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Torts

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were "in employment" as required by RCW 50.04.100. In concluding that the taxpayer could not claim exception under the provisions of RCW 50.04.140, the Court noted that the only freezers sold by the salesmen were those of the taxpayer and stressed the fact that, although the taxpayer did not in fact exercise extensive control over the actions of the salesmen, he did possess the *right* to control their activities.

TORTS

Malpractice — Limitation of Action in Malpractice Suits. The recent case of *Lindquist v. Mullen*[1] presented the problem of when the cause of action accrues in malpractice actions predicated upon negligence. The defendant left a surgical sponge in a hernia incision in February, 1946, but continued to treat the plaintiff till October, 1949. It was not until March, 1953, that the plaintiff discovered her suffering was caused by the presence of the surgical sponge. The charges were negligence in performance of the operation, and in the diagnosis and treatment subsequent to the injury. The court held that the action was barred by the three-year statute of limitation.[2]

Although seemingly unjust, this decision is in accord with the general rule that the mere fact the plaintiff is not aware of her cause of action for malpractice does not suspend the running of the statute of limitation.[3] The cause of action for malpractice accrues at the time of the physician's wrongful act or omission and not from the time the patient first discovers it.

However, an exception to this general rule has been recognized in most jurisdictions. This exception is based on the theory that where a party is guilty of fraudulent concealment so as to prevent the injured party from obtaining knowledge thereof, the statute of limitation does not start to run until the cause of action is discovered or might have been discovered through reasonable diligence. Among these jurisdictions, however, there is considerable confusion as to what constitutes fraudulent concealment. Some take the view that an affirmative act of concealment on the part of the physician is necessary,[4] while others recognize mere knowledge and failure to disclose to the patient the fact of injury as fraudulent.[5] Still another view employs the rationale

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[1] 145 Wash. Dec. 629, 277 P.2d 724 (1954).
[2] RCW 4.16.080(2).
[3] 74 A.L.R. 1318 (1931); 144 A.L.R. 209 (1943).
[4] Carrol v. Peyton, 138 S.W.2d 878 (Civ. App. Tex. 1940); Brown v. Grinstead, 212 Mo. App. 533, 252 S.W. 973 (1923).
[5] Picket v. Arlinsky (C.C.A. 4th), 110 F.2d 628 (1940); Bervath v. LeFever, 325 Pa. 43, 189 A. 542 (1937).

that knowledge is not an essential element of fraudulent concealment because of the confidential relationship between the parties.[6]

Conceding the rule to be established that lack of knowledge by the patient does not toll the statute, the obvious question arises as to the result had the plaintiff alleged in her complaint that the defendant fraudulently concealed her cause of action from her. The case of *McCoy v. Stephens*,[7] cited with approval in the instant case, seemingly can be construed to hold that Washington has repudiated this exception. In that case it was alleged that after receiving serious burns as a result of negligent X-ray treatments, the defendant, while continuing to treat her for a period of years, fraudulently assured her that the burns were merely superficial. Adopting the rule laid down in several malpractice actions against attorneys that the defendant's concealment of the malpractice does not toll the statute,[8] the court held that since the gist of the plaintiff's grievance was the negligent act of the physician and not the defendant's subsequent failure to disclose, the action was barred by the same three-year statute of limitation.

Furthermore, the language employed in the instant case would also appear to foreclose any recognition of this exception. While the statute is not definitive as to when the cause of action accrues in malpractice suits, the court, though not confronted with the question of fraud, reasoned that since the legislature took positive action to provide a specific exemption to the running of the statute in certain fraud cases, it did not intend this exemption to embrace malpractice cases, saying, "It is not our prerogative to do so." Apparently the basis of the court's position on this controversial question is its reluctance to engraft implied exceptions onto the express wording of the statute. The necessary conclusion is that doctors and dentists guilty of malpractice in Washington may now rest secure in the statute so long as their patients remain ignorant of their cause of actions for the prescribed statutory period.

Absolute Liability—Extent of Liability for Ultrahazardous Activities. In *Foster v. Preston Mill Co.*,[9] blasting operations of the defendant two and one-half miles distant from the plaintiff's mink

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[6] Burton v. Tribble, 189 Ark. 58, 70 S.W.2d 503 (1934); Wood v. Anderson, 60 Ga. App. 262, 35 S.E.2d 788 (1937).

[7] 182 Wash. 55, 44 P.2d 797 (1935).

[8] Cornwell v. Edsen, 78 Wash. 662, 139 Pac. 602 (1914); Jones v. Gregory, 125 Wash. 46, 215 Pac. 63 (1923); Smith v. Berkey, 134 Wash. 348, 235 Pac. 793 (1925).

