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because it could continue its operations without incurring the expense.

In denying the railroad any deduction for the repurchase premium, the court considered the effects of the provisions of the securities on their holders and the railroad. The right to participate in current earnings and to vote as a stockholder caused the market to value the securities more highly than conventional bonds and distinguished the securities from convertible bonds. Although the securities provided for first liens on the railroad's property, that bond characteristic was insufficient to offset the right to current earnings or to threaten the operation of the railroad. The court looked behind the labels which the railroad used to identify its repurchase transaction to determine the reason for the high repurchase premium.

KENNETH F. PARKS

XI. TORTS

A. Libel: The Application of *Gertz v. Robert Welch, Inc.*

The murky distinctions extant in the law of defamation have sparked lively debate among the commentators[1] and have presented "a forest of complexities . . . and perverse rigidities"[2] with which

Indus. Inc. v. Commissioner, 495 F.2d 653, 657 (3d Cir. 1974), *aff'g* 60 T.C. 163 (1973). Cases in which the courts indicated that the repurchase premiums paid on stock could be deducted as an ordinary and necessary expense illustrate the requirements of the dire necessity rule.

In Five Star Mfg. Co. v. Commissioner, 355 F.2d 724 (5th Cir. 1966), the company manufactured goods under a patent which one of its two owners licensed to it. When the licensor defaulted on his royalty agreement with the patent owner, the patent owner obtained a judgment against the licensor and the company, both on the verge of insolvency. The Fifth Circuit found that the judgment creditor permitted the company to survive only because it repurchased the defaulting partner's stock, thus severing his ties to Five Star. 355 F.2d at 727. Without the repurchase, the company could not have continued its operations. *See also* Unted States v. Smith, 418 F.2d 589, 596-97 (5th Cir. 1969), *rev'g* 266 F. Supp. 814 (S.D. Tex. 1967). *Cf.* Jim Walter Corp. v. United States, 498 F.2d 631 (5th Cir. 1974) (repurchase premium of first refusal warrants redeemed to avoid future interest payment was a capital expenditure not deductible under I.R.C. § 162); H.&G. Indus. Inc. v. Commissioner, 495 F.2d 653 (3d Cir. 1974), (expense deduction for repurchase of preferred stock redeemed to obtain a loan at a lower interest rate denied).

[1] *Compare* Prosser, *Libel Per Quod*, 46 VA. L. REV. 839 (1960), *with* Eldredge, *The Spurious Rule of Libel Per Quod*, 79 HARV. L. REV. 733 (1966), *and* Prosser, *More Libel Per Quod*, 79 HARV. L. REV. 1629 (1966), *with* Eldredge, *Variation on Libel Per Quod*, 25 VAND. L. REV. 79 (1972).

[2] Eaton, *The American Law of Defamation Through* Gertz v. Robert Welch, Inc. *and Beyond: An Analytical Primer*, 61 VA. L. REV. 1349, 1350 (1975) [hereinafter cited as Eaton].

litigants and courts alike must deal. In *Sauerhoff v. Hearst Corp.*,[3] the Fourth Circuit considered whether a news item appearing in a Baltimore newspaper amounted to defamation on its face, thereby entitling the plaintiff to general damages without proof of special damages.[4] The story reported the filing of a lawsuit by the plaintiff against a woman referred to in the account as his "girlfriend." At the time of the account, the plaintiff was happily married,[5] but upon reading it, his wife became convinced that he had been unfaithful to

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[3] 538 F.2d 588 (4th Cir. 1976).

[4] The Maryland courts have held that proof of special damages is not required in a libel action where the publication amounts to libel per se. Fennell v. G.A.C. Finance Corp., 242 Md. 209, 218 A.2d 492 (1966); Heath v. Hughes, 233 Md. 458, 197 A.2d 104 (1964); Pollitt v. Brush-Moore Newspapers, Inc., 214 Md. 570, 136 A.2d 573 (1957); General Motors Corp. v. Piskor, 27 Md. App. 95, 340 A.2d 767 (1975), *rev'd on other grounds*, 277 Md. 165, 352 A.2d 810 (1976). The rule is significant because general damages are presumed to have occurred, at least nominally, when libel per se is involved. Such a presumption frees the plaintiff from having to prove actual pecuniary harm. The general damages category includes injury to the plaintiff's reputation, emotional distress, the loss of society of others, and physical illness and pain, as well as estimated future damages of the same kind. W. PROSSER, HANDBOOK OF THE LAW OF TORTS, § 112, at 760-61 (4th ed. 1971) [hereinafter cited as PROSSER]; Eaton, *supra* note 2, at 1354; Murnaghan, *From Figment to Fiction to Philosophy—The Requirement of Proof of Damages in Libel Actions*, 22 CATH. U.L. REV. 1, 2 n.4 (1972) [hereinafter cited as Murnaghan]. For a discussion of the effect of Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) on a state's ability to afford recovery of "presumed" general damages, see text accompanying notes 25-31 *infra*.

[5] The newspaper account did not report that the plaintiff was married. The pleading and proving of such an "extrinsic" fact is required where the defamatory nature of the publication in question does not appear on its face. Thompson v. Upton, 218 Md. 433, 146 A.2d 880 (1958); Bowie v. Evening News, 148 Md. 569, 129, A. 797 (1925). Where such extrinsic facts are proved, the defamation is denominated as "libel per quod;" where the defamatory nature of a publication is apparent from the words used, it is "libel per se." 1 A. HANSON, LIBEL AND RELATED TORTS ¶ 15 (1969) [hereinafter cited as HANSON].

Murnaghan contends that under earlier Maryland case law, the difference between libel per se and libel per quod was one of proof rather than of labels. Under those cases, he states, the rule appears to be that words not defamatory in and of themselves may be rendered libelous per se by the pleading and proving of extrinsic facts. Murnaghan, *supra* note 4, at 17-21, *citing* Cobourn v. Moore 158 Md. 358, 148 A. 546 (1930); Flaks v. Clarke, 143 Md. 377, 122 A. 383 (1923); Weeks v. News Publishing Co., 117 Md. 126, 83 A. 162 (1912); De Witt v. Scarlett, 113 Md. 47, 77 A. 271 (1910). However, Murnaghan states that contrary dicta in more recent cases suggest that the Maryland Supreme Court, if squarely presented with the issue, would hold that where extrinsic facts are necessary to show defamatory nature, libel per quod rather than libel per se is involved. Murnaghan, *supra* note 4, at 25, *citing* M. & S. Furniture Sales Co. v. De Bartolo Corp., 249 Md. 540, 241 A.2d 126 (1968); Prucha v. Weiss, 233 Md. 479, 197 A.2d 253, *cert. denied*, 377 U.S. 992 (1964); Heath v. Hughes, 233 Md. 458, 197 A.2d 104 (1964); Thompson v. Upton, 218 Md. 433, 146 A.2d 880 (1958).

her and subsequently left him. The Fourth Circuit held that the wording of the account amounted to defamation on its face[6] and that the plaintiff was thus entitled to damages for actual injury.[7]

The district court in *Sauerhoff* granted summary judgment for the defendant,[8] holding that under Maryland law,[9] the defamation amounted only to a libel per quod,[10] which required the pleading and

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[6] 538 F.2d at 590. "Defamation" is a generic term for any invasion by one person of another's right of personal security in reputation and good name. General Motors Corp. v. Piskor, 27 Md. App. 95, 340 A.2d 767 (1975), *rev'd on other grounds*, 277 Md. 165, 352 A.2d 810 (1976); PROSSER, *supra* note 4, § 111, at 737. Defamation includes the torts of libel and slander. Generally, if the defamatory language is written, the tort is libel, and if it is oral, the tort is slander. *Id.* Actions and conduct, as well as printed or spoken words, can constitute actionable defamation. *See, e.g.*, M. & S. Furniture Sales Co. v. De Bartolo Corp., 249 Md. 540, 241 A.2d 126 (1968); Herring v. Citizens Bank & Trust Co., 21 Md. App. 517, 321 A.2d 182 (1974).

[7] The court noted that actual injury was not necessarily limited to out-of-pocket loss, but might also include "impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering," 538 F.2d at 590, *quoting* Gertz v. Robert Welch, Inc., 418 U.S. 323, 349-50 (1974).

[8] Sauerhoff v. Hearst Corp., 388 F. Supp. 117, 122 (D. Md. 1974).

[9] The court stated that its interpretation of the Maryland law of defamation was "only a guess" of what Maryland's highest court would hold if presented with the question before the court. The court noted that Maryland law was "somewhat cloudy" on the distinction between libel per se and libel per quod. 388 F. Supp. at 118. It adopted Murnaghan's conclusion that, in Maryland, whenever the libelous character of the language used is not evident on its face, the libel is per quod and not per se, and extrinsic facts and special damages must be pleaded and proved. 388 F. Supp. at 120. The court cited with approval Murnaghan's statement that Maryland would not, as Prosser has suggested in Prosser, *Libel Per Quod*, 46 VA. L. REV. 839, 844 (1960), recognize an exception to the general libel per quod rule for written words which, although libelous per quod, would have fallen into one of the four special slander per se categories, *see* note 19 *infra*, if they had been spoken. 388 F. Supp 121, *citing* Murnaghan, *supra* note 4, at 3 n.5, 19 n.71.

As for the rule requiring proof of special damages for libel per quod, Murnaghan notes that

> in all the Maryland cases bearing in any way on the question of whether special damages are an essential element of an actionable libel, no allusion is made to a statutory provision which would appear to represent an acknowledgement by the legislature that all libel is actionable without proof of special damages. Article 75, § 14. Subsections (34) and (35) of the ANNOTATED CODE OF MARYLAND (1969 Replacement Volume), set forth acceptable forms in which plaintiffs may state causes of action. The form for slander includes an example of how to proceed "if there be any special damage." The form for libel contains no such provision.

Murnaghan, *supra* note 4, at 24 n.93.

[10] Although the district court did not explicitly classify the language as libel per quod, the language used in the holding indicates that the court considered it libel per quod: "In the opinion of this Court the article can be read *by innuendo* as meaning

proving of extrinsic facts and special damages.[11] While the plaintiff had pleaded as special damages the loss of his wife's domestic services, the court found that no pecuniary loss was shown.[12]

In vacating the district court's grant of summary judgment,[13] the Fourth Circuit viewed the article as libelous per se,[14] thereby obviat-

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that Miss Adams and Sauerhoff were having an extra-marital affair." [Emphasis added] 388 F. Supp. at 122. "Innuendo" is the common law pleading term for the allegation which demonstratess through reference to the extrinsic facts the defamatory nature of the language in question. Since a libel per se is defamatory on its face, an innuendo is used only where the language is libelous per quod. *See* PROSSER, *supra* note 4, § 111 at 748-49.

[11] Special damages are those damages which are supported by specific proof and reflect a direct pecuniary loss. Examples of special damages include the loss of employment, loss of customers or business, and the loss of a particular contract. *Hanson, supra* note 5, ¶ 164. *See also* Note, *Defamation—Libel Per Quod and Special Damage,* 45 N.C.L. REV. 241 (1966); Note, *Libel Per Se and Special Damages,* 13 VAND. L. REV. 730 (1960). The loss of the society of friends or the loss of an association such as marriage are not elements of special damages unless the plaintiff can show that the association carried a pecuniary benefit. HANSON, *supra* note 5, ¶ 164; PROSSER, *supra* note 4, § 112, at 761.

[12] The district court stated that the loss of a wife's domestic services was similar to the loss of an "advantageous marriage," *see* note 11 *supra,* and was thus cognizable as special damage. It found, however, that the plaintiff had failed to prove any pecuniary loss because the evidence showed that he had actually saved money by moving in with his sister after his wife left him. 388 F. Supp. at 123.

[13] 538 F.2d at 592. The Fourth Circuit remanded to the district court with instructions to determine which of the four traditional slander per se categories the report fell into. The court stated that if the language fell into one of the slander per se categories, it was also libel per se. 538 F.2d at 591, *citing* Foley v. Hoffman, 188 Md. 273, 52 A.2d 476 (1947). Both Murnaghan and the district court judge in *Sauerhoff* rejected *Foley* as authority for this view. Murnaghan, *supra* note 4, at 19, 20 n.75; 388 F. Supp. at 121 n.9. In citing *Foley,* the Fourth Circuit was apparently relying on Prosser's view of that case as supporting his position that all words which are slander per se are also libel per se. *See* PROSSER, *supra* note 4, § 112, at 763 n.32. *See also* note 19 *infra.* The language in *Foley* which Prosser may have relied on is dicta to the effect that the scope of libel is wider than that of slander, but that

> with respect . . . to words injurious to a person only in his office, trade, business or employment, in the absence of aggravating language or circumstances, especially when the publication is qualifiedly privileged, the border line is much the same for libel as for slander.

