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Torts

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TORTS

I. STATUTES OF LIMITATIONS

In *Kelton v. District of Columbia*[1] the District of Columbia Court of Appeals construed the District's waiver of sovereign immunity statute[2] to rule that the six month period within which the District must be notified of a suit against it begins to run from the time "when the plaintiff knows or through the exercise of due diligence should have known of the injury."[3]

The plaintiff had undergone a Caesarean section in October, 1967, while a patient at D.C. General Hospital, but did not learn until March 26, 1976 that she *might* have undergone an unauthorized tubal ligation as well. The suspicion that the procedure was neither authorized nor required by a medical emergency was confirmed by medical records on September 15, 1976; the District was notified on November 18, 1976; the suit was filed against the District on March 21, 1977. The court declined to apply the rule of *Bridgford v. United States*, a Fourth Circuit case, that the notification period doesn't begin to run "until a claimant has had a reasonable opportunity to discover *all* of the essential elements of a possible cause of action."[4] The court found that the plaintiff's March 26 discovery gave her sufficient knowledge of an actionable injury to commence the running of the six month period. The plaintiff's failure to notify the District of her intention to sue until November 18 thus barred her claim.

In order to determine whether a three year statute of limitations[5] had run, the United States District Court for the District of Columbia, in *Hunt*

1. 413 A.2d 919 (D.C. 1980).

2. D.C. CODE § 12-309 (1973) provides in pertinent part:

> An action may not be maintained against the District of Columbia for unliquidated damages to person or property unless, *within six months after the injury or damage was sustained*, the claimant . . . has given notice in writing to the Commissioner of the approximate time, place, cause, and circumstances of the injury or damage (emphasis added).

3. 413 A.2d at 921 *quoting* Burns v. Bell, 409 A.2d 614, 617 (D.C. 1979).

4. Bridgford v. United States, 550 F.2d 978, 981-82 (4th Cir. 1977) (construing the federal waiver of immunity statute, 28 U.S.C. § 2401(b) (1976)), *discussed in* 413 A.2d at 921 n.4. *Cf.* United States v. Kubrick, 444 U.S. 111, 122-24 (1979) (specified action that should be taken once malpractice is suspected).

5. D.C. CODE § 12-301 (1973) provides in pertinent part:

> Except as otherwise specifically provided by law, actions for the following pur-

v. Bittman[6], attempted to define the point at which a cause of action accrues in a legal malpractice claim.[7]

The plaintiff pled guilty to six counts of burglary, conspiracy, and illegal wiretapping in January, 1973, and was sentenced and incarcerated on March 23, 1973. Because of a possible conflict of interest, the defendant withdrew as plaintiff's counsel in August, 1973. The plaintiff was released from prison for a time while he sought to withdraw his guilty plea. His appeal was denied in February, 1975. He was returned to prison on April 25, 1975, was released on February 23, 1977, and filed his malpractice suit on September 30, 1977. In response to the defendant's motion to dismiss because the statute had run, the plaintiff argued that his "injury" had occurred on either February 25, 1975, or from April 25, 1975 to February 23, 1977. The court agreed that a cause of action "accrues" when the plaintiff suffers injury, but ruled that this plaintiff's injury occurred no later than March 23, 1973, when he was sentenced and first imprisoned. Thus, his claim was barred. Unfortunately, the court did little to establish a general standard for determining when a cause of action accrues in tort.

In response to the plaintiff's alternative contention that the defendant's fraudulent concealment of his malpractice tolled the statute long enough past March 23, 1973, and saved the action, the court determined that the plaintiff had knowledge, prior to October 1, 1974, of every factual aspect of the defendant's acts of malpractice. He had not been precluded from filing suit in time to avoid the running of the statute.[8]

In *Shulman v. Miskell*,[9] the United States Court of Appeals for the District of Columbia Circuit held that, in a suit for malicious prosecution, the one-year statute of limitations[10] does not begin to run until all the elements of the cause of action exist. In the District[11], as in other jurisdic-

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poses may not be brought after the expiration of the period specified below from the time *the right to maintain the action accrues*:

. . . .

