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Recent Cases

RECENT CASES

TORTS—RIGHT OF PRIVACY

In *Hull v. Curtis Publishing Co.*[1] the Superior Court of Pennsylvania became the first appellate court in this jurisdiction to specifically recognize that an invasion of one's right to privacy can constitute an actionable tort.

Plaintiff was one of several policemen whose picture had been taken with a prisoner; evidently this picture created the impression that the plaintiff and his fellow officers were beating their prisoner. This picture was published in a newspaper, and nearly three years later, without the consent of the plaintiff, this picture appeared in the defendant's magazine. Plaintiff brought an action for the invasion of his right of privacy, basing his action on this publication. The court held that such a tort did exist in Pennsylvania but decided that the plaintiff could not recover, being barred by a two year statute of limitations.[2]

While this is the first time an appellate court has specifically held that such a tort existed in Pennsylvania, the Supreme Court of this Commonwealth came very close to so holding several times.

In 1937 our Supreme Court decided the case of *Waring v. WDAS Broadcasting Station, Inc.*[3] The plaintiff here sought to enjoin the broadcasting of his recordings by the defendant radio station. The majority concerned itself with the property rights of the plaintiff, but in a concurring opinion Justice Maxey said:

> "I think plaintiff's right which was invaded by the defendant was his right of privacy, which is a broader right than a mere right of property. A man may object to *any* invasion of his right to privacy or to its *unlimited* invasion."

In this opinion, the law review article by Warren and Brandeis,[4] which is credited with having created this tort, was cited as authority for the proposition that an individual has the power to fix the limits of the publicity to be given to his thoughts, sentiments and emotions so that he can therefore withdraw them from all dissemination.

In 1954 the Pennsylvania Supreme Court again was on the threshold of recognizing the existence of a right of privacy. In the case of *Schnabel v. Meredith*[5] the defendant owned a newspaper and in connection with an article

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[1] 182 Pa. Super. 86, 125 A.2d 644 (1956).
[2] Act of June 24, 1895, P.L. 236, § 2, tit. 12, PURDON'S PA. STAT. ANN. § 34.
[3] 327 Pa. 433, 194 Atl. 631 (1937).
[4] *The Right to Privacy*, 4 HARV. L.R. 193 (1890).
[5] 378 Pa. 609, 107 A.2d 860 (1954).

on gambling pointed out that some months previously slot machines had been discovered on the plaintiff's estate and that none had been located in the county since that time. Plaintiff thereupon sued on the theory that he had been libeled and his right of privacy invaded. The Court assumed that such a right exists in Pennsylvania but did not so decide because it was of the opinion that this article in the defendant's newspaper was of legitimate news value and thus could not support this action.[6] It was felt that the plaintiff had relinquished his right to privacy by his possession of the slot machines despite the fact that six months had elapsed between the discovery and this publication. The Court relied on the Restatement of Torts [7] to support its conclusion:

> ". . . It is only where the intrusion has gone beyond the limits of decency that liability accrues. These limits are exceeded where intimate details of the life of one who has never manifasted a desire to have publicity are exposed to the public. . . . A distinction can be made in favor of news items and against advertising use. . . ."

Several Pennsylvania lower court decisions have recognized that an invasion of one's right to privacy constitutes an actionable tort. In *Harlow v. Buno Co., Inc.*[8] a picture of the plaintiff was used, without any authorization, for advertising purposes. She thereupon brought an action on the theory that her right to privacy had been invaded. The court stated that there was no appellate decision recognizing this action in this jurisdiction and went on to find that, in the absence of such a decision, such a tort was in existence here. This tort, according to the opinion, is closely akin to one's personal liberty and security and is thus derived from natural law.[9] This case, it seems, is in complete agreement with the Restatement theory of making a distinction against advertising use of a person's picture.[10]

In *Clayman v. Berstein* [11] the same court that decided the *Harlow* [12] case was again called on to decide whether or not to enjoin a doctor from developing or making any use whatsoever of pictures he had taken of the facial disfigurations of the plaintiff. The defendant doctor preliminarily objected, claiming that one's right of privacy cannot be invaded in the absence of some publication. These preliminary objections were dismissed on the ground that

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[6] Justice Jones said: "Assuming, without deciding, that such a right does exist in Pennsylvania, the appellant has not brought himself within the operation of the rules governing the right of privacy where such right has been judicially recognized."

