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State Or Federal Standard Of Sufficiency Of The Evidence To Go To The Jury

Wratchford v. S.J. Groves & Sons Co.1
Boeing Co. v. Shipman2

INTRODUCTION

Inherent in the American legal system, comprised of both federal and state courts, is the problem of defining a workable relationship between these two separate court structures.3 One of the more difficult problems in this respect is whether a federal court sitting on the basis of diversity of citizenship should in a given context apply state or federal law. Erie Railroad v. Tompkins,4 the landmark case in a choice of law situation, has left unanswered several important questions. One of these questions is whether, in a suit based solely on diversity of citizenship, a federal court should apply state or federal law to determine the sufficiency of the evidence to go to the jury.5 A second, and related question, is what is the federal standard for determining the sufficiency of the evidence to go to the jury.

1. 405 F.2d 1061 (4th Cir. 1969).
2. 411 F.2d 365 (5th Cir. 1967).
4. 304 U.S. 64 (1938).
WRATCHFORD

In Wratchford v. S.J. Groves & Sons Co., the fourth circuit reaffirmed its holding that a federal standard is to be applied. On a winter morning plaintiffs' conservatee was found at the bottom of an open highway drainage hole. His skull had been fractured and his body was almost frozen. Plaintiffs alleged that defendant was negligent in not having placed a grating over the ditch, or in not barricading the hole to warn potential pedestrians of the presence of the open, unprotected hole. Plaintiffs' theory was that Wratchford stepped into the unprotected hole and sustained his injuries. Defendant contended that the circumstances gave rise to an inference of equal probability that Wratchford slipped on accumulated ice and snow and slid, slipped or crawled, after his injury, into the hole. It was assumed at the trial that the Maryland standard applied — which the district court interpreted as demanding a directed verdict where the evidence shows that the injury could have occurred in two ways, only one of which would render defendant liable. The district court directed a verdict for defendant. Plaintiffs filed a motion under Rule 60(b), claiming for the first time that a federal standard controlled. The motion was argued before the district court and denied, the court expressing doubts as to the propriety of its disposition as well as noting the appropriateness of the case for clarification on appeal. While plaintiffs did not take an appeal from the denial of the motion, the court of appeals, noting that its consideration of this issue was somewhat unorthodox, decided to give appellate consideration to the issue of the proper standard as to the sufficiency of the evidence to go to the jury because, as the court stated, "... when fundamental rights are involved appellate consideration is appropriate, despite inconsistency in the appellant's position." The court of appeals reversed the district court, holding that where jurisdiction is based on diversity of citizenship, the federal standard is to be applied by the court in determining the sufficiency of the evidence to go to the jury.

The decision in Wratchford is important, because, in addition to bringing up-to-date the controversy among the circuits as to the proper

6. 405 F.2d 1061 (4th Cir. 1969).
7. The parties were not in agreement as to the proper Maryland standard. The district court relied on three cases for the proper Maryland standard: Langville v. Glen Burnie Coach Lines, Inc., 233 Md. 181, 195 A.2d 717 (1963); Kettle v. R.J. Loock & Co., 199 Md. 95, 85 A.2d 459 (1952); Strasburger v. Vogel, 103 Md. 85, 63 A. 202 (1906). For cases seemingly adopting a more liberal standard, see, e.g., Board of County Comm'rs v. Dorcus, 247 Md. 251, 230 A.2d 656 (1967); Acme Poultry Corp. v. Melville, 188 Md. 365, 53 A.2d 1 (1947).
8. 405 F.2d at 1063. The question of the proper standard of sufficiency of the evidence to be applied in diversity actions was raised for the first time on appeal to the district court by plaintiff's motion under Rule 60(b) of the Federal Rules of Civil Procedure. The district court denied the motion but expressed the "appropriateness of this case for clarification of the matter on appeal." No appeal was taken by the plaintiff from the denial of the motion; thus technically the question was not before the court of appeals; however, the court looked to the statement of the district judge expressing his hope of appellate consideration of the question and proceeded to rule on the issue of the proper standard of sufficiency.
9. Id.
10. Id. at 1066.
standard to be applied, it enunciates several cogent reasons for applying the federal standard, reasons which cannot be ignored by the Supreme Court when it faces the issue.

THE MARYLAND STANDARD

The court in *Wratchford* expressed a belief that the Maryland standard requires a directed verdict for the defendant where an occurrence could have resulted with equal probability from two causes, only one of which can be traced to the defendant. There would appear to be two distinct situations, however, and in only one would this articulation of the Maryland standard be accurate. The first situation is where plaintiff's evidence produces two possible explanations as to the cause of the event, only one of which may have been caused by the defendant. In *Larsen v. Romeo*, where plaintiff's evidence showed that the automobile accident could have resulted either from plaintiff's unexpected brake failure or from defendant's negligence, the court, in directing a verdict for the defendant, stated:

> [W]hen the plaintiff himself shows that the injury complained of must have resulted *either* from the negligence of the defendant *or* from an independent cause for the existence of which the defendant is in no way responsible, he cannot be permitted to recover until he excludes the independent cause as the efficient and proximate cause of the injury.

The second situation arises where plaintiff's and defendant's evidence produces different inferences. This was the situation in *Board of County Commissioners v. Dorcus*, a case arising out of an automobile accident where the court affirmed a verdict based upon circumstantial evidence of negligence and causation. The court in *Dorcus* phrased its standard in different terms:

> The inferences drawn by the appellees from their evidence were reasonable and probable, and the inferences drawn by appellants were also reasonable and probable. There was, therefore, in the case a direct conflict as to the real factual situation. Such conflicts the trier of facts must resolve.