(8) for which a limitation is not otherwise specially prescribed--3 years . . . (emphasis added).

6. 482 F. Supp. 1017 (D.D.C. 1980).

7. The court cited Fort Myers Seafood Packers, Inc. v. Steptoe & Johnson, 381 F.2d 261 (D.C. Cir. 1967), *cert. denied*, 390 U.S. 946 (1968), and Weisberg v. Williams, Connolly & Califano, 390 A.2d 992 (D.C. 1978), but *Fort Meyers* says no more than that the "injury rule" applies, 381 F.2d at 262, and *Weisberg* expressly declined to answer "the question of when the legal malpractice claim . . . in that case accrued," 482 F. Supp. at 1021.

8. 482 F. Supp. at 1022-25.

9. 626 F.2d 173 (D.C. Cir. 1980).

10. D.C. CODE § 12-301(4) (1973).

11. *See, e.g.*, S. Freedman & Sons v. Hartford Fire Ins. Co., 396 A.2d 195, 198 (D.C. 1978).

tions[12], an essential element of malicious prosecution is the disposition of the underlying civil or criminal action in the defendant's favor. The defendant in *Shulman* argued that the statute had run from the date the underlying suit was originally filed. The court responded that, if the underlying suit terminated more than a year after filing, the attendant malicious prosecution suit would be barred by the statute before it ever legally accrued. Also, if a malicious prosecution suit were filed prior to termination of the underlying suit, in order to avoid possible future limitations problems, it would be subject to dismissal for failure to state a claim upon which relief could be granted.[13] The court thus followed the great majority of jurisdictions[14] in holding that the statute of limitations in a malicious prosecution suit runs from the date the underlying cause of action is resolved in the defendant's favor.

II. NEGLIGENCE

A. Duty

In *Caldwell v. Bechtel, Inc.*,[15] the United States Court of Appeals for the District of Columbia Circuit held that a consultant engineering firm (Bechtel), under contract to provide safety engineering services to the Washington Metropolitan Area Transit Authority in the construction of the Washington Metro system, owed a duty to protect an employee of a contractor performing Metro work under a separate Metro contract. The plaintiff alleged that he suffered from silicosis as a result of working in an atmosphere heavily laden with silica dust. He sued Bechtel for failing to enforce adequate safety standards at the site. His suit was dismissed by the district court primarily because of the absence of contractual privity between the employee and Bechtel.[16] The court of appeals remanded for trial, stressing that the case was grounded in tort, not contract.[17] The court found that Bechtel's duty to the employee originated from two "not entirely distinct" sources.[18] The first was contractually initiated and extended to workers who, like the plaintiff, were foreseeable victims of the dangers that Bechtel was under a contractual duty to rectify.[19] The second was based on the "special relationship" between Bechtel and the employee

12. *See* cases cited in 52 AM. JUR. 2D, *Malicious Prosecution*, § 29 n.6.
13. 626 F.2d at 175.
14. *See id.* and cases cited therein.
15. 631 F.2d 989 (D.C. Cir. 1980).
16. *Id.* at 995-96.
17. *Id.* at 997-1002.
18. *Id.* at 1002.
19. *Id.* at 1001-02.

that "transcended" Bechtel's contractual status: Bechtel was the employee's "coparticipant in a dangerous enterprise" and possessed the unique skill and authority to protect the employee on the job site.[20]

