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Wayne Pearce v. Martin J. Wistisen and Richard Oveson : Brief of Respondents

Utah Supreme Court

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IN THE SUPREME COURT

OF THE STATE OF UTAH

WAYNE PEARCE, Plaintiff-Appellant, vs. MARTIN J. WISTISEN and RICHARD OVESON, Defendants-Respondents.	:	Case No. 18,376

BRIEF OF RESPONDENTS

APPEAL FROM THE JUDGMENT OF THE FOURTH
JUDICIAL DISTRICT COURT IN AND FOR UTAH
COUNTY, HONORABLE ALLEN B. SORENSON PRESIDING

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES AND MISCELLANEOUS AUTHORITY:

IN THE SUPREME COURT

OF THE STATE OF UTAH

WAYNE PEARCE,	:	
	:	
Plaintiff-Appellant,	:	
	:	
vs.	:	Case No. 18,376
	:	
MARTIN J. WISTISEN and RICHARD OVESON,	:	
	:	
Defendants-Respondents.	:	

BRIEF OF RESPONDENTS

NATURE OF THE CASE

Appellant Wayne Pearce brought a wrongful death action against Respondents for damages arising out of his son's death from drowning during a boating excursion on Utah Lake.

DISPOSITION IN THE LOWER COURT

The case was tried by jury, The Honorable Allen B. Sorenson, Judge, presiding, on the 7th, 8th, 9th and 10th days of December, 1981. The jury returned the verdict of "no cause of action" and on December 23, 1981, the Court entered its judgment accordingly.

RELIEF SOUGHT ON APPEAL

Respondents' request that the verdict and judgment be affirmed.

STATEMENT OF FACTS

Appellant Wayne Pearce is the father of Evan Pearce, deceased, who was age eighteen when he drowned in Utah Lake sometime after 7:00 p.m., June 1, 1979 and before 5:00 a.m., June 2, 1979.

On May 31, 1979, Evan was a senior at Timpview High School in Provo, Utah. He left for school in the morning so as to arrive at the regular time of 8:00 a.m. (R. 381). He met Rod Hunt, who was his friend (R. 543), and they spent much of the day organizing and preparing for a graduation party which they had planned for later that night following the graduation ceremonies (R. 544). The party was to be held up Provo Canyon (R. 545) .

After the graduation ceremony, the boys went up the canyon for the party arriving about 9:00 p.m. (R. 546). Approximately two hundred of their fellow students attended the party where alcoholic beverages were available. Both Evan and Rod participated in drinking (R. 547). Kevin Wistisen, then age seventeen (R. 404), who is the son of Martin J. Wistisen, one of the Respondents, arrived later during the night.

Most of the students left the party about 3:00 a.m. June 1, 1979. However, Evan, Rod and Kevin, together with fifteen or so other students remained until about 9:00 a.m. during which time additional achololic beverages were consumed by all (R.

548). Evan had about one hour of sleep during the night (R. 548).

At about 9:00 a.m. on June 1, 1979, Evan Pearce, Rod Hunt and Kevin Wistisen left the canyon and returned to their homes in Provo (R. 548). On the way down the canyon, the boys discussed the possibility of going water skiing on Utah Lake (R. 550). Kevin was to get permission from his father to use the family Glastron 16½ foot boat which was jointly owned by Richard Oveson, the other Respondent (R. 301). Permission was given (R. 318). Rod decided he did not want to go water skiing with his two companions (R. 551).

Kevin and Evan made arrangements for two girls to go with them. One was Leslie Pearce, Evan's sister, and the other was Angela Adams (R. 331,359,406).

Kevin picked up his friends and all arrived at the Provo boat harbor about 5:30 p.m. The group decided to go to the west side of the lake directly across from the harbor because they felt conditions for skiing would be better there (R. 416).

Around 6:30 p.m., Kevin suggested that they return to the harbor (R. 417). All agreed, but Evan insisted on skiing again (R. 417). He bet each of the two girls that he could ski all the way back to the harbor (R. 345,365).

