

## Notes

CONFLICT OF LAWS — ACTION UNDER FOREIGN WRONGFUL DEATH STATUTE — THE FORUM COURT MAY CONSTITUTIONALLY REFUSE TO APPLY A DAMAGE LIMITATION PROVISION. — *Pearson v. Northeast Airlines Inc.* (2d Cir. 1962).

Plaintiff administratrix in New York relied upon the Massachusetts Wrongful Death Statute<sup>1</sup> to recover damages for her husband's death in a Massachusetts airplane crash. The statute had a provision limiting liability. The federal district court, sitting in New York, applying New York's conflict of laws rule, refused to enforce the limitation provision. On appeal, the decision was reversed, holding that the Full Faith and Credit Clause of the United States Constitution barred the awarding of unlimited recovery. On rehearing, *held*, district court's decision affirmed. In an action based upon a foreign wrongful death statute which contains a limitation provision repugnant to the forum state's public policy, a federal court applying the forum state's conflict of laws rule may constitutionally refuse to apply a provision limiting liability when the forum state has substantial contacts with the substance of the suit. *Pearson v. Northeast Airlines Inc.*, 309 F.2d 553 (1962), *cert. denied*, 372 U.S. 912 (1963).

Since *Erie Ry. v. Tompkins*,<sup>2</sup> in diversity cases the federal courts normally must follow the substantive law of the state in which they sit. The substantive law includes the local state's conflicts rule.<sup>3</sup> However, in a diversity case, federal courts cannot apply the state's conflicts rule, if, there would result a violation of some federal constitutional principle.<sup>4</sup> The problem in this case was whether or not the federal court could rightfully apply New York's conflicts rule without violating the Full Faith and Credit Clause.

In traditional conflict-of-laws parlance, it was considered to be well established that the law of the place of the wrongful death gov-

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<sup>1</sup> MASS. ANN. LAWS ch. 229, § 2 (1955):

If the proprietor of a common carrier of passengers . . . by reason of . . . its negligence . . . causes the death of a passenger . . . it shall be liable in damages in the sum of not less than two thousand nor more than fifteen thousand dollars, to be assessed with reference to the degree of culpability of the defendant. . . .

This range of damages was later changed to three thousand dollars minimum and thirty thousand dollars maximum. MASS. ANN. LAWS ch. 229, § 2 (1961).

<sup>2</sup> 304 U.S. 64 (1938).

<sup>3</sup> *Klaxon Co. v. Stentor Elect. Mfg. Co.*, 313 U.S. 487 (1941), *Noted*, 41 COL. L. REV. 1403 (1941), 6 MD. L. REV. 160 (1942).

<sup>4</sup> *Ibid.*

erns the right of the action no matter where the suits was brought.<sup>5</sup> Though earlier decisions sometimes refused to apply a foreign death statute on the grounds of substantial dissimilarity,<sup>6</sup> generally forum states have allowed suits arising under foreign statutes if such statutes do not contravene a strong public policy of the forum,<sup>7</sup> which has become less and less likely as the statutory cause of action for wrongful death has been established in most jurisdictions.

A more complicated problem arises, however, where the forum finds need to look to the foreign statute as the legal basis for recovery but for good reasons refuses to follow one or more of its provisions which differ from that of the forum's public policy. This problem, particularly pertaining to the amount of damages recoverable, is not new to the courts. While there is authority to the contrary,<sup>8</sup> the weight of authority has been to the effect that such provisions are to be governed by the place of the wrong and not where the suit is brought.<sup>9</sup> One reason stated for this majority view is that since the right is wholly statutory, the foreign statute "(i)tself is the sole source of the obligation and determines not only the existence but the extent of the obligation."<sup>10</sup> Another argument is that the legislation which created the statute did not contemplate that the statute would not be applied as enacted.<sup>11</sup> This majority view has also been regularly followed in various other kinds of limitations

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<sup>5</sup> RESTATEMENT, CONFLICT OF LAWS § 182 (1937); 25 C.J.S. *Death* § 28 (1941); see, e.g., *Northern Pacific R.R. v. Babcock*, 154 U.S. 190 (1894); *Slater v. Mexican Nat. R.R.*, 194 U.S. 120 (1904); *Barnes v. Union Pac. R.R.*, 139 F. Supp. 198 (1956); *McManus v. Red Salmon Canning Co.*, 37 Cal. App. 133, 173 Pac. 1112 (1918).

<sup>6</sup> STUMBERG, CONFLICT OF LAWS 192 (1951). This was considered to be a minority and erroneous position, see *Davis v. Ruzicka*, 170 Md. 112, 183 Atl. 569 (1936), 1 Md. L. Rev. 162 (1937).

<sup>7</sup> See, e.g., RESTATEMENT, CONFLICT OF LAWS § 612 (1934); *Christensen v. Floriston Pulp & Paper Co.*, 29 Nev. 552, 92 Pac. 210 (1907); *Richardson v. Pac. Power & Light Co.*, 11 Wash. 2d 288, 118 P.2d 985 (1941).

<sup>8</sup> *Armbruster v. Chicago R.I.&P.Ry.*, 166 Iowa 155, 147 N.W. 337 (1914); *Wooden v. Western N.Y.&P.R.R.*, 126 N.Y. 10, 26 N.E. 1050 (1891); but see *Rochester v. Wells Fargo & Co.*, 87 Kan. 164, 123 Pac. 729 (1912); *Loucks v. Standard Oil Co.*, 224 N.Y. 99, 120 N.E. 198 (1918); but see *La Puelle v. Cessna Aircraft Co.*, 85 F. Supp. 182 (D.C. Kan. 1949); *Higgins v. Central New England & W.R.R.*, 155 Mass. 176, 29 N.E. 534 (1892); *Kilberg v. Northeast Airlines Inc.*, 9 N.Y.2d 34, 172 N.E.2d 526 (1961).

<sup>9</sup> RESTATEMENT, CONFLICT OF LAWS § 391, comment *d* (1934); *Stoltz v. Burlington Transp. Co.*, 178 F.2d 514 (10th Cir. 1949); *Thomas v. Western Union Tel. Co.*, 25 Tex. Civ. App. 398, 61 S.W. 501 (1901); see 15 A.L.R.2d 762 (1951) for other states in accord.

<sup>10</sup> *Slater v. Mexican Nat. R.R.*, 194 U.S. 120, 126 (1904). It should be noted that the New York Court of Appeals in the *Kilberg* case, *infra* n. 13, stated "We think that time has proven the wisdom and practicality of the Slater case dissent."

<sup>11</sup> *Jackson v. Anthony*, 282 Mass. 540, 185 N.E. 389, 391 (1933).

besides damages.<sup>12</sup> It might be reasoned, however, that the traditional rule, of letting the *lex loci delicti* control finds its easiest and most correct application when the forum has no substantial contacts with the substance of the litigation and hence has little reason for asserting its own policy.

The problem before the court in the principal case was whether or not the court could look to the foreign statute as the basis of liability, yet refuse to apply the damage limitation provision attached to that foreign statute because of New York's strong policy of not restricting damages due to its citizens from wrongful death. The court looked to *Kilberg v. Northeast Airlines Inc.*,<sup>13</sup> where it was held, that in view of New York's contacts with the substance of the litigation and New York's strong policy against limiting damages in wrongful death actions, New York in this conflicts case could properly treat the measure of damages as procedural and therefore to be governed in accordance with New York's Constitution which permits no limitation on the amount recoverable.<sup>14</sup> The principal case held that the ruling of the New York Court of Appeals in *Kilberg* was the proper exercise of the state's power to develop its conflict of laws doctrine, and the court's refusal to apply the limitation of recovery provision in the Massachusetts wrongful death statute was a constitutional exercise of that power.

On this constitutional point the majority opinion reasoned that there were no controlling precedents requiring the court in the principal case to follow the Massachusetts rule as to damages.<sup>15</sup> On the contrary, it pointed out that the United States Supreme Court in *Wells v. Simonds Abrasive Co.*<sup>16</sup> had held that the failure of a forum

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<sup>12</sup> What period of time the action must be brought, *Wehler v. Southwestern Greyhound Lines*, 207 Ark. 601, 182 S.W.2d 214 (1944). *Contra*, *Wells v. Simonds Abrasive Co.*, 345 U.S. 514 (1953). What parties may bring the action, *Wooden v. Western N.Y.&P.R.R.*, 126 N.Y. 10, 26 N.E. 1050 (1891). What standard of care should be used by which to test the defendant's culpability, *Hess v. United States*, 361 U.S. 814 (1960). As to the amount of interest recoverable on the damages see 68 A.L.R.2d 1372 (1959).

<sup>13</sup> *Kilberg v. Northeast Airlines Inc.*, 9 N.Y.2d 34, 172 N.E.2d 526 (1961). This case arose out of the same airplane crash as the principal case. In *Kilberg*, the court concluded from an earlier New York decision, *Wooden v. Western N.Y.&P.R.R.*, *supra* note 12, that the measure of damages was procedural. The *Wooden* case, however, has been greatly criticized; see, e.g., *Loucks v. Standard Oil of New York*, 224 N.Y. 99, 120 N.E. 198 (1918). Thus, *Kilberg* is not in accord with numerous New York decisions which have rejected but not overruled the *Wooden* case. For limited applications of the *Kilberg* rule see *St. Clair v. Eastern Air Lines Inc.*, 302 F.2d 477 (2d Cir. 1962); *Davenport v. Webb*, 11 N.Y.2d 392, 183 N.E.2d 302 (1962). *But see* *Babcock v. Jackson*, 12 N.Y.2d 473, 191 N.E.2d 279 (1963).

<sup>14</sup> "The right of action now existing to recover damages for injuries resulting in death, shall never be abrogated, and the amount recoverable shall not be subject to any statutory limitation." N.Y. CONST. art. 1, § 16 (1894).

<sup>15</sup> *Pearson v. Northeast Airlines Inc.*, 309 F.2d 553, 558 (2d Cir. 1962).

<sup>16</sup> 345 U.S. 514 (1953). The dissenting opinion in *Wells* maintained that the distinction between general limitations and built-in limitations should be kept. See, RESTATEMENT, CONFLICT OF LAWS, § 397, 603-605 (1934). With the majority

to apply a foreign built-in statute of limitations did not violate the Full Faith and Credit Clause of the United States Constitution and that, by a parity of reason, there should be no full-faith-and-credit requirement to follow a limitation as to damages, particularly if the forum had strong enough contacts with the merits of the controversy to justify application of its own public policy as to damages. The court felt that such a conclusion was further supported by the fact that the United States Supreme Court in *Richards v. United States*<sup>17</sup> "has within the past year, cited with approval two cases emanating from the highest courts of two of our states which applied a rule of local law to govern an incident of a cause of action based upon the law of a forum state."<sup>18</sup> In one, *Grant v. McAuliffe*,<sup>19</sup> the California Supreme Court held that although a suit for personal injuries was based upon Arizona law its abatement on survival was sufficiently of concern to California to be governed by California law. In another, *Haumschild v. Continental Cas. Co.*,<sup>20</sup> Wisconsin as forum and domicile of the parties applied its law as to interspousal immunity to a tort committed outside the state.

Accepting those cases as indicating that forum states are not restricted in formulating conflict of laws rules to choosing the local law of some single state as controlling all incidents of a cause of action,<sup>21</sup> the court reasoned that if a forum state has sufficient contact with the substance of the litigation so that it could apply its own law and policy to the situation, then it would not be unconstitutional for such forum state to sustain a cause of action predicated upon a foreign statute, but eliminate the foreign damage limitation in favor of its local policy. Accordingly, the court concluded that since the deceased was domiciled in New York, purchased his ticket at the New York office of the foreign corporation, the flight departed from New York, and New York was the domicile of the administratrix and beneficiary, that the majority of the significant facts and events of the litigation were so closely related to the State of New York, that New York could constitutionally apply its own wrongful death statute<sup>22</sup> if it so chose, and accordingly there was no constitutional defect merely because New York's conflicts rule purported to be predicated upon accepting the Massachusetts statute in part and

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in *Wells* holding that the forum may apply its own limitations to shorten the period prescribed by the *lex loci delecti*, the question then arises as to whether they could similarly justify permitting the forum to extend the period of a built-in limitation which in effect would be allowing a cause of action on a right that is dead.

<sup>17</sup> 369 U.S. 1, 12 n.26 (1962).

<sup>18</sup> *Pearson v. Northeast Airlines Inc.*, 309 F.2d 553, 559 (2d Cir. 1962).

<sup>19</sup> 41 Cal.2d 859, 264 P.2d 944 (1953), 42 A.L.R.2d 1162 (1955).

<sup>20</sup> 7 Wis. 2d 130, 95 N.W.2d 814 (1959).

<sup>21</sup> *Haumschild v. Continental Cas. Co.*, *supra* note 20.

<sup>22</sup> N.Y. DECED. EST. LAW § 130 (1921).

relying in part upon New York's rule as to damages. And, there would be no constitutional defect in the federal court's application of the New York conflicts rule.

This decision strengthens the more current trend, which has found growing support,<sup>23</sup> that there is need for a more flexible choice of law rule. Courts are coming to realize that even though an accident or wrong occurred in another state, the forum state may have a legitimate and significant contact with the matter involved and may be justified in applying its own law and policy to the litigation.<sup>24</sup> Such an approach seems not only logical but just on the facts of the instant case, for it seems entirely unfair to allow a foreign state to govern the entire cause of action where the foreign state had but one significant contact, namely the crash within its borders, and the forum had many. We agree with the majority opinion of the principal case that to require the foreign statute to govern by reasoning that New York in the circumstances of the principal case would be constitutionally disabled from applying its own substantive rules of law to a cause of action arising out of a plane crash in Massachusetts (or from developing its own conflict of laws rule so as to determine the damages under New York's policy) would be "to 'freeze' into constitutional mandate a choice-of-law rule derived from what may be described as the Ice Age of conflict of laws jurisprudence—at a time where that jurisprudence is in an advanced stage of thaw."<sup>25</sup> The "thaw" should be continued for the many reasons so excellently covered in the majority opinion.

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CRIMINAL LAW — EVIDENCE — JUVENILE'S CONFESSION OBTAINED IN VIOLATION OF STATUTE INADMISSIBLE. — *State v. Shaw* (Ariz. 1963).

Defendant, under eighteen years of age, was arrested on suspicion of grand theft. He was held in custody for three hours, during which time he confessed. The arresting officers made no attempt to call a probation officer as required by statute.<sup>1</sup> The trial court

<sup>23</sup> Cavers, *A Critique of the Choice-of-Law Problem*, 47 HARV. L. REV. 173 (1933); Currie, *The Constitution and the Choice of Law: Governmental Interests and the Judicial Function*, 26 U. CHI. L. REV. 9 (1958); Morris, *The Proper Law of a Tort*, 64 HARV. L. REV. 881 (1951).

<sup>24</sup> *Alaska Packers Assn. v. Industrial Acc. Comm.*, 294 U.S. 532 (1935); *Bradford Elec. Light Co. v. Clapper*, 286 U.S. 145 (1932). This principle has been applied to many other issues of substantive law in tort actions. It has been held that the right of a child to sue a parent for negligence should be determined by the law of the residence of the parties rather than by the law of the place of the injury, *Emery v. Emery*, 45 Cal. 2d 421, 289 P.2d 218 (1955).