[7] RESTATEMENT, TORTS § 867, Comment (d).

[8] 36 D. & C. 101 (1939).

[9] Judge Alessandroni said: "The true nature of the right, however, is one which is closely akin to the rights of personal security and personal liberty and is derived from the natural law."

[10] See note 7 *supra.*

[11] 38 D. & C. 543 (1940).

[12] See note 8 *supra.*

the plaintiff could not be expected to be constantly on guard against a possible publication. The court pointed out that the wrong could be committed without plaintiff's knowledge and that the damage would then be done; the possibility of such an event could cause mental distress and humiliation to the plaintiff. The court here seemed to feel that the pictures should not even be used in giving medical instruction. Judge Alessandroni, in referring to the defendant's contention that this could be done, said:

> "While the court appreciates the development of the art of photography generally, and in the medical profession particularly, not only as a means of diagnosis and treatment, but also as a means of instruction, its progress has not yet reached a stage at which physicians have been accorded the right to photograph their patients without their consent. . . ."

This viewpoint seems to be somewhat at variance with the frequently stated theory that this right does not exist with respect to the dissemination of educational information.[13]

Another lower court decision in Pennsylvania in 1950 also was concerned with this tort. In *Lisowski v. Jaskiewicz* [14] the plaintiff charged the defendant with false imprisonment, malicious prosecution, uttering of slanderous words and civil conspiracy. The defendant filed a counterclaim for invasion of his right of privacy by the plaintiff. This counterclaim was based on numerous somewhat unneighborly tactics of the plaintiff which included calling the defendant insulting names, shouting insults at him, pounding on a party wall and sweeping dust in the defendant's yard. The plaintiff's preliminary objection to the counterclaim was sustained. In holding that the defendant had failed to make out a cause of action, the court stated:

> "Although Pennsylvania courts will recognize privacy as a personal right and will give damages for its invasion the right will not be extended so that it includes any annoyance a community dweller suffers." [15]

Prior to the *Hull* [16] case the United States District Court for the eastern district of Pennsylvania held, in *Leverton v. Curtis Publishing Co.*[17] that the publication of an accident victim's picture in a magazine some twenty months after the accident constituted an actionable invasion of the plaintiff's privacy. The court pointed out, and the plaintiff agreed, that a publication in a newspaper shortly after the plaintiff's misfortune would not have been the basis of a recovery since it would then have been a matter of public interest and of news value.

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[13] 77 C. J. S. 399, § 2, *Right of Privacy* (1952).
[14] 76 D. & C. 79 (1950).
[15] Judge Crumlish was the author of this excellent opinion.
[16] See note 1 *supra.*
[17] 192 F. 2d 974 (1951).

The Superior Court, in the *Hull* [18] case, was not, it should be noted, engaging in judicial legislation. The Uniform Single Publications Act,[19] the court pointed out, refers to invasion of privacy. It was therefore concluded that while the legislature did not create such an action, it had recognized its existence in the statute.

In conclusion, the courts of Pennsylvania have for some years agreed that the invasion of one's privacy could constitute a tort. Lower courts have specifically recognized this in numerous cases and appellate court decisions indicated that they would so hold when it became necessary, as in the *Hull* [20] case, to do so.

FRANK S. SEIDERS, JR.

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[18] See note 1 *supra.*
[19] Act of August 21, 1953, P.L. 1242, tit. 12, PURDON'S PA. STAT. ANN. § 2090.1.
[20] See note 1 *supra.*

ACCIDENT INSURANCE—CRIMINAL ACT—PROXIMATE CAUSE—PUBLIC POLICY

The Illinois Supreme Court in the case of *Taylor v. John Hancock Mutual Life Insurance Co.*, 9 Ill. App. 2d. 230, 132 N.E.2d. 579 (1956), allowed recovery under a group insurance policy covering employees against "bodily injuries sustained solely through external, violent and accidental means, directly or independently of all other causes" where the insured died while committing the crime of arson. This is apparently the first time that recovery has been sought under an accident policy where the insured was involved in an arson plot.

