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SOME UNREPORTED CASES AND UNRESOLVED ISSUES IN NORTH DAKOTA LAW

ROBERT VOGEL*

I. INTRODUCTION

The law is always changing, and each state is a separate laboratory where new ideas are being tested. Less populous states (like North Dakota) which have a proportionately smaller caseload often lag behind the larger states in adopting new and better legal doctrines. This commentary discusses three areas where clarification or updating of North Dakota law would be welcomed, at least by this author. This commentary also contains a partial and unscientific survey of holdings in the three areas under discussion. For a variety of reasons these issues have not reached the Supreme Court of North Dakota, but may contain clues and trends of value to practitioners and judges.

II. STRICT LIABILITY IN TORT

Probably the fastest growing doctrine in the law of tort in recent years has been that of strict liability. Starting with the adoption of Section 402A of the Second Restatement of Torts less than 10 years ago, over two-thirds of the American jurisdictions have now adopted the doctrine.[1]

Despite some tantalizing hints that North Dakota is about to adopt the doctrine, it has not yet done so. Among these are the following: (1) the ready adoption of other sections of the Restatement (Second) of Torts;[2] (2) the abundant citation of leading cases on strict liability in tort noted in *Lang v. General Motors Corp*;[3] (3) the use, in *Lang*, of language paralleling very closely

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1. W. PROSSER, LAW OF TORTS 658 (4th ed. 1971) [hereinafter cited as PROSSER].
2. *See, e.g.*, Section 398 of RESTATEMENT (SECOND) OF TORTS in Lindenberg v. Folson, 138 N.W.2d 573, 582 (N.D. 1965), and Section 339 in Mikkkelson v. Risovi, 141 N.W.2d 150, 154 (N.D. 1966).
3. Lang v. General Motors Corp., 136 N.W.2d 805 (N.D. 1965), *citing*, Pritchard v. Liggett and Myers Tobacco Co., 295 F.2d 292 (3rd Cir. 1961); Spence v. Three Rivers Builders and Masonry Supply, Inc., 353 Mich. 120, 90 N.W.2d 873 (1958); Randy Knit Wear, Inc. v. American Cyanamid Co., 11 N.Y.2d 5, 181 N.E.2d 399, 226 N.Y.S. 2d 363 (1962); Rodgers v. Toni Home Permanent Co., 167 Ohio St. 244, 147 N.E.2d 612, 75 A.L.R.2d 103 (1958).

the language in the leading case of *Henningsen v. Bloomfield Motors, Inc.*;[4] and (4) the giving of instructions on strict liability in tort by federal and lower court judges in North Dakota. One example of this is the unreported case of *Bender v. International Harvester Co.*,[5] involving a foreign corporation, in Emmons County District Court, where former Judge Adam Gefreh instructed the jury that they might find the defendant liable if the forage harvester in question was defective in design, regardless of whether or not negligence was established. The defendant paid the full judgment rather than going through with a threatened appeal.

In another unreported decision, *Foster v. Smith, Kline and French*,[6] in which there was a defense verdict and no appeal, the late United States District Court Judge George S. Register instructed the jury that a drug manufacturer which markets a product in a defective condition, unreasonably dangerous to the user or consumer, is liable for harm caused thereby, even though it exercised all possible care.

Based on the above arguments the plaintiff in *Christensen v. Osakis Silo Co.*,[7] maintained that North Dakota had actually adopted the doctrine of strict liability in tort. This was a case tried in Minnesota, but based on North Dakota law. United States District Court Judge Edward Devitt refused to give instructions on strict liability in tort, and the Eighth Circuit Court of Appeals also held that North Dakota had not yet adopted the doctrine.

Be that as it may, it is suggested that the North Dakota Supreme Court has, in effect, already adopted the doctrine, or should do so at the first opportunity. If two-thirds of the jurisdictions have adopted the doctrine within less than ten years, there is no reason for North Dakota to continue lagging behind.

III. STANDARD OF CARE REQUIRED OF MINORS

Three North Dakota cases discuss the standard of care required of children[8]. All of them state, in slightly varying terminology, that a minor is to be judged, not by the standards of conduct of an ordinarily reasonable adult person, but by the standard of conduct of an ordinary minor of like age, capacity, and experience.

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4. Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960).
5. Bender v. International Harvester Co., No. 4347 (Emmons County, filed March 7, 1966).
6. Foster v. Smith, Kline, and French, Civil No. 4215 (D.N.D., Feb. 13, 1968).
7. Christensen v. Osakis Silo Co., 424 F.2d 1301 (8th Cir. 1970).
8. Sheets v. Pendergrast, 106 N.W.2d 1 (N.D. 1960); Moe v. Kettwig, 68 N.W.2d 853 (N.D. 1955); Schweitzer v. Anderson, 83 N.W.2d 416 (N.D. 1957).

In other states a secondary rule has developed that holds that whenever a child "engages in an activity which is normally one for adults only, such as driving an automobile . . . , the public interest and the public safety require that any consequences due to his own incapacity shall fall upon him rather than the innocent victim, and that he must be held to the adult standard, without any allowance for his age."[9]

North Dakota cases do not discuss whether engaging in an adult activity changes the degree of care required of a minor. An examination of the cases, however, indicates that they are not inconsistent with the secondary rule quoted above. In *Moe v. Kettwig*[10] the child was bicycling, which is not an adult activity, and in *Schweitzer v. Anderson*[11] the child involved was a pedestrian. Again, walking is not specifically an adult activity. Therefore neither of these cases is contrary to the "adult activity" rule. In *Sheets v. Pendergrast*,[12] however, the minor was driving an automobile, and on its face the decision would appear to constitute a holding that North Dakota does not recognize the rule that a minor engaged in an adult activity is held to an adult standard of care. However, a closer examination of *Sheets*, and particularly the briefs filed by the parties, shows that the language of the case is actually dictum. There the court instructed the jury that a minor is not held to the same standard of conduct as an adult, and is only required to exercise that degree of care which ordinarily is exercised by minors of like age, mental capacity and experience.[13] The plaintiff prevailed against the defendant driver in spite of the higher burden of proving negligence by standards applicable only to children, and the defendant appealed. The defendant did not complain about the instruction as to the care required, since it was favorable to him. The plaintiff also made no objection because she had prevailed and only wished to have the judgment affirmed. Therefore, the language of the Supreme Court in the *Sheets* case is pure dictum and unnecessary to the decision. As such, it is not binding precedent.

