



1993

Recent Developments: *Monias v. Endal*: Tort Victims May Recover For "Lost Years" of a Shortened Life Expectancy but Family Members May Not

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Recommended Citation

Reaver, Kelly (1993) "Recent Developments: *Monias v. Endal*: Tort Victims May Recover For "Lost Years" of a Shortened Life Expectancy but Family Members May Not," *University of Baltimore Law Forum*: Vol. 24 : No. 1 , Article 9.
Available at: <http://scholarworks.law.ubalt.edu/lf/vol24/iss1/9>

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ing words" inciting violence "on the basis of race, color, creed, religion or gender," was unconstitutional because it prohibited only particular fighting words and violated the restriction against content-based discrimination. *Mitchell*, 113 S. Ct. at 2200-01 (quoting *R.A.V.*, 505 U.S. at ___ (1992)). The *Mitchell* Court distinguished the penalty enhancing statute, which involved constitutionally unprotected conduct, from the ordinance in *R.A.V.* because that ordinance explicitly prohibited expression. *Id.* at 2200-01.

In addition, the Court noted the societal value and importance of the penalty-enhancement statute's application to discriminatory conduct. *Id.* at 2201. The Court determined that society's need to redress discriminatory crimes justifies the existence of the penalty-enhancement statute. Therefore, the Court rejected the con-

tion that the statute was founded merely upon the legislature's disagreement with such discriminatory beliefs. *Id.*

The Supreme Court concluded by dismissing *Mitchell's* contentions that the penalty-enhancing statute is constitutionally overbroad and has a chilling effect on speech. *Id.* In so holding, the Court envisioned the stifled tones of bigoted individuals who anticipate future trials where evidence of their bigotry is allowed, and found such a hypothesis not only attenuated, but too speculative to warrant *Mitchell's* contention. *Id.* The Court further noted that the First Amendment does not bar the use of speech as evidence of elements of a crime, and that *Mitchell's* contention in this regard had previously been rejected in *Haupt v. United States*, 330 U.S. 631 (1947). *Id.* at 2201-2. Therefore, evidence of discriminatory conduct is

admissible in establishing the applicability of the penalty-enhancement statute.

In affirming the legislature's imposition of a stronger incentive for racially motivated crimes by concluding that a penalty-enhancing statute does not violate the First Amendment, the Supreme Court has opened the window of opportunity for Congress to take action in addressing racial unrest and discriminatory problems throughout the United States. Upholding the constitutionality of a statute which allows increased penalties for hate motivated crimes not only provides a framework for the conflicting state decisions on similar statutes, but also takes a bold step in granting the government the power to address the discrimination which plagues our country.

-Kimberly A. Kelly

Monias v. Endal

TORT VICTIMS MAY RECOVER FOR "LOST YEARS" OF A SHORTENED LIFE EXPECTANCY BUT FAMILY MEMBERS MAY NOT.

The Court of Appeals of Maryland recently defined how damages should be calculated for loss of household services and loss of wages for the "lost years" when a plaintiff's normal life expectancy has been reduced as a result of a defendant's negligence. In *Monias v. Endal*, 330 Md. 274, 623 A.2d 656 (1993), the court expanded a personal injury plaintiff's recovery by permitting an award for lost earnings damages for the period of the "lost years" of the plaintiff's shortened life expectancy. At the same time, the court refused to permit recovery for loss of services to the plaintiff's children during the same time period.

Glenna and Andrew Endal filed a medical malpractice action against Ms. Endal's gynecologist, Dr. Michael Monias, alleging that Dr. Monias was negligent in failing to diagnose and treat breast cancer in Ms. Endal. In August, 1986, Glenna Endal went to Dr. Monias after discovering a small lump in her breast. She was assured

that the lump was "fibrocystic breast disease," and there was "nothing to worry about." Dr. Monias ordered a mammogram, but did not order a biopsy. Ms. Endal saw Dr. Monias six months later as instructed. Again, a mammogram was ordered, but not a biopsy. Approximately eight months after her second visit, Ms. Endal returned to Dr. Monias, who then referred her to a specialist who performed a biopsy which revealed a malignant tumor. A lumpectomy revealed that the cancer had metastasized and was in an advanced state.