[9] 44 Wn.2d 440, 268 P.2d 645 (1954).

farm frightened a mother mink and caused her to kill her kittens,[10] wherein liability was sought to be imposed on the theory of absolute liability.[11] In denying recovery, the court was called upon to determine the extent of liability under that theory.[12] Adopting the test of the *Restatement of Torts*,[13] the court held that the injury was not within the risk created by the defendant's ultrahazardous activity.

Although the application of this test by the Washington court to limit liability is new, the rule that liability extends only to foreseeable consequences of hazardous activities is consistent with previous Washington cases, since the basis and justification for absolute liability stems from the hazard created to those in the vicinity. While this result is reached by various theories,[14] prior Washington cases have obtained this result by refusing to recognize the activity of the defendant as ultrahazardous.[15] This compels the plaintiff to predicate his action on a theory of negligence or nuisance, which therefore, subjects that action to the limitations of *proximate cause* or *balancing the interests*.

The court, however, by way of dictum, pointed out that even had the injury been foreseeable, recovery would have been denied since "... the *policy of the law* does not impose the rule of strict liability to protect against harms incident to the plaintiff's extraordinary and unusual use of land." What the court means by this *policy* is not altogether clear. A literal reading of this dictum would indicate that

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[10] For a discussion of the somewhat eccentric habits of female mink, see Hamilton v. King County, 195 Wash. 84, 79 P.2d 697 (1938).

[11] The theory of absolute liability is associated with Rylands v. Fletcher, (1886) L. R. Ex. 265, *aff'd*, Fletcher v. Rylands, (1868) L. R. 3 H. L. 330., that a land-owner who artificially accumulates water upon his premises is absolutely liable for damages caused by its escape. This case has been overruled by name in Anderson v. Rucker Brothers, 107 Wash. 595, 183 Pac. 70, *aff'd on rehearing*, 107 Wash. 604, 186 Pac. 293 (1919).

[12] The Washington court has accepted the theory of absolute liability for injuries caused by the use of explosives irrespective of negligence—it is an ultrahazardous activity which is carried on at peril. Patrick v. Smith, 75 Wash. 407, 134 Pac. 1076 (1913); Schade Brewing Co. v. C.M. & P.S. Ry., 79 Wash. 651, 140 Pac. 897 (1914).

[13] 3 RESTATEMENT, TORTS, 41 § 519 (1938). "Except as stated in §§ 521-4, one who carries on an ultrahazardous activity is liable to another whose person, land or chattels the actor should recognize as likely to be harmed by the unpreventable miscarriage of the activity for harm resulting thereto from that which makes the activity ultrahazardous, although the utmost care is exercised to prevent harm."

[14] Madison v. East Jordan Irr. Co., 101 Utah 552, 125 P.2d 794 (1942). Under facts similar to those in the instant case, recovery was denied on the ground that the mother mink's intervention broke the chain of causation.

[15] Klepsch v. Donald, 4 Wash. 436, 30 Pac. 991 (1892). The court held that the theory of absolute liability is inapplicable to persons whose premises are at such a distance that there is no reason to expect they will be damaged by blasting activities. Kendall v. Johnson, 51 Wash. 477, 99 Pac. 310 (1909). Blasting is not inherently dangerous when done so far away from human habitation that injury could not be foreseen.

the plaintiff's conduct must also be of sufficient utility to outweigh the foreseeable consequences of the defendant's hazardous activity.

JAMES A. FURBER

Wrongful Death—Defenses Available to the Tortfeasor. In the case of *Johnson v. Ottomeir*,[16] the court again explored the question of whether the right of a decedent's representative to maintain an action for wrongful death under RCW 4.20.010 is dependent upon the right of the decedent to have maintained such an action had he survived. In this case a husband murdered his wife and then committed suicide. The defendant was appointed administrator of both estates. The plaintiff, a son of the murdered wife, brought this action to have himself appointed administrator with will annexed of the estate of his mother. The son's contention was that a cause of action for wrongful death existed in his mother's estate against the estate of her husband which the defendant could not prosecute, being executrix of both estates. The defendant argued that under the Washington court's interpretation of the wrongful death statute, the tortfeasor, or in this case the tortfeasor's estate, had the benefit of any defenses which might have been available to him in an action brought by the decedent had she survived; and because of the immunity from suit between husband and wife for torts committed against the person during coverture[17] the decedent could not have maintained an action; therefore, none can be brought by her estate. The complaint was dismissed in the trial court.

