Fordham Law Review

Volume 7 | Issue 1 Article 8

1938

Obiter Dicta

OBITER DICTA

"An *obiter dictum*, in the language of the law, is a gratuitous opinion, an individual impertinence, which, whether it be wise or foolish, right or wrong, bindeth none—not even the lips that utter it."*

THE SINS OF THE PARENT

Illustrative of the vitality that seems to be a peculiar property of *dicta*, witness the resistance of the New York doctrine of imputed negligence to the continued effort to destroy it. We refer to the tort rule whereby the courts have visited upon the child the wrongdoing of its parent by depriving the child of recovery against a negligent defendant because of the parent's contributory negligence. The doctrine in New York had its origin in *dicta*. In 1839, *Hartfield v. Roper*, 21 Wend. 615 (N. Y. 1839) placed its decision for the defendant on the ground of unavoidable accident. The court proceeded to embellish its decision with the casual remark that even had there been negligence on the defendant's part, no recovery would have been allowed to the infant-plaintiff. The parents' carelessness would have vitiated its cause of action. Gratuitous as the statement was, it gradually became firmly imbedded in the law. *Morrison v. Erie Ry.*, 56 N. Y. 302 (1874).

Visited Upon Child

But no sooner was it engraved on the tablets of the law than an extreme distaste appeared. Again and again an effort was made to eradicate it with the acid of juristic attack. It was denounced [*Regan v. International Ry.*, 205 App. Div. 425, 426, 199 N. Y. Supp. 601, 602 (4th Dep't 1923)]; it was slyly ridiculed. [*Bellifontaine & Indiana Ry. v. Snyder*, 18 Ohio St. 399, 98 Am. Dec. 175 (1868).] But the judicial stylus had etched too deeply into the tablet. Ironically enough, although the doctrine originated out of *dictum* the subsequent efforts of the court to eradicate the anomaly by the same means was ineffective. The New York courts looked longingly at other states where the Vermont rule denying the doctrine of imputed negligence is followed. [*Robinson v. Cone*, 22 Vt. 213, 54 Am. Dec. 67 (1850)]; and in California where the New York rule was first adopted and later overruled. *Zarzana v. Neve Drug Co.*, 180 Cal. 32, 179 Pac. 203 (1919). An attempt to soften the doctrine was made in later New York cases by permitting a recovery for the child unless the child had done something that would amount to negligence in an adult. *Lannen v. Albany Gas Light Co.*, 46 Barb. 264 (N. Y. 1865); *Kupchinsky v. Vacuum Oil Co.*, 263 N. Y. 128, 188 N. E. 278 (1933). But even the wishful eye of the New York courts could still see in the modified rule traces of the overbearing severity of the original doctrine.

The Common Law

Finally the task of erasure was entrusted to the legislature. In 1935, Section 73 of the DOMESTIC RELATIONS LAW was enacted. It provided: "In an action by an infant to recover damages for personal injury the contributory negligence of the infant's parent or other custodian shall not be imputed to the infant." But in *Delia v. DeSena*, N. Y. L. J., July 23, 1937, p. 215, col. 5, an action by a parent as administrator for the death of his child, the statute was held to be inapplicable. The court reluctantly denied the plaintiff recovery because he had been contributorily negligent and was the parent of the child. The court observed: "No one could urge that our legislature intended to give greater rights to one who killed an infant than to him who has merely injured the child, yet that is exactly what has resulted from the amendment."

The Statute

* BIRRELL, OBITER DICTA (1885) title page.