<sup>25</sup> *Pearson v. Northeast Airlines*, 309 F.2d 553 (2d Cir. 1962).

<sup>1</sup> ARIZ. REV. STAT. ANN. § 8-221A (1956): "A peace officer, other than the probation officer, who arrests a child under the age of eighteen years shall forthwith notify the probation officer, and shall make such disposition of the child as the probation officer directs."

allowed the confession to be introduced in evidence. Defendant was convicted. On appeal, *held*, reversed. Statements obtained from a juvenile during a period when no effort is made by the police to contact a probation officer are inadmissible during a subsequent criminal prosecution. *State v. Shaw*, 93 Ariz. 40, 378 P.2d 487 (1963).

The great majority of jurisdictions have statutes which provide for the special handling of juvenile offenders.<sup>2</sup> These statutes have as their purpose the protection and rehabilitation of the minor, rather than punishment and retribution.<sup>3</sup> It has often been recognized that an infant should be handled with caution and deliberation, lest he be deprived of his fundamental rights.<sup>4</sup> As early as the eighteenth century, it was said, "the protective humanity of law will not, without anxious circumspection, permit an infant to be convicted on his own confession."<sup>5</sup> It has been with this protective spirit that a number of Florida cases have held that failure to comply with a statute requiring police officers to notify parents immediately upon the arrest of delinquent children invalidates subsequent criminal conviction.<sup>6</sup>

<sup>2</sup> ARIZ. REV. STAT. ANN. §§ 8-201-430 (1956); ARIZ. CONST. art 6, § 15. See generally, 31 AM JUR. *Juvenile Courts and Delinquent, Dependent, and Neglected Children* §§ 1-21 (1958); 43 C.J.S., *Infants*, §§ 93-102 (1945); Molloy, *Juvenile Court—A Labyrinth of Confusion for the Lawyer*, 4 ARIZ. L. REV. 1 (1962).

<sup>3</sup> See, e.g., *State v. Guerrero*, 58 Ariz. 421, 430, 120 P.2d 798, 802 (1942), where the court said, "The policy of the juvenile law is to hide youthful errors from the full gaze of the public and bury them in the graveyard of the forgotten past." Also note the language of the New York court in *In re Cotton*, 30 N.Y.S.2d 421, 423 (N.Y. 1941): ". . . to reclaim, rehabilitate and salvage, wherever possible, youth that may have violated moral sense, decent conduct and the law." Again, in *Durst v. Griffith*, 43 Ohio App. 44, 182 N.E. 519, 520 (1932), it was said, ". . . it is contrary to the spirit of modern penology to impose upon juvenile offenders, whose need is reclamation and reform rather than punishment, the penalties intended for adults." See also *Burrows v. State*, 38 Ariz. 99, 297 Pac. 1029 (1931) (The juvenile law affects the treatment of the offender, not his capacity for crime).

<sup>4</sup> E.g., *Elmore v. Commonwealth*, 282 Ky. 443, 138 S.W.2d 956, 961 (1940); *In re Rich*, 86 N.Y.S.2d 308, 310 (N.Y. 1949); *Ridge v. State*, 25 Okla. Crim. 396, 220 Pac. 965, 966 (1923).

<sup>5</sup> 1 Hawkin's Pleas of the Crown (Leach's ed.) 1 (1795). *Accord*, *State v. Guild*, 5 Halst. R. 163, 189 (N.J. 1828); *Ridge v. State*, *supra* note 4, at 966; 1 Hale's Pleas of the Crown (First American ed.), 26 n. (1847).

It has more recently been held that a minor is incapable of waiving any of his constitutional or statutory rights, in the absence of parents or counsel, unless it is clear that he fully understands the results of such a waiver. *Olivera v. State*, 354 P.2d 792 (Okla. Crim. 1960); *Dallas v. State*, 286 P.2d 282, 285 (Okla. Crim. 1955); *Clark v. State*, 95 Okla. Crim. 375, 246 P.2d 422, 424 (1952); *Fields v. State*, 77 Okla. Crim. 1, 138 P.2d 124, 131 (1943). Note, however, that in the *Olivera*, *Dallas* and *Clark* cases, the court felt that the error in admitting the confessions into evidence was harmless in light of the overwhelming evidence of guilt.

The courts carefully look to the age, experience and intelligence of the defendant before allowing him to waive his constitutional or statutory safeguards. See, e.g., *Application of Gaskill*, 335 P.2d 1088, 1092 (Okla. Crim. 1959); *Application of McDaniel*, 302 P.2d 496, 498 (Okla. Crim. 1956); *Ex Parte Lee*, 87 Okla. Crim. 427, 198 P.2d 1005, 1008 (1948).

<sup>6</sup> *Keene v. Cochran*, 146 So. 2d 364, 366 (Fla. 1962); *Vellucci v. Cochran*, 138 So. 2d 510, 511 (Fla. 1962); *Willis v. Cochran*, 131 So. 2d 728, 730 (Fla.

Similarly, the Virginia court has insisted upon strict compliance with a juvenile statute requiring a complete investigation of a minor defendant's physical, mental and social condition, and personality, before proceeding against him.<sup>7</sup> This approach, requiring strict compliance with juvenile statutes, reflects an increased awareness of the fact that, because of legislative intent as expressed in the special juvenile statutes and the growing public policy of separate and more protective procedures for minors, the courts should give special protective treatment to the minor criminal defendant,<sup>8</sup> affording him the benefit of every substantial rule of procedure in his favor.<sup>9</sup>

There is, however, authority to the contrary. The Ohio courts, adhering to the opposite position from that of the Florida courts, have elected to give a strictly literal construction to the Ohio statute requiring that juvenile offenders be taken "immediately" before a juvenile judge, refusing to extend the statute's intent to the exclusion of voluntary confessions made by juveniles before compliance with the statutory requirement.<sup>10</sup> The fact that the statute was violated was considered not sufficient in itself to render a confession inadmissible, but merely a fact for consideration by the jury in determining the voluntariness of the confession.<sup>11</sup> One foundation that might be

1961); *Kinard v. Cochran*, 113 So. 2d 843 (Fla. 1959). See also *Snell v. Mayo*, 84 So. 2d 581, 582 (Fla. 1956); *Clay v. State*, 143 Fla. 204, 196 So. 462, 463 (1940); *State v. Chapman*, 125 Fla. 235, 169 So. 658, 660 (1936); *Pitts v. State*, 88 Fla. 438, 102 So. 554, 555 (1924) (Note discussions in these cases concerning what constitutes sufficient compliance with the statute.) See generally Note, 14 U. FLA. L. REV. 290 (1961).

Compare *Myers v. Collett*, 1 Utah 2d 406, 268 P.2d 432 (1954) (Arresting police officer may use his own discretion and is not bound by juvenile statute to notify minor's parents immediately upon his arrest).

<sup>7</sup> *Tilton v. Commonwealth*, 196 Va. 774, 85 S.E.2d 368 (1955) (Failure to comply with the statute deprives the minor of his constitutional rights). *But see Durette v. Commonwealth*, 201 Va. 842, 113 S.E.2d 842 (1960) (Minor's constitutional rights not violated where the arresting officers failed to conform explicitly with requirements of juvenile statutes).

<sup>8</sup> *Cf. Ridge v. State*, 25 Okla. Crim. 396, 220 Pac. 965 (1923).

<sup>9</sup> *Cf. Ex Parte Lewis*, 85 Okla. Crim. 322, 188 P.2d 367, 379 (1947), where the court said, "All the rights under the Juvenile Act, for the benefit of the juvenile, must be secured to him in the manner therein provided." See also *Felder v. State*, 17 Ala. App. 458, 85 So. 868 (1920).

<sup>10</sup> *State v. Haley*, 79 Ohio App. 237, 72 N.E.2d 785 (1946), *appeal dismissed per curiam*, 147 Ohio St. 340, 70 N.E.2d 905 (1947), *rev'd on other grounds*, 332 U.S. 596 (1947), *cert. denied*, 337 U.S. 945 (1949), *appeal dismissed per curiam*, 151 Ohio St. 80, 84 N.E.2d 217 (1949); *State v. Lowder*, 79 Ohio App. 237, 72 N.E.2d 785 (1946), *appeal dismissed per curiam*, 147 Ohio St. 505, 72 N.E.2d 102 (1947); *State v. Parks*, 79 Ohio App. 237, 72 N.E.2d 785 (1946), *appeal dismissed per curiam*, 147 Ohio St. 536, 72 N.E.2d 81 (1947).

<sup>11</sup> Justice Udall seems to agree with this approach in his dissenting opinion. *State v. Shaw*, 93 Ariz. 40, 50, 378 P.2d 487, 494 (1963).

Failure to comply with statutes governing criminal procedure has long been a source of controversy concerning adult defendants. While federal courts have continued to apply the rule of *McNabb v. U.S.*, 318 U.S. 332 (1943) (a confession obtained during illegal detention is inadmissible), the great majority of state

offered for this position is the common-law philosophy which considered any infant over fourteen capable of committing crime and of being responsible therefor in the same manner as adults.<sup>12</sup>

In the instant case, one of first impression in the state, the Arizona court has chosen to follow the liberal approach of requiring strict compliance with its juvenile statutes, by holding that the sanction of excluding evidence obtained during a period of violation of the statute was one of the means of enforcement intended by the legislature. The court reasoned that the minor defendant labors under enough of a burden by suffering disabilities not attached to the adult.<sup>13</sup> Therefore, it seems only just to insist upon strict compliance with statutory provisions designed for his protection. While the court achieved its result by way of a judicially imposed rule of procedure to accomplish legislative intent,<sup>14</sup> it found partial support for its conclusion in a recent United States Supreme Court decision, *Gallegos v. Colorado*,<sup>15</sup> which held that due process standards were violated by admission in evidence of a juvenile confession obtained during a five-day period when the minor had seen no friendly adult.<sup>16</sup>

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courts have refused to do so, claiming that the *McNabb* rule has nothing to do with constitutional due process, but rather concerns itself with federal rules of criminal procedure, not applicable to state courts. See Annot., 19 A.L.R.2d 1331 (1951).

Current trends of constitutional requirements imposed by the United States Supreme Court, although not intended to be covered by this note, should not be overlooked. Cf. *infra* note 16.

<sup>12</sup> See, e.g., *Washington v. State*, 227 Ark. 255, 297 S.W.2d 930, 931 (1957).

In *State v. Lowder*, 79 Ohio App. 237, 72 N.E.2d 785 (1946), defendants were minors; yet the Ohio Court of Appeals elected to follow the reasoning and conclusions set down in *State v. Collett*, 44 Ohio L. Abs. 225, 58 N.E.2d 417 (1944) and *People v. Alex*, 265 N.Y. 192, 192 N.E. 289, 94 A.L.R. 1033 (1934), in which defendants were adults. The court applied an adult standard to minors. See also *State v. Kelley*, 253 Iowa 1314, 115 N.W.2d 184 (1962) (A confession is presumed to be voluntary, unless proven otherwise, and it is immaterial that defendant was a minor at the time of the confession).

<sup>13</sup> "He is not entitled to be released on bail; he does not have the right of trial by jury, or right of compulsory process to compel the attendance of witnesses on his behalf guaranteed by the Arizona Constitution in criminal prosecutions." *State v. Shaw*, 93 Ariz. 40, 47, 378 P.2d 487, 491 (1963).

<sup>14</sup> In summarizing its holding, the court said, "We have carefully considered the possible means of enforcing the policy expressed in A.R.S. Sec. 8-221 and have concluded that the means most in harmony with the purposes expressed and implicit in that section is to preclude the admission of statements obtained by the persuasion of police during the period when the section is being violated." *State v. Shaw*, *supra* note 13, at 49, 378 P.2d at 493.

<sup>15</sup> 370 U.S. 49 (1962) (asserting the constitutional protection against accepting involuntary confessions from minors).

<sup>16</sup> The position of dissenting Justice Udall that the *Gallegos* case was not in point, *State v. Shaw*, 93 Ariz. 40, 52, 378 P.2d 487, 495 (1963), serves to emphasize that the majority was not looking to the case as controlling authority, but rather as illustrative of the fact that the current thrust of United States Supreme Court decisions is toward more liberal application of constitutional guarantees to state criminal procedures. Cf. *Summaries of recent Supreme Court Terms*, 83 S. Ct. 201, 258-74, 82 S. Ct. 75, 127-47, 81 S. Ct. 105, 153-68. This constitutional insistence on fair criminal procedures is not likely to be lessened for the juvenile offenders. Cf. note 11 *supra*.

The decision of the Arizona court supports its conclusion as to the intent of the legislature by reference to current sociological thought concerning the best methods of handling juvenile offenders.<sup>17</sup> However, in offering explanation as to when the period of the minor's detention would be deemed unlawful so as to exclude any inculpatory statement by him, the court may in dictum have weakened the protection which such sociological opinion would call for and which the court's decision would otherwise afford.

Faced with a vigorous dissenting opinion,<sup>18</sup> and realizing that the rule adopted would be difficult to follow in some rural areas of Arizona if extended to require the actual presence of the probation officer, because a probation officer might not always be readily available, the court stated, by way of dictum, that as long as the police make a reasonable effort to contact a probation officer, any voluntary confession given by the juvenile defendant during a reasonable delay in reaching the officer would be admissible.<sup>19</sup> It appears that the court, seeking to avoid a too extreme position, suggested a possible compromise. The reasoning behind such a compromise would seem to be that to hold to the extreme position, similar to that of the Florida courts,<sup>20</sup> would work an undue hindrance on police officers in their investigation.

It is submitted however, that the court, in its dictum effort to appease the dissent, opened the door for withdrawal of much of the protection which it stated the statute was intended to secure. It had earlier said that one of the purposes of the statute in question is to protect the minor from the "adverse effects" of interrogation by the police.<sup>21</sup> But it is manifest that under the court's dictum interrogation of the minor defendant is still permissible and his statements are admissible, so long as the police have made an attempt to notify

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<sup>17</sup> See GLUECK, *THE PROBLEM OF DELINQUENCY* 539 (1959). In *State v. Shaw*, *supra* note 16, at 47, 378 P.2d at 491, the court said: "The need for special treatment begins at the instant the juvenile is contacted by peace officers and this was recognized by the legislature. A few hours of the treatment sometimes accorded mature and hardened criminals can give the impressionable mind of a youth an indelibly warped view of society and its interest in him."

<sup>18</sup> Mr. Justice Udall, in his dissent, takes the position that the majority opinion does not uphold the fundamental principle that "the law must be administered uniformly in all counties of the state." He further contends that the three-hour detention in the instant case was not unreasonable in the light of all the evidence and hence, not a violation of the statute. In effect, Justice Udall says that the majority opinion went too far in declaring the confession inadmissible. *State v. Shaw*, 93 Ariz. 40, 50, 378 P.2d 487, 494 (1963).

<sup>19</sup> "A period of detention which otherwise complies with the statutes and during which reasonable efforts are being made to contact the probation officer does not violate A.R.S. § 8-221." *State v. Shaw*, 93 Ariz. 40, 49, 378 P.2d 487, 493 (1963).

<sup>20</sup> Cases cited note 6 *supra*.

