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Case Digests

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TORTS: Failure to Buckle Automobile Seat Belts

Kavanagh v. Butorac,—Ind. App.—, 221 N.E.2d 824 (1966).

Plaintiff was a front-seat passenger in an auto which collided with a motor vehicle driven by the defendant. As a result of the collision the plaintiff suffered an injury resulting in the surgical removal of his left eye and other injuries. It was clearly established that the auto in which the plaintiff was riding was equipped with seat belts and that plaintiff's belt was unfastened at the time of impact. Also it was highly probable that the damage to plaintiff's eye was brought about by its forcible contact with the rear view mirror. The trial court acting without a jury awarded the plaintiff a judgment of 100,000 dollars for personal injuries.

On appeal, *held*, the failure to "buckle up" does not as a matter of law constitute a bar to recovery under the doctrines of contributory negligence, assumption of risk or avoidable consequences where the expert testimony and the record as a whole is insufficient to show that the injury could definitely have been avoided had the passenger used his seat belt. The judgment was sustained.

After first finding that the award of damages was not excessive and that the plaintiff was not contributorily negligent as a matter of law for failing to maintain a proper lookout, the court was pressed with arguments stemming from the plaintiff's failure to make use of available seat belts.

The court first focused its attention on the doctrine of avoidable consequences; one of several theories advanced by the defendant as a bar to plaintiff's recovery. In treating this theory, the court pointed out that the gist of this doctrine lies in a rule of damages by which certain items of loss are not recoverable when caused by the failure of the injured party to exercise reasonable care and diligence to minimize resulting loss or damage. Since the doctrine comes into play after the establishment of proximate cause in defendant's conduct, it is not a bar to recovery but rather a limitation on the amount of damages recoverable. In contrast, the doctrine of contributory negligence involves acts or omissions occurring before the defendant's wrongdoing has been completed, and when it is proven that such acts or omissions precipitated the proximate cause of the injury, the injured party is barred from recovery.

After noting this distinction, the court was unwilling to invoke the doctrine of avoidable consequences in the absence of a clearer

and more sufficient showing that some part of the injury "would not have occurred except for the fact that the plaintiff failed to avoid the consequence of the tort by not fastening his seat belt." The only proof submitted by the defendant pertaining directly to causation consisted of the testimony of an expert on safety who offered an opinion that the plaintiff would not have collided with the rear view mirror if his seat belt had been properly fastened. Since the case was not tried before a jury, the trial judge was at liberty to exercise his discretion in weighing this expert opinion. In the face of these considerations, the court felt that it could not conclude as a matter of law that the necessary *but for* causation was present so as to enable it to invoke the doctrine of avoidable consequences. These same limitations precluded application of both contributory negligence and assumption of risk.

Although the decision does not fully explore the feasibility of extending common law theories to the particular question involved, it is worthy of attention from the single standpoint of extending recognition to the possibility of placing an injured party under some type of duty to make use of available seat belts. At least the Indiana decision demonstrates an awareness of a judicial responsibility toward encouraging the policy favoring a constant use of seat belts by the traveling public. Such a position is certainly refreshing when compared with the attitude that the problem entails solely a matter of legislative rather than judicial cognizance. The latter attitude prevailed for example, in *Brown v. Kenrick*, 192 So. 2d 49 (Fla. Dist. Ct. App. 1966), in which a guest's failure to use seat belts was offered as a defense to a claim of gross negligence against the driver. The court sustained a motion to strike the defense on the basis that it was not willing to enter an area of legislative concern.

In the principal case, some of the important theoretical problems arising from the failure of an injured plaintiff to make use of available seat belts were only briefly discussed by the court. For instance, it is certainly of some concern in those states which have not adopted a comparative negligence statute, whether the omission on the part of the plaintiff is labeled contributory negligence. If such were the case, it is entirely conceivable that some courts might reach the position that the plaintiff should be completely barred from recovery. A similar result could follow if the theory of assumption of risk were employed. Although such holdings might be highly desirable as means for encouraging a safety conscious public, it is questionable whether these goals can be justified to the exclusion of the private interest of the law: adjusting and weighing the interests and wrongdoings of the litigants themselves. From this

standpoint, such holdings would seem unwarranted since the injured plaintiff's omitted act in no way increased the risk of initial collision but only the risk that certain injuries would be aggravated as a result of the initial collision. Thus, the existence of indistinguishable causation, which underlies the rationale of contributory negligence, is not present in the seat belt situation. Stated another way, the failure to use seat belts does not create a risk which would increase the probability of defendant's act becoming tortious, but only a risk with respect to the extent of damages resulting from such tortious conduct.