52 A.2d at 481. This language could be taken to mean that if the written words injure a person in his office, trade, or business and thus fall into that traditional slander per se category, see note 19 *infra,* they are automatically libel per se. However, such a broad reading of *Foley* appears to provide little support for Prosser's position since the quoted language was restricted to only one of the four traditional slander per se categories. On balance, Murnaghan's and the district court's views of *Foley* appear correct.

[14] The court noted that the story "depicted the plaintiff as engaged in an amorous association, sketched in terms of 'boyfriend' suing his 'girlfriend,'" suggesting "a covert office extramarital affair." 538 F.2d at 591.

ing any necessity for the plaintiff to plead and prove special damages.[15] In a dissenting opinion, Chief Judge Haynsworth disagreed with the majority's view of the district court's holding.[16] He contended that the district court had not held the press report defamatory on its face, but rather had held that the report was libel per quod because the article did not state that the plaintiff was married.[17]

Of the two views of the district court's holding, Chief Judge Haynsworth's appears to be more nearly correct, based on the nature of the newspaper article and the language in the district court's opinion. The article did not state that Sauerhoff was married; without this extrinsic fact, there would seem to be nothing defamatory about reporting that a man is suing his "girlfriend." The district court recognized this in holding that when the words in the article were coupled with "the extrinsic fact that Sauerhoff was a married man," the report could be read "by innuendo" as meaning that the woman and Sauerhoff were having an extra-marital affair.[18] The majority of the Fourth Circuit, which quoted the holding of the district court, nevertheless viewed the report as libelous per se, despite the absence of any mention in the report of the crucial extrinsic fact that Sauerhoff was married.

The circuit court, however, may have been confused about American libel law in general, and that of Maryland in particular. This confusion is evidenced by the court's holding that the report was defamatory on its face because it injured the plaintiff in his office, trade or business. Such an injury falls into one of the four traditional *slander* categories which are actionable without proof of special damages.[19] The Fourth Circuit's discussion of these categories became

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[15] *See* note 4 *supra.*

[16] 538 F.2d at 592.

[17] *See* note 5 *supra.*

[18] 388 F. Supp. at 122. *See* note 10 *supra.*

[19] The four traditional categories of slander actionable without proof of special damages are spoken words which charge a crime, impute a loathsome disease, injure the plaintiff in his office, trade or business, or impugn the chastity of a woman. Under English common law, all other slander was slander per quod regardless of whether the statement was defamatory on its face, and the plaintiff was required to prove special damages. All libel, however, was actionable without proof of special damages. It is possible to explain the distinction by noting the more enduring quality of written defamation and the fact that such defamation was a crime in England. Donnelly, *History of Defamation,* 1949 WIS. L. REV. 99, 120-21. *See also* RESTATEMENT OF TORTS § 568, comment b at 159-62 (1938); Veeder, *The History and Theory of the Law of Defamation,* 3 COLUM. L. REV. 546 (1903).

The Maryland courts have retained the four slander pe se categories and the rule that all other slander requires proof of special damages, as have the courts of most

unnecessary once it had determined that the language of the article was libel per se. Because the report was libel per se, the plaintiff did not need to plead and prove special damages.[20] Thus, discussion of the four slander per se categories was irrelevant to a finding that special damages were not necessary to the plaintiff's case.[21]

By holding that the report was libel per se, the Fourth Circuit refrained from becoming entangled in the continuing controversy over whether the earlier rule that all libel is actionable without proof of special damages should prevail over the more recent position that special damages must be proved in libel per quod cases.[22] The court discussed the conflicting views in a footnote and stated that it would not "attempt to reconcile these scholarly differences."[23] By finding libel per se, the court was also able to avoid the harsh result that would have followed from a finding of libel per quod. Such a finding would have triggered the special damages requirement and precluded

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other jurisdictions. Great Atlantic & Pacific Tea Co. v. Paul, 256 Md. 643, 261 A.2d 731 (1970); Cheek v. J.B.G. Properties, Inc., 28 Md. App. 29, 344 A.2d 180 (1975); General Motors Corp. v. Piskor, 27 Md. App. 95, 340 A.2d 767 (1975), *rev'd on other grounds*, 277 Md. 165, 352 A.2d 810 (1976). *See also Hanson, supra* note 5 ¶ 47; PROSSER, *supra* note 4 § 112; Henn, *"Libel-By-Extrinsic-Fact,"* 47 CORNELL L.Q. 14, 48-49 (1961) [hereinafter cited as Henn]; Murnaghan, *supra* note 4, at 14.

The rule that all libel is actionable without proof of special damages has undergone considerable change in the American courts. Maryland's rule is that special damages must be proved in libel per quod cases. *See* cases cited note 4 *supra*. Although most other jurisdictions have also adopted this rule, several still hold to the English rule. For the contention that this rule still prevails in the United States and a discussion of the cases so holding, see Eldredge, *The Spurious Rule of Libel Per Quod*, 79 HARV. L. REV. 733 (1966); Eldredge, *Variation on Libel Per Quod*, 25 VAND. L. REV. 79 (1972).

Prosser's suggested exception to the special damages requirement for written words which, although libelous per quod, would have fallen into one of the slander per se categories if spoken, see note 9 *supra*, has not been adopted by the courts. HANSON, *supra* note 5, at ¶ 16 n.14 (explaining Prosser's "four category exception" as necessary to avoid an anomalous result in which a statement defamatory by extrinsic facts and falling within one of the slander per se categories would be actionable without proof of special damages if spoken but not if written, while viewing the exception as not supported by the cases); Henn *supra*, at 79 (supporting the exception but recognizing that it has not been "articulated in the opinions"); Murnaghan, *supra* note 4, at 3 n.5 (viewing the exception as "a distinction not expressed or recognized by the courts"); Prosser, *More Libel Per Quod*, 79 HARV. L. REV. 1629 (1966).

[21] *See* note 4 *supra*.

[22] Prosser's exception to the special damages requirement, *see* note 19 *supra*, applies only to libel per quod. Thus, even if the Fourth Circuit had adopted the exception in *Sauerhoff*, the finding of libel per se eliminated any need to discuss the four categories.

[22] *See* notes 1 and 19 *supra*.

[23] 538 F.2d at 590 n.4.

the plaintiff from recovery because of his inability to show any direct pecuniary damage, despite the fact that the article had so clearly harmed his reputation and marriage.[24]

In addition to avoiding difficult issues and harsh results, the court's holding reflects the limitations placed on state libel law by the Supreme Court's decision in *Gertz v. Robert Welch, Inc.*[25] In *Gertz*, the Supreme Court held that states may not permit recovery by a private individual of presumed[26] or punitive damages for libel where liability is based on a showing of less than "actual malice." "Actual malice," as established and defined in *New York Times Co. v. Sullivan*,[27] is knowledge of the falsity or reckless disregard of the truth or falsity of the language in question.[28] The *Gertz* Court also held that

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[24] Murnaghan notes the harshness of the concurrent application of the extrinsic facts and special damages rules in libel per quod cases. He views the extrinsic facts rule as "a play on words of considerable dimensions" by which the courts have eliminated as libel per se any language the defamatory nature of which depends on extrinsic facts, without regard to how widespread knowledge of those facts is. The courts have also given "an unnecessarily curtailed" definition of special damages in libel cases, excluding a number of provable items of damage which the courts traditionally were able to recompense, such as loss of the society of family and friends. Murnaghan, *supra* note 4, at 36.

[25] 418 U.S. 323 (1974).

[26] "Presumed" damages are the general damages which are presumed to result from the publication of words that are libelous per se. *See* note 4 *supra*. By prohibiting presumed damages and limiting recovery to "actual injury," *see* note 7 *supra*, the Supreme Court created a hybrid of the earlier general and special damages categories. The court required the plaintiff to prove his damages, but stated that "actual injury" was not to be limited to the old special damages elements of direct pecuniary injury. *See* note 11 *supra*. Rather, the actual injury category was to include such former general damages as impairement to reputation and mental anguish. Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1974).

The *Gertz* case did not eliminate the need for a distinction between presumed general damages and special damages. That distinction remains significant when the plaintiff proves "actual malice" on the part of the defendant. Implicit in *Gertz* is the rule that where a private individual proves actual malice, he may proceed under state libel law and recover presumed general damages if state law permits. *Eaton, supra* note 2, at 1434; Frakt, *The Evolving Law of Defamation:* New York Times Co. v. Sullivan *to* Gertz v. Robert Welch, Inc. *and Beyond*, 6 RUT. CAM. L.J. 471, 507 (1975).

[27] 376 U.S. 254 (1964). The Court in *New York Times* held that plaintiffs who are public officials must prove publication of defamatory falsehoods with "actual malice" to recover even compensatory damages in an action for libel or slander. 376 U.S. at 279-80. *See* text accompanying note 28 *infra*. *See generally* Eaton, *supra* note 2, at 1364-69; Kalven, *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191; Pedrick, *Freedom of the Press and the Law of Libel: The Modern Revised Translation*, 49 CORNELL L.Q. 581 (1964).

[28] The "actual malice" defined in *New York Times* and *Gertz* is different from the earlier common law notions of malice as ill will, fraud or reckless indifference to

although states may define for themselves the appropriate standard of liability for a publisher of defamatory words, they may not impose liability without fault. The standard must be at least simple negligence, a breach of the duty of care based on the actions of the "reasonably prudent editor."[29]

The Fourth Circuit in *Sauerhoff* read the no-strict-liability-rule of *Gertz* as "possibly [discouraging] use of a per quod premise"[30] in the case. The court reasoned that if liability is imposed on a publisher of words which are libelous per quod on the basis of extrinsic facts which the publisher had no duty to know, the use of a libel per quod premise amounts to an imposition of strict liability for anything the publisher prints.[31] The danger of imposing strict liability would not be present

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consequences. The common law standard focuses on the defendant's attitude toward the plaintiff, while the *New York Times* definition focuses on knowing or reckless falsity. The common law notions of malice retain their vitality since state courts may still provide their own standards of malice for recovery or punitive damages once the federal "actual malice" barrier is crossed. For a discussion of the possiblee abandonment of common law malice, see Eaton, *supra* note 2, at 1439-41.

[29] 418 U.S. at 348. Four members of the Court assumed the states would adopt simple negligence standards. 418 U.S. at 353 (Blackmun, J., concurring), 360 (Douglas, J., dissenting), 366 (Brennan, J., dissenting), 376 (White, J., dissenting).

[30] 538 F.2d at 590.

[31] An English case strikingly similar to *Sauerhoff* has been cited by commentators to support the view that basing liability on extrinsic facts which the publisher has no reason to know amounts to holding the publisher strictly liable for anything he prints. *See* PROSSER, *supra* note 4, § 113, at 772; Holdsworth, *A Chapter of Accidents in the Law of Libel*, 57 L.Q. REV. 74 (1941); Smith, *Jones v. Hulton: Three Conflicting Views as to a Question of Defamation*, 60 U. PA. L. REV. 365 (1912). In *Jones v. Hulton & Co.*, ([1909] 2 K.B. 444), *aff'd*, ([1910] A.C. 20), the defendants published a story to the effect that one Artemus Jones had been seen with a woman not his wife. Out of North Wales appeared a real Artemus Jones, complaining that the story had been understood by his neighbors to refer to him. Upon receiving the complaint the defendants printed an erratum in their next issue, stating that the story was in no way meant to refer to him. Jones nevertheless sued for libel, and the publishers defended on the grounds that they had chosen the name as a fictitious one, unlikely to be the name of a real person. The jury returned a verdict for the plaintiff, and the House of Lords affirmed, holding that the defendants' innocent ignorance did not excuse them from liability.

Although the facts of *Jones* and *Sauerhoff* are similar, there are differences which would probably give rise to contrary results in the two cases under the *Gertz* duty standards. For instance, it would be more difficult to place a duty on the publisher in *Jones* to ascertain the crucial extrinsic facts since his sources of information were less readily available than those of the newspaper in *Sauerhoff*. In addition, the publisher in *Jones* alleged that he had tried to use an unusual name to prevent any misunderstanding; the publisher in *Sauerhoff* knew that he was reporting on a real person. Furthermore, the publisher in *Jones* did print a retraction; under most retraction statutes today, this would go far towards mitigating damages.

where the language amounts to libel per se. By definition, language libelous per se is defamatory on its face, and the publisher thus has notice of the defamatory nature of the language from the language itself. By holding that the newspaper report in *Sauerhoff* was libel per se, the Fourth Circuit avoided having to decide the duty issue which would have followed a finding of libel per quod. However, the result of the case would appear to have been the same if the court had used a libel per quod premise and determined whether the newspaper had a duty to discover the extrinsic fact of the plaintiff's marital status. Since the newspaper had access to court records and thus to the name and address of Sauerhoff's attorney, the court could have found a duty on the newspaper to ascertain Sauerhoff's marital status from his attorney before running a report that Sauerhoff was suing his "girlfriend."