Evan was skiing as the boat started back for the harbor; he fell; Kevin turned the boat to retrieve him; upon reaching Evan he told Kevin he was tired and wanted to rest, notwithstanding he insisted on skiing again and pushed away from the boat; in the meantime the boat had floated over the ski rope

and when Kevin placed the outdrive in gear, the rope became entangled (R. 417-423).

Kevin tried to untangle the rope from inside the boat; he could not, so he put on a life preserver and got into the water after disconnecting the electrical power to the engine and outdrive. Kevin was concerned for Evan in that the boat was drifting away from Evan due to the wind. He therefore told the girls to watch Evan (R. 424-425).

Evan, in the meantime, had removed his life jacket and began swimming toward the boat abandoning the jacket and skis in the water. The girls told Kevin. He then swam toward Evan while holding onto the ski rope in a effort to assist Evan. When Evan reached the end of the rope, it broke. Evan tried swimming back to the boat, but could not because the wind was blowing it too fast. Kevin then returned to Evan and held him above the surface of the water. At the time, Evan was exhausted. Kevin called to the girls to throw out another life preserver, which they did. The boys made their way to the extra life preserver. Evan put it on but did not adjust it for fit. He therefore was unable to zip it up. The boys then began swimming to the west shore because it appeared closest. Evan swam faster than Kevin causing the boys to separate. Kevin made it to the west shore arriving about midnight, Evan did not. Sometime after the boys separated, Evan drowned (R. 425-428).

ARGUMENT

POINT I

THE COURT DID NOT ERR IN REFUSING TO GIVE APPELLANT'S REQUESTED INSTRUCTION NUMBER SIX.

A. Legal standard for deciding whether Trial Court committed error in not giving a requested instruction:

The Utah Supreme Court in State vs. Ouzounian, 26 Utah 2d 442, 491 P.2d 1093(1971) stated the applicable standard in deciding whether error had been committed in not giving a requested instruction, as follows:

> "A refusal to give an instruction cannot be the basis for reversal, unless the jury was insufficiently advised of the issue they were to determine, or it appears that they were confused or misled to the prejudice of the person complaining." 491 P.2d @ page 1095 (emphasis added)

See also In re Richard's Estate, 5 Utah 2d 106, 297 P.2d 542(1956).

Even if one were to find error had occurred in the failure to give a requested instruction, there may be no basis for refusal if the alleged error were harmless. Rule 61, Utah Rules of Civil Prcedure, provides:

> "No error. . .is grounds for . . .disturbing a judgment, . . .unless refusal to take such action appears. . .inconsistant with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceedings which does not affect the substantial rights of the parties." (emphasis added)

In Ortega v Thomas, 14 Utah 2d 296, 283 P.2d 406(1963), the Utah Supreme Court stated:

> "It is necessary to keep in mind that it is the policy of our law that there shall be no reversal of a judgment merely because of error. This firmly established principle is reflected in Rule 61, U.R.C.P. and in our decisional law. In order to justify reversal the appellant must show error that was substantial and prejudicial in the sense there is at least a reasonable likelihood that in the absence of the error the result would have been different." 383 P.2d @ page 408 (emphasis added)

B. Failure of the Trial Court to give Appellant's requested Instruction Number Six was not error:

Appellant claims error in the Court's failure to give his requested Instruction Number Six (R. 118) upon grounds that it denied him the right to have his theory of the case (vicarious liability) considered by the jury. His claim is only meritorious if such failure insufficiently advised the jury of the issue it was to determine or confused or misled the jury to Plaintiff's prejudice.

The Court's Instruction Number Five (R. 178) clearly defined the issue for the jury to decide:

> "In this case the Plaintiff has the burden of pursuading you that the Defendants Martin J. Wistisen and/or Richard Oveson and/or the boat operator Kevin Wistisen was negligent and that such negligence was a proximate cause of the death of Evan Pearce."

The instruction advises the jury that the negligence

of both boat owners and its operator was in question and that Appellant had the burden of proving it.

