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New Diving Board Proves Costly

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her rights, expressions of interest and concern, and as an exercise of "reasonable firmness" in meeting the *McCray* test. They gave much weight to the counseling undergone by the mother and her husband with the Ohio agency, albeit on instructions from Chester County Children's Services. The court rationalized that the appellant mother was reasonably led to believe that these sessions would preserve her rights to her daughter.

The lower court's ruling that the grandmother and aunt were not acting on behalf of the mother was found to be without merit. Pennsylvania does not require that a parent personally take care of a child, and one may make reasonable arrangements for temporary care. *In re Adoption of Wolfe,* 454 Pa. 550, 557, 312 A.2d 793, 797 (1973). The fact that the grandmother and aunt satisfied their own emotional needs does not nullify the mother's concern. The court said that the main consideration is whether the mother reasonably relied on her family and whether they were aware of the reliance. The Court concluded that appellant's testimony supported the arrangement.

The majority noted that the mother continued to improve her environment, culminating in the separation from her husband, Melissa's stepfather, in order to make it adaptable to the raising of a child.

Justice Roberts wrote a strong and extensive dissent, charging the majority with misreading the record, erroneously construing the standard of parental responsibility required by the statute, and arriving at findings not supported by the record. He considered appellant's contacts with Melissa to have been minimal and found in the record that the counseling was unsuccessful. The record also showed that appellant and her husband denied any knowledge or responsibility for Melissa's injuries, and that the Ohio agency concluded that Melissa should not be returned to the custody of appellant. The dissent questioned appellant's sincerity in wanting to separate from her husband, noting that she never mentioned that desire until the termination hearing, and a mere two weeks before it she said her address was in Ohio.

The minority also noted that in both letters to Chester County Children's Services, the mother expressed her desire that Melissa be returned to her, and that her husband shared this wish. Justice Roberts concluded that "the decree of the Orphans' Court is supported by competent evidence. The decree granting the petition to terminate appellant's parental rights should be affirmed." *Pyott, supra,* at ___, 380 A.2d at 325.

Despite the minority's condemnatory reading of the record, the Pennsylvania Supreme Court majority seems to find failure or refusal to perform parental duties only in the most blatant situations of neglect. As the court stated in *In re Adoption of Farabelli,* 460 Pa. 423, 333 A.2d 846 (1975), "Unless there is impressive evidence either of inadequacy of the natural parent to properly care for, provide for, maintain and guide the child or other compelling facts dictated to the contrary, the relationship of parent and child should not be disturbed by granting custody of the child to a third party."

Obviously, the court saw the facts in the Pyott case as less than impressive evidence that Patricia Pyott Davis had neglected her parental duties toward Melissa, and that the tenuous contacts she maintained with Melissa were sufficient to preserve her parental rights.

It appears that Pennsylvania is following the parental right doctrine rather than the presumptive right doctrine. Although there is no direct mention in the opinion regarding any emotional investment Melissa may have made in her foster parents in those sixteen months, Justice Roberts alluded to it when he cited the legislative intent behind the Adoption Act that when ". . .the possibility exists for the child to establish an effective parent-child relationship through adoption, the parent-child relationship may be terminated." *Pyott, supra* at ___, 380 A.2d at 320. However, even had the court considered Melissa's relationship with the foster family and found the emotional investment substantial, it is unlikely that it would have allowed termination. The Pennsylvania Supreme Court has been unwilling to terminate a natural parent's rights unless the record clearly shows neglect or refusal to perform parental duties. *In re Adoption of Sarver,* 444 Pa. 507, 509, 281 A.2d 890, 891 (1971).

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by Thomas G. Ross

When the management of the Sheraton Park Hotel in Washington, D.C. first proposed to improve its swimming pool facility, they could not have envisioned the eventual expense to the corporation of that project. In 1968, the pool was equipped with a three-meter, high performance "Duraflex" diving board. Three years later, an inexperienced diver, eighteen-year-old Thomas Hooks, was propelled by the board into shallow water where his head was violently greeted by the pool's floor, resulting in Hooks' quadriplegic state.