Despite its view of the article as libelous per se, the Fourth Circuit held that Sauerhoff could not recover damages "based on anything not appearing in the publication and unknown to the newspaper."[32] This holding follows the approach taken by the American Law Institute in § 580B of the Second Restatement of Torts.[33] The Restatement imposes liability on a publisher who falsely defames a private person with knowledge of the defamation, in reckless disregard of extrinsic facts which make the language defamatory, or through negligent failure to ascertain the extrinsic facts. The plaintiff in *Sauerhoff* apparently could have met the negligence test of the Restatement and

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[32] 538 F.2d at 590. The court apparently set up a subjective standard in stating that Sauerhoff could not recover based on extrinsic facts "unknown to the newspaper." *Id.* The standard requires consideration of whether the publisher actually knew of the extrinsic facts rather than the objective-standard question of whether the publisher actually knew of the extrinsic facts or could have discovered them through the exercise of reasonable care. Adoption of the subjective standard would practically eliminate the use of a libel per quod premise, since very few publishers would print material when they actually know extrinsic facts which make the material defamatory. *See* Eaton, *supra* note 2, at 1359, 1428; Morris, *Inadvertent Newspaper Libel and Retraction,* 32 ILL. L. REV. 36, 37 (1937). When this unlikelihood of publication is combined with the plaintiff's difficulty in proving the defendant's subjective knowledge, libel per quod ceases to be a feasible alternative. The Fourth Circuit, however, saw *Gertz* as only discouraging the use of libel per quod, not eliminating it. 538 F.2d at 590. A reasonable inference from this dicta and the Fourth Circuit's adoption of the *Gertz* rationale is that the court meant the word "unknown" to mean "unknown through the exercise of reasonable care" as well as "actually unknown."

[33] RESTATEMENT (SECOND) OF TORTS, § 580B (Tent. Draft No. 21, 1975). Maryland adopted § 580B in Jacron Sales Co. v. Sindorf, 276 Md. 580, 350 A.2d 688 (1976). *Accord,* General Motors Corp. v. Piskor, 277 Md. 165, 352 A.2d 810 (1976); Food Fair Stores, Inc. v. Lascola, 31 Md. App. 153, 355 A.2d 757 (Ct. Spec. App. 1976); Stephens v. Dixon, 30 Md. App. 56, 351 A.2d 187 (Ct. Spec. App. 1976).

possibly the "reckless disregard" test as well, given the particular facts in the case. The newspaper reported that the plaintiff was suing his "girlfriend." Since the paper had access to sources from which it could ascertain Sauerhoff's marital status, it was negligent, and perhaps reckless, in failing to ascertain that crucial fact before stating that Sauerhoff had a "girlfriend."

The Fourth Circuit, by incorrectly holding that the report was libel per se, failed to determine the duty questions[34] posed by *Gertz* and the Restatement. The Fourth Circuit's determination is partially attributable to the common confusion surrounding the historical distinctions in the law of defamation,[35] and to a desire of the court to avoid entanglement in the scholarly debates of those distinctions. The court may have also been seeking to ameliorate the harshness of the special damages requirement in libel per quod cases.[36] The Fourth Circuit did indicate, however, that in future libel per quod cases, private individual plaintiffs will be expected to meet additional burdens of proof.[37] Accordingly, a plaintiff must prove not only the extrinsic facts which make the language defamatory, but also that the defendant publisher was negligent in failing to ascertain those facts before printing the defamatory story.[38] Negligence, rather than strict liability, will be the standard used in subsequent libel per quod cases.

In addition to questions of duty and negligence standards, *Gertz* also raised issues concerning a state's ability to afford recovery of punitive damages in defamation actions. In *Appleyard v. Transamerican Press, Inc.*,[39] the Fourth Circuit considered the effect of *Gertz* on the recovery of punitive damages by a public figure when actual malice is shown. The defendant, publisher of *Overdrive* magazine, printed two articles suggesting that the plaintiff had embezzled money from defense funds set up by the plaintiff and the editor of

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[34] *See* text accompanying note 29 *supra.*

[35] *See* notes 5, 9 *supra.*

[36] *Gertz* has no effect on a state's ability to require proof of special damages in libel per quod cases. The Supreme Court held only that a state may not allow a jury to presume general damages, but must limit damages to those which represent "actual injury." 418 U.S. at 349. *See* notes 7 and 26 *supra.* A state may still require the plaintiff to prove special damages, which are considerably more restricted than "actual injury" damages. Special damages are limited to those damages which reflect a direct pecuniary injury. *See* note 11 *supra.* Damages for actual injury include such non-pecuniary elements as personal humiliation and mental anguish, 418 U.S. at 350. *See* note 7 *supra.*

[37] 538 F.2d at 590.

[38] *Id.*

[39] 539 F.2d 1026 (4th Cir. 1976), *petition for cert. filed,* 45 U.S.L.W. 3371 (U.S. Oct. 29, 1976) (No. 76-596).

Overdrive in an effort to change certain ICC regulations. The plaintiff alleged that the articles were libelous and stipulated that he was a public figure. The jury awarded the plaintiff $10,000 compensatory damages and $75,000 punitive damages. The district court judge subsequently remitted the punitive damages award to $5,000.[40] The Fourth Circuit affirmed, holding that nothing in *Gertz* precludes a public figure who has proved actual malice by the defendant from recovering punitive damages.[41]

The court in *Appleyard* based its decision on several grounds. First, the court rejected the defendant's argument that *Gertz* precluded recovery of punitive damages by a public figure who met the *New York Times Co. v. Sullivan*[42] burden of proving actual malice[43] on the part of a media defendant.[44] The court noted that *Gertz* pre-

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[40] *Id.* at 1028.

[41] *Id.* at 1029-30.

[42] 376 U.S. 254 (1964).

[43] *See* text accompanying notes 27-28 *supra.*

[44] 539 F.2d at 1029-30. Only one case has accepted the argument that *Gertz* precludes recovery of punitive damages by a public figure who shows actual malice. In Maheu v. Hughes Tool Co., 384 F. Supp. 166 (C.D. Calif. 1974), the district court held unconstitutional a California statute allowing recovery of punitive damages in public figure defamation cases. The court reasoned that recovery of punitive damages has a chilling effect on freedom of speech and press and that the state's interest in allowing punitive damages must thus be balanced against the infringement of first amendment rights. *Id.* at 170. The state's interest in protecting the reputation and privacy of public figures was found insufficient to justify the infringement for several reasons. First, public figures have greater access to the media than private individuals and thus a more realistic opportunity to rebut defamatory remarks. *Id.* at 171-72. Also, deterrence of defamation is adequately served by awards of compensatory damages. *Id.* at 170. Finally, even where actual malice is shown, the arbitrary award of punitive damages by a jury might be used to punish unpopular opinion and thus inhibit free speech. *Id.* at 170, 173.

In striking down the California statute, the court declared that a state was not precluded from allowing punitive damages as long as it limited those damages in some way. *Id.* at 173. The court noted that a state could limit punitive damages to a specific dollar amount, to a particular multiple of compensatory damages, or to the amount of plaintiff's court costs and attorney's fees. *Id.* Whatever scheme it chooses, the legislature must avoid the possible arbitrariness inherent in a statute allowing a discretionary jury award of punitive damages. *Id.*

Thus, *Maheu* appears to hold that only the arbitrary award of punitive damages to a public figure is unconstitutional. In this respect, the *Maheu* and *Appleyard* decisions are reconcilable. As the Fourth Circuit noted in *Appleyard,* the award of punitive damages in that case was not excessive or arbitrary; it amounted to $5,000.00, one-half of compensatory damages, and was thus not "excessive in relation to the potential harm inherent in the libelous articles." 539 F.2d at 1030. *Appleyard* illustrates a point which the court in *Maheu* did not consider: even if the jury's award of punitive damages is arbitrary or excessive, the district judge may keep punitive damages within constitutional limitations via the power of remittitur. FED. R. CIV. P. 59(a).

cludes recovery of punitive damages only by a private individual who fails to show actual malice.[45] Thus, since the jury's award of compensatory damages to the plaintiff indicated that he had met his burden of proving actual malice on the part of the defendant,[46] he was entitled to recover punitive damages.

The *Appleyard* court viewed the rationale of *Gertz* as inapplicable where actual malice by defendant publishers has been shown.[47] The Fourth Circuit also declared that the purpose of the constitutional limitations imposed on state libel laws by *New York Times* and *Gertz* is to protect those critics of public figures who voice their criticism in the reasonable belief that it is true.[48] Where actual malice has been shown, the defendant has voiced his criticism either with knowledge of its falsity or with reckless disregard for its truth or falsity.[49] In such a situation, the good faith effort to point out abuses or to debate public issues which is protected by the first and fourteenth amendments does not exist.[50]

Further, the Fourth Circuit found that the imposition of punitive damages in such a case is a rational means for achieving a legitimate state end: deterring persons "who might engage in malicious false attacks on public figures."[51] Where actual malice is shown, the achievement of the state interest does not interfere with freedom of speech or press, since the first amendment does not protect those making statements with knowledge of their falsity or reckless disre-

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[45] 539 F.2d at 1039. In support of this view of *Gertz*, the court cited Justice Blackmun's concurring opinion in *Gertz*, which characterized that case as only "removing the specters of presumed and punitive damages in the absence of *New York Times* malice." 418 U.S. at 354. (Blackmun, J., concurring).

[46] 539 F.2d at 1030 n.4. The court in *Appleyard* noted that the jury had been instructed to determine liability and compensatory damages strictly in accordance with the *New York Times* actual malice test. The jury was further instructed to consider awarding punitive damages only if they found liability and awarded compensatory damages. Thus, any consideration of punitive damages was predicated on a jury finding of actual malice. *Id.*

[47] 539 F.2d at 1030.

[48] *Id., citing* New York Times Co. v. Sullivan, 376 U.S. at 279.

[49] *See* text accompanying notes 27-28 *supra.*

[50] 539 F.2d at 1030.

[51] *Id.* The Supreme Court in *Gertz* noted that punitive damages are in effect "private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence." 418 U.S. at 350. *See also* Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 75 (1971) (Harlan, J., dissenting) (viewing punitive damages as a permissible legislative choice for repressing false material published with actual malice, provided such damages bear "a reasonable and purposeful relationship to the actual harm done").

gard for their truth or falsity.[52] Thus, there is no constitutional bar to the recovery of punitive damages by a public figure as long as he is required to show actual malice on the part of the defendant.[53]

The holding of the Fourth Circuit in *Appleyard* accords with the decisions of other courts which have considered the propriety of awarding punitive damages to public figures.[54] While some commentators have argued that *Gertz* presages the ultimate abolition of punitive damages for public official and public figure plaintiffs,[55] the courts interpreting *Gertz* have viewed it differently.[56] Thus, *New York Times* and *Gertz* apparently limit the scope of state libel law only to the extent that actual malice has not been shown. Once the actual malice threshold is crossed, both public and private plaintiffs may recover presumed and punitive damages.

Although the major developments in the law of defamation have centered around the first amendment, common law defenses are still available to defeat a libel action. One such defense is the absolute privilege of statements made in connection with a judicial proceeding.[57] In *West v. Marjorie's Gifts, Inc.*,[58] the Fourth Circuit considered

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[52] The Supreme Court stated in *Gertz* that "there is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in 'uninhibited, robust, and wide open' debate on public issues". 418 U.S. at 340, *quoting* New York Times Co. v. Sullivan, 376 U.S. at 270.

[53] 539 F.2d at 1030.

[54] Buckley v. Littell, 539 F.2d 882 (2d Cir. 1976), *petition for cert. filed*, 45 U.S.L.W. 3365 (U.S. Nov. 9, 1976) (No. 76-652) (no constitutional bar to recovery of punitive damages where public figure has shown actual malice); Carson v. Allied News Co., 529 F.2d 206 (7th Cir. 1976) (public figure may recover presumed and punitive damages where actual malice shown and applicable state law permits such damages); Davis v. Schuchat, 510 F.2d 731, 737 (D.C. Cir. 1975) (viewing *Gertz* as linking "the propriety of punitive damages to the rigors of the *New York Times* definition of actual malice," and allowing recovery of punitive damages where public figure had shown slanderous remarks made with actual malice); Goldwater v. Ginzburg, 414 F.2d 324, 341 (2d Cir. 1969), *cert. denied*, 396 U.S. 1049 (1970) ("publisher who with actual malice prints defamatory falsehoods about a public official or public figure has put himself beyond the pale of the First Amendment").

[55] *See generally* Robertson, *Defamation and the First Amendment: In Praise of* Gertz v. Robert Welch, Inc., 54 TEXAS L. REV. 199 (1976); Comment, *Constitutional law—First Amendment—Punitive Damages in Defamation Actions Brought by Public Figures Chill First Amendment Rights and are Unconstitutional Unless Narrowly and Necessarily Promoting Compelling State Interests*, 28 VAND. L. REV. 887 (1975).

