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Evidence -- Admissibility of Scientific Evidence -- Harger Drunkometer

It is not entirely new to place a monetary value on the attention, love, and devotion received by the child from its parents. When a railroad employee dies as a result of injuries sustained in the course of employment, the damages awarded to his children are based on the loss of the parent's company, care, and guidance and not merely the detriment suffered due to the availability of only a less adequate means of support.[12] The Employer's Liability Act [13] provides that compensation be granted to the child in such cases and it has been decided that the infant's loss is of an altogether different nature than that suffered by the remaining spouse.[14]

Certainly, the denial of this right to children places the courts in a rather incongruous position. Pecuniary compensation is awarded for the intangible detriment resulting from the loss of a parent who is killed, but recovery is denied when damage is due to other means.

EVIDENCE—ADMISSIBILITY OF SCIENTIFIC EVIDENCE—HARGER DRUNKOMETER

Defendant was convicted of negligent homicide as a result of a death attributable to his negligence in an automobile accident. The results of a drunkometer test were admitted into evidence to support the state's contention that he was under the influence of alcohol at the time of the accident. This evidence obtained by the drunkometer was admitted over defendant's objection. *Held,* on appeal, that data obtained through the "Harger Drunkometer" was improperly admitted in evidence in support of the conclusion that defendant had been under the influence of alcohol at the time of the accident. *People v. Morse,* 38 N.W.2d 322 (Mich. 1949).

Where evidence obtained by a scientific device is sought to be admitted, the courts will usually permit the introduction of such evidence only if the device by which said evidence is obtained is reliable.[1] Until such proof, the probative value attributable to evidence of this nature is subject to dispute.[2] The courts appear to be overwhelmingly committed to the viewpoint that chemical analysis of body fluids, together with expert opinion testimony as to

12. Norfolk v. Western R.R., 235 U.S. 625 (1915); Michigan Cent. R.R. v. Vreeland, 227 U.S. 59 (1912); Alabama Great Southern R.R. v. Cornett, 214 Ala. 23, 106 So. 242 (1925); Snipes v. Michigan Cent. R.R., 231 Mich. 404, 204 N.W. 84 (1925).

13. 35 STAT. 65 (1908), 45 U.S.C. 51 (1946).

14. Mich. Cent. R.R. v. Vreeland, *supra.*

1. State v. Thorp, 86 N.H. 501, 171 Atl. 633 (1934) (ultraviolet ray machine); McGrath v. Fash, 244 Mass. 327, 139 N.E. 303 (1923) (x-ray machine); 3 WIGMORE, EVIDENCE § 795 (3d ed. 1934).

2. State v. Damm, 64 S.D. 309, 266 N.W. 667 (1936) (blood grouping to show paternity). Photomicrographs of cut surfaces of knife, *Compare* State v. Fasick, 149 Wash. 92, 270 Pac. 123 (1928) (inadmissible), *with* State v. Clark, 156 Wash. 543, 287 Pac. 18 (1930) (admissible).

what this analysis indicates regarding intoxication, are admissible, since such tests have been proven scientifically accurate.[3] On the other hand, the lie detector, known as the systolic blood pressure deception test, has not yet gained such standing and scientific recognition among authorities as would justify the admission of the results of such tests into evidence.[4]

In the instant case the prosecution endeavored to bring evidence obtained through use of the drunkometer within the scope of admissibility which it claimed has been accorded to the various types of experiments pertaining to the alcoholic content of body fluids. Defendant's contention was that the drunkometer was analogous to the lie detector and thus lacked the credibility necessary to be accepted in evidence. In support of the defendant's contention, five doctors testified against the device, one of which classified it as a "slot machine."

As a device to determine the alcoholic content of the blood the reliability of the drunkometer has been questioned both by medical and legal authorities.[5] The main reason is that it has been difficult to eliminate the margin of error, inherent in the machine itself.[6] Other reasons are that the physiological make-up of the person tested is usually unknown, the presence of any foreign matter in the suspect's mouth contaminates the machine,[7] and the evaporation of the chemicals in the device depends upon local temperature conditions indicating that different results would be reached in different parts of the country.[8]

It would appear that the drunkometer should not be given the probative value conceded to the analysis of the blood because of the possibility of error. It was inevitable that police officials and police courts should support mechanical or chemical devices that purport to determine the sobriety of a suspect. Appellate courts have been reluctant to permit considerations of administrative convenience to infringe upon the rights of the accused.[9] Such courts have

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3. State v. Duguid, 50 Ariz. 276, 72 P.2d 435 (1937); Kirschwing v. Farrar, 114 Colo. 421, 166 P.2d 154 (1946) ("We have been unable to find any case where the blood test to determine intoxication has been excluded because of its unreliable value as proof."); State v. Morkid, 286 N.W. 412 (1939). *But cf.* Kuroske v. Aetna Life Insurance Co., 234 Wis. 394, 291 N.W. 384 (1940).