Seeking to recover monetary damages for his disability and medical expenses, Hooks and his parents instituted a personal injury suit against the Sheraton conglomerate in the United States District Court for the District of Columbia. Their suit alleged negligence on the part of the defendant both in the operation and construction of the pool.

In a bifurcated trial on the issues of liability and damages, a jury found Sheraton liable to the plaintiffs for damages of $7,000,000. Following the jury's verdict and a defense motion, the trial judge ordered a new trial unless Hooks and his parents remitted the excess of $4,500,000 and $180,000 respectively. The plaintiffs filed the required remittiturs, and Sheraton appealed the verdict.

I. LIABILITY

In its appeal for reversal of the jury finding of liability, Sheraton contended that the trial judge's instructions to the jury on two negligence issues were improper and prejudicial. In writing the

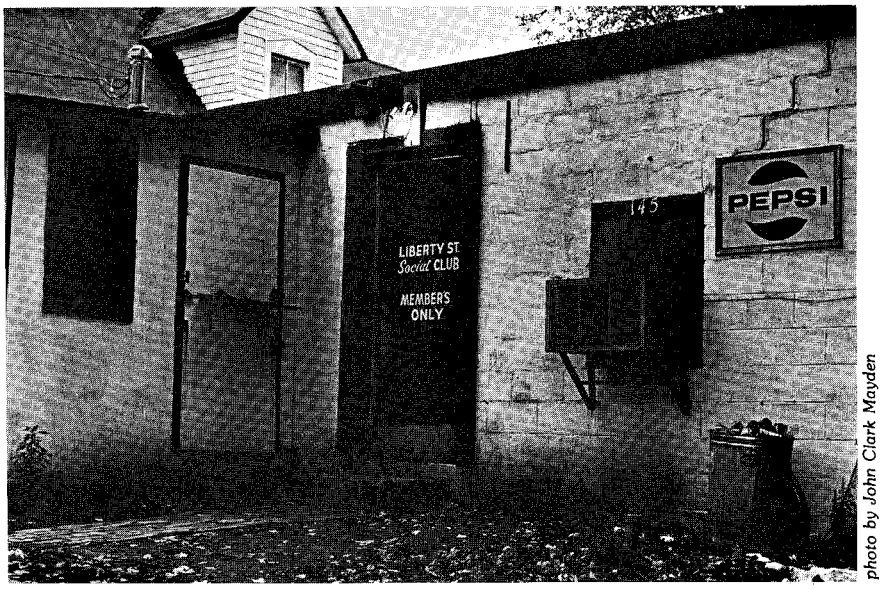


photo by John Clark Mayden

unanimous opinion for the circuit court in *Hooks v. Washington Sheraton Corporation,* No. 76-1958 (D.C. Cir. decided Dec. 22, 1977), Judge Robb stated that both of these arguments were without merit. No. 76-1958, slip op. at 5, 8.

The first argument posed by Sheraton attacked the instruction given by the trial judge on the hotelkeeper's duty of care. The appellant argued that, contrary to applicable District of Columbia law, the district court instructed the jury in a manner that required the Hotel to provide its guests with an "absolute warranty of safety." *Id.* at 3.

Sheraton contended that the law in the District of Columbia has applied the doctrine of implied warranty and cited the authority of *Bellevue, Inc. v. Haslup,* 80 U.S. App. D.C. 181, 150 F.2d 160 (1945) (Per Curiam). *See also, Picking v. Carbonaro,* 178 A.2d 428 (D.C. App. 1962). The court in *Bellevue* stated the following rule as to the respective duties of innkeepers and guests:

> The landlord is liable for failure to use reasonable care to keep safe such parts of the premises as he may retain under his control, either for his own use or for the common use of the guests or tenants in the hotel. Equally, it is the duty of a tenant or guest to exercise ordinary care for his own safety.

Bellevue, Inc. v. Haslup, 80 U.S. App. D.C. at 182, 150 F.2d at 161.