[56] *See* note 54 *supra*. *See generally* Frakt, *The Evolving Law of Defamation:* New York Times Co. v. Sullivan *to* Gertz v. Robert Welch, Inc. *and Beyond*, 6 RUT. CAM. L.J. 471 (1975); Comment, *Libel and Slander—State is Precluded from Imposing Liability Without Fault or Presumed or Punitive Damages in the Absence of* New York Times *Malice*—Gertz v. Robert Welch, Inc., 6 LOYOLA UNIV. L.J. 256 (1975).

[57] For general discussion of the absolute privileges to defame, see 1 F. HARPER &

whether this absolute privilege attaches to letters written by a party to a lawsuit after the filing of the complaint, but prior to the filing of any responsive pleading. The plaintiff, an accountant, had sued the defendants to recover for professional services in connection with the sale of the defendants' business. Before filing an answer and counterclaim alleging nonfeasance, malpractice, and fraud, the defendants' attorney[59] had responded to the plaintiff's attorney, making the same allegations and threatening a suit unless settlement of the disputes could be arranged. The plaintiff then filed two counterclaims which alleged common law defamation and defamation under the Virginia actionable words statute.[60] The district court entered summary judgment for the defendants, holding that the letter was absolutely privileged as part of a judicial proceeding.[61]

In affirming the district court, the Fourth Circuit held that under Virginia law, parties to judicial proceedings are absolutely privileged to publish false and defamatory matter if the publication occurs in the course of judicial proceedings and is relevant to the subject of the litigation.[62] The court stated that although the Virginia courts had not yet decided the question, it seemed probable that they would extend the privilege to letters written by one party to another.[63] The court based its conclusion on the district court's opinion that the Virginia courts would follow the lead of § 587 of the Restatement of Torts,[64] which extends the privilege to "communications" between

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F. JAMES, THE LAW OF TORTS §§ 5.22-5.23 (1956); PROSSER, *supra* note 4, § 114; Evans, *Legal Immunity for Defamation*, 24 MINN. L. REV. 607 (1940).

[58] No. 73-1307 (4th Cir. Oct. 2, 1975), *disposition recorded*, 529 F.2d 518 (1975).

[59] The defendants' attorney was not named as a defendant in the plaintiff's libel action, despite the fact that he had written the letter. The plaintiff proceeded against the clients on the ground that they had authorized and directed their agent, the attorney, to compose and publish the contents of the defamatory letter. Brief for Appellant at 9. The agency claim was not contested by the defendants and was not an issue at either the trial or appellate level.

[60] VA. CODE ANN. § 8-630 (Repl. Vol. 1957) provides:

> All words which from their usual construction and common acceptation are construed as insults and tend to violence and breach of the peace shall be actionable.

[61] No. 397-72-A (E.D. Va. 1973).

[62] No. 73-1307, slip op. at 2.

[63] *Id.*

[64] RESTATEMENT OF TORTS § 587 (1938) states:

> A party to a private litigation or a private prosecutor or defendant in a criminal prosecution is absolutely privileged to publish false and defamatory matter of another in communications preliminary to a proposed judicial proceeding, or in the institution of or during the course and as a part of a judicial proceeding in which he participates,

parties preliminary to or during judicial proceedings.

The court's assumption of what the Virginia courts would hold in a *West* situation finds considerable support in Virginia case law. In *Penick v. Ratcliffe*,[65] the court held that a publication made in judicial proceedings is privileged only if it is material, pertinent, or relevant to the issues raised.[66] In cases of doubt, the publication should be liberally construed in favor of relevancy.[67] Further, the definition of a judicial proceeding is "broad and comprehensive, including within its scope all proceedings of a judicial nature, whether pending in some court of justice or before a tribunal or officer clothed with judicial or quasi judicial powers."[68]

The Virginia courts have applied the principles and relevancy presumptions established in *Penick* to extend the absolute privilege to testimony of a witness,[69] charges in an indictment,[70] arrest warrants sworn out by private individuals,[71] pleadings,[72] petitions in actions to contest an election,[73] and press releases related to the allegations of a complaint.[74] This broad interpretation of *Penick* indicates that the

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if the matter has some relation thereto.

See also cases cited notes 65-74 *infra*.

[65] 149 Va. 618, 140 S.E. 664 (Spec. Ct. App. 1927). The publication in *Penick* was a petition which contested an election and alleged that an election judge had attempted to bribe a voter. The Virginia Special Court of Appeals held that the election contest, instituted under a state election statute, was a "judicial proceeding" for purposes of the absolute privilege, and that the charges in the petition were relevant to the election contest. *Id.* at 629, 140 S.E. at 670.

[66] *Id.* at 633, 140 S.E. at 669.

[67] *Id.* at 633-34, 140 S.E. at 668-69.

[68] *Id.* at 628, 140 S.E. at 667 *quoting* 36 CORPUS JURIS at 1250.

[69] Massey v. Jones, 182 Va. 200, 204, 211, 28 S.E.2d 623, 627-28 (1944). (testimony of witness as to plaintiff's indebtedness to corporation when such indebtedness at issue in suit was absolutely privileged against plaintiff's action for insulting words).

[70] James v. Powell, 154 Va. 96, 111, 152 S.E. 539, 544-45 (1930). (indictment containing charge of felony is a court proceeding and thus privileged).

[71] Darnell v. Davis, 190 Va. 701, 709, 58 S.E.2d 68, 71 (1950) (petition for dismissal of arrest warrant part of judicial proceeding and thus absolutely privileged).

[72] Fletcher v. Maupin, 138 F.2d 742 (4th Cir. 1943), *cert. denied*, 322 U.S. 750 (1944). In *Fletcher*, the plaintiff, a lawyer, had brought suit against several of his former clients to recover unpaid fees. In their answers, the defendants had alleged that the plaintiff had been disbarred during the litigation from which the fees arose. Such disbarment had the effect of a voluntary retirement by the plaintiff from the cases. The Fourth Circuit held that the allegations in the answer concerning disbarment were relevant to the claim for fees and were thus absolutely privileged.

[73] Penick v. Ratcliffe, 149 Va. 618, 140 S.E. 664 (1927).

[74] Bull v. Logetronics, Inc., 323 F. Supp. 115 (E.D. Va. 1971). In *Bull*, one of the allegations of the plaintiff's complaint charged the defendants with a conspiracy to deprive the plaintiff of his patent rights. Subsequent to the filing of the complaint,

Virginia Supreme Court would find the letter written in *West* privileged. The letter was written after judicial proceedings had been instituted by the filing of a complaint.[75] Further, the subject of the letter was settlement of the case; the acts alleged in the letter were the same acts which the defendants put forth as a defense to the plaintiff's claim for payment.[76]

The defamatory letter effectively did no more than inform the plaintiff's attorney of the absolutely privileged answer and counterclaim[77] filed by the defendants a few days later. Thus, the letter was written during judicial proceedings and was pertinent to the issues raised in those proceedings. Under the *Penick* rules, the Fourth Circuit's holding that the letter was absolutely privileged appears correct.

In *Sauerhoff, Appleyard* and *West,* the Fourth Circuit balanced the individual citizen's interest in reputation against the interests of society in full investigation and disclosure of the truth concerning private individuals, public figures, or issues in litigation. In each case, the weighing of interests resulted in a restriction of one form or another on a plaintiff's ability to recover in a defmation action. In *Sauerhoff,* the court noted that a plaintiff must prove that a defendant publisher was at least negligent in failing to ascertain extrinsic facts which render an otherwise innocent statement defamatory. In *Appleyard,* the court held that a publisher is immune from punitive damages for anything he prints about a public figure, unless he prints defamatory matter about the public figure with actual malice. In *West,* the court held that letters written by one party to litigation to

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the plaintiff issued a press release which said he had sued the defendants for a "conspiracy to defraud." *Id.* at 134. The defendants counterclaimed, alleging that the press release had defamed them. The district court held that the press release was a fair and accurate account of the privileged allegations of the complaint, and was thereby privileged also. *Id.* at 135.

[75] *Cf.* Bull v. Logetronics, Inc., 323 F. Supp. 115, 135 (E.D. Va. 1971) (filing of complaint triggers absolute privilege).

[76] Courts have generally tested the relevancy of defamatory statements by matching the statement against the issues involved in the judicial proceeding at hand. With regard to letters written by one attorney to another, the courts have inquired whether the defamatory statement in the letter made reference to the subject matter of the litigation. *See* Theiss v. Scherer, 396 F.2d 646 (6th Cir. 1968) (letter dealing directly with impending will contest); Richeson v. Kessler, 73 Idaho 548, 255 P.2d 707 (1953) (letter directly referring to subject matter of litigation); Dean v. Kirkland, 301 Ill. App. 495, 23 N.E.2d 180 (1939) (letter reiterating defenses pleaded in suit). *See also* Simon v. Potts, 33 Misc. 2d 183, 225 N.Y.S.2d 690 (Sup. Ct. 1962) (relevancy lost only when language used is clearly impertinent and needlessly defamatory).

[77] *See* note 72 *supra.*

another party are absolutely privileged from liability for defamation if they are relevant to the litigated issues. Each case reflects a recognition by the Fourth Circuit that unrestrained state libel law can have a chilling effect on the exercise of free speech and press, whether in the courts, in newspaper reports or the activities of public figures, or in seemingly innocent stories about private individuals. *Sauerhoff, Appleyard,* and *West* portend a cautious scrutiny by the Fourth Circuit of any state libel law which appears to go beyond the constitutional limitations imposed by *New York Times* and *Gertz.*

B. New Causes of Action for Breaches of Statutory Duties

Duty of Non-discrimination Under Interstate Commerce Act

In *Hubbard v. Allied Van Lines, Inc.,*[1] the Fourth Circuit held that breach of the duty of non-discrimination imposed on motor carriers by § 216(d) of the Interstate Commerce Act[2] gives rise to a private right of action for compensatory and punitive damages.[3] The plaintiffs sued Allied Van Lines, with which they had contracted to transport their household goods from Connecticut to South Carolina. They alleged that because the defendant had given an "undue and unreasonable"[4] preference to other persons within the meaning of § 216(d),[5] Allied had been more than a month late in delivering the goods,[6] thereby causing the plaintiffs to suffer mental anguish and distress.[7] The plaintiffs further alleged that in discriminating against them in violation of § 216(d), the defendant had acted in a reckless, willful, and wanton manner, entitling the plaintiffs to punitive dam-

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[1] 540 F.2d 1224 (4th Cir. 1976).

[2] Interstate Commerce Act § 216(d), 49 U.S.C. § 316(d) (1970).

[3] 430 F.2d at 1225. The court noted that no prior case had recognized a private right of action under § 216(d). *Id.* at 1226.

[4] *Id.* at 1226.

[5] 49 U.S.C. § 316(d) provides in pertinent part:

> It shall be unlawful for any common carrier by motor vehicle engaged in interstate or foreign commerce to make, give, or cause any undue or unreasonable preference or advantage to any particular person . . . in any respect whatsoever; or to subject any particular person . . . to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever. . . .

[6] 540 F.2d at 1225.

[7] The plaintiff, Mr. Hubbard, alleged that because he was starting a new career as a law professor and his wife was four months pregnant, they were particularly anxious to settle in their new home at the time contracted for delivery of their goods. *Id.* at 1225-26.

ages.[8] On the defendant's motion, the district court struck from the complaint all allegations relating to the recovery of punitive damages and compensatory damages for mental distress, holding that such damages are not recoverable for undue discrimination against a shipper of goods.[9]

In reversing the district court, the Fourth Circuit adopted the rationale of cases decided under the no-discrimination clause of § 404(b) of the Federal Aviation Act of 1958,[10] which is virtually identical[11] to the no-discrimination clause in § 216(d) of the Interstate Commerce Act. Those cases hold that a private right of action exists for any person damaged by an airline's violation of § 404(b).[12]

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[8] *Id.* at 1226.

[9] *Id.* at 1225. The district court assumed that there was a private right of action for violation of § 216(d), but held that punitive and mental distress damages were not proper elements of recovery. 540 F.2d at 1225.

[10] 49 U.S.C. § 1374(b) (1970). The court referred to the Civil Aeronautics Act of 1938 while citing decisions under the Federal Aviation Act of 1958. Section 404(b) of the Federal Aviation Act is identical to § 404(b) of the Civil Aeronautics Act and thus the confusion is insignificant.

