SURVEY OF RECENT DEVELOPMENTS IN NEW JERSEY LAW

In this section, the Seton Hall Law Review *presents synopses of recent New Jersey cases of interest to practitioners. In so doing, we hope to assist the legal community in keeping abreast of some of the more interesting changes in significant areas of practice.*

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INSURANCE—INJURY BENEFITS—EXCLUSIONARY CLAUSE WHICH BARS COVERAGE WHEN SUCH IS AVAILABLE UNDER WORKERS' COMPENSATION IS VALID AS TO PUBLIC POLICY—*LaPollo v. Hospital Service Plan*, 113 N.J. 611, 552 A.2d 150 (1989).

Charles J. LaPollo, a minor, incurred $70,000 in medical costs as a result of injuries sustained while working for Ponderosa Steak House. 113 N.J. at 614, 552 A.2d at 151. Although LaPollo was covered under his father's New Jersey Blue Cross and Blue Shield (Blue Cross/Blue Shield) health insurance policy, they denied him compensation. LaPollo brought suit against Blue Cross/Blue Shield demanding payment under the policy. The basis for Blue Cross/Blue Shield's denial was an exclusionary clause in the policy which specifically refused payment for any medical expenses where compensation was "available in whole or in part under the provisions of any Workers' Compensation Law." *Id.* at 616, 552 A.2d at 151. LaPollo had foregone his absolute right to workers' compensation and had brought a common law tort action against Ponderosa pursuant to N.J. STAT. ANN. § 34:15-10 (West 1988). *LaPollo*, 113 N.J. at 614, 552 A.2d at 151. Blue Cross/Blue Shield contended that while LaPollo opted to pursue a tort remedy, benefits under workers' compensation were originally "available" and this clause thus excluded payment. *Id.* at 615, 552 A.2d at 151.

The trial court, in granting LaPollo's motion for summary judgment, held that the exclusionary clause was ambiguous with regard to a minor's election to forego workers' compensation benefits. *Id.* at 614-15, 552 A.2d at 151. This ambiguity, according to the trial court, must be strictly construed against the policy-maker. *Id.* at 614, 552 A.2d at 151. The appellate court affirmed, reasoning that a finding for Blue Cross/Blue Shield would circumvent the preferential status given to minors under N.J. STAT. ANN. § 35:15-10. *LaPollo*, 113 N.J. at 615, 552 A.2d at 151. The appellate court reasoned that the inability of a minor to recover from a health insurance carrier if he declines to pursue workers' compensation benefits would greatly impede his right to seek tort damages. *Id.*, 552 A.2d at 151.

Justice O'Hern, writing for a unanimous court, stated that New Jersey's workers' compensation law provides a comprehensive, no-fault system of reimbursement for medical expenses and lost income stemming from work-related injuries. *Id.* at 613, 552 A.2d at 150. While this remedy is exclusive for most injured

workers, the court observed that N.J. STAT. ANN. § 34:15-10 affords minors the option to forego compensation under the plan and bring a tort action against the employer. *LaPollo*, 113 N.J. at 613, 552 A.2d at 151. The minor must choose between the definite, albeit limited amount available under workers' compensation, or the possibility of a greater recovery in a tort action. *Id.*, 552 A.2d at 151. Justice O'Hern noted that it was the plaintiff's decision to pursue the latter approach which triggered the exclusionary clause in the Blue Cross/Blue Shield policy. *Id.* at 614, 552 A.2d at 151.

