acts of third parties?

The court answered the first issue in the affirmative, but refused to apply a special duty standard of care used in common carrier-passenger cases. Rather, the court held that the landlord of urban apartment complexes must exercise reasonable care for the tenants' safety in common areas within the landlord's control, and that to require a greater standard of care would put a landlord "perilously close to the position of insurer of the tenants' safety." *Id.* at 167, 359 A.2d at 553.

In considering the second question, the court found that if the landlord knows, or should have known, of criminal activity against persons or property in the common areas, he has a duty to take reasonable measures to eliminate the conditions contributing to the criminal activity. The court indicated that since the landlord can affect the risk only within his own premises, then only criminal acts occuring on the landlord's premises, and of which he knows or should have known, constitute relevant factors in determining whether the landlord exercised reasonable care.

In answering the third question, the court noted that even if no duty existed to employ a particular level of security on the landlord's part, his improper performance of such a voluntary act could, in particular circumstances, constitute a breach of duty.

Finally, in considering whether the landlord's breach of the duty of reasonable care is the proximate cause of a tenant's injuries suffered at the hands of third parties, the court found that the breach by the landlord would result in liability only if the breach *enhanced the likelihood* of the particular criminal activity which occurred.

by H. Jerome Fenzel and Milton Baxley

BRUTON DISTINGUISHED

In *Brooks & Brooks v. State,* 32 Md. App. 116, 359 A.2d 217 (1976), the Maryland Court of Special Appeals held that errors committed in admitting the confessions of co-defendants, because of *Bruton v. United States,* 341 U.S. 123 (1968), were cured when each defendant took the stand and subjected himself to cross-examination. While *Bruton* held that, in a joint trial, the admission of a non-testifying co-defendant's extrajudicial confession implicating the defendant violated the right to confrontation, the need for applying the rule is negated when the co-defendant takes the stand and subjects himself to cross-examination by the defendant's attorney.

CRIMINAL APPEAL DE NOVO MUST BE TRIED BASED UPON SAME CHARGING DOCUMENTS

In *Pinkett v. State,* 30 Md. App. 458, 352 A.2d 358 (1976), the Maryland Court of Special Appeals held that an appeal to the Circuit Court of a criminal case tried in the District Court must be heard on the same charging documents. Pinkett was convicted in the District Court on the strength of a statement of charges and an arrest warrant. The Circuit Court tried him on the two previous charges plus two new charges. The Court remanded the two previous charges back to the District Court for retrial on the original charging documents. As to the new charges, based on a newly filed information, it was proper for the Circuit Court to try the defendant, even though the charges which had been an issue in the District Court had to be retried.

In determining this point, the court distinguished this case from the holding of *Ashe v. Swenson,* 397 U.S. 436 (1970). There, the Supreme Court held that after a jury determined that the accused was not one of the robbers involved, the state could not relitigate the same issue at a second trial. The court of special appeals stated that *Ashe* "does not stand for the proposition that where the accused is convicted of one crime he may not be prosecuted for another crime arising out of the same factual circumstances." *Pinkett, supra* at 472-73, 352 A.2d 367-68.

SEIZURE OF HEROIN IN "ABANDONED" WASTE UPHELD WHERE THERE WAS NO INTRUSION INTO THE DEFENDANT'S BODY

In *Venner v. State*, 30 Md. App. 599, 354 A.2d 483 (1976), the Maryland Court of Special Appeals held that it is not an illegal search or seizure when police come into possession of contraband, instrumentalities or fruits of crime, or mere evidence without violating the security of the defendant's person or his house or other constitutionally protected area. Here, the police, after being called by a nurse, retrieved balloons containing hashish oil from the defendant's bedpan. The court determined that Venner neither exercised or attempted to exercise any disposition or control over the waste, and had no expectation of privacy with respect to the disposition of his waste. Once the balloons were deposited in the bedpan, they were abandoned property.