[11] 49 U.S.C. § 1374(b) (1970). This subsection provides in pertinent part:

> No air carrier or foreign air carrier shall make, give, or cause any undue or unreasonable preference or advantage to any particular person . . . in any respect whatsoever or subject any particular person . . . to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

Id. Compare § 1374(b) *with* § 316(d), note 5 *supra.*

[12] Nader v. Allegheny Airlines, Inc., 512 F.2d 527, 537 (D.C. Cir. 1975), *rev'd on other grounds,* 96 S. Ct. 1978 (1976); Archibald v. Pan American World Airways, Inc., 460 F.2d 14, 16 (9th Cir. 1972); Fitzgerald v. Pan Americann World Airways, 229 F.2d 499, 501-02 (2d Cir. 1956); Wills v. Trans World Airlines, Inc., 200 F. Supp. 360, 366-67 (S.D. Calif. 1961). In *Fitzgerald,* the Second Circuit held that § 404(b) of the Civil Aeronautics Act of 1938, 49 U.S.C. § 484(b) (1970), the identical predecessor to § 404 (b) of the Federal Aviation Act of 1958, was enacted to protect a specified class and thus created a civil right in members of the class, even though the only express sanctions in the Act were criminal ones. 229 F.2d at 501. In *Wills,* a California federal district court held that specific statutory authority is not a prerequisite to the existence of power in the federal courts to enforce the purposes of the Federal Aviation Act by granting relief in damages. 200 F. Supp. at 364. The court noted that a federal private cause of action would complement the power of the Civil Aeronautics Board under the Act to order future compliance with § 404(b) by giving relief to passengers for past violations of the Act. *Id.* In addition, the court held that the plaintiff could recover punitive damages as a proper means of protecting the rights of all air passengers from future encroachment. *Id.* at 367. In *Archibald,* the Ninth Circuit held that § 404(b) of the Federal Aviation Act, *see* note 11 *supra,* creates a private federal cause of action against an airline for unreasonable preferences or unjust discrimination in the "bumping" of passengers on oversold flights. 460 F.2d at 16. The plaintiff must show actual discrimination in order to establish a prima facie case of unreasonable preference or unjust discrimination. *Id., citing* Flores v. Pan American World Airways, Inc.,

The court stated that no material differences exist between the duties of non-discrimination imposed by the two statutes and thus there is no reason for reaching a result different from that of the cases decided under the Federal Aviation Act.[13] Therefore, the Fourth Circuit held that a private right of action exists for violation of the no-discrimination clause of § 216(d) of the Interstate Commerce Act.

The defendant in *Hubbard* contended, however, that even if a private right of action exists for violations of § 216(d), recovery of punitive damages and damages for mental distress was precluded by the Carmack Amendment to the Interstate Commerce Act.[14] The Carmack Amendment makes a common carrier liable "for the full actual loss, damage, or injury to such property caused by it."[15] The defendant argued that the Carmack Amendment's reference to "such property" indicated that its liability was limited to damages for physical injury to the property being ttansported. Alternatively, the defendant contended that the word "actual," which comes before the phrase "loss, damage, or injury," limits the liability of a carrier to damages of a direct pecuniary nature, thus precluding the recovery

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259 F. Supp. 402, 404 (D.P.R. 1966). Such a prima facie case may be rebutted by the defendant airline's showing that it adhered to an established, reasonable "bumping" policy in selecting one passenger over another. 460 F.2d at 16, *citing Wills, supra,* 200 F. Supp. at 367-68; Strough v. North Cent. Airlines, Inc., 55 Ill. App. 2d 338, 204 N.E.2d 792 (1965). The plaintiff may recover compensatory damages, including an award for humiliation and hurt feelings when the facts warrant. 460 F.2d at 16, *citing Flores, supra,* 259 F. Supp. at 404. In addition, punitive damages may be granted where the defendant has acted wantonly, oppressively, or maliciously; substantial overselling of flights is evidence of such malice. 460 F.2d at 16, *citing Wills, supra,* 200 F. Supp. at 367-68.

In *Nader,* the District of Columbia Circuit agreed with the Ninth Circuit in *Archibald* that overselling of flights is not a per se violation of § 404(b). 512 F.2d at 537-38, *citing Archibald, supra,* 460 F.2d at 16. Furthermore, with regard to punitive damages, the *Nader* court held that substantial overbooking of flights by the airline is not enough in itself to show the malice required for recovery of punitive damages. There must be additional aggravating factors, such as deliberate discriminatory actions which display a spirit of malice. *Id.* at 550.

[13] 540 F.2d at 1226.

[14] 49 U.S.C. § 20(11) (1970). (Originally enacted as Act of June 29, 1906, ch. 3591, § 7, 34 Stat. 593).

[15] *Id.* The Carmack Amendment provides in pertinent part:

> Any common carrier . . . receiving property for transportation . . . shall be liable . . . for any loss, damage, or injury to such property caused by it . . . and any such common carrier . . . shall be liable . . . for the full actual loss, damage, or injury to such property caused by it [except where the ICC has authorized the establishment of rates based on declared value, in which case liability may be limited to the declared value].

of punitive and mental distress damages.[16]

The Fourth Circuit rejected both arguments, stating that the Supreme Court had construed "to such property" as modifying only the word "injury,"[17] thus leaving the words "loss" and "damage" unlimited.[18] In rejecting the defendant's second argument, the court noted that the Amendment imposes liability for "*any* loss, damage, or injury" and states that this liability is not to be limited by the contract.[19] Liability for damages exceeding "full actual loss, damage, or injury" may be limited by the tariff rate where the ICC allows such limited liability rates, but that situation was not present in the *Hubbard* case.[20] Thus, since liability for "*any* loss, damage, or injury" was not limited by the tariff and could not be limited by the contract, the "actual loss" phrase was inapplicable.[21] The Fourth Circuit deter-

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[16] 540 F.2d at 1226-27. The defendant used the Carmack Amendment, which is made applicable to motor carriers but not to air carriers by 49 U.S.C. § 319 (1970), to distinguish *Hubbard* from the Federal Aviation Act cases, *see* note 12 *supra,* which allowed recovery of punitive and mental distress damages under that Act's no-discrimination clause. The defendant argued that the Carmack Amendment placed limits on damages recoverable under the Interstate Commerce Act which were not applicable in the airline cases.

[17] In New York, Phila. & N. R.R. v. Peninsula Produce Exch., 240 U.S. 34 (1916), the plaintiff, a shipper of fresh produce, sued the carrier for failure to transport and deliver the goods with reasonable dispatch. The defendant argued that the Carmack Amendment limited carrier liability to physical damage to the property transported, and that the Amendment did not comprehend damages for loss of the market because of unreasonable delay. The Supreme Court held for the plaintiff, stating that:

> The words "any loss, damage, or injury to such property" . . . are comprehensive enough to embrace all damages resulting from any failure to discharge a carrier's duty . . . . It is not necessary, nor is it natural, . . . to take the words "to the property" as limiting the word "damage" as well as the word "injury," and thus as rendering the former wholly superfluous.

Id. at 38. *See also* Southeastern Express Co. v. Pastime Amusement Co., 299 U.S. 28, 29 (1936) (allowing recovery of damages under Carmack Amendment for delay in delivery of motion picture); Gold Star Meat Co. v. Union Pac. R.R., 438 F.2d 1270, 1272 (10th Cir. 1971) (delay in delivery); American Synthetic Rubber Corp. v. Louisville & Nash. R.R., 422 F.2d 462, 465-66 (6th Cir. 1970) (misdelivery).

[18] 540 F.2d at 1227.

[19] *Id.* at 1228.

[20] *Id.*

[21] The court noted that:

> [T]he negative implication of the statute is that while liability for "*any* loss, damage, or injury" may not be limited by contract, it may be limited by tariff to the extent that it exceeds "full *actual* loss, damage, or injury." Defendant has not drawn our attention to any such limiting tariff.

540 F.2d at 1228.

mined that the prevention of limitations on the liability of common carriers is the main purpose of the Carmack Amendment, and refused to hold that the provisions of the Amendment limited liability in the absence of any contractual or tariff limitation.[22]

After concluding that the Carmack Agreement did not preclude recovery of punitive or mental distress damages for breach of the duty

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[22] The court's construction of the Carmack Amendment appears to be correct. Read literally, the Carmack Amendment provides that while liability for *any* damage may not be limited by contract, it may be limited by the tariff. *See* note 15 *supra*. Further, liability for *actual* damage may not be limited by the tariff except where the ICC has authorized the establishment of value-based tariffs, in which case liability may be limited to the declared value of the goods shipped. 49 U.S.C. § 20(11) (1970).

Despite this literally correct construction, the court's reading of the Amendmentt as not prohibiting mental distress seemingly conflicts with Southern Express Co. v. Byers, 240 U.S. 612 (1916). The Court there held that damages for mental suffering *only* are not recoverable under the Carmack Amendment. The *Southern Express* case appears distinguishable from *Hubbard* at first blush since the defendant carrier in *Southern Express* had limited its liability by tariff, while the carrier in *Hubbard* had not done so. Also, the plaintiff in *Southern Express* had suffered no property damage, while the plaintiff had alleged property damage in *Hubbard*. 540 F.2d at 1225.

The *Southern Express* rule that no action for mental suffering alone may be maintained in a federal court remains viable. *See* In re United States, 418 F.2d 264 (1st Cir. 1969); Leathermore v. Gateway Transp. Co., 331 F.2d 241 (7th Cir. 1964); Kaufman v. Western Union Tel. Co., 224 F.2d 723 (5th Cir. 1955). However, the Eighth Circuit indicated recently that the Southern Express rule might be applicable only in cases where the plaintiff's claim is based solely on the defendant's tortious conduct. Millstone v. O'Hanlon Reports, Inc., 528 F.2d 829 (8th Cir. 1976). In *Millstone*, the court allowed the plaintiff to recover daages for mental suffering alone, holding that the *Southern Express* rule was inapplicable because the plaintiff asserted an independent cause of action under the Fair Credit Reporting Act, apart from any recovery he might have sought in tort. *Id.* at 834-35. In *Hubbard*, the plaintiff's cause of action under § 216(d) of the Interstate Commerce Act was independent of any recovery he might have sought under the Carmack Amendment for the carrier's negligence in transporting his goods. Thus, an argument can be made from *Millstone* that the *Southern Express* rule was inapplicable in *Hubbard* and that the plaintiffs in *Hubbard* could thus recover mental distress damages.

Although the Supreme Court has held that the Carmack Amendment prohibits recovery of mental distress damages, the Court has never addressed the question of whether the Amendment prohibits recovery of punitive damages as well. Only one state, South Carolina, has held that the Carmack Amendment prohibits punitive damages when the carrier has neither authorized nor ratified the willful or wanton acts of its servants. DeLoach v. Southern Ry. Co., 106 S.C. 155, 90 S.E. 701 (1916). *Accord*, Huddy v. Railway Express Agency, Inc., 181 S.C. 508, 188 S.E. 247 (1936); Phillips v. Atlantic Coast Line R.R., 160 S.C. 323, 158 S.E. 274 (1931); Harman v. Southern Ry., 106 S.C. 209, 90 S.E. 1023 (1916). The Fourth Circuit's view of the Carmack Amendment as permitting punitive damges seems correct since nothing in the Amendment expressly forbids punitive damages. Moreover, the Court's allowance of punitive damages is not in conflict with any other federal decision.

of non-discrimination imposed by § 216(d), the court considered whether each element of damages should be allowed as a matter of federal law. In permitting punitive damages, the court was persuaded by the reasoning of the cases decided under the no-discrimination clause of the Federal Aviation Act,[23] which allowed recovery of punitive damages. These cases viewed punitive damages as a means of vindicating the plaintiff's rights as a passenger and protecting the rights of every air passenger from future encroachment.[24] The Fourth Circuit in *Hubbard* noted that punitive damages under § 216(d) would likewise serve to deter intentional, malicious discrimination and would thus help achieve compliance with the requirements of § 216(d).[25] The court also adopted the standard of proof required of a plaintiff claiming punitive damages in the airline cases.[26] Accordingly, punitive damages are proper only upon a showing that the defendant acted "wantonly, or oppressively, or with such malice as implies a spirit of mischief or criminal indifference to civil obligations."[27]

Since no claims for mental distress damages had been presented in the airline cases,[28] the Fourth Circuit reviewed general tort principles to determine the propriety of such an award. Noting the traditional reluctance of courts to redress mental injuries, the court proposed several criteria[29] for scrutinizing the evidence supporting a claim for mental distress damages in carrier discrimination cases.

Two of the criteria proposed by the Fourth Circuit were the presence of other injuries concomitant to or resulting from the mental distress, and the presence of some special relationship between the parties establishing a higher than usual duty for the defendant toward the plaintiff. In *Hubbard* the plaintiffs had suffered property damage along with the alleged mental distress, which the court believed to be a strong indication, similar to physical injury, that the claimed mental distress was real.[30] Further, the court found that the

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[23] *See* note 12 *supra.*

[24] *See, e.g.*, Wills v. Trans World Airlines, Inc., 200 F. Supp. 360, 367 (S.D. Calif. 1961).

[25] 540 F.2d at 1229.

[26] *Id.* at 1228-29.

[27] *Id., quoting* Wills v. Trans World Airlines, Inc., 200 F. Supp. 360, 367 (S.D. Calif. 1961) *and* Archibald v. Pan American Airways, Inc., 460 F.2d 14, 16 (9th Cir. 1972).

[28] 540 F.2d at 1229.

