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Criminal Law - Former Jeopardy - Discharge of the Jury because of the Absence of a Material Prosecution Witness

Gordon W. Schnell

area of negligence.[15] There has been no statuatory determination of the question.

It is submitted that the admissibility of evidence of prior accidents to show notice or knowledge of danger causing an accident does not readily lend itself to statuatory provision, and that it will be incumbent upon North Dakota attorneys to investigate thoroughly the court proceedings in other states. Although the permanency of condition approach has a great deal of merit, it may, if adopted as a criterion for admitting evidence of prior accidents, have a tendency to place the plaintiff at a disadvantage; thus giving rise to unjust decisions because of a lack of pertinent evidence.

PAUL CRARY

CRIMINAL LAW — FORMER JEOPORDY — DISCHARGE OF THE JURY BECAUSE OF THE ABSENCE OF A MATERIAL PROSECUTION WITNESS—The petitioner was brought to trial on a federal conspiracy indictment. The jury was impaneled and sworn, but before any evidence was presented a mistrial was declared because a material prosecution witness was absent. Two days later a new jury was selected and the petitioner was convicted. The United States Supreme Court *held*, four Justices dissenting, that this violated the Double Jeopardy Clause of the Fifth Amendment— " . . . nor shall any person be subject for the same offense to be twice put in jeopardy of life and limb. . ."[1] *Downum v. United States*, 83 S. Ct. 1033 (1963).

Generally a person is first put "in jeopardy" when he has been placed on trial under a valid indictment before a court of competent jurisdiction, has been arraigned and has pleaded, and a proper jury has been impaneled and sworn to hear the evidence.[2] After jeopardy has thus attached,

15. See Chacey v. City of Fargo, 5 N.D. 173, 64 N.W. 932 (1895). This lone case allowed evidence of former condition to establish constructive notice of defect.

1. U.S. CONST. amend. V.

2. Nordlinger v. United States, 24 App. D.C. 406 (Sup. Ct. 1904); United States v. Van Vliet, 23 Fed. 35 (E.D. Mich. 1885). See, McCarthy v. Zerbst, 85 F.2d 640, 642 (10th Cir. 1936). (Jeopardy attaches in a case without a jury when the accused "has been indicted and arraigned, has pleaded, and the court has begun to hear evidence.")

a second prosecution will ordinarily be barred upon discharge of the jury without the consent of the accused.[3]

However, under the "manifest necessity" exception, a trial may be discontinued when particular circumstances so require, and when the ends of justice would otherwise be defeated.[4] In this situation jeopardy is said not to have attached, and therefore no double jeopardy results when a second trial is held.[5]

It is at the discretion of the court, "taking all the circumstances into consideration," whether there are sufficient grounds for invoking this "manifest necessity" exception.[6] A court must never lose concern for the protection of the defendant's rights. Thus the defendant's valued right to have his trial completed by one tribunal[7] may be subordinated to the public interest only upon manifest necessity.[8] Examples of such a situation include when the jury fails to agree on a verdict,[9] when a juror becomes incapacitated,[10] when it is discovered that a juror is biased,[11] or when other "unforseeable circumstances" arise, making completion of the trial impossible.[12]

But should this discretion be abused to the detriment of the defendant, the awarding of a new trial will not be upheld.[13] Harassment of an accused by successive prose-

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3. Green v. United States, 355 U.S. 184, 188 (1957); Kepner v. United States, 195 U.S. 100, 128 (1904).

4. Wade v. Hunter, 336 U.S. 684 (1949); United States v. Perez, 22 U.S. (9 Wheat.) 579 (1824).

5. State v. Emery, 59 Vt. 84, 7 Alt. 129 (1886).

6. Brock v. North Carolina, 344 U.S. 424, 427 (1953); United States v. Perez, 22 U.S. (9 Wheat.) 579 (1824); Cornero v. United States, 48 F.2d 69 (9th Cir. 1931).

7. United States v. Whitlow, 110 F. Supp. 871 (D.D.C. 1953).

8. See, Wade v. Hunter, 336 U.S. 684 (1949); United States v. Harriman, 130 F. Supp. 198, 202 (S.D.N.Y. 1955).

9. Keerl v. Montana, 213 U.S. 135 (1909); Dreyer v. Illinois, 187 U.S. 71 (1902); Logan v. United States, 144 U.S. 263 (1892).

10. United States v. Potash, 118 F.2d 54 (2d Cir. 1941) **cert. denied,** 313 U.S. 584 (1941) (Juror incapacitated); United States v. Haskell, 26 Fed. Cas. 207 (No. 15321) (C.C.E.D. Pa. 1823) (insanity of juror).

11. Thompson v. United States, 155 U.S. 271 (1894) (petit juror was member of indicting grand jury); Simmons v. United States, 142 U.S. 148 (1891) (juror acquainted with accused); United States v. Cimino, 224 F.2d 274 (2d Cir. 1955) (juror prejudiced to accused).

12. See, Wade v. Hunter, **supra** note 8 at 689 (military tactics necessitated discontinuance of court-martial); Lovato v. New Mexico, 242 U.S. 199 (1916) (failure to have the defendant arraigned before trial).