The Court distinguished *People v. Bracamonte*, 15 Cal. 3d 394, 540 P.2d 624, 124 Cal. Rptr. 528 (1975), where, pursuant to a search warrant, police arrested the defendant, took her to the hospital, and ordered her stomach pumped. When the defendant resisted, she was strapped to the table and a tube was passed through her nose. Finally, she gave up and regurgitated balloons containing heroin. The court noted that in that case the intrusion was more than minor and the facts of the case constituted a condition other than the emergency condition present in *Schmerber v. California*. 384 U.S. 757 (1966). The court noted that Venner was never confronted by the police and that there was no intrusion into his body.

JUDICIAL NOTICE OF REPRESENTATION BY COUNSEL UPHELD

In *James v. State*, 31 Md. App. 666, 358 A.2d 595 (1976), the Maryland Court of Special Appeals held that a violation of the principle enunciated in *Burgett v. Texas*, 389 U.S. 109 (1967), was not reversible error where the court on appeal could take judicial notice of the fact that the Supreme Bench of Baltimore City, in 1963, assigned counsel to all felony cases and the docket entries disclosed that the defendant was represented by counsel. There a parole order was admitted into evidence by the trial court without establishing that the parole resulted from a trial at which the defendant was represented by counsel or knowingly and voluntarily waived counsel. The court pointed to the fact that it could take notice of a matter, in this case, which was part of the public record in an effort to maintain judicial economy, despite *Fletcher v. Flournoy*, 198 Md. 53, 81 A.2d 232 (1951), which stated that the "court will not travel outside the record in order to take notice of proceedings unless put into evidence." *Id.* at 60, 81 A.2d at 235.

LIMITATIONS UPON STATE'S USE OF DEFENDANT'S PRIOR CONVICTIONS WHEN QUESTIONING CHARACTER WITNESS

In *Taylor v. State*, 360 A.2d 430 (1976), the Maryland Court of Appeals held that it was reversible error to permit the prosecution to cross-examine the defense's character witnesses about the defendant's prior convictions without any prior introduction of the convictions. The court felt that what was impermissible in the questioning of the defendant should also be impermissible in the examination of character witnesses.

The court avoided reaching the question whether three recent Supreme Court decisions have tempered the holding of *Michaelson v. United States*, 335 U.S. 469 (1948). In *Michaelson*, the Supreme Court held that a character witness for a criminal defendant might be cross-examined as to an arrest of the defendant, whether or not that arrest resulted in a conviction. The recent cases, however, stand for the proposition that constitutionally firm convictions can not be used to support the guilt of the defendant, *Loper v. Belo*, 405 U.S. 473 (1972), enhance his punishment, *United States v. Tucker*, 404 U.S. 443 (1972), or impeach his credibility, *Burgett v. Texas*, 389 U.S. 109 (1967). In this case, the error was harmless and did not prejudice the defendant, in view of the overwhelming evidence of his guilt.

by John Crabbs

NEW LIGHT ON VICARIOUS LIABILITY

The recent decision of the Maryland Court of Appeals in *Mabe v. B.P. Oil Corp.*, 31 Md. App. 221, 356 A.2d 304 (1976), if allowed to stand, may open a broad new area of vicarious liability in Maryland law. The Maryland Court of Appeals granted certiorari and oral argument was heard on November 5, 1976. *B.P. Oil Corp. v. Mabe*, No. 43, Sept. Term, 1976.

Claude Mabe, while driving, pulled into a B.P. station and asked the attendant for water for his radiator. He was given a can which contained not water, but some other liquid, which when spilled on the hot engine, exploded and injured Mabe. It was not disputed that the injury was the result of the negligence of the station attendant who gave him the can. The only issue was whether B.P. Corporation was vicariously liable for the negligence.

After a jury verdict for Mabe, the trial judge, upon proper motion, entered a judgment n.o.v. for B.P. Mabe appealed on the grounds that there was sufficient evidence to present a jury question, "either of the existence of an actual agency relationship between B.P. and the station operator, or of an apparent agency based on manifestation thereof by B.P., upon which appellant relied." *Id.* at 226, 356 A.2d at 308.

