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Torts

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TORTS

I. IMPUTED LIABILITY

Bell v. West, 284 S.E.2d 885 (W. Va. 1981)

Bartz v. Wheat, 285 S.E.2d 894 (W. Va. 1982)

Mozingo v. Barnhart, 285 S.E.2d 497 (W. Va. 1981)

In *Bell v. West*¹ and *Bartz v. Wheat*,² the West Virginia Supreme Court of Appeals acknowledged the existence of the family purpose doctrine in West Virginia. As the court explained in *Bartz*, “the family purpose doctrine provides that the owner of a motor vehicle purchased or maintained for the use or enjoyment of his family is liable for injuries caused by the negligent driving of that vehicle by any member of his family.”³

Bell v. West involved an action by a plaintiff who had been injured by the alleged negligent operation of a vehicle by the son of the owner of the vehicle. The plaintiff attempted to bring an action against the father who owned the vehicle pursuant to the family purpose doctrine. In *Bell*, the court affirmed, in a *per curiam* opinion, the trial court’s holding that the family purpose doctrine did not apply to this case. Consequently, the father who owned the vehicle was not liable because the son involved in the accident had been living and working away from his parent’s home for over two years and was home only to visit his family and friends. In so holding, the court stated: “Although the family purpose doctrine is firmly entrenched in the jurisprudence of this State, we have never applied the doctrine to a factual circumstance where the son’s relationship to the owner of the car is as attenuated as it is in this case.”⁴ The court went on to declare that the family purpose doctrine has no application where the child has not been a part of the parent’s household for an extended period of time.

In his dissent, Justice Harshbarger criticized the majority for limiting the family purpose doctrine unnecessarily. Justice Harshbarger declared: “We should not look to age, self-sufficiency or residence of the parties—we should only determine that there is a family car, and that it was used by a family member with its owner’s permission.”⁵ However, both the majority and the dissent in *Bell* recognized the continued existence of the family purpose doctrine in West Virginia.

The court also refused to apply the family purpose doctrine to impute the contributory negligence of the driver of the plaintiff’s vehicle to the plaintiff-owner. In *Bartz v. Wheat*,⁶ the plaintiff’s son was riding a motorcycle owned by

¹ 284 S.E.2d 885 (W. Va. 1981).

² 285 S.E.2d 894 (W. Va. 1982).

³ *Id.* at 895.

⁴ 284 S.E.2d at 887.

⁵ *Id.* at 890.

⁶ 285 S.E.2d 894 (W. Va. 1982).

the plaintiff when the son attempted to pass the automobile in front of him. While attempting to pass the vehicle in front of him, the plaintiff's son on the motorcycle was hit when the car in front turned to the left. As a result of the accident, the son was injured and the motorcycle was virtually destroyed. In the plaintiff-owner's action to recover for the damages to his motorcycle, the trial court set aside a jury verdict for the father declaring that the plaintiff was barred from recovery by his son's contributory negligence under the family purpose doctrine. After reinstating the jury verdict for the father, the court stated, "the family purpose doctrine was initially formulated and has been consistently applied to permit a plaintiff to recover from a financially responsible party, the doctrine should not be used to impute negligence to the owner to bar his recovery."⁷ Writing for the court, Justice Neely noted that this holding might seem contrary to previous decisions which compare the family purpose doctrine to the law of agency. The law of agency would impute the negligence of the agent to the principal. However, the court distinguished the family purpose doctrine from the law of agency on the grounds that the family purpose doctrine was established only to improve the chances for financial recovery by a plaintiff and not to hold the person who benefits from the agent's efforts accountable for the agent's negligence which is the rationale in agency law.⁸

The court did not address why the comparative negligence theory established in *Bradley v. Appalachian Power*⁹ was not applied or what effect, if any, the comparative negligence theory would have upon the family purpose doctrine. However, the language in *Bartz* indicates that the family purpose doctrine could not be used to impute the comparative negligence of the driver of a plaintiff's vehicle to a plaintiff-owner.

