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Abstracts of Recent Cases

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ABSTRACTS

Procedure—Upward Revision of Verdict and New Trial on Issue of Damages Alone

D's automobile struck and fatally injured a six-year-old child crossing the highway. A wrongful death action was brought against *D* in the federal district court based on diversity jurisdiction. The major issue was whether "the child had entered the highway so suddenly that the defendant could not stop or otherwise avoid the injury." The child could not be guilty of contributory negligence as a matter of law. Judgment was entered for *P* on a verdict for \$5,000. *P* moved for a new trial *nisi* on the ground of inadequacy of the verdict and alternatively for a new trial on the issue of damages. *Held*, motions denied. The federal court could not, under the federal constitution, increase the jury award. A new trial would not be granted on the issue of damages alone when the verdict, although inadequate and possibly a compromise, was not insubstantial and when there was no obvious misconduct by the jurors. *Barton v. Griffith*, 253 F. Supp. 774 (D.S.C. 1966).

The federal court's rejection of the request for an upward revision of the verdict was based on the decision in *Dimick v. Schiedt*.¹ In that case, the United States Supreme Court, in a 5-4 decision, determined that a federal court is without power to increase the amount of damages awarded by the jury. To allow such an increase would be to infringe the right of jury trial granted by the seventh amendment. On the other hand, remittiturs, or downward revisions of verdicts, were found acceptable in the *Dimick* case. The Court, however, did suggest that it would have ruled against the use of remittiturs in federal courts if the device had not been so well established.

Since the *Dimick* decision has been interpreted as having application only to federal courts, some state courts have adopted the use of additurs.² However, its use has been limited in most instances to cases involving liquidated damages.³ State courts have

¹ 293 U.S. 474 (1935).

² See WRIGHT, FEDERAL COURTS § 92, at 350 (1963); Annot., 56 A.L.R.2d 213 (1957).

³ See *e.g.*, Fall v. Tucker, 113 Kan. 713, 216 Pac. 283 (1923).

allowed remittiturs more frequently than additurs. These downward revisions are generally allowed even if the damages are unliquidated.⁴ However, in several states, including West Virginia, remittiturs are granted only when the amount of damages is measurable by a definite standard.⁵

The court in the principal case, referring to the obvious inadequacy of the verdict and the close question of liability, concluded that the jury's decision may have been a compromise. A compromise verdict occurs when the jurors cannot agree on the issue of liability and a verdict is reached by some jurors surrendering their convictions on one issue in return for concessions by other jurors on another issue.⁶ Ordinarily this is cause for a new trial on all issues because such an occurrence taints the entire decision.⁷ West Virginia is among the jurisdictions adhering to this view.⁸ This concept is actually a corollary to the general rule that if the issue of damages cannot be severed from other issues in the case, a new trial on all issues should be granted.⁹ A new trial absolute was not granted in the principal case because a request for such a trial was not made by the plaintiff and the court would not order a new trial on its own motion in the absence of obvious misconduct of the jurors.

Whether a West Virginia plaintiff faced with an inadequate verdict as in the principal case could successfully request an additur is doubtful since no reported decisions of the West Virginia Supreme Court have considered the propriety of additur. He may be able to accomplish the same result by moving for a new trial on the amount of damages alone if the verdict is so small as to indicate that the jury was influenced by improper motives or a mistake concerning the applicable law.¹⁰ However, in a case in which the verdict is the result of an improper compromise of non-severable issues of liability or a mistaken view of the case,

⁴ Carlin, *Remittiturs and Additurs*, 49 W. VA. L. REV. 1, at 5 (1942).

⁵ *Id.* at 29.

⁶ High v. Lenow, 195 Tenn. 158, 258 S.W.2d 742 (1953).

⁷ Jenkins v. Gerber, 336 Ill. App. 469, 84 N.E.2d 699 (1949).

⁸ Munden v. Johnson, 102 W. Va. 735, 135 S.E. 832 (1926). See also Kelly v. Rainelle Coal Co., 135 W. Va. 594, 64 S.E.2d 606 (1951) (quotient verdict).

⁹ Rawle v. McIlhenny, 163 Va. 735, 177 S.E. 214 (1934).

¹⁰ W. VA. R. Crv. P. 59(a); Richmond v. Campbell, 148 W. Va. 595, 136 S.E.2d 877 (1964); cf. Stone v. United Fuel Gas Co., 111 W. Va. 569, 163 S.E. 48 (1932); Chafin v. Norfolk & W. Ry., 80 W. Va. 703, 93 S.E. 822 (1917).

the new trial must be on all the issues. The reluctance of courts to substitute their judgment for that of the jury is obviously motivated by a recognition that, even though a more liberal practice would accomplish uniformity, it would make the right to jury trial in civil cases practically meaningless.