Judge Robb indicates in his opinion that the appellant based its argument solely on the following sentence of the trial court's instruction to the jury:

> You are instructed that the owner or the operator of a hotel *warrants* (emphasis added) to its patrons that the facilities of said hotel are safe for the use by its patrons, free from defects or dangerous designs, and that such facilities can be used in the use and manner for which they were intended without danger or risk of injury and that such facilities are reasonably fit and suitable for their intended use.

Slip op. at 4.

In rejecting the contention that this sentence may have been understood by the jury "to mean that the hotel owed an 'absolute warranty of safety' to its guests," the appellate court noted that such an inference by the jury would have been unreasonable considering the totality of the instruction, i.e. the fact that the trial judge offered seven pages of instructions on the issue of negligence to the jury, as well as the trial court's admonition to the jury that a hotelkeeper is not the "insurer" of his guest's safety. Slip op. at 4,5.

In its second allegation of error as to liability, Sheraton addressed the trial court's instruction on the doctrine of negligence *per se.* The appellant maintained that no instruction on this doctrine should have been given to the jury. Basing its contention on the District of Columbia Circuit Court of Appeals decision in *H.R.H. Construction Corp. v. Conroy,* 134 U.S. App. D.C. 7, 411 F.2d 722 (1969), Sheraton argued that it had made the necessary explanation that "any possible violations" of applicable D.C. regulations were not inconsistent with its exercise of due care. *Id.* at 5,6.

The court noted that, pursuant to the *Conroy* ruling, the law in the District of Columbia on the issue of a negligence *per se* jury instruction is as follows:

> This court drew a distinction between cases in which the defendant offers no explanation of a violation of a statute or regulation and those in which the defendant introduces evidence tending to show that its failure to comply with the statute or regulation is consistent with the exercise of due care.

Slip op. at 6; *See, e.g., Ross v. Hartman,* 139 F.2d 14 (1943), *cert. denied,* 321 U.S. 790 (1944); *Richardson v. Gregory,* 281 F.2d 626 (1960); *Hecht Co. v. McLaughlin,* 214 F.2d 212 (1954); *Karlow v. Fitzgerald,* 288 F.2d 411 (1961).

At trial, the defendant had introduced testimony of the Chief of the District of Columbia Air and Water Quality, who had approved the plans for the pool in 1960. The court noted that this witness testified only to the extent that the pool would not have been licensed for operation unless it had been constructed according to the approved plans; however, no testimony was introduced to show that the pool was, in fact, so constructed. Slip op. at 6,7.

The applicable D.C. regulations required a depth of ten feet directly below a diving board and extending out for twelve feet. After that, the requirement was that the depth could be lessened at the rate of one foot for every three feet of distance from the board. *Id.* at 7.

The plaintiffs' evidence at trial showed the following:

> 1. The approved plans indicated that the pool would be equipped with a wooden diving board, not the aluminum "Duraflex" model;
> 2. The "Duraflex" board extended into the pool five inches more than the wooden one. the one included in the

approved specifications for the pool;
3. The water level in the pool on the day of the accident was several inches low;
4. Several expert witnesses, including the 1976 U.S. Olympic diving coach and a college diving instructor, testified that the "Duraflex" board was unsafe for inexperienced divers because of its greater "elasticity" and spring.

Slip op. at 7.

The appellate court agreed with the trial court's instruction on negligence *per se*, indicating in the opinion that Sheraton had not met the test set by the court in *Conroy*. The fact that the original plans had been approved and the pool licensed to operate by the District of Columbia did not explain Sheraton's violation of the city's regulation by its insertion of the unapproved board, and the jury could properly infer that this violation was inconsistent with the hotel's duty of due care.

II. DAMAGES

In arguing on appeal that the jury's award to the plaintiffs was "grossly excessive" and that the remittiturs were unsatisfactory, Sheraton objected on three grounds. The appellate court refused to consider the first two contentions, admission of evidence of estimated future inflation and the allegation that the plaintiffs' closing argument was inflammatory, indicating that they were untimely objections which could not be initially raised in the appellant's brief and motion for new trial respectively. Judge Robb stated that the arguments had been reviewed, however, and that no plain error basis was found. No. 76-1958, slip op. at 8,9.

