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Torts

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TORTS

I. GOVERNMENTAL MOTOR VEHICLE TORT CLAIMS ACT

The South Carolina Governmental Motor Vehicle Tort Claims Act[1] allows claims against the state for death, personal injury, or loss of property caused by the negligent operation of a vehicle by a government employee.[2] In this limited area, the statute abrogates sovereign immunity in favor of a person who suffers injury or loss "to his person or property," if the person otherwise would have an action against a private party.[3] The Tort Claims Act does not expressly preclude third-party recovery, but, in *Watford v. South Carolina Highway Department,*[4] the South Carolina Supreme Court refused to allow a husband to sue the state for loss of consortium because the husband was not injured directly by the harm sustained by his wife in an automobile accident. Although earlier cases evidenced both broad and narrow constructions of the statute,[5] in *Watford,* the court narrowly interpreted the provisions of the law and denied the husband's derivative claim because it could not be considered an injury "to his person." *Watford,* thus, delimited the scope of the Tort Claims Act and gave preference to strict construction of its terms.

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1. S.C. CODE ANN. §§ 15-77-210 to -250 (1976 & Cum. Supp. 1979).
2. *Id.* Section 15-77-230 (Cum. Supp. 1979) provides:

> Any person sustaining an injury by reason of the negligent operation of any motor vehicle while being operated by an employee of a governmental entity while in and about the official business of such governmental entity may recover in an action against such governmental entity such actual damages as he may sustain . . . .

3. *Id.* § 15-77-220(5) (1976).
4. 273 S.C. 463, 257 S.E.2d 229 (1979).
5. *See* Morris v. South Carolina Highway Dep't, 264 S.C. 369, 215 S.E.2d 430 (1975) (construing "in and about the official business" in favor of the highway department, denying any recovery to plaintiffs); Truesdale v. South Carolina Highway Dep't, 264 S.C. 221, 213 S.E.2d 740 (1975)(holding that "negligent operation" includes a parked motor vehicle, allowing recovery for wrongful death). In 1976, one observer noted these divergent approaches. One view would interpret the Act with liberal regard for the rights of the injured party; the other focused on the right of the state to be free from liability unless it waived its immunity. The writer correctly predicted that the court would ultimately protect sovereign immunity by strictly construing the statute. *See Torts, Annual Survey of South Carolina Law,* 28 S.C.L. REV. 401, 411-12 (1976).

Watford's wife had sustained permanently disabling injuries in a June 1974 automobile collision with a state highway patrol car, giving rise to the husband's lawsuit under the Tort Claims Act for medical expenses and loss of consortium.[6] The trial judge rejected those claims by sustaining the demurrer of the highway department. He held, first, that the state cannot be sued without its express consent; second, that statutes waiving the state's immunity must be strictly construed; and finally, that damages under the Tort Claims Act could be recovered only for direct injury to person or property and not for consequential damages.[7] The validity of the doctrine of governmental immunity,[8] without which there would be no need for the Tort Claims Act, had not been challenged; therefore, the single issue on appeal was whether the trial judge had interpreted the statute properly to preclude third-party recovery against the state for medical expenses and loss of consortium.

Prior to the enactment in 1968 of the Tort Claims Act, gov-

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6. Record at 1.

7. *Id.* at 2-3.

8. The source of governmental immunity in South Carolina is said to be Young v. Commissioners of Rds., 11 S.C.L. (2 Nott. & McC.) 537 (1820), which recognized that suits against public officials would be a "prolific source of litigation" and stated that "where the officer acts for the public in general" no private action could be had against him. *See* Belton v. Richland Memorial Hosp., 263 S.C. 446, 450, 211 S.E.2d 241, 242 (1975). The first case to expressly hold that no suit would lie against the state, however, apparently was Treasurers v. Cleary, 37 S.C.L. (3 Rich.) 372, 375 (1831). A long succession of cases followed holding that actions in tort could not be brought without consent of the legislature, unless the injury constituted a taking of property without adequate compensation. *See* Graham v. Charleston County School Bd., 262 S.C. 314, 204 S.E.2d 384 (1974); Chilton v. City of Columbia, 247 S.C. 407, 147 S.E.2d 642 (1966); Gasque v. Town of Conway, 194 S.C. 15, 8 S.E.2d 871 (1940); Brooks v. One Motor Bus, 190 S.C. 379, 3 S.E.2d 42 (1939); Sherbert v. School Dist. No. 85, Spartanburg County, 169 S.C. 191, 168 S.E. 391 (1933); Chick Springs Water Co. v. State Highway Dep't, 159 S.C. 481, 157 S.E. 842 (1921); Lowry v. Thompson, 25 S.C. 416, 1 S.E. 141 (1886).

