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Recent Developments: Torts—Punitive Damages—Allowed in Maryland for Wanton Disregard of Human Life. Smith v. Gray Concrete Pipe Co., Inc., 267 Md. 149, 297 A.2d 721 (1972)

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TORTS—PUNITIVE DAMAGES—ALLOWED IN MARYLAND FOR WANTON DISREGARD OF HUMAN LIFE. *SMITH V. GRAY CONCRETE PIPE CO., INC.*, 267 Md. 149, 297 A.2d 721 (1972).

In *Smith v. Gray Concrete Pipe Co.*,[1] plaintiffs brought an action as administrator and parents for the wrongful death of their minor son. The son was killed when his automobile collided with a truck entrusted to Edwards by his employer, the Gray Concrete Pipe Co., Inc. Edwards was an eighteen-year-old laborer who possessed no chauffeur's license and who had no experience in operating this type of truck. Indeed, his only experience in operating any type of vehicle had resulted in three traffic violations. The truck entrusted to Edwards was in an unsafe condition, manifesting fifteen violations of the Interstate Commerce Commission safety regulations. Edwards drove this truck upon a high-speed, limited-access highway. In the course of this trip a piece of wire which secured the hood of the truck separated, causing the hood to rise up and completely obstruct the vision of the driver. In response to this emergency Edwards, at once and without warning, steered the truck into one of the high-speed lanes of the three lane highway and stopped. Decedent's automobile collided with the rear of the truck, and he was killed.

The action was brought in the United States District Court for the Eastern District of Virginia. That court certified to the Maryland Court of Appeals the question of whether punitive or exemplary damages might be had under the laws of Maryland in automobile tort cases. Before reaching the question certified to it, the Court of Appeals dealt with three procedural issues raised by the defendants: whether the court had proper jurisdiction of the subject matter; whether the decision of a lower Maryland court (where the action was originally brought) sustaining a demurrer to plaintiff's prayer for exemplary damages was res judicata, and whether the administrator of a decedent's estate was a proper party to recover exemplary damages.

The *Smith* court held that it had proper jurisdiction as opposed to the Court of Special Appeals when considering questions certified to it under the Uniform Certification of Questions of Law Act.[2] The question of res judicata was dismissed because the plaintiffs had assented to

1. 267 Md. 149, 297 A.2d 721 (1972).
2. *Smith* involved the first question to be certified to the Maryland courts under the Uniform Certification of Questions of Law Act, MD. ANN. CODE art. 26, §§ 161–72 (1972). The defendants contended that the case should not have been certified to the Court of Appeals but rather to the Court of Special Appeals. Their argument was based on the statutory provisions which grant initial appellate jurisdiction in tort cases to the Court of Special Appeals. MD. ANN. CODE art. 5, §§ 5A(16), 21 (1968). To allow certification to the Court of Appeals was said to be inconsistent with these provisions. In rejecting the defendants' contention, the court reasoned that the legislative purpose underlying the Act was to obtain a speedy and final determination of Maryland law on the question certified. Because the Court of Appeals was the court best able to make such a determination, the court concluded that it should have initial appellate jurisdiction of certified questions. 267 Md. at 154–55, 297 A.2d at 724–25.

a voluntary nonsuit in the lower court before entry of final judgment.[3] In holding for the first time in Maryland that an administrator was a proper party to recover exemplary damages, the court reasoned that: "[I]f the wrongdoer may be punished if his victim lives, then he surely should not escape retribution if his wrongful act causes death."[4]

Upon consideration of the certified question, *Smith* held that exemplary damages could be recovered in automobile tort cases. Because the driver (Edwards) had merely shown poor judgment in exigent circumstances, punitive damages were not assessable against him.[5] On the other hand, the conduct of the Gray Concrete Pipe Co. in entrusting the defective truck to Edwards was of a character to support an award of punitive damages.[6]

Although *Smith* is the first case in Maryland to fully delineate the granting of punitive damages in an automobile case, the concept of exemplary damages is not new. It was considered as early as 1817 in the case of *Pratt v. Ayler*,[7] where the court allowed punitive damages as "additional punishment" for the tortfeasor. The test applied in all of the early cases considering exemplary damages for tortious acts[8] was one of actual malice or evidence which gives cognizance to that malice.[9]

