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circumstances or products.

Whether one accepts or rejects the unreasonably dangerous test in the Restatement's language, proof of a defect is a *sine qua non* in products liability actions. Hopefully, the developing case law will provide a more workable standard by which defectiveness can be measured; until then, the *Barker* case represents a positive attempt to eliminate negligence principles from strict liability in tort.

—Bert Riddell Cramer

Residual Hearsay Exceptions & Confrontation: Continuing Constitutional Dilemma

by Thomas G. Ross

While there are numerous exceptions to the general rule that hearsay evidence is inadmissible in formal court proceedings, Rule 804 (b) of the Federal Rules of Evidence provides for only five categories of hearsay exceptions where the declarant is unavailable.[1] The basic premise behind admitting such evidence is the reliability factor surrounding the circumstances at the time a statement was made. These circumstances provide a substitute guarantee of reliability. Such guarantee is necessary in order to admit testimony which may be crucial to the outcome of the case.

Historically, the best safeguard against unreliable testimony has been the right of opposing parties to cross-examine adverse witnesses. The admission of hearsay evidence restricts this ability in that it depends for its probative value upon the testimony of someone not subject to cross-examination. For this reason, the Rule 804 (b) exceptions are limited to circumstances that are theoretically so reliable as to overcome the right in the opposing party to cross-examine the declarant.

The recent decision in *United States v. West*, 574 F.2d 1131 (4th Cir. 1978), addresses itself to the admission of hearsay testimony of an unavailable declarant and the defendants' right of confrontation.

At trial in the United States District Court for the Eastern District of Virginia, West and his two co-defendants were convicted of distribution of heroin and possession with intent to distribute heroin, both violations of the Controlled Substance Act, 21 U.S.C. §841 *et seq.*[2]

The trial judge allowed the admission of the grand jury testimony of Michael V. Brown, the unavailable declarant, under Rule 804 (b) (5) of the Federal Rules of Evidence.[3] He noted that "under the circumstances, it [a transcript of Brown's grand jury testimony] was essential and trustworthy." 574 F.2d at 1134.

The government's evidence at trial included photographs, the transcript of Brown's grand jury testimony, testimony by an expert in voice identification, and the purchased heroin. Also offered as further corroboration of Brown's testimony were tapes of Brown's conversations with the defendants and testimony of Drug Enforcement Administration agents regarding their observations. Arrest records, as well as transcripts of Brown's tape-recorded conversations with the defendants were made available to defense coursed.

I. HEARSAY

> Hearsay evidence is testimony, in court, or written evidence, of a statement made out of court, the statement being offered as an assertion to show the truth of matters asserted therein, and thus resting for its value upon the *credibility* of the out-of-court asserter. (emphasis added)

McCormick, *Evidence*, §246 at 584 (2d Edition, 1972).

Defendants contended that the trial court erred in admitting the transcript of Brown's grand jury testimony. While it was not contested that the transcript of that testimony met the necessary criteria of clauses (A), (B) and (C) of Rule 804 (b) (5) of the Federal Rules of Evidence, the defendants argued that the provision had not been satisfied because the admitted statements failed to have the requisite "equivalent circumstantial guarantees of trustworthiness" as statements admitted under any of the preceding four paragraphs of the rule (Rule 804 (b) [1]-[4]). Their contention was that the admission of Brown's grand jury testimony was far less trustworthy than the other Rule 804 (b) provisions required, and that the legislative history of the rule provided that the provision was to be applicable only

1. 1) Former testimony; 2) Dying declaration; 3) Statement against Interest; 4) Statement of personal or family history; 5) Other exceptions.

2. FACTS: The testimony of an unavailable declarant, Michael V. Brown, played a critical role in the convictions of West and his co-defendants. Brown had volunteered to assist the Drug Enforcement Administration (DEA) in its investigation. At the time, he was incarcerated with a pending drug charge as well as a parole violation detainer.

Under police surveillance, Brown purchased heroin from the defendants. Several of his telephone calls to the defendants in which he set up a "buy" were monitored; a transmitter was concealed on Brown to tape-record the conversations; law enforcement officials observed and photographed Brown's meetings with the defendants.

Before each transaction, Brown was searched for drugs and given money to purchase heroin. According to the government's evidence, transactions took place between Brown and West on three occasions, and three similar "deals" were made between Brown and the two co-defendants.

