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Insurance--Effect of Clause in Auto Liability Policy Excepting Risks of Operation by Infants

Robert T. Stealey
West Virginia University College of Law

in its inquiries, need not be limited by jury-trial rules. However, there must somewhere be found, in the mass of evidence accepted, sufficient evidence legally acceptable by jury-trial rules to sustain the finding.[3] This rule is followed by several courts and it promises to become even more widely accepted.[4]

Professor Wigmore, generally recognized as the authority in the field of evidence, thinks that this is an unsatisfactory rule. It still virtually requires the tribunal to test its proceedings by the jury-trial rules, throwing itself open to the order of technicalities of trial tactics. "The requirement of a 'residuum of legal evidence' rests on the assumption that the legal evidence is always credible and sufficient, while the illegal evidence is never credible nor sufficient."[5]

Our statute provides that the commission shall not be bound by the usual common law or statutory rules of evidence. It seems that this statute could be properly interpreted so as to allow the commission greater latitude in regard to the use of evidence in proceedings before it, and we would doubtless be justified in trusting to its expert judgment and good faith.[6] To permit such liberality seems to be consonant with the purpose and spirit of legislation in this field.

—JOHN K. CHASE.

INSURANCE—EFFECT OF CLAUSE IN AUTO LIABILITY POLICY EXCEPTING RISKS OF OPERATION BY INFANTS.—The plaintiff in the case of *Raptis v. United States Fidelity and Guaranty Company*[1] had what is commonly known as an automobile liability insurance policy with the defendant, which policy contained a provision exempting the defendant from liability in case the car was operated by a person under the age of sixteen years. The defendant hired one Farris to operate the truck and one McClain as helper. Farris having left the truck with McClain in it for some moments to make a delivery, a traffic jam occurred and McClain in attempting to

[3] Carroll v. Knickerbocker Ice Co., 218 N. Y. 435, 113 N. E. 507 (1916).
[4] See collection of cases in (1923) 36 HARV. L. REV. 263.
[5] 1 WIGMORE ON EVIDENCE (2d ed. 1923) § 4C.
[6] Poccardi v. Public Service Commission, 75 W. Va. 542, 546, 84 S. E. 242 (1915); Caldwell v. Compensation Commissioner, 106 W. Va. 14, 16, 144 S. E. 568 (1928).

[1] 156 S. E. 53 (1930).

move the truck out of the way lost control and struck a pedestrian, who subsequently recovered judgment against the now plaintiff. McClain not being sixteen years of age the defendant claimed it was not liable but a recovery was allowed on the theory that the negligence causing the injury was that of Farris and not McClain and that within the meaning of the policy Farris was operating the truck.

To hold the assured liable for any injury whatever two facts must appear. First, the servant operating the truck must have been acting within the scope of his employment, and, second, the injury must have been the proximate cause of the servant's negligence. Who was operating this truck? If it be conceded that Farris was operating it, then he was certainly acting within the scope of his employment for he was hired for that purpose. In the opinion Judge Woods says: "In the instant case the truck was under the control of Farris, and within the meaning of the policy was being operated by him."[2] Although it may well be doubted whether the negligence of Farris, if any, was the proximate cause of the injury to the pedestrian, since there seem to be at least two independent intervening agencies operating, that question is settled by the judgment against this plaintiff below. The crux of the matter is who shall be considered as operating this truck within the meaning of the policy, in order to determine defendant's liability under it.

Insurance contracts are not construed as other contracts. The usual rule is that contracts are construed according to the intent of the parties, objectively considered. But in West Virginia, where two constructions of an insurance contract are possible, the language of the policy is construed strictly against the insurer.[3] To say that the word "operate" as commonly used in describing the control of an automobile does not include a sense of physical control is simply to deny the plain, ordinary meaning of that word. It may seem socially desirable to shift a loss of this sort to the insurance companies, it does not obviate the fact that it is equally unfair to make them the subject of word-juggling. The real question is, was this risk within the contemplation of the parties when they used that language?

The syllabus of this case, point number one, by the court,

[2] See Aetna Casualty & Surety Co. v. Etoch, 174 Ark. 409, 295 S. W. 376 (1927) (accord on almost identical facts on this theory of the operation but with a dissent by three members of the court).

[3] Shinn v. West Virginia Ins. Co., 104 W. Va. 353, 359, 140 S. E. 61 (1927).

reads: "An insurer. . . .against liability from loss. . . .cannot escape liability under a condition contained therein to the effect that it shall not be liable if such accident occurs while the truck is being operated by any person under the age of sixteen years, except it establish the relation of principal and agent as between the assured and the party, under the age of sixteen years, who is claimed to have been operating. . . ." Under this syllabus, in order for the insurance company to escape liability under any state of facts, it must establish agency between the insured and the operator. Certainly neither the insured nor the insurer contemplated liability because of the operation of the car by totally unauthorized persons under the age of sixteen years. How could the assured himself be liable?[4] It is difficult to find any reason whatsoever for putting this decision on the grounds of agency. It seems to be purely the construction of a word in an insurance contract. This syllabus, if literally followed, might lead the court far afield. It may be that the result is desirable but the steps by which it is attained are unsubstantial indeed.

—ROBERT E. STEALEY.

PARENT AND CHILD—RIGHT OF MINOR CHILD TO SUE PARENT FOR PERSONAL TORT.—The plaintiff, an unemancipated child of sixteen, residing with her father, the defendant, was injured in an automobile accident while a passenger in her father's automobile, driven by him. She sued him for damages, alleging negligent driving of the car by her father.

Held: No recovery since an unemancipated infant may not maintain against his parents an action for personal injuries caused by the parent's negligence in driving his automobile wherein the child was a passenger. *Securo v. Securo*.[1]

In this case the West Virginia Court has spoken for the first time on the right of a minor child to sue his parent for personal tort. In refusing such an action the court follows the great weight of authority in the United States.[2] The Supreme Court of South

[4] Hossley v. Union Indemnity Co., 137 Miss. 537, 102 So. 561 (1924); BLASHFIELD, AUTOMOBILE LAW (1927) 2642.

[1] 156 S. E. 750 (W. Va. 1931).

[2] Small v. Morrison, 185 N. C. 577, 118 S. E. 12 (1923); Materese v. Materese, 47 R. I. 131, 131 Atl. 198 (1925); Elias v. Collins, 237 Mich. 175, 211 N. W. 88 (1926); McKelvey v. McKelvey, 111 Tenn. 388, 77 S. W. 664 (1923); Fortinbury v. Holmes, 89 Miss. 373, 42 So. 799 (1907); Goldstein v.