13. Himmelfarb v. United States, 175 F.2d 924 (9th Cir.) **cert. denied,** 338 U.S. 860 (1949); United States v. Watson, 28 Fed. Cas. 499 (No. 16651) (D.C.S.D.N.Y. 1868).

cutions,[14] or declaration of a mistrial so as to afford the prosecution a more favorable opportunity to convict,[15] are examples.

In the instant case the prosecutor had not checked on the presence of his witness before allowing the jury to be sworn. The trial court thought that under the circumstances, a mistrial should be granted.[16] The majority opinion applied to this case the rule of cases where the prosecutor began trial without sufficient evidence to convict, thus entitling the defendant to an acquittal.[17] Accordingly, the majority ruled that the absence of the witness should have entitled the petitioner to an acquittal, thus barring a new trial under the Former Jeopardy Rule.

The dissenting opinion thought that the defendant's cause had not been sufficiently prejudiced by the trial court's allowance of two days for the government to locate its key witness.[18] The "ends of public justice" require that the government have a fair opportunity to present the people's case and obtain adjudication on the merits,[19] rather than freeing a criminal because of a harmless oversight of the prosecutor. Thus they argued that the "manifest necessity" exception should have been applied and a second trial allowed.

It is submitted that the dissenting opinion is the better view. Freeing the accused on a technicality not prejudicial

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14. See, Gori v. United States, 367 U.S. 364 (1961); Kepner v. United States, **supra** note 3.

15. Gori v. United States, 367 U.S. 364 (1961); **Cf.** Clawans v. Rives, 104 F.2d 240 (D.C. Cir. 1939).

16. The petitioner's case was No. 10 (of 12 set for the week), and the prosecutor stated that he did not forsee that it would be reached on Tuesday. The marshal could not locate a key witness but the prosecutor was told that the witness' wife would inform the marshal of her husband's whereabouts. On Tuesday the petitioner's case was called while the prosecutor was engaged in another trial. Being unable to locate the marshal, the prosecutor announced he was ready for trial without ascertaining whether or not the witness was present.

17. Cornero v. United States, **supra** note 6; United States v. Watson, **supra** note 13. "When the trial of an indictment has been commenced by the swearing of the jury, the defendant is in their charge, and he is entitled to a verdict of acquittal if the case on the part of the prosecution is, for any reason, not made out against him. . . ."

18. Wade v. Hunter, **supra** note 8. **But see** Cornero v. United States, **supra** note 6.

19. Brock v. State of North Carolina, **supra** note 6; Himmelfarb v. United States, **supra** note 13.

to his cause leaves his guilt undetermined, and serves to defeat the public's interest in the conviction of criminals.

GORDON W. SCHNELL

MUNICIPAL CORPORATIONS — ACTIONS — EFFECT OF LIABILITY INSURANCE ON GOVERNMENT IMMUNITY—City defendant, as a government function, owned and maintained a tobaggan slide for the use of the public. There was no admission charged. The plaintiff sues to recover damages for injuries sustained when her toboggan struck a patch of frozen hummocks at the bottom of the hill. The Supreme Court of Wisconsin in reversing the trial court decision *held*, two Justices dissenting, that since the city had taken out liability insurance and the insurer had agreed not to raise the defense of governmental immunity while defending in the city's name; the city had thereby waived its immunity and plaintiff could recover. The dissent argued that the procurement of insurance in and of itself, should not create liability where none theretofore existed. *Marshall v. City of Green Bay*, 118 N.W.2d 715 (Wis. 1963).

The general rule is that the carrying of liability insurance has no effect on existing immunity in the performance of governmental functions.[1] Such immunity has been deemed fundamental and jurisdictional when running to subdivisions of the state.[2] The majority of jurisdictions hold that in the absence of a statute expressly granting such power, a governmental unit cannot make an agreement which will waive immunity from tort liability.[3] This would be considered a usurpation of legislative powers.[4] It has not been the intent of legislatures, in authorizing the procurement of insurance

1. Hummer v. School City of Hartford County, 124 Ind. App. 30, 112 N.E.2d 891 (1953); Stucker v. County of Muscatine, 249 Ia. 485, 87 N.W.2d 452 (1958); Maffei v. Inc. Town of Kemmerer, 80 Wyo. 33, 338 P.2d 808 (1959).

2. Mann v. County Bd. of Arlington County, 199 Va. 169, 98 S.E.2d 515 (1957).

3. Stephenson v. City of Raleigh, 232 N.C. 42, 59 S.E.2d 195 (1950); Boice v. Board of Ed. of Rock Dist., 111 W.Va. 95, 160 S.E. 566 (1931); Price v. State Highway Comm'n, 62 Wyo. 385, 167 P.2d 309 (1946). The court in the principal case expressly overruled Pohland v. City of Sheboygan, 251 Wis. 10, 27 N.W.2d 736 (1947) which was in accord with the above authority.

4. Livingston v. New Mexico College of A. & M. Arts, 64 N.M. 306, 328 P.2d 78 (1958).