Torts—West Virginia's Privity Requirement for Products Liability

P's arm was amputated when caught in a harvesting machine manufactured by *D*. *P* contended that *D* negligently constructed and designed the harvester. *D* asserted that *P*, an employee of the purchaser, could not maintain an action since no privity of contract existed between *P* and *D*. *Held*, judgment for *D*. The negligence of *D* was not established. However, the absence of privity would have been no bar to liability if negligence had been shown, even though the harvester was not inherently or imminently dangerous. *Shanklin v. Allis-Chalmers Mfg. Co.*, 254 F. Supp. 223 (S.D. W. Va. 1966).

The doctrine of privity of contract arose in the middle nineteenth century in order to afford manufacturers and merchants protection against excessive liability. The court in *Winterbottom v. Wright* stated, by dictum, that privity of contract is required in a negligence action against a manufacturer or seller of a product alleged to have caused injury.¹ Consequently, the original seller was not liable for any damages caused except to the immediate buyer.

The fate of the *Winterbottom* decision, however, was not expansion but rather extensive limitation. Thus, a seller became liable to third parties injured through the use of a product when he failed to inform the buyer that the product was dangerous for its intended purpose.² However, the most important limitation on the privity requirement was effected by imposing liability on a seller for the sale of an article "imminently" or "inherently" dangerous.³ This included a wide range of products, such as explosives and products intended for human consumption.⁴ The

¹ 10 M. & W. 109, 152 Eng. Rep. 402 (1842).

² *Shubert v. J. R. Clark Co.*, 49 Minn. 331, 51 N.W. 1103 (1892).

³ *Thomas v. Winchester*, 6 N.Y. 397, 57 Am. Dec. 445 (1852).

⁴ PROSSER, TORTS § 96, at 660 (3d ed. 1964).

exact definition of "inherently dangerous" remained obscure until the landmark case of *MacPherson v. Buick Motor Co.*⁵ The effect of this decision was to impose on a manufacturer a duty of reasonable care toward the original consumer who might foreseeably be injured as a result of the distribution of goods negligently manufactured. *MacPherson* met with widespread acceptance and has been extended to such a degree that it may be concluded that the duty of the manufacturer extends to all persons who might reasonably be expected to be in the vicinity of the product in its probable use.⁶ Phrasing the duty of the manufacturer in these terms has the effect of abolishing privity completely when negligence is the theory of recovery. This effect has been achieved by a Virginia statute which provides that privity is no defense if the "plaintiff was a person whom the manufacturer or seller might reasonably have expected to use, consume or be affected by the goods."⁷

The West Virginia court, however, has not made a final disposition on the question of privity. The court has allowed exceptions for articles intended for internal consumption,⁸ and for products dangerous if defectively made,⁹ but the necessity of an "inherently" dangerous instrumentality has not been expressly repudiated.

The principal case refers to the case of *Williams v. Chrysler Corp.*¹⁰ as the latest case touching upon the privity question in West Virginia. In this instance, the lower court stated that "it seems to be well settled in West Virginia that the manufacturer is liable only where the product is inherently dangerous."¹¹ The West Virginia court did not settle this issue, but instead decided the case on a disclaimer provision, stating that the express warranty between the plaintiff and the defendant precluded the plaintiff from maintaining the action. The court's consideration of the implied warranty provisions of the Uniform Sales Act, now a part of the Uniform Commercial Code in West Virginia, might be interpreted as suggesting a different result had the Code been operative in West Virginia at the time the cause of action arose.

⁵ 217 N.Y. 382, 11 N.E. 1050 (1916).

⁶ PROSSER, *op. cit. supra* note 4, at 662-63.

⁷ VA. CODE § 8.2-318 (1965).

⁸ *Webb v. Brown & Williamson Tobacco Co.*, 121 W. Va. 115, 2 S.E.2d 898 (1939).

⁹ *Roush v. Johnson*, 139 W. Va. 607, 80 S.E.2d 857 (1954).

¹⁰ 148 W. Va. 655, 137 S.E.2d 225 (1964).

¹¹ *Id.* at 657, 137 S.E.2d at 227.

Such an interpretation has no apparent foundation since the Code is "consciously neutral"¹² on the issue of the manufacturer's liability to the consumer.