The court quickly dispensed with the issue of the clause's ambiguity. *Id.* at 616, 552 A.2d at 152. Justice O'Hern stated that the exclusionary clause eliminated any uncertainties regarding contemporaneous payments. *Id.* While the exclusionary clause was deemed not to be ambiguous, the court emphasized that the enforceability of the clause required separate consideration. *Id.*

Recognizing the appellate court's emphasis on the minor's right to a tort remedy as an important public policy consideration, Justice O'Hern stressed the greater concern of eliminating the possibility of double recovery. *Id.* at 616-17, 552 A.2d at 152. The court explained that allowing a minor to recoup medical expenses from an insurance carrier, and then to successfully recover in a tort action, would lead to duplicate reparation. *Id.* at 617, 552 A.2d at 152-53. Double recovery, according to the court, is clearly antagonistic to the underlying principle of New Jersey's personal injury protection laws. *Id.*, 552 A.2d at 152.

Justice O'Hern noted that because the plaintiff in the present case successfully pursued his tort remedy, the court would not address the issue of whether an unsuccessful tort action against the employer precludes the availability of health benefits. *Id.*, 552 A.2d at 153. The court acknowledged, however, that in such a situation the minor would be left without compensation for medical expenses if the exclusionary clause was given full force. *Id.*

Considering that the legislature has already expressed a strong preference for affording minor workers greater benefits than adults, the court emphasized that the legislature should address the policy issues of such exclusionary clauses. *Id.* at 618, 552 A.2d at 153. According to Justice O'Hern, the legislature, as regulators of the insurance industry, should foreclose this argument. *Id.*

Although the court correctly identified the possibility of double reparation as a major policy consideration, the rights afforded minor workers may have been unduly subjugated. Recognizing the lower courts' reliance on the strong legislative intent in reserving greater protection to working minors, Justice O'Hern nonetheless systematically found shielding against double reparation an overriding concern.

As noted by the appellate court, giving full force to the exclusionary clause would tend to have a chilling effect on a minor's right to opt for a tort remedy. If a minor is not to receive payments for medical expenses should his tort action fail, the privilege afforded by the legislature to forego workers' compensation is a shallow one.

Legislative intent to protect working minors and the court's prescription against double reparation need not, however, be mutually exclusive. For N.J. STAT. ANN. § 2A:15-97 (West Supp. 1988), which deducts from a plaintiff's award any benefits paid by a collateral source, already protects against the risk of double reparation. A minor could thus elect to pursue a tort remedy without the fear of noncompensation of medical expenses. This practice would lead to the ultimate preservation of both the minor's rights and the policy against double reparation.

Robert John Beacham

EVIDENCE—DRUNKEN DRIVING—DEFENDANT SUBJECTED TO BREATHALYZER TEST MAY SUPPRESS RESULTS IF POLICE DENY REQUEST TO MAKE A TELEPHONE CALL WHICH WOULD AID IN OBTAINING INDEPENDENT EXAM—*State v. Hicks*, 228 N.J. Super. 541, 550 A.2d 512 (App. Div. 1988).

In October of 1987, defendant Ned Hicks was arrested for his involvement in a two-vehicle collision. 228 N.J. Super. at 544, 550 A.2d at 513. Patrolman Pantuso reported to the scene of the accident and observed Hicks acting in an argumentative and loud manner. *Id.*, 550 A.2d at 513-14. The officer also detected the odor of alcohol on Hicks's breath. *Id.*, 550 A.2d at 514. After failing various field sobriety tests, the patrolman brought Hicks to police headquarters, where he underwent two breathalyzer ex-

aminations. Both tests revealed a blood alcohol reading in excess of the legal limit.

Hicks appeared before the municipal court, which determined that the defendant had been informed of his right to have independent blood tests administered by a physician or person of his choice, pursuant to N.J. STAT. ANN. 39:4-50.2(c) (West Supp. 1988). *Hicks*, 228 N.J. Super. at 544-45, 550 A.2d at 513. The court also discovered, however, that Hicks had been denied repeated requests to contact his wife, both at the scene of the accident and at the police station. *Id.* at 545-46, 550 A.2d at 514. Significantly, Hicks testified that he desired to contact his wife, "so she would know exactly where [he was]." *Id.* at 545, 550 A.2d at 514. Because Hicks was not afforded the opportunity to contact his wife, he moved to dismiss the charges. *Id.* at 544, 550 A.2d at 513. The municipal court judge denied Hicks's request, and relying on the two blood alcohol readings, found the defendant guilty of drunken driving. *Id.* at 546, 550 A.2d at 514.