Once the fault concept is placed in proper perspective the problem is reduced to the discovery of a rule pertaining only to damages. In the instant case the court was of the opinion that the doctrine of avoidable consequences would serve such a purpose. The burden of proof in establishing this doctrine as a limitation on recovery rests, of course, with the party asserting it. The critical question here concerns whether this burden should be cast in terms of *but for* causation or some lesser standard such as *highly probable* cause. In view of the range of opinion concerning the precise safety effect of seat belts, the proof of mere *but for* causation may appear overly harsh. At any rate, it is not unreasonable to conclude that most of the litigation dealing with the question of seat belts will turn on the burden and adequacy of proof. The recent case of *Mortensen v. Southern Pac. Co.*,— Cal. App.2d—, 53 Cal. Rptr. 851 (Dist. Ct. App. 1966) indicates that the proof question will constitute the battleground in Federal Employment Liability Act cases. In this case a railroad employee was driving defendant's truck when it was struck in the rear by another vehicle, the driver of which was drunk. The defendant's truck rolled down an embankment causing the employee to be thrown out. Under FELA requirements, liability attaches if injury or death results in whole or in part by reason of any defect or insufficiency due to the railroad's negligence. The question before the court was whether the failure to provide seat belts, under the evidence submitted, was sufficient to send the case to the jury. By an affirmative holding on this question, the court has in effect forced the dispute to turn on the degree and sufficiency of proof before the finder of facts.

CONSTITUTIONAL LAW: Commerce Clause

Tupman Thurlow Co. v. Moss, 252 F. Supp. 641 (M.D. Tenn. 1966).

Plaintiff, a dealer in imported meats, instituted this action for a declaratory judgment that two Tennessee statutes dealing with imported meat were unconstitutional. One of these was a labeling

statute and the other set forth a licensing requirement. The labeling statute provided that anyone who sold or offered any imported meat in whatever form was required to identify the product and its origin by a label on the meat, or in some cases, a conspicuous sign in lieu of the label. The licensing statute required wholesalers and retailers of certain imported meat to register and pay a significant fee although the fee could be dispensed with for periods when it was determined that there was a shortage of native meats.

A three-judge court was convened to hear the case, and it determined that the two acts were in conflict with the commerce clause of the United States Constitution in that they imposed unreasonable and discriminatory restrictions and burdens upon interstate and foreign commerce. The labeling statute was attacked upon the basis that it would require handlers of meat to trace its origin whereas the prior practice had been that foreign and domestic meats were indiscriminately co-mingled. That compliance with the statute in light of the earlier practice would be burdensome was said to be self-evident. Furthermore, it was noted that the burden was discriminatory since meats produced within the United States were exempt from any labeling requirement. With regard to the licensing statute, the court noted that it also imposed unreasonable and discriminatory restrictions and burdens upon commerce, but the statutes were viewed together as one regulatory scheme.

The defendant argued that the legislation should be upheld on the basis that the state could protect its citizens from fraud and deception through exercise of its police power. To support this argument, defendant pointed out that foreign meat is frozen in the country of origin and suggested that the consumer is therefore deceived because he thinks he is buying a fresh product. The court apparently conceded that fresh products are, in some respects, superior, but stated that there was no evidence that the consumer supposed the product he purchases to be fresh, nor was there evidence that such products were represented to be fresh. In addition, the argument suffered because the consumer was not entitled to information about domestic meats which had been frozen. All of the cases cited by the defendant upholding regulation to prevent fraud and deception were distinguished on the basis that they dealt with legislation concerning the nature, quality or quantity of the product whereas it was said that the labeling statute did "nothing except inform the public that a meat product had its origin in a foreign country. . . ." *Tupman Thurlow Co. v. Moss*, 252 F. Supp. 641, 649 (1966).

Whatever the motives behind legislation of this nature, it is extremely susceptible to an inference that its purpose was to pro-

tect domestic, if not local, producers. In other words, it is a backdoor attempt at the state level to prohibit or impede the importation of meat from abroad. Regardless of the argument that importation of meat places a ceiling upon the producers' prices and thereby keeps them from advancing with the cost of living, regulation of commerce remains an area where the federal right under the commerce clause is predominant, and the state can act only in areas of legitimate local interest. See Bison, *Economic Protective Powers of States Under the Commerce Clause*, 38 GEO. L. J. 590 (1950). With this in mind, it is expected that the courts will continue to thwart direct or indirect attempts by states aimed at keeping "the system unimpaired by competition from afar." *Baldwin v. Seelig*, 294 U.S. 511, 519 (1935).