The question of whether a sheriff is still vicariously liable for the negligent acts of his deputies was answered in the affirmative by the court in *Mozingo v. Barnhart*.¹⁰ In *Mozingo*, a Brooke County deputy, while performing a lawful arrest, drew his pistol, which discharged and killed the plaintiff's decedent. The trial court held that the sheriff was vicariously liable, even though the deputy was employed under the civil service system. In affirming the sheriff's liability, the court noted that liability was not imposed upon the sheriff based upon a *res ipsa loquitur* or related theory of law, but because of the sheriff's failure to fulfill his responsibility to train and supervise his deputies. The facts disclosed in the trial court indicated that the deputies had been issued pistols with virtually no training on how or when the pistols were to be used. Due to this failure to properly train his deputies, the court in *Mozingo* held the sheriff vicariously liable for the wrongful death of the plaintiff's decedent.

⁷ *Id.* at 896.

⁸ *Id.*

⁹ 256 S.E.2d 879 (W. Va. 1979).

¹⁰ 285 S.E.2d 497 (W. Va. 1981).

II. INSURANCE

Smith v. Municipal Mutual Insurance Co., 289 S.E.2d 669 (W. Va. 1982)

Staley v. Municipal Mutual Insurance Co., 282 S.E.2d 56 (W. Va. 1981)

Camden Fire Insurance Association v. Johnson, 294 S.E.2d 116 (W. Va. 1982)

In *Smith v. Municipal Mutual Insurance Co.*,¹¹ the court declared that a written notice of cancellation of a farmer's mutual fire insurance policy must be actually received by the insured policyholder at least five days prior to the effective date of cancellation in order to be binding upon the insured. In *Smith*, a farmer's mutual insurance company, after discovering that an insured's premises were unoccupied, attempted to cancel the policy by mailing a notice of cancellation to the address they suspected to be vacant. After a fire loss occurred a few months later, the trial court found the cancellation to be ineffective and held the insurance company liable on the policy because the policyholder did not receive actual written notice of the cancellation five days before the cancellation was to be effective. In affirming the liability of the insurance company, Justice Neely, writing for the court, interpreted the pertinent statutes of the West Virginia Code¹² to mean that the insured had to receive actual written notice. The Code states in part, "The company may cancel any policy upon at least five days' written notice to the holder."¹³

In holding that there must be actual written notice to the policyholder for a cancellation to be effective, the court restricts, if not overrules, the decision in *Laxton v. National Grange Mutual Insurance Co.*,¹⁴ which held that the mailing of the cancellation notice was sufficient to cancel an automobile insurance policy. In *Laxton*, as in the present case, the insurance policy in question clearly provided that the mailing of the notice of cancellation would be sufficient proof of such notice. *Laxton* also held that the automobile insurance policy had been bargained for by the insurance company and the insured and that the cancellation provisions were clear and unambiguous and not contrary to public policy. Justice Neely distinguished *Laxton* from the present case on the grounds that (1) there were no West Virginia statutes concerning the cancellation of automobile policies, (2) the court in *Laxton* considered that the government, in its operation of the mails, was the agent of the insured, and (3) the *Laxton* court determined that the cancellation provision was bargained for by the parties.

In his dissenting opinion, Justice McHugh declared that, "[t]he majority is, in effect, rewriting the policy and amending the statutes."¹⁵ Justice McHugh stated that the reasoning of *Laxton* should have been applied and, since the insurance company complied with the cancellation provisions of the insurance policy, the mailing of the notice of cancellation should have been sufficient to

¹¹ 289 S.E.2d 669 (W. Va. 1982).

¹² W. VA. CODE §§ 33-22-14, 15 (1982).

¹³ W. VA. CODE § 33-22-15(c) (1982).

¹⁴ 150 W. Va. 598, 148 S.E.2d 725 (1966), *overruled*, 289 S.E.2d 671 (W. Va. 1982).

