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Torts

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original agreement. RESTATEMENT, CONTRACTS, § 406, points out that "an agreement by the parties to a contract to rescind their *contractual* duties . . . discharges such duties if the agreement is . . . based on sufficient consideration. . . ." (Emphasis added.) Thus, in this type of situation the making of the original contract of sale is the event upon which the excise tax is imposed.

Washington cases in accord with § 406 of the RESTATEMENT, CONTRACTS, include *McMillan v. Bancroft,* 162 Wash. 175, 298 P. 460 (1931), and *Carter v. Miller,* 155 Wash. 14, 283 P. 470 (1929).

One might also ask whether there should not be a second excise tax upon the rescission agreement involved in the principal case. The statutory definition of a taxable event found in RCW 28.45.010 includes the clause, "or other contract under which possession of the property is given to the purchaser, or [to] any other person by his direction. . . ." It should be noted that the shifting of possession as well as the making of the contract is required for the creation of a taxable event. Thus, in a situation similar to the principal case, where there is a rescission and also a shifting of possession, it might well be questioned whether the result is another taxable event within the meaning of the statute.

Inheritance Tax—Cash Value of Insurance Policy Subject to Taxation. In deciding *In re Leuthold's Estate,* 152 Wash. Dec. 250, 324 P.2d 1103 (1958), the Washington court overruled a position formerly taken in *In re Knight's Estate,* 31 Wn.2d 813, 199 P.2d 89 (1948). The rule in Washington now is that the cash surrender value of a life insurance policy is property, which, if bought with community funds, produces a community interest in the cash surrender value in the non-insured spouse. It follows, consequently, that upon the death of the non-insured spouse, this community interest is property of his or her estate which is subject to an inheritance tax.

The facts of the *Leuthold* case are as follows: the wife died testate, predeceasing her husband, upon whose life the community held six life insurance policies with cash surrender value provisions. The state contended that the wife's death was a taxable event because it passed her half of the community interest in the surrender value of the policies to her legatees. The wife's executor, however, convinced the lower court that the *Knight* rule ("the cash surrender value of a life insurance policy is not property which passes by will or the statute of inheritance") should control. The supreme court, upon the first hearing, reported in 150 Wash. Dec. 227, 310 P.2d 872 (1957), affirmed, five to three. On rehearing, the court reversed its former position and overruled the *Knight* case by a five-to-four decision, in which a judge who had not previously participated and the judge who had written the original majority opinion, voted to reverse the earlier decision.

TORTS

Constitutional Taking and Constitutional Damaging—Wrongful Activity by Municipal Corporation—Recovery Against Airport by Adjacent Property Owners—Airspace Ownership. *Ackerman v. Port of Seattle*[1] is the first case in Washington to consider the relative rights of the owner of an airport, here a municipal corporation, and the owners of property near the airport. Sixty-one owners of real property situated near the Sea-Tac airport, which is owned and oper-

[1] 152 Wash. Dec. 663, 329 P.2d 210 (1958).

atd by the Port of Seattle, brought this action for damages, naming the Port and several airlines as defendants. The plaintiffs complained about the frequent low flights of planes taking off and landing at Sea-Tac airport. Four alternative theories of recovery were pleaded: nuisance, trespass, constitutional taking, and constitutional damaging. The trial court overruled demurrers to the complaints of all of the plaintiffs except five who owned only vacant land. These five appealed from the trial court's action in sustaining demurrers to their complaints. The Port of Seattle was the only defendant involved in the appeal.

The supreme court, in a five-to-four decision, reversed the trial court and held that the demurrers to the appellants' complaints were not properly sustained. The court disposed of the trial court's objection to the appellants' complaints by holding that it made no difference that the appellants' lands were vacant, since it is the character of the invasion that controls, and not the amount of the damage. The court then proceeded to discuss the Port's other objections to the complaints. The argument that the activity of the Port was an exercise of its police power, and thus free from the obligation to compensate private property owners for their loss, was disposed of by the court by finding that property rights were taken from the plaintiffs and conferred upon the public. The court said that there is no duty to pay compensation when private property rights are completely destroyed generally;[2] but eminent domain principles apply when private property rights are taken from the individual and conferred upon the public for public use.[3]

The plaintiffs alleged injury to two legally protected interests: their interest in the exclusive possession of land, and their interest in the use and enjoyment of land. Invasion of the first interest by a private individual is normally treated as a trespass,[4] while unreasonable interference with the second interest by a private individual is normally a private nuisance.[5] The distinction is important in determining possible equitable remedies and in determining when the statute of limitations begins to run,[6] as well as in solving constitutional problems.

The court held that the tort causes of action, trespass and nuisance, were precluded, since recovery would be for the same injuries as that

[2] State *ex rel.* Miller v. Cain, 40 Wn.2d 216, 242 P.2d 505 (1952).
[3] Conger v. Pierce County, 116 Wash. 27, 198 Pac. 377 (1921).
[4] See PROSSER, TORTS § 13 (2d ed. 1955).
[5] *Id.* § 72.
[6] *Id.* § 72.

given under the causes of action for constitutional damaging and constitutional taking. An action for constitutional taking or damaging is an action brought directly under Article 1, Section 16, of the Washington Constitution, as amended, which provides, in part, that "no private property shall be taken or damaged for public or private use without just compensation having been first made. . . ." [7] The cause of action for constitutional taking or damaging arises when the state, or a municipal or private corporation with an express statutory grant of powers of eminent domain,[8] has proceeded to take or damage private property without first acquiring the property through purchase or condemnation.