In *Belton*, the supreme court in a per curiam opinion admitted "serious reservations about the soundness and fairness" of the "entrenched" doctrine of sovereign immunity, but refused to exercise recognized judicial authority to abolish it on grounds that reform should come from the legislature. 263 S.C. at 450-51, 211 S.E.2d at 243. Justice Ness has objected strongly to the continuation of governmental immunity, charging it is "an obsolete, inequitable principle." Lyon v. City of Sumter, 272 S.C. 359, 364, 252 S.E.2d 118, 121 (1979)(Ness, J., dissenting); *see also* Boyce v. Lancaster County Natural Gas Auth., 266 S.C. 398, 223 S.E.2d 769 (1976)(Ness, J., dissenting). The court, however, has remained steadfast in its commitment to protect the doctrine. *See, e.g.*, Teague v. Cherokee Memorial Hosp., 272 S.C. 403, 252 S.E.2d 296 (1979)(refusing to make an exception to the governmental immunity doctrine to allow recovery of damages resulting from a governmentally created nuisance).

ernmental immunity was abrogated to a limited extent by the "defect" statutes which allowed recovery of tort claims arising out of defects in state,[9] county,[10] or city[11] maintained roadways. The municipal "defect" statute[12] had been construed to deny recovery for loss of consortium.[13] Plaintiff Watford, however, argued that substantial differences between the new law and the "defect" statutes support the view that the General Assembly intended to create a more liberal right of recovery under the Tort Claims Act.[14] First, the Act created a new legislative scheme, consolidating under a single statute authorization for claims against "any office, department, agency, authority, commission, board, institution, hospital, college, university, or other instrumentality" of the state[15] for the negligent operation of a vehicle by a government employee. The Act also seemed to place the state in the position of a private party defendant by providing recovery for "death, injury to a person, damage to or loss of property, or any other injury or loss that a person may suffer to his person or property, that would be actionable at law if inflicted by or through the fault of a private person or his agent."[16] Finally, the amount of compensation permitted under the Tort Claims Act was substantially greater than had been allowed against the highway department under the "defect" statute.[17]

These arguments were rejected by three of the five justices, who found no legislative intent to create new grounds for third-

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9. S.C. CODE ANN. § 57-5-1810 (1976). This section was amended by the act that created the Tort Claims Act and the portion that had allowed recovery for negligent operation of state motor vehicles was deleted. 1968 S.C. Acts 3027, No. 1273.

10. S.C. CODE ANN. § 57-17-810 (1976).

11. *Id.* § 5-7-70.

12. *Id.*

13. *See* Brazell v. City of Camden, 238 S.C. 580, 121 S.E.2d 221 (1961); Hollifield v. Keller, 238 S.C. 584, 121 S.E.2d 213 (1961).

14. Brief of Appellant at 5.

15. S.C. CODE ANN. § 15-77-220(1) (1976).

16. *Id.* § 15-77-220(5).

17. At the time of its passage, the Tort Claims Act allowed recovery of up to $10,000 for personal injury and $5,000 for property loss or damage, the total for a single mishap not to exceed $25,000. 1968 S.C. Acts 3027, No. 1273. Before 1968, liability of the highway department was not to exceed $3,000 for property damage by 1959 S.C. Acts 297, No. 157 (current version at S.C. CODE ANN. § 57-5-1810 (1976)) and possible recovery for personal injury or death was set at $8,000 by 1953 S.C. Acts 54, No. 53 (current version at S.C. CODE ANN. § 57-5-1810 (1976)).

party recovery.[18] Quoting from a case in which the court had denied recovery for loss of consortium under the municipal "defect" statute, Justice Rhodes, on behalf of the majority, wrote: "We cannot, by interpretation, expand or enlarge the provisions of the said statute. To hold otherwise would have the effect of broadening the permissory statute by judicial decree and bring about that which the Legislature has within its perogative not done."[19] He stressed that the Tort Claims Act limits a plaintiff's recovery to injuries suffered to "his person or property."[20] Loss of consortium is a derivative action based on a husband's legal obligation[21] and, therefore, is not an injury to "his person or property" within the provisions of the statute.[22]

Despite the *Watford* decision, there seem to be ample grounds for allowing recovery for loss of consortium under the Tort Claims Act without sacrificing reasonable and practicable construction of the statute. By abrogating absolute sovereign immunity, the legislature indicated a willingness to have the state assume the costs that would otherwise burden a party injured through the negligent operation of a motor vehicle by a state employee. Loss of consortium is a derivative claim, but to a husband whose wife has been permanently disabled, it is an injury to him nonetheless. Without relief, he must bear the burden of a loss that would entitle him to compensation in an action against a private party. Long before adoption of the Tort Claims Act, the common law recognized the need for compensating a husband for physical harm to his wife.[23] Notably, recovery for loss of consortium has been allowed against the federal government

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18. Watford v. South Carolina Highway Dep't, 273 S.C. at 466, 257 S.E.2d at 230 (Ness and Gregory, J.J., dissenting).