In the early case of *Philadelphia, Wilmington & Baltimore R.R. v. Hoeflich*,[10] the court, in reversing an award of punitive damages, held that the test applicable for the award of such damages was that of fraud, malice or evil intent.[11] The *Hoeflich* rule has been applied to a large number of cases covering the full range of tort actions,[12] and has resulted in the denial of exemplary damages when the plaintiff has been unable to meet the heavy burden of proving actual malice, wantoness, animosity or ill will.[13]

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3. 267 Md. at 155-58, 297 A.2d at 725-26. The *Smith* court observed that the circuit court proceeding was neither part of the record of the instant case nor within the certification, and thus was not properly before the court. However, the court decided the issue anyway, concluding that "an order sustaining a demurrer is not a final judgment" and, therefore, the doctrine of res judicata was not applicable. *Id.* at 157, 297 A.2d at 726. *See also* State for Use of Staylor v. Jenkins, 70 Md. 472, 17 A. 392 (1889).
4. 267 Md. at 159-60, 297 A.2d at 727, quoting from Leahy v. Morgan, 275 F. Supp. 424, 425 (N.D. Iowa 1967).
5. 267 Md. at 171, 297 A.2d at 733.
6. *Id.* at 171-72, 297 A.2d at 733-34.
7. 4 H.&J. 349 (Md. 1817).
8. *See* Byers v. Horner, 47 Md. 23 (1878); Barton Coal Co. v. Cox, 39 Md. 1 (1873); Moore v. Schultz, 31 Md. 418 (1869); Shafer v. Smith, 7 H.&J. 67 (Md. 1826).
9. Shafer v. Smith, 7 H.&J. 67 (Md. 1826).
10. 62 Md. 300, 50 Am. Rep. 223 (1884).
11. *Id.* at 307, 50 Am. Rep. at 224.
12. *See, e.g.*, Summit Loans, Inc. v. Pecola, 265 Md. 43, 288 A.2d 114 (1972) (invasion of privacy); Drug Fair, Inc. v. Smith, 263 Md. 341, 283 A.2d 392 (1971) (assault and false imprisonment); Nichols v. Myer, 139 Md. 450, 115 A.2d 786 (1921) (trespass).
13. Associates Discount Corp. v. Hillary, 262 Md. 570, 278 A.2d 592 (1971) (trespass); Damazo v. Wahby, 259 Md. 627, 270 A.2d 814 (1970) (interference with contract); Dennis v Baltimore Transit Co., 189 Md. 610, 56 A.2d 813 (1948) (assault); Baltimore Transit Co. v. Faulkner, 179 Md. 598, 20 A.2d 485 (1941) (assault and battery); Baltimore & O.R.R. v.

The first Maryland case dealing with the question of punitive damages in automobile tort actions was *Davis v. Gordon.*[14] In *Davis* two pedestrians were struck by an automobile while walking on the shoulder of a highway. Davis was injured and his companion was killed by the car, which was operated by the defendant who was driving at an excessive rate of speed and without a license. After striking the two men, the defendant fled the scene of the accident.[15] Reversing the lower court, the Court of Appeals denied punitive damages, using the same test as was used by the *Hoeflich* court: "[T]o entitle one to such damages there must be an element of fraud, or malice, or evil intent, or oppression entering into and forming part of the wrongful act."[16] Further, the *Davis* court implied that exemplary damages should not be granted where the imposition of a criminal punishment would fulfill the same punitive purpose.[17]

Several years after *Davis*, the court in *Conklin v. Schillenger*[18] expressed a willingness to apply exemplary damages in an automobile case where gross negligence was present, but this opinion was by way of dicta, as the court held that the issue of recoverability of punitive damages was not properly before it.[19] As in *Smith* and *Davis*, the factual situation before the *Conklin* court, as considered in the dicta, was one in which the evidence did not indicate actual malice or intent to injure. The *Conklin* court stated:

> We think it is clear that none of the decisions in this Court has held that in *no conceivable set of facts* there may not be a recovery of punitive damages in a tort case seeking damages for personal injuries resulting from the use of automobiles, and the opinion in *Davis* suggests that there may be recovery of punitive damages in the event of an intentional, malicious injury in automobile cases. The difficulty in the Maryland cases arises in regard to factual situations in which there is no evidence of *actual intent* to injure or of *actual malice* toward the injured person, but in which the defendant's conduct is of such an extraordinary character as possibly to be the legal equivalent of such actual intent or actual malice, sometimes described as

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Boyd, 63 Md. 325 (1885) (trespass); Philadelphia, Wil. & Balto. R.R. v. Hoeflich, 62 Md. 300, 50 Am. Rep. 223 (1884) (assault).