Although there may be some difficulty in those cases where the cause of an event is unknown, it would appear that plaintiffs' testimony in

13. Id. at 226, 255 A.2d at 390, citing, *Strasburger v. Vogel*, 103 Md. 85, 91, 63 A. 202, 204 (1906).
16. Id. at 259, 230 A.2d at 661.
Wratchford would be such as permit two inferences as to the cause of the accident. Accordingly, coming within the first category mentioned above, recovery would have been denied the plaintiffs in Wratchford if the Maryland standard were applied.

The Federal Standard

The Court of Appeals for the Fourth Circuit, as previously mentioned, proceeded to resolve the case before them in terms of the federal standard of sufficiency of the evidence, affirming their earlier holdings that a federal standard should be controlling. At the outset, it must be noted that one of the major problems encountered when dealing with the proper standard for testing the sufficiency of the evidence is the virtual impossibility of isolating the test which is applied as the federal standard. In the first place, Supreme Court discussion as to the standard for testing sufficiency is rare except in Federal Employers Liability Act cases. There is some doubt as to whether the standard applied in FELA cases is the same as the standard applied in other cases, and much of the confusion is directly attributable to the Supreme Court itself. Often the Supreme Court will cite FELA cases in non-FELA situations, and frequently in FELA cases the court will rely on non-FELA cases as authority. The Federal Employers Liability Act expressly imposes liability upon the employer to pay damages for injury or death due in whole or in part to its negligence. This proposition is recognized in Rogers v. Missouri Pacific Railroad, where the Supreme Court stated:

The law was enacted because the Congress was dissatisfied with the common-law duty of the master to his servant. The


There is disagreement whether Lavender represents the proper standard for diversity cases. Compare Crowe v. Hertz Corp., 382 F.2d 681, 687 (5th Cir. 1967), with Jellison v. Kroeger Co., 290 F.2d 183 (6th Cir. 1961). See also Bagalay, Jr., Directed Verdicts and the Right to Trial by Jury in Federal Courts, 42 Texas L. Rev. 1053, 1065–69 (1964). There may be constitutional objections to the application of varying standards. See, e.g., Simler v. Connor, 372 U.S. 221 (1963). See also Aylor v. Intercounty Constr. Corp., 381 F.2d 930 (D.C. Cir. 1967); Wells v. Warren Co., 328 F.2d 606 (5th Cir. 1964); Preston v. Safeway Stores, Inc., 163 F. Supp. 749 (D.D.C. 1958). Assuming that the federal standard is that established by the Supreme Court in Lavender, it is likely that the Maryland standard does not meet these liberal requirements.


statute supplants that duty with the far more drastic duty of paying damages for injury or death at work due in whole or part to the employer's negligence. The employer is stripped of his common-law defenses and for practical purposes the inquiry in these cases today rarely presents more than the single question whether negligence of the employer played any part, however small, in the injury or death which is the subject of the suit. . .

It has been argued that the standard of sufficiency of evidence in FELA cases is more liberal than in ordinary tort actions and that it would be inaccurate to characterize the federal standard as that applied in FELA situations.

The Fifth Circuit Court of Appeals, in *Boeing Co. v. Shipman*, reached this conclusion in overruling its earlier decision in *Planters Manufacturing Co. v. Protection Mutual Insurance Co.* In *Boeing*, plaintiff, an employee of Boeing, sued his employer for injuries received during the course of his employment, alleging that his employer was negligent in failing to provide him with a safe place to work. The question presented on appeal was whether the evidence was sufficient to support the jury's verdict in favor of plaintiff. The fifth circuit, sitting en banc, first dealt with the question of the proper standard to be applied in diversity actions and, after concluding that the federal standard should control, proceeded to discuss the federal standard. In rejecting the FELA standard as the standard applicable in an ordinary diversity case, the court went on to formulate its own "federal standard." A majority of the circuits, however, have re-

22. Id. at 507-08.
24. 411 F.2d 365 (5th Cir. 1969). The earlier opinion of the fifth circuit is found in 389 F.2d 507 (5th Cir. 1961).
25. 380 F.2d 869 (5th Cir. 1967), cert. denied, 389 U.S. 930 (1968). Here the fifth circuit regarded the federal standard as analogous to the FELA standard, the reasons given being identical to those expounded by Judge Rives in his dissent in *Boeing*.
26. "[W]e now reject the *Planters* principle and hold that the FELA test is peculiar to that kind of case as a consequence of the statute itself and is accordingly not applicable in non-FELA jury trials." 411 F.2d 365, 372 (5th Cir. 1969). The court then announced the proper federal standard:

On motions for directed verdict and for judgment notwithstanding the verdict the Court should consider all of the evidence — not just that evidence which supports the non-mover's case — but in the light and with all reasonable inferences most favorable to the party opposed to the motion. If the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions, the motions should be denied, and the case submitted to the jury. A mere scintilla of evidence is insufficient to present a question for the jury. The motions for directed verdict and judgment n.o.v. should not be decided by which side has the better of the case, nor should they be granted only when there is a complete absence of probative facts to support a jury verdict. There must be a conflict in substantial evidence to create a jury question. However, it is the function of
peatedly referred to the standard of sufficiency announced in *Lavender v. Kurn*,\(^\text{27}\) a FELA case, as being the federal standard. Arguably the language in *Lavender*, unlike that found in *Rogers v. Missouri Pacific Railroad*,\(^\text{28}\) more closely resembles the standard of sufficiency applied in ordinary tort actions:

It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference. Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear.\(^\text{29}\)

The court in *Boeing*, however, rejected *Lavender* as being the proper federal standard, seizing upon *Lavender*'s language of "complete absence" to support its conclusion that the standard announced there was typical of FELA cases generally. The majority in *Boeing* stated that a motion for directed verdict should be granted not only where "there is a complete absence of probative facts . . . [but] there must be a conflict in substantial evidence to create a jury question."\(^\text{30}\) In an extensive dissent, Judge Rives took issue with the majority's rejection of *Lavender*, stating: "It is submitted that 'complete absence' must be read in context with the phrase 'of probative facts' immediately following it; and, so read, whatever misapprehensions the majority may have appear unfounded."\(^\text{31}\)

The basis of the controversy between the majority and minority centers around their understanding of the FELA standard. The

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*Id.* at 374-75.