In *Teasley v. United States*,[21] the plaintiff sought damages from a mental hospital for injuries sustained when she was raped. She alleged that the hospital negligently failed to show at a judicial hospitalization hearing that her assailant, if not hospitalized, would pose a danger to himself and others. The United States Court of Appeals for the District of Columbia Circuit affirmed a summary judgment order in favor of the hospital on the ground that a hospital's duty in a hospitalization hearing is limited to disclosing to the Mental Health Commission the material facts known to it concerning the subject patient. The ultimate responsibility for the decision to hospitalize the patient is the Commission's.[22] The hospital had disclosed to the Commission all the evidence it had; it "could do no more than alert the Commission to the possibility of danger."[23] The court thus distinguished *Hicks v. United States*,[24] where a mental hospital was found liable for the death of a woman shot by her husband. In *Hicks*, the hospital had failed to provide the Commission with information it possessed concerning the husband's dangerous mental disorder; the husband committed his crime shortly after being released.

In *Morowitz v. Marvel*,[25] a physician sued an attorney for allegedly professional negligence in filing a frivolous medical malpractice suit against him. The District of Columbia Court of Appeals affirmed dismissal of the suit on several grounds. First, the court noted that the privity of contract doctrine generally bars a professional negligence suit brought by an opposing party against adverse counsel.[26] Second, the adverse party was not an intended beneficiary of the adverse counsel's legal services.[27] Finally, the court stated that imposing a duty upon an attorney to an adverse party would violate public policy. Conflicts of interest would be created between

20. *Id.* at 1002 (citing Sweet, *Site Architects and Construction Workers: Brothers and Keepers or Strangers?*, 28 EMORY L.J. 291, 327 n.24 (1979)).

21. 109 DAILY WASH. L. REP. 209 (D.C. Cir. Feb. 5, 1981).

22. *See* D.C. CODE §§ 21-542, -544 (1973).

23. 109 DAILY WASH. L. REP. at 213.

24. 511 F.2d 407 (D.C. Cir. 1975).

25. 423 A.2d 196 (D.C. 1980).

26. *Id.* at 199 (citing National Savings Bank of D.C. v. Ward, 100 U.S. 195 (1879)).

27. *Id.* at 199-200 (citing Goodman v. Kennedy, 18 Cal. 3d 335, 556 P.2d 737, 134 Cal. Rptr. 375 (1976); Victor v. Goldman, 74 Misc. 2d 685, 344 N.Y.S.2d 672 (Sup. Ct. 1973), *aff'd mem.*, 43 A.D.2d 1021, 351 N.Y.S.2d 956 (App. Div. 1974)).

his client and himself,[28] with a consequent inhibition of free access to the courts.[29]

The District of Columbia Court of Appeals expanded the potential scope of a landlord's duty to his tenants in *Graham v. M & J Corp.*.[30] The plaintiffs, tenants in an apartment building in a high-crime section of the city, sued their landlord for damages resulting from a fire deliberately set in the hallway of the building by one tenant's former paramour. The trial court found that the landlord had no duty as a matter of law and granted him summary judgment. The appeals court reversed and remanded for trial, stating that "[f]oreseeability is the key element in establishing the landlord's duty."[31] Thus, the court concluded, the trier of fact—in this case the jury—must decide whether, under all the circumstances, a criminal assault by arson perpetrated by a tenant's rejected lover was sufficiently "probable and predictable" to impose a duty upon the landlord to take protective measures.[32]

Judge Nebeker dissented on procedural, substantive, and policy grounds. He argued that, "particularly . . . where negligence law is expanding in response to changing social conditions . . . the question of duty is better left to the discretion and judgment of the court than to an often bewildered jury."[33] He emphasized that precedent requires the landlord to be put on actual notice of prior criminal activity in the building before he has a duty to protect tenants from criminal assault. There was no such notice here.[34] Finally, he warned that the "unfettered jury discretion" al-

28. *Id.* at 199-200 (citing Berlin v. Nathan, 64 Ill. App. 3d 940, 952, 381 N.E.2d 1367, 1376 (1978)).