However, the legislature may not have erred as grievously as the court intimates. Many states which follow the Vermont rule deny recovery to the parent in actions to recover for the death of the child. Commenting on *Smith v. Hestonville Ry.*, 92 Pa. St. 450 (1880), Thompson says: "In this case defendants were clearly negligent, and recovery would have been allowed if the child had been maimed instead of killed." 3 THOMPSON, NEGLIGENCE (2d ed. 1902) 537. The eminent text writer is neither shocked nor alarmed at that result. In the *Smith* case, the parent suing as administrator was the sole beneficiary and distributee of the fund to be recovered in the action. A parent whose negligence has been a contributing cause of his child's death should not be permitted to profit by it. It does not appear in the *Delia* case whether the administrator was such sole beneficiary. If so, the accidental failure of the legislature to wash away completely the careless line of *Hartfield v. Roper* might be justified.

The Pending Problem

TOAST OF THE TOWN

An unprecedented legal problem, presented to an attorney, is a stimulant par excellence. Frequently he is stirred not alone by the final result but by the novelty of the litigated question. A challenge to the lawyer's analytical powers is latent in a news item which appeared in the New York Times, August 2, 1937, p. 21, col. 5. It is there related that in the state of Kansas, the potency of 3.2 beer has been magically diluted by legislative fiat. Such alcoholic content has been declared non-intoxicating in sharp contrast with the .5 standard fixed by the Volstead Act during the prohibition era. The report states that a citizen of Kansas was hauled before the Bar for being intoxicated while driving an automobile. His unique defense was that the only beverage that he had imbibed was 3.2 per cent beer. Immediately there is suggested a problem that well may send the legal minds a-reeling. What should the courts do in the face of the legislative decree?

A Mixed Drink

Perhaps a clue for the liberation of this defendant is found in a case in New York of recent vintage. *People v. Koch,* 250 App. Div. 623, 294 N. Y. Supp. 987 (2d Dep't 1937). The defendant therein was convicted of violating a state statute similar to the one in the principal case. N. Y. VEHICLE AND TRAFFIC LAW (1933) § 70 (5). On appeal, the court reversed the conviction on the ground that although the defendant was intoxicated, his condition was caused by the inadvertent overdose of the drug, luminal. His intoxication was not voluntary and, said the court: "the statute contemplates only voluntary intoxication." [See similarly New York Times, August 17 and 18, 1937, p. 21 ("insulin shock" by a diabetic)].

Hence *involuntary* intoxication seeps through as a defense. This doctrine is rarely used and strictly limited. An investigation of the New York cases offers no further amplification. Although actual adjudications on the subject are not numerous, the legal cellar of another jurisdiction is much better stocked, and we find *Johnson v. Commonwealth,* 135 Va. 524, 115 S. E. 673, 30 A. L. R. 755 (1923) saturated with discussion. Claiming that intoxication is involuntary when whiskey is absorbed without the advice of a doctor to relieve a stubborn toothache, the accused demanded his freedom. This gentleman evidently saw eye to eye with Horace: "For to the abstemious has the god ordained that everything be hard, nor are the cankering cares dispelled except by Bacchus' gift." Refusing to take cognizance of this plea, the court expounded the true test of involuntary intoxication as "the absence of an exercise of independent judgment and volition on the part of the accused in taking the intoxicant,

A New Recipe

as for example, when he has been made drunk by fraudulent contrivance of others, by casualty, or by error of his physician." This court does not explain what is meant by casualty. However, in *Choate v. State*, 19 Okla. Crim. Rep. 169, 197 Pac. 1060 (1921), it was held that if one imbibes freely a medicinal alcoholic preparation without knowing its properties or ingredients, intoxication therefrom is not *wilful*. Could this be the meaning of "casualty"?

If so, the rule in its entirety now fits exactly the facts of the original problem pending in Kansas. Did our Kansan manifest "an absence of exercise of independent judgment" as to the overcoming powers of his thirst-quencher? It might be said that he was reliably informed that it was lawful and refreshing, and that he was officially advised that it was non-intoxicating. It might even be argued that he was "lulled into a sense of security" by the very men he had sent to Topeka to represent him—and instability was the reward for his credulity! Thus, the doctrine of involuntary intoxication "brewed" in Virginia and New York, may be uncorked to serve the law-abiding citizen of Kansas.

Another Casualty