¹⁵ 289 S.E.2d at 673.

declare the cancellation effective.¹⁶

In another case discussing a notice of cancellation of an insurance policy, the court stated, "A notice of cancellation of insurance must be clear, definite and certain . . . it must contain such a clear expression of intent to cancel the policy that the intent to cancel would be apparent to the ordinary person."¹⁷ In *Staley v. Municipal Mutual Insurance Co.*,¹⁸ a notice of cancellation of a fire insurance policy was held to be insufficient, even though it was actually received by the insured, because the notice that the insurance company intended to cancel the policy was not clear. The cancellation notice in question only referred to the "non-renewal" of the policy and did not contain either the words "cancelled" or "cancellation." The insureds were further misled when they received an invoice for and paid the next year's insurance premium. In holding the notice of cancellation ineffective, Justice Miller also declared that "[a]ll ambiguities in the notice will be resolved in favor of the insured."¹⁹

Therefore, based on the holdings in *Smith v. Municipal Mutual Insurance Co.*²⁰ and *Staley v. Municipal Mutual Insurance Co.*,²¹ in order for a notice of cancellation of a fire insurance policy to be effective, the fire insurance company must provide actual written notice of cancellation that is received by the insured policyholder at least five days prior to its effective date and such notice of cancellation must be in a form that clearly shows the intent of the insurance company to cancel the insurance policy.

In another insurance case, the court adopted the majority view that the term "business pursuits" in an insurance contract means, "a continuous or regular activity engaged in by the insured for the purpose of earning a profit or livelihood."²² In *Camden Fire Insurance Association v. Johnson*,²³ an insurance company attempted to avoid payment of a personal injury claim on the grounds that the insured was engaged in "business pursuits" that excluded the insured from coverage. In *Johnson*, the insured was babysitting her grandson during the day and receiving \$80.00 a month from the Department of Welfare for these services. One day while the grandmother was babysitting the grandson, the grandson was injured when he was struck by an automobile. The insurance company that provided personal liability coverage under a homeowners policy for the grandmother claimed they were not obligated to defend her in the action on behalf of the grandson against the grandmother because she was engaged in business pursuits which expressly excluded her from coverage. In holding that this babysitting arrangement was not a "business pursuit" which would exclude coverage under the insured's homeowners policy, the court said that the determination of whether an activity constitutes a business

¹⁶ *Id.*

¹⁷ *Staley v. Municipal Mut. Ins. Co.*, 282 S.E.2d 56, 57 (syl. pt. 1) (W. Va. 1981).

¹⁸ 282 S.E.2d 56 (W. Va. 1981).

¹⁹ *Id.* at 57 (syl. pt. 1).

²⁰ 289 S.E.2d 669 (W. Va. 1982).

²¹ 282 S.E.2d 56 (W. Va. 1981).

²² *Camden Fire Ins. Ass'n v. Johnson*, 294 S.E.2d 116, 119 (W. Va. 1982).

²³ 294 S.E.2d 116 (W. Va. 1982).

pursuit would have to be decided on a case-by-case basis.²⁴ In *Johnson*, it was held that the insured's babysitting was not a business pursuit because she was not licensed to carry on the activity, did not advertise her babysitting, did not babysit for anyone other than her grandchildren, and was not always compensated for her babysitting.²⁵

III. COMPARATIVE NEGLIGENCE

Bowman v. Barnes, 282 S.E.2d 613 (W. Va. 1981)

Sitzes v. Anchor Motor Freight, Inc., 289 S.E.2d 679 (W. Va. 1982)

In *Bowman v. Barnes*²⁶ the court declared that a plaintiff's contributory negligence must be compared against the negligence of all the parties involved in the accident and not just the parties involved in the litigation when applying the comparative negligence theory established in *Bradley v. Appalachian Power*.²⁷ *Bowman* involved the wrongful death of a plaintiff's decedent who was killed when a train struck the automobile she was a passenger in at a railroad crossing. As a result of this accident, the decedent's administrator brought a wrongful death action against both the driver of the car she was a passenger in and the B & O Railroad Company. Upon the trial court's own motion, separate trials of the plaintiff's claims against the defendant railroad and the defendant car driver were ordered over the objections of both the plaintiff and the defendant driver. After the jury found that the defendant railroad had not been negligent, both the plaintiff and the defendant driver appealed claiming that the trial court wrongfully ordered separate trials. The court held that the use of separate trials for the defendant railroad and the defendant driver was error.²⁸ Justice Miller said, "Rule 42(c), R.C.P. . . . must be considered in light of the general policy of our joinder rules Such rule should also be interpreted with regard to our comparative negligence doctrine, which is designed to compare plaintiff's contributory negligence to the negligence of all parties involved in the accident and litigation."²⁹ Justice Miller went on to say that the cases are rare where the trial court would be warranted in ordering separate trials as to joint tortfeasors.³⁰

