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Recent Developments: State v. Garlick: Confrontation Right Not Offended by Admitting Laboratory Test Results into Evidence without Technician's Testimony

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efits had been awarded in cases where the injury resulted from participating in recreational or social events. The court reasoned that allowing an employee to use his employer's equipment for personal projects on its premises also benefitted the employer in a similar fashion as participating in recreational or social events. The benefit to the employer in allowing and encouraging these activities is the creation and maintenance of good employer-employee relationships. Good employee morale benefits the employer. "The benefit expected by, or accruing to, the employer as a result of allowing personal projects to be done using its equipment and on its premises is no different than that flowing to the employer as a result of its sponsorship of recreational or social events." Md. App. at 162, 543 A.2d at 895. Therefore, Austin's activity met the "in the course of employment" requirement of section 15 of the Act.

In holding that such an activity arises out of and in the course of employment, the court of special appeals has expanded the employer's liability for the insurance of its employees. Accordingly, employers and their insurance companies will now find themselves with even greater responsibility for the activities of employees while on the employer's premises.

—Rita Kaufman

State v. Garlick:
CONFRONTATION RIGHT NOT OFFENDED BY ADMITTING LABORATORY TEST RESULTS INTO EVIDENCE WITHOUT TECHNICIAN'S TESTIMONY

In *State v. Garlick*, 313 Md. 209, 545 A.2d 27 (1988), the Court of Appeals of Maryland held that the respondent's right of confrontation was not offended by the admission into evidence of laboratory test results contained in his hospital record without the testimony of the hospital technician and without accounting for the technician's unavailability. In so holding, the court reversed the holding of the court of special appeals.

On June 16, 1985, the respondent Gary Ray Garlick (Garlick) was driving eastbound on U.S. Route 50. As he approached the Chesapeake Bay Bridge toll plaza at an excessive rate of speed, he swerved into another lane, smashing into the rear of a car waiting for change. The impact forced both cars past the toll booth. A police officer soon arrived and observed that Garlick was "extremely incoherent" and had "great difficulty" finding papers necessary for identification. The officer arrested Garlick, charging him with failure to reduce speed to avoid an accident, failure to stop and render aid, and driving under the influence of a controlled dangerous substance.

The officer took Garlick to Anne Arundel General Hospital where the emergency room physician, Dr. Joel R. Buchanan, Jr., examined Garlick. After Garlick gave abnormal responses to a neurological exam, the doctor ordered blood and urine tests. The blood test indicated that there was phencyclidine (PCP) present in Garlick's system.

The technician who administered the test did not appear at the trial in the Circuit Court for Anne Arundel County, and his report was not admitted into evidence. Dr. Buchanan, however, appeared as a witness, and the emergency room report, which referred to the test results, was admitted into evidence. Garlick's objection regarding the admissibility of this report was overruled. Although acquitted on the charge of failing to stop and render aid, Garlick was found guilty of driving while under the influence of a controlled dangerous substance and of failing to reduce speed to avoid an accident. The court of special appeals later determined that the blood test results, contained in the emergency room report, should not have been admitted into evidence and reversed the conviction. *Garlick v. State*, No. 12 (Md. Ct. Spec. App. filed Sept. 23, 1987).

The court of appeals granted certiorari to consider the admissibility of the test results.

The sixth amendment of the United States Constitution, made applicable to the states through the fourteenth amendment, and article 21 of the Maryland Declaration of Rights, provide that every defendant in a criminal prosecution has a right to confront the witness against him. This right "(1) insures that the witness will give his statements under oath...; (2) forces the witness to submit to cross-examination,...; [and] (3) permits the jury that is to decide the defendant's fate to observe the demeanor of the witness making his statement...." *Lee v. Illinois*, 476 U.S. 530 (1986) (quoting *California v. Green*, 399 U.S. 149 (1970)).