Thus, it can safely be said that North Dakota has not yet specifically ruled on the question of whether a minor is held to an adult standard of care while engaged in an adult activity, such as driving an automobile. When the opportunity presents itself, North Dakota courts should hold minors engaged in adult activity to an adult standard of care, and thereby help to reduce the carnage on the

9. PROSSER, *supra* note 1, at 154-55, *accord*, RESTATEMENT (SECOND) OF TORTS §§ 293 & 464, (2)(3), (f), particularly illustration f2, § 464; 60A C.J.S. *Motor Vehicles* § 462.

10. Moe v. Kettwig, 68 N.W.2d 853 (N.D. 1955).

11. Schweitzer v. Anderson, 83 N.W.2d 416 (N.D. 1957).

12. Sheets v. Pendergrast, 106 N.W.2d 1 (N.D. 1960).

13. *Id.*

highways. In addition, Pattern Jury Instruction 103[14] should no longer be used, since it is based entirely on the dictum in the *Sheets* case and not on binding authority.

IV. DAMAGES FOR WRONGFUL DEATH OF CHILDREN

As a practical matter, it is still possible in North Dakota for a claim adjuster to tell bereaved parents that the highest award for the wrongful death of a child ever approved by the Supreme Court of North Dakota was a verdict for $7,800 and that the Supreme Court called that award "very liberal." It is possible for this statement to be made because of the decision of *Henke v. Peyer*[16] in 1958, in which the court made this determination. No other case discussing the question has since gone to the Supreme Court of North Dakota. What a claim adjuster making such a statement may not know, or may not tell the bereaved parents, is that other awards of $75,000 and $65,000 have been made by juries, and upheld by trial courts on motions for new trial, and that the cases have been settled pending appeal (for $35,000 and $55,000 respectively), thereby precluding a review by the Supreme Court of the adequacy of the awards.[17]

The basis for the award of damages for the death of children is long overdue for an overhaul. While North Dakota is to be commended for not having a dollar limitation upon awards for wrongful death as many states do, and for having taken a broad view of what is included in "pecuniary" damages for death in the case of *Dahl v. North American Creameries*,[18] it still has basic cruelty involved in awarding damages for the death of family members which, according to our standard instructions, must be limited to "pecuniary" damages—that is, damages that can be measured in dollars and based upon losses that can be measured in dollars.

It is an unfortunate fact that a jury that literally interprets the standard instructions on awards for wrongful death cannot ordinarily make more than a nominal award for the death of children. This is so because the standard instruction is based upon monetary losses, and we all know that raising children is not a profitable enterprise. If the jury does as it is told, and awards parents the amount of money they could expect to receive from the child and then deduct the cost of raising the child, the net result will almost always be a negative figure. It would almost appear that the wrongdoing defendand would be entitled to a bounty. Fortunately, jurors are also told

14. North Dakota Pattern Jury Instruction No. 103.
15. Henke v. Peyerl, 89 N.W.2d 1, 11 (1958).
16. Henke v. Peyerl, 89 N.W.2d 1 (1958).
17. McQuade v. Roth, No. 19612 (Burleigh County, April 7, 1967); Ebel v. Toffin, Civil No. 960 (D.N.D., Feb. 13, 1970).
18. Dahl v. North American Creameries, 61 N.W.2d 916 (1953).

to exercise their common sense, and they do so, which results in substantial wrongful deaths awards in many cases involving children.

Incidentally, in the *Dahl* case where a verdict of $65,000 was awarded the claim adjuster had offered the parents the amount of the funeral bill plus $2,000, "even though the defendant didn't owe them anything." The same adjuster later delivered a check for $55,000 in settlement of the $65,000 judgment.

Other states have tackled the problem of damages for wrongful death by allowing the cost of raising the child as an item of expense or otherwise mitigating the harshness of the standard rule of damages.[19]

It is to be hoped that the North Dakota Supreme Court will soon have the opportunity to declare that $7,800 is no longer "very liberal" as an award for the death of a child, and will have the further opportunity of sustaining awards in substantial amounts, as the federal court did in *Ebel v. Toffin*,[20] where the award was $65,000, and the Burleigh County District Court did in *McQuade v. Roth*,[21] where the award was $75,000.

V. CONCLUSION

These are but a few of the areas where North Dakota law may be expected to develop within the next few years. With guidance from the decisions of other states with heavier case loads and greater populations, and from some of our own unreported cases, we should be able to avoid some of the false starts and blind alleys that other jurisdictions have encountered.

It is to be hoped that North Dakota will follow the rapidly developing majority rules on such matters as strict liability in tort, compensatory damages for wrongful death of children, and the standard of care required of minors engaged in adult activities.

19. *See, e.g.*, Rohm v. Stroud, 35 Mich. App. 257, 192 N.W.2d 388 (1971).
20. Ebel v. Toffin, Civil No. 960 (D.N.D., Feb. 13, 1970).
21. McQuade v. Roth, No. 19612 (Burleigh County, April 7, 1967).