It is settled under Maryland law that vicarious liability for torts of an agent exists only if that agent is a servant. *Gallagher's Estate v. Battle*, 209 Md. 592, 122 A.2d 93 (1956). Thus it must be assumed that the grounds of appeal are the existence of a jury question as to the applicability of the doctrine of respondeat superior by estoppel.

From the facts, there appears little difficulty in finding sufficient evidence for a jury question as to the existence of a master-servant relationship. On that point the inquiry is whether B.P. had the right of control over the station manager in respect to the work to be performed.

See State ex rel. Bozango v. Blumenthal-Kahn Elec. Co., 162 Md. 84, 159 A. 106 (1932).

Facts of the case relevant to this question are: (1) the station manager was paid through a reciprocal lease agreement on commissions for fuel sold, (2) he was not permitted, by agreement, to use the premises for repair or maintenance of automobiles, (3) he was not allowed to affix any sign, fixture or device to the station without permission from B.P., and (4) the court suggests that there was coercion by the company to force the manager to accept "suggestions" of a sales representative.

The court suggests insulation of the company from the manager by means of a reciprocal lease agreement, but this is not convincing. The cases cited in support of this proposition are not totally apposite. In all of the cases used by the court on this point, the lease agreement was only one of the factors looked at, and the main discussion of the lease provisions centered around liability of owners or possessors of land and not the issue of master-servant relation.

Rather than take the direct conventional route to the imposition of liability, the court resorted to the "emerging doctrine" of the "apparent servant". *Mabe, supra* at 233, 357 A.2d at 312. This doctrine as stated by the RESTATEMENT (SECOND) OF AGENCY §267 (1957) is:

> One who represents that another is his servant or other agent and thereby causes a third person to rely upon the care or skill of such apparent agent is subject to liability to the third person for harm caused by the lack of care or skill of the one appearing to be the servant or other agent as if he were such.

The broad extension of the law is not in accepting this statement as the law in Maryland, but in the meager facts required as the basis of representing that another is his servant.

In considering the question, it is necessary to set aside those facts mentioned above with respect to the existence of an actual master-servant relationship, as these are not representations to Mabe. The existence of actual and

apparent master-servant relationships are two distinct questions which must be carefully separated.

The facts which were the basis of the apparent master-servant representations were: (1) a large B.P. sign at the station, (2) the B.P. trademark on the oil cans, the pumps and "everything" including the attendant's uniforms. The court also noted B.P.'s national and regional sales campaigns, as well as advertising on T.V. and in periodicals and the yellow pages. The dissenting opinion states, however, that there was no evidence of either the contents of this advertising, nor that the plaintiff had any awareness of its existence. Without awareness, Mabe certainly could not have relied on these facts as representative of the existence of the master-servant relation.

If the Maryland Court of Appeals, in its consideration of the issue, accepts the apparent servant basis of liability in the case, the court would do well to give some definite indication of the scope of such liability.