Garlick argued that his right of confrontation was violated because the results of his blood test were admitted, although the hospital technician was not called to appear as a witness. To support this contention, he relied upon *Moon v. State*, 300 Md. 354, 478 A.2d 695 (1984), *cert. denied*, 469 U.S. 1207 (1985). In that case, the Court of Appeals of Maryland did not allow a hospital record to be admitted unaccompanied by the technician's testimony. The *Garlick* court, however, was unpersuaded by *Moon*, recognizing that the circumstances in the earlier case distinguished it from the case at bar.

In *Moon*, a blood sample was not analyzed until three days after it had been taken. In addition, the defendant's name did not appear on the report, and the tests were not performed until after the patient received the treatment for which the tests were sought. Considering these facts, the *Moon* court felt that the need for the technician to testify was "neither frivolous nor pointless." *Id.* at 370-71, 478 A.2d at 703. Moreover, one's confrontation right usually requires that if the hearsay declarant is unavailable for cross-examination at trial, proof of his unavailability must be offered. *Id.* at 367-68, 478 A.2d at 701-02. Nonetheless, the *Moon* court recognized instances involving "no confrontation violation because the evidence ... offered is clothed with substantial indicia of reliability. Such evidence is admitted without the declarant's testimony when producing the witness would likely prove unavailing or pointless. Business and hospital records fall within this category...." *Id.* at 369, 478 A.2d at 702-03.

The case *sub judice* turns on the business records exception to the rule against hearsay. The court relied on a 1925 case that examined this issue. *Globe Indemnity Co. v. Reinhart* held that the hearsay exception was based on the "circumstantial guaran-

tee of trustworthiness of the record itself, and upon the inconvenience and well-nigh impossibility of producing witnesses who could from their own personal knowledge testify to the truth of the entries made." 152 Md. 439, 446, 137 A. 43, 45 (1925). *Globe* emphasized that from the hospital's standpoint

> there could be no more important record than the chart which indicates the diagnosis, the condition, and treatment of the patients.... It is difficult to conceive why this record should not be reliable. There is no motive for the person, whose duty it is to make the entries, to do other than record them correctly and accurately.

Id. at 446-47, 137 A. at 46.

This theory is codified as Md. Cts. & Jud. Proc. Code Ann. § 10-101 (1987 Repl. Vol.). This statute declares

> (a)..."Business" includes business, profession, and occupation of every kind.
> (b)...A writing or record made in the regular course of business as a memorandum or record of an event is admissible to prove the act, transaction, occurrence, or event.
> (c)...The practice of the business must be to make such written records of its acts at the time they are done or within a reasonable time afterwards.
> (d)...The lack of personal knowledge of the maker of the written notice may be shown to affect the weight of the evidence but not its admissibility.

In *Bethlehem-Sparrows Point Shipyard v. Scherpenisse,* the Court of Appeals of Maryland included hospital records within the scope of this statute, explaining that the statute's purpose was to broaden the rule of evidence that limited one's testimony to what was personally known or observed. 187 Md. 375, 381, 50 A.2d 256, 260 (1946). Some entries within hospital records, however, have been declared inadmissible. *Gregory v. State* held that this legislation did not extend to a document containing a psychiatrist's opinion of an individual's mental capacity or criminal responsibility. 40 Md. App. 297, 325, 391 A.2d 437, 454 (1978).

Based on its review of the aforementioned authorities, the *Garlick* court concluded that the "pathologically germane" entries in hospital records are generally admissible because they are part of a hospital's "regular course of business." 313 Md. at 223, 545 A.2d at 33. The U.S. Supreme Court declared in *Palmer v. Hoffman* that "regular course" of business finds "its meaning in the inherent nature of the business in question and in the methods systematically employed for the conduct of the business as a business." 318 U.S. 109, 115 (1943). The court of appeals cited with approval the dissenting opinion of *New York Life Ins. v. Taylor,* which reasoned that a hospital's "regular course of business" is the treatment of patients. In order to fullfill this obligation, a hospital methodically maintains a record. Otherwise, a hospital cannot render adequate treatment. 147 F.2d 297, 301 (4th Cir. 1945).