The insured with others plotted and prepared to burn a house in order to recover the insurance thereon. The insured died when the fire started prematurely while he was in the house recovering some articles for his own use. The court held that it was the fire rather than the criminal act which caused the death, and that the death was the result of an accident within the accident policy.

The insurance carrier contended that the deceased was not only engaged in an unlawful act but died through means which were wilful, voluntary, intentional, and designedly employed by him in committing the crime of arson. The whole act of preparing the fire and the subsequent igniting (apparently by a pilot light on the stove) were a part of the same single happening.

The majority of the court accepted the beneficiary's argument that the conditions which created the fire (spreading gasoline, and the presence of the pilot light) were not the immediate cause of death. Preparing for the arson created the condition, but the fire caused the death. And the fire was an accident in that it occurred before the deceased intended it to occur. The insured was a criminal engaged in a criminal act but not a suicide. He intended to profit by his act, not to lose his life.

The dissenting opinion conceded that the insured did not intend to die. However, it agreed with the insurer's contention that the act of re-entering the house to get bedspreads was so inseparably connected with the arson plan in conduct and timing that there was no occasion for discussion of proximate cause. To this was added the further statement that to allow recovery would be contrary to public policy under the Criminal Code.

A provision, such as the one in the *Taylor* policy requiring loss to be caused by accident "independent of all other causes" is equivalent to a provision requiring it to be the proximate cause.[1] In negligence cases the proxi-

[1] 29 AM. JUR., *Insurance* § 932 (1940).

mate cause of an injury is that cause which, in a natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury and without which the result would not have occurred.[2] It has been held, however, that the rules applicable to tort cases are not necessarily controlling in insurance law,[3] and further, that the meaning of the word "accident" which should be applied in accident insurance cases is the meaning applied in the common speech of man.[4] Appleman [5] summarizes two general views of what an accident is: (1) if the insured performs a voluntary act the result of which, as a reasonable man, he should have foreseen would naturally and probably result in injury to himself, his injury is not accidental;[6] and (2), the strict doctrine, that regardless of how unforeseeable the result is, if the circumstances leading to injury are set in motion by the insured's own act, there can be no recovery.[7]

Most of the accident insurance cases which have arrived at a result *via* the argument of proximate cause have been decided where an injury or death occurred to one inflicted with a pre-existing disease. Many of these cases have held that death resulting from the combined effects of an accident and a pre-existing disease aggravated thereby does not preclude recovery on an accident policy [8] if the disease, while existing, is but a condition and the accident is the sole and proximate cause of the insured's death.[9] It is not material that the pre-existing diseased condition contributed to the death where injury is the primary cause.[10] For example, death from blood poisoning following injury to a diabetic was aided and accelerated by the insured's condition. Nevertheless, recovery on the accident policy, similar to the one in the *Taylor* case, was allowed.[11] The physical condition of the insured in another case [12] set the stage for injuries sustained when he slipped and fell. In this case the slipping and not the physical condition was held to be the sole and efficient cause of the injury. Many cases have held that the diseased condition or infirmity of the insured merely set the stage, and that the injury was an efficient intervening cause; thus the insured or his beneficiary has recovered.

This seems to be the reasoning followed in the *Taylor* case; namely, the cause of an injury or death is that which actually produces it, while the occa-

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[2] 38 AM. JUR., *Negligence* § 50 (1940).
[3] Roeper v. Monarch Life Ins. Co., 138 Pa. Super. 238, 11 A.2d 184 (1940).
[4] Lewis v. Ocean Acc. and Guaranty Corp., 224 N.Y. 18, 120 N.E. 56 (1918).
[5] I APPLEMAN, INSURANCE § 391 (1941).
[6] Piotrowski v. Prudential Ins. Co., 141 Misc. 172, 252 N.Y.S. 313 (1931).
[7] Trau v. The Preferred Acc. Ins. Co. of N.Y., 98 Pa. Super. 89 (1930).
[8] Rebenstorf v. Mutual Life Ins. Co., 299 Ill. App. 71, 19 N.E.2d 420 (1939).
[9] Foulkrod v. Standard Acc. Ins. Co., 343 Pa. 505, 23 A.2d 430 (1942).
[10] Union Life Ins. Co. v. Epperson, 221 Ark. 522, 254 S.W.2d 311 (1953).
[11] Moyer v. Mutual Benefit Health and Acc. Ass'n., 94 F.2d 457 (6th Cir. 1938).
[12] Kelly v. Pittsburgh Casualty Co., 256 Pa. 1, 100 Atl. 494 (1916).