In *Sitzes v. Anchor Motor Freight, Inc.*,³¹ a woman was killed when the pick-up truck in which she was a passenger collided with a truck. After the administrators of the decedent's estate brought a wrongful death action against the owner of the truck, the defendant truck owner filed a third-party complaint against the driver of the pick-up truck who was the husband of the decedent. The jury found that 70 percent of the negligence was attributable to the defendant truck owner and the remaining 30 percent of the negligence was

²⁴ *Id.* at 119.

²⁵ *Id.* at 120.

²⁶ 282 S.E.2d 613, 621 (W. Va. 1982).

²⁷ 256 S.E.2d 879 (W. Va. 1979).

²⁸ 282 S.E.2d at 619.

²⁹ *Id.*

³⁰ *Id.*

³¹ 289 S.E.2d 679 (W. Va. 1982).

attributable to the defendant pick-up truck driver. The jury also found damages for the plaintiff in the amount of \$100,000.00, of which \$75,000.00 was to be awarded to the decedent's son and \$25,000.00 was to be given to the surviving husband who was also the third-party defendant.

As a result of this case, the United States District Court for the Southern District of West Virginia certified two questions to the supreme court. The first question involved the issue of whether the third-party complaint against the decedent's husband was barred by the doctrine of interspousal tort immunity. In response to this question, the supreme court declared that the third-party action was not barred because the ruling in *Coffindaffer v. Coffindaffer*³² was to be applied retroactively.

The second question in *Sitzes* was what effect the adoption of comparative negligence in West Virginia had upon the rules of contribution among joint tortfeasors and the distribution of a jury's award of damages pursuant to a wrongful death action. The court responded to this question by reaffirming this jurisdiction's commitment to the concept of joint and several liability and declaring that the holding in *Bradley* did not change the right of a plaintiff to collect the entire amount of a judgment from any joint tortfeasor against whom the judgment was entered.³³

As to the issue of contribution, Justice Miller stated:

The basic purpose of the joint and several liability rule is to permit the injured plaintiff to select and collect the full amount of his damages against one or more joint tortfeasors. This rule however need not preclude a right of comparative contribution between joint tortfeasors *inter se*. The purpose of this latter rule is to require the joint tortfeasors to share in contribution based upon the degree of fault that each has contributed to the accident.³⁴

Consequently, contribution between joint tortfeasors should now be based upon the relative degrees of fault of the joint tortfeasors. Although a plaintiff may still collect all of a judgment in his favor from any of the joint tortfeasors against whom the judgment was entered, a defendant who has paid a judgment has a right to contribution from his joint tortfeasors based upon the joint tortfeasors' relative degrees of fault.

The decision in *Sitzes* also held that the defendant truck owner had a right to contribution from the third-party defendant even though the defendant truck owner was 70 percent negligent because nothing in *Bradley*³⁵ bears upon the right of contribution.³⁶ *Sitzes* also held that the third-party defendant, the decedent's husband, could not set-off his \$25,000.00 judgment against his \$30,000.00 contribution debt to the defendant truck owner. In so holding, the court stated: "Generally, parties may set-off on judgments obtained against

³² 244 S.E.2d 338 (W. Va. 1978). *Coffindaffer* abolished the doctrine of interspousal tort immunity in West Virginia.

³³ 289 S.E.2d at 684.

³⁴ *Id.* at 685.

³⁵ 256 S.E.2d 879 (W. Va. 1979).