<sup>21</sup> *State v. Shaw*, 93 Ariz. 40, 50, 378 P.2d 487, 493 (1963).

the probation officer at their "earliest reasonable opportunity."<sup>22</sup> This suggests a rule that a confession obtained before a phone call to the probation officer is inadmissible, but a confession obtained after such a phone call is admissible, *whether the probation officer is in fact contacted or not*, and whether or not he performs his duty of appearing to protect the minor.

It would seem that the only way to accomplish fully the purpose of the statute, as expressed by the court,<sup>23</sup> would be to render inadmissible all of a minor defendant's statements obtained before the defendant has the benefit of the probation officer's presence and counsel, at least without some showing that it was impossible with reasonable effort to secure this or some similar protection. While such a rule would undoubtedly cause some inconvenience to police officers, inasmuch as they would be forced to wait for the arrival of the probation officer before questioning the defendant, it would nonetheless offer the measure of protection to the minor probably intended by the statute.<sup>24</sup>

*Thomas A. Zlaket*

EVIDENCE — ATTORNEY-CLIENT PRIVILEGE — AVAILABILITY TO CORPORATIONS. — *Radiant Burners, Inc. v. American Gas Ass'n* (7th Cir. 1963).

At the commencement of a civil antitrust action, the plaintiff sought pre-trial discovery of documents in the possession of the law firm representing the defendant corporation. The defendant contended that these documents were obtained by the firm in their capacity as attorneys and were protected from disclosure. The trial court ruled that the corporation was not entitled to invoke the attorney-client privilege because historically the privilege was created only for natural persons and was applicable only to communications that were completely confidential. *Radiant Burners, Inc. v. American Gas Ass'n*, 207 F. Supp. 771, *aff'd. on rehearing*, 209 F. Supp. 321 (N.D. Ill. 1963); on appeal, *held, reversed*. Corporations are entitled to invoke the attorney-client privilege. 320 F.2d 314 (7th Cir. 1963).

The history of the attorney-client privilege can be traced to the reign of Elizabeth I.<sup>1</sup> "In order to promote freedom of consultation of legal advisers by clients, the apprehension of compelled disclosure

<sup>22</sup> *Id.* at 49, 378 P.2d at 493.

<sup>23</sup> *Id.* at 50, 378 P.2d at 493.

<sup>24</sup> Note the strict and detailed procedures that police officers must follow when arresting a juvenile in California. CAL. WELFARE & INST'NS CODE art. 6, §§ 625-41 (1961). Seventeen sections of the California Code deal with the temporary custody and detention of the minor offender. Compare these sections with ARIZ. REV. STAT. ANN. §§ 8-221-239 (1956).

<sup>1</sup> WIGMORE, EVIDENCE § 2290 (McNaughton rev. 1961), referring to *Berd v. Lovelace*, Cary 83, 21 Eng. Rep. 33 (Ch. 1577).

by the legal advisers must be removed; hence the law must prohibit such disclosure except on the client's consent. Such is the modern theory."<sup>2</sup> It is now universally established that when a client seeks legal advice from an attorney, any communication relating to that purpose is permanently protected from compulsory disclosure by himself or his attorney if such communication is made in confidence and the privilege is not waived.<sup>3</sup> The rule rests on the belief that litigation under our adversary system can be handled more effectively if clients make full disclosure to their attorneys.<sup>4</sup> To induce clients to make such communications, the privilege preventing later disclosure was held to be a necessity.<sup>5</sup>

While some decisions,<sup>6</sup> like that of the trial court here, have narrowly limited the scope of the privilege as applied to corporations, the majority of the courts, as recognized by the Court of Appeals, have traditionally deemed the privilege applicable.<sup>7</sup> One of the leading cases states that the privilege may be invoked only if: the asserted holder of the privilege is or sought to become a client; the person to whom the communication was made is a member of the bar of a court, or his agent in receiving the communication; the communication relates to a fact of which the attorney was informed by his client without the presence of strangers for the purpose of securing primarily either an opinion on law or legal assistance in some legal proceeding and not for the purpose of committing a crime or tort; and the privilege is claimed and has not been waived by the client.<sup>8</sup>

Arizona statutes, modeled in part on California law,<sup>9</sup> have codified the ancient common law privilege allowing the client, at his option, to prevent interrogation of his attorney as to advice given or information exchanged in the course of the professional relation-

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<sup>2</sup> *Id.* § 2291.

<sup>3</sup> *Id.* § 2292.

<sup>4</sup> *Id.* § 2290; 3 JONES, EVIDENCE § 1845 (2d ed. 1944); McCORMICK, EVIDENCE § 181 (1954):

<sup>5</sup> MODEL CODE OF EVIDENCE rule 210 (1942).

<sup>6</sup> *Hickman v. Taylor*, 329 U.S. 495 (1946).

<sup>7</sup> *U.S. v. Louisville and Nashville R.R.*, 236 U.S. 318 (1915); *Zenith Radio Corp. v. Radio Corp. of America*, 121 F. Supp. 792 (D. Del. 1954); *Georgia-Pacific Plywood Co. v. United States Plywood Corp.*, 181 F.R.D. 463 (S.D.N.Y. 1956); *Stewart Equip. Co. v. Gallo*, 32 N.J. Super. 15, 107 A.2d 527 (L. 1954); *Major and Corp. v. Cox*, 26 Ch. D. 678 (1884); and many other American and English cases cited by the Court of Appeals, *Radiant Burners, Inc. v. American Gas Ass'n*, 320 F.2d 314, 319 n.7 (7th Cir. 1963).

<sup>8</sup> *U.S. v. United Shoe Mach. Corp.*, 89 F. Supp. 357 (D. Mass 1950).

<sup>9</sup> See WEST ANN. C.C.P. § 1881 (1955); *Heffron v. Los Angeles Transit Lines*, 170 Cal. App. 2d 209, 339 P.2d 567 (1959) (allowed privilege); *Holm v. Superior court*, 42 Cal. App. 2d 500, 267 P.2d 1025 (1954) (allowed privilege).

ship.<sup>10</sup> An Arizona case, following the majority rule, allowed the corporate client to invoke the privilege.<sup>11</sup>

In the instant case<sup>12</sup> the trial court had analyzed the privilege and its applicability to corporations and concluded it was not available for two reasons: first, it was historically created only for natural persons; and second, the fundamental element of confidentiality in the communication was impossible in light of the corporate structure. The rationale behind the trial court's first assumption was that the attorney-client privilege was analogous to the privilege against self-incrimination and since the privilege against self-incrimination was purely a personal right and unavailable to corporations,<sup>13</sup> the attorney-client privilege must also be unavailable. The Court of Appeals rejected this reasoning, saying in part:

It is argued that because corporations have been denied the protection of the constitutional privilege against self-incrimination, . . . because of their impersonal character, that by analogy they are to be denied the protection of the attorney-client privilege. . . . It is our view, . . . that the attorney-client privilege derives from a regard for the rights of a client, personal or impersonal in character, fostering a social policy concerned with facilitating the workings of justice. \* \* \* that the privilege is that of a "client" without regard to the non-corporate or corporate character of the client.<sup>14</sup>

The trial court advanced a lack of confidentiality in support of its second reason. If the communication was disclosed to third parties—anyone other than the attorney or the client—the confidence was "profaned" and the privilege terminated.<sup>15</sup> In answering this argument, the Court of Appeals concluded that:

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<sup>10</sup> UDALL, ARIZONA LAW OF EVIDENCE § 94 (1960); ARIZ. REV. STAT. ANN. § 12-2234 (1956):

In a civil action an attorney shall not, without the consent of his client, be examined as to a communication made by the client to him, or his advice given thereon in the course of professional employment. An attorney's secretary, stenographer or clerk shall not, without the consent of his employer, be examined concerning any fact the knowledge of which was acquired in such capacity.

<sup>11</sup> Bank of Ariz. v. Haverty Co., 13 Ariz. 418, 115 P. 73 (1911), *aff'd*, 232 U.S. 106 (1914).

<sup>12</sup> Radiant Burners, Inc. v. American Gas Ass'n, 207 F. Supp. 771 (N.D. Ill. 1962).

<sup>13</sup> U.S. v. White, 322 U.S. 694 (1944); U.S. v. Onassis, 133 F. Supp. 327 (S.D.N.Y. 1955). For an excellent historical account of the two privileges see, 8 WIGMORE, EVIDENCE §§ 2290, 2250 (McNaughton rev. 1961).

<sup>14</sup> Radiant Burners, Inc. v. American Gas Ass'n, 302 F.2d 314, 324 (1963). A corporation has also been considered within the definition of "client" by the MODEL CODE OF EVIDENCE, Rule 209(a) (1942) and by the UNIFORM RULES OF EVIDENCE 26(3)A.

<sup>15</sup> Radiant Burners, Inc. v. American Gas Ass'n, 207 F. Supp. 771 (N.D. Ill. 1962).

There is no reason to believe that the required confidentiality cannot properly be maintained within the corporate family. It can just as readily be dissipated. These matters will all have to be resolved on a case-by-case basis. \* \* \* A corporation is entitled to the same treatment as any other "client" — no more and no less. If it seeks legal advice from an attorney, and in that relationship confidentially communicates information relating to the advice sought, it may protect itself from disclosure, absent its waiver thereof.<sup>16</sup>

In conjunction with the problem of confidentiality, the trial court discussed the difficulty of determining what persons within the corporate structure hold its confidence and may properly be considered as its alter ego and therefore the "client." As to these difficulties, the Court of Appeals cited several cases in which the problem had been competently met and implied that similar tests could be invoked here.<sup>17</sup> The Court concluded by saying "It is our considered judgment that based on history, principle, precedent and public policy the attorney-client privilege in its broad sense is available to corporations, and we so hold."<sup>18</sup>

A relatively recent case, *Zenith Radio Corp. v. Radio Corp. of America*, solved this problem (as to who in the corporation may properly invoke the privilege) by saying anyone not "strangers" to the corporation, meaning those affiliated with the corporation as employees, officers, directors, or outside counsel are qualified to speak for the corporate client.<sup>19</sup> Equally significant is the reasoning of two federal cases, decided between the trial court's decision in the instant case and the Court of Appeals reversal thereof, which considered the result reached by the trial court and expressly disapproved it.<sup>20</sup>

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<sup>16</sup> *Radiant Burners, Inc. v. American Gas Ass'n*, 302 F.2d 314, 324 (1963).

<sup>17</sup> *Id.* at 324, citing: *American Cyanamid Co. v. Hercules Powder Co.*, 211 F. Supp. 85, 88 (D.C.D. Del. 1962); *Zenith Radio Corp. v. Radio Corp. of America*, 121 F. Supp. 792 (D.C.D. Del. 1954); *U.S. v. United Shoe Mach. Corp.*, 89 F. Supp. 357 (D.C.D. Mass. 1950).

<sup>18</sup> *Id.* at 323.

<sup>19</sup> *Zenith Radio Corp. v. Radio Corp. of America*, 121 F. Supp. 792, 795 (D. Del. 1955); *accord*, *Connecticut Mut. Life Ins. Co. v. Shield*, 18 F.R.D. 448 (S.D.N.Y. 1955).

<sup>20</sup> *Philadelphia v. Westinghouse Electric Corp.*, 210 F. Supp. 483 (E.D. Pa. 1962); *American Cyanamid Co. v. Hercules Powder Co.*, 211 F. Supp. 85 (D. Del. 1962). In the *Westinghouse* case, the court pointed out that the availability of the privilege to corporations has gone unchallenged so long and has been so generally accepted that it must be recognized to exist. The court concluded that if any employee making the communication is in a position to control or take a substantial part in a decision concerning any action which the corporation may take upon the advice of the attorney, or if he is an authorized member of a body or group which has that authority, then, in effect, he is (or personifies) the corporation when he makes his disclosure to the lawyer and the privileges would apply. In the *Hercules* case, the court said that the result reached in the *Radiant Burners* case was an unjustifiable restriction of the immunity, reasoning that the basis for the privilege is the importance of increasing the effectiveness of the

Numerous tests have been devised by the courts in an attempt to clarify who within the corporation may assert the privilege. One feasible solution of this aspect of the problem, as suggested by the trial court in the principal case, would be a statute granting the privilege to corporations and establishing definite standards for determining who qualifies to represent the corporation as "client."<sup>21</sup> It seems clear that the majority of the courts and legal writers agree with the Court of Appeals in the instant case that a corporation should be entitled to this privilege. The major split of authority arises not in the result reached, but in the means of obtaining the result.

Corporations benefit as much as any individual from legitimate legal assistance and, if the legal affairs of a corporation are to be carried forward in a practical fashion, someone in the corporation should be permitted the privilege of confidential disclosure bearing on corporate matters. The social good derived from the proper performance of the functions of lawyers acting for their clients outweighs the harm that may come from the suppression of evidence in specific cases.<sup>22</sup>

*William H. Jury*

EVIDENCE — WIRE TAPPING — CONVERSATIONS RECORDED ON TELEPHONE EXTENSION ADMISSIBLE IN CRIMINAL PROCEEDINGS. — *Ferguson v. United States* (10th Cir. 1962).

An extension telephone was installed by the government in the home of a prostitute to whom the defendant was attempting to sell narcotics. Recordings of conversations between the defendant and the prostitute enabled the government to effect an arrest at the time of delivery and to secure the defendant's conviction for the purchase and sale of narcotics despite counsel's objection that the admission of such evidence was in violation of Section 605 of the Federal Communications Act,<sup>1</sup> prohibiting any unauthorized interception of communica-

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attorney by encouraging full disclosure by the client. The court did not feel a corporation should be able to insulate vital facts by using the privilege in a perverted manner. It felt that "the proper approach lies in tailoring the ordinary rules to the peculiar cloth of this legal entity." See also *Garrison v. General Motors Corp.*, 213 F. Supp. 515, 521 (D.C.S.D. Cal. 1963).

<sup>21</sup> *Radiant Burners, Inc. v. American Gas Ass'n*, 207 F. Supp. 771 (N.D. Ill. 1962): A number of recent law reviews suggest a variety of possible solutions to this unsettled area of the law. Symposium, *The Lawyer-Client Privilege: Its Application to Corporations, the Role of Ethics, and Its Possible Curtailment*, 56 Nw. U.L. REV. 235 (1961); Simon, *The Attorney-Client Privilege as Applied to Corporations*, 65 YALE L.J. 953 (1956); Maurer, *Privileged Communication and the Corporate Counsel*, 16 BUS. LAW. 983 (1961).

<sup>22</sup> MODEL CODE OF EVIDENCE, comment to rule 210 (1942).

<sup>1</sup> Federal Communications Act § 605, 48 Stat. 1103 (1934), 47 U.S.C. § 605 (1958) provides:

. . . and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; . . .

tions. On appeal, *held*, affirmed. The recording of conversations over an extension phone with the consent of one party does not constitute "interception" within the meaning of the Federal Communications Act and is therefore admissible evidence in federal courts. *Ferguson v. United States*, 307 F.2d 787 (10th Cir. 1962).