The court has permitted this type of action to be brought even though there is no statutory authority for it.[9] The reasoning which supports the court's position is somewhat obscure, but the court has said that taking or damaging by a municipal corporation must be deemed to have been done pursuant to the city's sovereign power of eminent domain, and not as a tortious act.[10] The court's alternative would have been to limit the property owner to an action for tort and to require the state or municipal corporation to condemn in a separate action. The action brought under the constitution apparently serves the purposes of both. This appears to conflict with the court's previous holding that statutory procedures must be strictly followed before a municipal corporation can condemn[11] and possibly ignores the constitutional requirement of a judicial determination of "public purpose." The court has failed to explain how the municipal corporation can acquire title without satisfying the statutory and constitutional requirements.

The court has commonly defined the terms "taking" and "dam-

[7] The early case of Brown v. Seattle, 5 Wash. 35, 31 Pac. 313 (1892), traced the development and interpretation of this provision in other jurisdictions. It originally appeared in the Illinois Constitution of 1870. The damage provision was added to an earlier version in Illinois in order to provide a compensable property interest when the state did not actually take physical possession of the land. This was precluded by court decisions so long as only compensation for taking was provided. See Chicago v. Taylor, 125 U.S. 161 (1888), which construed the Illinois constitutional provision.

[8] Here RCW 14.07 and RCW 14.08 gave municipal corporations powers of eminent domain to condemn land or easements in order to establish airports. A municipal corporation has no inherent power of eminent domain and can exercise such power only when expressly authorized by the legislature. Tepley v. Sumerlin, 46 Wn.2d 504, 282 P.2d 827 (1955); State *ex rel.* Mower v. Superior Court, 43 Wn.2d 123, 260 P.2d 355 (1953).

[9] This is consistent with the view taken toward similar provisions in other states. The property owner need not rely upon condemnation but has an action for damages under the constitution. People *ex rel.* Tyson v. Kelley, 379 Ill. 297, 40 N.E.2d 510 (1942).

[10] Armstrong v. Seattle, 180 Wash. 39, 38 P.2d 377 (1934).

[11] Tepley v. Sumerlin, 46 Wn.2d 504, 282 P.2d 827 (1955).

aging" by applying tort concepts.[12] The court looks to tort law to find what legally protected interests the plaintiffs had and then, in effect, equates these to constitutionally protected interests. Here the court decided that the frequent low flights amounted to a taking of an air easement for the purpose of flying airplanes over the plaintiffs' land, and that, although this would be a trespass if done by a private person,[13] it is a constitutional taking when done by a municipal corporation with the power to condemn.[14]

Trespass as a theory for recovery against low-flying aircraft has given the courts some difficulty,[15] since at common law it was thought that the surface owner owned the airspace all the way to the heavens.[16] This concept has been universally repudiated and several theories have been developed to replace it.[17] The most popular theory with the courts, the "zone" theory,[18] was adopted by the Washington court in the instant case by following the case of *United States v. Causby*.[19] The "zone" theory divides the airspace into two horizontal zones. The surface owner has the exclusive right to possession of the lower zone, and the upper zone is part of the public domain. Invasion of the surface owner's zone is a trespass. The exact limits of the two zones must be determined by the facts in each case.[20] In the *Causby* case, the United States Supreme Court accepted the Civil Aeronautics Board's regulations regarding level flight[21] as being a measure of a reasonable dividing line between the two zones. The Port used that case as a

[12] See *e.g.*, see Armstrong v. Seattle, 180 Wash. 39, 38 P.2d 377 (1934); Price v. Humptulips Driving Co., 127 Wash. 69, 219 Pac. 871 (1923); Aylmore v. Seattle, 100 Wash. 515, 171 Pac. 659 (1918).

[13] RESTATEMENT, TORTS § 158, comment *i* (1934), states, in part, "if, by any act of his, the actor intentionally causes a third person to enter land, he is as fully liable as though he himself enters. Thus, if the actor has commanded or requested a third person to enter land in the possession of another, the actor is responsible for the third person's entry, if it be a trespass."

[14] See Keesling v. Seattle, 152 Wash. Dec. 205, 324 P.2d 806 (1958); Kincaid v. Seattle, 74 Wash. 617, 134 Pac. 504 (1913).

[15] *E.g.*, the concurring opinion in Thrasher v. Atlanta, 178 Ga. 514, 173 S.E. 817 (1934).

[16] See Hackley, *Trespassers in the Sky*, 21 MINN. L. REV. 773 (1937).

[17] See Hunter, *The Conflicting Interests of Airport Owner and Nearby Property Owner*, 11 LAW & CONTEMP. PROB. 539 (1946).

[18] There are two other major theories. The first was expressed in Hinman v. Pacific Air Transport, 84 F.2d 755 (9th Cir. 1936), which did not recognize any ownership rights in the unoccupied airspace. The second theory was adopted in RESTATEMENT, TORTS, § 194 (1934). It preserves the common law concept of ownership of the airspace by the surface owner but makes flights complying with certain conditions privileged.

[19] 328 U.S. 256 (1946).

[20] See Eubank, *The Doctrine of the Airspace Zone of Effective Possession*, 12 B.U.L. REV. 414 (1932).