29. *Id.* at 200 (citing Pantone v. Demos, 59 Ill. App. 3d 328, 335, 375 N.E.2d 480, 485 (1975); Drago v. Buonagurio, 89 Misc. 2d 171, 391 N.Y.S.2d 61, 63 (Sup. Ct. 1977), *rev'd*, 61 A.D.2d 282, 402 N.Y.S.2d 250 (App. Div. 1978), *original order reinstated, mem.*, 46 N.Y.2d 778, 386 N.E.2d 821, 413 N.Y.S.2d 910 (1978)).

30. 424 A.2d 103 (D.C. 1980).

31. *Id.* at 105.

32. *Id.* (citing the familiar trilogy of Kline v. 1500 Mass. Ave. Apt. Corp., 439 F.2d 477 (D.C. Cir. 1970); Spar v. Obwoya, 369 A.2d 173 (D.C. 1977); Ramsay v. Morrissette, 252 A.2d 509 (D.C. 1969)). *See also* Lacy v. District of Columbia, 424 A.2d 317, 325 (D.C. 1981) (duty to protect from criminal assault arises only where the particular crime of assault is foreseeable).

33. *Id.* at 108 (Nebeker, J., dissenting).

34. *Id.* Judge Nebeker correctly stated that a high incidence of crime in the area is insufficient notice to impose such a duty on the landlord. *See* St. Paul Fire & Marine Ins. Co. v. Davis Constr. Co., 350 A.2d 751 (D.C. 1976). But he minimized, if not ignored, evidence that tenants had repeatedly complained about a broken outer door that had led to acts of vandalism in the common hallway. 424 A.2d at 104, 106. He insisted that "the landlord must have had notice of prior 'like' crimes before imposing liability." *Id.* at 107 (Nebeker, J., dissenting).

lowed by the majority's holding would serve as a further disincentive to invest in an already strained rental housing market.[35]

B. Breach

In *Waldon v. Covington*,[36] the District of Columbia Court of Appeals affirmed summary judgment in favor of the defendants, various faculty members of the University of the District of Columbia, in a suit brought by the widow of a former professor who died of a heart attack allegedly caused by the defendants' intentional infliction of extreme emotional distress. The suit was brought under the survival[37] and the wrongful death[38] statutes. The court of appeals did not apply the lower court's proximate cause analysis.[39] It focused instead on the defendants' lack of intent. The applicable test is whether the defendants "purposely caused a disturbance of another's mental or emotional tranquility of so acute a nature that harmful physical consequences might be not unlikely to result."[40] In *Waldon*, the defendants failed to give the decedent keys to a laboratory, to notify him of departmental meetings, or to give him teaching assignments within his specialty. Such acts were not "beyond all the bounds of decency"[41] so as to permit an inference of intent to inflict extreme emotional distress.[42]

In *Copeland v. Baltimore & Ohio Railroad Co.*,[43] a train lacking headlights that met the statutory luminosity requirement[44] struck a trespasser at night.[45] The trespasser alleged that the railroad breached its duty of ordinary care and had proximately caused his injuries. The District of Columbia Court of Appeals upheld a summary judgment in the railroad's favor. It adopted the generally accepted standard that an owner of real property only owes a duty of ordinary care to those trespassers whose presence on

35. *Id.* at 108 (Nebeker, J., dissenting).

36. 415 A.2d 1070 (D.C. 1980).

37. D.C. CODE § 12-101 (1973).

38. D.C. CODE § 16-2701 (1973).

39. 415 A.2d at 1075-76 n.18.

40. *Id.* at 1077 (quoting Clark v. Associated Retail Credit Men, 105 F.2d 62 (D.C. Cir. 1939)). It should be remembered that actual physical injury or impact is required only in cases of *negligent* infliction of extreme emotional distress. *See* Parrish v. United States, 375 F.2d 320 (D.C. Cir. 1967); Perry v. Capital Traction Co., 32 F.2d 938 (D.C. Cir.), *cert. denied*, 280 U.S. 577 (1929).