The Court's Instruction Number Six (R. 179) prescribes the standard the jury was to apply in deciding the negligence of each:

> "It is the duty of owners and operators of boats, such as the one here involved, to have that boat equipped with all safety appliances and devices that a reasonable prudent person conversant with boating and water skiing would have for the protection of the life and safety of users of the boat, including a water skier, anticipating possible foreseeable emergencies." (emphasis added)

The special verdict given by the Court (R. 193,194) incorporates Instructions Five and Six in Question One as follows:

> "1. Were the Defendants Martin J. Wistisen and Richard Oveson, or either of them, and Kevin Wistisen negligent at the time of the occurrence in question?" (emphasis added)
>
> ANSWER:
>
> _____
> (yes or no)

Since the instructions given by the Court, and also the Special Verdict made reference to both the owners of the boat and its operator, and in most cases by their respective names, it seems abundantly clear that the jury received instructions advising them that the issue of negligence involved all three. Question One of the Special Verdict asked for a finding of negligence as to all three and Question Five of the Special

Verdict asked for a total percentage of negligence as to all three.

Appellant's Complaint that the term "vicarious liability" was not specifically defined or used in the Court's instructions is one of form only and not substance. Vicarious liability as applied in this case simply means that the negligence of the operator of the boat is added to the negligence of its owner or owners in determining the total liability of the owners. The Court's instructions as drawn and given implicitly made that addition and thus Plaintiff had his theory of vicarious liability considered by the jury though the term was not specifically defined.

It appears to Respondents that the Court's instructions were more clear and less confusing than had the Court attempted to explain the legal term of vicarious liability and then instructed the jury as to its application as requested by Appellant in his requested Instruction Number Six.

As stated in Walters v Querry, 626 P.2d 455 (Utah 1981):

> "Nevertheless, the Court cannot be said to have failed to properly instruct the jury when requested instructions are fully covered in other instructions given." 626 P.2d @ pages 458, 459

C. Even if the Trial Court committed error in not giving Appellant's requested Instruction Number Six, it was harmless and does not constitute ground for reversal:

The jury specifically found Martin J. Wistisen and Richard Oveson, the owner of the boat, and Kevin Wistisen, its operator, negligent at the time of the occurance. Therefore, Appellant received the finding of negligence which he sought notwithstanding his allegation of error. Again, as stated in Walters v Querry, 626 P.2d 455 (Utah 1981);

> "These instructions relate specifically to the negligent character of Defendants conduct. The jury specifically found in Plaintiff's favor on this issue. The dismissal was based on causation alone, and therefore, no flaw in the Court's instruction relating to negligence can inure to Plaintiff's benefit." 626 P.2d @ page 459 (emphasis added)

In the instant case, the matter was also decided on the issue of causation and thus Appellant's claim is not grounds for reversal.

POINT II

THE COURT DID NOT ERR IN REFUSING TO GIVE APPELLANT'S REQUESTD INSTRUCTION NUMBER THIRTEEN CONCERNING THE PRESUMPTION THAT A DECEASED WOULD EXERCISE DUE CARE FOR HIS OWN SAFETY.

Respondents have no argument with the general rule of law that man's natural instinct for self-preservation gives rise to a presumption that one will normally avoid harm to himself which otherwise could cause death. However, Respondents disagree with Appellants concerning its application in the instant case.

A. Legal standard for giving instruction concerning the presumption:

In Mecham v Allen, 1 Utah 2d 79, 262 P.2d 285 (1953), the Utah Supreme Court analyzed the effect of the presumption and its application, as follows:

> "A presumption deals with a rule of law which requires the trier of the facts to assume the existence of one fact or set of facts (herein called the presumed facts) from the establishment of another fact or set of facts (herein called the basic facts). Unless the basic facts are conclusively shown to exist, that question, if material, should be submitted to the jury. The existence of the basic facts may or may not have a logically tendency to prove the presumed facts, also they may have some such logical tendency but be insufficient standing alone to justify an inference on that question. From the basic fact that a human being was accidently killed a presumption arises which requires the trier of the facts to assume the presumed facts, that decedent used due care for his own safety, in the absence of a prima facia showing to the contrary, but in this kind of a presumption upon the making of such showing the presumption disappears from and becomes wholly inoperative in the case, and the trial from then on should proceed exactly the same as through no presumption ever existed or had any effect on the case.
>
> Such a presumption deals only with the burden of going forward with or the production of evidence. The question of whether a prima facia case has been made is the same here as in all other cases a question for the court and not for the jury to determine. It is established whenever sufficient evidence is produced from which its existence could be reasonably found. It is immaterial which party produces such evidence. If the court concludes that a prima facia case has been made, it should submit the question of the existence of the presumed facts to the jury on the evidence without commenting on or mentioning to them that there was or is such a

