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Recent Cases

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CONSTITUTIONAL LAW—MENTAL HEALTH—PROCEDURAL DUE PROCESS AND INVOLUNTARY COMMITMENT

Lessard v. Schmidt[1]

On October 29, 1971, two police officers took Alberta Lessard into custody and delivered her to a mental health center, where she was detained for mental observation based on the officers' determination that the detention was advisable. Three days later the police officers gave their reasons for that determination at an *ex parte* hearing before a Milwaukee County Court judge. He ordered the confinement be continued for 10 days. On November 4, 1971, a staff doctor of the mental health center filed an application for a judicial inquiry in the same court, recommending permanent commitment based on his diagnosis of schizophrenia. The judge immediately ordered an examination by two physicians and 10 additional days of detention. The following day the judge informed Miss Lessard she would be examined and that a guardian *ad litem* would be appointed for her. Miss Lessard, however, hired her own counsel. On the afternoon of November 15, 1971, she was notified that her hearing would be the following morning. Ultimately, the hearing was delayed for one week to allow her attorney time to prepare his case.

Due to these delays, all of which were sanctioned by law, Miss Lessard was confined, without recourse, for 26 days before being given the opportunity to present her case at an adversary hearing. At the hearing she was committed for an additional 30 days, an order that was extended every 30 days up to the date of the decision in the principal case.[2]

The *Lessard* decision was the result of a class action brought in a Wisconsin federal district court on November 12, 1971, on behalf of Miss Lessard and others involuntarily confined. Jurisdiction was asserted under 42 U.S.C. § 1983. The plaintiffs sought declaratory and injunctive relief from certain provisions of Wisconsin's civil commitment laws on the ground that they violated procedural due process. A three judge court was convened because the suit raised substantial constitutional questions.[3]

After a careful review of all the applicable law, the court concluded that Wisconsin civil commitment procedures violated procedural due process as guaranteed by the United States Constitution in numerous respects.[4] The court held the Wisconsin scheme unconstitutional insofar as it

1. 349 F. Supp. 1078 (E.D. Wis. 1972), *appeal docketed,* No. 73-568, U.S., Sept. 28, 1973.

2. *Id.* at 1081-82.

3. *Id.* at 1082.

4. *Id.* at 1103. It is generally accepted that the state has the right to involuntarily confine the mentally ill under certain circumstances. The first basis for involuntary commitment was the police power, which allowed commitment of insane persons dangerous to others. *See, e.g.,* State v. Mullinax, 364 Mo. 858, 269

fails to require effective and timely notice of the "charges" under which a person is sought to be detained; fails to require adequate notice of all rights, including the right to jury trial;[5] permits detention longer than 48 hours without a hearing on probable cause;[6] permits detention longer than two weeks without a full hearing on the necessity for commitment;[7] permits commitment based upon a hearing in which the person charged with mental illness is not represented by adversary counsel,[8] at which hearsay evidence is admitted,[9] and in which psychiatric evidence is presented without the patient having been given the benefit of the

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S.W.2d 72 (En Banc 1954). Later, the police power was found to be broad enough to permit commitment of those dangerous only to themselves. *See, e.g., In Re* Josiah Oakes, 8 Law Rep. 123 (Mass. 1845).

Parens patriae, a second basis for involuntary commitment, represents the idea that the mentally ill require commitment for their own welfare (for treatment or self-protection) and that the state, as sovereign, has both the right and the duty of guardianship over them. State *ex rel.* Sweezer v. Green, 360 Mo. 1249, 1256, 232 S.W.2d 897, 902 (En Banc 1950); Harriford v. Harriford, 336 S.W.2d 113, 115 (K.C. Mo. App. 1960).

The first basis for commitment has been criticized because it allows mere preventive detention, which is impermissible if the individual is sane and merely dangerous. Ennis, *Civil Liberties and Mental Illness,* 7 CRIM. L. BULL. 101, 107-09 (1971). It is also attacked because it assumes the mentally ill are more dangerous than sane people. *Hearings on Constitutional Rights of the Mentally Ill Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary,* 91st Cong., 1st & 2nd Sess. 245 (1970) [hereinafter *Hearings*]. Finally, it is criticized because it is impossible to predict the probability that mental illness will cause a dangerous act sometime in the future. Ennis, *supra* at 108.

Parens patriae is criticized because it assumes that the mentally ill person cannot make a rational decision as to his need for commitment when in fact many are capable of doing so. *Id.* at 104. Further, even if they are not capable, the very nature of personal freedom suggests that they should be permitted to make a wrong decision when it does not infringe on other's rights. *Id.*

Now, almost all commitment procedures are governed by statute.

5. The court believed this deficiency fatal under *In re* Gault, 387 U.S. 1 (1966), wherein the United States Supreme Court required that a defendant be afforded reasonable opportunity to prepare for his hearing.

6. *See* McNeil v. Director, Patuxent Institution, 407 U.S. 245 (1972), indicating the undesirability of commitments based on *ex parte* hearings.