Prior to the adoption of Section 605 of the Federal Communications Act in 1934, the question of telephone interception by the tapping of wires was one of constitutionality under the Fourth Amendment.<sup>2</sup> It had been held in *Olmstead v. United States*<sup>3</sup> that use of evidence obtained by tapping a phone outside the house was not a violation of the Constitution and therefore admissible. The Court stated in part:

Congress may, of course, protect the secrecy of telephone messages by making them, when intercepted, inadmissible in evidence in Federal criminal trials, by direct legislation and thus depart from common law of evidence. . . .<sup>4</sup>

Subsequently, Congress enacted legislation which prohibited any person not authorized by the "sender" from intercepting any communication and divulging its contents.<sup>5</sup> This statute was so broad that immediate problems of interpretation arose.<sup>6</sup> An early circuit court case held that information obtained by tapping of telephone wires did not come within the scope of the statute and was admissible in court.<sup>7</sup> However, the Supreme Court, in *Nardone v. United States*,<sup>8</sup> held that such information was within the purview of the act and inadmissible as evidence. The Court reasoned that, since the Act prohibited divulging the contents of such interception, admitting any evidence obtained through wiretapping would be further perpetration of a

<sup>2</sup> U.S. CONST. amend. IV states:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . .

<sup>3</sup> *Olmstead v. United States*, 277 U.S. 438 (1928). This case held that the Fourth Amendment was not intended to apply to telephone communications.

<sup>4</sup> *Id.* at 465, 466.

<sup>5</sup> 48 Stat. 1103 (1934), 47 U.S.C. § 605 (1958).

<sup>6</sup> For interpretation of legislative intent see S. REP. No. 781, 73d Cong., 2d Sess. 11 (1934).

<sup>7</sup> *Smith v. United States*, 91 F.2d 556 (D.C. Cir. 1937) (held wiretapping not illegal under Federal Communications Act and relied on *Olmstead* for admitting evidence obtained); *Beard v. United States*, 82 F.2d 837 (D.C. Cir. 1936), *cert. denied*, 298 U.S. 655 (1936).

<sup>8</sup> *Nardone v. United States*, 302 U.S. 379 (1937). This case attempted to define the vague terms of the act. It held that "no person" included federal agents, that to "any person" embraces testimony in court and that the legislative history shows that telephone communications were intended within the word "any communication." However, it left defined the meaning of "intercept" and "the sender." *Nardone v. United States*, 308 U.S. 338 (1939), extended the first *Nardone* case to exclude all evidence derived from information obtained in violation of § 605 of the Federal Communications Act.

crime. Thus, by judicial construction, the Act provided a rule of evidence for federal courts that has remained as such to date.<sup>9</sup>

Once it was decided that evidence obtained in violation of Section 605 was inadmissible, the federal courts were split in their determination of the meaning of "unauthorized interception." Strictly construing the act so as to afford protection to the privacy of telephone communications, some courts, when presented with cases involving telephone conversations either overheard or recorded by a third person with only the consent of one party, found: (1) that only the person placing the call was the "sender" and that only he could authorize an interception, and (2) any interference whatsoever with the message was an "interception."<sup>10</sup>

On the other hand, in those districts where the *Nardone* decisions were unpopular, as unnecessarily hampering criminal investigations, each party to a telephone conversation was said to be both "sender" and "receiver,"<sup>11</sup> and authorization of one was sufficient to avoid violation of the act.<sup>12</sup> These courts also required a physical interruption of the telephone circuit to effect an "interception" of the conversation.<sup>13</sup> Thus, eavesdropping on an extension phone or re-

<sup>9</sup> *United States v. Sugden*, 226 F.2d 281 (9th Cir. 1955), *aff'd without op.*, 351 U.S. 916 (1956). Court commented that the act is not at any place within its own corners designated as a rule of evidence, but has become a rule of evidence for federal courts by judicial construction.

<sup>10</sup> *Weiss v. United States*, 308 U.S. 321 (1939); *Reitmeister v. Reitmeister*, 162 F.2d 691 (2d Cir. 1947) (telephone extension used by defendant for recording conversations between plaintiff and defendant's employees was "intercepting" messages); *United States v. Polakoff*, 112 F.2d 888 (2d Cir. 1940), *cert. denied*, 311 U.S. 653 (1940) (recordings on machine connected to extension of phone on which dealer talked to accused were not admissible on theory that dealer was a "sender" to the communication); *United States v. Hill*, 149 F. Supp. 83 (D.C.N.Y. 1957) (tape recordings of telephone conversation excluded where the recorder was placed at the receiver and considered interception).

<sup>11</sup> This argument can be used either to allow evidence or to prohibit it. The strict districts argue that since each party is at some time during the course of the communication a "sender," then the consent of both parties would be necessary. The liberal courts argue conversely, stating that if either party will qualify as "sender," then permission of one would authorize the interception.

<sup>12</sup> *Goldman v. United States*, 316 U.S. 129 (1942) (officers placed telephone in office and thus listened to conversations directly. Court said that the act was to protect the means not the secrecy of conversation.); *Rayson v. United States*, 238 F.2d 160 (9th Cir. 1956) (eavesdropping); *United States v. Bookie*, 229 F.2d 130 (7th Cir. 1956) (officer put ear to receiver with consent of person receiving call); *United States v. White*, 228 F.2d 832 (7th Cir. 1956) (extension); *Flanders v. United States*, 222 F.2d 163 (6th Cir. 1955) (extension); *United States v. Pierce*, 124 F. Supp. 264 (N.D. Ohio 1954), *aff'd*, 224 F.2d 281 (6th Cir. 1955) (extension); *United States v. Sullivan*, 116 F. Supp. 480 (D.D.C. 1953), *aff'd*, 219 F.2d 760 (D.C. Cir. 1955) (listening near the receiver); *United States v. Lewis*, 87 F. Supp. 970 (D.D.C. 1950) (recording made by a device attached to telephone and, on separate calls, stenographic records made by person listening over extension); *United States v. Yee Ping Jong*, 26 F. Supp. 69 (W.D. Pa. 1939) (Phonographic recording made by attachment of device to the telephone wire *inside* house of narcotic agent's associate).

<sup>13</sup> *But see United States v. Stephenson*, 121 F. Supp. 274 (D.D.C. 1954). A distinction was made and evidence inadmissible where recording device was attached to wiring in the bell box of the telephone before wiring reached the receiver and transmitter.

ording a conversation at some point after the voice had reached the receiver was no "interception."<sup>14</sup> The courts reasoned that once the wave lengths of the voice reached the telephone receiver and thus the ear of the listener, the message was completed, precluding any "interception."

This split among district courts and circuits was mended by the Supreme Court in *Rathbun v. United States*,<sup>15</sup> which held that conversations overheard on a regularly used telephone extension by two policemen at the request of the party called were admissible evidence not offensive to Section 605. Thus *Rathbun*, in effect, sanctioned the liberal view taken in those lower courts which had previously admitted such evidence, when obtained with the consent of one party.

The evidence in the instant case was obtained in substantially the same manner as in *Rathbun*, but with two factual variations. Conversations were recorded on an extension installed for the purpose of obtaining evidence, whereas in *Rathbun* the officers merely listened in on an extension already there for normal use. Despite Chief Justice Warren's opinion in *Rathbun* having placed some emphasis on the fact that the extension phone was one installed previously and for normal use, the court in the principal case chose to regard this distinction as insignificant. Utilizing Chief Justice Warren's reasoning that telephone conversations are not deemed to be secret, the court in the instant case liberalized the view taken in *Rathbun* by allowing officers with the consent of the telephone subscriber to install telephone extensions for the purpose of obtaining evidence. Furthermore, the court adopted the view existing in the districts courts prior to the *Rathbun* decision by allowing recording of such conversations.<sup>16</sup>

The first cases to interpret the Communications Act found the

<sup>14</sup> *Rayson v. United States*, 238 F.2d 160 (9th Cir. 1956).

It was not interception within the meaning of the statute for another person to listen to what is said through a receiver in the hand of a person to whom sender is talking. The conversation is completed when heard and not intercepted before it reaches the person to whom it is addressed.

<sup>15</sup> 355 U.S. 107 (1957). Note that on the same day the Supreme Court decided *Benanti v. United States*, 355 U.S. 96 (1957), where state officers authorized by a New York statute placed a tap on the wire of a telephone in a bar known to be frequented by the defendant and obtained evidence without the consent of either party to the conversation. The Supreme Court found that the evidence was obtained in violation of § 605 and was inadmissible.

<sup>16</sup> *United States v. Lewis*, 87 F. Supp. 970 (D.D.C. 1950); *United States v. Yee Ping Jong*, 26 F. Supp. 69 (W.D.Pa. 1939) both involve recordings on extension telephones. *Contra*, *United States v. Polakoff*, 112 F. Supp. 888 (2d Cir. 1940), *cert. denied*, 311 U.S. 653 (1940), involved recordings on an extension which were not admitted into evidence. Since the *Rathbun* decision, *Carnes v. United States*, 295 F.2d 598 (10th Cir. 1961) held recordings of telephone conversations with the consent of one party admissible. *Cert. denied*, 369 U.S. 861 (1962).

legislature's intent to be the protection of personal privacy and held that allowing officers to infringe on this privacy, even in an effort to promote the general safety and welfare, would not be permitted. However, denying the admissibility of evidence obtained in the instant case would unnecessarily hamper the government in its efforts to protect society. This writer feels that the policy of *Rathbun* as extended by the instant case<sup>17</sup> is for the protection of the innocent in society, that the infringement on privacy is slight, and therefore permissible. One is not guaranteed absolute privacy when using a telephone; for, if such were the case prior to *Rathbun*, crimes would have been committed daily by secretaries and family members listening on extensions at the request of the party receiving the call and later divulging the contents of the conversation. Any infringement upon privacy when a third person listens on an extension with the permission of the owner is negligible when weighed against the benefits to be derived by facilitating obtaining evidence needed for the detection and conviction of criminals preying upon society.

*Nancy Elise Miller*

INSURANCE — AUTOMOBILE LIABILITY POLICY — COVERAGE OF A SECOND PERMITTEE UNDER THE OMNIBUS CLAUSE. — *Hays v. Country Mut. Ins. Co.* (Ill. 1962).

The defendant issued an automobile policy which extended coverage to anyone riding in or operating the motor vehicle with the permission of the insured or any adult member of the insured's family. The insured permitted his daughter to drive the car to town to see a movie accompanied by her younger brother and sister. The brother permitted a friend to use the automobile in the presence of his sister, who did not object to the permission given. The second permittee while operating the vehicle in absence of the first permittee, and on a personal pleasure trip, was involved in a collision in which the plaintiff was injured. Plaintiff was not a member of the insured's family, but was a guest of the second permittee. The plaintiff sued the insurer claiming to be an additional insured under the policy. The trial court rendered judgment for defendant. On appeal, *held*, reversed.<sup>1</sup> Where a person is given permission to use an automobile

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<sup>17</sup> Subsequent cases which follow the instant case are: *Gonzales v. United States*, 314 F.2d 750 (9th Cir. 1963) (conversations overheard and recorded did not constitute unlawful interception); *Carbo v. United States*, 314 F.2d 718 (9th Cir. 1963) (electronic recordings—use of induction coil did not constitute, mechanically, an interception); *United States v. Williams*, 311 F.2d 721 (7th Cir. 1963) (tape recorder amplifier reproduced conversation through conversion of electrical impulses transmitted from telephone instrument through induction coil); *Harris v. United States*, 310 F.2d 934 (10th Cir. 1962) (conversations recorded through a device attached to the transmitting and receiving portions of extension telephone used by agent). Thus it seems that mechanical distinctions are no longer drawn.

<sup>1</sup> One judge dissenting.

by the owner, and that person permits its use by another, the use by the second permittee is deemed to be with permission of the owner so as to afford coverage to the second permittee under the omnibus clause. *Hays v. Country Mut. Ins. Co.*, 38 Ill. App. 2d 1, 186 N.E.2d 153 (1962).

In the standard automobile liability policy there is an "omnibus clause," which extends coverage under the policy to any person using such automobile, provided the actual use thereof is with the expressed or implied permission of the named insured. Upon the happening of an accident while the vehicle is being operated by a qualified additional insured with the permission of the owner, the insurance to the permittee is derivative but independent of the underwriters' responsibility to the named insured, and the rights of an injured party are the same as if the operator had been the named insured in the policy.<sup>2</sup> The omnibus clause has been the subject of more litigation than any other clause in the basic automobile liability policy.<sup>3</sup> The presence of the clause in a policy can be attributed to the highly competitive nature of the insurance business; however, the consequence of the clause is a large and considerably confused body of case law based on narrowly drawn semantic distinctions. The problem narrows to one of effective underwriting based on a predictable risk in conflict with a strong public policy of assuring financial protection for innocent victims of automobile accidents.

Litigation involving the construction of the omnibus clause generally comes within two categories. First, what is referred to as the "permission problem" as to which there is little harmony among the courts. Under the conventional analysis, the decisions are divided into three groups:<sup>4</sup> (1) Under the strict or "conversion" rule, any deviation from the time, place, or purpose specified by the person granting permission is sufficient to take the permittee outside the coverage of the omnibus clause;<sup>5</sup> (2) Under the moderate or "minor deviation" rule, a material deviation from the permission granted constitutes a use without permission, but a slight deviation is not sufficient to exclude the permittee from coverage;<sup>6</sup> and, (3) Under the liberal or "initial permission" rule, if the permittee has permission to use the automobile in the first instance, any subsequent use while it remains *in his possession*, though not within the contemplation of the parties at the time of the bailment, is a permissive use within

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<sup>2</sup> *Dransfield v. Citizen Cas. Co.*, 5 N.J. 190, 74 A.2d 304 (1950); *Century Indem. Co. v. Norbut*, 117 N.J. Eq. 584, 177 Atl. 248 (1935), *aff'd*, 184 Atl. 822 (1936).

<sup>3</sup> June M. Austin, *Permissive Use Under the Omnibus Clause of the Automobile Liability Policy*, 29 INS. COUNSEL J. 49 (1962).

<sup>4</sup> See generally Annot., 5 A.L.R.2d 600 (1949); 7 APPLEMAN, *INSURANCE LAW AND PRACTICE* §§ 4366-68 (1962).

<sup>5</sup> *Bekaert v. State Farm Mut. Ins. Co.*, 230 F.2d 127 (8th Cir. 1956).

<sup>6</sup> *Savage v. Am. Mut. Liab. Ins. Co.*, 158 Me. 259, 182 A.2d. 669 (1962).

the terms of the clause.<sup>7</sup>

A second problem involving the construction of the omnibus clause is often referred to as the "sub-permission" question.<sup>8</sup> This involves the authority of the original permittee to delegate permission to use the automobile so as to bring the second permittee within the coverage of an omnibus clause, as in the principal case. The general rule is that the scope of coverage under an omnibus clause in relation to a secondary permittee is determined by the intent of the named insured. When the named insured has expressly or impliedly permitted such delegation,<sup>9</sup> or when the use by the second permittee is of some purpose, benefit or advantage to the first permittee,<sup>10</sup> the courts have generally held that the second permittee is within the coverage of the omnibus clause.<sup>11</sup> Of course, when the first permittee has been expressly forbidden to delegate his authority, there would be no permission from the insured to the second permittee.<sup>12</sup> When the named insured gives another permission to use the motor vehicle and is silent with respect to delegation of authority, the use by a second permittee solely for his benefit is usually held not to be within the coverage of the policy.<sup>13</sup>

The principal case does not follow the rule that, when the insured is silent and the use is solely for the benefit of the sub-permittee, there is no coverage. The result in the instant case is an example of the continual extension by the courts of the coverage under an omnibus clause. Although the insured undertook to limit the place and purpose for which permission was given, *i.e.*, driving to town, parking the car, going to the movie, and returning home, this was of no effect since Illinois follows the initial permission rule.<sup>14</sup> How-

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<sup>7</sup> *Lumbermen's Mut. Ins. Co. v. Russell*, 243 La. 189, 142 So. 2d 391 (1962).