sion is that which provides an opportunity for the casual agencies to act.[13] The fire is the cause; the preparation is the condition.

On the basis of the tort definition of proximate cause and the results of the class of cases previously mentioned, the *Taylor* case stands with considerable support. It is not to be suggested, however, that all cases in the pre-existing disease class have allowed recovery. Many courts have held that where the pre-existing disease *either* causes or contributes in causing death there can be no recovery under an accident policy.[14] In these cases it was apparently felt that the condition was the primary cause in spite of the intervening injury. By this view it could be held that no recovery should be allowed in the *Taylor* case on the ground that the deceased's preparation for the fire by spreading gasoline around the house created a condition which very materially contributed to the disastrous results.

The insurer likened the principal case to the situation where a person started a fight and received a broken leg in the affray.[15] That person had created a condition the result of which was natural and probable. But the Illinois court in the *Taylor* case distinguished the latter situation from the principal case by saying that the aggressor in a fight knows when he starts the fight that he might be injured. Does this mean that the unknown risk involved in burning houses, because of little common experience in these lines, should permit the insured to recover for injuries or death resulting from such activity?

Very few "criminal act-accident insurance" cases have been decided with specific reference to proximate cause.[16] The reason may be that the courts here have steered clear of this concept, no definition of which can be altogether clarifying or satisfactory since, inevitably, terms used in the definition will themselves require definition,[17] and other means will reach desired results. While such courts speak in terms of "foreseeability", "natural and probable consequences", and "reasonably anticipated", which are mere words and possibly hazy concepts, it would seem from a long line of cases that this is an approach which lends itself to the type of relief sought by the court on grounds of public policy where the insured was engaged in a crime at the time of injury or death. There is a distinction between voluntary engagement in crime where-

[13] Phillabaum v. Lake Erie & W. Ry., 315 Ill. 131, 145 N.E. 806 (1924).

[14] Muraskey v. Commercial Travelers Mut. Acc. Ass'n., 94 F.2d 578 (2d Cir. 1938); Rodia v. Metropolitan Life Ins. Co., 354 Pa. 313, 47 A.2d 152 (1946); Travelers Ins. Co. v. Witt, —— Ark. ——, 260 S.W.2d 641 (1953).

[15] Hutton v. States Acc. Ins., 267 Ill. 267, 108 N.E. 296 (1915).

[16] See Szymanska v. Equitable Life Ins. Co., 37 Del. 272, 183 Atl. 309 (1936), where insured's conduct in paying improper attention to another's wife whose husband brought about insured's death because of a fall down stairs was held a means contributing proximately to the result, and hence death did not result from accidental means within the accident policy, as against contention that insured's conduct furnished the occasion and not the cause of death.

[17] 38 AM. JURS. *Negligence* § 50 (1940).

by the stage is set for injurious results and an involuntary disease condition of the insured. And it would seem that should the court desire on grounds of public policy to deny relief to the criminal or his beneficiary, it might best avoid talking in terms of an intervening cause.