At a trial de novo in the New Jersey Superior Court, Law Division, the defendant again contended that the breathalyzer results should not be admitted due to the officer's failure to help Hicks in effectuating his right to an independent examination. *Id.* The law division affirmed the defendant's conviction, concluding that the state has no duty to aid a defendant in obtaining independent tests, and that it is the defendant's responsibility to procure such examinations. *Id.* at 547, 550 A.2d at 515.

On appeal, the New Jersey Superior Court, Appellate Division concluded that breathalyzer results may be suppressed only when a defendant is given notice of his statutory right to an independent exam and is not afforded a meaningful opportunity to effectuate completion of the test. *Id.* The court cautioned, however, that the defendant must establish that his telephone call was "sought for the purpose of arranging or discussing the possibility of a test, and if such an examination could have been conducted in a reasonable period of time so as to produce relevant or probative evidence." *Id.* at 551, 550 A.2d at 517.

Writing for the appellate panel, Judge Stern noted that a defendant, when asked by police officers to submit to a breathalyzer exam, could not challenge the results based on the failure to receive *Miranda* warnings or for not having been afforded counsel. *Id.* at 547-48, 550 A.2d at 515-16 (citing *State v. Stever*, 107 N.J. 543, 527 A.2d 408 (1987), *cert. denied*, 108 S. Ct. 348 (1987); *State v. Leavitt*, 107 N.J. 534, 527 A.2d 403 (1987)). The court recog-

nized, however, that breathalyzer results may be challenged when police do not afford the means to implement the statute. *Id.* at 549, 550 A.2d at 516. Judge Stern noted that refusing a defendant reasonable access to an independent exam makes his right to the exam meaningless and effectively "den[ies] him the only opportunity he has to defend himself against the charge." *Id.* at 550, 550 A.2d at 516 (quoting *State v. Nicastro*, 218 N.J. Super. 231, 239, 527 A.2d 492, 496 (Law Div. 1986)).

The judge reasoned, however, that a defendant's right to a telephone call to effectuate an independent exam must be guided by practicality and timing. *Id.*, 550 A.2d at 517. Accordingly, the judge averred that failure to permit a defendant to make a telephone call would not result in suppression of the breathalyzer results if it was not feasible that such a test could have been conducted within a reasonable time. *Id.* at 551 n.4, 550 A.2d at 517 n.4. The court next explained that in order to successfully challenge breathalyzer results, it must be evident that the defendant's phone call was for the express purpose of implementing his right to an independent exam. *Id.* at 550, 550 A.2d at 517. Thus, the court concluded that the mere refusal by police to allow a defendant to make a telephone call would not result in the suppression of breathalyzer results. *Id.* at 550-01, 550 A.2d at 517. Finally, Judge Stern noted that because there was no express testimony indicating that defendant sought to call his wife in order to implement his statutory right, the case was remanded to "determine if such a call was sought for the purpose of arranging or discussing the possibility of such a test." *Id.* at 551, 550 A.2d at 517.

The right to an independent exam exists as a prophylactic measure for defendants faced with incriminating breathalyzer results. By enabling defendants to obtain a private, independent exam, individuals may successfully rebut both the accuracy of a breathalyzer test as well as the competency of the examiner. The *Hicks* court correctly observed that without being provided adequate means to obtain an independent exam, the defendant is essentially deprived of his statutory right.

The *Hicks* decision also provides significant guidelines for police officers and individuals seeking to invoke the right to an independent exam. By establishing reasonable procedures, the decision checks the actions of the police officers, while preventing defendants from unfairly invoking the statute and improperly suppressing breathalyzer results. In this regard, the *Hicks* deci-

sion recognizes and balances the need to expeditiously obtain breathalyzer results with the individual's interest in securing the independent exam.