<sup>8</sup> See generally 45 C.J.S. *Insurance* § 829 (1946).

<sup>9</sup> See, *e.g.*, *Osborne v. Security Ins. Co.*, 56 Cal. App. 2d 597, 318 P.2d 94 (1957); *Costanzo v. Pennsylvania Threshermen & Farmers' Mut. Cas. Ins. Co.*, 30 N.J. 262, 152 A.2d 589 (1959); *Mercer Cas. Co. v. Kreamer*, 105 Ind. App. 358, 11 N.E.2d 84 (1937).

<sup>10</sup> See, *e.g.*, *Fireman's Fund Indem. Co. v. Freeport Ins. Co.*, 30 Ill. App. 2d 69, 173 N.E.2d 543 (1961); *Third Nat'l Bank v. State Farm Mut. Auto. Cas. Co.*, 334 S.W.2d 261 (Ky. 1960); *Garland v. Audubon Ins. Co.*, 119 So. 2d 530 (La. App. 1960); *Schimke v. Mut. Auto. Cas. Co.*, 266 Wis. 517, 64 N.W.2d 195 (1954).

<sup>11</sup> *But cf.* *Maryland Cas. Co. v. Baker*, 196 F. Supp. 234 (E.D. Ky. 1961); *Card v. Commercial Cas. Ins. Co.*, 20 Tenn. App. 132, 95 S.W.2d 1281 (1936).

<sup>12</sup> See, *e.g.*, *Cocos v. Am. Auto Ins. Co.*, 302 Ill. App. 442, 24 N.E.2d 75 (1939); *Boudreaux v. Cagle Motors*, 70 So. 2nd 741 (La. App. 1954); *Clemons v. Metropolitan Cas. Ins. Co.*, 18 So. 2d 228 (La. App. 1944).

<sup>13</sup> *Horn v. Allied Mut. Cas. Co.*, 272 F.2d 76 (10th Cir. 1959); *Ewing v. Colorado Farms Mut. Cas. Co.*, 133 Colo. 447, 296 P.2d 1040 (1956); *Kadmas v. Mudna*, 107 N.W.2d 346 (N.D. 1961); *Hamm v. Camerota*, 48 Wash. 2d 34, 290 P.2d 713 (1955).

<sup>14</sup> *Konrad v. Hartford Acc. & Indem. Co.*, 11 Ill. App. 2d 503, 137 N.E.2d 855 (1956).

ever, the initial permission rule does not carry with it authority for a permittee to let another use the motor vehicle when the owner expressly forbids such delegation.<sup>15</sup> If the owner did not expressly prohibit others from operating the vehicle, at least he was silent as to the delegation, and since the secondary permittee was obviously on a personal trip of no advantage to the first permittee or the insured, his use would not come within the coverage of the omnibus clause in most jurisdictions.<sup>16</sup> Perhaps, the only conclusion that can be drawn from this case is that under the initial permission rule in Illinois, the insured must expressly prohibit the using of the insured vehicle by anyone except the first permittee; and, if he fails to do so, any use by the first permittee or subsequent user with permission of the first permittee, comes within the scope of the omnibus clause.

A number of courts apparently feel that an ordinary automobile liability insurance contract is as much for the benefit of members of the public as for the benefit of the named insured. The Arizona Supreme Court has never been called upon to determine the coverage of an omnibus clause; however, in a recent decision the court held that the omnibus clause is a part of every motor vehicle liability policy, by whatever name it may be called.<sup>17</sup> However, the United States District Court for the District of Arizona has considered the coverage of an insurance contract which contained an omnibus clause. The insured's grandson was employed as a pickup and delivery boy for the insured's laundry and dry cleaning business, and in the course of his duties, he was permitted to and did use the insured station wagon. There were no explicit restrictions on the use of the insured vehicle. The grandson took the wagon without permission for the purpose of running away from home, and was involved in an accident in which the grandson and a cousin were injured. On appeal, the United States Court of Appeals, 9th Circuit, held that under these particular facts, the permission of the insured owner covered the use of the vehicle on that occasion, thus not putting Arizona in any category, *i.e.*, strict, minor deviation, or initial permission, as to coverage under an omnibus clause.<sup>18</sup>

The principal case may be criticized, yet it is typical of the construction usually given the ambiguously drawn omnibus clause in an insurance policy. By extending coverage the courts have adapted to the rapidly changing times by giving a realistic interpretation to the

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<sup>15</sup> Standard Acc. Ins. Co. v. New Amsterdam Cas. Co., 249 F.2d 847 (7th Cir. 1957).

<sup>16</sup> Annot., 160 A.L.R. 1195 (1946).

<sup>17</sup> Jenkins v. Mayflower Ins. Co., 93 Ariz. 287, 380 P.2d 145 (1963); ARIZ. REV. STAT. ANN. § 28-1170 (1956).

<sup>18</sup> U.S. Fid. & Guar. Co. v. Smith, 279 F.2d 678 (9th Cir. 1960).

clause, and until the coverage is clearly defined, the courts will probably continue to give what may be termed a liberal interpretation to such clauses. A possible solution is for the insurer to be more explicit in the wording of the omnibus clause so as to let the insured and the courts know the intended extent of the coverage.

*David L. Haga, Jr.*

LABOR LAW — UNEMPLOYMENT COMPENSATION — DISQUALIFICATION UNDER STATUTE OF NON-STRIKING EMPLOYEES WHO REFUSE TO CROSS PICKET LINES. — *Various Claimants & Constr. Unions v. Employment Security Comm'n* (ARIZ. 1963).

Claimants, non-striking employees of contractor, refused to cross the picket lines of their striking fellow workers to report for work. Employment Security Commission denied their claims for unemployment compensation under a disqualification provision of the Arizona Unemployment Compensation Act which denies benefits to any employee participating in a labor dispute. The decision was affirmed by the superior court. On appeal, *held*, affirmed. Claimants' refusal to cross picket lines of striking fellow workers was participation in a labor dispute within the meaning of the disqualification provision. *Various Claimants & Constr. Unions v. Employment Security Comm'n*, 92 Ariz. 183, 375 P.2d 380 (1962).

The purpose of unemployment compensation is to give financial assistance for a limited period of time to those capable of working and available for work who are involuntarily unemployed through no fault of their own.<sup>1</sup> Despite this meritorious aim, there was a realization at the time unemployment compensation systems were first created that abuses could occur. Consequently, the various state legislatures provided disqualification provisions to protect unemployment compensation funds from those who preferred benefits to jobs.<sup>2</sup>

The source of the most common disqualification provision was the labor-dispute disqualification clause of the Social Security Board draft bill.<sup>3</sup> The wording of this bill has been closely followed in approximately three-fourths of the states,<sup>4</sup> including Arizona.<sup>5</sup> The clause provides that the claimant will be disqualified for benefits for any week with respect to which his total or partial unemployment is due to a labor dispute, strike or lockout at the place where he is, or was last, employed. The claimant may avoid the operation of the clause by showing that he was not participating in, financing

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<sup>1</sup> ARIZ. REV. STAT. ANN. § 23-601 (1956).

<sup>2</sup> *Soricelli v. Board of Review*, 46 N.J. Super. 299, 134 A.2d 723 (1957).

<sup>3</sup> The text of this clause may be found in Williams, *The Labor Dispute Disqualification — A Primer and Some Problems*, 8 VAND. L. REV. 333, 339 (1955).

<sup>4</sup> For a state-by-state breakdown of the wording of labor-dispute disqualification provisions see Haggart, *Unemployment Compensation During Labor Disputes*, 37 NEB. L. REV. 668, 696 (1958).

<sup>5</sup> ARIZ. REV. STAT. ANN. § 23-777 (1956).

or directly interested in the labor dispute, strike or lockout or that he did not belong to a grade or class of workers participating in, financing or directly interested in the dispute.<sup>6</sup> The burden of proving the right to benefits is upon the claimant,<sup>7</sup> and he must show that he comes within all of the exceptions before the disqualification impediment is removed.<sup>8</sup>

The question raised in the principal case was whether or not the claimants' refusal to cross the picket lines of their striking fellow workers was participation in a labor dispute. It is almost always held that non-striking employees who refuse to cross the picket lines of their striking fellow workers are participating in a labor dispute.<sup>9</sup> The reason appears to be that the non-striking employees add their strength to that of the strikers by their refusal to report for work. It is thought that the strikers are placed in a better bargaining position since the absence of the non-striking employees may force the employer to close the whole plant or factory, rather than just that portion where the strikers are employed.<sup>10</sup> Also, some courts find that the non-striking workers have the legal right to cross the picket line and look upon their failure to do so as voluntary unemployment.<sup>11</sup> It is well settled that a refusal to cross a picket line because of a desire to abide either by a traditional union practice<sup>12</sup> or a constitutional provision of the union to which the claimant belongs<sup>13</sup> is sufficient grounds for disqualification. The same is true of a refusal which stems from strong union convictions<sup>14</sup> or an unwillingness to be branded a "scab."<sup>15</sup>

The cases are in general agreement that where a non-striking

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<sup>6</sup> *Ibid.*

<sup>7</sup> *Vickers v. Western Elec. Co.*, 86 Ariz. 7, 339 P.2d 1033 (1959); *Appeals by Employees of Polson Lumber & Shingle Mills*, 19 Wash. 2d 467, 143 P.2d 316 (1943).

<sup>8</sup> *Lanyon v. Adm'r, Unemployment Compensation Act*, 139 Conn. 20, 89 A.2d 558 (1952); *Auker v. Review Bd.*, 117 Ind. App. 486, 71 N.E.2d 629 (1947).

<sup>9</sup> *Lanyon v. Adm'n, Unemployment Compensation Act*, 139 Conn. 20, 89 A.2d 558 (1952); *Mitchell v. Maryland Employment Security Bd.*, 209 Md. 237, 121 A.2d 198 (1956); *Meyer v. Industrial Comm'n*, 240 Mo. App. 1022, 223 S.W.2d 835 (1949); *Annot.*, 28 A.L.R.2d 272, 333 (1953).

<sup>10</sup> *In re Persons Employed at St. Paul & Tacoma Lumber Co.*, 7 Wash.2d 580, 110 P.2d 877 (1941).

<sup>11</sup> *Id.* at 884.

<sup>12</sup> *Lanyon v. Adm'r, Unemployment Compensation Act*, 139 Conn. 20, 89 A.2d 558 (1952).

<sup>13</sup> *Brown v. Maryland Unemployment Compensation Bd.*, 189 Md. 233, 55 A.2d 696 (1947).

<sup>14</sup> *In re Persons Employed at St. Paul & Tacoma Lumber Co.*, 7 Wash. 2d 580, 110 P.2d 877, 884 (1941).

<sup>15</sup> *American Brake Shoe Co. v. Anunzio*, 450 Ill. 44, 90 N.E.2d 83 (1950).

employee's refusal to cross the picket lines is based upon a real,<sup>16</sup> genuine<sup>17</sup> or justifiable<sup>18</sup> fear of injury or bodily harm, he will not be disqualified since his act is not one of his own volition. However, the cases demonstrate that there is some inconsistency as to what will give rise to a real or genuine fear of harm. One group of cases is based on the presumption that strikers on the picket lines are law-abiding.<sup>19</sup> These cases require more than a mere theoretical threat of violence. Where non-striking employees were advised by pickets that "it would not be healthy" to attempt to enter the plant, this was held not sufficient to overcome the presumption that the picketing was lawful and orderly, and thus claimants could not recover.<sup>20</sup> A Pennsylvania case intimates that threats of violence should be accompanied with a show of force in order to be the basis of a reasonable fear of harm.<sup>21</sup> Where there was a widespread belief among non-striking employees that pictures would be taken of those attempting to enter the plant and employees had heard of "violence in the East," benefits were denied.<sup>22</sup> Generally, these cases indicate that unless there is actual violence, or the possibility of violence is open and apparent, claimants must attempt to cross the picket lines before they can qualify for benefits.<sup>23</sup>

Other courts, in allowing recovery, have required less in finding that a real or genuine fear of violence existed. In a Texas case,<sup>24</sup> the court affirmed a finding that verbal threats of retaliation against those who attempted to cross the picket lines gave rise to well-founded fears. In Illinois, two recent cases held that a reasonable fear might arise from both actual and potential violence.<sup>25</sup> A 1949 Michigan case affirmed a finding by a referee that an employer had an affirmative duty to provide safe ingress and egress to and from the plant for his

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<sup>16</sup> *McCann v. Unemployment Compensation Bd. of Review*, 163 Pa. Super. 379, 62 A.2d 87 (1948).

<sup>17</sup> *Achenbach v. Review Bd. of Ind. Employment Security Div.*, 179 N.E.2d 873 (Ind. 1962).

<sup>18</sup> *Mitchell v. Maryland Employment Security Bd.*, 209 Md. 237, 121 A.2d 198 (1956).

<sup>19</sup> *Steamship Trade Ass'n v. Davis*, 190 Md. 215, 57 A.2d 818 (1948).

<sup>20</sup> *Meyer v. Industrial Comm'n*, 240 Mo. App. 1022, 223 S.W.2d 835 (1949).

<sup>21</sup> *Urbach v. Unemployment Compensation Bd. of Review*, 169 Pa. Super. 569, 83 A.2d 392 (1951).

<sup>22</sup> *Appeals of Employees of Pacific Tel. & Tel. Co.*, 31 Wash. 2d 659, 198 P.2d 675 (1948).

<sup>23</sup> *In re Persons Employed at St. Paul & Tacoma Lumber Co.*, 7 Wash. 2d 580, 110 P.2d 877, 887 (1941) (dissenting opinion).

<sup>24</sup> *Texas Co. v. Texas Employment Comm'n*, 261 S.W. 2d 178 (Texas 1953).

<sup>25</sup> *Sangamo Elec. Co. v. Donnelly*, 26 Ill. 2d 348, 186 N.E.2d 230 (1962); *Shell Oil Co. v. Cummins*, 7 Ill. 2d 329, 131 N.E.2d 64 (1955).

employees.<sup>26</sup>

In the principal case, the Arizona Supreme Court held that the refusal of the non-striking employees to cross the picket lines of their striking fellow workers was participation in a labor dispute within the meaning of the disqualification provision. The case is one of first impression in Arizona, and the decision is consistent with those of sister states which have similar disqualification provisions.<sup>27</sup> The actual participation which the statute prohibits is found in the effect of the non-strikers' acts—the possibility that more or perhaps all of the employer's operation will be shut down due to the absence of the non-strikers, thus placing the striking employees in a better bargaining position.<sup>28</sup> The court also stated that by refusing to cross the picket lines, the non-strikers made the dispute one of their own and were thereby active participants in the strike.<sup>29</sup>

The question presented by the principal case was properly decided in accord with the great weight of authority. Although it was not a question in this case, cases in other jurisdictions show that there is some confusion as to what conditions will give rise to a real or genuine fear of harm which would justify a claimant's refusal to cross. It is suggested that the adoption of several objective tests would help to avoid possible confusion. Such tests might include: the total absence of both violence and threats of violence; the failure to use available police protection; the failure to cross where others have done so without mishap; or a prior indication by the employees' union of its decision not to cross the picket lines.<sup>30</sup>

James D. McVay

SALES — PRIVACY RULE IN IMPLIED WARRANTIES — MANUFACTURER LIABLE TO ULTIMATE CONSUMER. — *Picker X-Ray Corp. v. General Motors Corp.* (D.C. Mun. Ct. App. 1962).