4. Frye v. United States, 293 Fed. 1013 (1923); People v. Becker, 399 Mich. 562, 2 N.W.2d 503 (1942); People v. Forte, 279 N.Y. 204, 18 N.E.2d 31 (1938); State v. Bohner, 210 Wis. 651, 246 N.W. 314 (1933).

5. Rabinowitch, *Medicolegal Aspects of Chemical Tests of Alcoholic Intoxication*, 26 CAN. B. REV. 1456 (1948); Newman, *Proof of Alcoholic Intoxication*, 34 KY. L.J. 266 (1946).

6. Haggard, Greenberg, Miller and Carroll, *The Alcohol of the Lung Air as an Index of Alcohol in the Blood*, 26 JOURNAL OF LABORATORY AND CLINICAL MEDICINE 1527 (1941).

7. Newman, *supra* note 5.

8. Rabinowitch, *supra* note 5.

9. Spitler v. State, 221 Ind. 107, 46 N.E.2d 591 (1943); Guenther v. State, 221 S.W.2d 781 (Tex. 1949); Touchton v. State, 154 Fla. 547, 18 So.2d 752 (1944).

refused to accept conclusions in the name of "science" which would be rejected if presented under any other authority.[10]

FEDERAL TAXATION—STOCKHOLDERS' SALE OF ASSETS OF LIQUIDATING CORPORATION

Plaintiff corporation's stockholders, at all times carrying on negotiations for themselves and not the corporation, caused the company to be dissolved and the physical assets to be distributed to themselves as a liquidating dividend. They thereupon sold the assets to another corporation, the entire procedure being for the avowed purpose of avoiding double taxation. Plaintiff corporation brought suit in the Court of Claims to recover a tax deficiency assessment, the tax having been paid and a claim for refund disallowed. *Held,* this was a sale of assets by the stockholders as individuals and not a sale by the corporation. The corporation was therefore entitled to a refund. *Cumberland Public Service Company v. United States,* 83 F. Supp. 843 (1949).[1]

In recent years the courts have been confronted with an ever-recurring problem as to whether or not the sale of assets by a liquidating corporation through its stockholders is taxable both to the corporation and to the stockholders. This question generally arises where a corporation is owned by a small number of stockholders [2] who are disposing of all or nearly all of the physical assets of the company, and the current market value of the assets exceeds

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10. The admissibility of evidence obtained by use of the "Harger Drunkometer" is on appeal to the Supreme Court of Florida. Because the defendants' submission to the drunkometer had been voluntary, the matter of constitutional rights was not in issue. This case points this out by showing that though a so-called test be taken voluntarily, its results still are not admissible until the prosecution has carried the burden of showing that it really is a "test," and a test of sufficient soundness to sustain expert testimony based upon it. The court attempts to dispel the tendency to confuse the constitutional right against self-incrimination with the totally irrelevant matter of the dependability of a given "test."

1. *Cert. granted,* 70 Sup. Ct. 88 (1949). *But cf.* Kaufmann v. Comm'r of Int. Rev., 175 F.2d 28 (5th Cir. 1949) (This decision, one week prior to that of the instant case, ruled that where negotiations were begun by a corporation before the commencement of liquidation proceedings, the sale, though subsequently cast in the form of an agreement with the stockholders, was actually made by the company).

1a. After this Note was approved the Supreme Court of the United States affirmed the instant case, United States v. Cumberland Public Service Co., 18 U.S.L. WEEK 4076 (U.S. Jan. 9, 1950), P-H 1950 FED. TAX SERV. 72,006. Said Mr. Justice Black, 18 U.S.L. WEEK at 4077, "While the distinction between sales by a corporation as compared with distribution in kind followed by shareholder sales may be particularly shadowy and artificial when the corporation is closely held, Congress has chosen to recognize such a distinction for tax purposes."

2. *E.g.,* Comm'r v. Court Holding Co., 324 U.S. 331 (1945) (corporation had two shareholders and its president was husband of the principal stockholder); Fairfield Steamship Co. v. Comm'r, 157 F.2d 321 (2nd Cir. 1946) (liquidating corporation 100% owned by the corporation negotiating the sale); Cumberland Public Service Co. v. United States, 83 F. Supp. 843 (1949) (two men and their families owned all of the stock).

3. See Ayers, *Stockholder or Corporate Sale of Assets in Liquidation as Affected by Court Holding Company and Howell Turpentine* in N.Y.U. INSTITUTE ON FEDERAL TAXATION 364 (6th Annual ed. 1947).