[21] These were 500 feet over congested areas, and 1,000 feet above the nearest obstacle over congested areas.

basis for arguing that the same rule should apply to the Board's regulations regarding planes approaching or leaving an airport, which provided for inclined approach routes into the airport. The Washington court refused to accept those regulations as a standard to apply, and held that the flights in question invaded the plaintiff's airspace. Apparently all of the plaintiffs' complaints here alleged frequent flights under 500 feet above the ground. Although the court was willing to find that these allegations were sufficient to state a cause of action, it did not indicate any test for determining how high the surface owner's airspace extends.

The court also said that even if the plaintiffs' land were found to lie outside the normal approach area of the airport,[22] they still might recover for constitutional damaging, indicating that a theory of nuisance would support an action for constitutional damaging. This does not require an interference with the use and enjoyment of land. The elements of interference with the plaintiffs' use and enjoyment which were alleged here are noise and fear. Recovery is allowed if the fear is reasonable,[23] or if the noise is unreasonable.[24]

When the nuisance alleged is created by the noise and fear caused by low-flying airplanes the airlines may clearly be liable in tort. However, the liability of the airport is not so clear. The airport must have contributed to the nuisance before it can be held liable to pay compensation for damaging. The court adopted the grounds given in *Phoenix v. Harlan*[25] for attributing the nuisance to the airport. These are that the airport has inadequate facilities, so that persons using it cannot avoid interfering with the plaintiffs' use and enjoyment, or, assuming that the facilities are adequate, the airport has actual or constructive notice that persons using the airport are substantially interfering with the plaintiffs' use and enjoyment of their land. These grounds appear to have supported recovery in other jurisdictions as well.[26]

The dissenting opinion expressed the view that the operation of the airport could not be a nuisance because of RCW 7.48.160, which provides that "nothing which is done or maintained under the express authority of a statute, can be deemed a nuisance." The majority opinion met this argument by relying upon *Shields v. Spokane School*

[22] Th complaints alleged that the plaintiffs' land lay within the approach area.
[23] Brady v. Tacoma, 145 Wash. 351, 259 Pac. 1089 (1927).
[24] Aubol v. Tacoma, 167 Wash. 442, 9 P.2d 780 (1932).
[25] 75 Ariz. 290, 255 P.2d 609 (1953).
[26] See Mace, *Ownership of Airspace*, 17 U. CIN. L. REV. 343 (1948).

Dist.,[27] together with a number of cases from other jurisdictions construing similar statutes, which held that, although the statute prevents the defendant's conduct from being a nuisance *per se*, it may still be a nuisance in fact. Both opinions ignored the effect of the defendant's municipal character on this issue and thus misconstrued the problem. The action is one brought under the constitution and not an action in tort, even though a tort analysis has generally proved valid in determining when an injury has occurred. The problem is what interests of the landowner are protected by the constitution, not what constitutes a nuisance. If the landowner has a constitutionally protected interest in the use and enjoyment of his property the legislature has no power to destroy that interest merely by changing the general tort law. The same argument, that RCW 7.48.160 prevented recovery, was presented to the court in *Jacobs v. Seattle*.[28] There it was answered by distinguishing between an action for nuisance and an action for constitutional damaging, which appears to be a better analysis than that followed here.

In the past the court has attempted to apply various Washington statutes of limitations to actions for constitutional taking and damaging. Here, the court followed a number of prior decisions[29] and held that the ten-year statute of limitations, which applies to prescriptive rights, applied to the cause of action for constitutional taking. This rule apparently was derived from a feeling that if an individual can acquire a prescriptive right in ten years, a municipal corporation should be able to do so too. The court also held that the ten-year statute applied to the cause of action for constitutional damaging. The court said that "if both the cause of action for constitutional damage and the cause of action for continuing nuisance are barred, it must be on some theory of prescriptive right to do the acts occasioning the damage; and a prescriptive right can only be acquired on the basis of the prescriptive period."[30] This puts both taking and damaging on the same basis, insofar as limitation of

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[27] 31 Wn.2d 247, 196 P.2d 352 (1948).

[28] 93 Wash. 171, 160 Pac. 299 (1916).

[29] Northwest Cities Gas Co. v. Western Fuel Co., 13 Wn.2d 75, 123 P.2d 771 (1942); Litka v. Anacortes, 167 Wash. 259, 9 P.2d 88 (1932); Domrese v. City of Roslyn, 101 Wash. 372, 172 Pac. 243 (1918); Aylmore v. Seattle, 100 Wash. 515, 171 Pac. 659 (1918).

[30] Ackerman v. Seattle, 152 Wash. Dec. 663, 682, 329 P.2d 210, 223 (1958). This would indicate that the court is willing to find a prescriptive right in activities which would normally constitute a private nuisance. No prior Washington case has taken this position, but a number of other jurisdictions have adopted it in different fact situations. See annot., 152 A.L.R. 343 (1944).

actions is concerned. The court expressly disavowed two prior cases[31] which had treated the recovery for damaging as one for a promise implied in law, similar to an action for restitution, and had said that the three-year statute of limitations applied.

Why should the court apply any statute of limitations? The Washington constitution contains no limitation and the legislature has not attempted to limit such actions expressly. Indeed, the legislature appears not to have authorized or even recognized such actions. The court apparently has found that the authority to hear an action for constitutional taking or damaging is implied by the terms of the constitution. So far the court has proved unwilling to recognize that none of the existing statutes of limitations can logically be applied to limit such actions.