7. The court based this part of the holding on Boddie v. Connecticut, 401 U.S. 371 (1971), where the Supreme Court ruled that the deprivation of a significant right must be based on an opportunity to be heard. *Boddie* involved an indigent who sought use of the courts to obtain a divorce. *See* Barry v. Hall, 98 F.2d 222, 225 (D.C. Cir. 1938). For other court rulings that there is a right to be heard within a reasonable time whenever substantial rights are involved see *In re* Barnard, 455 F.2d 1370 (D.C. Cir. 1971); Fhagen v. Miller, 29 N.Y.2d 348, 278 N.E.2d 615, 328 N.Y.S.2d 393 (1972).

8. The court relied on Heryford v. Parker, 396 F.2d 393 (10th Cir. 1968), which held that indigent persons detained on grounds of mental illness have a right to counsel, and Argensigner v. Hamlin, 407 U.S. 25 (1972), which required appointment of counsel in all criminal proceedings in which the accused could be deprived of his library.

The court could have analogized to juvenile proceedings. *See, e.g., In re* Gault, 387 U.S. 1, 36 (1966). *See also* S. BRAKEL & R. ROCK, THE MENTALLY DISABLED AND THE LAW 5, 61-63 (rev. ed. 1971); Schneider, *Civil Commitment of the Mentally Ill,* 58 A.B.A.J. 1059, 1063 (1972).

9. The court relied on dicta in *In re* Gault, 387 U.S. 1 (1966); and the lack of policy reasons for admitting hearsay to justify its position. *But see* Sas v. Maryland, 334 F.2d 506 (4th Cir. 1964).

privilege against self-incrimination;[10] permits commitment without proof beyond a reasonable doubt that the patient is both "mentally ill"[11] and dangerous;[12] and fails to require those seeking commitment to consider less restrictive alternatives to commitment.[13]

The court tested the procedures for civil commitment against the rigorous requirements of procedural due process in criminal actions.[14] The Wisconsin statutes, like their Missouri counterparts,[15] were designed to meet only the less stringent requirements of procedural due process traditionally considered applicable to civil commitment actions. The ultimate holding in *Lessard* was that all the unnamed members of the class represented in the class action must either be released from custody within 90 days or recommitted under procedures meeting the constitutional require-

10. The court recognized the patient's conflicting interests (*i.e.*, the desire for freedom and the need for treatment) and decided in favor of the patient's interest in freedom, refusing to make a technical civil–criminal distinction where a loss of liberty was involved. A finding of mental illness is usually based on testimony of an examining physician. Therefore, granting the privilege of remaining silent seems to preclude the state's remedy for protecting society because, absent overt acts, a psychiatrist would have very little basis for his testimony.

The court said that the privilege would not apply where insanity is used as a defense to a crime because there the accused raises the issue of insanity.

11. The court relied on *In re* Winship, 397 U.S. 358 (1970), which held that due process requires proof beyond a reasonable doubt where a juvenile might be confined if found guilty. *Id.* at 368. *Cf.* Dexter v. Hall, 82 U.S. 9 (1872), indicating that a "lunatic" needs more protection than a minor.

The court pointed out that at least one state requires proof beyond a reasonable doubt (Denton v. Commonwealth, 383 S.W.2d 681 (Ky. 1964)) and that others require more than a preponderance of the evidence. *See, e.g.*, Dixon v. Attorney Gen. 325 F. Supp. 966, 974 (M.D. Pa. 1971).

Lessard's pronounced reliance on juvenile cases is appropriate because both involve a possible loss of liberty of persons that are not fully competent. If anything, the mentally ill should be given more protection because they have committed no criminal offense. Another consideration making the analogy credible is the questionable benefit of the confinement in both instances. *See* Ennis, *supra* note 4, at 110; Comment, *The MDSO—Uncivil Commitment*, 11 SANTA CLARE LAW. 169 (1970). For suggestions that the degree of proof required should vary inversely with the degree of danger the patient represents see Postel, *Civil Commitment: A Functional Analysis*, 38 BROOKLYN L. REV. 1 (1971); Comment, *Hospitalization of the Mentally Ill: Due Process and Equal Protection*, 35 BROOKLYN L. REV. 187, 202-04 (1969).

12. It is unclear whether *Lessard* holds that the requirement the subject be dangerous is constitutionally required or that the particular statute required it and it was not proved. The "dangerous" requirement has been read into the Wisconsin Statute. *See* Humphrey v. Cady, 405 U.S. 504, 509 (1972) *and* note 4 *supra*.