19. *Id.* (quoting Hollifield v. Keller, 238 S.C. 584, 598-99, 121 S.E.2d 213, 220 (1961)).

20. 273 S.C. at 466, 257 S.E.2d at 230.

21. Consortium includes spousal society, companionship, and services. Because a husband is required to furnish necessities to his wife, he has the right to recover for harm to her. Hughey v. Ausborn, 249 S.C. 470, 475-76, 154 S.E.2d 839, 841 (1967). A married woman was not entitled to recover for loss of consortium under common law, but was given the right statutorily in 1969 with the enactment of what is now S.C. CODE ANN. § 15-75-20 (1976). For a discussion of loss of consortium, see Comment, *Damages—Husband and Wife, Parent and Child—Punitive Damages Disallowed in Husband's Cause of Action Arising Out of Injuries To His Wife and Minor Child,* 19 S.C.L. REV. 871 (1967).

22. 273 S.C. at 466, 257 S.E.2d at 230.

23. See note 21 *supra.*

under the Federal Tort Claims Act.[24]

By choosing to interpret narrowly the terms of the statute as applied to the facts in *Watford,* the court did not find relevant its own warning in an earlier case that "extremely strict construction" of the Tort Claims Act would defeat its purpose, which was "clearly remedial in nature" and designed to protect "those persons who have sustained damage and injury."[25] Instead, the court reaffirmed the strict standard of *Morris v. South Carolina Highway Department,*[26] which concluded that "it is the duty of the court to construe the Acts waiving sovereign immunity so as to uphold the power of the State to refuse to be sued by a citizen in its own court, except in those instances where the State has expressly consented to be sued."[27] With the supreme court presently taking the position that it is the guardian of governmental immunity, lawyers should look to the General Assembly rather than the courts for any further restriction of that doctrine when bringing suits pursuant to the Governmental Motor Vehicle Tort Claims Act.

II. Libel and Slander

The South Carolina Supreme Court, in *Richardson v. McGill,*[28] held that an absolute privilege[29] protects state legislators

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24. 28 U.S.C. § 1346(b) (1976) provides:

> Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

See, e.g., Griffin v. United States, 500 F.2d 1059 (9th Cir. 1974); United States v. Bell, 354 F.2d 220 (5th Cir. 1965); McCluggage v. United States, 296 F. Supp. 485 (S.D. Ohio 1966); Kolesar v. United States, 198 F. Supp. 517 (S.D. Fla. 1961).

25. Truesdale v. South Carolina Highway Dep't, 264 S.C. 221, 227-28, 213 S.E.2d 740, 743 (1975).

26. 264 S.C. 369, 215 S.E.2d 430 (1975).

27. *Id.* at 374, 215 S.E.2d at 432-33.

28. 273 S.C. 142, 255 S.E.2d 341 (1979).

29. The court explained that

> [p]rivileged communications in the law of libel and slander are either *absolute* or *qualified.* "When the communication is absolutely privileged, no action will

from defamation suits arising from remarks made outside legislative proceedings. Overcoming the absence of constitutional or statutory immunity from libel and slander actions,[30] the court based its decision on the broad application of absolute privilege to other kinds of communications and a public policy that historically has favored the protection of government representatives. The decision provides protection for legislative communications whenever the representative has an "official interest"[31] in the subject matter of his remarks. A legislator qualifies for the privilege if he is engaged in a "legislative duty or process,"[32] even though he is outside the statehouse and speaks about matters which are of interest only in his district.

The defamation suit in *Richardson* was brought against State Representative Frank McGill for remarks allegedly made about the competence and morals of Williamsburg County Recreation Department Director George Richardson[33] during a private meeting of the Williamsburg County legislative delegation and the county recreation commission in September 1975.[34] At that time the legislative delegation was charged with appropriat-

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lie for its publication, no matter what the circumstances under which it is published. When qualified, however, the plaintiff may recover if he shows that it was actuated by malice."

Id. at 145, 255 S.E.2d at 342 (quoting Bell v. Bank of Abbeville, 208 S.C. 490, 493, 38 S.E.2d 641, 642 (1946)).