When the court reached the question of damages, it indicated that the plaintiffs could recover the difference between the value of their property before the airport was used extensively and the value thereafter, plus interest from that time. There was no indication that a different measure of damages would be applied to property within the approach area than that applied to property outside of it.

The court made it clear that airport owners, as well as airplane owners and operators, will be held liable for the drop in real estate values which takes place in the vicinity of airports when they are built. In doing so, the court committed itself to the "zone" theory of airspace ownership. The fact of the surface owner's property interest in the airspace was clarified, even if the extent of that interest is still open to question in each case.

JOHN L. NEFF

Misrepresentation as a "Fraudulent Act" of the Insured. In the case of *Brown v. Underwriters at Lloyd's*,[1] a real estate broker sought indemnity under the terms of an "errors and omissions" insurance policy,[2] sometimes referred to as brokers' malpractice insurance. The broker's agent had previously been found liable for a misrepresenta-

[31] Papac v. City of Montesano, 49 Wn.2d 484, 303 P.2d 654 (1956); Gillam v. City of Centralia, 14 Wn.2d 523, 128 P.2d 661 (1942).

[1] 153 Wash. Dec. 126, 332 P.2d 228 (1958).

[2] "*Now Therefore* this Insurance . . . indemnifies the Assured against any claim or claims for breach of duty as . . . General Insurance Agents which may be made against them . . . by reason of *any negligent act*, error or omission whenever or wherever committed, . . . on the part of the Assured or any person who has been, is now, or may hereafter during the subsistence of this Insurance be employed by the Assured, in the conduct of any business conducted by or on behalf of the Assured in their capacity as . . . General Insurance Agents." Brown v. Underwriters at Lloyds, *supra* p 127.

tion regarding the heating and cooling system of a commercial building made to the person he subsequently induced to buy the property. The insurer denied the broker's claim, contending that a clause in the insurance policy excluded indemnity for "claims brought about or contributed to by the dishonest, *fraudulent,* criminal or malicious act or omission of the assured or any employee of the assured" (Emphasis added). In the prior action by the purchaser against the broker (which the insurer declined to defend), the trial court gave the jury instructions[3] respecting the broker's liability for fraudulent representation, and the insurer therefore assumed that its policy would not cover such liability. In fact the agent had only repeated the statement made to him by the owner of the property, "that the heating and cooling system was adequate." However, the statement was made as if it were of the agent's own knowledge, when in fact he did not know whether the system was adequate and, as it turned out, it was not. The broker paid the judgment of over three thousand dollars, and the insurer declined to prosecute an appeal. In the broker's action against the insurer, the trial court found the act of the agent to be within the exclusionary clause of the policy, and thus held for the defendant insurance company. On appeal, the supreme court reversed, holding that the misrepresentation was not fraudulent within the meaning of the exclusionary clause.

With respect to contract interpretation problems, the intent of the parties is usually of primary importance.[4] No cases involving similarly worded insurance policies that would reveal a commonly accepted definition of the words "fraudulent" and "dishonest" are available. There are, however, numerous cases dealing with employer's fidelity bonds. Such bonds are designed to protect the employer against fraudulent acts practiced upon himself by his employees. (In the omissions policy presently under discussion, the employer wanted protection from liability incurred by his employee's negligence to third parties.) Nevertheless, one might expect the meaning given to the word "fraudulent" in the indemnity and fidelity bond cases to be the proper meaning for the word "fraudulent" in the present case.

[3] "Under the law a real estate agent is under a duty to exercise reasonable care and diligence to ascertain the truth or falsity of information furnished him by his principal, and such agent is responsible for such representations inducing a buyer to purchase . . . if such agent knew the statements were false, or in exercise of reasonable care and diligence on his part, should have known the statements to be false, or if he made such statements as positive assertions . . . that he had actual knowledge of their truth, when in fact he had no such knowledge; . . ." Brown v. Underwriters at Lloyds, *supra* p. 128.

[4] RESTATEMENT, CONTRACTS § 266 (1932).

In *Mortgagee Corp. v. Aetna Cas. & Sur. Co.*,[5] a New Jersey case, an inspector was under a duty to the insured mortgage corporation to inspect houses personally and certify as to the stage of their construction, so that the mortgage company could make further advances to the construction company. The inspector made false certifications without any inspections but did not profit personally from these incorrect reports. Nevertheless, the court classified his acts as dishonest and allowed the insured mortgagee to collect from the surety company. The court stated that the words "fraud" and "dishonesty" as used in indemnity bonds are broadly interpreted to include any acts which show a want of integrity or a breach of trust.[6]

In *Jacobs v. Fidelity Deposit Co.*,[7] an employee made an improper expenditure of his employer's funds to contractors without first obtaining mechanic's lien waivers, and the court held that the determination of whether this was a dishonest act under the terms of the policy was a question for the jury. Courts generally seem inclined to apply a construction which will favor recovery by an insured, rejecting strict literal readings which most frequently would favor the interests of the insurance company that drafted the policy.[8] To apply such a broad meaning to the same words in an errors and omissions policy would defeat the underlying purpose of favoring the insured; so the court in the present case preferred to alter the result so as to preserve this purpose. This is the anomalous result of a broad meaning to the word "fraud" in a fidelity bond case and a narrow meaning when the same word is used in an errors and omissions policy.[9]

A number of Washington cases hold that one of the essential elements of a tort action for fraudulent representation is proof that the speaker knew his statement was false *or that he was ignorant of*

[5] 19 N.J. 30, 115 A.2d 43, 46 (1955), stating that the "words 'fraud' and 'dishonesty' as used in indemnity bonds are to be taken most strongly against surety company."