Corporate plaintiff sought recovery from defendant manufacturer for breach of implied warranty in the sale of a new automobile through a retail dealer. Three months after its purchase, the vehicle was damaged when it left the road, due allegedly to a defective steering mechanism. Trial court granted defendant's motion to dismiss the warranty count on the ground there was no privity between it and the purchaser. On appeal, *held*, reversed. Regardless of lack of con-

<sup>26</sup> *Kalamazoo Tank and Silo Co. v. Michigan Unemployment Compensation Comm'n*, 324 Mich. 101, 36 N.W.2d 226 (1949).

<sup>27</sup> The cases establishing this position are too numerous for an exhaustive citation. See Haggart, *Unemployment Compensation During Labor Disputes*, 37 NEB. L. REV. 668, 681 (1958).

<sup>28</sup> *Various Claimants & Const. Unions v. Employment Security Comm'n*, 92 Ariz. 183, 185, 375 P.2d 380, 382 (1962).

<sup>29</sup> *Id.* at 186, 375 P.2d at 382.

<sup>30</sup> These tests were suggested in an article by Shadur, *Unemployment Benefits and the "Labor Dispute" Disqualification*, 17 U. CHI. L. REV. 294, 327 (1950).

tractual privity, manufacturer's implied warranty of fitness and merchantability runs to the ultimate consumer for whose use the article or personal property had been purchased. *Picker X-Ray Corp. v. General Motors Corp.*, 185 A.2d 919 (D.C. Mun. Ct. App. 1962).

The general view on the privity aspect of the law of sales is, for the most part, similar to that which grew from an English case:<sup>1</sup> privity of contract, the relationship existing between original contracting parties which is essential to the maintenance of an action on that contract, is indispensable to recovery against a manufacturer or other supplier of a product which has caused injury where defendant's breach of implied warranty is asserted.<sup>2</sup> Great dissatisfaction with the general rule has engendered numerous exceptions, the first being the "dangerous instrumentality" doctrine,<sup>3</sup> which formed the foundation upon which rested the landmark tort case of *MacPherson v. Buick Motor Co.*,<sup>4</sup> which declares "[I]f the nature of the thing is such that it is reasonably certain to place persons in peril when negligently made, the liability attaches, irrespective of contract, for failure to properly inspect and discover defects, coupled with the knowledge of probable danger therefrom."

The greatest single exception to the general requirement of privity has developed in the area of food, beverages and drugs,<sup>5</sup> so that strict liability is presently imposed upon manufacturers and other suppliers of these particular products in seventeen states.<sup>6</sup> Five states deal with this exception by statute,<sup>7</sup> fourteen have indicated require-

<sup>1</sup> Winterbottom v. Wright, 10 M. & W. 109, 152 Eng. Rep. 402 (Ex. 1842).

<sup>2</sup> Vaccarino v. Cozzubo, 181 Md. 614, 31 A.2d 316 (1943), noted in 8 MD. L. REV. 61 (1943); Chysky v. Drake Bros. Co., 235 N.Y. 468, 139 N.E. 576 (1923); Whitethorn v. Nash-Finch Co., 67 S.D. 465, 293 N.W. 859 (1940); Dobbins v. Pacific Coast Coal Co., 25 Wash. 2d 190, 170 P.2d 642 (1946); 46 AM. JUR. SALES § 306 (1943); 77 C.J.S. SALES § 305 (1952). See 1 WILLISTON—SALES § 244 (rev. ed. 1948).

<sup>3</sup> Huset v. J. I. Case Threshing Mach. Co., 120 Fed. 865 (8th Cir. 1903).

<sup>4</sup> 217 N.Y. 382, 111 N.E. 1050 (1916).

<sup>5</sup> See, e.g., Gottsdanker v. Cutter Labs., 182 Cal. App. 2d 602, 6 Cal. Rptr. 320 (1960); Escola v. Coca-Cola Bottling Co., 24 Cal. 2d 453, 150 P.2d 436 (1944); Brown v. Globe Labs., 165 Neb. 138, 84 N.W.2d 151 (1957); Jacob E. Decker & Sons v. Capps, 139 Tex. 609, 164 S.W.2d 828 (1942).

<sup>6</sup> Annot., 75 A.L.R.2d 1, 71 (1961).

<sup>7</sup> Connecticut, Georgia, Minnesota, Montana and South Carolina. See, e.g., GA. CODE ANN. § 96-301 (1957), which provides:

The manufacturer of any personal property sold as new property either directly or through wholesale or retail dealers, or any other person, shall warrant the following to the ultimate consumer, who, however, must exercise caution when purchasing to detect defects, and provided there is not express covenant of warranty and no agreement to the contrary:

(1) The article sold is merchantable and reasonably suited to the use intended.

(2) The manufacturer knows of no latent defects undisclosed.

ments of privity still exist,<sup>8</sup> and there appears to be no definite law on this matter in fourteen states.<sup>9</sup> This food-beverage-drug exception, which now looms as a great springboard with which courts are finding it increasingly easy to hurdle the requirement of privity, has led to more and broader exceptions. The first notable reduction in size of the obstacle of privity was an extension of strict liability to manufacturers of animal food.<sup>10</sup> The reduction was further implemented by extending strict liability to products for "intimate external bodily use."<sup>11</sup> The hurdle thus being reduced in stature, an Ohio court attempted to step over it by holding the seller of a grinding wheel strictly liable to a remote purchaser's employee,<sup>12</sup> but that jurisdiction apparently encountered a stumbling block in so holding.<sup>13</sup>

Gradually, the courts subverted the privity rule by disregarding that requirement as not essential to a recovery for breach of implied warranty on non-food products, though the courts' language has, at times, been equivocal.<sup>14</sup> The *Spence v. Three Rivers* decision was followed closely by another which indicated the privity hurdle had been cleared, but the court in that case also spoke in equivocal terms.<sup>15</sup>

<sup>8</sup> See, e.g., *Pelletier v. Dupont*, 124 Me. 269, 128 Atl. 186 (1925); *Kennedy v. Brockelmen*, 334 Mass. 225, 134 N.E.2d 747 (1956); *Lombardi v. California Packing Sales Co.*, 83 R.I. 51, 112 A.2d 701 (1955); *Williams v. S. H. Kress & Co.*, 48 Wash. 2d 88, 291 P.2d 662 (1955).

<sup>9</sup> Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099, 1107 (1960).

<sup>10</sup> *McAfee v. Cargill, Inc.*, 121 F. Supp. 5 (S.D. Cal. 1954) (public policy); *Midwest Game Co. v. M. F. A. Milling Co.*, 320 S.W.2d 547 (Mo. Sup. Ct. 1959) (implied warranty).

<sup>11</sup> *Graham v. Bottenfield's, Inc.*, 176 Kan. 68, 269 P.2d 413 (1954) ("certain exceptions"); *Kruper v. Procter & Gamble Co.*, 113 N.E.2d 605 (Ohio Ct. App. 1953), *rev'd on other grounds*, 117 N.E.2d 7 (1954) (implied warranty).

<sup>12</sup> *DiVello v. Gardner Mach. Co.*, 65 Ohio L. Abs. 58, 102 N.E.2d 289 (1951) (implied warranty).

<sup>13</sup> *Wood v. General Elec. Co.*, 159 Ohio St. 273, 112 N.E.2d 8 (1953), which held privity was necessary on implied warranty. Doubt was cast on *Wood* in *Rogers v. Toni Home Permanent Co.*, 167 Ohio St. 244, 147 N.E.2d 612 (1958), an express-warranty-through-advertising case, which hinted at validity of recovery on implied warranty regardless of privity. *Kennedy v. General Beauty Prods., Inc.*, 167 N.E.2d 116 (Ohio App. 1960), stated, however, that privity was necessary to implied warranty recovery and that the *Wood* rule was not modified by *Rogers*. Subsequently, dictum in *Magee v. General Motors Corp.*, 124 F. Supp. 606 (W.D. Pa. 1954), where the court stated that in an action against automobile manufacturer to recover for injuries suffered in accident allegedly resulting from a defect in the steering mechanism, evidence established right of plaintiff to recover either upon theory of breach of implied warranty of fitness for purpose and merchantability or upon basis of common law negligence, reduced that still-formidable requirement even more.

<sup>14</sup> *Spence v. Three Rivers Builders & Masonry Supply, Inc.*, 353 Mich. 120, 90 N.W.2d 873 (1953) (court also spoke of manufacturer's negligence).

<sup>15</sup> *Continental Copper & Steel Indus., Inc. v. Cornelius*, 104 So. 2d 40 (Fla. Dist. Ct. App. 1958) (court spoke of lack of privity in negligence action). This decision apparently was reinforced by *Canada Dry Bottling Co. v. Shaw*, 118 So. 2d 840 (Fla. Dist. Ct. App. 1960), though doubt was cast on "no privity required"

The case was taken further forward through successful negotiation of a series of privity-requirement barriers in non-food cases by courts in Pennsylvania<sup>16</sup> and Kansas,<sup>17</sup> where the requirement was abrogated, as it was in *Henningsen v. Bloomfield Motors, Inc.*,<sup>18</sup> which has since become the leading case in this field.

Arizona, in view of *Crystal Coca-Cola Bottling Co. v. Cathey*,<sup>19</sup> seems still to require privity in most instances, but its explicit adoption of public policy considerations<sup>20</sup> could well be an indication of possible abrogation of the rule.

It appears that the foremost deterrent to an orderly transition from requirement of privity to strict liability in the food, as well as in the non-food, cases is the prevalent, though misguided, preoccupation with contract in implied warranties.<sup>21</sup> Originally, the consumer had recourse through an action on the case in deceit, and *assumpsit* arose later as an alternative remedy.<sup>22</sup> Not to be slighted in this consideration is the judicial inattention to the dichotomy of negligence and warranty. Liability in negligence is based on the supplier's failure to exercise reasonable care and therefore involves fault, while liability in warranty arises where damage is caused by the failure of a product to measure up to express or implied repre-

rule by *Carter v. Hector Supply Co.*, 128 So. 2d 390 (Fla. Sup. Ct. 1961), where privity was stated to be a requirement except on foodstuffs and perhaps dangerous instrumentalities.

<sup>16</sup> *Jarnot v. Ford Motor Co.*, 191 Pa. Super. 422, 156 A.2d 568 (1959).

<sup>17</sup> *B. F. Goodrich v. Hammond*, 269 F.2d 501 (10th Cir. 1959).

<sup>18</sup> 32 N.J. 358, 161 A.2d 69 (1960). A new car was purchased from defendant-dealer by plaintiff-husband. Plaintiff-wife was injured when car, made by defendant-manufacturer, suddenly veered to the right and crashed into a brick wall. In holding that absence of privity of contract would not bar action on asserted breach of implied warranty of merchantability, the court said:

[W]here the commodities sold are such that if defectively manufactured they will be dangerous to life or limb, then society's interest can only be protected by eliminating the requirement of privity between the maker and his dealer and the reasonably expected ultimate consumer. . . . It is our opinion that an implied warranty of merchantability chargeable to either an automobile manufacturer or a dealer extends to the purchaser of the car, members of his family, and other persons occupying or using it with his consent.

<sup>19</sup> 83 Ariz. 163, 169, 317 P.2d 1094, 1097 (1957), a case of first impression and the only case in point, stated:

We hold that in the case of food, beverages and drugs an implied warranty by the manufacturer that the goods are pure and free from deleterious foreign substances inures to the benefit of the ultimate consumer of those goods by operation of law even in the absence of privity of contract.

<sup>20</sup> *Id.* at 168-69, 317 P.2d at 1096-97.

<sup>21</sup> PROSSER, TORTS §§ 83, 84 (2d ed. 1955); 1 WILLISTON, *op. cit. supra* note 2, § 195.

<sup>22</sup> Ames, *History of Assumpsit*, 2 HARV. L. REV. 1, 188 (1888). See also RESTATEMENT SECOND, TORTS § 420A (tentative draft), which provides for strict liability in tort in all cases of sellers of food.

sentations on the part of the manufacturer or other supplier and is imposed by operation of law regardless of fault.<sup>23</sup>

The instant case recognized these differences<sup>24</sup> and proceeded accordingly, as did *Henningsen* and *B. F. Goodrich v. Hammond*,<sup>25</sup> to impose liability "by law for the protection of the buying public." The small parade is gradually being joined by other courts which recognize these distinctions,<sup>26</sup> but many still are relying on various methods of indirection to accomplish the desired result of recovery for the injured plaintiff-consumer.<sup>27</sup> The court in the instant case also specifically rejected the contention that the Uniform Sales Act had codified the doctrine of privity,<sup>28</sup> thereby discrediting the claim that any alteration in the privity rule must come from the legislature.<sup>29</sup> By this decision, the court of the District of Columbia completely abrogated privity requirements which had been in effect prior to this,<sup>30</sup> and followed the lead of *Henningsen*.<sup>31</sup> There are, however, many jurisdictions which still have refused to follow that lead<sup>32</sup> and some which

<sup>23</sup> 1 FRUMER & FRIEDMAN, *PRODUCTS LIABILITY* § 16.01[1] (1960). See Condon, *Products Liability Problems*, 57 Nw. U.L. REV. 536 (1962).

<sup>24</sup> *Picker X-Ray Corp. v. General Motors Corp.*, 185 A.2d 919, 920-21 (D.C. Mun. Ct. App. 1962).

<sup>25</sup> 269 F.2d 501 (10th Cir. 1959).

<sup>26</sup> *Sitta v. American Steel & Wire Div. of U.S. Steel Corp.*, 254 F.2d 12 (6th Cir. 1958) (defective wire rope); *Chapman v. Brown*, 198 F. Supp. 78 (D. Hawaii 1961) (hula skirt ignited); *McQuaide v. Bridgeport Brass Co.*, 190 F. Supp. 252 (D. Conn. 1960) (harmful insect spray); *Asher v. Coca-Cola Bottling Co.*, 172 Neb. 855, 112 N.W.2d 252 (1961) (mouse in beverage); *Randy Knitwear, Inc. v. American Cyanamid Co.*, 11 N.Y.2d 5, 181 N.E.2d 399, 226 N.Y.S.2d 363 (1962) (flammable cloth); *Williams v. Union Carbide Corp.*, 17 App. Div. 2d 661, 230 N.Y.S.2d 476 (1962) (defective grinding wheel); *Greenberg v. Lorenz*, 9 N.Y.2d 195, 173 N.E.2d 773 (1961) (deleterious salmon).

<sup>27</sup> See, e.g., *Mannsz v. Macwhyte*, 155 F.2d 445 (3rd Cir. 1946) (express warranty by advertisements); *Spada v. Stauffer Chem. Co.*, 195 F. Supp. 819 (D. Ore. 1961) (Uniform Sales Act as implied warranty); *Hamon v. Diagliani*, 148 Conn. 710, 174 A.2d 294 (1961) (express warranty by labels and advertisements); *Ebers v. General Chem. Co.*, 310 Mich. 61, 17 N.W.2d 176 (1945) ("inherently dangerous" product); *Baxter v. Ford Motor Co.*, 168 Wash. 456, 12 P.2d 409 (1932) (catalogues and brochures as express warranty).