30. In Tenny v. Brandhove, 341 U.S. 367, 375 n.5 (1951), Justice Frankfurter listed forty-one states that have speech or debate clauses in their constitutions protecting the legislative privilege to speak and act without fear of criminal or civil liability. These provisions are similar to those found in the federal constitution protecting members of Congress "for any Speech or Debate." U.S. CONST. art. I, § 6. South Carolina offers constitutional protection for legislators only from arrests for misdemeanors and criminal and civil summons for a period beginning ten days before and ending ten days after the General Assembly session. S.C. CONST. art. III, § 14.

The common-law principle that would restrict absolute privilege to communications in legislative or judicial proceedings has been recognized but never applied by the state's courts. *See, e.g.*, Fulton v. Atlantic Coast Line R.R., 220 S.C. 287, 296, 67 S.E.2d 425, 429 (1951).

31. *See* Richardson v. McGill, 273 S.C. at 146, 255 S.E.2d at 343.

32. *Id.*

33. McGill's remarks allegedly were:

"That people are dissatisfied with George Richardson, that he is incompetent. That he was going with the women in the Department and no woman would be hired unless George Richardson could go to bed with them and as a result he would hire no married women."

Id. at 144, 255 S.E.2d at 342.

34. *Id.*

ing county funds and recommending appointees to the recreation commission. Furthermore, the recreation commission was required to file an annual report of its operations, expenditures, and activities with the legislative delegation,[35] although it supervised the recreation department and retained hiring and firing power over its employees,[36] which included Richardson. Given these circumstances, the supreme court concluded that McGill had an "official interest" in the operations and personnel of the Williamsburg County Recreation Commission and a legitimate reason to speak out against Richardson.[37] According to the court, "[u]nder the present facts, public policy mandated that legislators be permitted to pursue reports of incompetent or illegal behavior involving appointed county personnel without the necessity of having to justify their actions in a suit for defamation."[38]

Although the South Carolina Supreme Court has stated that the class of absolutely privileged communications should be "practically limited to legislative and judicial proceedings and acts of state,"[39] it has not adhered to this view. Absolute privilege has been applied in a variety of circumstances including those involving letters between attorneys,[40] letters between private parties,[41] the probating of a libelous will,[42] communications in an arbitration proceeding,[43] and petitioning the General Assembly for redress of grievances.[44] Moreover, as the court noted in *Richardson,* "[a] sound public policy has long recognized an absolute immunity of members of legislative bodies for acts in the performance of their duties."[45] Historically, the view has

35. *Id.* at 147, 255 S.E.2d at 343.

36. *See* Brief of Respondent at 5-6.

37. 273 S.C. at 146, 255 S.E.2d at 343.

38. *Id.* at 147, 255 S.E.2d at 343.

39. Fulton v. Atlantic Coast Line R.R., 220 S.C. at 296, 67 S.E.2d at 429. For application of absolute privilege in judicial proceedings, *see, e.g.,* McKesson & Robbins v. Newsome, 206 S.C. 269, 33 S.E.2d 585 (1945); Lybrand v. State Co., 179 S.C. 208, 184 S.E. 580 (1936); Sanders v. Rollinson, 33 S.C.L. (2 Strob.) 447 (1848); Vausse v. Lee, 19 S.C.L. (1 Hill) 197 (1833).

40. *See* Rodgers v. Wise, 193 S.C. 5, 6, 7 S.E. 517, 517 (1940).

41. *See* State v. Drake, 122 S.C. 350, 351, 115 S.E. 297, 298 (1922).

42. *See* Carver v. Morrow, 213 S.C. 199, 204-06, 48 S.E.2d 814, 816-17 (1948).

43. *See* Corbin v. Washington Fire & Marine Ins. Co., 278 F. Supp. 393, 398 (D.S.C. 1968).

44. *See* Reid v. Delorme, 4 S.C.L. (2 Brev.) 76, 79 (1806).

45. 273 S.C. at 146, 255 S.E.2d at 343.

been that for a representative to carry out his duties "with firmness and success . . . he should enjoy the fullest liberty of speech . . . protected from the resentment of every one."[46]

Subject to the sole limitation that the communication be "connected with, or relevant or material to the matter under inquiry,"[47] the privilege protecting McGill is extensive. When a legislator has an "official interest," his remarks are privileged, and, under the facts in *Richardson,* he can claim immunity by showing a connection to the defamed party that is only incidental to his legislative duties. The United States Supreme Court, however, has interpreted the legislative privilege to be much more limited and has recently reaffirmed this position in *Hutchinson v. Proxmire.*[48] The speech or debate clause of the United States Constitution and the South Carolina legislative privilege are based on the same policy favoring legislative freedom that was adopted "as a matter of course"[49] when the United States was founded, but the Supreme Court found nothing in the clause or its history manifesting an intention on the part of the framers to extend absolute immunity to remarks made outside the Capitol Chambers.[50] Moreover, *Hutchinson* held that protection under the speech or debate clause is limited to conduct essential to the deliberative process[51] and does not protect "all conduct relating to the legislative process."[52]