[6] Although it would be easier to deduce intent on the part of the inspector to commit a fraudulent act than it would under the facts of the case in discussion, the decision reflects the court's inclination to favor an interpretation which will allow an insured to recover.

[7] 202 F.2d 794, 798 (7th Cir. 1953). The court stated: "mere negligence, mistake, or error in judgment would not ordinarily be considered a dishonest act—acts resulting from incompetence cannot be characterized as dishonest," although "the words 'dishonest' and 'fraudulent' used in reference to conduct covered by the bond are to be given a broad meaning."

[8] Generally doubtful provisions in contracts of insurance must be construed most favorably to insured. Ringstad v. Metropolitan Life Ins. Co. 182 Wash. 550, 553, 47 P.2d 1045 (1935).

[9] In action on bond indemnifying bank against dishonest act of employees, words "dishonest act" used in bond should be given broad and comprehensive meaning, Hansen v. American Bonding Co. of Baltimore, 183 Wash. 390, 48 P.2d 653 (1935).

its truth.[10] Thus, in the purchaser's action against the insured broker for fraudulent representation, it was not necessary for the court to distinguish between actual and constructive fraud. The Washington court, in order to provide some remedy, includes what would more appropriately be classified as negligent misrepresentation under the title of fraudulent representation. This characterization of an action as one for fraudulent representation in some instances will involve a misnomer, hence causing the word "fraudulent" to lose its significance. This results in the loss of the fundamental distinction between intentional and negligent acts.[11]

In a jurisdiction in which an action of fraudulent representation is maintainable for an honest but inaccurate statement, the court may consider it a species of fraud for the speaker negligently to fail to ascertain the truth before speaking. Or it might regard one who makes an incorrect statement without affirmative knowledge of whether it is correct or incorrect, as though he were conscious that his statement is untrue. The leading case of *Derry v. Peek*[12] is to a large extent the source of many of the problems that have developed in this area. Certain terminological inadequacies of the legal system become apparent in situations involving an overlap of two or more stereotyped theories of action.[13]

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[10] Dixon v. MacGillivray, 29 Wn.2d 30, 185 P.2d 109 (1947). Relief was granted in an action for fraudulent representations by a real estate agent as to land boundaries, constituting an honest mistake without intent to deceive. Swanson v. Solomon, 50 Wn.2d 825, 314 P.2d 655 (1957), stated that the same elements are necessary to establish fraud in the sale of real property as in the sale of personal property and that *a defendant cannot defeat recovery by showing he did not know that his misrepresentations were false.* It was said that, to recover for fraud, the speaker's knowledge of its falsity, *or ignorance of its truth* must be shown. Accord, Scroggin v. Worthy, 51 Wn.2d 119, 316 P.2d 480 (1957); Salter v. Heiser, 36 Wn.2d 536, 219 P.2d 574 (1950); Marr v. Cook, 51 Wn.2d 338, 318 P.2d 613 (1957). In Gronlund v. Anderson, 38 Wn.2d 60, 227 P.2d 741 (1951), an action on a vendor's agent's misrepresentation that a pump on hte property would provide adequate water, the court pointed out that, where the remedy requested is rescission, it is not necessary to use the word "fraudulent" in the complaint.

[11] It was pointed out in the case of Hartford Acc. and Indem. Co. v. Singer, 185 Va. 620, 39 S.E.2d 505, 507 (1946), that "it is true that whether an . . . act is fraudulent or dishonest usually depends upon the intent with which it is done, and consequently the courts hold, in construing this or like provisions in fidelity bonds, that ordinarily it is for a jury to say, under the circumstances of the particular case, whether the intent to defraud was or was not present." Accord: Bank of Erie Trust Co. v. Employer's Liab Assur. Corp., 322 Pa. 132, 185 Atl. 224 (1936). Pletcher v. Porter, 177 Wash. 560, 33 P.2d 109 (1934), states that, while fraud is not presumed, it is still a question of fact.

[12] 14 App. Cas. 337, 58 L.J. Ch. 814 (1889). The case, a deceit action, established the requirement of conscious intent to deceive when reference was to a commercial, financial, or economic venture, and this decision has plagued the area of misrepresentation ever since.

[13] In an attempt to bring to light some of the problems associated with the area of misrepresentation, two formidable authors have lent their talents: Williston, *Liability for Honest Misrepresentation,* 24 HARV. L. REV. 415 (1911), and Carpenter,

An example of how one state dealt with a problem in this area is provided by *Cunningham v. C. R. Pease House Furnishing Co.*,[14] a New Hampshire case. The court stated that:

> A person who acts upon a false representation made for the purpose of inducing him to change his position may recover the damages he sustains in an action of deceit, when the maker of the statement knew it to be false, and in an action of negligence when he ought to have known it to be so.

This appears to be a logical categorization, and it would permit the separation of those who make intentional misstatements from those who make only careless misstatements.