<sup>28</sup> See, e.g., ARIZ. REV. STAT. ANN. §§ 44-215, -276 (1956).

<sup>29</sup> See, e.g., *Randy Knitwear, Inc. v. American Cyanamid Co.*, 11 N.Y.2d 5, 181 N.E.2d 399, 226 N.Y.S.2d 363 (1962); *Greenberg v. Lorenz*, 9 N.Y.2d 195, 173 N.E.2d 773 (1961), which states that the present rule is itself of judicial making since New York statutes (Uniform Sales Act) say nothing at all about privity, and alteration of the law in such matters has been the business of the courts. "Moreover," the court in the *Picker X-Ray* case stated, "the Uniform Commercial Code § 2-318, comment 3 . . . expressly leaves questions concerning privity to the judiciary."

<sup>30</sup> *Hanback v. Dutch Baker Boy, Inc.*, 107 F.2d 203 (App. D.C. 1939); *Connecticut Pie Co. v. Lynch*, 57 F.2d 447 (App. D.C. 1932).

<sup>31</sup> 32 N.J. 358, 161 A.2d 69 (1960).

<sup>32</sup> *Page v. Cameron Iron Works, Inc.*, 155 F. Supp. 283 (S.D. Tex. 1957), *rev'd on other grounds*, 259 F.2d 420 (1958); *Atwell v. Pepsi-Cola Bottling Co.*, 152 A.2d 196 (D.C. Mun. Ct. App. 1959) (applying Maryland law); *Jacquet v. Wm. Filene's Sons Co.*, 337 Mass. 312, 149 N.E.2d 635 (1958); *Odum v. Ford Motor Co.*, 230 S.C. 320, 95 S.E.2d 601 (1956); *H. M. Gleason & Co. v. International Harvester Co.*, 197 Va. 255, 88 S.E.2d 904 (1955).

appear to follow in an incomplete manner,<sup>33</sup> as well as those which have followed in the face of resistance.<sup>34</sup>

Legal writers have attacked the rule of privity in implied warranty as being illogical and unjust.<sup>35</sup> These writers are urging the discontinuance of the legal subterfuges in lieu of recognizing "in name the absolute liability which in substance is fast becoming established by means of legal fictions"<sup>36</sup> and are resolving with finality that, "If there is to be strict liability in tort, let there be strict liability in tort, declared outright, without an illusory contract mask."<sup>37</sup> Legal fictions such as warranty through advertising are urged to be abandoned because:

If injury from defective products is properly a risk of the producer's enterprise, it would be so whether he advertised or not and whether or not there was a conscious need to rely on his skill. In either event, it is the maker who creates the risk and reaps the profit.<sup>38</sup>

Professor Lester Feezer, as early as 1938, suggested the abrogation of the privity requirement and indicated his desire for judicial decisions in this area similar to that made in *Henningsen v. Bloomfield Motors, Inc.*,<sup>39</sup> when he wrote:

<sup>33</sup> See *Burr v. Sherwin-Williams Co.*, 42 Cal. 2d 682, 268 P.2d 1041 (1954); *Shopak v. United States Rubber Co.*, 17 Misc. 2d 201, 183 N.Y.S.2d 112 (1959). *Contra*, *Hinton v. Republic Aviation Corp.*, 180 F. Supp. 31 (S.D.N.Y. 1959); *Greenberg v. Lorenz*, 9 N.Y.2d 195, 173 N.E.2d 773 (1961).

<sup>34</sup> See, e.g., *Spence v. Three Rivers Builders & Masonry, Inc.*, 353 Mich. 120, 90 N.W.2d 873, 882 (1958) (dissent); *Randy Knitwear, Inc. v. American Cyanamid Co.*, 11 N.Y.2d 5, 181 N.E.2d 399, 404, 226 N.Y.S. 363 (1962) (concurring opinion disagrees on this point); *Greenberg v. Lorenz*, 9 N.Y.2d 195, 173 N.E.2d 773, 776 (1961) (concurring opinion disagrees on this point).

<sup>35</sup> See, e.g., 1 FRUMER & FRIEDMAN, PRODUCTS LIABILITY § 16.03[2] (1960), stating:

If privity must be regarded as essential to the maintenance of a warranty action, there seems to be no good reason why it should not be said today that a manufacturer is in privity, albeit not in a contractual sense, with the consumers and users of his product. There is very little logic to recommend a rule of law which holds a manufacturer-immediate seller liable on warranty to the immediate purchaser, but denies liability on this theory if a manufacturer-remote seller vends his product through middlemen who act as mere conduits in getting his products into the hands of the public, or if injury is sustained by a person other than the immediate purchaser.

See *Peterson v. Lamb Rubber Co.*, 343 P.2d 261 (Cal. Dist. Ct. App. 1959), modified, 353 P.2d 575, in which the California Supreme Court held that there was privity in an action by the purchaser's employee where the product has been purchased direct from the manufacturer.

<sup>36</sup> Jeanblanc, *Manufacturers' Liability to Persons Other Than Their Immediate Vendees*, 24 VA. L. REV. 134, 157 (1937).

<sup>37</sup> Prosser, *The Assault Upon the Citadel*, *supra* note 9, at 1134.

<sup>38</sup> James, *Products Liability*, 34 TEXAS L. REV. 192, 196 (1955). See also Amram & Goodman, *Some Problems in the Law of Implied Warranty*, 3 SYRACUSE L. REV. 259, 268 (1952).

<sup>39</sup> 32 N.J. 358, 161 A.2d 69 (1960).

Why not ignore it [the privity requirement], why not recognize it for what it is, a ghost from the past, and formulate a new concept that will lead directly to the result which is admittedly in harmony with modern conditions and will effectuate an enlightened contemporary social policy?<sup>40</sup>

In view of efforts of the last three decades to solidify the law, these seem not to be impertinent suggestions. Speculatively, the courts' adoption of such a view would indicate to manufacturers the standards of production to which they will be held and would as an ultimate result obtain greater protection for the consuming public, especially in view of the fact that the manufacturer is in the best position to prevent defective and dangerous products from entering the economic flow.

*Michael S. Milroy*

TORTS — LIABILITY OF PARENT — PARENT THROUGH APPROVAL AND PARTICIPATION LIABLE FOR INJURY INCURRED BY PRACTICAL JOKE OF CHILD. — *Langford v. Shu* (N.C. 1962).

The defendant set the stage for her eleven-year-old son's practical joke by making misrepresentations to the plaintiff, a next-door neighbor visiting defendant's home, as to the contents of a wooden box, which was placed on the back porch and labeled "Danger — African Mongoose." Defendant had told her that the box contained a mongoose which ate snakes; in previous discussions with defendant, the plaintiff had said that she was afraid of "snakes, bugs, and so forth." When the child released a spring and a furry object, which the plaintiff believed to be an animal, sprang at her from the box, the plaintiff jumped with fright and stumbled back into the wall, causing serious injuries to her knee. The lower court rendered judgment of nonsuit at the close of plaintiff's evidence. On appeal, *held*, reversed. The evidence raised a jury question whether the defendant, knowing that injury to another would be a probable consequence, was liable (1) for having approved and participated in the practical joke played on the plaintiff, and/or (2) for having failed to exercise the power of control which she had over the child. *Langford v. Shu*, 258 N.C. 135, 128 S.E.2d 210 (1962).

The well-recognized common-law rule that a parent is not liable for the tortious acts of his child on the basis of mere relationship<sup>1</sup> has not evolved without various statutory and judicial appendages.

The courts have generally seen fit to hold the parent to liability based on the fault of the parent, where the circumstances are such as to render his own tortious act or omission a proximate cause of

<sup>40</sup> Feezer, *Manufacturer's Liability for Injuries Caused by His Products: Defective Automobiles*, 37 MICH. L. REV. 1 (1938).

<sup>1</sup> 39 AM. JUR. *Parent and Child* § 55 (1942); 67 C.J.S. *Parent and Child* § 66 (1950).

the injury.<sup>2</sup> Where the doctrine of respondent superior is clearly involved<sup>3</sup> or where the parent intentionally participates in the tort,<sup>4</sup> there is little difficulty in assigning liability to the parent. More often the question arises when liability is to be attributed to the parent's negligent participation through his active misconduct or his passive omission of a duty to act.<sup>5</sup>

Although the "exceptions" to the above-noted common-law rule of no parental liability are more logically explained as evasions representing resolutions to the problem of the insolvent minor,<sup>6</sup> there is a notable struggle among the courts in uncovering the appropriate basis for finding the parent liable.<sup>7</sup> A very liberal attitude was adopted with the advent of the family automobile, and the so-called family-purpose doctrine in a sense distorted the traditional agency conceptions within the family unit in order to impose the much-desired liability upon the solvent family head.<sup>8</sup> The ordinary rules of negligence have generally been applied to the conduct of the parent in determining such liability. More recently, jurists have focused upon the affirmative duty on the part of the parent to exercise his parental control,<sup>9</sup> such duty being created by the parent-child relationship itself. This latter ground emphasizes the duty of the parent to exercise reasonable care in controlling his minor child so as to prevent him from intentionally harming others, or creating unreasonable risk of harm, when the parent knows, or has reason to know, of the necessity and opportunity for exercising such control, and has the ability to do so.<sup>10</sup> Mere knowledge by the parent of his child's mischievous or reckless disposition generally does not seem enough to make him liable for the torts of the child, at least where the exercise of permissible parental restraint upon the child would not necessarily of itself have prevented the injury. Thus, whether the parental "fault"

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<sup>2</sup> *Ibid.*

<sup>3</sup> *Altoonian v. Muldonian*, 277 Mass. 53, 177 N.E. 830 (1931).

<sup>4</sup> *Kallenberg v. Long*, 68 Cal. App. 317, 229 P. 57 (1924).

<sup>5</sup> Some courts have been slow to recognize and honor the distinction, e.g., *Martin v. Barrett*, 120 Cal. App. 2d 625, 261 P.2d 551 (1953); however, in many cases there is little need to distinguish since where evidence of both active misconduct and failure to act affirmatively are present, either may be a basis for parental liability. See note, 6 *HASTINGS L.J.* 102 (1954).

<sup>6</sup> Note, 43 *CALIF. L. REV.* 874 (1955).

<sup>7</sup> See, e.g., 155 *A.L.R.* 85 (1945).

<sup>8</sup> See note, 38 *HARV. L. REV.* 513 (1925); *Benton v. Regeser*, 20 *Ariz.* 273, 179 *P.* 966 (1919).

<sup>9</sup> *Harper & Kime, The Duty to Control the Conduct of Another*, 43 *YALE L.J.* 886, 893 (1934). See, e.g., *Ryley v. Lafferty*, 45 *F.2d* 641 (*D.C. Cir.* 1930); *Bieker v. Owens*, 350 *S.W.2d* 522 (*Ark.* 1961); *Ellis v. D'Angelo*, 116 *Cal. App.* 2d 310, 253 *P.2d* 675 (1953); *Herrin v. Lamar*, 106 *Ga. App.* 91, 126 *S.E.2d* 454 (1962); *Stoelling v. Hauch*, 56 *N.J. Super.* 386, 153 *A.2d* 339 (1959); *Norton v. Payne*, 154 *Wash.* 241, 281 *Pac.* 991 (1929).

<sup>10</sup> *RESTATEMENT, TORTS* § 316 (1934); *Bieker v. Owens*, *supra* note 9.

must in all cases proximately cause the injury or may be merely a substantial factor is often analyzed in light of what would have resulted absent the parent's breach. This requires an inquiry into the nature of parental duty and a determination of what constitutes reasonable exercise of care by the parent under the circumstances. It would seem that, especially where he has knowledge of particular acts of the same kind as those which caused the injury, he may, under some circumstances, be held liable solely on the basis of such knowledge followed by his failure to restrain or caution the child<sup>11</sup> without a clear establishment of proximate cause.

The common-law rule regarding non-liability of a parent for a child's tort has undergone further modification in some states by statute.<sup>12</sup> Under Arizona's parental-liability statute,<sup>13</sup> liability is limited for all purposes of civil damages (1) to the parents having custody and control of the minor (2) up to an amount not to exceed five hundred dollars for each tort of the minor (3) who commits an act of malicious or willful misconduct (4) which results in an injury to the person or property of another. The statute further provides that this remedy is in addition to any common-law remedy already existing. Some state statutes omit from their scope provisions for parental liability for personal injuries, limiting recovery solely to property damage up to a specified amount and leaving the common law to govern fully recovery for injuries to person.<sup>14</sup>

The right of a victim of a practical joke to recover from its perpetrator is founded upon the defendant's voluntary conduct breaching a duty and causing damage.<sup>15</sup> The fact that an unintended injury which was the natural and probable result of an act occurred with-

<sup>11</sup> 39 AM. JUR. *Parent and Child* § 58 (1942).

<sup>12</sup> Various statutes holding parents to liability up to a maximum amount (from two hundred-fifty to five hundred dollars) for willful or malicious conduct of their minor or child under a specified age (generally between ages seventeen and twenty-one) include: California, CIV. CODE § 1714.1; Colorado, REV. STAT. § 41-2-7; Connecticut, G.S. § 52-572; Delaware, CODE ANN. § 10-3923; Florida, STAT. ANN. § 45.20; Georgia, CODE ANN. § 105-113; Hawaii, REV. LAWS ch. 830; Idaho, CODE, 1947, § 6-210; Indiana, BURNS' STAT. § 2-520; Montana, REV. CODE § 61-112-1; Nebraska, REV. STAT. § 43-801 (Supp. 1952); Ohio, BALDWIN'S REV. CODE § 2151.411; Rhode Island, GEN. LAWS § 9-1-3; Tennessee, CODE ANN. §§ 37-1001-1003 (Supp. 1957); Washington, S.L. 1961, ch. 99.

In Ohio if a child is found delinquent and placed on probation, and if the court finds parent having custody failed or neglected to subject child to reasonable parental control and authority and such failure is the proximate cause of acts of child, court may require such parent to post bond of not more than five hundred dollars, conditioned on faithful discharge of probation. OHIO REV. CODE § 2151.411.

Tennessee adds to its parental liability statute that there will be no recovery if the parent "shows due care and diligence in his care and supervision of such minor child." TENN. CODE ANN. §§ 37-1001.

<sup>13</sup> ARIZ. REV. STAT. ANN. § 12-661 (1956).

<sup>14</sup> California, Delaware, Florida, Idaho, Indiana, Montana, Nebraska, Tennessee, and Washington; see note, 43 CALIF. L. REV. 874 (1955).

<sup>15</sup> See Annot., 9 A.L.R. 364 (1920).

out desire to harm or under honest belief of lawful right is immaterial when the person so acting, with due diligence or reasonable foresight, should have known his conduct was likely to result in some injury to the victim.<sup>16</sup>

In the instant case the North Carolina court was called upon to consider whether the circumstances of a child's practical joke could be said to have charged the parent with recognizing the involvement of an unreasonable risk of bodily harm and whether the parent became liable through her active knowledge and consent to the act and/or her failure to exercise affirmatively her duty of parental control. By its ruling that the evidence raised a jury question as to the mother's liability, the court observed the traditional operations of the law of negligence,<sup>17</sup> and the commonly held rule as to liability for injury caused by a practical joke. Further, the court brought to light the issue of parental liability for the tort of a child on the basis of fault of the parent—that is, whether the parent's conduct was such as to render his own negligence a proximate cause of the injury.