[29] *Id.* at 1229-30. The mental distress criteria were derived from the RESTATEMENT (SECOND) OF TORTS § 46 and W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 12 (4th ed. 1971).

[30] *Id.* at 1229 *citing* RESTATEMENT OF TORTS § 905, comments c-e (1938).

plaintiffs and defendant occupied the special relationship of shipper and carrier, a relationship which has long been held to create an extraordinary duty in the carrier to safeguard the shipper's interests.[31]

Two additional criteria proposed by the Fourth Circuit were the severity of the mental distress and the presence of intentional or reckless conduct by the defendant. The court noted that the plaintiffs had alleged that their mental distress was severe and that the defendant's conduct was reckless, willful, and wanton. The Fourth Circuit stated that the allegations were to be accepted as true in light of the defendant's motion to strike.[32]

The court considered the additional factor of whether the defendant's conduct was so extreme or outrageous as to grossly offend a person of normal sensibilities, but found that the plaintiffs had not established that factor.[33] Likewise, the court expressed doubt that even willful discrimination by a carrier against a shipper would meet this standard.[34] However, the Fourth Circuit held that the plaintiffs had met enough of the criteria to make their allegations sufficient to introduce evidence of mental distress.[35]

In establishing a private right of action for violation of the no-discrimination clause of the Interstate Commerce Act and setting forth standards of proof of claims for punitive and mental distress damages, the Fourth Circuit recognized a right which other circuits have not yet reviewed. The allowance of such damages for violation of the no-discrimination clause should not present a serious problem for moving companies and other common carriers. The standards of proof required in *Hubbard* for the recovery of punitive and mental distress damages are substantially higher than mere negligent failure to deliver the transported goods on time.[36] The crucial question in

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[31] 540 F.2d at 1230.

[32] *Id.* The motion, referred to by the Fourth Circuit throughout the opinion as a "motion to strike," was apparently a motion for summary judgment on the issue of recovery of mental distress and punitive damages.

[33] *Id.*

[34] *Id.*

[35] The court did not state how many of the criteria must be met before a plaintiff can introduce evidence of mental distress. In *Hubbard,* the plaintiffs met four of the five proposed criteria, which the court believed "on balance, rendered the allegations of the complaint sufficient. . . ." 540 F.2d at 1230.

[36] For the standards of proof required for recovery of punitive damages, see text accompanying notes 26-27 *supra.*

The only issue on appeal was whether punitive damages and damages for mental distress were proper elements of recovery in a cause of action under § 216(d). The district court assumed, and the Fourth Circuit held, that a private right of action

discrimination cases, however, is whether the discrimination or preference given by the carrier was "undue" or "unreasonable." Such a reasonableness standard should give the common carrier a great deal of flexibility in operating in accordance with economic and geographic realities.

Duty of Maintaining Psychiatric Patient's Care Status Under Court Order

Duties may be placed on persons by court orders as well as statutes. A court order placing a person convicted of a serious crime under the care of a psychiatric hospital raises questions concerning the duties of the hospital, the treating psychiatrist, and the probation officer to secure the committing judge's approval before making any changes in the convict's care status. The duty imposed by the order is, in turn, critical in determining the liability of the psychiatrist and probation officer for any injuries the offender may cause subsequent to his release without the approval of the court. In *Semler v. Psychiatric Institute,*[37] the Fourth Circuit held that a state court order committing a criminal offender to the care of a psychiatrist and probation officer imposes a duty on them to follow the requirements of the order.[38]

The plaintiff's daughter was killed by John Gilreath, who had earlier been convicted in a Virginia state court of kidnapping another young girl. The trial judge sentenced Gilreath to twenty years' imprisonment, but suspended the sentence and placed him under the care and supervision of the defendants, a psychiatrist and a probation officer. The committing court order required that any change in Gilreath's confinement be approved by the state court judge.[39] The judge had subsequently approved a change in Gilreath's status from inpatient to day-care patient.[40] He did not approve,[41] however, a later

existed under § 216(d). 540 F.2d at 1225. Because of the limited nature of the appeal, the Court was not required to make a determination of the elements of a § 216(d) cause of action.

[37] 538 F.2d 121 (4th Cir.), *cert. denied,* 97 S. Ct. 83 (1976).

[38] *Id.* at 125.

[39] The state court ordered Gilreath to "continue to receive treatment at and remain confined in the Psychiatric Institute until released by the Court." *Id.* at 124.

[40] As a day care patient, Gilreath lived at home with his parents and came into the psychiatric hospital from 8:00 A.M. to 5:00 P.M. on weekdays. He was under parental supervision on nights and weekends. *Id.* at 123.

[41] The judge was not aware of Gilreath's change to out-patient status. The psychiatrist had informed the probation officer of the change, but the officer did not report the modification to the judge. *Id.* at 124.

change to out-patient status, under which Gilreath came to the hospital two nights a week for group therapy sessions.[42] While Gilreath was an out-patient, he killed the plaintiff's daughter. The plaintiff sued the hospital and the psychiatrist, who joined the probation officer as a third party defendant. The district court, sitting without a jury, found for the plaintiff and awarded a $25,000 judgment.[43]

The Fourth Circuit affirmed the lower court's damage award on the basis of the general principles of Virginia negligence law.[44] In determining the duty placed on the defendants by the state court order, the court of appeals noted that any duty imposed would follow the terms of the order.[45] The Fourth Circuit viewed the existence of the duty as dependent upon the reasonable foreseeability of harm to the public if Gilreath was released from the hospital in violation of the state court order.[46]

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[42] As an out-patient Gilreath at first continued to live at home, but later lived alone. He was apparently living alone at the time he killed the plaintiff's daughter. *Id.*

The plaintiff named the Psychiatric Institute of America and the Professional Associates of the hospital as defendants in conjunction with the hospital. *Id.* at 123 n.1. The hospital and the two other defendants stipulated that if the treating psychiatrist was liable, they were jointly liable. 538 F.2d at 123 n.1.

[43] *Id.* at 123. The court required the probation officer-third party defendant to contribute half of the $25,000 judgment. *Id.*

[44] *Id.* at 123. Federal jurisdiction was based on diversity. *Id.* Thus, the rule of Erie R.R. v. Tompkins, 304 U.S. 64 (1938), controlled, and Virginia law was applied. 538 F.2d at 124.

[45] *Id.* at 125.

[46] *Id.* at 124. The court cited Trimyer v. Norfolk Tallow Co., 192 Va. 776, 66 S.E.2d 441 (1951) for the rule that no duty arises where the harm caused by the defendant's actions was not reasonably foreseeable. The Fourth Circuit noted that in this respect the concepts of duty and proximate cause are related. 538 F.2d at 124, *citing* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 42 at 244-45 (4th ed. 1971) [hereinafter cited as PROSSER]. Both concepts, grounding liability on reasonable foreseeability, involve a policy determination by the courts that a person should not be held accountable for the harm flowing from his acts when that harm was not reasonably foreseeable. *See* Palsgraf v. Long Island R.R., 248 N.Y. 339, 162 N.E. 99 (1928); Eldredge, *The Role of Foreseeable Consequences in Negligence Law,* 23 PA. B.A.Q. 158 (1952); Morris, *Duty, Negligence and Causation,* 101 U. PA. L. REV. 189 (1952); Prosser, *Palsgraf Revisited,* 52 MICH. L. REV. 1 (1953). The courts have invoked this policy in situations involving unforeseeable harm either by holding that the defendant owed the plaintiff no duty to guard against the particular harm, Trimyer v. Norfolk Tallow Co., *supra,* or by holding that the harm to the plaintiff was not proximately caused by a breach of the defendant's duty, Palsgraf v. Long Island R.R., *supra.*

The Fourth Circuit applied the reasonable foreseeability standard in Crawford v. F.H. Ross & Co., No. 75-1614 (4th Cir. April 29, 1976), *disposition recorded,* 534 F.2d 328, to determine the extent of the duty owed by a seller of dangerous substances to warn users of the product's potential dangers. The plaintiffs, employees of Duke Power

The court stated that the reasonable foreseeability of harm to the plaintiff's daughter was apparent from the judge's expressed concern for the public's safety,[47] indications in the pre-sentence report that Gilreath had molested young girls on previous occasions,[48] and the lengthy sentence imposed by the judge. Furthermore, the defendant's psychiatrist was aware of these facts.[49] Taken together, these circumstances indicated that the decision to release Gilreath was not to be merely a medical determination based on his mental health, but was to entail a judgment by the court on whether his release would be in the best interest of the community.[50] Thus, the court order imposed a duty on the psychiatrist and the probation officer "to protect the public from the reasonably foreseeable risk of harm at Gilreath's hands that the state judge had already recognized."[51] Further, the duty imposed by the order was not to be measured by the standard of reasonable care,[52] but by the precise language of the order, to the effect that the defendants were to retain custody over Gilreath until

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Co.. had been injured when acetone they were using exploded and started a fire. They brought suit against the defendant, a supplier of acetone, on theories of negligence, strict liability, and breach of warranty. The district court granted summary judgment for the defendant and the Fourth Circuit reversed, holding that there was a genuine issue as to the adequacy of the defendant's warnings on drums of acetone sole to Duke Power Co. No. 75-1614, slip op. at 2. The court stated that the adequacy of the warnings depended on whether the seller could reasonably foresee that Duke Power Co. would not warn its employees of the dangers of acetone. *Id.* at 3. Such reasonable foreseeability in turn depended on whether Duke Power Co. had knowledge of the dangers of acetone independent of the seller's warnings. *Id.* The Fourth Circuit held that there was a genuine dispute as to the extent of Duke's independent knowledge and remanded to the district court for a determination of the adequacy of the warnings. *Id.* at 6. Thus, like the duty found in *Semler,* the seller's duty to warn in *Crawford* was premised on reasonable foreseeability of harm.

[47] 538 F.2d at 124-25 n.2.

[48] *Id.* at 124.

[49] The psychiatrist had been consulted by the state trial judge and Gilreath's attorney in connection with the criminal trial. *Id.* at 123, 125 n.2.

[50] *Id.* at 125.

[51] *Id.*

[52] The reasonableness standard for a custodian's duty is set forth in the RESTATEMENT (SECOND) OF TORTS § 319 (1965):

> One who takes charge of a third person whom he knows or should know to be likely to cause bodily harm to others if not controlled is under a duty to exercise reasonable care to control the third person to prevent him from doing such harm.
>
> The difference in the two standards is explained by the fact that the *Semler* standard of strict compliance was imposed by a court order, which, like a statute, may set the standard of care higher than the general reasonableness standard.

he was released from the hospital *by order of the court.*[53] The Fourth Circuit expressly stated that no lesser measure of care would suffice.[54]

The defendants also contended that even if the duty imposed by the order was applicable to them, there had been no breach of the duty since the transfer of Gilreath from the judge-approved day-care status to out-patient status was simply a normal progression of treatment that required no additional judicial approval.[55] The court rejected this argument, noting the substantial difference in the quality of supervision and treatment which Gilreath received as a day-care patient and that which he received as an out-patient.[56] In view of these differences, the court found no error in the district court's holding that the defendants had breached the duty imposed by the state court order.[57]

The Fourth Circuit next considered whether the defendant's breach of the court order-imposed duty had proximately caused the death of the plaintiff's daughter. The court cited its discussion of the duty issue,[58] which had predicated the existence of a duty on the reasonable foreseeability of harm to the public recognized by the state judge when he entered the commitment order. Noting the common link of reasonable foreseeability between duty and proximate cause,[59] the court held that the breach of duty, followed by the foreseeable harm on which it was predicated, established proximate cause.[60] The court noted as support for this holding that expert psychiatric testimony in the district court had established that the tragedy was foreseeable if Gilreath was not kept on day-care or otherwise

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[53] *See* note 39 *supra.*

[54] 538 F.2d at 125.

[55] *Id.*

[56] For a comparison of day-care status and out-patient status, see text accompanying notes 40-42 *supra.* The court observed that while Gilreach was an out-patient,

> No one effectively monitored his medication, nor was he under constant observation. Moreover, he lacked the daily psychiatric supervision which . . . was available to him as a day care patient. Thus, he did not have the resources of the environment of the Institute to sustain him in times of mental stress.

538 F.2d at 125-26.

[57] *Id.* at 126.