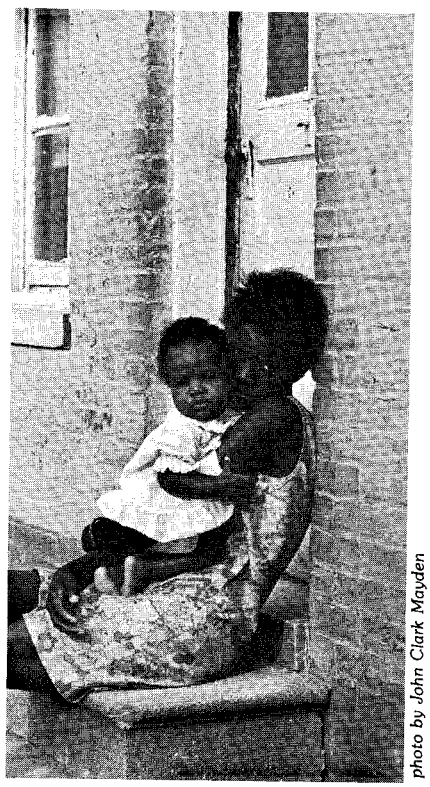
As to Sheraton's third contention, the court held this argument to be valid. Judge Robb noted that the appellate court may have reversed the trial court verdict on this issue, and remanded the case for new trial, had it not been for the required remittiturs. Ruling that the sufficiency of the remittiturs was "in conformity with the interests of justice," the District Court verdict was affirmed. *Id.* at 13.

The prejudicial error occurred when the trial court ordered testimony of the plaintiffs' expert concerning the income tax effect on Hooks' future earnings to be stricken, and the judge instructed the jury to disregard it.

In expanding its own holding in *Runyon v. District of Columbia*, 150 U.S. App. D.C. 228, 463 F.2d 1319 (1972), the Circuit Court held that Hooks' income taxes over his lost future career should have been deducted by the jury in its award. The *Runyon* decision involved a wrongful death, the court there holding that "the jury could award only the amount available to the estate after deducting taxes and the costs of maintenance of the decedent and his dependendants." 76-1958, slip op. at 9; *See Runyon*, 463 F.2d at 1320.

In his opinion for the court, Judge Robb wrote:

> We are unable to perceive any distinction between death cases and personal injury cases in computing lost future earnings. ***That the estate in a death case receives only a net amount after taxes and expenses are deducted whereas the personal injury plaintiff is himself being compensated for his lost future earnings is a distinction without legal significance.



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Slip op. at 9.

To complement the court's position on the issue of damages, Judge Robb quoted the following from McCormick, Law of Damages 560 (1935):

> The primary aim in measuring damages is compensation, ***damages for a tort should place the injured person as nearly as possible in the same condition he would have occupied if the wrong had not occurred.

Slip op. at 9.

In further argument on this issue, both parties relied on a Second Circuit *en banc* opinion, *McWeeney v. New York, N.H. & H. R.R.*, 282 F.2d 34, *cert. denied*, 364 U.S. 870 (1960), which held that juries should be precluded from considering the effect of income taxes in determining damages for middle and low income plaintiffs.

The District of Columbia Circuit Court was not persuaded by the reasoning in *McSweeney*. There the court had reasoned that the determination of future tax liability was too speculative and confusing for a jury, and that inflation factors would equitably offset their recovery. In *Hooks*, Judge Robb pointed to the fact that the trial court had been more specific by allowing the plaintiff to introduce evidence of the effect of future inflation. The court noted that expert testimony of Hooks' "Hypothetical Career" was "speculative" in itself, and that the most serious factor, jury confusion, could be minimized by "expert testimony, presented under the watchful eye of the experienced trial court." No. 76-1958, slip op. at 10.

In concluding for the court, Judge Robb wrote that even if the tax rate on Hooks' lost future earnings was assumed to be as high as 40%, testimony by the plaintiffs' expert witness on economics concerning Hooks' lost "career earnings" indicated a maximum set-off of $450,000 in income taxes. Since Hooks' remittitur amounted to a greater savings by Sheraton, the court determined that the appellant had received sufficient compensation for any error attributable to the trial court.

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