13. 349 F. Supp. at 1103. This requires determining availability of alternatives, which have been investigated, and the feasibility of using a less restrictive one. *See* Lake v. Cameron, 364 F.2d 657 (D.C. Cir. 1966), interpreting a District of Columbia statute which allowed alternatives as requiring inquiry into alternatives to commitment. Covington v. Harris, 419 F.2d 617, 623 (D.C. Cir. 1969), broadening the concept beyond mere statutory requirements. *See also* S. BRAKEL & R. ROCK, *supra* note 8, at 61-63; Chambers, *Alternatives to Civil Commitment of the Mentally Ill: Practical Guides and Constitutional Imperatives*, 70 MICH. L. REV. 1107 (1972); Ennis, *supra* note 4, at 112. *But see* State v. Sanchez, 80 N.M. 438, 457 P.2d 370 (1969).

14. 349 F. Supp. at 1090.

15. *See* WISC. STAT. ANN. §§ 51.02-51.04 (1969); §§ 202.797-.807, RSMo (1969).

ments of *Lessard*.[16] Miss Lessard, who had been conditionally released previously, was protected by the order insofar as it declared her previous commitment defective and prevented its extension.[17]

There has been considerable debate for many years over the standard procedural due process applicable to commitment cases. Some have agreed with the reasoning in *Lessard*, arguing that because civil commitment is as serious an infringement of an individual's freedom and dignity as a criminal incarceration, the safeguards in commitment proceedings should be fully as comprehensive as those in criminal cases.[18] They point out that commitment not only results in confinement against a person's will, but that other important civil rights are often lost as well.[19] In addition, statistical surveys show that the death rate is higher among inmates in mental institutions than in society at large.[20]

Those who believe procedural safeguards for commitment should be less stringent than for criminal cases suggest that commitment is not punishment but rehabilitation;[21] at the very most it is a form of protective custody.[22] Others suggest that the commitment proceeding is civil in nature and thus criminal safeguards are not required.[23] Some argue that formal legal proceedings might be so traumatic to the prospective patient as to

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16. 349 F. Supp. at 1103.

17. *Id.*

18. *See, e.g.*, Cross v. Harris, 418 F.2d 1095 (D.C. Cir. 1969); Denton v. Commonwealth, 383 S.W.2d 681 (Ky. 1964); Ennis, *supra* note 4, at 108-09.

19. 349 F. Supp. at 1088-89. Section 202.847, RSMo 1969, states that the patient retains his "civil rights" unless he has been adjudicated incompetent. But, apparently the head of the hospital can impose some restrictions if such are required to prevent impairment of the patient's treatment. *See also* Ely, *The Status of Mental Incompetents in Civil Cases in Missouri*, 33 Mo. L. Rev. 1, 4 (1968).

20. 349 F. Supp. at 1089-90.

21. The extent of the patient's right to treatment (for a discussion of this right see Rouse v. Cameron, 373 F.2d 451 (D.C. Cir. 1966)) may determine the applicable standards. Section 202.840, RSMo 1969, provides a right to treatment, but only "to the extent that facilities, equipment and personnel are available . . . ." Of course, even an absolute right to treatment is of no consequence where the mental disease is incurable. *See* Jackson v. Indiana, 406 U.S. 715 (1972) (indicating more procedural protections should be provided where treatment would not help). It is also of no consequence when the treatment is inadequate or absent. *See, e.g., Id.* at 735 (indicating that many hospitals are not providing adequate treatment). *See also In re* Gault, 387 U.S. 1, 22 (1966) (inadequate rehabilitation was one of the bases for increasing the procedural safeguards in juvenile proceedings). The theory of *parens patriae* logically supports the proposition that the degree of rehabilitation the state provides should help determine the extent of procedural safeguards in the commitment process.

22. In re Moynihan, 332 Mo. 1022, 62 S.W.2d 410 (1933). *See* cases cited note 4 *supra*. *But see In re* Winship, 397 U.S. 358 (1970), concerning juvenile proceedings.

23. Glasco v. Brassard, 94 Idaho 162, 483 P.2d 924 (1971); State *ex rel.* Sweezer v. Green, 360 Mo. 1249, 232 S.W.2d 897 (En Banc 1950); *In re* Moynihan, 332 Mo. 1022, 62 S.W.2d 410 (1933). *But see In re* Winship, 397 U.S. 358, 365-66 (1970); Barry v. Hall, 98 F.2d 222, 225 (D.C. Cir. 1938); Reade v. Halpin, 193 App. Div. 566, 184 N.Y.S. 438 (3d Dept. 1920). The labeling of an action as civil or criminal should not determine rights; the interests involved must be defined and balanced.

adversely affect his susceptibility to treatment.[24] Thus, many psychiatrists and psychologists favor commitment based on medical discretion alone.[25]

The entry of judgment in *Lessard* was delayed from the date of the opinion, October 18, 1972, until June 29, 1973, to allow the legislature an opportunity to enact procedures conforming with its holding. When the judgment was finally entered, however, the state appealed to the United States Supreme Court.[26] *Lessard,* if affirmed on appeal, will require radical changes in Wisconsin commitment procedures and, if applicable generally, in Missouri also.[27] As illustrated below, Missouri's commitment procedure has many of the same features as Wisconsin's.