41. 415 A.2d at 1076.

42. *Id.* at 1077-78.

43. 416 A.2d 1 (D.C. 1980).

44. *Id.* at 2 (citing 49 C.F.R. § 230.231 (1977)).

45. *See id.* at 2-3.

his property is known or reasonably foreseeable.[46] The engineer's conduct in immediately applying the train's brakes and horn after discovering the plaintiff on the tracks was clearly an exercise of ordinary care. Plaintiff's presence on the tracks was not reasonably foreseeable,[47] and defendant therefore owed plaintiff nothing more than the duty customarily owed to the undiscovered trespasser: to refrain from wanton and willful misconduct.[48] The court held the railroad not liable because the wanton and willful standard of liability was not satisfied. The inadequacy of the train's headlights was not intentional and the unforeseeability of plaintiff's presence on the tracks made it unlikely that someone would be injured merely because the lights were dim.

C. Causation

In *Elam v. Ethical Prescription Pharmacy, Inc.*,[49] the District of Columbia Court of Appeals held that causation in an automobile accident is generally a jury question and that the plaintiff, here the favored motorist in a controlled intersection, was not contributorily negligent as a matter of law for failing to look down the intersecting street before proceeding into the intersection. The court distinguished cases[50] that held favored motorists contributorily negligent as a matter of law "for failing to see a vehicle that already had entered an intersection and was clearly visible in the oncoming lanes of traffic,"[51] because in *Elam* the defendant driver was unfavored and ran a stop sign.

In *Lacy v. District of Columbia*,[52] the District of Columbia Court of Appeals approved the giving of a "substantial factor" jury instruction[53] in a case involving the liability of school officials for an intervening criminal act by an employee in sexually assaulting a student at the school. The school officials were found not liable.[54] The court divided the concept of

46. *Id.* at 3.
47. *Id.* at 4.
48. *Id.* at 3.
49. 422 A.2d 1288 (D.C. 1980).
50. *See* Frager v. Pecot, 327 A.2d 306 (D.C. 1974); D.C. Transit System, Inc. v. Harris, 284 A.2d 277 (D.C. 1971).
51. 422 A.2d at 1291.
52. 424 A.2d 317 (D.C. 1981).
53. The instruction read:

> However in order to find the defendants school officials liable for the sexual assaults . . ., you must first find that it was more likely than not that the conduct of the defendants was a substantial factor in the assaults. A mere possibility of such causation is not enough and if the probabilities are at best evenly balanced, you should find for the defendants. *Id.* at 318, 325.

54. *See* Lacy v. District of Columbia, 408 A.2d 985 (D.C. 1980).

proximate cause into a "cause-in-fact (causation) element and a policy element."[55] To the extent that the cause-in-fact element in cases of concurrent cause is a difficult issue for a jury to confront, the court suggested that the substantial factor instruction might be of considerable assistance.[56]

In his dissent, Judge Kern argued persuasively that the verdict in favor of the school officials should be overturned.[57] He stated that, regardless of the existence of concurrent causes, each defendant's liability for proximately causing the plaintiff's injuries must be proved by a preponderance of the evidence. The unavoidable effect of giving the "substantial factor" instruction was to add something to that standard of proof and increase the plaintiff's burden.

III. DEFAMATION

The District of Columbia Court of Appeals held, in *Global Van Lines, Inc. v. Kleinow*,[58] that a writ of attachment served on the plaintiff's employer following an improperly entered default judgment against the plaintiff does not provide grounds for a defamation action by the plaintiff against his judgment creditor. The writ was "published" not by the judgment creditor, but by the issuing court, and thus the critical element of publication was lacking.[59] The court also noted in dictum that the defenses of truth and privilege barred the suit from the outset.[60]

The Church of Scientology, in *Church of Scientology of California v. Foley*,[61] sued certain federal employees for "negligent deprivation of constitutional rights" arising out of the defendants' roles in the preparation and dissemination of an allegedly false memorandum about the Church. The United States District Court for the District of Columbia dismissed the case, finding that the cause of action sounded in defamation and was barred by the District's one-year statute of limitations.[62] The United States Court of Appeals for the District of Columbia Circuit agreed that, to the extent the complaint alleged defamation it was barred, but the court reversed because, read broadly, the complaint sounded in negligence and

55. 424 A.2d at 325.