> presumption. If the court concludes that no prima facia showing of the nonexistence of the presumed facts has been made he should direct the jury to assume the existence of the presumed facts, or if such facts are determinative of the whole case he should direct a verdict in accordance therewith. Such is the effect of this kind of a presumption....." (emphasis added) 262 P.2d @ 290

See also DeMille v Erickson, 23 Utah 2d 278, 462 P.2d 159, 161 (1969).

The instruction on the presumption should only be given when evidence has not been adduced during the trial establishing a prima facia case negating the presumed fact. A prima facia case

> ". . . is established whenever sufficient evidence is produced from which its existence (conclusion negating the presumed facts) could be reasonably found." 262 P.2d @ 290

B. There was sufficient evidence adduced during the trial establishing a prima facia case that Evan Pearce was contributorily negligent thus negating the presumed fact that he used due care.

The record clearly shows that evidence was adduced during trial establishing that Evan Pearce:

> 1. Had slept very little during the approximate thirty-six (36) hours prior to his death (R. 543-550);
>
> 2. Was pushing himself physically by water skiing beyond reason (R. 344-345,365);
>
> 3. Refused to stop skiing when requested to do so by Kevin Wistisen, the operator of the boat, notwithstanding the windy conditions (R. 417);

4. Continued to ski though he was fatigued (R. 421-423);

5. Removed his life preserver and started swimming toward the boat leaving the jacket and skies abandoned in the lake (R. 348-351,115,424);

6. Failed to adjust the replacement life preserver to properly fit his body (R. 411); and

7. After the boys were stranded, left Kevin Wistisen behind during the swim to the West shore (R. 426-427).

It is abundantly clear that one could reasonably conclude that Evan Pearce contributed to his own demise thus negating the presumed fact that he used due care. Consequently, the Trial Court properly denied Appellant's requested Instruction Number Six.

POINT III

THE COURT DID NOT ERR REGARDING ITS INSTRUCTIONS CONCERNING THE REQUIREMENT OF AN ANCHOR ABOARD THE BOAT.

A. Utah statutory law does not require that all boats be equipt with an anchor.

Appellant contends that there is a statutory requirement that the boat in question was required to have an anchor aboard at the time of the incident. He is in error on this point.

UCA §73-18-8 (1980) provides:

> "All vessels except those capable of being safely beached shall be equipped with an anchor and line of sufficient weight and length to securely anchor such vessel. (emphasis added)

See also 4 Utah Admin. R. §A60-01-3(3)(b)(12)(1975).

Whether a vessel is required to have an anchor aboard depends upon its capability of being safely beached. The safe beachability of a boat is a question of fact, not of law. Evidence was adduced on both sides of the issue at trial. (R. 468, 569)

For Appellant to argue that the boat in question was statutorily required to have an anchor aboard presupposes that Appellant's evidence was the only reasonable conclusion to be drawn regarding its beachability irrespective of Respondents' evidence to the contrary. Such a supposition is without merit.

B. The Court properly instructed the jury as to Repondents' duty concerning the proper equipment required to be on board the subject boat.

At trial, Appellant claimed Defendants were negligent in two particulars:

FIRST, because they allegedly violated codified statutory and administrative law in failing to have the proper equipment on board, to wit: improper number of approved life preservers; no oar or paddle; no horn or whistle; no bail bucket; improper lightning; no throwable device; and

SECOND, because they allegedly violated non-codified safety standards promolgated by boating experts and recommended by the Utah Parks and Recreation Department, to wit: no anchor (unless boat incapable of safe beaching); no boat hook; no

compass; no distress signals; no flashlight; no first aid kit; no heaving line; no spare oars; no ring buoy; etc. (See Appendix A-1 of Appellants' brief for a complete list of such equipment.)

The first allegation of negligence if proven would yield a finding of negligence on Defendants part as a matter of law, while the second allegation, if proven, could only yield a finding of negligence if the trier of fact concluded that the alleged misconduct violated the reasonable man standard.