Quite clearly, the only bases upon which a labeling act could be upheld as valid state legislation would be to establish that the measure was not enacted for economic reasons, but instead either is designed to protect the citizens against fraud or is supported by health or safety considerations. *Hood & Sons v. DuMond*, 335 U.S. 808 (1948). According to the reasoning of the case under consideration, this burden cannot be met since labeling indicates nothing more than the origin and that apparently is not enough to bring it within the area of permissible state legislation. Even apart from the question of legitimate local interest, it does not appear that this type of statutory regulation could be amended so as to avoid a charge of burdening commerce.

The reasons for presenting this case are twofold. First, it is apparently the only case thus far dealing with this exact question. Second, Nebraska has a recently enacted labeling statute which is quite similar to that presented for analysis in the above case. NEB. REV. STAT. §§ 81-2,211-16 (Supp. 1965). From what appears, it seems doubtful that the Nebraska statute could withstand attack on constitutional grounds.

PROPERTY: Easements

Reliable Washer Serv. v. Delmar Associates, 49 Misc. 2d 348, 267 N.Y.S.2d 419 (City Ct. of Long Beach 1966).

Plaintiff entered into an agreement with the defendant's grantor under which he would install and maintain one washing machine and one dryer in the laundry room on each floor of grantor's apartment building. The agreement was to run for five years and two months terminating December 31, 1968. Plaintiff also agreed to pay 250 dollars quarterly for the privilege of so placing his equip-

ment. The seventh paragraph of the contract provided that the agreement shall "bind the parties hereto, and shall bind and enure to the legal representatives, successors and assigns of the parties respectively." The basic question raised was whether the defendant grantee of the apartment building was bound by the agreement. The plaintiff relied on a New York decision, *Polner v. Arling Realty*, 194 Misc. 831, 88 N.Y.S. 2d 348 (Sup. Ct. 1949), in contending that the agreement was a lease. The court distinguished the *Polner* case on the basis that in that case there was a grant of exclusive possession of specific space, rather than a mere right to install one washer and one dryer in each laundry room. The court held that absent the exclusive possession of a specific portion of the premises, the agreement was not a lease and must therefore be a license. The defendant grantee would not be bound by the license agreement in that such an agreement is terminable at will. CLARK, COVENANTS AND INTERESTS RUNNING WITH LAND 16 (1929).

In looking at the operative facts of the instant case to determine the legal theory which would best serve the intention of the original parties and also do substantial justice, both the plaintiff and the court apparently neglected to consider that what the parties had created was in fact an easement. There are a number of factors in the agreement that support the theory that it was the intention of the parties to create an agreement in the nature of an easement. First, paragraph seven provides that subsequent parties were to be bound. Second, the specific time, five years and two months, tends to show that the time element was carefully considered and quite important. Third, the amount of money paid by the plaintiff and the amount of investment in equipment and time would clearly indicate that the plaintiff intended not to have an agreement terminable at will. The fact that there was granted no right of exclusive possession of a specific area, which barred a finding that a lease had been created, is irrelevant to finding that an easement had been granted the plaintiff. The agreement was in writing; thus the Statute of Frauds would not be a bar. Although all the necessary elements of an easement were present in the instant case, this theory of recovery was ignored. The court seemed to hold that because the agreement was not a lease it was therefore a license. This is not a necessary conclusion. Had the plaintiff pleaded the existence of an easement, the court would have found that the facts showed all the necessary elements establishing that type of interest, and also fulfilled the apparent intention of the parties.

TORTS: Parental Immunity

Briere v. Briere, — N.H. —, 224 A.2d 588 (1966).

The defendant's wife brought suit in behalf of their two children to recover for injuries which the children suffered as a result of the alleged negligence of their father in driving an automobile. The lower court granted the defendant's motion to dismiss on the basis that a minor unemancipated child cannot sue his parent—the parental immunity doctrine. The Supreme Court of New Hampshire reversed and *held* that the continual erosion of the parental immunity doctrine in recent years requires that it now be overturned. The court further held that since the children may sue their father, a fortiori the wife may sue in her own behalf for consequential damages she sustained because of the injuries to the children.

The *Briere* case, at present, in the latest in a growing number of minority decisions which consider that the policy reasons behind the parental immunity doctrine no longer out-weigh underlying principles of tort law: (1) the law of torts is a means for creating and protecting rights, as well as a vehicle for compensating harm caused by others and (2) tort law is a field where "conditions are not static but dynamic, as the law grows and changes to meet new social and economic conditions." *Briere v. Briere*, — N.H. —, 224 A.2d 588, 590 (1966). The court recognized that the parental immunity doctrine in most jurisdictions is a "court-made rule" and also, in deference to the legislative function, that the state legislature had had ample opportunity to exercise its prerogative but had chosen not to act. From these principles, the court assaulted three of the primary policy reasons which support the doctrine of parental immunity still enforced in the majority of jurisdictions.