56. *See* Graham v. Roberts, 441 F.2d 995 (D.C. Cir. 1970) (approving the use of a "substantial factor" instruction in the District of Columbia).

57. 424 A.2d at 326 (Kern, J., dissenting).

58. 411 A.2d 62 (D.C. 1980).

59. *Id.* at 64.

60. The writ was true because it stated the fact that a default judgment had been entered; it was privileged by the absolute privilege accorded to statements made by a court. *Id.*

61. 108 DAILY WASH. L. REP. 501 (D.D.C. March 19, 1980).

62. *See* D.C. CODE § 12-301 (1973).

was therefore subject to the three-year statute. While expressly declining to decide whether the Church had a cause of action, the court recognized that the government has a general duty of care, that this duty applies to the compilation and maintenance of files and memoranda, and that, on remand, the district court may decide whether that duty encompasses the preparation of the subject memorandum.[63]

Judge Wilkey dissented stating that the District's statute of limitations focuses on the "purpose" of the action, and that the purpose of the Church's complaint was "*to redress the injury* that [it] allegedly sustained to its reputation as a *result of the dissemination* of false information to third parties."[64] He would thus find the suit sounding only in defamation and barred by the one-year statute.

IV. MISREPRESENTATION

The United States District Court for the District of Columbia emphasized, in *Rothenberg v. Aero Mayflower Transit Co.*,[65] that a false representation must be of a *material* fact in order to sustain a claim for fraudulent misrepresentation. A moving company was unable to pick up and move the plaintiff's belongings at a promised time because it had overbooked its orders. The plaintiff had not been advised previously of this overbooking policy, but was given two weeks' notice by the moving company of its inability to meet its obligations. The plaintiff sued the mover for fraudulent misrepresentation, relying primarily on the authority of *Nader v. Allegheny Airlines*.[66] The court distinguished *Nader* by finding that, although the plaintiff there had his reservation on an airplane cancelled because of an unannounced overbooking policy, the misrepresentation in that case was material because receipt of cancellation notice just five minutes before departure contravened plaintiff's "generalized expectations" of commercial flight.[67] The misrepresentation in *Rothenberg* was immaterial.[68]

63. 108 DAILY WASH. L. REP. at 505-06.

64. *Id.* at 506 (Wilkey, J., dissenting).

65. 495 F. Supp. 399 (D.D.C. 1980).

66. 365 F. Supp. 128 (D.D.C. 1973), *rev'd*, 512 F.2d 527 (D.C. Cir. 1975), *rev'd*, 426 U.S. 290 (1976), *on remand*, 445 F. Supp. 168 (D.D.C. 1978).

67. 495 F. Supp. at 406.

68. *Id.* The plaintiff's prayer for punitive damages was also dismissed. *Id.* at 407. The defendant's advance notice to the plaintiff constituted less a showing of malice than "consideration for its disappointed customer." *Id.* at 408.