The Courts Instruction Number Six (R. 179), circumscribes both allegations. The first paragraph of the instruction defines the reasonable man standard (Appellant's second claim for negligence) as follows:

> "It is the duty of owners and operators of boats, such as the one here involved, to have that boat equipped with all safety appliances and devices that a reasonable prudent person conversant with boating and water skiing would have for the protection of the life and safety of users of the boat, including a water skier, anticipating possible foreseeable emergencies. A violation of such duty may be the basis for a determination that the person or persons thus violating the duty was negligent."

The second and succeeding paragraphs define the codified laws and regulations of Utah regarding boating as follows:

> "Under the laws and regulations of this State, an operator of a boat, such as that involved herein, is required to have aboard the vessel and readily available;
>
> 1. One coastguard approved life preserver buoyant vest or special purpose water safety buoyant device for each person aboard and of the appropriate size for the person wearing it or for whom it was intended, plus at least one coastguard approved buoyant cushion, ring life

buoy, or equivalent, which is immediately available as a throwable device.

2. At least one oar or paddle capable of being used to maneuver such motorboat when necessary.

3. One horn or whistle which may be operated either by mouth, by hand, or by power and shall be audible for at least on half mile.

4. An adequate bail bucket or hand operated bilge pump.

5. While under way, and between sunset and sunrise, a thirty two point white light aft, and visible for two miles all around, a combination bow light showing red to port (left) and green to starboard (right) which shall be visible for one mile from dead ahead to two point abaft the beam.

6. An operator of a boat, such as the one here involved, shall require each person who is surfing or being towed on water skies or similar device to wear a proper fitting coastguard approved floatation device.

7. An operator of a boat, such as the one here involved, shall not allow swimming from an unanchored vessel, unless there is at least one person left aboard who is capable of operating it properly.

A violation of any of these laws and regulations would be negligence as a matter of law."

In both cases, Appellant's theories of negligence were given to the jury in the Court's Instruction Number Six.

Appellant complains that his requested Instruction Number Eight was not given. However, to have done so would have been redundant in light of the Court's Instruction Number Six. Moreover, it would have called more attention to the recommended safety standards embodied therein (which were already before the

jury as Plaintiff's Exhibit Number Seven) than other evidence relevant to the reasonable man standard.

There was no error in the Courts refusal to give Appellant's requested Instruction Number Eight.

C. Even if it were error not to give Appellant's requested Instruction Number Eight, it was not prejudicial and thus is not grounds for reversal.

The Special Verdict found Respondents (including Kevin Wistisen, the operator of the boat) negligent (R. 193). Consequently, the failure of the Court in giving Appellant's requested Instruction Number Eight cannot now be said to have prejudiced Appellant because the jury's finding on negligence, as to Respondents, was in Appellant's favor.

Therefore, if error did indeed exist in not giving the instruction, under Rule 61, Utah Rules of Civil Procedure, it is harmless error and not grounds for reversal.

POINT IV

THE COURT DID NOT ERR IN ALLOWING TESTIMONY THAT THE DECEDENT CONSUMED ALCOHOL DURING THE NIGHT AND MORNING PRECEDING HIS DEATH.

Respondants defended Appellant's claim of wrongful death at trial in part, upon the ground that Evan Pearce was contributorily negligent due to his physical exhaustion caused by his own conduct during the approximate thirty-six (36) hours prior

to his death (R. 259). Consequently, evidence was adduced concerning the fact that he had essentially been without sleep for the entire period (R. 546,657); had consumed alcohol during the middle twelve hours thereof (R. 547-549, 656); was intent upon celebrating his high school graduation during the entire period (R. 528) and water skied when he was overly tired (R. 353, 421, 425, 574); all of which contributed to a deteriorated physical condition which proximately caused the circumstances resulting in his death.