Most notable in *Richardson* is the failure of the court to consider the countervailing interests of the allegedly defamed person in protecting his character and reputation. A more balanced decision might have weighed Richardson's rights against the public interest to be protected by the absolute privilege. The court also could have addressed the quality of the representative's interest and the value of his communication to the legislative inquiry involved. The "official interest" of a representative

46. Tenny v. Brandhove, 341 U.S. at 373 (quoting 2 WORKS OF JAMES WILSON 38 (Andrews ed. 1896)(quoting James Wilson, member of the Committee of Detail which was responsible for the speech or debate clause, U.S. CONST. art. 1, § 6)).

47. 273 S.C. at 146, 255 S.E.2d at 343.

48. 99 S. Ct. 2675 (1979).

49. The history of legislative immunity was traced by Justice Frankfurter in Tenny v. Brandhove, 341 U.S. 367, 372 (1951).

50. 99 S. Ct. at 2684.

51. *Id.* at 2686.

52. *Id.* (quoting United States v. Brewster, 408 U.S. 501, 512 (1972)).

should not exceed his authority and when he has no authority there is no reason for a representative to have special protection. Conversely, when a representative's authority is greatest, protection should be most extensive. Requiring only the presence of an "official interest," no matter how incidental to the legislator's duties,[53] is not satisfactory because an "official interest" cannot account for all of a representative's motives when he acts within such a broad range of activities. The *Richardson* decision, however, creates an irrebuttable presumption that a legislator will not make defamatory remarks in the absence of public concern. The questionable validity of this presumption is compounded by the court's refusal to consider legitimate interests of potential plaintiffs.

Although the court's analysis is not satisfactory in theory, as a practical matter, *Richardson* presents an anomalous situation. As rare as libel and slander actions are, defamation suits against a state representative are even less common. Furthermore, with the adoption of home rule in South Carolina resulting in more clearly demarcated boundaries between state and local governments,[54] a state legislator's sphere of duties is more easily defined and an incidental association is less likely to be within the ambit of an official interest. Most significantly, the facts in *Richardson* illustrate how far beyond legislative and judicial proceedings the court has decided to extend a legislator's absolute privilege of communication.

III. Statute of Limitations

Traditionally in South Carolina, the statute of limitations for a legal malpractice action began running at the time of injury to the client.[55] The difficulty with this rule, of course, was that the statute might bar a claim before the injury could be discov-

53. Restatement (Second) of Torts § 590, Comment *a* (1977) recommends that an absolute privilege be granted to representatives performing a "legislative function" that is not confined to the floor of the legislative body or to the time the legislature is in session. The privilege recommended by the Restatement, however, would not protect a legislator "who engages in other activities incidentally related to legislative affairs but not a part of the legislative process itself."

54. *See* 1975 S.C. Acts 692, No. 283 (current version at S.C. Code Ann. § 4-9-10 to -1230 (1976)).

55. *See* Executors of Thomas v. Executors of Ervin, 25 S.C.L. (Chev.) 22 (1839).

ered. Faced with this classic problem in *Mills v. Killian*,[56] the South Carolina Supreme Court chose not to impose that harsh result and struck down the old rule in favor of tolling the statute of limitations until the claimant discovers he has been harmed.[57] Practitioners should note that although the old practice fixed the term of a lawyer's malpractice exposure, under the new rule the period is indeterminable.[58]

The cause of action in *Mills* arose from an attorney's failure to find notice of a second mortgage on a property deed while preparing a foreclosure for a savings and loan association in 1958. In 1975, the holder of the second mortgage attempted to foreclose against the property owners, who joined their predecessor in title, the savings and loan association. The savings and loan, which had given a general warranty deed on the property, joined the attorney in order to crossclaim against him for negligence in the event that they were held liable.[59] The six-year[60] or ten-year[61] statute of limitations, raised by the lawyer in defense,[62] would have barred the savings and loan's claim under the old rule. The supreme court concluded, however, that imposing the statute when the savings and loan did not know of the error during the limitations period would be "manifestly unfair."[63] The court decided, as many courts have in the past ten years,[64] that it is "more equitable and rational" to toll the statute until the client discovers his injury.[65]

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56. 273 S.C. 66, 254 S.E.2d 556 (1979).

57. *Id.* at 70, 254 S.E.2d at 558.