Missouri statutes provide three ways to commence commitment proceedings. First, a person may be committed under a nonprotesting provision.[28] This requires written application by a qualified person[29] and certification by two licensed physicians that the subject is mentally ill, in need of treatment, and lacks the capacity to responsibly make his own application. The county welfare office must then inform the subject that unless he requests a judicial hearing within five days he will be summarily committed. Should the subject request a hearing, the person seeking his commitment must commence a judicial proceeding as authorized under section 202.807 within five days.[30]

Missouri provides for two methods of obtaining temporary, emergency commitment. The first requires written application by a health or police officer or any other person stating grounds for his belief that the individual is likely to cause injury to himself or to others if not immediately restrained.[31] The statute also requires certification by a licensed physician that he has examined the individual and believes he is mentally ill and should be restrained. This certificate, when endorsed by a judge, authorizes confinement.[32]

A second emergency procedure permits any health or police officer, without judicial involvement, to transport a person to a hospital for temporary confinement if such officer has reason to believe that the individual

24. Ennis, *supra* note 4, at 110. This argument is discussed and rebutted. Would not commitment itself cause these problems regardless of the procedure used? *See generally* S. BRAKEL & R. ROCK, *supra* note 8.

25. S. BRAKEL & R. ROCK, *supra* note 8; Slovenko, *Civil Commitment in Perspective,* 20 J. PUB. L. 3 (1971); Comment, *Hospitalization of the Mentally Ill: Due Process and Equal Protection, supra* note 11.

26. The appeal to the Supreme Court was docketed Sept. 28, 1973. 42 U.S.L.W. 3201 (U.S. Oct. 9, 1973). For questions presented see 42 U.S.L.W. 3277 (U.S. Nov. 6, 1973).

27. Because *Lessard* stands a reasonable chance of being affirmed, Missouri lawmakers should now consider conforming changes in the Missouri commitment procedure. This would assure sufficient time for full consideration of the changes.

28. § 202.797, RSMo 1969.

29. A qualified person is either "a friend, relative, spouse or guardian of the individual, a health or public welfare officer, or the head of any institution in which such individual may be." *Id.*

30. *Id.* There is no confinement prior to the hearing unless the individual "waives" the hearing.

31. § 202.800, RSMo 1969.

32. If there is no time to obtain a judge's signature, § 202.803 permits commitment without it.

is mentally ill and is, therefore, likely to injure himself or others.[33] The application for admission must state the circumstances under which the individual was taken into custody and the reason for the officer's belief.

Under both emergency procedures the hospital is required to notify the probate court within 10 days of the individual's emergency confinement.[34] If no proceeding is initiated within five days after notification, the patient is ordered released. If proceedings are initiated, the court must hold the hearing within 10 days. The judge may order continuation of the temporary confinement until there is a judgment. But, the judgment must be rendered within five days after the hearing ends.

All the above methods of involuntary confinement require an eventual hearing. The hearing procedure is set out in section 202.807.[35] It is commenced by filing a written application accompanied by a physician's certificate stating that the physician has examined the subject and believes he is mentally ill and should be hospitalized, or that the subject refused to submit to examination. The patient must be given notice of the application and the time of the hearing. He is permitted to appear, testify, and cross-examine witnesses, and is entitled to representation by counsel. He is not required to be present. The court can order hospitalization for an indefinite period if it finds the patient to be mentally ill; in need of custody, care, or treatment in a mental institution; and incapable of making responsible decisions about hospitalization.

The Missouri commitment statutes fail to meet many of the stringent *Lessard* requirements. For instance, neither of Missouri's emergency commitment sections provides for a hearing within 48 hours of the initial confinement. Although one section[36] does require "endorsement" by a judge, it fails to meet *Lessard* standards because the hearing is *ex parte* and the judge's determination is not required to be based on probable cause.[37] The other emergency section fails more grievously, because it requires, to permit confinement beyond the allowable 48 hour period, only that a health or police officer have a "reason to believe" that the individual is mentally ill and is likely to injure himself or others if not confined.[38]

The Missouri procedure is defective under *Lessard* in other areas as well. *Lessard* permits only 14 days of confinement without a full hearing on the merits; whereas, compliance with Missouri law could result in confinement 25 days prior to such a hearing.[39] *Lessard* requires that proof of need for confinement be beyond a reasonable doubt; Missouri statutes ap-

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33. § 202.803, RSMo 1969.
34. § 202.805, RSMo 1969.
35. § 202.807, RSMo 1969. *See also* Comment, *Involuntary Commitment in Missouri,* 37 U.M.K.C.L. REV. 319 (1969).
36. § 202.800, RSMo 1969.
37. 349 F. Supp. at 1091.
38. § 202.803, RSMo 1969.
39. § 202.803, RSMo 1969. Twenty-five days is the maximum time, and the hearing could occur sooner. *But see* Dix, *Acute Psychiatric Hospitalization of the Mentally Ill in the Metropolis: An Empirical Study,* 1968 WASH. U.L.Q. 485, indicating that one-half of the involuntary patients admitted to one facility in Missouri never received a hearing because it was delayed (about three weeks), and they are released before that.