Appellant claims that the evidence admitted concerning alcohol consumption caught him by surprise, was irrelevant, remote in time, prejudicial and thus was reversable error. (Appellant's Brief, Page 15)

Rule 4, Utah Rules of Evidence states the standard for the alleged erroneous admission of evidence:

> "A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous admission of evidence unless (a) there appears of record objection to the evidence timely interposed and so stated as to make clear the specific ground of objection, and (b) the court which passes upon the effect of the error or errors is of the opinion that the admitted evidence should have been excluded on the ground stated and probably had a substantial influence in bringing about the verdict or finding. However, the court in its discretion, and in the interest of justice, may review the erroneous admission of evidence even though the grounds of the objection thereto are not correctly stated. (emphasis added)

See also Bambrough v Bethers, 552 P.2d 1286 (Utah 1976)

A reversal should only occur when the grounds are specified and the allegedly erroneous evidence probably had a substantial influence in bringing about the verdict.

A. Appellant's claim of surprise:

Appellant claims surprise concerning the subject testimony (R. 262) although he received the information approximately one week before trial at the time counsel on both sides exchanged witness lists (R. 262). Notwithstanding, the Court offered to continue the trial and allow Appellant's counsel leave to depose Rod Hunt, the witness from whom the alcohol testimony was to be elicited. Appellant's counsel refused the continuance and requested that the trial proceed. (R. 262-265) Appellant cannot now properly claim prejudice due to surprise.

B. Appellant's claim of irrelevancy:

For evidence to be relevant, it must have:

> ". . . some tendency to establish the ultimate point for which the evidence is offered." Poulin v. Zurtman, 542 P.2d 251, 260(Alaska 1975)

The evidence was properly admitted at trial for TWO REASONS:

FIRST, notwithstanding the discussion of counsel with the Court in chambers prior to trial concerning the issue (R. 253-266). Appellant's counsel raised the subject of Evans's condition before

the jury first (R. 489,528). Consequently, Respondents therefore had the right to introduce evidence concerning the matter by way of rebuttal.

SECOND, and more important, is the fact that the evidence of alcohol as presented by Respondents, directly related to Respondents' theory of contributory negligence, i.e. physical exhaustion: Respondants were not trying to prove the decedent was intoxicated, or even under the influence at the time of death; but, rather, the evidence was admitted to show that the drinking had occurred during the night and morning hours proceeding death which Respondents allege contributed to decedents deterioated physical condition during the emergency and subsequent events. The premise upon which the evidence was given to the jury was that a persons normal knowledge, experience and understanding of life is sufficient to allow him/her to know that the commonly referred to "hang over" which usually follows ones consumption of alcohol results in a loss of physical efficiency.

The evidence was relevant to the issue as described. In Bach v Penn Central Transportation Co., 502 F.2d 1117 (6th Cir. 1974) the Court stated the general rule:

> "Clearly, testimony tending to show that the decedent had been drinking before a fatal accident is generally relevant to the jury's consideration of contributory negligence." 502 F.2d @ 1121

C. Appellant's claim as to remotness in time.

Appellant claims that the evidence regarding the time of consumption is so remote from the occurance that it has no

probative value. Bach v Penn Central Transporation Co., Id. is the authority relied upon for that proposition. (See Appellant's Brief at Page 19)

However, in Bach, the fatality occurred Saturday afternoon and the alleged drinking spree occurred the preceeding Thursday evening, some forty to forty-eight hours earlier. Bach @ 1121 In the instant case, the alleged drinking by the decedent occurred the night preceeding the incident (R. 294,404), some twelve hours prior and during the early morning hours on the day of the incident (R. 548), some eight to ten hours prior.

Common experience justifies the jury being allowed to consider the effect consumption of alcohol may have on one's physical condition when the consumption is that proximate in point of time.

D. Appellant's claim of prejudice.

Appellent claims error because the Trial Court admitted the alcohol testimony on grounds that its probative value did not outweigh its prejudical value.

The balancing of these two competing issues is left to the Courts discretion, Rule 4, Utah Rules of Evidence, which is broad in measure and should only be reversed if it is abused. Martin v Safeway Store, Inc., 565 P.2d 1139, 1141 (Utah 1977).