While it would be unreasonable to place upon the parent an absolute responsibility for the acts of his child, it is logical to hold the parent to some responsibility of control. In *Langford v. Shu* the evidence seems sufficient for a finding by the jury of parental fault on either of the grounds of active misconduct or lack of affirmative action in exercising parental discipline. The evidence upon which a jury might find that the defendant approved and participated in the practical joke her children played on the plaintiff could be convincing: the defendant knew plaintiff was afraid of snakes and of the contents of the box which defendant had told her contained a mongoose which ate live snakes; and defendant could hear the conversation between the children and the plaintiff, preliminary to the demonstration of the box. The appellate court's decision rested primarily on this implicit evidence that the defendant participated in the act, but it did not belie the speculative effect of lack of parental control.

In focusing the issue of negligence upon a particular failure of the parent to adopt reasonable measures to prevent a definite type of harmful conduct on the part of the child, the courts provide a basis for extending the liability of a parent for his child's torts though containing it still within the scope of parental fault, and they more clearly define the general parental duty to control the child.

Arizona has not been confronted with the issue presented in the principal case. However, in view of the enactment of the parental-liability statute dealing with injuries to person or property inflicted by a minor's act of malicious or willful misconduct, it appears that

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<sup>16</sup> 86 C.J.S. TORTS § 20 (1954); *Johnson v. Pittard*, 62 Ga. App. 550, 8 S.E.2d 717 (1940); *Nickerson v. Hodges*, 146 La. 735, 84 So. 37, 9 A.L.R. 364 (1920); *Lewis v. Woodland*, 101 Ohio App. 442, 140 N.E.2d 322 (1955).

<sup>17</sup> RESTATEMENT, TORTS § 281 (1934).

the trend in Arizona is toward placing greater responsibility upon the parent. There is a very real possibility that a practical joke, such as in the *Shu* case, might fall within the category of "willful misconduct."<sup>18</sup> Where the common law would make the parent liable, Arizona's statute provides that the common law theory of action be an alternative remedy, and recovery would not be limited to the statutory amount.

Such parental-liability statutes and court decisions defining a parent's duty to exercise reasonable care to control his minor have been interpreted as "striking a blow" for home discipline,<sup>19</sup> and as a practical approach to juvenile delinquency. The inroads by the courts and legislatures into the problem of providing compensatory relief for the victims of minors' tortious conduct have had an overall result of more carefully describing parental responsibilities; the effectiveness of holding the parent to a greater and more exact degree of responsibility as a deterrent to the misconduct of minors remains to be evaluated.

W. Michael Flood

TORTS — NEGLIGENCE — FALLING ASLEEP AT WHEEL OF AUTOMOBILE IS NEGLIGENCE AS A MATTER OF LAW. — *Theisen v. Milwaukee Auto. Ins. Co.* (Wis. 1962).

While driving home from a party, the driver, an insured of the defendant company, fell asleep at the wheel. The car left the highway and struck a tree, killing the driver and injuring the plaintiff guest. In a negligence action the trial court gave judgment for the plaintiff. On appeal, *held*, reversed and new trial granted on the basis of improper special verdict questions, but with the court declaring that falling asleep at the wheel of an automobile is negligence as a matter of law. *Theisen v. Milwaukee Auto. Ins. Co.*, 18 Wis. 2d 91, 118 N.W.2d 140 (1962).

The leading case of *Bushnell v. Bushnell*<sup>1</sup> provided the foundation for the "well-settled" and generally followed rule<sup>2</sup> that going to sleep while driving makes out a prima facie case of negligence.<sup>3</sup> An-

<sup>18</sup> Exceptional difficulties may arise in defining "willful misconduct" and distinguishing it from negligence in borderline acts. See PROSSER, TORTS 150-51 (2d ed. 1955).

<sup>19</sup> *Bieker v. Owens*, 350 S.W.2d 522 (Ark. 1961).

<sup>1</sup> 103 Conn. 583, 131 Atl. 432 (1925).

<sup>2</sup> See, e.g., Annot., 138 A.L.R. 1388 (1942); Annot., 28 A.L.R.2d 12 (1953); 5A AM. JUR. AUTOS § 694 (2d ed. 1963); 60 C.I.S., *Motor Vehicles* § 264 (1949). As for cases so holding, see, e.g., *Cooper v. Kellogg*, 2 Cal. App. 2d 504, 42 P.2d 59 (1935); *Diamond St. Tel. Co. v. Hunter*, 41 Del. 336, 21 A.2d 286 (1941); *Lavard v. Randall*, 103 N.H. 234, 169 A.2d 276 (1961); *Bernosky v. Greff*, 350 Pa. 59, 38 A.2d 35 (1944); *Jones v. Pasco*, 179 Va. 7, 18 S.E.2d 258 (1942).

<sup>3</sup> The inference of negligence refers only to ordinary negligence; see note 2 *supra*. In a number of other cases, however, the fact of falling asleep has been held to be a factor for the jury, without any presumptions or inferences, in deter-

other view, with little authority prior to the principal case to support it, is that falling asleep is negligence as a matter of law.<sup>4</sup> A third view holds the issue of negligence to be one of fact, no inferences being drawn from the mere fact of the driver's falling asleep.<sup>5</sup>

The imputation of prima facie negligence is sometimes said to be based on the view, derived from both scientific and common knowledge, that one does not ordinarily fall asleep without some advance warning of drowsiness.<sup>6</sup> According to the general doctrines of negligence a motorist would not be liable for unforeseeable risks coming into existence *after* he fell asleep at the wheel.<sup>7</sup> But he can be charged with negligence for allowing himself to fall asleep if forewarned by drowsiness or other symptoms of approaching sleep.<sup>8</sup> Whether or not such forewarning existed in the particular case is said to be an issue of fact, without any inference of negligence, by the holders of the third view, *supra*.<sup>9</sup>

The principal case, in declaring that falling asleep at the wheel is negligence as a matter of law, recognized that it was breaking new ground in Wisconsin and departing from earlier Wisconsin cases which had relied on the *Bushnell* case as authority.<sup>10</sup> Justifying its conclusion on different grounds from those that had been elsewhere argued for such a result, the court stated in part:

Although it has been argued the liability of a sleeping driver

mining higher degrees of negligence. *E.g.*, *Stewart v. Combs*, 206 F. Supp. 19 (W.D.S.C. 1962) (heedless and reckless conduct); *Hodges v. Ladd*, 143 Colo. 143, 352 P.2d 660 (1960) (wilful misconduct); *Hamilton v. Sullivan*, 186 N.E.2d 118 (Mass. 1962) (gross negligence).

A few cases have found falling asleep at the wheel to be a proper *res ipsa loquitur* situation. *Druzanich v. Criley*, 19 Cal. App. 2d 439, 122 P.2d 53 (1942); *Thompson v. Kost*, 298 Ky. 32, 181 S.W.2d 445 (1944); *Collins v. McClure*, 143 Ohio St. 569, 56 N.E.2d 171 (1944) (*res ipsa*, but not negligence as a matter of law).

<sup>4</sup> *Theisen v. Milwaukee Auto. Mut. Ins. Co.*, 18 Wis. 2d 91, 118 N.W.2d 140 (1962). *Contra*, *Vignola v. Britts*, 205 N.Y.S.2d 215 (1960). For a variation on the theme, see *State v. Tuccillo*, 76 N.J. Super. 584, 185 A.2d 222 (1962), where the court, in revoking defendant's driver's license for one year, concluded as a matter of law that falling asleep at the wheel was "careless driving" within the meaning of the state statute.

<sup>5</sup> *Vignola v. Britts*, *supra* note 4.

<sup>6</sup> The court in the *Bushnell* case cited scientific writings to support this reasoning. In *Paulson v. Hanson*, 226 Iowa 858, 285 N.W. 189 (1939), and *People v. Robinson*, 253 Mich. 507, 235 N.W. 236 (1931), the element of common knowledge was stressed.

<sup>7</sup> RESTATEMENT, TORTS § 2, comment *a* (1934).

<sup>8</sup> The *Bushnell* case provided the classic statement to this effect: "In any ordinary case, one cannot go to sleep while driving an automobile without having relaxed the vigilance which the law requires, without having been negligent. It lies within his own control to keep awake or cease from driving." *Bushnell v. Bushnell*, 103 Conn. 583, 131 Atl. 432, 434 (1925).

<sup>9</sup> *Vignola v. Britts*, 205 N.Y.S.2d 215 (1960).

<sup>10</sup> For example, see *Krantz v. Krantz*, 211 Wis. 249, 248 N.W. 155 (1933).

should be absolute on the grounds of an extrahazardous activity,<sup>11</sup> we do not base our decision on that ground but hold that falling asleep at the wheel is negligence as a matter of law because no facts exist which will justify, excuse or exculpate such negligence. The language in earlier Wisconsin cases that falling asleep while driving may be excusable is overruled.<sup>12</sup>

This would seem to be not so much a radically new approach to this area of the law as it was a carrying of the *Bushnell* doctrine to a more certain conclusion as possibly foreshadowed by cases in other jurisdictions,<sup>13</sup> and intervening cases in related areas in Wisconsin.<sup>14</sup>

In Arizona the issue of conflicting judicial views in the situation under consideration has been decided by the case of *Brownell v. Freedman*.<sup>15</sup> There the court followed the general rule and held that where the defendant fell asleep while driving, a prima facie case of negligence resulted, and it was incumbent upon the defendant to show any circumstances tending to excuse or justify his conduct.<sup>16</sup>

Arizona recognizes the doctrine of negligence as a matter of law,<sup>17</sup> but the court has defined it as a violation of a statutory duty of care.<sup>18</sup>

<sup>11</sup> The court here referred to *The Case of the Sleeping Motorist*, 25 N.Y.U.L. REV. 362 (1950).

<sup>12</sup> 18 Wis. 2d 91, 118 N.W.2d 140, 144 (1962).

<sup>13</sup> Several transitional cases elsewhere paved the way for the evolutionary route from the prima-facie-evidence rule of the *Bushnell* case to the negligence-as-a-matter-of-law doctrine in the principal case. See, e.g., *Spencer v. Bright*, 159 F. Supp. 16 (E.D. Ky. 1958) (undisputed evidence pointed to negligence as a matter of law); *Bonanno v. Hanes*, 215 N.Y.S.2d 846 (1961) (summary judgment where defendant offered no excuse for falling asleep); *Stanley v. Burnside*, 192 N.Y.S.2d 452 (1959) (summary judgment where defendant did not rebut inference of negligence).

<sup>14</sup> For example, in an analogous situation, the Wisconsin court had previously held that an epileptic driver was negligent as a matter of law where he had prior knowledge of such incapacity and continued to operate the vehicle nonetheless. *Eleason v. Western Casualty and Surety Co.*, 254 Wis. 134, 35 N.W.2d 301 (1948). And see the court's discussion in the principal case, 18 Wis. 2d 91, 118 N.W.2d 140, 144.

<sup>15</sup> 39 Ariz. 385, 6 P.2d 1115 (1932).

<sup>16</sup> In an Arizona case subsequent to *Brownell v. Freedman*, 39 Ariz. 385, 6 P.2d 1115 (1932), the court stated that if the decedent went to sleep while driving and thus permitted his car to cross to the wrong side of the road, he was guilty of negligence, and in such event the plaintiff should prevail. *Pacific Employers Ins. Co. v. Morris*, 78 Ariz. 24, 275 P.2d 389 (1954) (dictum).

<sup>17</sup> For a brief history of the doctrine of negligence per se, which is another term for negligence as a matter of law in Arizona, see WILSON, ARIZONA AUTOMOBILE NEGLIGENCE 4-9 (1962).

<sup>18</sup> The Arizona court has defined negligence per se in a number of cases. See, e.g., *Young Candy and Tobacco Co. v. Montoya*, 91 Ariz. 363, 372 P.2d 703 (1962) (term defined in motor-vehicle context); *Cobb v. Salt River Valley Water Users Ass'n*, 57 Ariz. 451, 114 P.2d 904 (1941), where the term was defined as a violation of an ordinance or statute forbidding a party to do a certain act.

It is open to conjecture whether the argument based on the principal case would impel the Arizona courts to depart from *Brownell v. Freedman* and the cases limiting negligence as a matter of law to situations governed by statute. Some years ago, Arizona declined to follow a famous Wisconsin decision<sup>19</sup> which held that failure to stop a motor vehicle within the range of its lights was negligence as a matter of law.<sup>20</sup> A later Arizona case rejected the earlier Wisconsin rule and held that the touchstone for determining negligence should be what the ordinary and prudent person would have done under the circumstances.<sup>21</sup>

Although a period of nearly forty years separated the *Bushnell* decision from that of the principal case, both rules were predicated on the great danger inherent in the operation of automobiles and the duty of a driver to heed the forewarnings of sleep. The peremptory legal effect given to these considerations by the *Theisen* decision may seem to be a harsh rule.<sup>22</sup> It is submitted, however, that the increased risks stemming from an ever-mounting traffic density and the correlative enhanced duty of care to prevent the loss of conscious control, where it is within the power of the driver to do so,<sup>23</sup> justify a conclusion of negligence as a matter of law in the case of the sleeping motorist.

D. B. Krom

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<sup>19</sup> *Lauson v. Town of Fond du Lac*, 141 Wis. 57, 123 N.W. 629, 25 L.R.A.N.S. 40, 135 Am. St. Rep. 30 (1909).

<sup>20</sup> This rule of common-law negligence as a matter of law was still adhered to 50 years later by the Wisconsin court. *Barker Barrel Co. v. Fisher*, 10 Wis. 2d 197, 102 N.W.2d 107 (1960).

<sup>21</sup> *Alabam Freight Lines v. Phoenix Bakery*, 64 Ariz. 101, 166 P.2d 816 (1946); *accord*, *Butane Corp. v. Kirby*, 66 Ariz. 272, 187 P.2d 325 (1947). *Cf.*, *Wolfe v. Ornelas*, 84 Ariz. 115, 324 P.2d 999 (1958), where the court held that the violation of a statute on reducing speed at intersections was *not* negligence *per se* under all conditions.

<sup>22</sup> It should be noted that while the court declared in the principal case the conduct of falling asleep at the wheel was negligence as a matter of law, still the plaintiff had the burden of proving that the defendant did in fact fall asleep. Once the condition of sleep was established, however, the rigidity of the rule would become apparent. *But cf.* James, *Statutory Standards and Negligence in Accident Cases*, 11 LA. L. REV. 95 (1950), wherein the author approves of the circumventions the courts use in the analogous cases of negligence *per se*, in relation to statutory violations, to prevent any rigid application of the doctrine in ascribing negligence as a matter of law. For example, liability is often limited to violations of statutes which apply only to a particular hazard or a specific class of plaintiffs.

<sup>23</sup> In the principal case, the court specifically excluded from absolute liability the related situations of fainting at the wheel while driving or of being subject to an epileptic seizure, provided that such losses of consciousness were not to be anticipated. *Theisen v. Milwaukee Auto. Mut. Ins. Co.*, 18 Wis. 2d 91, 118 N.W.2d 140, 144 (1962).