In *Shanklin*, the court suggested that the reasoning in the *Williams* case might have been "somewhat misguided" and contrary to the "spirited trend toward disregarding privity." Nevertheless, the court concluded that if this case were presented to the West Virginia Supreme Court of Appeals at this time, it would "adopt the modern view by holding that such a showing [of privity] is not a requirement for maintenance of the action." This statement was dicta because no negligence was found. Of course, the "Erie-educated guess" of a federal district court, in any event, is not a binding interpretation of law.¹³ Therefore, whether the West Virginia court will abandon the privity requirement in this kind of case is doubtful.

Wills—Divorce and Property Settlement as Implied Revocation of Will

Decedent's will devised all of his estate to his wife, the appellee. Subsequently he and his wife were divorced and a property settlement was executed. On the death of her husband, the appellee offered the will for probate. Appellant, a surviving brother of the decedent and one of several heirs at law, filed a caveat. Appellee was awarded a directed verdict giving the will effect. *Held*, reversed. The combination of the divorce and property settlement had the function of revoking the will by implication of law. *Luff v. Luff*, 359 F.2d 235 (D.C. Cir. 1966).

At common law the doctrine of implied revocation of a will was invoked upon a woman's marriage and upon a man's marriage and the subsequent birth of issue.¹ This doctrine has been expanded in most jurisdictions by judicial interpretation and statutory enactment. In this process of expansion, some courts have adopted the view that a divorce coupled with a property settlement

¹² Lorensen, *Product Liability and Disclaimers in West Virginia*, 67 W. VA. L. REV. 291 (1965).

¹³ *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

¹ ATKINSON, *WILLS* § 85 (2d ed. 1952); e.g., *Mosely v. Mosely*, 217 Ark. 536, 231 S.W.2d 99 (1950).

impliedly revokes a will.² However, this extension of the doctrine has not been accepted in all jurisdictions.

The divergent viewpoints are greatly attributable to differences in applicable statutes. In instances where the statute specifies that a will is impliedly revoked by a change of conditions or circumstances, the majority of courts have held that the will is revoked, the rationale being that divorce and a property settlement is a sufficient change of circumstances to satisfy the statute.³ However, if the statute is silent in this regard, the weight of authority is to the contrary.⁴

The court in the instant case found that a revocation by implication occurred even though the applicable statute provided express methods of revocation which did not include revocation by change of circumstances or conditions.⁵ Taking the view that implied revocation is applicable to situations occurring at common law as well as to those situations "within the rationale of the doctrine due to historical change," the court seems to be attempting judicial expansion of the statute by reading the common law doctrine into the statute and expanding the doctrine to meet more modern situations.

It is to be noted that the applicable statute in the principal case is similar to the West Virginia statute on revocation.⁶ The similitude involved relates to the enumeration of express means of revocation without mention of implied revocation by change of conditions or circumstances. In construing the statute, however, the West Virginia court has reached a different result. The court, in *Swann v. Swann*,⁷ held that "implied revocation is precluded as a recognized principle by the express language of our applicable statute."⁸ Thus, the West Virginia court appears to follow the doctrine of "inclusio unius est exclusio alterius"—the inclusion of

² *Caswell v. Kent*, 158 Me. 493, 186 A.2d 581 (1962). It is to be noted that generally a divorce alone, in the absence of a statute to the contrary, will not effect this result. *Davis v. Davis*, 57 So. 2d 8 (Fla. 1952).

³ 52 HARV. L. REV. 332 (1938); e.g., *Pardee v. Grubess*, 34 Ohio App. 474, 171 N.E. 375 (1929); *Lansing v. Haynes*, 95 Mich. 16, 54 N.W. 699 (1893).

⁴ 52 HARV. L. REV., *supra* note 3; e.g., *Matter of the Estate of Robinson*, 64 Cal. App. 643, 222 Pac. 374 (1923); *Pacetti v. Rowlinski*, 169 Ga. 602, 150 S.E. 910 (1929).

⁵ D.C. Code Ann. § 19-103 (1961).

⁶ W. VA. CODE ch. 41, art. 1, § 7 (Michie 1966).

⁷ *Swann v. Swann*, 131 W. Va. 555, 48 S.E.2d 425 (1948).

⁸ *Swann v. Swann*, *supra* at 559, 48 S.E.2d at 428.

one is the exclusion of the other. Therefore, it would seem doubtful that the West Virginia court will in the future incorporate any extension of the common law doctrine of implied revocation into the statute on revocation.

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