Arnold L. Natali, Jr.

LIBEL—ABSOLUTE PRIVILEGE—ATTORNEY'S STATEMENT TO HIS CLIENT'S CUSTOMER IS SUFFICIENTLY WITHIN THE COURSE OF A JUDICIAL PROCEEDING AND IS ABSOLUTELY PRIVILEGED—*DeVivo v. Ascher*, 228 N.J. Super. 453, 550 A.2d 163 (App. Div. 1988).

Triangle Travel (Triangle) employed Eileen DeVivo as a sales representative from January, 1978 to August, 1984. 228 N.J. Super. at 455, 550 A.2d at 164. DeVivo earned commissions on sales, including travel bookings for Johnson & Johnson's Personal Products Division (Johnson & Johnson). Johnson & Johnson agreed to pay in advance for the travel arrangements, while Triangle agreed to refund payments for cancelled trips.

In July, 1984, Triangle's bookkeeper discovered errors in the Johnson & Johnson account. An audit was then conducted which resulted in the delay of commission payments to DeVivo. Under the advice of her attorney, DeVivo withdrew a check in the amount of $4,516.19 against Triangle's account for the commission payments and endorsed the check over to her attorney. *Id.* at 456, 550 A.2d at 164. Additionally, DeVivo removed specific account records from Triangle's office. These records were later returned after allegedly having been factually altered.

On October 8th, 1984, DeVivo filed a complaint against Triangle for the recovery of her commission payments. One month later, Triangle filed an action against DeVivo for the recovery of money conveyed by DeVivo to her attorney along with the original and unaltered form of the business records. The actions were consolidated and the funds were placed in the court clerk's trust account. Both actions were then settled and terminated by court order.

After certain business records had been subpoenaed from Johnson & Johnson during the course of the litigation between

DeVivo and Triangle, Johnson & Johnson made a claim against Triangle, seeking a refund for $7,749.82 for the cancelled bookings. *Id.*, 550 A.2d at 164-65. On July 12th, 1985, Attorney Ascher, counsel for Triangle, responded to Johnson & Johnson's claim in a letter, asserting that DeVivo had participated in "unlawful activity" and was "engaged in a skimming operation which inured to the detriment not only of [Triangle] but of Johnson & Johnson." *Id.*, 550 A.2d at 165. On the basis of these statements, DeVivo filed a libel suit against Ascher. *Id.* at 456-57, 550 A.2d at 165.

The New Jersey Superior Court, Law Division, granted summary judgment on behalf of the defendant. *Id.* at 454-55, 550 A.2d at 164. The court maintained that the defendant's statements, published in the letter of July 12th, were absolutely privileged, and therefore, immune from civil liability. *Id.* at 455, 550 A.2d at 164.

On appeal, the appellate division extended the doctrine of absolute privilege to cover the defendant's statements. *Id.* at 463, 550 A.2d at 168. Judge Shebell, writing for a unanimous court, declared that absolute privilege protects any statements made within the course of a judicial proceeding, even though the statements may have been uttered maliciously, with deliberate ill will or without excuse or justification. *Id.* at 457, 550 A.2d at 165. Judge Shebell further noted that a sharp distinction exists between qualified and absolute privileges. *Id.* (citing *Rainier's Dairies v. Raritan Valley Farms, Inc.*, 19 N.J. 552, 558 (1955)). Under the two-pronged test set forth in *Rainier's Dairies*, Judge Shebell asserted that a statement must "(1) have been made in the course of a judicial proceeding, and (2) have some relation to the judicial proceeding" to be afforded absolute immunity. *Id.* (quoting *Rainier's Dairies v. Raritan Valley Farms, Inc.*, 19 N.J. 552, 558 (1955)). The court acknowledged that it has consistently given a broad interpretation to the phrase "in the course of judicial proceeding" in an effort to grant attorneys the highest possible degree of freedom in the defense of their clients. *Id.* at 458-59, 550 A.2d at 165-66.