In an *en banc* decision, with one dissenting justice, the Supreme Court reversed the lower court's dismissal, and thus for the first time recognized a cause of action for wrongful death as existing in favor of a decedent's estate where the decedent would have had no remedy in an action brought by himslf. Recognizing the apparent inconsistency between this decision and the earlier expressed rule that "all defenses available to the defendant, if the action had been brought by the person injured, prior to his death, are available to the defendant in an action brought by his personal representative to recover damages for his death,"[18] the court attempts to distinguish this case from others in which the problem has arisen. The basis of this distinction the court finds to be in the nature of the defense which has been asserted in the previous cases where the existence of a cause of action has been denied. These defenses the court places into two major categories.

[16] 145 Wash. Dec. 391, 275 P.2d 723 (1954).
[17] Schultz v. Christopher, 65 Wash. 496, 118 Pac. 629 (1911).
[18] Ostheller v. Spokane & Inland Empire R. Co., 107 Wash. 678, 182 Pac. 630 (1919).

First, there are defenses which the court finds to "inhere in the tort"[19] that is, defenses which are related to the tortious conduct in such a way as to prevent its being a death resulting from a "wrongful act or neglect" within the court's interpretation of the statute. Included in this category the court finds contributory negligence,[20] self-defense,[21] consent,[22] and the relationship of host and guest under Washington's host-guest statute.[23] Where these defenses are present the court has held that there has been no breach of duty owing to the decedent, and hence it is not a death by wrongful act or neglect, and no action is maintainable.

The second category of defenses which will be available to the tortfeasor, according to this opinion, exists where the conduct of the decedent following injury, but prior to his death, was such that he would have been precluded from bringing an action himself while alive. Included within this category are cases in which the decedent has given a release and satisfaction to the tortfeasor[24] as well as those in which the decedent has allowed the statute of limitations to run on the original injury while he was still alive.[25]

The defense of husband-wife immunity asserted in the *Johnson* case, the court finds, is included in neither of these categories. It exists merely by virtue of the disability of the wife to bring suit. Such disability, being personal to her, terminates on her death, there being no valid reason for allowing its assertion in an action maintained by her representative.

Despite the liberalized interpretation of the wrongful death statute in the instant case, the opinion indicates that for most purposes the court will continue to treat the statute as conferring a remedy more in the nature of a survival action rather than as granting a new cause of action in favor of the decedent's estate. In most cases the action will still apparently be subject to all the defenses which might have been raised against the decedent. The only exception to this appears to be in that limited area where the court finds what it terms a "personal defense" present. It is submitted that in a wrongful death action

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[19] The court seems to derive this conception of defenses which inhere in the tort from the decision of the Pennsylvania court in Kaczorowski v. Kalkosinski, 321 Pa. 438, 184 Atl. 663 (1936).

[20] Ostheller v. Spokane & Inland Empire R. Co., *supra* note 18.

[21] Welch v. Creech, 88 Wash. 429, 153 Pac. 355 (1915).

[22] Hart v. Geysel, 159 Wash. 632, 294 Pac. 570 (1930).

[23] Upchurch v. Hubbard, 29 Wn.2d 559, 188 P.2d 82 (1947).

[24] Brodie v. Washington Water Power Co., 92 Wash. 574, 159 Pac. 791 (1916).

[25] Calhoun v. Washington Veneer Co., 170 Wash. 152, 15 P.2d 943 (1932). Grant v. Fisher Flouring Mills Co., 181 Wash. 576, 44 P.2d 193 (1935).

brought under a statute as exists in Washington the only valid defenses should be those, such as self-defense and consent, which prevent the defendant's conduct from being tortious at all. All of the others discussed by the court are, in fact, as personal to the decedent as the defense of husband-wife immunity. They operate merely to prevent the decedent's recovery and do not prevent the conduct of the defendant from being tortious. If, as the court states, the wrongful death statute does create a new cause of action in favor of the decedent's estate and not merely a survival action, there seems little reason to limit the statute's application in the way the court suggests.

ROBERT E. DIXON

Affirmative Defenses—Voluntary Assumption of Risk—*Volenti Non Fit Injuria.* In *Ewer v. Johnson,* 44 Wn.2d 746, 270 P.2d 813 (1954), and in *Kingwell v. Hart,* 145 Wash. Dec. 372, 275 P.2d 431 (1954), the court again reiterated the distinction between the affirmative defenses of assumption of risk and the maxim, *volenti non fit injuria.* The former applies only to cases arising out of the relationship of master and servant or involving a contractual relationship, whereas the "maxim" applies independently of any contract relationship. The court also pointed out that both of these defenses are closely akin to contributory negligence, the distinction being that assumption of risk and *volenti non fit injuria* may bar recovery even though the injured person may be free from contributory negligence.