After each transaction, DEA agents would search Brown and his car for contraband. Brown would then return to the DEA office where he would meet with a DEA agent to discuss and compose a summary of the events that took place. They would also listen to the tape-recordings.

On March 8, 1976, the defendants were indicted without Brown's testimony. On March 16, 1976, however, Brown testified before a grand jury investigating Virginia drug traffic.

In exchange for his cooperation, the government entered a *nolle prosequi* to the pending drug charge against Brown and dismissed the detainer. He was given $855 as a form of "protection" and released. On March 19, 1976, Brown was murdered "contract-style," i.e. four bullets into the back of his head while he was driving his car.

3. Rule 804 (b) (5) provides:

(b) Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(5) Other exceptions. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.

where "exceptional circumstances" attached to the statement a degree of trustworthiness *equivalent* to the evidence admissible under the other Rule 804 (b) exceptions. (emphasis added). The defendants stressed the inherent lack of credibility in Brown's statements due to his extensive criminal record and their lack of an opportunity at any stage in the case's development to cross-examine him about his statements.

The case law of the federal circuits shows division over the issue of the admission of prior grand jury testimony in the case of an unavailable witness. In *United States v. Fiore,* 443 F.2d 112 (2d Cir. 1971), a case decided prior to the adoption of the Federal Rules, Judge Friendly wrote for the unanimous three-judge panel in ruling such testimony inadmissible:

> Under such circumstances the admission of his grand jury testimony would appear to offend not only the hearsay rule, even in the liberalized form adopted by this circuit, but the confrontation clause of the Sixth Amendment as well, *Douglas v. Alabama,* 380 U.S. 415 (1965).

443 F.2d at 115.

In two cases decided subsequent to the adoption of the Federal Rules of Evidence, two federal circuits have split in their decisions concerning the admission of grand jury testimony under Rule 804 (b) (5), the "Other Exceptions" provision.

The Eighth Circuit in *United States v. Carlson,* 547 F. 2d 1346 (1976), admitted the grand jury testimony of an unavailable witness as "evidence of a material fact" under this "trustworthiness" exception. In making a qualitative assessment of the trustworthiness of the testimony, the court inquired into both the reliability and the necessity of the witness' statements. The court pointed to the fact that the "unavailable" witness, while refusing to testify at trial, had stated at trial that his testimony before the grand jury relating to his participation in a drug transaction was true. In view of these facts, the court ruled that the grand jury testimony was reliable and that, since no other individual could testify about the drug transaction, there was a substantial need to admit the grand jury transcript.

In *United States v. Gonzalez,* 559 F.2d 1271 (1977), the Fifth Circuit was faced with the issue of whether grand jury testimony of a co-conspirator who refused to testify at trial was admissible under Rule 804(b)(5) as a statement with "equivalent circumstantial guarantees of trustworthiness." Under Rule 804(a)(2), the co-conspirator was clearly "unavailable" within its provisions due to his refusal to testify despite a grant of immunity and a court order to so. That court reviewed determinations that were made at the trial court level regarding "materiality, probative value, need for the evidence, and interests of justice." Fed. R. Evid. 804(b)(5).

Due to the admission by the lower court of the grand jury transcript of the unavailable witness, the *Gonzalez* court reversed and remanded the case to the trial court. Avoiding the confrontation issue, the court held that such evidence was unreliable hearsay which did not meet the "trustworthiness" test due to the following factors:

> 1. Pressure of the prosecutor and grand jurors forcing an answer from witness, whether true or not;
> 2. Answers of the witness were to leading questions not permissible at trial;
> 3. The fact that the testimony was under oath, subject to penalties for perjury, was insignificant due to threats made by the prosecutor of repeated contempt sentences;
> 4. Witness had incentive not to tell the truth because of fear of personal harm to himself and his family;
> 5. Testimony was unsupported and not subject to cross-examination.

559 F.2d at 1273.

In distinguishing *Carlson,* the Fifth Circuit noted that the unavailable witness there had refused to testify because of threats directly attributable to the defendant. This was not the case in *Gonzalez.*

In further concluding that *Carlson* was distinguishable, the *Gonzalez* opinion noted the following factual distinctions present in *Carlson:*

> 1. No indication of prosecutorial threat to the witness of open-ended contempt sanctions for failure to testify;
> 2. No indication that the witness was as unwilling to testify before the grand jury;
> 3. The witness specifically stated at the time of trial that his testimony before the grand jury had been true, but that he was afraid to testify further.