Washington indulges in a presumed intent to deceive when it can be shown that the speaker was ignorant of the truth of the statement made. So there is in this state a form of strict liability with regard to misrepresentation. This "tongue-wagging" tort could just as appropriately be dealt with by using the general principles of the law of negligence. Merely because negligent misrepresentations are sometimes conceived of as extensions of the law of deceit and spoken of as a species of fraud, the rules developed in deceit actions should not be considered applicable to misinformation negligently though intentionally spoken.[15]

The effect of the instant case on Washington law is that the word "fraudulent," when used in an errors and omissions insurance policy, will be construed to mean only actual fraud, as distinguished from constructive fraud. The case also places in bold relief those problems which arise as a result of Washington's unwillingness to apply the theories of negligence to injuries caused by words.

JAMES M. FEELEY

Negligence—Consequence of Failure to Obey Posted Traffic Control—Efficacy of "Yield Right of Way" Sign. In *Warner v. Ambrose*,[1] the Washington court considered as a matter of first im-

Responsibility for Intentional, Negligent and Innocent Misrepresentation, 24 ILL. L. REV. 749 (1930).

[14] 74 N.H. 435, 69 Atl. 120 (1908). A vendor represented to a purchaser that certain stove black could be safely applied, when he did not know this to be a fact. The defendant was found not liable in an action of deceit, as the statement was not made with a conscious knowledge of its falsity. The appellate division recognized that there was bodily harm as a result of this misrepresentation and found liability based on a negligence theory.

[15] A very good summary of the remedies associated with the area of injuries caused by words is found in Bohlen, *Misrepresentation as Deceit, Negligence or Warranty*, 42 HARV. L. REV. 733 (1929).

[1] 153 Wash. Dec. 215, 332 P.2d 941 (1958).

pression the effect of a "Yield Right of Way" sign upon ordinary rules of the road. Plaintiff alleged that defendant failed to yield the right of way, as instructed by the sign, when plaintiff approached an intersection on defendant's left. Therefore plaintiff contended that defendant was negligent *per se* and liable for the injuries plaintiff sustained in the resulting collision. Defendant argued that the sign was improperly posted under the provisions of the Seattle Traffic Code, and that, being on the right, he was entitled to the right of way, since the sign did not alter existing rules. The trial court sustained a demurrer to the complaint. On appeal the judgment for defendant was reversed. The court reasoned that whether or not the sign was properly posted, defendant's failure to obey it showed lack of reasonable care and constituted negligence, as users of public streets have a right to rely on the authenticity of all regulatory signs posted.

The "Yield Right of Way" sign was created in 1955 by the legislature[2] and supersedes the normal right of way rules at intersections where it is posted. Other statutory provisions outline its use and operation. Pursuant to RCW 47.36.060, such a sign is not restricted in its use to the state highway system.[3] Under RCW 47.36.110 a driver approaching the sign is required to "[R]educe speed or stop if necessary in order to yield the right of way to all traffic on the intersecting street which is so close as to constitute an immediate hazard." This latter section further provides that, if a motorist proceeds past the "Yield Right of Way" sign and collides with traffic on the intersecting street, this "shall be prima facie evidence that the motorist has not obeyed the sign and yielded the right of way. . . ." The plain meaning of the language cited would preclude the validity of defendant's contention which the trial court accepted in sustaining the demurrer.[4] Had the legislature intended to change the right of way rules on state highways only or to limit the posting of the signs only to such thoroughfares, it appears clear that it would have so provided in express language.

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[2] This was done by adding the proviso in RCW 46.60.150 (Laws of 1955, ch. 146, § 3, at 645).

[3] *"Traffic devices on county roads and city streets.* Local authorities in their respective jurisdictions shall place and maintain such traffic devices upon public highways under their jurisdictions as are necessary to carry out the provisions of the law or local traffic ordinances, or to regulate, warn or guide traffic."

[4] The memorandum opinion of the trial court further held that even a validly erected "Yield Right of Way" sign would not supersede normal rules and that a driver approaching such sign would not be required to yield to traffic approaching from his left. This also was held error by the supreme court.

It becomes equally basic that a presumption must exist that an official-looking sign standing at the intersection of two public streets was properly placed there.[5] The driver approaching such a sign must obey its instruction, whether it tells him to stop, reduce speed, or yield the right of way, regardless of his personal conviction as to the sign's validity. This has been the consistent position of the Washington court[6] and substantiates the holding in the instant case that the favored position of a driver approaching an intersection from the right is abrogated when a posted sign directs him to yield the right of way. The court achieves its result by a straightforward interpretation of RCW 46.60.150.

The court cited language in *Comfort v. Penner*,[7] which continued to state the applicable law,[8] although the dispute in the *Comfort* case concerned a stop-sign:

> Presumably the sign was erected and maintained by legally constituted authority; but whether so or not, is of no particular moment, as it was at least a *de facto* warning sign. Whether it was a *de jure* warning sign or not, is not necessary to determine. It was maintained for the safety of traffic. Travelers upon public highways are not to first ascertain and determine whether such signs are established in strict compliance with law, before respecting them.[9]

This and other Washington cases are in line with decisions in other jurisdictions.[10]

A corollary aspect of the *Warner* decision concerns the perspective utilized in applying statutory criminal liability to civil actions. While these statutes, specifically those imposing a criminal sanction on the

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[5] Comfort v. Penner, 166 Wash. 177, 6 P.2d 604 (1932).