Judge Rives, dissenting, found fault with the majority's formulation of a standard in three respects:

First, the majority expressly overrules the Supreme Court's own sufficiency test set out in *Lavender v. Kurn*. . . [t]he majority, in so doing, commits constitutional error, for the *Lavender* test represents but one articulation of several constitutional formulas used by the Supreme Court.

Second, the majority simply has no authority to "promulgate" any one standard when the Supreme Court itself has prescribed a number of them. . . . Third, I disagree with the new standard "established" by the majority because it is at least misleading in its use of the term "substantial," if it is not erroneous. The word "substantial," used in its legal sense, can equally well connote either a qualitative or a quantitative meaning. . . . In closing, too, I note that, notwithstanding all the variations which the Supreme Court has played on its sufficiency theme, I have been unable to find a single instance in which the Supreme Court has used "substantial" in any of its articulations of the constitutional standard.

*Id.* at 392-94.

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\(\text{28}\) 352 U.S. 500 (1957). See text accompanying notes 20-22 supra.

\(\text{29}\) 327 U.S. 645, 653 (1946) (emphasis added).

\(\text{30}\) 411 F.2d 365, 374-75 (5th Cir. 1969).

\(\text{31}\) *Id.* at 392 n.26.
majority in *Boeing* found that the burden of proof is substantially altered in FELA actions, with slight negligence sufficing to take the case to the jury. thus, to the majority, the sufficiency of the evidence in FELA cases is far more liberal than in ordinary tort actions. the dissenting opinion of Judge Rives, however, reasoned that there is no difference between the standards of sufficiency being applied in the two cases. He reasoned that the results in FELA cases, which frequently are in favor of injured employees, are due not to any more liberal standard as to sufficiency of evidence required for submission of a case to the jury, but rather are attributable to the distinct substantive elements of the tort. The dissent’s rationale was that the standard as to sufficiency remains constant, but that the result of the application of that standard varies with the type of substantive claim litigated.

The majority would thus define “probative facts” in relation to FELA cases — a showing of slight negligence; while the minority would view “probative facts” much in the same manner as the majority’s “substantial evidence.” The primary difficulty with the formulation of the federal standard as expressed by both the majority and minority lies in defining the terms “substantial” or “probative.” The majority defined substantial as “evidence of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions....” It would appear that substantial in many respects is similar to probative as that term is used by Judge Rives.

While the majority in *Boeing* rejected the standard enunciated in *Lavender* as being the appropriate standard in ordinary diversity cases, it can be argued that the majority failed to view *Lavender* apart from its FELA status. While *Lavender* involved litigation under the Federal Employers Liability Act, the standard there established by the court was articulated in such a manner that it in fact comports with later Supreme Court pronouncements in non-FELA situations.

The court in *Boeing* dealt with another aspect of the proper federal standard as to sufficiency of the evidence to go to the jury. The majority argued that there was no constitutional requirement that the FELA standard be the same as that applied in non-FELA cases. The dissent argued that it violated the seventh amendment to apply a different standard of sufficiency of evidence to create a jury question in FELA and non-FELA cases. The dissent based its argument on the proposition that the FELA standard is a constitutional standard, and is to be applied in all actions. Since an action “under the FELA is a ‘suit at common law’ as that expression is

32. Id. at 370–73.
33. Id. at 392.
34. Id. at 374.
35. [T]he Seventh Amendment . . . does not require, either expressly or impliedly, that the test of sufficiency of evidence to create a jury question in a non-FELA federal case be the same as in an FELA case. The tendency of some federal courts, at times, to use overly broad language or to cite indiscriminately FELA cases in non-FELA situations does not obviate this conclusion.
36. Id. at 373.
37. Id. at 384.
used in the seventh amendment," and since the seventh amendment applies to FELA cases brought in a federal court, the jury trial afforded litigants in FELA cases is the same jury trial available to the parties in any other controversy before the federal courts. Reasoning from this, the dissent concluded that the role of the jury in FELA cases is the same as in non-FELA cases and accordingly, submission of a case to the jury is to be tested in all cases by the same standard.

The major difference between the two positions enunciated in Boeing can be attributed to their divergent views as to the nature of FELA actions. The majority was concerned that the application of the FELA standard to ordinary tort actions would result in revival of the "scintilla" rule. The dissent noted that the "scintilla" rule had been firmly rejected, and, as stated above, argued that the often liberal jury awards in FELA cases were due to the substantive elements of such actions rather than to any relaxed standard of sufficiency.

Courts commenting upon the standard set forth in Lavender have stated that this case constitutes an abandonment of an earlier federal standard which was characterized by a stricter standard of sufficiency of the evidence. In attempting to trace the evolution of the federal standard it will be necessary to view the federal standard with respect to two distinct situations. The first situation is that in which plaintiff's own evidence gives rise to two inferences as to the cause of an event, and the second is where plaintiff's and defendant's evidence produces conflicting inferences.