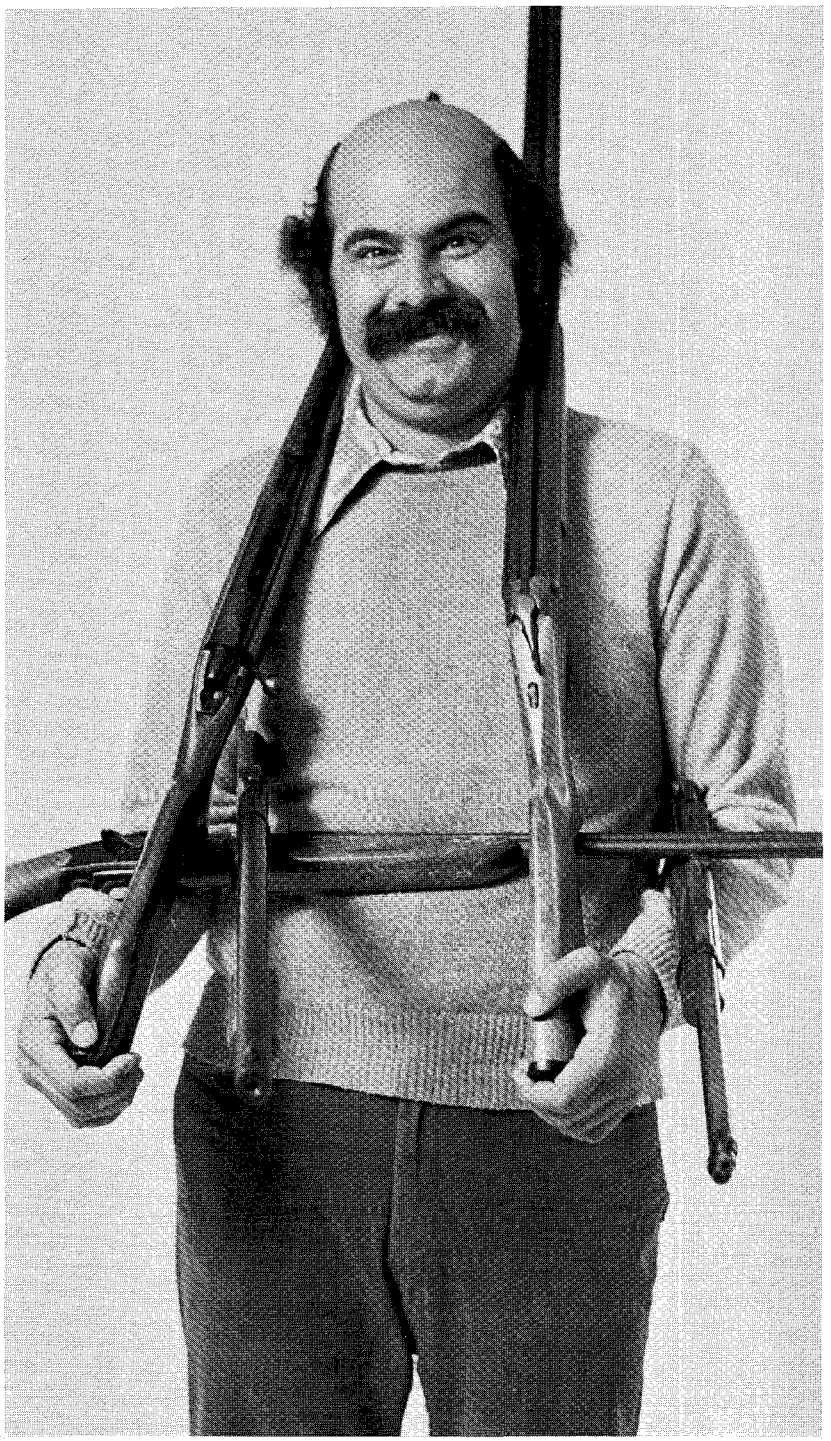

photo by Chris Michael

A Farewell to Arms

by Len Moodispaw

For years gun advocates have been quoting the second amendment to support their claim that the Constitution gives Americans the right to bear arms. However, constitutional scholars have recently discovered evidence that may throw the National Rifle Association into disarray. It is the diary of one of the authors of the Bill of Rights, written at the time that the first ten amendments were being drafted. We were fortunate enough to get a peek at that diary and an exerpt follows:

Circa 1789

Went to dinner with Madison, Mason and Adams. We felt like celebrating because we finished drafting the second amendment. It finally read that a militia is needed for national security and the Government could call on people to serve if needed.

Hamilton wanted to add a phrase about everybody having the right to keep knives, guns, or any weapons they wanted. We hooted him out of the room. We could not imagine letting everyone run around with guns. Our soldiers drove General Washington crazy during the war. He claims we shot more of our own men than the Redcoats did! In one battle we had 14 casualties and that was before the British arrived!

We were talking about the logistical problems we were encountering in get-