14. 183 Md. 129, 36 A.2d 699 (1944).
15. While flight from the scene of an accident is not generally considered to be negligence, the plaintiffs argued that it should be considered to show the reckless state of mind of the defendant. *Id.* at 133–34, 36 A.2d at 701. In many states flight coupled with other negligent acts has been a key element in an award of punitive damages. *See, e.g.*, Smith v. McNulty, 293 F.2d 924 (5th Cir. 1961). The Court of Appeals in *Davis* rejected this element. 183 Md. at 134, 36 A.2d at 701.
16. 183 Md. at 133, 36 A.2d at 701.
17. *Id.* The implication was rejected *sub silentio* in *Smith*. Not only did the court allow punitive damages contrary to that theory, but also it adopted the same test for awarding such damages as the court has used for defining gross negligence in criminal prosecutions for automobile manslaughter. *See* p. 161 *infra*.
18. 255 Md. 50, 257 A.2d 187 (1969).
19. *Id.* at 76, 257 A.2d at 200.

> "wanton," "reckless disregard of the rights of others," and the like. We rather agree that in this latter type of situation, the language of some of the Maryland cases needs further interpretation and possible reconsideration to reach a more clear-cut rule, but unfortunately the present case is not one in which we can accomplish this desirable result . . . .[20]

In *Smith* the court obviously found an occasion for such further interpretation or reconsideration. In establishing a standard for measuring conduct sufficient to allow an award of punitive damages, the court relied on the *Conklin* dicta and the cases defining gross negligence in criminal prosecutions for automobile manslaughter.[21] The test was:

> We regard a "wanton or reckless disregard for human life" in the operation of a motor vehicle, with the known dangers and risks attendant to such conduct, as the legal equivalent of malice. It is a standard which, although stopping just short of wilful or intentional injury, contemplates conduct which is of an extraordinary or outrageous character.[22]

The court implied that the adoption of that test would confer a dual benefit. First, because it had been frequently applied in the automobile manslaughter cases, the standard was a familiar one.[23] Secondly, the strictness of the criminal standards would limit the application of the rule.[24] To further emphasize its apparent intention to limit recovery of punitive damages, the court adopted a strict rule of pleading. In future actions, the court indicated, the facts giving rise to a claim for punitive damages must be specified in the pleading with particularity.[25]

For the first time in Maryland the Court of Appeals has authorized a recovery of punitive damages in an automobile tort action. In so doing the court set aside the old, stricter requirement of actual malice as a condition to such an award and substituted for it the more liberal requirement of conduct equivalent to imply malice. That conduct was defined as "a wanton or reckless disregard for human life." Despite the

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20. *Id.* at 71, 257 A.2d at 198.
21. *See, e.g.*, Romanesk v. Rose, 248 Md. 425, 237 A.2d 12 (1968).
22. 267 Md. at 168, 297 A.2d at 731–32.
23. *Id.* at 168, 297 A.2d at 732.
24. Prior to discussing the new standard the court stated: "[W]e perceive from some of the reported decisions the danger of formulating a test which may be so flexible that it can become virtually unlimited in its application." *Id.* at 166, 297 A.2d at 730–31. Compare that statement with the court's later comment: "And if, as a test, it has been regarded as adequately stringent to serve as a basis for possible imprisonment, then, surely, there appears to be no valid reason for deeming it too liberal for imposing civil sanctions." *Id.* at 168, 297 A.2d at 732.
25. The court phrased the requirement as follows:
> No bald or conclusory allegations of "wanton or reckless disregard for human life," or language of similar import, shall withstand attack on grounds of insufficiency. It follows from what we have said that far greater specificity will be required than that reflected by the "Appendix of Forms" accompanying the Maryland Rules.

Id. at 168, 297 A.2d at 732.

assertion of the majority that the new test was consistent with the old standard,[26] *Smith* is a clear departure from the old rule.[27] The new rule brings Maryland within the growing majority of states which allow punitive damages in automobile tort actions.[28]

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26. "The problem . . . is in fashioning a test which does not depart from our prior decisions . . . ." *Id.* at 165, 297 A.2d at 730.
27. In his dissenting opinion Judge Smith criticized the majority thusly: "To me it is clear that the existing rule does not permit recovery of punitive damages under the facts set forth in this declaration. Therefore, if the law is to be changed, it should be done by the General Assembly." *Id.* at 174, 297 A.2d at 735.
28. *Id.* at 163-65 n.3, 297 A.2d at 729-30 n.3.