The court of appeals also relied upon the holding in *Pratt v. State* that the information within a hospital record is admissible "as long as it is pathologically germane." 39 Md. App. 442, 455, 387 A.2d 779, 787 (1978), *aff'd,* 284 Md. 516, 398 A.2d 421 (1979). It then determined that "'pathologically germane' ... includes facts helpful to an understanding of the medical or surgical aspects of the case, within the scope of medical inquiry." 313 Md. at 222, 545 A.2d at 33.

After establishing this premise, the court sought to determine whether Garlick's hospital record was prepared in the "regular course of business" and if its contents were "pathologically germane" to his condition. If so, the document could be admitted into evidence under the hearsay rule exception.

Therefore, the significant facts of the case were recounted. The emergency room doctor examining Garlick ordered the blood and urine tests to understand why the patient responded poorly in his neurological exam. The doctor was not present when the blood sample was taken, nor was he aware of the identity of the hospital employee who conducted the tests. In addition, he was not aware whether the equipment performing the tests had been recently inspected, nor was he aware if the testing procedure itself conformed with routine practice. Nonetheless, the doctor testified that he had every confidence in the veracity of the test results.

It was noted that the doctor did not have litigation in mind when he ordered the blood sample taken. The sample was tested by the hospital and not by the police. There was no reason to doubt the record on its face. Considerations of utility and convenience outweighed the probative value behind pursuing the testimony of every medical staff member who examined either Garlick or his blood. The court concluded, "The examining doctor relied on these objective scientific findings for Garlick's treatment and never doubted their trustworthiness. Neither do we." 313 Md. at 225-26, 545 A.2d at 35.

The Court of Appeals of Maryland paid particular attention to the facts in distinguishing Garlick's situation from that in *Moon.* It recognized that Garlick's test results constituted "pathologically germane" entries in a hospital record prepared within the hospital's "regular course of business." This information, in light of the circumstances, satisfied the *Moon* requirement of substantial reliability. The *Garlick* court, therefore, understood that *Moon* was unique in its facts, and reinforced the trend that existed before the *Moon* decision. Thus, Maryland continues to recognize that one's right to confront his accuser is not violated by admitting into evidence a hospital record containing laboratory test results, even though the technician administering those tests is not called to testify.

— *Gregory R. Smouse*

Schochet v. State: STATUTE PROHIBITING UNNATURAL AND PERVERTED SEXUAL PRACTICES DOES NOT VIOLATE THE CONSTITUTIONAL RIGHT TO PRIVACY WHEN APPLIED TO A PRIVATE SEXUAL ACT BETWEEN CONSENTING, UNMARRIED, HETEROSEXUAL ADULTS

In *Schochet v. State,* 75 Md. App. 314, 541 A.2d 183 (1988), the Court of Special Appeals of Maryland recently held that a statute which prohibits unnatural and perverted sexual practices, Md. Ann. Code art. 27, §554 (1957), does not violate the constitutional right to privacy when it is applied to private acts of fellatio between consenting, unmarried, heterosexual adults.

Eight separate charges were filed against Steven Adam Schochet based upon three alleged sexual episodes stemming from an alleged rape. Schochet was acquitted of all six charges involving force and the lack of consent of the victim and of a seventh charge of sodomy. He was convicted only of a violation of Article 27, §554, which prohibits among other things, the act of fellatio, which is considered an "unnatural and perverted sexual practice." Schochet appealed the conviction on the issue of the constitutionality of §554 as applied to consenting, unmarried, heterosexual adults.

To begin its analysis, the court of special appeals examined whether Schochet had standing to raise the constitutional issue of whether there is some substantive due process right of privacy shielding him from