58. *See* R. MALLEN & V. LEVIT, LEGAL MALPRACTICE 204, at 286 (1977).

59. 273 S.C. at 67-68, 254 S.E.2d at 557.

60. S.C. CODE ANN. § 15-3-530(5) (Cum. Supp. 1979) provides a six-year statute of limitations for "[a]n action for criminal conversation or for any other iniury to the person or rights of another, not arising on contract, not hereinafter enumerated, and those provided for in § 15-3-545." Section 15-3-545 provides for actions for medical malpractice. See note 74 *infra*. Other actions enumerated in the section include wrongful death, fraud, recovery under an insurance policy, and recovery against directors or stockholders of a moneyed corporation or banking association. S.C. CODE ANN. § 15-3-530(6)-(9) (1976).

61. S.C. CODE ANN. § 15-3-600 (1976) provides that "[a]n action for relief not provided for in this chapter must be commenced within 10 years after the cause of action shall have accured."

62. 273 S.C. at 69, 254 S.E.2d at 558.

63. *Id.* at 70, 254 S.E.2d at 558.

64. *See* cases cited note 76 *infra*.

65. 273 S.C. at 70, 254 S.E.2d at 558.

In 1977, the General Assembly enacted a statute that tolls the six-year statute of limitations for personal injury claims until the claimant "knew or by the exercise of reasonable diligence should have known that he had a cause of action."[66] This statutory "discovery rule"[67] probably could be applied to post-1977 attorney malpractice actions. Since it does not apply to contract actions, however, and since malpractice claims have elements of both tort and contract, that application would not be certain. *Mills* would render futile any prospective attempt to raise as a bar to an attorney malpractice action the six-year statute of limitations for contract actions[68] or the ten-year statute of limitations for "any other action" not expressly covered by statute,[69] neither of which is subject to the statutory rule providing that the statute of limitations does not begin to run on personal injury causes of action until the injury is discovered.

The old practice furthered traditional objectives of the statute of limitations—preventing stale claims, protecting potential defendants' reasonable expectations of not being sued long after the event, and discouraging claimants from "sleeping on their rights"[70]—but the results of application of the "occurrence rule" could be indisputably harsh.[71] Most clients, understanding little of the law,[72] stand in a relationship of trust with their lawyers. Often a lawyer works without assistance of the client or other lawyers, and carelessness, particularly in a property transaction, may remain undetected for a long period of time. Denying recovery on a valid claim because of strict application of the statute of limitations could impose on an injured party a greater burden

66. S.C. CODE ANN. § 15-3-535 (Cum. Supp. 1979) provides: "Except as to actions initiated under § 15-3-545 of the 1976 Code, all actions initiated under Item 5 of § 15-3-530 as amended, shall be commenced within six years after the person knew or by the exercise of reasonable diligence should have known that he had a cause of action."

67. The court's use of the term "discovery rule," 273 S.C. at 70, 254 S.E.2d at 558, in reference to the tolling of the statute of limitations until the cause of action is discovered is apparently in keeping with other jurisdictions. *See, e.g.*, Gattis v. Chavez, 413 F. Supp. 33 (D.S.C. 1976); R. MALLEN & V. LEVIT, *supra* note 58, § 204, at 284-89.

68. *See* S.C. CODE ANN. § 15-3-530(1) (1976).

69. *See id.* § 15-3-600.

70. *See* Kelley, *The Discovery Rule for Personal Injury Statutes of Limitations: Reflections on the British Experience*, 24 WAYNE L. REV. 1641, 1643-45 (1978).

71. *See* R. MALLEN & V. LEVIT, *supra* note 58, § 201, at 270.

72. See Comment, Martin v. Clements: *The Statute of Limitations for Attorney Malpractice in Idaho*, 15 IDAHO L. REV. 345, 351 (1979).

than a reasonable policy demands.[73] The South Carolina General Assembly realized the harshness of such a rule on medical malpractice claims,[74] as well as other personal injury actions.[75] Therefore, the supreme court, concurring with the General Assembly, wisely joined the national trend,[76] and applied to attorney malpractice claims the rule that a cause of action will accrue upon discovery of the injury.