The Court felt the alcohol testimony did go to the issue of physical exhaustion. During the chamber conference prior to trial the following dialogue occurred:

"MR. HANSEN: I represent Wistisen and Oveson, and Wistisen with his son Kevin has been living in Washington, so I have not had access to them; therefore I was slow getting to Rod Hunt. I might indicate that part of our defense in this case is that this boy drowned because he had been up for thirty-six hours, he was physically exhausted, his conduct the night before aggravated his physical exhaustion, there had been no sleep, he had had alcohol, he had some drugs, namely speed and marijuana, and it just seems to me that has probative value in this case. At least it ought to go to jury, even though we don't have scientific evidence from someone on quantity and say as of 4:30 he would have had this much in his system, as of 5:30 and 6:30 he would have had this much in his system. The body itself was not recovered until eight days later, and you can't take a test of a body at that time, a blood-alcohol test, and have it do you any good.

THE COURT: Doesn't it run, Mr. Howard, to the question of his state of exhaustion when this episode occurred?

MR. HOWARD: I don't think so, Your Honor. I don't have any objection to him testifying that they had had a party that night and he didn't get very much sleep, but I do object to this fellow coming in who has a -- I haven't had any opportunity to take his deposition.

THE COURT: Do you want it?

MR. HOWARD: It's a complete surprise to me.

THE COURT: Do you want it?

MR. HOWARD: I don't want it at this stage. I am ready for trial.

THE COURT: Pardon?

MR. HOWARD: I am ready for trial."
(R. 259-260)

Notwithstanding the Courts feeling that the testimony was proper, he offered counsel a continuance so he could depose Rod Hunt prior to trial, (R. 269). However, counsel refused the continuance and demanded that the Court immediately proceed with trial (R. 264)

There cannot now be a successful claim for prejudice made by Appellant because he waived the offer to correct the alleged error (if indeed there was one) by refusing the continuance for deposition purposes thereby denying himself opportunity to check the testimony in question or to prepare rebuttal testimony in opposition.

E. Even if the admission of the testimony concerning alcohol was error, it was not substantial and thus is not grounds for reversal.

The jury found both the decedent (Evan Pearce) and Respondants negligent. (R. 193) However, it further found that only the negligence of the decedent proximately caused his demise and that Respondents' negligence did not proximately cause decedent's death. (R. 193) Consequently, the issue as to the percentage of negligence between the parties was never reached by the jury.

Therefore, the holding in Bach v Penn Central Transportation Co., 502 F.2d 1117 (6th Cir. 1974) as quoted on Pages 19 and 20 of Appellant's Brief concerning the allocation of negligence in a comparative negligence case is not applicable

here. In Bach the jury found causation on both parties, where in the instant case causation was attributable only to the decedent.

Since there is ample evidence to support the jury's findings on both the negligence and the causation issues, without the alcohol testimony, it follows that it cannnot now be claimed that had the alcohol testimony been excluded, the result may have been different. Consequently the alleged error in admitting the testimony was not substantial and is not grounds for reversal.

CONCLUSION

Appellant's claims for error concerning instructions are not a basis for reversal because:

1. Vicarious liability: The instructions given by the Court implicity instructed the jury of the doctrine of vicarious liability; and even if they did not, the alleged error did not prejudice Appellant because the jury found in Appellant's favor on the negligence issue; and

2. Presumption: The Court's refusal to give the instruction that the decedent used due care at the time of his death was proper because the evidence adduced at trial established a prima facia case that he had not used due care; and

3. Anchor: The instructions given by the Court properly informed the jury concerning any anchor requirements regarding the subject boat as that issue related to Respondents' negligence; but, even if they did not, Appellant's were not prejudiced because

the jury found in Appellant's favor on the issue of negligence to which the anchor matter applied.

The Court did not err in allowing testimony regarding Evan Pearce's consumption of acohol a short period of time prior to the incident because it was relevant and had probative value. Moreover, even if it were error, it was not substantial in that the jury found against Appellant on the issue of causation and there was substantial testimony in support of that finding without the testimony of the acohol consumption.

Consequently, the Trial Court should be affirmed.

Respectfully submitted this 25 day of August, 1982.

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MAILING CERTIFICATE

Mailed two copies of the foregoing Brief of Respondents to Mr. Jackson Howard, attorney for Appellants, 123 East 300 North, P.O. Box 778, Provo, Utah 84601, postage prepaid, this 25 day of August, 1982.