³⁶ 289 S.E.2d at 689.

each other. This rule is, however, not a matter of absolute right but subject to the court's discretion."³⁷ The supreme court justified the denial of the set-off in this case by explaining that both parties had adequate insurance and, therefore, only the insurance companies would benefit if the set-off was allowed.

IV. STRICT LIABILITY

Peneschi v. National Steel Corp., 295 S.E.2d 1 (W. Va. 1982)

In *Peneschi v. National Steel Corp.*,³⁸ the court formally adopted into the common law of this jurisdiction the strict liability doctrine established in *Rylands v. Fletcher*.³⁹ In his majority opinion, Justice Neely explained the basic principle of *Rylands* to be, "that where a person chooses to use an abnormally dangerous instrumentality, he is strictly liable without a showing of negligence for any injury proximately caused by that instrumentality."⁴⁰ The *Rylands* principle adopted is essentially the same as that stated in the *Restatement (Second) of Torts*.⁴¹

In *Peneschi*, an employee of an independent contractor who had been hired to install a coke furnace for the National Steel Corporation was injured when a coke oven battery exploded. In the plaintiff employee's action against National Steel, the court held that the coke oven was a type of dangerous instrumentality that would have imposed the *Rylands*-type of strict liability upon National Steel for injuries to independent third parties. However, the court ruled that National Steel was not strictly liable to the plaintiff employee because he was an employee of an independent contractor hired by National Steel, and, consequently, the plaintiff had assumed the risk. In a dissenting opinion, Justice McGraw agreed with the majority that assumption of risk could be a valid defense in a strict liability situation, but criticized the majority for holding that the employee had assumed the risk, as a matter of law, because of his employer's contract with National Steel.⁴²

The plaintiff employee in *Peneschi* was also unable to collect from his employer, the independent contractor, under the theory established in *Mandolidis v. Elkins Industries*⁴³ because he did not attempt to join his employer as a defendant until five years after the time of the accident and, therefore, he was barred by the statute of limitations. The supreme court affirmed the trial court's denial of the plaintiff's motion to amend his complaint to include the independent contractor on the grounds that the plaintiff had been aware of his cause of action against the independent contractor at the time of the original action and elected not to assert the claim against his employer. The denial of this motion prevented the plaintiff from utilizing the "relation

³⁷ *Id.* at 691.

³⁸ 295 S.E.2d 1 (W. Va. 1982).

³⁹ *Fletcher v. Rylands*, 3 H.&C. 774, 159 Eng. Rep. 737 (1865), *rev'd*, *Fletcher v. Rylands*, L.R. 1 Ex. 265 (1866), *aff'd* *Rylands v. Fletcher*, L. R. 3 H. L. 330 (1868).

⁴⁰ 295 S.E.2d 1, 5 (W. Va. 1982).

⁴¹ RESTATEMENT (SECOND) OF TORTS §§ 519-524A (1976).

⁴² 295 S.E.2d 1, 16.

⁴³ 246 S.E.2d 907 (W. Va. 1978).

back" provision of West Virginia Rule of Civil Procedure 15(c)⁴⁴ to defeat the bar of the statute of limitations.

Although *Peneschi* formally adopted the *Rylands v. Fletcher* doctrine of strict liability into the common law of West Virginia, the court expressly declared that, "this decision in no way alters our decision in *Morningstar v. Black and Decker Manufacturing Co.*, not to adopt the *Rylands* doctrine into our tort product liability law."⁴⁵

V. INFORMED CONSENT

Cross v. Trapp, 294 S.E.2d 446 (W. Va. 1982)

The issue of informed consent was addressed in *Cross v. Trapp*.⁴⁶ In *Cross*, the supreme court adopted the "patient need" standard which measures the duty of the physician to disclose information to the patient by what the physician knows or should know to be the patient's informational needs in deciding whether to consent to the proposed treatment. *Cross* involved an action by a patient who had part of his prostate gland removed after signing only a general consent. The patient claimed he did not consent to the prostate operation. In adopting the patient need standard and finding that the patient had not consented to the prostate operation, the court cited *Canterbury v. Spence*⁴⁷ which stated, "that the topics demanding disclosure by the physician included: (1) the inherent and potential hazards of the proposed treatments, (2) the alternative to that treatment, if any, and (3) the results likely if the patient remains untreated."⁴⁸ *Cross* also recognized that there could be certain emergency situations where consent could not be obtained and, therefore, would not be required, but the burden of proof would be upon the treating physician to establish the circumstances of the emergency situation.⁴⁹