Some courts have specifically stated that they will aid no man to take a profit from the violation of a law. They hold that since a contract insuring one against the risks of crime is void for reasons of public policy, then, *a fortiori,* for the same reasons one should not be permitted to recover under an accident policy when he is injured or killed while engaging in crime.[18] Other courts have been equally specific in denying recovery because, otherwise, crime would be encouraged by protecting the criminal from some of the consequences which society imposes.[19]

Of the remaining courts deciding cases in the criminal act-accident insurance class, the majority have also denied recovery to the insured or his beneficiary under accident policies similar to the one in the *Taylor* case. Their reasons have been varied, and the following are a few examples. Insured, engaged in robbery, was killed by the police; it was held that the results should have been foreseen.[20] Insured had left the scene of the crime of burglary while an accomplice was resisting the police; his death was part of the res gestae.[21] Insured was killed during a robbery; he might have reasonably anticipated such a result.[22] The insured was killed while resisting arrest; it was held that it was no accident.[23] Insured was fleeing from the police after the act of burglary; this result was natural and probable and should have been foreseen.[24] The discharge of a weapon when the insured was struggling for it was held not to be unforeseeable, but rather the natural and probable consequence.[25] Examples of the contra minority view follow. Insured, attempting to flee from a house after committing burglary, was killed by the discharge of his own gun; the burglary was held not the cause of the death.[26] Insured attacked another person; after losing his gun in the struggle he withdrew, and then was shot; it was held that insured had no reason to expect a deadly defense.[27]

[18] Collins v. Metropolitan Life Ins. Co., 27 Pa. Super. 353 (1904).

[19] Piotrowski v. Prudential Ins. Co., 141 Misc. 172, 252 N.Y.S. 313 (1931) (killed committing a felony); Rousseau v. Metropolitan Life Ins. Co., 299 Mass. 91, 11 N.E.2d 921 (1937) (auto theft; insured killed in wreck as he was fleeing); DeMello v. John Hancock Mut. Life Ins. Co., 281 Mass. 190, 183 N.E. 255 (1932) (violation of the prohibition laws; insured injured).

[20] Price v. Business Mens' Assur. Co., 188 Ark. 637, 67 S.W.2d 186 (1934).

[21] Eagan v. Prudential Ins. Co., 234 Mo. App. 295, 128 S.W.2d 1085 (1939).

[22] McGuire v. Metropolitan Life Ins. Co., 164 Tenn. 32, 46 S.W.2d 53 (1932).

[23] Bernard v. Prudential Ins. Co., 134 Neb. 402, 278 N.W. 846 (1938).

[24] Griffin Adm'r. v. Metropolitan Life Ins. Co., 61 York Legal Record 128 (Pa. Common Pleas, 1947).

[25] Koester v. Mutual Life Ins. Co., 36 Del. 537, 179 Atl. 327 (1934).

[26] Jordan v. Logia Suprema De La Alianza Hispano Americana, 23 Ariz. 584, 206 Pac. 162 (1922).

[27] Erb v. Commercial Mut. Acc. Co., 232 Pa. 215, 81 Atl. 207 (1911).

Of course, in reference to the matter of public policy, it may be desirable to allow the beneficiary to recover on the criminal's insurance policy rather than to have the possibly innocent beneficiary suffer for the misdeeds of the insured. While this idea might have motivated the court in the *Taylor* case, there is nothing in the opinion to so indicate.

Apparently, Illinois will continue in the same vein with other cases of the same general nature in the future. Since the *Taylor* decision, another beneficiary collected on an accident policy like the one in the principal case.[28] There the insured was killed while recklessly driving his automobile at an excessively high rate of speed. If the insurance companies want to guard with certainty against the type of situation described in the principal case, it appears that it will be necessary to specifically qualify the terms of the policy with a "violation of law" clause.

In summary, there is an abundance of authority for holding, as did the *Taylor* decision, that an act may furnish the occasion for another act and that the second act may be the cause of the injury without the first act in any manner being a contributing cause of the injury. The second act may be the result of some intervening cause in no manner flowing from the original act, but this cause is given an opportunity to operate through the occasion furnished by the original act.[29] While this approach is one commonly employed in pre-existing disease cases, even their recovery is not always allowed. In the class of cases herein called criminal act-accident insurance, the majority of courts have either expressly refused recovery on grounds of public policy or have used terminology omitting the idea of an intervening cause and have achieved the same result of no recovery.

JOHN S. KOOKOGEY.

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[28] Rodgers v. Reserve Life Ins. Co., —— Ill. ——, 132 N.E.2d 692 (1956).
[29] Phillabaum v. Lake Erie & W. Ry., 315 Ill. 131, 145 N.E. 806 (1924).