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Abstracts of Recent Cases

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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.

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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

burden of proving presence is first upon the state." Similar statements can be found in many West Virginia decisions. *State v. Withrow*, 142 W. Va. 522, 96 S.E.2d 913 (1957); *State v. Parsons*, 90 W. Va. 307, 110 S.E. 698 (1922). The essential difficulty with the West Virginia Court's language is that it does not clearly differentiate between the burden of proof and the duty to go forward with evidence. See 20 AM. JUR. EVIDENCE § 154 (1939). Certainly, the defendant must bring forth sufficient evidence to raise a reasonable doubt in the mind of the jury as to his presence, or his defense will fail, but that does not mean that he must prove his absence beyond a reasonable doubt. In *State v. Lowry, supra* at 211, the West Virginia Court did say that defendant's burden of proof only meant his duty to produce sufficient proof so as to raise a reasonable doubt as to his presence. While the language used in these cases is somewhat ambiguous, the effect of these decisions is to place West Virginia, along with Delaware, in accord with the weight of authority.

It would appear that the answer to this problem is simplified by a general statement set forth by Wharton: "In all criminal prosecutions, without regard to the nature of the defense which the defendant may raise, the burden of proof remains at all times upon the prosecution to establish the guilt of the defendant beyond a reasonable doubt." 1 WHARTON, CRIMINAL EVIDENCE § 14 (12 ed. 1955).

Federal Courts—Federal Jurisdiction Cannot Be Restricted By State Statutes

P, a citizen of California, alleged that, while driving her automobile in Newport News, Virginia, she struck an open manhole which the city had wrongfully left unguarded. She brought an action against the city in a federal district court which had jurisdiction by virtue of diversity of citizenship. A Virginia statute provided that a tort action against a city could be instituted only in a state court established pursuant to the Constitution of Virginia. The United States District Court for the Eastern District of Virginia held that the statute was valid and dismissed the case. *Held*, reversed. The jurisdiction of a federal district court is fixed by Congress and the Constitution of the United States and cannot be limited by acts of a state legislature. *Markham v. City of Newport News*, 292 F.2d 711 (4th Cir. 1961).

The district court, after considering a number of cases, concluded that the case of *Erie R.R. v. Tompkins,* 304 U.S. 64 (1938), controlled the principal case. The "Erie Doctrine" holds that a federal court, sitting in effect as a court of the state, will be governed by state law in determining the substantive rights of the parties. Since under the "Erie Doctrine" the state could impose conditions precedent to the enforcement of any right, it was argued that under these circumstances Virginia made the institution of the action in its state court a condition precedent to enforcing the right.

Judge Haynsworth, speaking for the circuit court, carefully pointed out that the "Erie Doctrine" does not extend to matters of jurisdiction, or generally, to procedure. Jurisdiction in the federal courts is determined by acts of Congress, implementing the Constitution of the United States, and cannot be affected by state statutes. The philosophy of the "Erie Doctrine" is that a federal court adjudicating rights created by a state, sits as another court of that state and should reach the same result as a state court deciding the identical issue.

Any other conclusion would have been foreign to the broad powers granted to Congress in the establishment of the federal courts.

Torts—Rights of Children to Recover for a Negligent Injury to Their Parents

Three minor children, through their next friend, brought an action to recover damages from *Ds* for the negligent injury to their father, who was still living. The trial court sustained a motion to strike on the basis that the children had no cause of action. *Held,* affirmed. A minor child has no cause of action for damages arising out of the disability of his father caused by the negligence of another. *Hoffman v. Dautel,* 368 P.2d 57 (Kan. 1962).

At present, the universal rule is that minor children have no cause of action for injuries to their parent caused by the negligence of a tort-feasor. *Meredith v. Scruggs,* 244 F.2d 604 (C.A. Hawaii 1957); *Turner v. Atlantic Coast Line R.R.,* 159 F. Supp. 590 (N.D. Ga. 1958); *Halberg v. Young,* 41 Hawaii 634, 59 A.L.R.2d 445 (1957); *Erhardt v. Havens, Inc.,* 53 Wash. 2d 103, 330 P.2d

1010 (1958). See generally, ANNOT., 59 A.L.R.2d 454 (1958). Even though the rule is universal, there has been substantial agitation by writers to permit such an action by minor children. 32 B.U.L. REV. 82 (1952); 20 CORNELL L.Q. 255 (1935); 2 ST. LOUIS U.L.J. 305 (1953); 6 VAND. L. REV. 926 (1953).

Recovery is generally denied to minor children on one or more of the following bases: (1) there was no such action at common law, and any change should be made by the legislature; (2) the damages are too uncertain to be determined by a jury; (3) granting recovery would encourage a multiplicity of actions based on a single tort and one physical injury; and (4) the possibility that recovery of damages by a minor would overlap with his parent's recovery. PROSSER, TORTS § 103 (2d ed. 1955). Of these reasons, only the multiple-recovery possibility appears to have substantial merit. In *Halberg v. Young supra,* the Hawaii Court pointed out that where the injury did not result in death the parent could recover the full damages which he had incurred, including inability to properly support and maintain his children. Therefore a further recovery by a child would, to that extent, duplicate the parent's recovery.