In its analysis, the appellate court examined the defendant's statements to determine whether they were offered in the course of a judicial proceeding. *Id.* at 459, 550 A.2d at 166. The court maintained that the statements contained in the letter "were made in response to an inquiry concerning the same accounts at issue in the consolidated cases." *Id.* Thus, the court reasoned

that the defendant's letter had been "intertwined" with the defense of Triangle, and as such, was published within the course of a judicial proceeding. *Id.*

Upon finding the first prong of the test satisfied, the court proceeded to analyze whether the defendant's statements had a significant relation to the judicial proceeding. *Id.* at 460, 550 A.2d at 166-67. The court claimed that "'as to the degree of relevance needed to invoke the absolute shield of this immunity, the courts are most liberal.'" *Id.* (quoting *Fenning v. S.G. Holding Corp.*, 47 N.J. Super. 110, 118 (App. Div. 1957)). Thus, in using this liberal scope of immunity analysis, the court averred that the defendant's statements were generated as a response to evidence that the subpoenaed account records of Johnson & Johnson had been factually altered. *Id.* at 461, 550 A.2d at 167. Similarly, the court stated that these documents were the focal point of Johnson & Johnson's claim against Triangle, and consequently, declared that the defendant's statements were sufficiently related to the judicial proceeding to satisfy the second criteria of the absolute-privilege standard. *Id.* at 460, 550 A.2d at 166-67.

The appellate division's affirmation of the trial court's granting of absolute privilege to defendant Ascher's statements exemplifies the even-handed approach invoked by the court. By liberally interpreting the two-pronged test, the court successfully upholds the necessary freedom granted to attorneys in making statements consistent with a thorough defense for their clients. Such a broad scope of this important privilege creates a spirit of fairness and enables attorneys to concentrate on competent representation free from the concern of personal liability.

Timothy D. Lyons

PUBLIC WELFARE—ASSISTANCE BENEFITS—DEPARTMENT OF HUMAN SERVICES REGULATION TERMINATING EMERGENCY HOUSING AID HELD INVALID—*Williams v. Department of Human Services*, 228 N.J. Super. 529, 550 A.2d 505 (App. Div. 1988).

Appellants are recipients of monies under the General Public Assistance Law (GA). 228 N.J. Super. at 530, 550 A.2d at 506 (citing N.J. STAT. ANN. §§ 44:8-107 to -152 (West Supp. 1988)).

The New Jersey Department of Human Service (DHS) is charged with the responsibility of administering monies in compliance with the GA. The DHS distributes such funds through emergency grants or assistance (EA). GA recipients qualify for EA assistance if they lose their lodgings and are unable to find accommodations because of illness or incapacity. *Id.* at 531, 550 A.2d at 506 (citing N.J. ADMIN. CODE tit. 10, § 854.6(b)(v) (Supp. 1988)). Displaced GA recipients can receive EA funding for up to five months. *Id.* at 533, 550 A.2d at 508 (citing N.J. ADMIN. CODE tit. 10, §§ 85-4.6(a)(3)(i), (b)(v) (Supp. 1988)). At the end of this five month period, however, all GA funds are automatically terminated. *Id.* at 531, 550 A.2d at 506 (citing N.J. ADMIN. CODE. tit. 10, § 854.6(b) (Supp. 1988)).