[58] *See* text accompanying notes 45-54 *supra.*

[59] *See* note 46 *supra.*

[60] 538 F.2d at 126, *citing* Baltimore & O. R.R. v. Green, 136 F.2d 88, 91 (4th Cir. 1943) ("If the injury complained of is a natural and probable consequence of a violation of the statute, then that violation is correctly taken as the proximate cause of the injury").

closely supervised.[61]

The defendants argued, however, that there was insufficient evidence to show that the state judge would not have approved Gilreath's transfer to out-patient status had the request been made.[62] The Fourth Circuit took an opposite view, stating that it was reasonable to infer from such proven facts as the seriousness of Gilreath's prior criminal offense, the length of his prison sentence, and the relatively short time he had been at the hospital, that the state judge would have been alerted to the problems Gilreath's release might create and would thus have refused to approve the transfer.[63] Such an inference might also be drawn from the judge's past actions, since he had approved the previous transfer to day-care status only after being assured in writing that the hospital would provide daily psychiatric supervision for Gilreath. The court suggested that the absence of this daily supervision and the other substantial differences between day-care and out-patient status[64] made it likely that the judge would have declined to allow the transfer, at least without further investigation.[65]

The *Semler* decision raises problems for psychiatrists and psychiatric hospitals under whose custody a court has placed criminal defendants awaiting trial or prisoners who have already been convicted. For example, a psychiatrist may have considerable difficulty in determining when one stage of treatment which has not been approved differs "substantially"[66] from a previous stage which has been approved. Whether the state judge in *Semler* considered the daily psychiatric supervision a condition of granting the change of status to day-care, or whether he simply summarily approved the psychiatrist's recommendation is unclear. If the judge considered the daily supervision a continuing condition of the validity of the committing order, he did not expressly state that condition to the psychiatrist.[67] On the other hand, if he was merely "rubber-stamping" the psychiatrist's recommendation, the judge probably would have approved another recommended change of status to out-patient regardless of the presence or absence of daily supervision. Thus, absent a clearly

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[61] 538 F.2d at 126.

[62] *Id.*

[63] *Id.*

[64] *See* text accompanying notes 40-42 *supra.*

[65] 538 F.2d at 126.

[66] *Id.* The Fourth Circuit did not establish any criteria for determining whether one stage of treatment differs "substantially" from another.

[67] *Id.*

defined committing order[68] which states the terms on which it is granted and the conditions on which changes in treatment and confinement will be approved, psychiatrists may be acting at their peril in making the slightest changes in the treatment or confinement of criminal defendants if other courts decide to follow the *Semler* decision.

Equally strong arguments can be made for imposing liability on a psychiatrist in such a situation. Even if the judge does "rubber-stamp" the recommendations of the treating psychiatrist, society has determined that the judge, not the psychiatrist, should pass final judgment on any changes in an offender's treatment or confinement.[69] Further, the psychiatrist need not decide for himself whether a proposed stage of treatment differs "substantially" from a previously approved stage; he can simply ask the judge for approval of the change. While this procedure may impose a burden on the treating psychiatrist, the burden is small indeed compared to the injury which the offender may cause if he is released too soon.

Although the *Semler* decision may reflect a broad policy decision by the Fourth Circuit in favor of the latter argument, a close reading of the case reveals a more narrow factual holding. The court in *Semler* discussed concepts of reasonable foreseeability at length and apparently placed great weight on the fact that Gilreath had committed a crime after his unauthorized release which was similar to the crime of which he had been convicted.

Rather than holding that all committing court orders impose a duty of strict compliance on the treating psychiatrist or hospital,[70] the

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[68] Even narrowly-drawn statutes requiring indeterminate confinement of mentally disturbed "dangerous offenders" pose problems of definition and prediction for treating psychiatrists in determining when an offender ceases to be "dangerous" to society. *See* A. STONE, MENTAL HEALTH AND LAW: A SYSTEM IN TRANSITION, 25-37 (1975); Morris, *Psychiatry and the Dangerous Criminal*, 41 S. CAL. L. REV. 514, 529-36 (1968); Price, *Psychiatry, Criminal-Law Reform and the "Mythophilic" Impulse: On Canadian Proposals for the Control of the Dangerous Offender*, 4 OTTAWA L. REV. 1, 33-44 (1970); Schreiber, *Indeterminate Therapeutic Incarceration of Dangerous Criminals: Perspectives and Problems*, 56 VA. L. REV. 602, 612-24 (1970).

[69] The societal determination that the judge is to make the final determination on any changes in an offender's confinement may be embodied in state statutes. *See, e.g.*, VA. CODE ANN. §§ 19.2-299 to 306 (Repl. Vol. 1975).

[70] The majority of American jurisdictions hold that an unexcused violation of an applicable statute (or, by analogy, a court order) establishes negligence per se. *See, e.g.*, Hardaway v. Consolidated Paper Co., 366 Mich. 190, 114 N.W.2d 236 (1962); White v. Gore, 201 Va. 239, 110 S.E.2d 228 (1959); Martin v. Herzog, 228 N.Y. 164, 126 N.E. 814 (1920); RESTATEMENT (SECOND) OF TORTS § 288B (1965). However, in determining whether a particular statute is applicable, the courts undertake an analy-

Fourth Circuit in *Semler* examined the facts surrounding the commitment of the offender and considered whether those facts gave rise to a reasonable foreseeability of harm before holding that the court order imposed a duty on the defendants. Thus, implicit in *Semler* is the proposition that a committing court order does not in itself place a duty of strict compliance on a hospital or treating psychiatrist. Nevertheless, where the committed offender has been improperly released and has caused harm similar to that which led to his original conviction, liability may be imposed on the psychiatrist or hospital that released the offender.

C. Calculation of Damages in Actions Brought Under the Federal Tort Claims Act

In *Mosley v. United States*[1] the Fourth Circuit considered whether estimated future state and federal income taxes and statutory benefits to which a decedent would be entitled during his estimated lifetime may be deducted from damages recoverable in a wrongful death action brought under the Federal Tort Claims Act.[2] The court affirmed the district court's award of compensatory damages in a wrongful death action stemming from the negligence of a Veterans Administration hospital in North Carolina.[3] Specifically, the court

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sis similar to that made by the Fourth Circuit in *Semler*. The courts consider whether the statute is designed to protect the class of persons in which the plaintiff is included against the risk of the type of harm which has occurred as a result of its violation. *See* PROSSER, *supra* note 46, § 36 at 192-202.

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[1] 538 F.2d 555 (4th Cir. 1976).

[2] 28 U.S.C. §§ 2671-2680 (1970).

[3] North Carolina law was applicable in *Mosley* since the negligent act occurred in that state. 28 U.S.C. § 2674 (1970). *See* Richards v. United States, 369 U.S. 1 (1962); Patrick v. United States, 316 F.2d 9 (4th Cir. 1963). The North Carolina wrongful death statute then in effect, N.C. GEN. STAT. §§ 28-173 and 174 (Repl. Vol. 1966) provides:

> The plaintiff in such action may recover such damages as are a fair and just compensation for the pecuniary injury resulting from such death.

The Fourth Circuit had interpreted the phrase "pecuniary injury" in the statute as

> 'present value of the net pecuniary worth of the deceased, to be ascertained by deducting the cost of his own living and expenditures from the gross income, based upon his life expectancy' [and] may include other sources of income for life, such as disability income, retirement benefits, pensions, and annuities.

Mosely v. United States, 499 F.2d 1361, 1362 (4th Cir. 1974) *quoting in part* Mendenhall v. North Carolina R.R., 123 N.C. 275, 278, 31 S.E. 480 (1898).

held that the trial judge had correctly determined the decedent's life and work expectancies and had properly deducted income taxes, Railroad Retirement Act survivors' benefits, and Veterans Administration benefits from estimated lifetime earnings in the calculation of damages.[4]

Mosley v. United States had been before the Fourth Circuit before. In the original action, the district court found the government liable and awarded $2,000 for the decedent's pain and suffering and $10,000 for his wrongful death. Neither the plaintiff nor the government appealed from the finding of liability or the award of damages for pain and suffering. However, the plaintiff appealed from the trial judge's determination of the wrongful death damages, and the Fourth Circuit remanded for a redetermination of those damages. Mosley v. United States, 499 F.2d 1361 (4th Cir. 1974). On remand, the district court increased the award of wrongful death damages to $25,508.25. 405 F. Supp. 357, 360 (E.D.N.C. 1974). The plaintiff appealed from this redetermination, and the Fourth Circuit has held most recently that the district court had properly calculated the damages. 538 F.2d 555 (4th Cir. 1976).

[4] 538 F.2d at 557-61. The district court calculated the damages as follows:

Estimated yearly gross earnings (Life expectancy of 6 years)		
1969	$12,944.00	
1970	13,644.00	
1971	15,165.00	
1972	16,164.00	
1973	19,144.00	
1974	19,300.00	
Estimated total gross earnings		$96,361.00
Less: One third, reflecting finding that he could only have worked 2/3 of the remaining 6 years		—32,121.00
Estimated working-life earnings		$64,240.00
Less:		
Personal living expenses	$11,563.20	
Income taxes (10%)	6,424.00	—17,987.20
Estimated net earnings		$46,252.80
Add: RRA disability benefits	$14,400	
Less: RRA survivors' benefits (Dist. Ct. viewed the above as cancelling each other out)	(unknown)	

The Fourth Circuit upheld the district court's determination of the decedent's life and work expectancies on the basis of the "painstaking study" of his health which the trial judge had made.[5] After determining that the decedent had had a life expectancy of six years and that he could have worked only "two-thirds of the time during this six years,"[6] the trial judge calculated his future earnings by adding the decedent's expected salaries for the six years after his death and then directly reducing this amount by one third.[7] The judge then deducted an amount representing the decedent's expected personal living expenses for the six year period.

In allowing the deduction of estimated future income taxes from future earnings, the Fourth Circuit adopted the rationale enunciated in *Brooks v. United States.*[8] The *Brooks* court reasoned that if the decedent had lived, his future earnings would have been subject to income taxes and the amount available to his dependents would have been the amount after taxes.[9] Thus, unless income taxes are deducted from future earnings, the survivors will receive more than they would have received had the deceased lived[10] since damages in wrongful

Less: VA survivors' benefits	—22,744.55
	$23,508.25
Add: Damages for pain and suffering	2,000.00
Total recovery	$25,508.25

[5] 538 F.2d at 557.

[6] 405 F. Supp. at 359. The meaning of "two thirds of the time" became a matter of controversy between the parties at the appellate level. The plaintiff believed the finding meant a partitioning of the six years into an initial work period of four years followed by two years of disability. The government argued that the finding meant the decedent could have worked only two out of every three working days throughout the six year period. 538 F.2d at 560. For a discussion of the controversy and the Fourth Circuit's resolution, *see* text accompanying notes 14-18 *infra.*

[7] *See* note 4 *supra.*

[8] 273 F. Supp. 619 (D.S.C. 1967).

[9] *Id.* at 628-629.

[10] The Ninth Circuit recently has held that awarding a high-income decedent's full income to his survivors without deducting income taxes would amount to overcompensation. The court reasoned that the effect of such overcompensation would be punitive and thus violative of the Federal Tort Claims Act ban on punitive damages. Felder v. United States, 543 F.2d 657 (9th Cir. 1976). *Felder* apparently is the first decision attaching a punitive damages notion to the overcompensation rationale of the cases allowing deduction of income taxes.

The Ninth Circuit in *Felder* limited the application of the deduction rule to cases in which the decedent had an annual income of $30,000 or more. This limitation follows

death actions are exempt from federal income taxation.[11] Although a majority of courts have held that income taxes should not be deducted from future earnings,[12] the Fourth Circuit found the *Brooks* reasoning compelling and followed the minority view[13] that income

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a compromise formula established by the Second Circuit in McWeeney v. New York, N.H. & H.R.R., 282 F.2d 34 (2d Cir.), *cert. denied*, 364 U.S. 870 (1960). The court in *McWeeney* held that future income taxes may be deducted from a damages award only where the amount of such taxes is relatively large. 282 F.2d at 38-9. The rationale behind *McWeeney* and *Felder* is that, in the average case, the speculative nature of future income taxes makes deduction improper; any possible overcompensation of the plaintiff in such a case will be offset by inflation and attorney's fees, factors which are not considered in the awarding of damages. However, if the amount of prospective taxes is very large, the cumulative effect of those factors will not be sufficient to offset the overcompensation, and income taxes should thus be deducted. 543 F.2d at 665-70; 282 F.2d at 37-39. Several other courts have followed this approach. *See, e.g.*, Canal Barge Co. v. Griffith, 480 F.2d 11 (5th Cir. 1973), *cert. denied*, 423 U.S. 840 (1975); Cox v. Northwest Airlines, Inc., 379 F.2d 893 (7th Cir. 1967); Montellier v. United States, 315 F.2d 180 (2d Cir. 1963).

[11] The Internal Revenue Code excludes from gross income "the amount of any damages received (whether by suit or agreement) on account of personal injuries . . . ." I.R.C. § 104(a)(2). This exemption has been construed to include damages for wrongful death. Anderson v. United Air Lines, 183 F. Supp. 97 (S.D. Cal. 1960); Rev. Rul. 19, 1954-1 C.B. 179.

[12] 2 F. HARPER & F. JAMES, THE LAW OF TORTS, § 25.12, at 1327 (1956); Burns, *A Compensation Award for Personal Injury or Wrongful Death is Tax-Exempt: Should We Tell the Jury?* 14 DEPAUL L. REV. 320, 321 (1965); Nordstrom, *Income Taxes and Personal Injury Awards*, 19 OHIO ST. L.J. 212, 213 (1958); Comment, *Personal Injuries: Should Non-Taxability of Judgments Decrease Award?*, 8 TULSA L.J. 242 (1972).