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73. *See* Gattis v. Chavez, 413 F. Supp. 33, 39 (D.S.C. 1976). In *Gattis,* a medical malpractice suit, the court correctly predicted that South Carolina would adopt the "discovery" rule and that a cause of action would accrue when the plaintiff discovered or by reasonable means should have discovered the facts from which the cause of action arose. *Id.* This rule was adopted, but by statute. *See* note 74 *infra.*

74. *See* S.C. CODE ANN. § 15-3-545 (Cum. Supp. 1979), which provides:

> Any action to recover damages for injury to the person arising out of any medical, surgical or dental treatment, omission or operation by any licensed health care provider as defined in Article 2 of Chapter 59 of Title 38 shall be commenced within three years from the date of the treatment, omission or operation giving rise to the cause of action or three years from date of discovery or when it reasonably ought to have been discovered, not to exceed six years from date of occurrence. When the action is for damages arising out of the placement and inadvertent, accidental or unintentional leaving of a foreign object in the body or person of any one of the negligent placement of any appliance or apparatus in or upon any such person by any licensed health care provider by reason of any medical, surgical or dental treatment or operation, such action shall be commenced within two years from date of discovery or when it reasonably ought to have been discovered; *provided,* however, that the provisions of this section shall apply only to causes of action which arise after June 10, 1977, and, as to causes of action which arise prior to June 10, 1977, the Statute of Limitations existing prior to June 10, 1977, shall apply.

75. *See* S.C. CODE ANN. § 15-3-535 (Cum. Supp. 1979).

76. For cases on attorney malpractice, *see, e.g.,* Woodruff v. Tomlin, 511 F.2d 1019 (6th Cir. 1975); Pioneer Nat'l Title Ins. Co. v. Sabo, 432 F. Supp. 76 (D. Del. 1977); Neel v. Magana, Olney, Levy, Cathcart & Gelfand, 6 Cal. 3d 176, 491 P.2d 421, 98 Cal. Rptr. 837 (1971); Edwards v. Ford, 279 So. 2d 851 (Fla. 1973); Kohler v. Woollen, Brown, and Hawkins, 15 Ill. App. 3d 455, 304 N.E.2d 677 (1973); Cameron v. Montgomery, 225 N.W.2d 154 (Iowa 1975); Hendrickson v. Sears, 365 Mass. 83, 310 N.E.2d 131 (1974); Sorenson v. Pavlikowski, 94 Nev. 127, 581 P.2d 851 (1978); McKee v. Riordan, 116 N.H. 729, 366 A.2d 472 (1976); United States Nat'l Bank v. Davies, 274 Or. 663, 548 P.2d 966 (1976); Peters v. Simmons, 87 Wash. 2d 400, 552 P.2d 1053 (1976); Family Sav. & Loan, Inc. v. Ciccarello, 157 W. Va. 983, 207 S.E.2d 157 (1974).

Maryland, already having held that the statute of limitations would be tolled in professional malpractice cases sounding in negligence involving doctors and engineers until discovery of the injury, was apparently the first state to apply the rule to attorney malpractice. In a case arising from an allegedly negligent title search, the Maryland Supreme Court reasoned that lawyers should be held to the same principle imposed on other professionals even though the attorney-client relationship is contractual. Mumford v. Staton, Whaley & Price, 254 Md. 697, 255 A.2d 359 (1969).

IV. Automobile Guests

The South Carolina Supreme Court struck down the Automobile Guest Statute[77] in *Ramey v. Ramey*,[78] holding that the statute violated the guest-passenger's constitutional guarantee of equal protection.[79] After *Ramey*, a guest-passenger no longer must show intentional, reckless, or heedless misconduct to recover damages from a host-driver. Less apparent, but significant to future claims by injured automobile guests, was the implicit substitution of the reasonable care negligence standard for the "slight care" standard provided for in the statute.[80]

The guest statute, by requiring a plaintiff to prove more than ordinary negligence, modified general common-law notions of personal injury recovery for the sake of protecting the guest-host relationship and preventing collusive lawsuits.[81] Under the guest statute, the degree of care owed a nonpaying guest was less than that owed a paying passenger, an approach similar to the one employed by the law of bailments, which, in establishing required degrees of care, distinguishes gratuitous bailees from bailees for hire.[82] Thus, the standard of care was determined by

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77. S.C. Code Ann. § 15-1-290 (1976). The Automobile Guest Statute provided:

> No person transported by an owner or operator of a motor vehicle as his guest without payment for such transportation shall have a cause of action for damages against such motor vehicle or its owner or operator for injury, death or loss in case of an accident unless such accident shall have been intentional on the part of such owner or operator or caused by his heedlessness or his reckless disregard of the rights of others.
>
> This section shall not relieve a public carrier or any owner or operator of a motor vehicle which is being demonstrated to a prospective purchaser of responsibility for any injuries sustained by a passenger while being transported by such public carrier or while such motor vehicle is being so demonstrated.

Id.

78. ___ S.C. ___, 258 S.E.2d 883 (1979). For a discussion of the constitutional significance of the *Ramey* case, see *Constitutional Law, Annual Survey of South Carolina Law, 32* S.C.L. Rev. 29, 29 (1980).