[6] Besides Comfort v. Penner, *supra*, the line of cases includes Mathias v. Eichelberger, 182 Wash. 185, 45 P.2d 619 (1935); Lyle v. Fiorito, 187 Wash. 537, 60 P.2d 709 (1936), and Wood v. Chicago, M. St. P. & P. Ry., 45 Wn.2d 601, 277 P.2d 345 (1954).

[7] 166 Wash. 177, 6 P.2d 604 (1932).

[8] See, *e.g.*, Robinson v. Ebert, 180 Wash. 387, 396, 30 P.2d 992 (1935) (speed limit sign); Mathias v. Eichelberger, 182 Wash. 185, 189, 45 P.2d 619 (1935) (one-way street sign); Fothergill v. Kaija, 183 Wash. 112, 118, 48 P.2d 643 (1935) (stop-sign); Wood v. Chicago, M., St. P. & P. Ry., 45 Wn.2d 601, 611, 277 P.2d 645 (1954) (city limit and speed zone signs).

The duty incumbent upon the driver, however, is not restricted to mere obedience to the sign; he must in addition exercise reasonable care and proceed onto the favored street with caution. Angelo v. Lawson, 26 Wn.2d 198, 173 P.2d 124 (1946).

[9] 153 Wash. Dec. 215, 217, 332 P.2d 941, 944 (1958), quoting from Comfort v. Penner, 166 Wash. 177, 183, 6 P.2d 604 (1932).

[10] See, *e.g.*, the closely analogous case of Clinkscales v. Carver, 22 Cal.2d 72, 136 P.2d 777 (1943). The California court held that a reasonable man would have obeyed the sign regardless of doubts as to its authenticity, terming failure to stop at a posted sign "[U]nreasonably dangerous conduct whether or not the driver is immune from criminal prosecution because of some illegality in the erection of the stop-sign." Numerous related cases are collected in Annot., 164 A.L.R. 8 (1946).

violation of traffic laws, cannot be used as the final determinant of a defendant's liability—due to a number of considerations, namely the prospect of contributory negligence, the lack of legislative pronouncement that guilt under the statute carries with it the concomitant of civil liability, and the fact that the civil defendant is not presently on trial for violation of the statute—they can nevertheless be of valuable assistance as a statement of public policy on the standard of care to which drivers must be accountable.[11]

The total result of the cases considered places the law in correct perspective by formulating two rules of genral application: First, a motorist is entitled to rely upon the authenticity of posted traffic controls of all types; second, these controls, whether or not authorized by law, define the minimum standard of care to which a driver encountering them will be held. The *Warner* case indicates that the "Yield Right of Way" sign is to be classed as a type with older varieties of traffic controls, subject to application of the aforementioned rules.[12]

STANLEY B. ALLPER

Contributory Negligence and Assumption of Risk as Defenses to Negligence Per Se. In *Skarpness v. Port of Seattle,* 152 Wash. Dec. 427, 326 P.2d 747 (1958), the plaintiffs' commercial fishing gear, which was stored in rented lockers in one of the defendant's net sheds, was destroyed when the shed burned. The shed was not equipped with proper fire protection equipment, in violation of both a city ordinance and a state statute. However, the defendant did have other sheds, with lockers available for rental at a higher rate, which did satisfy the ordinance and the statute. The trial court found that the defendant was negligent and gave judgment for the plaintiffs, even though it found that the plaintiffs knew of the risk of fire. The trial judge's memorandum opinion indicated that contributory negligence would have been a bar to recovery except for the fact that the defendant had violated a statute.

HELD, Judgment for the plaintiffs reversed. The court held that contributory negligence is a defense to negligence per se, except in those instances in which the statute is designed to protect a class of persons from their own negligence. The statute and ordinance in question were found only to establish a standard of care.

The court also held that *volenti non fit injuria* applied and was a defense to negligence per se. The court restated the distinction between assumption of risk and *volenti non fit injuria,* which it had made earlier in *Walsh v. West Coast Coal Mines,* 31 Wn.2d 396, 197 P.2d 233 (1948). Although the theory and effect of each is the same, the former is applied only to cases arising out of the relationship of master and servant or involving a contractual relationship, while the latter applies independently of any contractual relationship. Both are based upon the consent of the plaintiff to the risks created by the defendant's negligence.

[11] *Cf.* Morris, *The Role of Criminal Statutes in Negligence Actions,* 49 COLUM L. REV. 21 (1949).

[12] See, generally, the comprehensive annotation, Liability for accident at street or highway intersection as affected by reliance upon or disregard of traffic sign, signal, or marking, Annot., 164 A.L.R. 8 (1946).

The court did not indicate that there are statutes to which the defense of assumption of risk does not apply, as it did when discussing contributory negligence. However, in *Depre v. Pacific Coast Forge Co.*, 151 Wash. 430, 276 Pac. 89 (1929), the court held that assumption of risk is not a defense to the statutes concerned with factory working conditions; and in *Moore v. Dresden Investment Co.*, 162 Wash. 289, 298 Pac. 465 (1931), the court refused to permit the defense of assumption of risk in an action based upon the violation of a city ordinance requiring adequate fire escapes for hotels. These cases were not expressly overruled by the *Skarpness* case.