In the second situation, where plaintiff's and defendant's evidence produces varied inferences, the federal courts have uniformly held that the question is one for jury determination. However, in cases where plaintiff's own evidence produces the inferences, there has been a noticeable shift in the federal standard. In Pennsylvania Railroad v. Chamberlain, where the death of the brakeman in question could have resulted either from his own negligence or that of his employer, the Court stated:

We, therefore, have a case belonging to that class of cases where proven facts give equal support to each of two inconsistent

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37. Id.
38. Id. at 386.
39. Id. at 372-73.
40. See Moore v. Guthrie Hosp., Inc., 403 F.2d 366, 369 (4th Cir. 1968); Planters Mfg. Co. v. Protection Mut. Ins. Co., 380 F.2d 869, 871 (5th Cir. 1967), cert. denied, 389 U.S. 930 (1968); NLRB v. Marcus Trucking Co., 286 F.2d 583, 592 (2d Cir. 1961); Baltimore & O.R.R. v. Postom, 177 F.2d 53, 54 (D.C. Cir. 1949). This shift in the federal standard is alluded to in Wratchford: "The federal standard may once have been the same as that which the District Court understood was applicable in the state courts of Maryland, but it no longer is." 405 F.2d 1061, 1066 (4th Cir. 1969).
41. See notes 10 and 13 supra and accompanying text, dealing with the Maryland standard.
42. See, e.g., Gunning v. Cooley, 281 U.S. 90, 94 (1930), where the Supreme Court reasoned: "Where uncertainty as to the existence of negligence arises from a conflict in the testimony or because, the facts being undisputed, fair-minded men will honestly draw different conclusions from them, the question is not one of law but of fact to be settled by the jury." This standard is found expressed as the federal standard as early as 1873 in Railroad Co. v. Stout, 84 U.S. (17 Wall.) 657, 663 (1873), and appears to be the standard at common law.
43. 288 U.S. 333 (1933).
inferences; in which event, neither of them being established, judgment, as a matter of law, must go against the party upon whom rests the necessity of sustaining one of these inferences as against the other, before he is entitled to recover.44

Although this formulation has been followed by the federal courts in the past,45 it would appear that Chamberlain is no longer authoritative.46 Federal courts, when presented with the situation where plaintiff's own evidence gives rise to two inferences as to the cause of an event, will, as did the fourth circuit in Wretchford, allow the jury to decide the issue.

THE ERIE PROGRESSION

In determining whether a state or a federal standard of sufficiency will be applied, it is helpful to review several Supreme Court decisions dealing with similar questions.

In 1938 the Supreme Court decided Erie Railroad v. Tompkins,47 and later in the same year the Federal Rules of Civil Procedure48 took effect. In Erie the Supreme Court overruled Swift v. Tyson49 as an erroneous interpretation of the Rules of Decision Act,50 which had engendered an unconstitutional invasion of state power51 by the federal judiciary. The Court stated that there is no federal general common law, and thus initiated the principle that in diversity suits, the federal

44. Id. at 339.
45. See Jones v. Mutual Life Ins. Co., 113 F.2d 873, 875 (8th Cir. 1940); Truitt v. Hardware Dealers Mut. Fire Ins. Co., 112 F.2d 140, 142 (5th Cir. 1940); Henry H. Cross Co. v. Simmons, 96 F.2d 482, 486 (8th Cir. 1938); Liggett & Myers Tobacco Co. v. De Parcq, 66 F.2d 678, 684 (8th Cir. 1933), cert. denied, 298 U.S. 680 (1936).

The conclusion seems inescapable that the decision in Lavender v. Kurn, must be deemed to constitute an abandonment of the earlier doctrine that if the evidence is capable of either of two inferences, it cannot be deemed to support either. The case substitutes the principle that in such an event, it is for the jury to determine which inference to deduce and that the jury has a right to draw either one. The prior cases [such as Chamberlin] must be deemed to have been overruled sub silentio.

Id. at 752-53.
47. 304 U.S. 64 (1938).
50. The act provided: “The laws of the several states, except where the Constitution, treaties, or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply.” Act of Sept. 24, 1789, ch. 20, § 34, 1 Stat. 92 [now 28 U.S.C. § 1652 (1964)].
51. 304 U.S. at 80. The constitutional basis of the Erie holding is the tenth amendment. There have been, however, arguments that Erie is without a constitutional basis. See Clark, State Law in the Federal Courts: The Brooding Omnipresence of Erie v. Tompkins, 55 YALE L.J. 267 (1946). Contra, Hart, The Relations Between State and Federal Law, 54 COLUM. L. REV. 489 (1954).
courts are to apply the "substantive rules of common law applicable in a state." The converse of adherence to state substantive law is the proposition, effectuated by the adoption of the Federal Rules, that the federal courts are free to apply federal procedural law. In 1945, the Supreme Court stated explicitly what had been apparent since Erie—there is no simple dichotomy of substance on the one hand and procedure on the other. In Guaranty Trust Co. v. York, the Court substantially redefined and modified the Erie principle: Erie meant to insure that the outcome of the litigation in the federal court should be substantially the same, so far as legal rules affect it, as it would be if tried in a state court.

The next important Supreme Court pronouncement was Byrd v. Blue Ridge Cooperative, where the Court indicated that there are certain countervailing circumstances which limit the application of the outcome-determinative test enunciated in Guaranty Trust Co. v. York. In Byrd, the Supreme Court was faced with the issue whether, in a federal court, the state rule, that the defense of statutory immunity is a question for the court, must be followed. The Court found that the state rule was not bound up with state created rights and was not "...announced as an integral part of the special relationship created by the statute," but was rather "merely a form and mode of enforcing the immunity." Recognizing nonetheless that by allowing the issue of statutory immunity to go to the jury the outcome of the litigation might be substantially affected, the Court indicated that the independent nature of the federal judicial system outweighed the need for strict adherence to the Erie doctrine, and held that the state rule was not to be followed. Byrd has been repeatedly cited as authority for following the federal standard of sufficiency of the evidence to go to the jury in diversity cases. Furthermore, commentators have expressed their opinion as to the certainty of applying the federal standard, and the Supreme Court has given every indication of

52. 304 U.S. 64, 78 (1938).
53. See Erie Railroad v. Tompkins, 304 U.S. 64, 92 (1938) (concurring opinion of Reed, J.): "The line between procedural and substantive law is hazy but no one doubts federal power over procedure."
55. Id. at 109.
57. Id. at 537.
58. Id. at 536.
59. Id.
62. See note 5 supra.
following such a course. However, the problem is still referred to as an "open question." 68