According to expert medical testimony, if the breast cancer had been properly diagnosed in August, 1986, Ms. Endal would have had an 85-90% probability of survival and a normal life expectancy. Because the cancer had advanced, Ms. Endal had only a 20% chance of survival beyond November, 1992.

The case was submitted to the jury on written issues, and the trial

judge divided the elements of damages into damages before November, 1992, the statistically probable date of Ms. Endal's premature death, and damages after November, 1992, which were called "post premature death" damages. The second category included 1) the loss of income between Ms. Endal's probable date of death from cancer to her probable retirement date at age 65, and 2) loss of services to her three children from Ms. Endal's probable date of death until the youngest child reached age 18.

The total jury award for damages for the period before November, 1992 was \$461,682.00. "Post premature death" damages were awarded in the amounts of \$250,000 for loss of income or earnings, and \$200,000 for loss of household services to the children. In an unreported opinion, the court of special appeals affirmed the jury's determination of liability and affirmed all damage awards except for the \$200,000 "post premature death" damage award for the loss of household services to Ms. Endal's children. The court of appeals granted certiorari to review the damage award for loss of earnings and loss of services.

The court of appeals began its discussion of the loss of earnings award by noting that this was a personal injury action as opposed to either a survival or wrongful death action, and that recovery in this action would preclude a duplicative recovery for the same damages for loss of support in a wrongful death action. *Monias*, 330 Md. at 279-80. The court specifically rejected Dr. Monias' contention that future loss of wages is limited to the plaintiff's actual (shortened) life expectancy rather than the plaintiff's normal expectancy had the tort not occurred. *Id.* at 280. This issue had been left open in *Rhone v. Fisher*, 224 Md. 223, 231-32, 167 A.2d 773, 779 (1961), where the court

stated the rule that "generally a plaintiff is not entitled to recover damages for the 'lost years' themselves where the defendant's tort shortened the plaintiff's life expectancy." *Id.* at 280-81, 623 A.2d at 659. However, the plaintiff in *Rhone* failed to raise the issue of loss of earnings for the "lost years."

Stating that "[they would] not permit the tortfeasor to reduce liability for the victim's loss of earnings by reducing the victim's life expectancy," the court found that Ms. Endal was entitled to her loss of future earnings based on the normal life expectancy had she been properly diagnosed and treated. *Id.* at 282, 623 A.2d at 660.

As for the loss-of-services award, the court of appeals concluded that the award for the period before Ms. Endal's probable premature death was included in either the \$200,000 "noneconomic damages" award, or the \$75,000 award for loss of consortium. *Id.* at 283, 623 A.2d at 660. The loss-of-services award at issue was the "post premature death" award of \$200,000 for "loss of household services to children."

As noted above, the general rule is that a plaintiff cannot recover damages for the "lost years" of a shortened life expectancy caused by a defendant's negligence. *Rhone v. Fisher*, *supra*. The *Rhone* court did, however, acknowledge two potential categories of recoverable damages relating to a plaintiff's "lost years." The first category was mental suffering resulting from knowledge of the shortened life expectancy. The *Rhone* court upheld a jury's award that included such damages. *Monias*, 330 Md. at 283, 623 A.2d at 660. The second category, approved in the instant case, was "lost earnings during the lost years." *Id.* The *Monias* court recognized that this case involved a third category - "loss of services that the tort victim will not be able to provide to her family because of her

shortened life expectancy." *Id.* at 284, 623 A.2d at 660.

The court referred to Ms. Endal's contention that loss-of-services damages should be treated the same as loss-of-earnings damages, but noted that none of the cases cited by Ms. Endal in support of this contention addressed the issue of loss-of-services damages as it related to the "lost years" of a plaintiff's life expectancy. *Id.* at 284, 623 A.2d at 661.

The court differentiated between the two, stating that the case for recognizing loss-of-services damages relating to "lost years" is not as compelling as the case for recognizing loss-of-earnings damages for the same years. *Id.* "Loss-of-earnings damages are to compensate a tort victim for income the victim will not receive because of the tort. Loss-of-services damages, on the other hand, are to compensate a tort victim for services the victim will not be able to provide because of the tort." *Id.* (emphasis in original) Recognizing that while tort victims may seek damages for loss of services they would have provided for themselves, the court pointed out that the loss-of-services award in the instant case was to compensate Ms. Endal's family. Holding that family members should properly seek recovery for loss of services in a wrongful death action, the court of appeals found no justification for extending *Rhone* to permit a personal injury plaintiff's family to recover an award for loss-of-services damages for the "lost years" of a shortened life expectancy. *Id.* at 285, 623 A.2d at 661.