parently require only a reasonable belief.[40] *Lessard* forbade the use of hearsay testimony that does not come within an exception to the hearsay rule; a Missouri statute specifically provides that the court in commitment proceedings is not bound by the rules of evidence.[41] *Lessard* requires that alternatives to commitment be considered;[42] the Missouri statute requires that the subject be hospitalized for an indefinite period, or unconditionally released.[43] *Lessard* grants the privilege against self-incrimination to the subject; an opinion of the Missouri Attorney General states that the probate court can require the subject to submit to an examination to determine the question of illness in an involuntary commitment proceeding.[44]

One of the few areas in which the Missouri statute is free from attack under *Lessard* is the subject's right to counsel. The *Lessard* court pointed out that the Wisconsin statutes provided for counsel only by allowing the court, at its discretion, to appoint a guardian *ad litem,* who must be an attorney. Not only is this appointment merely discretionary, but *Lessard* also stated that a guardian *ad litem* does not qualify as representative counsel under the Constitution.[45] Missouri requires that "[i]f it is found that the proposed patient is not represented by an attorney, the court shall appoint an attorney to represent him. . . ."[46] This provision meets the most stringent possible interpretation of *Lessard.*

Lessard represents an extreme view of the extent to which fourteenth amendment procedural due process applies to commitment proceedings.

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40. *In re* Moynihan, 332 Mo. 1022, 1038, 62 S.W.2d 410, 418 (1933). This is partially because Missouri treats the hearing as civil in nature.

41. § 202.807 (4), RSMo 1969. *In re* Delany, 226 S.W.2d 366 (St. L. Mo. App. 1950), stated that the hearsay rules are applicable in an *incompetency* hearing and required clear and convincing evidence for a finding of incompetency. It is incongruous to require a lighter burden of persuasion in cases involving personal freedom than cases involving property.

42. 349 F. Supp. at 1095-96.

43. § 202.807 (5), RSMo 1969.

44. 13 Mo. Att'y Gen. Op. No. 18 (June 6, 1957). The hearing may be commenced by application accompanied by a statement that the patient refused to submit to an examination. § 202.807 (1), RSMo 1969, But, at least one witness at the hearing must be a physician who has examined the patient. § 202.807 (3), RSMo 1969.

Requiring the subject to submit to examination might not violate *Lessard* if the patient is extended the privilege at the examination. There are, however, practical and medical considerations which favor disallowing the privilege, *i.e.,* it will be hard to determine a patient's mental condition in order to commit him or to treat him.

45. 349 F. Supp. at 1099. Th court said that a guardian and a representative attorney in commitment proceedings have separate roles. The court quoted Dix, *Hospitalization of the Mentally Ill in Wisconsin: A Need for a Reexamination,* 51 MARQ. L. REV. 1, 33 (1967):

> In present practice, it seems clear that in almost all cases where a guardian is appointed he sees his role not as an advocate for the prospective patient but as a traditional guardian whose function is to evaluate for himself what is in the best interests of his client-ward and then proceed, almost independent of the will of the client-ward, to accomplish this.

349 F. Supp. at 1099.

46. § 202.807 (4), RSMo 1969.

Yet, without rigorous safeguards the process is subject to abuse.[47] Accordingly, it is submitted that *Lessard* should,[48] and probably will, be affirmed at least partially by the Supreme Court. The Missouri legislature should begin now to study this matter, so that such a decision would not unduly interrupt the functioning of the commitment process.

ROBERT K. MCDONALD

CONSTITUTIONAL LAW—PRIVILEGE AGAINST SELF-INCRIMINATION—APPLICATION OF MIRANDA V. ARIZONA TO MOTOR VEHICLE VIOLATIONS

State v. Neal[1]

On August 22, 1969, the Missouri State Highway Patrol investigated a report that an automobile had struck a highway signpost. The investigating officer, Trooper Walter Aytes, following a trail of water and antifreeze leading away from the signpost to a point about a mile beyond the end of the trail, found Martin Van Buren Neal sitting in an automobile stalled in the middle of the road. Aytes observed that the car was overheated and had sustained extensive front-end damage. Further observing that Neal appeared intoxicated, Aytes arrested him. Aytes then advised Neal that his answers to any questions could be used against him in a court of law, but failed to advise him of his right to remain silent and his right to counsel. Defendant was subsequently charged with driving while intoxicated[2] (hereinafter DWI).

At trial, state's witness Trooper Herndon, who had later arrived on the scene, testified that Aytes had asked Neal if he had been driving the vehicle and that Neal had answered affirmatively. Herndon's testimony was the state's only evidence on the crucial issue of whether Neal had been driving the car. Defense counsel objected to the admission into evidence of Neal's statement, contending that Aytes's attempt to apprise Neal of his constitutional rights had failed to satisfy the requirements of *Miranda v. Arizona*.[3] The objection was overruled, and the defendant was convicted.