As was pointed out above, 64 the circuits are not in agreement as to the proper standard to be applied. Several recent Supreme Court cases provide a background for the situation as it presently exists. Stoner v. New York Life Insurance Co. 65 was cited in a footnote to Byrd 66 as standing for the proposition that a state standard of sufficiency of the evidence must be applied in a diversity suit. Many commentators 67 have stated that Stoner does not appear to stand for such a proposition, and an examination of that case leaves little doubt that it does not. In Stoner, an action under an insurance policy, the state court had held that there was sufficient evidence to create a jury issue as to total disability. The district court, sitting without a jury, reached the same result. The circuit court reversed, finding the evidence insufficient to create a jury issue. The Supreme Court reversed the circuit court, holding that under Erie the federal courts were required to follow the state decisions that the evidence supported a finding of total disability. One authority states that Stoner is "merely a peculiar application of the doctrine of 'law of the case.'" 68 Later pronouncements of the Supreme Court itself indicate that it has seemingly discarded the notion that Stoner meant what Byrd said it did. In Dick v. New York Life Insurance Co. 69 and Mercer v. Theriot, 70 the Supreme Court has stated that the question is still open.

RIGHT TO TRIAL BY JURY

Regardless of whether there are policy reasons which would lead the Supreme Court to hold that a federal, rather than a state, standard as to sufficiency of the evidence should be applied, there is the preliminary issue of whether the seventh amendment commands that the federal standard be applied. If it does, there will be no need for the Supreme Court to reach a decision based upon the Erie rationale, for the Erie doctrine must give way to the explicit command of the Constitution. Even if Erie was a constitutional decision, 71 the seventh amendment would still require application of the federal standard, since the specific constitutional command of the seventh amendment would prevail over the tenth amendment's reservation of rights to the states. 72

The court in Wretchovided its decision on an attempt to prevent the disruption of the allocation of functions between judge

64. See note 5 supra and accompanying text. See also Whicher, The Erie Doctrine and the Seventh Amendment: A Suggested Resolution of Their Conflict, 37 Texas L. Rev. 549 (1959).
65. 311 U.S. 464 (1940).
66. 356 U.S. at 540 n.15.
70. 377 U.S. 152 (1964).
71. See note 50 supra.
and jury in the federal system, indicating that the dictates of the seventh amendment would so require a federal standard to be applied. Reliance was placed upon the Supreme Court's reasoning in *Byrd*, where the Court stated:

> The federal system is an independent system for administering justice to litigants who properly invoke its jurisdiction. An essential characteristic of that system is the manner in which, in civil common-law actions, it distributes trial functions between judge and jury and, under the influence — if not the command — of the Seventh Amendment, assigns the decisions of disputed questions of fact to the jury. . . . 78

Thus, inquiry must be directed at ascertaining what the seventh amendment commands as to the distribution of functions between the judge and jury.

The seventh amendment provides that:

> [I]n suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law.

It would appear that the seventh amendment would require the application of a federal standard in determining if a particular controversy should be decided by judge or jury, as well as the standard of the sufficiency of the evidence to be applied in that case. Where the state rule as to sufficiency of the evidence to go to the jury is more restrictive than the federal rule, the application of the state rule by a federal court in a diversity case would seemingly deprive the party, against whom a directed verdict will be granted, of the benefit of a jury determination of the issues to which he would be entitled were the federal standard applied. 74 This, of course, assumes that the federal standard is, and that the state standard is not, in conformity with the common law standard as to sufficiency of evidence to go to the jury. This reasoning alone has been sufficient to lead many of the commentators to conclude that the seventh amendment precludes the application of the state standard. 75 This view of the seventh amendment is seemingly grounded on the avowed federal interest in the jury trial right, because if the state standard does not violate the common law standard the seventh amendment would not prevent its application. The Supreme Court has frequently articulated the view that a party's right to a jury trial is to be jealously guarded. 76 Since there is a

73. 356 U.S. at 537.
strong federal interest in preserving the guarantee of the seventh amendment, it would fly in the face of this interest to apply a state standard which would defeat a jury determination.

It may also be instructive to examine the standard which prevailed at common law for testing the sufficiency of the evidence to go to the jury. This is so because according to one view, the claim of a litigant as to a right to a jury trial is to be measured against the practice of the common law in 1791 when the amendment was adopted. 77

The leading case on the right to trial by jury is Galloway v. United States, 78 in which the Supreme Court reviewed the development of the practice of directed verdicts:

Finally, the objection appears to be directed generally at the standards of proof judges have required for submission of evidence to the jury. But standards, contrary to the objection's assumption, cannot be framed wholesale for the great variety of situations in respect to which the question arises. Nor is the matter greatly aided by substituting one general formula for another. . . . [T]he essential requirement is that mere speculation be not allowed to do duty for probative facts, after making due allowance for all reasonably possible inferences favoring the party whose case is attacked. The mere difference in labels used to describe this standard, whether it is applied under the demurrer to the evidence or on a motion for a directed verdict, cannot amount to a departure from "the rules of the common law" which the Amendment requires to be followed. 79

If the state rule as to sufficiency does not amount to a "departure from the rules of the common law," it cannot amount to a violation of the seventh amendment. The central problem here, however, is in ascertaining what the state and federal rules are. The difficulty in determining what was the common law standard of proof required for submission of evidence to the jury is complicated by the fact that in 1791 there was no directed verdict. 80 At common law there were several devices for withdrawing a case from the jury. Among the common law devices were instructions on the law, advice on the facts,