The court also presented, and rejected, two alternative theories for permitting an award for loss of household services to children. First, recognizing that this type of award is similar to a claim for "loss of parental consortium," the court found that Maryland law has not recognized such a claim for children except in the context of a wrongful death action.

Id. Second, while Maryland has recognized a limited claim for loss of the economic value of a child's services, the court declined to recognize a reciprocal loss of parental services claim on behalf of minor children. *Id.* at 286, 623 A.2d at 661-62.

By permitting a personal injury

plaintiff to recover damages for lost income, the Court of Appeals of Maryland eliminated the general rule that a plaintiff cannot recover for the "lost years" of a shortened life expectancy caused by a defendant's negligence. However, by refusing to allow recovery of damages for the tort

victim's children under a "lost years" theory, and refusing to recognize alternative theories of recovery, the court of appeals has made it clear that tort victims and their families have specific means of seeking recovery that the judiciary is not willing to expand.

-Kelly Reaver

***McCready Memorial Hospital
v. Hauser***

***CLAIMANT'S ATTEMPT TO
OBTAIN AUTOMATIC EXTENSION
FOR FILING EXPERT'S
CERTIFICATE PURSUANT TO
THE MARYLAND HEALTH
CARE MALPRACTICE
CLAIMS STATUTE NOT TRIGGERED
BY MERE REQUEST
UNDER § 3-2A-04(b)(1)(ii).***

In *McCready Memorial Hospital v. Hauser*, 624 A.2d 1249 (Md. 1993), the Court of Appeals of Maryland recently held that a claimant instituting an action under the Maryland Health Care Malpractice Claims Statute and attempting to obtain an extension to file the required certificate of qualified expert under Md. Cts. & Jud. Proc. Code Ann. § 3-2A-04(b)(1)(ii) must actually file the expert's certificate within 180 days from the initial filing of the action. The court concluded that a 90-day extension was automatic in a narrow class of cases, however, merely requesting a § 3-2A-04(b)(1)(ii) extension is not the proper path a claimant should take.

On March 14, 1990, five days before the statute of limitations was to run on their claim, John and Maxine Hauser filed a claim with the Health Claims Arbitration Office ("HCAO") pursuant to the Maryland Health Care Malpractice Claims Statute, Md. Cts. & Jud. Proc. Code Ann. § 3-2A-04(b)(1). The Hausers named the Edward J. McCready Memorial Hospital and two doctors who had consulted with Mrs. Hauser as defendants. They alleged that the doctors had negligently diagnosed her condition, allowing a cancerous tumor to go untreated. McCready Memorial Hospital was to be held vicariously liable for the acts of the doctors.

While the Hausers' "claim was timely filed, [they] failed to file an

expert's certificate with the HCAO within 90 days as required by § 3-2A-04(b)(1)(i). . . ." *Id.* at 1251-52. After the filing period had expired, the defendants filed motions to dismiss, asserting that the Hausers had failed to comply with the filing requirements of § 3-2A-04(b)(1)(i). Not until July 3, 1990, 21 days after the 90-day filing period had expired, did the Hausers respond to the motions to dismiss. *Id.* at 1252. An expert's certificate was not filed; however, the Hausers requested a 90 day extension pursuant to § 3-2A-04(b)(1)(ii), which reads:

(ii) In lieu of dismissing the claim, the panel chairman shall grant an extension of no more than 90 days for filing the certificate required by this paragraph, if:

1. The limitations period applicable to the claim has expired; and
2. The failure to file the certificate was neither willful nor the result of gross negligence. *Id.*

The Hausers contended that they came under the ambit of § 3-2A-04(b)(1)(ii), asserting that the statute of limitations had run and their failure to file an expert's certificate was neither willful nor the result of gross negligence. *Id.*

At a hearing on October 17, 1990, over 200 days after the Hausers filed their claims, the HCAO Panel Chair dismissed the claims for failure to file an expert's certificate or request an extension within the initial 90-day