47. An extreme example is using commitment to silence political dissent, as in the Soviet Union today. *Notes from Soviet Asylums,* NATIONAL REVIEW, June 9, 1972, at 633; *Crackdown on Dissent,* TIME, Dec. 18, 1972, at 31.

48. *Hearings, supra,* note 4, at 2. Senator Ervin, introducing hearings on constitutional requirements for commitment of the mentally ill, stated:

> Although at that time, the courts had dealt with some extreme problems of illegal hospitalization, on the whole, the testimony we heard in 1961 supported the charge that this was one of the most neglected areas of American law—neglected by most private citizens, by the courts, by State legislatures and generally by politicians.

Id.

1. 476 S.W.2d 547 (Mo. En Banc 1972).

2. § 564.440, RSMo 1969.

3. 384 U.S. 436 (1966). In *Neal,* the defendant was told only that anything he said could be used against him. Although the warning need not consist of the exact words stated in *Miranda* (see note 6 *infra*), the entire substance of the warning must be conveyed to be effective. *See, e.g.,* United States v. Fox, 403 F.2d 97, 100 (2d Cir. 1968); Lathers v. United States, 396 F.2d 524, 535 (5th Cir. 1968); United States v. Vantermool, 394 F.2d 697, 698-99 (2d Cir. 1968).

On appeal, the Springfield Court of Appeals reversed and remanded, holding that the admission of Herndon's testimony was error because the defendant had not been properly informed of his rights. Because the question involved was one of general interest and importance, the court of appeals transferred the case to the Missouri Supreme Court for determination pursuant to article V, section 10, of the Missouri Constitution. The Missouri Supreme Court held, two judges dissenting, that the *Miranda* decision does not apply to cases involving misdemeanor motor vehicle offenses.[4]

The United States Supreme Court formulated the *Miranda* rule as a procedural safeguard against infringement of the constitutional privilege against self-incrimination.[5] The rule requires that the police give a person certain warnings concerning his privilege against self-incrimination[6] before they subject him to "custodial interrogation."[7] Evidence obtained as a result of custodial interrogation is inadmissible unless the prosecution demonstrates that the police gave the *Miranda* warning and that the defendant waived[8] the rights the warning seeks to protect.[9]

In traffic violation cases, courts seldom have occasion to determine whether a *Miranda* warning is required because the prosecution usually does not need to introduce the defendant's statements to sustain its burden of persuasion. The arresting officer has usually witnessed the crime and has personal knowledge of all elements of the offense, so that his testimony alone is sufficient to convict. The question whether a *Miranda* warning is required becomes paramount, however, when the defendant incriminates himself without having been properly warned of his rights and the state needs to introduce the defendant's statement into evidence to complete its case. In traffic offense cases, this problem arises most often in two situations: First, where the defendant is stopped for some other traffic violation and the arresting officer suspects but has no firsthand knowledge that the

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4. 476 S.W.2d at 553.

5. 384 U.S. at 478.

6. The Court in *Miranda* set forth the required contents of the warnings as follows:

> [U]nless other fully effective means are adopted to notify the person of his right of silence and to assure that the exercise of the right will be scrupulously honored, the following measures are required. He must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.

Id. at 478-79.

7. For a discussion of the custodial interrogation concept generally and its application to motor vehicle offense situations specifically see text accompanying notes 12-15 *infra*.

8. The Court in *Miranda* provided for this waiver as follows:

> After such warnings have been given, and such opportunity [to exercise the rights enumerated in the warnings] afforded him, the individual may knowingly and intelligently waive these rights and agree to answer questions or make a statement.

384 U.S. at 479.

9. *Id.*

defendant was drinking;[10] and, second, where the officer arrives on the scene after an accident and has no personal knowledge that the defendant was driving one of the cars involved.[11]

Most courts that have found it necessary to decide whether *Miranda* applies to traffic offense cases have held that it does not. Several rationales have been employed to reach this result. The remainder of this casenote discusses and criticizes these various lines of reasoning.

Some courts hold *Miranda* inapplicable based on the guidelines set out therein regarding the intended scope of the decision. The Supreme Court said that its decision was intended neither "to hamper the traditional function of police officers in investigating crime," nor to preclude "general on-the-scene questioning as to facts surrounding a crime."[12] The warning must be given, the Court said, "when the individual is first subjected to police interrogation while in custody at the station *or otherwise deprived of his freedom of action in any significant way.*"[13] This decisive stage is commonly referred to as "custody"; questioning conducted once this point is reached constitutes "custodial interrogation."

The line between on-the-scene investigatory questioning, where no *Miranda* warning is required, and custodial interrogation, where a warning is required, is often tenuous. Arguably, when a driver is stopped for a routine traffic violation he is not in custody. The police officer simply writes a citation and the driver signs it. Thus, some courts reason that because neither the officer's actions nor the atmosphere are outwardly coercive, the defendant is not really in custody and no *Miranda* warning is required.[14]

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10. This assumes that the defendant did not submit to a breathalyzer or similar sobriety test.

