Volume 64 | Issue 4 Article 14

June 1962

Torts--Malpractice--Wrongful Death Action Based on Breach of Contract

Ralph Charles Dusic Jr.
West Virginia University College of Law

power from W. VA. CODE ch. 8, art. 1, § 2 (Michie 1961), while the city of St. Albans requires regulatory licenses of plumbing as provided under the Municipal Home Rule Law. It is to be again noted that the court in the principal case found no statute under the provisions of chapter 8 of the West Virginia Code sufficient to give a corporation the power to require regulatory licensing of plumbers.

There exists considerable confusion between the non-home rule and home rule provisions of chapter 8 and chapter 8A of the code. There are now two sets of municipal laws, each supposedly independent of the other, but legislative enactment and court interpretation has made difficult the interpretation of many statutes in chapters 8 and 8A. To correct the existing condition of municipal laws, a revised municipal code has been drafted by the Bureau for Government Research of West Virginia University, consolidating chapters 8 and 8A into a single chapter. This consolidation and revision will soon be presented for legislative approval, and could greatly clarify existing municipal corporation law in West Virginia.

John Everett Busch

Torts—Malpractice—Wrongful Death Action Based on Breach of Contract

Ps entered into a contract with *D*, a surgeon, for the performance of a tonsilectomy on their five year old son. The child died as a result of the operation and *Ps* brought an action setting forth claims under the Wrongful Death Act and for breach of contract. The lower court dismissed the count alleging breach of contract on the grounds of legal insufficiency. *Held*, affirmed. A common law contract action will not lie against a doctor for an alleged breach of contract resulting in the death of a patient. Such breach could, however, be the basis of liability under the Wrongful Death Act, based either upon *D's* breach of contract or upon tort, as either theory gives rise to a "default" within the meaning of the act. *Zostautas v. St. Anthony De Padua Hospital*, 178 N.E.2d 303 (Ill. 1961).

The instant case provides a basis for considering the pertinent West Virginia law in this area. The following questions are raised: May a recovery under the West Virginia Wrongful Death Act be based on a breach of contract? May a recovery be had in a malpractice action based on breach of contract where the malpractice results in the death of the patient?

The Illinois Wrongful Death Act permits recovery by an administrator where the death is caused by a "wrongful act, neglect or default" of another who would have been liable in an action by the decedent if death had not ensued. ILL. REV. STAT. ch. 70, § 1 (1959). The West Virginia act is identical in permitting recovery where the death is caused by "wrongful act, neglect, or default" of another. W. VA. CODE ch. 55, art. 7, § 5 (Michie 1961). Despite this identical wording, it is doubtful that West Virginia would permit recovery under the Wrongful Death Act where the action is based upon breach of contract. The nature of the action for wrongful death is generally held to be ex delicto and not ex contractu. In *State ex rel. Yost v. Scouszzio,* 126 W. Va. 135, 27 S.E.2d 451 (1943), a personal representative brought an action under the Wrongful Death Act based upon a peace bond which the defendant was required to file. Here, the court held that the action under the act "provides for the recovery of 'damages' only, and only from the tortfeasor, which presupposes an action in tort." The procedure of the plaintiff in bringing the action in covenant was an "insuperable obstacle to the maintenence of the action."

The West Virginia Supreme Court has yet to define the term "default" as it is used in the Wrongful Death Act. In view of the existing authority construing that act it appears that the term is more susceptible of a definition analogous to omission or failure to act rather than breach of contract. *Jones v. Rinehart-Dennis Co.,* 113 W. Va. 414, 168 S.E. 482 (1933); *Richards v. Iron Works,* 56 W. Va. 510, 49 S.E. 437 (1904).

Other jurisdictions have reached conclusions diametrically opposed to that of the prinicpal case, stating that death resulting from a failure to perform a duty required only under the terms of a contract, and not independently thereof, is not within the scope of the Wrongful Death Act, *Dice v. Zweigart,* 161 Ky. 646, 171 S.W. 195 (1914); *Lewis v. Taylor Coal Co.,* 112 Ky. 845, 66 S.W. 1044 (1902); the malpractice of a physician amounting to a mere breach of contract is not a wrongful or negligent act within the meaning of the wrongful death statute. *Thaggard v. Vafes,* 218 Ala. 609, 119 So. 647 (1928).

A split of authority exists with regard to whether a cause of action can be shown where the plaintiff alleges malpractice causing the death of the patient and bases the action on a breach of contract. This issue seems to hinge upon whether Lord Ellenborough's dictum

in the case of *Baker v. Bolton,* 1 Camp. 493, 170 Eng. Rep. 1033 (K.B. 1808), to the effect that "in a civil court the death of a human being could not be complained of as an injury" would apply to contract actions where death is caused by the breach, as well as to tort actions. Smedley, *Wrongful Death—Bases of the Common Law Rules,* 13 VAND. L. REV. 605 (1960). The above rule has been generally applied to tort and contract cases alike in the United States, with the exception of an early Connecticut case. *Crofs v. Guthery,* 2 Root 90 (Conn. 1794).