V. PRODUCTS LIABILITY

In *Russell v. G.A.F. Corp.*,[69] the District of Columbia Court of Appeals outlined standards for determining a manufacturer's liability for failure to warn of foreseeable danger in the use of its product. The plaintiff was injured when he fell through a corrugated asbestos sheet that shattered as he walked across it. The manufacturer had enclosed a booklet in each bundle of sheets explaining that planks and grids should be used to give support to the sheets. The individual sheets, however, displayed no label indicating the danger of failing to provide such support. The trial court granted a directed verdict in the manufacturer's favor, finding no evidence of a "defect" in the sheets at the time they left the manufacturer's hands. The court of appeals disagreed with the lower court's analysis and reversed. It held that, in cases alleging either negligence or strict liability for failure to warn of danger, evidence of a defect is irrelevant: "a product can be perfectly made and still require directions or warnings in proper use in order to be safe."[70] As a result, the proper threshold inquiry, assuming a danger serious enough to create a duty to warn exists,[71] is whether the warning actually provided was adequate.[72] The court adopted the Restatement's adequacy-of-warning test, which entails consideration of four different factors: "(1) the risk of injury; (2) the seriousness of harm which might result; (3) the practicality and expense of placing a warning directly on the product; and (4) the reliability of the middleman as the conduit of the warning."[73] Because of the trial court's inappropriate "defect" analysis, the jury was improperly prevented from considering those factors. The case was remanded.

In another labelling case, *Young v. Up-Right Scaffolds, Inc.*,[74] the United States Court of Appeals for the District of Columbia Circuit sought to remove all doubt about the validity of a strict liability cause of action in the District. Although recognizing that "[n]o District of Columbia court has held a defendant liable for a product defect solely on the basis of a

69. 422 A.2d 989 (D.C. 1980).

70. *Id.* at 991.

71. Here, the evidence showed that the manufacturer knew that it was common practice for workers to walk on the asbestos sheets, *id.* at 994, and knew or should have known that the sheets would not support a person's weight if they developed a hairline crack or became wet. *Id.* at 992.

72. Thus, even in strict liability cases involving warnings and instructions, the threshhold issue is: "Was there a *negligent* failure to warn?" *See id.* at 991 n.* (emphasis added).

73. *Id.* at 992 (quoting RESTATEMENT (SECOND) OF TORTS § 388, comment n (1965)). *See also* Griggs v. Firestone Tire and Rubber Co., 513 F.2d 851, 858 (8th Cir.), *cert. denied*, 423 U.S. 865 (1975).

74. 109 DAILY WASH. L. REP. 113 (D.C. Cir. Jan. 22, 1981).

strict liability claim sounding in tort,"[75] the court nevertheless found implicit approval for such a claim in numerous recent cases from the District of Columbia Court of Appeals.[76] The *Young* case involved alleged inadequate labelling, thus requiring the plaintiff to sustain the preliminary burden of showing the manufacturer's *negligence* in labelling the product.[77] As a result, a jury instruction was necessary to the effect that contributory negligence is not a defense.[78] Because the trial judge declined to recognize the validity of a strict liability cause of action, no such instruction was given. The jury was thereby allowed to find both sides at fault, and thus the verdict was for the defendant. The appellate court reversed and remanded.

VI. WORKERS' COMPENSATION

The United States Court of Appeals for the District of Columbia Circuit held, in *Riley v. United States Industries/Federal Sheet Metal, Inc.*,[79] that the Longshoremen's and Harbor Workers' Compensation Act[80] accords an injured claimant a rebuttable presumption that his injury arose out of and in the course of employment and, without sufficient evidence to the contrary, the injury is covered by the Act.[81] In *Riley*, the claimant was denied disability benefits when an administrative law judge and the Benefits Review Board found that the evidence was sufficient to demonstrate that he had sustained an accident at work. The court reversed and remanded, stating that the finding "that no accident had in fact occurred, is . . . not responsive to the issue properly presented for resolution."[82] Because the claimant had clearly suffered an "injury,"[83] the only issue to be resolved was whether the injury arose out of and in the course of employment. On that issue, the claimant was entitled to the statutory presumption that the

75. *Id.* at 118.

76. *See, e.g.*, Russell v. G.A.F. Corp., 422 A.2d 989 (D.C. 1980); Berman v. Watergate West, Inc., 391 A.2d 1351 (D.C. 1978); Cottom v. McGuire Funeral Serv., Inc., 262 A.2d 807 (D.C. 1970). *See also* Stewart v. Ford Motor Co., 553 F.2d 130 (D.C. Cir. 1977).