Chief Judge Haynsworth, in writing the 2-1 majority opinion in *West,* affirmed the trial court ruling admitting the grand jury testimony.[4] "There were present very exceptional circumstances providing substantial guarantees of trustworthiness of Brown's grand jury testimony probably exceeding by far the substantial guarantees of trustworthiness of some of the other §804 (b) hearsay exceptions." 574 F.2d at 1135. The majority cited the following as "guarantees of trustworthiness":

> 1. "Elaborate steps" of DEA agents to assure that Brown had no drugs or money (other than what the agents supplied to him);
> 2. Brown was under DEA surveillance and photographs were taken of him with one of the defendants;
> 3. A transmitter broadcast Brown's conversations with the defendants, and the tape recorder preserved them;
> 4. Brown and DEA agent reviewed each transaction, and a statement was prepared;
> 5. The DEA agents appeared as witnesses at trial and were subject to cross-examination;
> 6. Defense counsel knew of Brown's criminal record and his interest in avoiding further incarceration, both tools of impeachment.
>
> Under all these circumstances, the absence of an opportunity to cross-examine Brown is of considerably less significance than in those cases involving statements against interest, statements of family history, or dying declarations.
> * * *
> Whether the circumstantial guarantees of trustworthiness of Brown's grand jury testimony are equivalent to those which arise from cross or direct examination which underlies the former testimony exception of §804 (b) (1), we need not determine. In this unusual case, those guarantees were probably greater, but the equivalent guarantees of trustworthiness requirement of §804 (b) (5) is met if there is

4. There were three other holdings in *West,* all affirming the trial court: 1) Admission of grand jury testimony was not barred by the confrontation clause of the sixth amendment in view of substantial indicia of reliability; 2) Testimony of law enforcement officials with respect to taped conversations was sufficient to authenticate the tapes for admission purposes; 3) There was no abuse of discretion on the part of the trial court where the jury was allowed to see transcripts of taped conversations while the tape was played.

equivalency of *any one* of the preceding §804 (b) exceptions. Clearly there is such equivalency with the exceptions we find in paragraphs 2, 3, and 4. (emphasis added)

574 F.2d at 1135, 1136.

In a one-paragraph dissent on this issue, Judge Widener questioned the reliability of the admitted grand jury testimony. Citing *N.L.R.B v. McClure Associates, Inc.*, 556 F.2d 725 (4th Cir. 1977), a case which held that an affidavit of one with no interest in the proceeding was inadmissible because it did not have the equivalent circumstantial guarantees of trustworthiness (§803 (24), identical in text to §804 (b) (5), was the basis for that decision).

> Accordingly, I do not agree that the guarantees of trustworthiness surrounding the grand jury testimony in this case are any greater and should not be held sufficient to allow its introduction into evidence under the residual exception to the hearsay rule. Certainly the rule of exclusion should be at least as broad in criminal as in civil proceedings.

574 F.2d 1138, 1139.

II. CONFRONTATION

A closely-related principle, and one that seemingly contradicts the residual hearsay exceptions, is contained in the Sixth Amendment United States Constitutional mandate: "In all criminal proceedings, the accused shall enjoy the right. . .to be confronted with the witnesses against him."

As a secondary contention, the defendants asserted that even if Brown's testimony met the §804 (b) (5) requirements, the confrontation clause served as a bar to its admission. As Chief Judge Haynsworth noted, the Supreme Court has held that the right of confrontation requires the production not only of all available witnesses but also the exclusion of unreliable extra-judicial statements.

Citing *Dutton v. Evans*, 400 U.S. 74 (1970), and *California v. Green*, 399 U.S. 149 (1970), Chief Judge Haynsworth noted: "Thus, we are required to make a separate determination, focusing upon the Confrontation Clause itself, whether Brown's grand jury testimony bore sufficient guarantees of reliability, or whether the circumstances provided the jury with sufficient bases to judge its trustworthiness." 574 F.2d at 1136.