79. Ruby Ramey brought suit against her husband alleging his negligence caused her injuries sustained as a guest-passenger in an automobile accident. Her husband admitted responsibility for the mishap, but denied any intentional, reckless, willful, or wanton misconduct on his part. Mrs. Ramey claimed that by not allowing her to sue her husband for simple negligence, the guest statute violated both the United States and South Carolina Constitutions. ___ S.C. at ___, 258 S.E.2d at 883.

80. *See* Comment, *The Common Law Basis of Automobile Guest Statutes*, 43 U. Chi. L. Rev. 798, 809-14 (1976).

81. Ramey v. Ramey, ___ S.C. at ___, 258 S.E.2d at 884.

82. *See* W. Prosser, Handbook of the Law of Torts § 34, at 181-84 (4th ed. 1971); Comment, *supra* note 80, at 806-07.

the relationship of the driver to the passenger.[83] The supreme court rejected this scheme in *Ramey,* finding no significant difference between automobile guests and "all other recipients of a host's generosity," or between nonpaying guests and paying passengers.[84] It affirmed the trial court's holding that there is "no rational justification for singling out persons injured in automobile accidents as different from all others injured in negligent torts."[85]

The court also noted that "[p]rior to the enactment of the guest statute in 1930, the common law imposed a duty of reasonable care on those who transported nonpaying guests."[86] Actually, prior to 1930, South Carolina, unlike most states, had no judicial pronouncement on the standard of care owed automobile guests. In other jurisdictions either of two common-law viewpoints prevailed. The majority held that a "voluntary undertaker should . . . be required to exercise that degree of care and caution which would seem reasonable and proper from the character of the thing undertaken,"[87] while the minority held that "[j]ustice requires that the one who undertakes to perform a duty gratuitously should not be under the same measure of

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83. Ramey v. Ramey, ___ S.C. at ___, 258 S.E.2d at 887 (Littlejohn, J., dissenting).

84. *Id.* at ___, 258 S.E.2d at 885-86. The court apparently was referring to the duty of the host not to take affirmative action to injure a guest (a licensee), and not a duty to inspect and warn the guest. Paying passengers, on the other hand, are to be accorded the "highest degree of care" by common carriers. Sutton v. Southern Ry., 82 S.C. 345, 348, 64 S.E. 401, 402 (1909). In actual application, the care owed by a common carrier is no more than "a prudent person in the exercise of ordinary care" in the same situation would provide. Poliakoff v. Shelton, 193 S.C. 398, 403, 8 S.E.2d 494, 496 (1940)(quoting Louisville & I. R. Co., 152 Ky. 719, 154 S.W. 16 (1913)).

This view of the duty owed by common carriers is recognized by some commentators:

> A majority of courts uphold an instruction to the jury which exacts of a common carrier of passengers for hire, toward the passenger, the highest degree of care and forethought consistent with practical operation of the business. . . . [T]here is general agreement that the reasonable man engaged in the public transportation business would recognize the great potential dangers which attend rapid transit. . . . In view of this it is not at all clear that the instruction actually imposes on the carrier a standard different from that of ordinary care under the circumstances.

2 F. HARPER & F. JAMES, THE LAW OF TORTS 947-48 (1956). *See also* W. PROSSER, *supra* note 82, § 34, at 181.

85. ___ S.C. at ___, 258 S.E.2d at 883.

86. *Id.* at ___, 258 S.E.2d at 884.

87. Avery v. Thompson, 117 Me. 120, 124, 103 A. 4, 6 (1918).

obligation as one who enters upon the same undertaking for pay."[88] Obviously the minority position imposed a standard of care similar to that of the South Carolina Guest Statute, while the majority adopted the standard of ordinary care.[89] Now that the guest statute has been struck down, it is important to note what standard the court adopted.

The court found that automobile guests are similarly situated to other types of guests.[90] By no longer requiring a showing of reckless, willful, or wanton misconduct as required by the statute, plaintiff could now go forward with the suit based on simple negligence. Thus, the supreme court effectively joined the majority of courts that imposed reasonable care as the standard of negligence prior to widespread adoption of the guest statutes. While the court did not expressly reinstate the common-law standard of ordinary care, it seems certain that this standard will be applied now that the lower standard imposed by statute has been held invalid.

Charles L. Henshaw, Jr.

88. Massaletti v. Fitzroy, 228 Mass. 487, 516, 118 N.E. 168, 177 (1917). *See also* 5 BLASHFIELD AUTOMOBILE LAW AND PRACTICE § 211.1-.2 (3d ed. 1966).

89. *See generally* Comment, *supra* note 80.

90. _ S.C. at _, 258 S.E.2d at 885.