Child's Cause of Action Arising from Negligent Injury to Parent. In *Erhardt v. Havens, Inc.*, 153 Wash. Dec. 88, 330 P.2d 1010 (1958), plaintiffs, infant children, sued the defendant hospital through their guardian, for their loss resulting from alleged negligent injury to their mother. Plaintiffs alleged that their mother was injured in a twenty-five-foot fall from a second-floor psychiatric ward, that her spinal cord was severed, and that she was therefore caused to be permanently paralyzed and to lose all mental powers. Since there was no hope that her condition would improve, plaintiffs asserted they were damaged to the same extent as if she were dead. They contended that their action was analogous to one for wrongful death. The trial court sustained a demurrer and dismissed the case.

The supreme court affirmed, following an overwhelming mass of authority, and refused to pioneer a change in the direction of *Scruggs v. Meredith*, 134 F.Supp. 868 (1955), the only noted exception to this weight of precedent. In the *Scruggs* case the United States District Court in Hawaii had taken the ill-fated step of recognizing a cause of action in children who were deprived of their mother's training, society and affection by defendant's negligent conduct. On rehearing, following an initial affirmance, relying on an intervening Hawaii decision, *Halberg v. Young*, 41 Haw. 634 (1957); Annot., 59 A.L.R.2d 445 (1957), the Circuit Court of Appeals reversed the *Scruggs* case. *Meredith v. Scruggs*, 244 F.2d 604 (9th Cir. 1957).

The court in the instant case further indicated that the cause of action was community property and that the suit properly could have been brought in the husband's own name. Defendant conceded that in such an action the loss suffered by the children would be a proper item of damage.

The decision of the court militates against any diversion at this time from the established rules. However, children's causes of action for loss of parental services have been recognized in allied domestic relations fields, especially for the intentional tort of alienation of affections of a parent. *Daily v. Parker*, 152 F.2d 174 (7th Cir. 1945). In PROSSER, TORTS § 103 (2d Ed. 1955), the author suggests that, although at the time the treatise was written a child was denied all remedy for loss suffered through negligent injury to a parent, his protection should predictably increase in the direction of a legal remedy rather than of strengthened social controls.

Contributory Negligence of Children and Parents. The case of *Cox v. Hugo*, 152 Wash. Dec. 763, 329 P.2d 467 (1958), was a consolidated action in which a child, five years, eight months of age, sought to recover damages for injuries received while playing with an unattended trash fire before it had died out, and her parents sought to recover for the medical expenses incurred in treating her injuries. The defendants' son, who had started the fire at the direction of his mother, had warned the plaintiff child to stay away. The trial court admitted evidence of contributory negligence of both the child and her parents. The jury found for the defendants in both actions. The plaintiff child was granted a new trial because of the error in admitting evidence of contributory negligence, but her parents' motion for a new trial was denied. Plaintiff parents and the defendants appealed.

HELD, Order for a new trial for plaintiff child affirmed. Order denying plaintiff parents a new trial reversed. In upholding the order for a new trial for the plaintiff child, the court relied upon *Von Saxe v. Barnett,* 125 Wash. 639, 217 Pac. 62 (1923), and applied the following rules: (a) under six years of age, there is a conclusive presumption that a child is incapable of contributory negligence; (b) six to fourteen, there is a prima facie presumption against contributory negligence; (c) over fourteen, the infant bears the burden of showing lack of capacity. As to the parents' motion for a new trial, the court held that, as a matter of law, in the absence of knowledge of special danger in so doing, parents are not guilty of contributory negligence in permitting their five-year-old children to play outside without constant supervision.

Negligence—Guest Statute—Payment, What Constitutes. In *Woolery v. Shearer,* 153 Wash. Dec. 141, 332 P.2d 236 (1958), the plaintiff sought to recover for injuries sustained by his wife while riding in the defendant's pickup truck. Defendant, half-brother of the injured wife, interposed the host-guest statute. Plaintiff sought to overcome the defense by a showing that his wife was in defendant's truck returning from a meeting where they had discussed with an attorney her appointment as guardian of their mother. Since the guardianship would give the wife access to a bank account and enable her to aid defendant in his business, plaintiff contended that payment had been established and that his wife was not a guest within the meaning of the statute.

The trial court gave judgment for the plaintiff, and on appeal the supreme court reversed, holding that the mere hope of obtaining a benefit, when uncommunicated to the passenger, does not constitute payment within the contemplation of the statute. The unanimous departmental decision indicated no desire to extend construction of the "payment" clause beyond the limits defined in earlier cases. The court found that plaintiff's argument fell short of the test suggested in *Fuller v. Tucker,* 4 Wn.2d 426, 103 P.2d 1086 (1940), that the transportation must be motivated by the expectation of a tangible business benefit. In answer to plaintiff's contention that an agreement regarding the anticipated payment is not necessary, the court properly distinguished *Scholz v. Leuer,* 7 Wn.2d 76, 109 P.2d 294 (1941), as being a case in which "the anticipated payment was received during the course of the transportation."

The case illustrates the consistency of the court in literally interpreting the "payment" exception of the statute and adds to the substantial body of case law supporting this interpretation.

WILLS AND PROBATE

Executors and Administrators—Accountability of Administratrix for Rental Value of Residence. A solution to a troublesome problem which had recurred in the Washington court for over half a century was recently advanced in *In re Kruse's Estate.*[1] The question, abstractly, is whether a surving spouse, who is also administratrix, must account to the estate for the rental value of her occupancy of the family residence when she has no independent claim against the estate and when she is entitled to an award in lieu of homestead of a partial but substantial interest in the residence. The court answered that, as a matter of basic policy, she need not.

[1] 152 Wash. Dec. 290, 324 P.2d 1088 (1958).