Appellants consisted of several homeless individuals who suffer from various illnesses or diseases. *Id.* at 532, 551 A.2d at 507. The DHS terminated their EA assistance funds pursuant to the five month statutory expiration period. *Id.* at 530-31, 550 A.2d at 506. On appeal before the New Jersey Superior Court, Appellate Division, appellants challenged the validity of the termination provision. *Id.* at 537, 550 A.2d at 510. Appellants asserted that a termination after a five month span without consideration of personal need was arbitrary and capricious. *Id.*, 550 A.2d at 510. In support of their position, several of the appellants documented their individual physical and mental incapacities to the court in order to illustrate both the gravity of their plight and the callousness of the regulation. *Id.* at 532, 550 A.2d at 507. Moreover, appellants asserted that under the New Jersey Constitution they had a right to shelter and that the legislature ratified this right by enacting the GA law. *Id.* at 533, 550 A.2d at 508.

By contrast, the State argued there was no constitutional onus which obligated the public to supply housing for the impoverished. *Id.* at 534, 550 A.2d at 508. The State conceded the EA program failed to meet the housing needs of every indigent citizen, but placed blame for this failure on the legislature's inability to properly fund the program. *Id.* Thus, the State claimed that it acted reasonably given its limited funding. *Id.*

In an opinion by Judge Scalera, the appellate division noted a clear conflict between the statutory purpose of the GA law and the arbitrary termination of EA funds. *Id.* at 538, 550 A.2d at 510. The court construed the GA law to require continued assistance to EA recipients for as long as they are destitute. *Id.* at

538, 550 A.2d at 510. The court also acknowledged the delicate balance of powers at issue observing that they did not want to upset this through judicial legislation. *Id.* at 534-36, 550 A.2d at 508-09. Rather than create a quasi-legislative solution to the problem, the court invalidated N.J. ADMIN. CODE tit. 10, § 85-4.6(b) (Supp. 1988) finding it an "arbitrary, capricious and unreasonable method of dealing with the problem." *Williams*, 228 N.J. Super. at 540, 550 A.2d at 511. In so doing, the court avoided the appellant's constitutional claims. *Id.* at 541, 550 A.2d at 512. The court remanded the case to the DHS with the direction to promulgate a new regulation which considers individual need. *Id.*, 550 A.2d at 511-12.

It is clear from the opinion that the appellate court sympathized with the needs of the "destitute, sick and disabled." *Id.* at 530, 550 A.2d at 506. Judge Scalera, however, was mindful of treading too heavily on areas within the province of the executive and legislative branches of government. *Id.* at 534-36, 550 A.2d at 508-09. Consequently, the court chose to simply wash its judicial hands of the problem by invalidating the regulation and remanding the issue to the DHS. While this opinion at first glance appears to signal a victory for the homeless, it does nothing to solve their long-term problems. This, the court aptly recognized, will take much more than judicial decrees. Unfortunately the expanding problem of the homeless far exceeds the limited resources needed to rectify this social dilemma.

Jeffry F. Nielsen

FAMILY LAW—INTERSPOUSAL IMMUNITY—PERSONAL INJURY SUIT AGAINST SPOUSE FOR TRANSMITTAL OF SEXUAL DISEASE NOT BARRED BY NUPTIAL PRIVILEGE OF SEXUAL RELATIONS—*G.L. v. M.L.*, 228 N.J. Super. 566, 550 A.2d 525 (Ch. Div. 1988).

In February of 1983, G.L. discovered symptoms of the genital herpes virus on her husband M.L., the defendant. 228 N.J. Super. at 570, 550 A.2d at 527. Consequently, on November 2nd, 1984, the plaintiff commenced divorce proceedings against M.L. *Id.* at 568, 550 A.2d at 526. The complaint contained four separate personal injury counts alleging that the defendant com-

municated genital herpes to the plaintiff during their marriage. G.L. further alleged that M.L. continued sexual relations with her despite the defendant's awareness of the disease. *Id.* at 569, 550 A.2d at 526. While denying previous knowledge of the virus, the defendant conceded his participation in an affair. *Id.* at 570, 550 A.2d at 527.