11. Often, the driver of an automobile who is stopped for a traffic violation and given no *Miranda* warning gives incriminating statements about another crime or offense, and is later convicted of that second crime or offense. This area is beyond the scope of this note. For a discussion see Annot., 25 A.L.R.3d 1082 (1969). Also, the question may arise whether a person arrested for DWI is capable of knowingly and intelligently waiving his rights. For a discussion see Erwin, *Application of Miranda, etc. In Traffic Cases,* 158 N.Y.L.J. 35, 36 (1967).

12. 384 U.S. at 477. The routine police practice of checking a driver's license or vehicle registration is an example of on-the-scene questioning not subject to the *Miranda* requirments. *See* United States v. Chase, 414 F.2d 780 (9th Cir.), *cert. denied,* 396 U.S. 920 (1969); Lowe v. United States, 407 F.2d 1391 (9th Cir. 1969).

13. 384 U.S. at 478 (emphasis added).

14. *See* State v. Dubany, 184 Neb. 337, 342, 167 N.W.2d 556, 559 (1969); State v. Desjardins, 110 N.H. 511, 514, 272 A.2d 599, 602 (1970); State v. Pyle, 48 Ohio Op. 2d 82, 83, 249 N.E.2d 826, 828 (Sup. Ct.), *cert. denied,* 396 U.S. 1007 (1969); State v. Twitty, 47 Ohio Op. 2d 14, 19, 246 N.E.2d 556, 561 (Ct. App. 1969); Higgins v. State, 473 S.W.2d 493, 494-95 (Tex. Crim. App. 1971).

The extent to which the court in *Neal* used the custody concept as a basis for its decision is unclear. After noting that "[o]n cross-examination counsel was at some pains to determine when the defendant had been 'arrested' *in the sense that he was placed under restraint*" (476 S.W.2d at 552) (emphasis added), the court held that *Miranda* was inapplicable "regardless of whether the questions are asked before or after arrest." *Id.* at 553. As one of the reasons for its holding, however, the court stated that "[n]early all of the interrogation occurs, as in the case at bar, at or near the scene of the violation and not in a coercive atmosphere created by law enforcement officials." *Id.*

This reasoning strains the custody concept. Although a defendant is arguably not in custody where the arresting officer intends to release him after issuing a ticket (as opposed to taking him to the station), the better view is that the defendant is in custody in both situations. The procedure is inherently coercive because the driver is often being questioned and is not free to leave until the procedure is completed. One approach to the problem, followed in Minnesota, requires that a *Miranda* warning be given when the officer has reasonable grounds to believe that the interviewee has committed a crime.[15]

Some courts have distinguished serious and minor crimes in holding *Miranda* inapplicable to motor vehicles offenses. These decisions fall into three categories.

The first category consists of cases holding *Miranda* inapplicable to misdemeanors.[16] In *State v. Pyle,*[17] a misdemeanor DWI case, the Ohio Supreme Court followed what it termed the "accepted principle that any court made rule of law must be read in relation to the facts which precipitated it."[18] Since *Miranda* involved four felony cases,[19] the Ohio court concluded no warning was required. In *Neal,* the Missouri Supreme Court used a narrower version of this distinction, restricting its holding to *"only those misdemeanor offenses* arising from the operation of a motor vehicle."[20]

Such a distinction, whether narrow or broad, exposes more problems than it solves. An officer does not always know that the driver has committed only a misdemeanor when he first stops him for questioning.[21] For example, Missouri's DWI statute is "hybrid" in that the first two offenses are misdemeanors and subsequent violations are felonies.[22] Yet, when a DWI suspect is stopped, the Missouri officer has no immediate way to

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15. State v. Kinn, 288 Minn. 31, 35, 178 N.W.2d 888, 891 (1970).

16. State v. Angelo, 251 La. 250, 203 So. 2d 710 (1967); City of Dayton v. Nugent, 54 Ohio Op. 2d, 31, 265 N.E.2d 826 (Dayton Mun. Ct. 1970); State v. Pyle, 48 Ohio Op. 2d 82, 249 N.E.2d 826, (Sup. Ct.), *cert. denied,* 396 U.S. 1007 (1969); *cf.* State v. Gabrielson, 192 N.W.2d 792 (Iowa 1971) (holding *Miranda* inapplicable to simple misdemeanors, as opposed to indictable misdemeanors). *Contra,* Commonwealth v. Bonser, 215 Pa. Super. 452, 258 A.2d 675 (1969); *cf.* Harvey v. Mississippi, 340 F.2d 263 (5th Cir. 1965) (rejecting the misdemeanor-felony distinction regarding assistance of counsel at entry of plea).