The first policy reason is that the threat of fraud and collusion in intra-family litigation is great. However, the court noted that New Hampshire has previously allowed suits between husband and wife, relatives, host and guest, and intimate friends, and in all instances the litigation involves the same likelihood of collusion. The courts, having proved themselves competent to handle those cases, are equally equiped to "ferret out" collusive suits when minors and their parents are parties. "In short, we are unwilling to espouse the doctrine that the mere opportunity for fraud and collusion should be an insuperable barrier to an honest and meritorious action by a minor." *Id.* at —, 224 A.2d at 590.

The second policy behind the doctrine of parental immunity, "depletion of the family exchequer," was refuted by the court by realizing that few suits would be brought against a parent unless

the parent had the means to satisfy the judgment, and any parent with means will inevitably carry insurance. Unwilling to predicate liability on the presence or absence of insurance alone, the court added: "[T]he prevalence of insurance cannot be ignored in determining whether a court should continue to discriminate against a class of individuals by depriving them of a right enjoyed by all other individuals." *Id.* at —, 224 A.2d at 590.

The last policy, "the preservation of parental authority and family harmony," was recognized by the court to be fundamental to the validity of the doctrine. The court observed that the same policy argument arises, but is not determinative in suits which may be maintained between spouses, or between a minor unemancipated child and his parent under all of the exceptions to the doctrine that exist in many jurisdictions: for example, actions on contracts, actions to protect property rights and actions for injuries caused by willfull or intentional conduct of the parent. An opposing policy which the court found to be of equal weight to the policy of preserving family harmony is that "a parent nearly always desires above all to protect and benefit his children . . . ." *Id.* at —, 224 A.2d at 591. Thus, the doctrine of parental immunity was put to rest as being supported by policy considerations which no longer have any substantial bearing on contemporary requirements and conditions.

In *Goller v. White*, 20 Wis.2d 402, 122 N.W.2d 193 (1963), the Supreme Court of Wisconsin also obliterated the parental immunity doctrine. The court noted that the Wisconsin Legislature had previously considered a statute that would have abolished parental immunity but it had refused to act. Nevertheless, as in the *Briere* case, the Wisconsin court felt that since the rule had originated in the courts, it could die in the courts as well. *Id.* at 412, 122 N.W.2d at 198. In contrast to the *Briere* case, the Wisconsin court fashioned a rule which it thought best gives substance to what little policy still supports the parental immunity doctrine, rather than rejecting the doctrine in totality. The court chose to retain the doctrine "(1) where the alleged negligent act involves an exercise of parental authority over the child; and (2) where the alleged negligent act involves an exercise of ordinary parental discretion with respect to the provision of food, clothing, housing, medical and dental services, and other care." *Id.* at 413, 122 N.W. 2d at 198.

The Supreme Court of Nebraska held in *Fisher v. State*, 154 Neb. 166, 47 N.W.2d 349 (1951), that a parent may be civilly or criminally liable for assault of her child if the correction is "immoderate and unreasonable." In *Nelson v. Johansen*, 18 Neb. 180, 24 N.W. 730 (1885), the court held that one in loco parentis may be

civilly liable for negligently failing to provide sufficient warm clothing for the plaintiff. Therefore, the Supreme Court of Nebraska has indicated a willingness to find exceptions to the doctrine of parental immunity, as have most courts. Yet in the more recent case of *Pullen v. Novak*, 169 Neb. 211, 99 N.W.2d 16 (1959), the court refused to consider abolishing the doctrine, and further refused to allow a minor unemancipated child to sue his parent's employer for the negligent acts of his parent acting within the scope of his employment. Even though the father-employee is still personally immune from suit instigated by his child in most jurisdictions, the majority of cases in these jurisdictions nevertheless allow recovery against the employer, as being one of the many exceptions to the doctrine. Comment, *A Proposed Modification of the Parental Immunity Doctrine*, 23 OHIO ST. L.J. 339, 343 (1962). This exception clearly indicates that courts have gone to anomalous extremes to avoid the doctrine, realizing that the employer has a right over against his negligent employee.

In recent years, the assault on the doctrine of parental immunity has strengthened. Yet in *Hastings v. Hastings*, 33 N.J. 247, 163 A.2d 147 (1960), the court retained the doctrine by a four to three vote. But as noted in *Briere*, "the dissenting minority counters with an equally impressive collection dominated by text writers, professors and dissident judges maintaining the opposite opinion." — N.H. —, —, 224 A.2d 588, 589 (1966). It appears that Wisconsin and New Hampshire have charted a well reasoned course that will inevitably be followed by many other jurisdictions.