However, it would appear that the possibility of multiple recovery and the lesser reasons given above are not the true explanation for most of the decisions, rather these reasons seem to be an attempt by the courts to justify a policy decision. Thus the courts are reaching an apparently reasonable conclusion in deciding, in effect, that an action by a child of the injury party is outside of the scope of the risk.

Trial—Argument of Counsel—Use of a Formula Not Based on Evidence

Is it permissible for the plaintiff's counsel to suggest to the jury a method of determining compensation for pain and suffering founded on a mathematical or per-diem basis? In the past several months various courts throughout the country have had this highly controversial issue before them. The West Virginia Supreme Court of Appeals in a three-two decision held that the use of a per-diem formula constituted reversible error. *Crum v. Ward,* 122 S.E.2d 18 (W. Va. 1961), 64 W. VA. L. REV. 237 (1962). In light of the recent comment in the Law Review, a discussion of these hold-

ings might be beneficial in determining whether or not there is a discernible trend in the decisions.

In *Hall v. Booth,* 178 N.E.2d 619 (Ohio 1961), the Ohio Court of Appeals disapproved the plaintiff's counsel's use of a mathematical formula argument, but held that use of such argument was not prejudicial error in that there was substantial evidence to sustain the verdict of the jury. Although it apparently favors the implementation of per-diem arguments, the Montana court has taken a view similar to Ohio's in stating that: "In any event, whether improper argument requires reversal depends upon whether prejudice has been engendered which prevents a fair trial. Upon examination of the record, we are unable to say that any prejudice resulted." *Wyant v. Dunn,* 368 P.2d 917, 920 (Mont. 1962).

While Ohio and Montana have taken a functional approach to the problem, other courts have recently taken more definite positions. The South Carolina court held, with one dissent, that implementation of a per-diem argument was improper. *Harper v. Bolton,* 124 S.E.2d 54 (So. Car. 1962). The Illinois Supreme Court, likewise with one dissent, reached a similar result. *Caley v. Manicke,* 30 U.S.L. WEEK 2468 (Ill. Sup. Ct. March 23, 1962). But, the Maryland Court of Appeals, with two dissents, held that the use of a mathematical formula argument was permissible. *Eastern Shore Pub. Serv. Co. v. Corbett,* 177 A.2d 701 (Md. 1962). However, the Maryland court tempered its holding somewhat by adding that the mathematical formula argument should be accompanied by cautionary instructions to the jury that the argument is not evidence and that the jury alone must determine the proper verdict.

The above cited cases provide little by way of novel treatment of the issue, but merely espouse one view or the other without a great deal of comment. Obviously, the question is still an open one, and it appears that it will remain open. Perhaps the functional approach taken by Montana and Ohio will bank the fires of this legal battle, but, judging by the rate at which decisions on the question are being handed down, the end is not near.

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Sales—Disclaimer of Warranty in Sale in New Motor Vehicle Held Valid in West Virginia

P recovered judgment in the Common Pleas Court for damages to a new truck resulting from an accident which *P* claimed resulted from the failure of a defective wheel on the truck. The accident occured nine days after purchase. *D*, seller, gave a written warranty that all parts of the vehicle were "free . . . from defects in material and workmanship," limited its obligation to a replacement of defective parts and expressly disclaimed all other warranties. Judgment for plaintiff was set aside in the Circuit Court. On writ of error to the Supreme Court of Appeals, *Held:* affirmed, the judgement was rightly set aside. The disclaimer provision is valid and bars recovery for damage to the truck *(alternative holding).* (The court also held the plaintiff failed to produce evidence sufficient to support a jury finding that the accident resulted from a defect in the product sold.) *Payne v. Valley Motor Sales, Inc.*, 124 S.E.2d 622 (W. Va. 1962).

In this first ruling on a written disclaimer of implied warranties, the West Virginia court has refused to follow the consumer-protection view of *Henningsen v. Bloomfield Motors Inc.*, 32 N.J. 358, 161 A.2d 69 (1960) which held invalid on grounds of public policy the disclaimer of warranty usually found in new car sales contracts. See, comment 65 W. VA. L. REV. 351 (1962). The reasons advanced for refusing to enforce such disclaimers is the lack of actual bargaining and conscious agreement on such terms of sale and also upon the better position of the seller or manufacturer to bear the risks of loss. The rationale of the West Virginia position as expressed in the instant case "the recognized right of the parties to contract and to have such contracts upheld by a court." 124 S.E.2d at 628. The adoption of the Uniform Commercial Code in West Virginia would not change the principle of this case but would require additional findings to reach the same result. Warranties may be disclaimed under the Code provisions, but such disclaimers must be "conspicuous," *viz.*, in type of a different style or color than that of the rest of the contract. UNIFORM COMMERCIAL CODE §§ 2-316, 1-210(10). See Lorensen, *The Uniform Commercial Code Sales Article Compared With West Virginia Law*, 64 W. VA. L. REV. 142, 168-73 (1962). The Code rule would permit the freedom of contract espoused by the West Virginia court while making it more likely that the purchaser is actually aware of the content of the contract he has made.