Since an 1892 Supreme Court opinion, *Mattox v. United States*, 146 U.S. 140 (dying declarations), it has been held that not all admissions in a criminal trial of extra-judicial statements are barred by the confrontation clause. *See also, California v. Green*, 399 U.S. 149 (1970) (former testimony at preliminary hearing); *Mancusi v. Stubbs*, 408 U.S. 204 (1972) (former testimony at prior trial); *Chambers v. Mississippi*, 410 U.S. 284 (1973) and *Dutton v. Evans*, 400 U.S. 74 (1970) (declarations against penal interest).

As the court states in its opinion, the Supreme Court has held in *Pointer v. Texas*, 380 U.S. 400 (1965), and *Barber v. Page*, 390 U.S. 719 (1968), that testimony at preliminary hearing not subjected to cross-examination is barred by the confrontation clause. Those cases indicated that the right of confrontation is a basic trial right, requiring both the opportunity to cross-examine and the occasion for the jury to weigh in its fact-finding decision the demeanor of the witness.

The question that Chief Judge Haynsworth raised was whether the right of confrontation *requires* an opportunity to cross-examine in order to gain the reliability necessary to be admitted at trial. (emphasis added). Acknowledging that the Supreme Court has always distinguished, in cases involving prior recorded testimony, between testimony that was subject to cross-examination and testimony that was not, Chief Judge Haynsworth, citing no Supreme Court cases, observed:

> The Supreme Court has never intimated, however, that cross-examination is the only means by which prior recorded testimony may be qualified for admission under the confrontation clause. Just as surrounding circumstances may give assurance of reliability to dying declarations and to declarations against penal interest, so surrounding circumstances may give assurance of reliability to prior recorded testimony which was not subject at the time to cross-examination. They also may provide the trier of fact with firm bases for judging the credibility of the witness and the truthfulness of his testimony.
> * * *
> Such circumstances are present in abundant measure here. We have canvassed them in considering the admissibility of the testimony under §804 (b) (5) of the Federal Rules of Evidence.

574 F.2d at 1137.

Citing the same factual reasons on which it relied in finding Brown's testimony admissible as a hearsay exception under §804 (b) (5), the court held that the confrontation clause did not bar the admission of that testimony which, based on the facts, had "high degree of reliability and trustworthiness." 574 F.2d at 1138.

Writing that the majority "confused the issues of the admissibility of hearsay and the right of a criminal defendant to be confronted by his accusers," Judge Widener dissented, stating that the "two different rules of law. . .are by no means identical, but are closely akin." 574 F.2d at 1139, quoting *Dutton v. Evans*, 400 U.S. 74.

Judge Widener argued that the majority's confusion was in treating the confrontation clause as a rule of evidence rather than as it was intended, i.e. to regulate criminal trial procedure by compelling the accuser's presence before the jury and the defendant. Criticizing the conclusion of the majority that the confrontation clause was not violated because the grand jury testimony was reliable and corroborated and that, therefore, "the jury could assess his veracity in his absence," Judge

Widener referred to Justice Harlan's concurring opinion in *Dutton*, 400 U.S. at 97: ". . .the whole question is not whether the testimony is truthful; rather, the issue is whether there has been such "adequate 'confrontation' " as to satisfy the requirements of the Constitution's Sixth Amendment. 574 F.2d at 1139.

In stating his belief that the admission of Brown's grand jury testimony violated the right of the defendants to confront him, forcing a reversal of the trial court convictions and remanding the case for new trial, Judge Widener reiterated that "the confrontation clause invokes a means of trial procedure which provides a minimal, or threshold level of protection to the defendant."

Citing *Barber v. Page*, 390 U.S. 719 (1968), Judge Widener stated: ". . .the essence of the confrontation clause is the judgment that, the defendant is entitled, at the very least, to the presence of the accuser before him and the jury." 574 F.2d at 1140.

As the dissent of Judge Widener concludes, this writer believes that the issue of the inclusion at trial of grand jury testimony of an unavailable witness, testimony controlled by the prosecutor's leading questions and not subject to cross-examination, is one that the Supreme Court must address. In *West*, the majority may have extended the residual hearsay exception under §804 (b) (5) of the Federal Rules of Evidence to a point that infringed on the basic procedural right of confrontation of the defendants.