In a motion for summary judgment, the defendant asserted that a sexual act between spouses falls within the scope of marital privilege, thus precluding liability from both a negligence and intentional tort claim. *Id.* at 569, 550 A.2d at 527. The Superior Court of New Jersey, Chancery Division, denied the motion for summary judgment. *Id.* at 571, 550 A.2d at 528. The court articulated that personal injury claims between spouses for the transmittal of venereal disease were not barred by the nuptial privilege of sexual relations. *Id.*

Writing for the court, Judge Krafte explored the archaic doctrine of interspousal immunity, first noting the New Jersey Supreme Court's recognition of the theory in prior law. *Id.* at 568, 550 A.2d at 526. Selected matters of privacy and familiarity, according to the judge, are "beyond the reach of the law of torts because they 'fall outside the bounds of a definable and enforceable duty of care' and are encompassed by a marital or nuptial privilege." *Id.* (quoting *Merenoff v. Merenoff*, 76 N.J. 535, 555, 388 A.2d 951, 961 (1978)). The judge observed, however, that this tenet has been substantially abrogated and few exceptions remain intact. *Id.* Due to the lack of New Jersey precedent, Judge Krafte cited a Missouri Supreme Court decision relying on *Merenoff*, which held that courts may validly adjust the standard of care between spouses. *Id.* at 569, 550 A.2d at 526 (citing *S.A.V. v. K.G.V.*, 708 S.W.2d 651, 653 (Mo. 1986)). Additionally, in arriving at its conclusion, the court relied on Minnesota law which holds that a spouse infected with genital herpes has a duty to use reasonable care to avert transmission. *Id.*, 550 A.2d at 526 (citing R.A.P. v. B.J.P., 428 N.W.2d 103 (Minn. Ct. App. 1988)).

Examining the negligence claim, the judge rejected the defendant's argument that sexual intercourse between spouses lies within the visage of a nuptial privilege. *Id.*, 550 A.2d at 527. The court declared that it would be unconscionable to allow an individual to elude liability for transmitting a disease by claiming that the communication occurred during "privileged sexual relations." *Id.* Moreover, the judge posited that the defendant extinguished any marital privilege by his intentional involvement in an

extramarital affair. *Id.* Thus, the court announced that the doctrine of interspousal immunity created no impediment to a conventional negligence claim. *Id.* at 570, 550 A.2d at 527.

Judge Krafte next considered the intentional personal injury claim. *Id.* Noting that the defendant admitted his participation in the affair, the court dismissed as misguided the defendant's argument that he never intended to infect his wife with the virus. *Id.* The judge reasoned that the intentional act was not that of knowingly transmitting the disease, but that of sexual involvement with one's spouse after sexual relations with another. *Id.* The court declared that such conduct by the defendant placed his wife at risk of physical harm. *Id.*

A duty of care, according to the court, exists where such threat of physical harm is present. *Id.* at 571, 550 A.2d at 527. Noting that the doctrine of interspousal immunity exists as a limited exception in some cases, the court stated that a "defendant can not be allowed to hide behind the veil of marital privilege." *Id.*, 550 A.2d at 527-28. Hence, the judge opined that interspousal immunity provides no barrier to such personal injury suits as between spouses. *Id.*, 550 A.2d at 528.

While the court's holding appears to dispense with the previous anomalies pertaining to interspousal immunity, the implications remain unclear. The decision in *G.L.* accurately reflects the nation's growing concern with the spread of venereal disease and the deadly AIDS virus. The court, in denouncing the moral turpitude of the extramarital act, clearly suggests that any spouse involved in such an act resulting in the transmittal of a sexual disease renders themself subject to liability. However, the court's emphasis on the adulterous act leaves unanswered the question of whether the mere transmission of a disease subjects a spouse to liability. Due to the uncertainty in the testing of the AIDS virus and its lengthy incubation period, a spouse could enter a marriage carrying the AIDS virus. Thus, future decisions by the court must determine whether tortious liability attaches to one who unknowingly enters marriage with the disease or whether the privilege of marital immunity shields one from such liability.

Deanna L. Mueller