77. *See* note 62 *supra*.

78. 109 DAILY WASH. L. REP. at 118. *See also* Russell v. G.A.F. Corp., 422 A.2d at 991 n.*.

79. 627 F.2d 455 (D.C. Cir. 1980).

80. 33 U.S.C. §§ 901 *et. seq.* (1976), made applicable to the District of Columbia by D.C. CODE §§ 36-501 to -502 (1973).

81. *See* 33 U.S.C. § 920(a) (1976).

82. 627 F.2d at 459.

83. The claimant, who had an arthritic neck, woke up with severe pain the morning after he had allegedly struck his neck and shoulders on an overhead obstruction while working. *See id.* at 457.

injury was "employment-bred."[84] The court concluded that, in attaching inappropriate significance to the occurrence of an "accident,"[85] the administrative law judge and the Board improperly failed to grant the claimant the right to that presumption.

In *Hastings v. Earth Satellite Corp.*,[86] the United States Court of Appeals for the District of Columbia Circuit decided several questions relating to the calculation of the amount of benefits paid under the Act. First, the court held that "where . . . *two* injuries befall an employee, the employee's earning capacity during the time preceding the second injury must be the basis of computing benefits attributable to the second injury."[87] Thus, a claimant's diminished earnings following his initial, partially disabling injury are the basis for determining his benefits following a later, permanently disabling injury. Second, the court softened its first ruling by upholding the propriety of concurrent awards for both the permanent-partial disability of the claimant's initial injury (a stroke) and the permanent-total disability of his second injury (pulmonary emboli and phlebitis).[88] Because the claimant's permanent-total award was based on the diminished income he received after the first injury, "logic and fairness" required that the compensation for lost earnings represented by the first, permanent-partial award be continued concurrently with the permanent-total award.[89] Third, the court gave retroactive effect to an amendment to the Act,[90] enacted after the claimant was injured, that repeals a $24,000 ceiling on aggregate payments of permanent-partial disability benefits. The court thus reversed the Board's order that such benefits cease when a total of $24,000 has been paid.[91] Finally, the Court ruled that, in calculating a claimant's average weekly wages, an administrative law judge need not apply mechanically the statutory formula of one fifty-second part of

84. *See id.* at 458 (citing J.V. Vozzolo, Inc. v. Britton, 377 F.2d 144, 149 (D.C. Cir. 1967)).

85. *Cf.* Swinton v. J. Frank Kelly, Inc., 554 F.2d 1075 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976) (mental breakdown suffered as cumulative result of claimant's years of service); *see also* Mitchell v. Woodworth, 449 F.2d 1097 (D.C. Cir. 1971); Butler v. District Parking Mgmt Co., 363 F.2d 682 (D.C. Cir. 1966).

86. 628 F.2d 85 (D.C. Cir.), *cert. denied*, 101 S. Ct. 281 (1980).

87. *Id.* at 90 (construing 33 U.S.C. § 910 (1976), which awards benefits based on the employee's average weekly wage "*at the time of the injury*") (emphasis added by the court).

88. *Id.* at 91.

89. *Id.*

90. Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972, Pub. L. No. 92-576, § 5(e), 86 Stat. 125 (repealing 33 U.S.C. § 914(m) (1970)).

91. 628 F.2d at 94. *Accord*, Davis v. United States Dep't of Labor, 109 DAILY WASH. L. REP. 45 (D.C. Cir. Jan. 9, 1981).

the claimant's average yearly wages.[92] Rather, where the claimant "demonstrates a progressive increase (or decrease) in earnings in the year immediately preceding an injury," the administrative law judge may weigh the most recent weeks' wages more heavily.[93]

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92. *Cf.* 33 U.S.C. § 910(2)(d) (1976).
93. 628 F.2d at 95-96.