VI. LIBEL

Havalunch, Inc. v. Mazza, 294 S.E.2d 70 (W. Va. 1982)

In *Havalunch, Inc. v. Mazza*,⁵⁰ an award of \$15,000.00 in punitive damages for libel was reversed by the supreme court because there was no showing of an intentional or reckless publication of false defamatory material.⁵¹ *Havalunch* involved a writer for the *Daily Athenaeum*, the West Virginia University

⁴⁴ W. VA. R. Civ. P. 15(c) allows an amended pleading to "relate back" to the time of the original pleading as long as the claim or defense asserted arose out of the same transaction and, if the amendment involves the joinder of another defendant, that defendant must have been on adequate notice so he would not be unfairly prejudiced and also that defendant must have known or should have known that, except for a mistake, the defendant would have been a defendant in the original action.

⁴⁵ 295 S.E.2d at 11 n.9 (citation omitted).

⁴⁶ 294 S.E.2d 446 (W. Va. 1982).

⁴⁷ 464 F.2d 772 (D.C. Cir.), cert. denied, 409 U.S. 1064 (1972).

⁴⁸ *Id.* at 787.

⁴⁹ 294 S.E.2d 446, 455 (W. Va. 1982).

⁵⁰ 294 S.E.2d 70 (W. Va. 1982).

⁵¹ *Id.* at 73.

school newspaper, who wrote an article concerning various eating establishments in the Morgantown area. In this article, she wrote a noncomplimentary paragraph concerning Havalunch, which questioned, in a humorous manner, the cleanliness of the establishment and the quality of its clientele. Havalunch brought a libel action against the writer and was awarded \$15,000.00 in punitive damages and no compensatory damages. In reversing the award for Havalunch, the court stated that the article in question was protected under the doctrine of "fair comment" which is a "form of qualified privilege and comment is 'fair' when based on facts truly stated and free from imputations of corrupt or dishonorable motives on the part of the person whose conduct is criticized, and where it is an honest expression of the writer's real opinion or belief."⁵² Also, the awarding of punitive damages without a showing of malice must fail based upon the holding in *Gertz v. Robert Welch, Inc.*⁵³ In its holding, the court adopted the majority rule in this area of the law of defamation as articulated in *Restatement (Second) of Torts*.⁵⁴ The court did not address the issue of whether punitive damages may be properly awarded when the jury finds no compensatory damages for the plaintiff.

VII. NUISANCE

West v. National Mines Corp., 285 S.E.2d 670 (W. Va. 1981)

In *West v. National Mines Corp.*,⁵⁵ the court recognized that property owners along public roads have a cause of action against someone who negligently uses those public roads. *West* involved adjoining landowners who brought action against a coal company for the dust nuisance created by the coal trucks using the public road. By reversing a decision for the coal company and directing the circuit court to grant a preliminary injunction to abate the dust nuisance, the court has entered into a new area of tort law that could have significant ramifications.⁵⁶

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⁵² *Id.* at 71 (syl. pt. 3).

⁵³ 418 U.S. 323 (1974). *Gertz* held that punitive damages may be recovered only when the defendant knew the reported information was false or had a reckless disregard for the truth. 418 U.S. 323, 348-50.

⁵⁴ RESTATEMENT (SECOND) OF TORTS, § 566 (1977) states, "A defamatory communication may consist of a statement in the form of an opinion, but a statement of this nature is actionable only if it implies the allegation of undisclosed defamatory facts as the basis for the opinion."

⁵⁵ 285 S.E.2d 670 (W. Va. 1981).

⁵⁶ For a thorough discussion of *West*, see Comment, *West v. National Mines: Creation of Private Nuisance by Use of Public Property*, 85 W. VA. L. REV. 263 (1983).