Host-Guest Statute—Implied Contract for Transportation—Emergency Doctrine—Res Ipsa Loquitur. *Vogreg v. Shepard Ambulance Service, Inc.,* 44 Wn.2d 528, 268 P.2d 642 (1954), was an action for injuries sustained as a result of falling out of the defendant's ambulance while attempting to close the rear door in which the plaintiff's husband, a paralytic, was riding. The trial court held that the plaintiff was a guest in the defendant's ambulance, as a matter of law, and the doctrine of *res ipsa loquitur* was inapplicable. *Held:* Whether the defendant impliedly contracted to transport wife was a question of fact for the jury to determine under the purview of RCW 46.08.080, and the existence of an emergency, *viz.,* the unexplained opening of the rear door, did not make the plaintiff's conduct necessarily unreasonable rendering *res ipsa loquitur* inapplicable.

Contributory Negligence—Excusable Breach of Statute. *Wood v. Chicago, M., S.P. & P. Ry.,* 145 Wash. Dec. 561, 277 P.2d 345 (1954), was an action for injuries sustained in a grade crossing accident which occurred before plaintiff reached signs indicating the location of a speed zone and city limits. The issue presented was whether the plaintiff was guilty of contributory negligence *per se* because he exceeded the maximum speed limit of twenty-five miles per hour within the limits of an incorporated town, as prescribed by RCW 46.48.020. Citing previous Washington cases that indicate a reluctance either to impose liability or to find contributory negligence for violation of a statute as a matter of law where, except for the statute, the conduct would not be deemed neglect, the court held that the absence of any notice or warning constituted an excusable breach of the statute. The court also emphasized the ever increasing reliance on the part of drivers today on signs to warn them of any impending hazard.

Negligence—Instructions. *Blassick v. City of Yakima,* 145 Wash. Dec. 287, 274 P.2d 122 (1954), was an action for injuries sustained by a pedestrian falling on an allegedly defective alley crosswalk. The trial court instructed that the plaintiff to recover must prove one or more acts of negligence "and that such negligence *proximately caused* or *materially contributed* to the accident." The court pointed out that the *materially contributed* test is synonymous with the *substantial factor* test proposed by the *Restatement of Torts,* 1159, § 431 (1938), but the test should not be used either as a definition of or a substitute for *proximate cause* in determining what is actionable negligence. It was also pointed out that the *materially contributed* test should be confined to the fact of causation alone, as distinguished from *proximate cause* which embraces all policy considerations that limit liability even though the defendant's conduct is a materially *contributing cause.*

Malicious Prosecution—Necessity of Special Injury. In *Petrich v. McDonald,* 44 Wn.2d 211, 266 P.2d 1047 (1954), the defendant had brought an action in Admiralty with a libel for a foreclosure on a preferred ship mortgage and the issuance of an attachment *in rem* against the plaintiff's vessel. The action was dismissed in Admiralty, whereupon the plaintiff brought this suit for malicious prosecution alleging injury as a result of the attachment of his vessel. In reversing a judgment for the plaintiff the court held that while a seizure of property may afford occasion for the maintenance of an action for malicious prosecution such seizure must constitute special injury *"which would not necessarily result in all like prosecutions."* As the attachment of the plaintiff's vessel was a necessary incident to the defendant's maintenance of his action in Admiralty such attachment did not constitute special injury, and on which a suit for malicious prosecution could not properly be grounded.

Libel—Defenses of Qualified Privilege and Fair Comment or Criticism. In *Cohen v. Cowles Pub. Co.,* 145 Wash Dec. 241, 273 P.2d 893 (1954), an action for libel, the court indicated that the defense of fair comment or criticism must be based on statements of fact which are true, and not merely on facts which are reasonably believed to be true. This is the first clear statement of the court's position. The rule was previously considered in the dissenting opinion in *Gaffney v. Scott Pub. Co.,* 41 Wn.2d 191, 248 P.2d 390 (1952). For a discussion of the confusion surrounding the defenses of qualified privilege and fair comment or criticism, see Comment, *An Outline of the Law of Libel in Washington,* 30 WASH. L. REV. 36 (1955).

WILLS AND ESTATES

Attestation of Wills—Personal Knowledge of the Genuineness of Decedent's Signature is Necessary. The case of In re *Cronquist's Estate*[1] tests the meaning of *attestation* by witnesses as used in RCW 11.12.020, which provides, in part: "Every will . . . shall be attested to by two or more competent witnesses, subscribing their names to the will. . . ."[2] In the *Cronquist* case, neither of the persons who signed as witnesses saw the decedent affix his signature to the will nor did the decedent acknowledge to either that he had so affixed his signature.

[1] 145 Wash. Dec. 321, 274 P.2d 585 (1954).
[2] RCW 11.12.020.