78. 319 U.S. 372 (1943).
79. Id. at 395.
80. It is settled that a case is to be taken from the jury where there is no evidence on the subject. See, e.g., Improvement Co. v. Munson, 81 U.S. (14 Wall.) 442 (1871). It is also well established that a mere scintilla of evidence is not sufficient. See, e.g., Gunning v. Cooley, 281 U.S. 90, 94 (1930). The most frequently encountered statement as to the sufficiency required for submission to a jury is whether there is any evidence upon which a jury can properly proceed to a verdict. See Gunning v. Cooley, 281 U.S. 90, 94 (1930); Commissioners v. Clark, 94 U.S. 278 (1876); Pleasants v. Fant, 89 U.S. (22 Wall.) 116 (1874); Improvement Co. v. Munson, 81 U.S. (14 Wall.) 442 (1871); Parks v. Ross, 52 U.S. (11 How.) 362 (1850).
While the modern directed verdict is largely an outgrowth of these devices, none is directly analogous to the directed verdict. The modern directed verdict is merely one of those devices by which the court can control the jury, and it is subject to the same vague standards that were applicable to similar devices at common law. It would seem, then, that in applying an historical test, the Supreme Court will not find any clearly enunciated standard for testing the sufficiency of the evidence to go to the jury at common law. Rather, the Court will find itself presented with a long line of cases which have established only vague generalities. The futility of undertaking an historical approach is summed up in the well-worn statement that it is proper for the court to direct a verdict where there is no evidence on which the jury can properly proceed to find a verdict for the party with the burden of proof. This statement only begs the question, however, because what is at issue is which standard, state or federal, is to be applied, where the evidence points to two possible inferences, one exculpatory, the other inculpatory. An attempt to isolate the common law standard for testing the sufficiency of the evidence, and then to compare this standard with the questioned state standard to determine if it violates the constitutional requirements, seems futile. In addition to the above reasons, the standards at common law, much like the standard for a directed verdict, were not static, but were constantly changing, always toward a more liberal standard. This difficulty is equally true with respect to determining whether a particular cause of action should be tried by judge or jury. Here the historical test, to the extent that it is still applicable, works without undue difficulty where the case presents but a single claim for relief. However, modern practice has encouraged the joining of both equitable and legal claims, and this has given rise to situations that do not fit smoothly into the 1791 common law.

These difficulties have resulted in a modification of an historical test as is aptly demonstrated by the Supreme Court granting jury trials in cases where they would not have been available at common law. The Supreme Court, however, has indicated that the preservation of the common law distribution of functions between judge and jury

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83. See note 41 supra.


86. In Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1959), the Supreme Court extended the provisions of trial by jury to a case in equity. Professor James, commenting upon the case, stated that it is "cloudy and ambiguous and susceptible of an interpretation which would go far to abolish the historical test altogether and extend jury trial over most of the former domain of equity." James, Right to a Jury Trial in Civil Actions, 72 Yale L.J. 655, 687 (1963).
is not the only constitutional basis for applying a federal standard in
diversity actions. The right to a jury trial in a federal court is to be
determined according to a federal standard, and the recent case of
Simler v. Connor held that the federal standard also controls in a
diversity case. Since the federal standard is to be applied in determin-
ing the right to a jury trial, perhaps it should also control the incidents
of a jury trial. The right to have a jury determine a particular issue
is part of the right to a jury trial, and it would be inconsistent to apply
a federal standard as to the existence of the right initially, and then
deny a jury determination by the application of a state standard.

It has also been urged that to apply a state standard as to suffi-
ciency violates the seventh amendment command because it interferes
with the traditional role of the federal judge. The seventh amend-
ment directs that disputed issues of fact in a federal court be deter-
dined by the jury. The court, however, has the power to direct a
verdict, and the case need not go to the jury at all. The role of the
judge in a jury trial is equally as important as that of the jury,
and part of the judge’s function is to present the issues to the jury.
To require a federal court to apply a state standard as to sufficiency
would disrupt the traditional allocation of functions between judge
and jury, an allocation seemingly directed by the seventh amendment.

The Simler Court was faced with the issue whether state or
federal law is to control in deciding whether a controversy is equitable
in nature and therefore to be tried by the court, or legal and triable
to a jury. The Court held that federal law controls, basing its de-
cision in part upon the ground of uniformity of the exercise of the
jury right: “Only through a holding that the jury-trial right is to be
determined according to federal law can the uniformity in its exercise
which is demanded by the seventh amendment be achieved.” The
application of a federal standard in deciding the right to a jury trial
will insure that in every diversity case the issue will be decided by
the same standard, while the application of a state standard could result
in different outcomes, depending upon the state standard involved.
The seventh amendment’s command that the right to a jury trial be
preserved would or would not be obeyed depending upon the state
standard being applied. The right preserved by the seventh amend-
ment to parties in a federal court should not be dependent upon the

87. See 2B BARRON & HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 871.1
(Wright ed. 1961); Bagalay, Directed Verdicts and the Right to Trial by Jury in
Federal Courts, 42 Texas L. Rev. 1053 (1964). But see Whicher, The Erie Doctrine
and the Seventh Amendment: A Suggested Resolution of Their Conflict, 37 Texas
89. See Feldman, The Difference Between the Pennsylvania and Federal Tests of Sufficiency of Circumstantial Evidence of Negligence and the Choice of Law
364 (1913); Capital Traction Co. v. Hof., 174 U.S. 1 (1899).
92. See Bagalay, Directed Verdicts and the Right to Trial by Jury in Federal
Courts, 42 Texas L. Rev. 1053 (1964).
93. 372 U.S. at 222.
state in which that court is sitting. This right should be available in the same degree to every party before the federal courts. The same reasoning could be applied to the standard for the sufficiency of the evidence to go to the jury. If the federal courts apply various state standards as to the sufficiency of evidence, the right to a jury trial will vary with the standard being applied. If the seventh amendment requires a uniform exercise of the jury-trial right, it can only be achieved by applying the same standard in all cases — the federal standard.95

When the issue of the proper standard to be applied in determining the sufficiency of the evidence is squarely presented to the Supreme Court, there is available sufficient precedent dealing with the right to a jury trial that the Court can in all probability fashion a constitutional argument for a holding that the federal standard controls. As the above analysis discloses, however, none of the seventh amendment arguments commands the application of the federal standard; instead, these arguments indicate that the influence of the seventh amendment leads to the application of the federal standard.