The courts have advanced four reasons for refusing to deduct estimated future income taxes from future earnings in the calculation of damages. First, future taxes are unduly speculative because of changes in tax rates, the individual's family status, and allowable deductions and exemptions. Phoenix Indem. Co. v. Givens, 263 F.2d 858, 863 (5th Cir. 1959); Stokes v. United States, 144 F.2d 82, 87 (2d Cir. 1944). Second, consideration of future income taxes unduly complicates the trial, both in the admission of evidence and in instructions to the jury. Huddell v. Levin, 395 F. Supp. 64, 89-90 (D.N.J. 1975). Third, income taxes are strictly between the taxpaying plaintiff and the government and of no legitimate concern to the defendant. Hall v. Chicago & N.W. Ry., 5 Ill. 2d 135, 152, 125 N.E.2d 77, 86 (1955). Finally, deduction of income taxes frustrates the congressional intent to benefit injured plaintiffs as manifested in the exemption of damage awards from income taxation. Dixie Feed & Seed Co. v. Byrd, 52 Tenn. App. 619, 627, 376 S.W.2d 745, 749 (Ct. App. 1963), *app. dismissed*, 379 U.S. 15 (1964).

For a discussion and analysis of the arguments for and against the deduction of income taxes from future earnings, see Comment, *Damages—Wrongful Death—Jury May Properly Receive Evidence and Instructions as to Impact of Inflation and Income Taxation*, 29 RUT. L. REV. 681 (1976).

[13] *See, e.g.*, Burlington Northern, Inc. v. Boxberger, 529 F.2d 284 (9th Cir. 1975); Downs v. United States, 522 F.2d 990 (6th Cir. 1975); Turcotte v. Ford Motor Co., 494 F.2d 173 (1st Cir. 1974); Brooks v. United States, 273 F. Supp. 619 (D.S.C. 1967); Nollenberger v. United Air Lines, Inc., 216 F. Supp. 734 (S.D. Cal. 1963).

taxes should be deducted.

As a railroad employee, the decedent in *Mosley*, or his family, would be entitled to disability and survivors' benefits under the Railroad Retirement Act.[14] The plaintiff contended that under the district court's determination of the decedent's life and work expectancies,[15] the decedent would have been entitled to two years of disability benefits.[16] In contrast, the government argued that the finding by the district court of a two-thirds disability did not mean the partitioning of the six year life expectancy into an initial work period of four years followed by two years of total disability. Rather, the government contended that the ability to work two-thirds of the remaining life expectancy meant that the decedent would have worked only two out of three working days throughout the entire six year period, thus eliminating any claim for total disability. The Fourth Circuit rejected this argument, stating that nothing in the text of the trial judge's finding supported the government's interpretation.[17] The court adopted the plaintiff's view and held that the district court properly included the decedent's disability benefits in the calculation of damages.[18]

The Fourth Circuit did hold, however, that the survivors' benefits which the decedent's family had been receiving under the Railroad Retirement Act from the date of the decedent's death must be set off against the disability benefits previously allowed in the calculation of damages.[19] The court viewed the indemnities as "an entirety" and "an inseparable sequence" in which the employee's life-time disability payments were to be followed by the survivors' benefits after the employee's death.[20] The court reasoned that to allow the inclusion of

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[14] 45 U.S.C. §§ 228(a)-228(s) (1970).

[15] *See* text accompanying notes 5-7 *supra.*

[16] The figure of two years' total disability represented one-third of the six year life expectancy, reflecting the finding by the district court that the decedent could have worked only "two-thirds of the time during this six years." 405 F. Supp. at 359.

[17] The government's interpretation, however, is supported by the trial judge's calculation of gross future earnings. If the judge had followed the plaintiff's interpretation of the life and work expectancy by partitioning the six years into four years of work and two years of total disability, he presumably would have omitted the last two years' salaries in calculating gross future earnings. Instead, the judge added the projected salaries for all six years and then deducted the one-third disability figure. 538 F.2d at 557-58; *see* note 4 *supra.* Such a calculation would implicitly support the government's two-out-of-three-working-days interpretation and thus justify disallowing addition of the total disability benefits in the calculation of damages.

[18] 538 F.2d at 559.

[19] *Id.* at 560.

[20] *Id.*

the disability benefits in the calculation of damages while simultaneously allowing the payment of survivors' benefits to the plaintiff would result in a duplication of benefits. The Fourth Circuit took a similar view with respect to military service benefits paid to the decedent's survivors by the Veterans Administration. The court adopted the holding of the Supreme Court in *Brooks v. United States*[21] that any statutory serviceman's benefits to which a plaintiff is entitled should be deducted from damages recovered in an action under the Federal Tort Claims Act.

The rule advanced in *Brooks* and other cases,[22] and applied by the Fourth Circuit in *Mosley,* is based on the general principle that the United States need not pay twice for the same loss, as where an injury is compensable under both the Federal Tort Claims Act and some other legislative provision.[23] This rule ignores the dual role of the federal government in Federal Tort Claims actions, that of tortfeasor and provider of benefits for those who Congress has deemed deserve them. In *Mosley,* for example, the decedent was entitled to railroad retirement and veterans' benefits not by virtue of the tort which the government's agents had committed, but because of his employment with the railroad and his service in the armed forces.[24] The Fourth Circuit was amiss in its view that because the compensations were overlapping they were duplicative of each other. The tort inflicted on the decedent and his service with the armed forces and the railroad were not duplicative in any sense; neither were the compensations flowing from the two sources. To take a contrary view is to say that a plaintiff who has "paid into" the railroad retirement or veterans systems with years of service must give up his vested benefits if he wins a judgment in a Federal Tort Claims Action.

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[21] 337 U.S. 49 (1949). The Supreme Court in *Brooks* stated in dicta that there was no indication that Congress, in passing both the Federal Tort Claims Act and statutes providing for servicemen's disability and survivors' benefits, meant the United States to pay for the same injury twice. *Id.* at 53-54.

[22] Feeley v. United States, 337 F.2d 924 (3d Cir. 1964); O'Connor v. United States, 269 F.2d 578 (2d Cir. 1959); Knecht v. United States, 242 F.2d 929 (3d Cir. 1957).

[23] Brooks v. United States, 337 U.S. 49, 54 (1949). The court in *Brooks* noted that "it would seem incongruous . . . if the United States should have to pay in tort for hospital expenses it had already paid" under a servicemen's disability benefits statute.

[24] Both forms of benefits would have been paid to the decedent or his survivors if the tort had not been committed. Had he lived, Mosley would have received the Railroad Retirement disability benefits because of a service-connected heart condition. 405 F. Supp. at 358. Upon his death, either from that disability or other causes, his survivors would have been entitled to both Railroad Retirement Act survivors' benefits and Veterans Administration survivors' benefits.

In *Kielwien v. United States,*[25] another Federal Tort Claims Act case, the Fourth Circuit indicated that the procedural requirements of the Act should be strictly construed. In *Kielwien,* the court reviewed § 2675(b) of the Act,[26] which provides that a Federal Tort Claims action may not be instituted for an amount greater than that stated in the plaintiff's administrative claim unless the plaintiff pleads and proves "intervening facts" or "newly discovered evidence not reasonably discoverable at the time of presenting the claim."[27] The plaintiff filed a claim for $25,000 with the Department of the Navy for injuries resulting from an operation at a naval hospital.[28] When no action was taken on her claim, the plaintiff sued the government, alleging negligence by the Navy doctors. After a trial without a jury, the district court found for the plaintiff and awarded her $123,578.90 in damages.[29] The trial court held that the plaintiff was not limited to the amount stated in her administrative claim because "intervening facts" relating to the amount of the claim and the extent of her injuries had arisen between the filing of the claim and the bringing of suit.[30]

The Fourth Circuit reversed, holding that the trial court's finding of "intervening facts" as to damages was clearly erroneous.[31] The court of appeals based its decision on a careful examination of testimony regarding statements made by the plaintiff's physicians concerning the nature and extent of her injuries before and after the filing of her administrative claim.[32] The court determined that the

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[25] 540 F.2d 676 (4th Cir.), *cert. denied,* 97 S. Ct. 491 (1976).

[26] 28 U.S.C. § 2675(b) (1970).

[27] *Id.*

[28] Plaintiff, the wife of a Marine sergeant, had been admitted to the United States Naval Hospital at Beaufort, South Carolina for the removal of a lump on her neck. After the operation she experienced a drooping of her left shoulder accompanied by pain. The injury to her shoulder was diagnosed as being the result of injury to a spinal nerve during the operation. 540 F.2d at 677-78.

[29] 540 F.2d at 679.

[30] *Id.* The "intervening fact" found by the district court was medical advice received four months after the filing of the claim that no form of surgery would "help" the plaintiff. *Id.* at 680. The district court apparently placed great weight on the fact that prior to the filing of the claim, several of the doctors the plaintiff consulted expressed only doubt that surgery would not give her relief. *See* note 32 *infra.* Although the district court found "intervening facts," it held that there was no "newly discovered evidence" on the extent or permanency of the plaintiff's injury that would justify an award in excess of her administrative claim. *Id.* at 679.

[31] *Id.* 680.

[32] *Id.* at 678. The plaintiff's operation took place on October 1, 1970. She visited a physician immediately thereafter for relief of the pain she was experiencing in her shoulder, but was told that the pain was a normal post-operative symptom. She under-

plaintiff's medical counseling after the filing of the claim was substantially the same as what other physicians repeatedly had told her before the filing. Thus, the court found that the plaintiff knew she had a permanent disability and that no form of surgery could even partially relieve the condition.[33] Therefore, the post-filing diagnoses were not "intervening facts" within the meaning of § 2675(b),[34] and the plaintiff was limited in her recovery to the amount stated in her

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went physical therapy in January 1971 to no avail. On February 24, 1971 a neurologist diagnosed the pain as being caused by an injured spinal accessory nerve and recommended exploratory surgery. The plaintiff saw a neurosurgeon on March 30, 1971 and was advised against any kind of surgery because of the danger of paralysis. On August 30, 1971 the plaintiff consulted an orthopedist, with whom she discussed the practical possibilities of an operation to reconstruct her back muscles. He later informed her, however, that there was no guarantee that such an operation would be successful. She was seen by another neurosurgeon on September 7, 1971, who told her that surgery on the injured nerve was out of the question and that she was going to have to live with the pain. The plaintiff was referred by her attorney to another neurosurgeon on September 10, 1971, who told her that her injuries were permanent but indicated that two operative procedures might be attempted. However, he expressed "doubt that either of these procedures would be of very much benefit" to the plaintiff. *Id.* at 679.

The plaintiff filed her administrative claim for personal injury on October 1, 1971, fixing the amount of her claim as $25,000. She visited another orthopedist in December, 1971 and February, 1972 and was told that "neither 'neck surgery' nor 'muscle surgery' . . . would 'help' her." *Id.* at 680.

[33] *Id.*

[34] 28 U.S.C. § 2675(b). The courts have not undertaken to expressly define the "intervening facts" or "newly discovered evidence" exceptions to § 2675(b). They have instead focused on the facts of each case to determine if there have been such intervening facts or newly discovered evidence which would justify allowing the plaintiff to recover an amount greater than his administrative claim. Those courts considering the question have generally allowed recovery in excess of the administrative claim where the claim was filed a short time after the injury occurred, before the full benefits of medical diagnosis were available, Joyce v. United States, 329 F. Supp. 1242 (W.D. Pa. 1971) *rev'd on other grounds,* 474 F.2d 215 (3rd Cir. 1973); Rabovsky v. United States, 265 F. Supp. 587 (D. Conn. 1967); where the injury received was so subtle or complex (such as head injuries or mental illness) that the full extent of the injury could not have reasonably been discovered at the time of filing the claim, United States v. Alexander, 238 F.2d 314 (5th Cir. 1956); Bonner v. United States, 339 F. Supp. 640 (E.D. La. 1972); Joyce v. United States, *supra;* Phillips v. United States, 102 F. Supp. 943 (E.D. Tenn. 1952); or where all the plaintiff's medical bills were not available to him at the time of filing, Molinar v. United States, 515 F.2d 246 (5th Cir. 1975). The courts have refused to find intervening facts or newly discovered evidence when the seriousness of the plaintiff's condition could have been discovered with reasonable diligence on his part at the time of filing, Rudd v. United States, 233 F. Supp. 730 (M.D. Ala. 1964); Morgan v. United States, 123 F. Supp. 794 (S.D.N.Y. 1954); or where there was no change in the plaintiff's condition between a physician's report on which the original amount claimed was based and the bringing of suit, Smith v. United States, 239 F. Supp. 152 (D. Md. 1965).