VIVA CEPEDA! Products Liability and Employee Protection

Products liability actions typically involve complaints against parties who distribute products that cause physical injury to persons or property. These suits are generally based upon theories of negligence, breach of warranty, and strict liability in tort,[1] with the latter cause of action at the vanguard of recent developments in "actionable products" litigation.

Two issues of particular concern to the products liability attorney are the concepts of defect and contributory negligence in a strict liability action.[2] The New Jersey Supreme Court recently addressed these points in *Cepeda v. Cumberland Engineering Co., Inc.*, 76 N.J. 152, 386 A.2d 816 (1978), a decision which offers a viable solution to the problems of setting the standard for defining the defectiveness of a product, but continues the controversy over the degree and kind of contributory negligence on the part of the injured plaintiff which will bar his recovery.

The doctrine of strict liability in tort is expressed in the Restatement (Second) of Torts (1965) as follows:

> Section 402A. Special Liability of Seller of Product for Physical Harm to User or Consumer.
>
> (1) One who sells any product in a defective condition unreasonably dangerous to the user or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
>
> (a) the seller is engaged in the business of selling such a product, and
>
> (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
>
> (2) The Rule stated in Subsection (1) applies although
>
> (a) the seller has exercised all possible care in the preparation and sale of its product, and
>
> (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

It is immediately apparent that in a strict liability action one neither needs to prove negligence on the part of the seller, nor establish privity as a requirement to sue. The inquiry in the strict liability suit is directed towards the product; such liability is *strict* in that the seller's compliance with a negligence standard of care is irrelevant. Moreover, inasmuch as the requirement of privity is abolished, the intricacies of the law of commercial transactions[3] no longer must receive the attention of the jury; again, the proper focus is shifted to the product, and thus a workable definition of what constitutes defectiveness under the Restatements formula assumes great importance.

There are three modes of defectiveness precedent to finding that a product is actionable:[4] defects from design, a manufacturing error, and defects from a failure to affix to hazardous products warnings and instructions necessary to ensure their safe and proper use.[5] Because strict liability does not mean absolute liability, the plaintiff must prove that there was a defect in the product at the time it left the defendant's control. *See*, Note, 17 FORDHAM L. REV, 943, 944 (1974). This need for a standard of defectiveness is particularly important because a juror may intuitively find a product to be defective simply because the plaintiff was injured while using the product—the juror would believe that the presence of injury means that something was "wrong" with the product. This is clearly absolute liability. As Dean Wade has stated: "Strict liability for products is clearly not that of an insurer. If it were, the plaintiff would need only to prove that the product was a factual cause in producing his injury. Thus, the manufacturer of a match would be liable for anything burned. . ." Wade, *On the Nature of Strict Tort Liability for Products*, 44 MISS. L.J. 825, 828 (1973); *see also*, Note, *supra*, 17 FORDHAM L. REV. 943, 944-946.

1. One commentator has stated that there are "at least nine distinct legal theories on which a plaintiff may rely." Tort theories are: negligence, negligent misrepresentation threatening physical harm, strict liability for defective product, and strict liability for innocent misrepresentation; Contract theories: breach of implied warranty of merchantability, breach of implied warranty of fitness for a particular purpose, and breach of express warranty; Also, "two hybrid theories that may involve a breach of some 'extra-U.C.C.' implied or express warranty." Darling, *The Patent Danger Rule: An Analysis of its Vitality*, 29 MERCER L. REV. 583, 584-585 (1978).

2. *See*, Keeton, *Product Liability and the Meaning of Defect*, 5 ST. MARY'S L. J. 30 (1973).

3. For example, the seller may exclude warranties under U.C.C. §2-316 (although such disclaimer is unconscionable in personal injury cases). *But see*, MD. COMMERCIAL LAW CODE §2-316.1. A statute of limitations may defeat even a timely products liability complaint where it runs from the date of sale, and the injury may not occur until after the sales transaction. Further, the plaintiff's action may fail due to lack of privity, although some versions of U.C.C. §2-318 allow for actions by third party beneficiaries not in privity to the sale.

4. Wade, *A Conspectus of Manufacturer's Liability for Products*, 10 INDIANA L. REV. 755, 756 (1977). The term "actionable" is Wade's-it signifies a product's state or characteristic which would support a cause of action.

5. A treatment of this third aspect is beyond the inquiry of this article.