The basic nature of the relationship created between the physician and his patient could give rise either to a contract or to a tort action against the physician. The consensual relations of physician to patient forms the basis of a duty and it is this duty, when violated by the negligent conduct of the physician, which gives rise to tort liability. However, malpractice is inextricably bound up with the idea of breach of implied contract, in that the physician impliedly promises to use reasonable care, such as is usually associated with the standards of his profession is similar localities. *Maxwell v. Howell,* 114 W. Va. 771, 173 S.E. 553 (1934). When the physician fails to satisfy this standard, he is held to have breached the contractual duty owing to his patient. *Browning v. Huffman,* 86 W. Va. 468, 103 S.E. 484 (1920); *Dye v. Corbin,* 59 W. Va. 266, 53 S.E. 147 (1906). For a general discussion of malpractice, see Posten, *The Law of Medical Malpractice in West Virginia,* 41 W. VA. L.Q. 35 (1935).

The majority rule seems to be that the mere fact that the complaint contains allegations relating to a contractual relation between the decedent and the party allegedly liable for the death will not defeat the right of action under the death statutes. The courts generally reach this result by one of two approaches. The first is to regard the allegations concerning the contract as merely preliminary statements showing how the defendant's obligation or duty arose. Here the original allegations are considered as merely laying the basis for a cause ex delicto. *Braun v. Riel,* 40 S.W.2d 621 (Mo. Sup. Ct. 1931); *Cabe v. Ligon,* 115 S.C. 376, 105 S.E. 739 (1920). The second alternative is that the court may take the position that it is immaterial whether the cause of action sounds in contract or in tort and that it is unnecessary to determine this question where a statute creates a new cause of action for wrongful death. *Keiper v. Anderson,* 138 Minn. 392, 165 N.W. 237 (1917);

Roche v. St. John's Riverside Hospital, 96 Misc. 289, 160 N.Y. Supp. 401 (1916).

The only case in West Virginia presenting a situation analogous to the problem is *Jones v. Rinehart-Dennis Co., supra,* which involved the death of an employee resulting from silicosis. Maintenence of an action under the Wrongful Death Act was allowed, although the duty to decedent arose out of the contract of employment. However, this latter point was not raised nor made a part of the opinion of the court. Rather, the court seemed to rely quite strongly on the negligence of the employer in failing to provide proper ventilation and safety devices as the basis of liability.

Where the patient survives the malpractice of the doctor, there is no question as to the liability of the latter where the patient can prove negligence. Here, it is generally held that the action is one for negligence and is predicated on the failure of the physician to exercise requisite medical skill. *Colvin v. Smith,* 276 App. Div. 9, 92 N.Y.S.2d 794 (1949). The gravamen of a malpractice action when the patient survives is the negligence of the physician and the contract with the patient is only explanatory of how the former became engaged and serves to raise a duty on his part. It is the breach of this duty that imposes liability. *Kuhn v. Brownfield,* 34 W. Va. 252, 12 S.E. 519 (1890).

Several interesting corollary problems arise with regard to a malpractice action by a surviving patient. Prior to adoption of the West Virginia Rules of Civil Procedure, a malpractice action could be sounded in either contract or tort. In the leading case of *Kuhn v. Brownfield, supra,* the court held that where a physician is employed to treat a patient without any express special contract defining the character and extent of his duties, the plaintiff may bring an action either in assumpsit or case for the breach of the implied obligation arising from such employment.

In conclusion, it appears from the *Zostautas* case, that the Illinois Supreme Court gave the Wrongful Death Act a liberal interpretation in order to create a remedy where it felt none existed. It is difficult to perceive, however, why one would wish to base liability on breach of contract under the Wrongful Death Act in a malpractice situation unless the plaintiff could not prove negligence on the part of the physician. Even in the trial of an action for breach of contract, it would be necessary, in the absence of an express agreement to effect a cure, to prove that the physician

had failed to exercise reasonable and ordinary care such as accords with the usual standards practiced in similar localities. *Maxwell v. Howell, supra.* It would appear that expert testimony would be necessary to prove liability regardless of whether the action is based on tort or contract. *Sherlag v. Kelly,* 200 Mass. 232, 86 N.E. 293 (1908); Miller, *The Contractual Liability of Physicians and Surgeons,* 1953 WASH. U.L.Q. 413. It would appear, therefore, to be necessary to base a malpractice action to recover for the death of the patient on breach of contract only in extreme cases.

Ralph Charles Dusic, Jr.

ABSTRACTS

Evidence—Burden of Proof—Alibi

At a criminal trial, the jury was instructed that: "An alibi will not avail as a defense unless the jury are satisfied by reliable and credible testimony that the absence of the defendant has been so clearly shown that it was impossible for him to have committed the offenses . . . ." Upon conviction, *D* appealed. *Held,* reversed. The trial court committed reversible error in charging, in effect, that *D* bore the burden of proving his defense of alibi. *Halko v. State,* 175 A.2d 42 (Del. 1961).

When the defense of alibi is asserted, it is commonly held that the ultimate burden of proving defendant's presence at the scene of the crime at the time of its commission is upon the prosecution, not upon the defendant to show that he was at another place. 22A C.J.S. *Criminal Law* § 574 (1961); 1 WHARTON, CRIMINAL EVIDENCE § 23 (12th ed. 1955). However, some confusion has arisen because some courts have treated alibi as an affirmative defense analogous to self-defense. The better view would appear to be that an alibi is not an affirmative defense as it does not raise any new matter, but merely denies an essential allegation made by the prosecution. Annot., 29 A.L.R. 1139 (1924).

The position of the West Virginia Supreme Court of Appeals has not been entirely clear. In *State v. Lowry,* 42 W. Va. 205, 211, 24 S.E. 561, 563 (1896), the court said: "Alibi, being strictly a defense, must be proven by the defendant. But, the presence of the accused being necessary to the commission of the offense, the