**Policy Considerations**

Should the Supreme Court fail to resolve the problem in terms of the seventh amendment guarantee of a right to a jury trial, it will then have to resolve the issue in terms of the *Erie* policy. *Erie Railroad v. Tompkins*96 and *Guaranty Trust Co. v. York*97 articulated several policy grounds which require the application of state substantive law. *Byrd v. Blue Ridge Cooperative*98 and *Hanna v. Plummer*99 enunciated certain policy grounds which seemingly militate against those requiring application of the state rule. It is in light of these two divergent lines of policy that the present question must be resolved.

The *Erie* decision was based in part on a notion of fairness, and in part was designed to prevent the practice of forum shopping. *Guaranty Trust* attempted to clarify some of the ambiguities implicit in the *Erie* decision by showing that there can be no simple dichotomy between substance and procedure. The outcome-determinative test there laid down was intended to further the policy underlying the *Erie* rule, namely, to "[discourage] forum-shopping and [avoid] inequitable administration of the laws."100

*Byrd* marked a turning point in the *Erie* progression.101 There the Supreme Court explicitly stated that there is a limit to how far the outcome-determinative test can be extended. In *Byrd* the Court recognized that the application of a federal rule might have an effect

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96. 304 U.S. 64 (1938).
100. 380 U.S. 460, 468 (1964).
upon the litigation, and went on to state what the considerations might be for disregarding the outcome test. The countervailing consideration enunciated in *Byrd* was the federal practice of division of functions between judge and jury. In the recent case of *Hanna v. Plummer*, the Supreme Court further elaborated on the limitations of the outcome test. *Hanna* was the first case where there was a direct conflict between a state rule of procedure and one of the Federal Rules of Civil Procedure. The Court was therefore required to determine which rule, as to service of process, was to be applied by a federal court sitting on the basis of diversity of citizenship. The Court held that the federal rule was to be applied, and in the course of its opinion cited *Byrd*. While the *Hanna* issue differs somewhat from the question of the proper standard as to sufficiency of the evidence, the case demonstrates the importance, in any choice of law question, that the court will accord to the federal interest in maintaining an independent judiciary. The Court in *Hanna* was called upon to meet the contention that to apply the federal rule would result in a different outcome than would be obtained were the state rule to be applied. The Court recognized that were the federal rule to be applied, the litigation would continue, since plaintiff had satisfied the requirements of the federal rule. On the other hand, were the state service of process rule applied, defendant would prevail since the state rule had not been satisfied. The *Hanna* Court noted that the *Guaranty Trust* decision was expressed in terms of substantial variations in outcome. In a case such as *Wratchford v. S.J. Groves & Sons Co.*, it can be argued that the application of a federal standard as to the sufficiency of the evidence will not substantially alter the outcome that would result from the application of the state standard. If the state standard requires a higher quantum of evidence than the federal standard, and a party has failed to satisfy the state standard, its application will result in a directed verdict for his adversary. The application of a more liberal federal standard, would, on the other hand, prevent a directed verdict, and allow the issue to go to the jury. The jury, however, would not necessarily reach a verdict that differs from that rendered by the judge in granting a directed verdict. If the jury renders a verdict which is against the weight of the evidence, the court has the power to grant a new trial. The fact that the jury's verdict must be based on some substantial evidence, and the power of the federal court to grant motions for judgment n.o.v. and new trials, go far to dispel the concern that the application of a

103. The Federal Rule involved was Rule 4(d)(1).
104. The question of the validity and applicability of a Federal Rule of Procedure, the *Hanna* court stated, is not to be determined by the *Erie* doctrine. If a Federal Rule is within the power of the Supreme Court under the Rules Enabling Act, and does not violate constitutional bounds by enlarging, abridging or modifying substantive rights, it is the rule to be applied by the federal courts sitting on the basis of diversity jurisdiction. *Hanna v. Plummer*, 380 U.S. 460, 464-65 (1965). The discussion in *Hanna* relating to the *Erie* doctrine is, therefore, dicta, but highly persuasive to say the least.
105. 405 F.2d 1061 (4th Cir. 1969).
more liberal federal standard as to sufficiency of the evidence will substantially alter the outcome of the litigation. Neither Byrd nor Hanna overrules the outcome-determinative test; rather, they demonstrate that this alone is not always the determining factor. While the Court in Hanna discussed the outcome-determinative test in terms of substantial variations, the court in Wratchford went even further and indicated that the outcome-determinative test is not the appropriate one for choosing the applicable rule for the distribution of functions between judge and jury.\textsuperscript{107} Rather, the court stated, the general approach of Byrd is appropriate for determining the proper standard as to sufficiency of evidence to be applied in a diversity action.\textsuperscript{108}

The court of appeals in Wratchford followed a line of reasoning similar to that articulated in Hanna. While the Erie doctrine requires the federal courts to apply state law defining and limiting the primary rights and obligations of the parties, the federal courts are not bound to follow state rules which are not so connected with rights and obligations, where to do so would disrupt the federal system of allocating judge- jury functions.\textsuperscript{109} The court in Wratchford reasoned that Erie demands the application of those state rules which govern the conduct and affairs of members of society, whether that conduct is later questioned in a state or federal court. The court stated that rules as to the sufficiency of evidence to go to the jury are not concerned with the ordering of affairs of anyone.\textsuperscript{110} This discussion of state rules which govern the ordering of affairs of individuals is reminiscent of the language of the Supreme Court in Hanna. There the Court spoke directly to what outcome-determinative means:

Though choice of the federal or state rule will at this point have a marked effect upon the outcome of the litigation, the difference between the two rules would be of scant, if any, relevance to the choice of a forum. . . . Moreover, it is difficult to argue that [application of the federal rather than the state rule] alters the mode of enforcement of state-created rights in a fashion sufficiently "substantial" to raise the sort of equal protection problems to which the Erie opinion alluded.\textsuperscript{111}

Where a party has a choice of forums, one of which follows a more liberal standard as to sufficiency of the evidence, he may choose this forum in the expectation of obtaining a jury verdict. But the difference in the rules is not likely to be of such importance in the choice of forum, since the jury's verdict must still comport with the evidence

\textsuperscript{107} Now, as is generally recognized, the question of the applicability of the Erie principle cannot always be resolved by discursive analysis of the rule in question in terms of its being "substantive or procedural." Nor is Guaranty Trust's "outcome-determinative" test the appropriate one in selecting the governing rule for the distribution of functions between court and jury. Wratchford v. S.J. Groves & Sons Co., 405 F.2d 1061, 1964 (1969) (footnotes omitted).

\textsuperscript{108} 405 F.2d at 1064.


\textsuperscript{110} 405 F.2d at 1065-66.

\textsuperscript{111} 380 U.S. at 469.
and because the judge still has the power to grant a new trial. Furthermore, the test as to sufficiency is not bound up with state created rights and obligations, and does not alter the manner in which such rights are enforced.

Because of the absence of any clear guidelines by the Supreme Court, it may be helpful to look to decisions in the courts of appeals for an analysis of why one standard is to be preferred over the other. Such an analysis is not too illuminating, however. Almost without exception, those courts which have adhered to the state standard of sufficiency have done so on the authority of Erie. Furthermore, several of the circuits which had previously followed the state rule have, since the decisions in Dick and Mercer, declined to make a decision, preferring to wait for a Supreme Court pronouncement. Under the rationale of Erie, several courts have held that the question of sufficiency is bound up with a cause of action, and is therefore substantive. Such a discursive reference to Erie is inappropriate in light of later cases modifying the Erie principle. Following the teachings of Guaranty Trust, other courts have held that a rule as to sufficiency is outcome-determinative and therefore substantive. In light of what Hanna had to say about outcome-determination, it appears that these cases similarly fail to sufficiently appraise the problem.

The cases which have applied the federal test of sufficiency have followed reasoning similar to that employed in Byrd. In those cases which were decided prior to Byrd, reliance was consistently placed on the reasoning of Herron, that "... state laws cannot alter the essential function of a federal court." Since Byrd, many of the courts of appeals have relied on the "judge-jury relationship" rationale there posited as outweighing the outcome-determinative test.

CONCLUSION

It is not difficult to understand why many courts have concluded on the basis of the Erie doctrine, that a federal court sitting on the grounds of diversity of citizenship must follow a state test as to sufficiency of evidence. The application of a federal standard might significantly affect the result of the litigation. Furthermore, it is not

112. See text accompanying note 106 supra.
115. See, e.g., Clay County Cotton Co. v. Home Life Ins. Co., 113 F.2d 856 (8th Cir. 1940).
118. See, e.g., Gorham v. Mutual Benefit Health & Accident Ass'n, 114 F.2d 97 (4th Cir. 1940).
119. See, e.g., Phipps v. N.V. Nederlandsche Amerikaansche Stoomvart, Maats, 259 F.2d 143 (9th Cir. 1958).
entirely improbable that a litigant will choose the federal forum when he is dubious as to the quantum of his evidence. If the federal courts are viewed merely as sitting as another state court when jurisdiction is based on diversity, it is entirely consistent to require conformity to state standards.\textsuperscript{120} It is submitted, however, that the courts which have applied the state test as to sufficiency have not been cognizant of those policies expressed by the Supreme Court in \textit{Byrd} and \textit{Hanna} and relied upon in \textit{Wratchford}. It is clear that recent cases have indicated a change in judicial attitude.\textsuperscript{121} No longer are federal courts, when sitting on the basis of diversity jurisdiction, to be viewed merely as extensions of the state judicial machinery. Rather, there is a strong federal interest in the independent administration of justice in the federal courts, and when the application of a state rule, not bound up with state created rights and obligations, threatens to disrupt the distribution of functions between court and jury, the federal court should be free to apply its own standards. Underlining this distribution lies the seventh amendment which would seemingly require the federal courts to preserve the right of trial by jury as it existed at common law. Although inroads have been made upon the historical test, the seventh amendment has taken on new life as the federal courts seek to uphold their independence by applying a federal standard which will determine the type of trial to be afforded litigants as well as the standard of sufficiency to be applied at that trial.

The better reasoned approach, in light of \textit{Byrd} and \textit{Hanna}, is that adopted by the fourth circuit in \textit{Wratchford v. S.J. Groves & Co.}\textsuperscript{122} There the court reiterated the strong federal interest favoring jury determinations, an interest which the court deemed sufficient to outweigh state interests. Furthermore, the court spoke in terms that more nearly adopted the test of \textit{Hanna} that outcome-determination is to be tested at an earlier time, at a point where an individual "orders his affairs." The court's ultimate reliance was on the approach formulated by the Supreme Court itself in \textit{Byrd} — the federal interest in the relationship between judge and jury. If and when the Supreme Court is called upon to determine which is the proper standard to be applied, it would be consistent with its decisions in \textit{Byrd} and \textit{Hanna} if it follows the reasoning of \textit{Wratchford}.

\textsuperscript{120} See Guaranty Trust Co. v. York, 326 U.S. 99 (1945).
\textsuperscript{122} 405 F.2d 1061 (4th Cir. 1969).