17. 48 Ohio Op. 2d 82, 249 N.E.2d 826 (Sup. Ct.), *cert. denied,* 396 U.S. 1007 (1969).

18. *Id.* at 83, 249 N.E.2d at 827.

19. Four cases were decided in the *Miranda* decision. One was a kidnapping and rape case, one involved robbery and murder, and two were robbery cases.

20. 476 S.W.2d at 553.

21. As the *Neal* dissent points out:

> This risk [that the defendant's statement will be inadmissible] is *inevitable* where the criterion for determining the applicability of Miranda warnings is not, has the person been taken into custody as set forth in Miranda, but whether the police can divine at the time the person is first taken into custody if he is to be prosecuted for only a motor vehicle misdemeanor or something more serious.

Id. at 555 (emphasis added).

22. § 564.440, RSMo 1969.

ascertain whether it is a first, second, or third offense. It is illogical to say that the defendant should be given a *Miranda* warning when stopped for his third DWI offense, but not his first two. Moreover, no logical connection exists between the constitutional rights protected by *Miranda* and the place of possible confinement.[23]

The second category of courts hold, as did the Missouri Supreme Court in *Neal,* that *Miranda* is inapplicable to traffic offenses.[24] In *Neal,* the court based its decision on four grounds. First, the court noted that nothing in the *Miranda* decision states that it applies to minor offenses involving motor vehicles. To hold *Miranda* applicable, the court thought, would stretch the decision beyond its logical limits.[25] *Miranda* clearly states, however, that the warning is necessary whenever *the privilege against self-incrimination is jeopardized.*[26] Second, the court stated that its position was supported by the current weight of authority elsewhere.[27] Third, the court believed that the penalties for motor vehicle violations were not serious enough to warrant the interference with law enforcement that would be occasioned by requiring the police to recite a warning and possibly wait until a defendant obtains or is provided counsel before questioning him.[28] This conclusion does not comport with reality. The defendant stood to lose his driving privilege[29] and was subject to a $100 fine and a six-month jail sentence.[30] Fourth, the supreme court believed it would be impossible to provide enough lawyers to advise all the motor vehicle operators likely to request legal advice.[31] Two recent studies show, however, that felony suspects rarely request lawyers after receiving a *Miranda* warning.[32] If felons

23. In Missouri, a felony is defined in § 556.020, RSMo 1969, as an offense punishable by imprisonment in the state penitentiary. A misdemeanor is defined in § 556.040, RSMo 1969, as an offense punishable by fine or imprisonment in a county jail.

24. State v. Bliss, 238 A.2d 848 (Del. 1968); State v. Macuk, 57 N.J. 1, 268 A.2d 1 (1970); State v. Zucconi, 93 N.J. Super 380, 226 A.2d 16 (1967) (dictum). *Contra,* People v. McLaren, 55 Misc. 2d 676, 285 N.Y.S.2d 991 (1967); Commonwealth v. Bonser, 215 Pa. Super. 452, 258 A.2d 675 (1969).

25. 476 S.W.2d at 553.

26. 384 U.S. at 478.

27. 476 S.W.2d at 552.

28. *Id.* at 553.

29. Section 302.302(1)(7), RSMo 1969, states that 12 points are to be assessed against a driver's license for a DWI conviction. Section 302.304(3), RSMo 1969, states that a driver's license shall be revoked when a driver accumulates 12 points within a 12-month period.

30. § 564.440, RSMo 1969. The admission of Neal's statement could also lead to a charge of leaving the scene of an accident, an aspect the court does not mention.

31. 476 S.W.2d at 553.

32. Medalie, Zeitz, & Alexander, *Custodial Police Interrogation in Our Nation's Capital: The Attempt to Implement Miranda,* 66 MICH. L. REV. 1347 (1968); *Interrogations in New Haven: The Impact of Miranda,* 76 YALE L.J. 1519 (1967). In the New Haven study, only 7.2 percent of the felony suspects given the *Miranda* warning called for a lawyer. *Interrogations in New Haven, supra* at 1600 n.222. In the District of Columbia study, only 7 percent of the 15,430 persons arrested for serious misdemeanors and felonies in 1967 sought legal advice after having been given the proper warning. Medalie, Zeitz, & Alexander, *supra* at 1351-52. In the latter study the authors concluded that "defendants were loathe to use attorneys and frequently gave statements to the police because of their inability to apply Miranda to their own circumstances." *Id.* at 1395.

rarely request counsel, traffic violation suspects would probably seek immediate legal advice even less often.

Other cases that restrict *Miranda* to non-traffic offenses use arguments similar to those in *Neal*.[33] As the *Neal* dissent points out,[34] this reasoning would equate a speeding ticket with manslaughter by culpable negligence in the operation of a motor vehicle,[35] although the latter's consequences are far more severe.[36]

In a third limitation on *Miranda*, two state courts have held it inapplicable to minor or petty violations.[37] They relied, in part, on the United States Supreme Court decision in *Duncan v. Louisiana*,[38] which delineated a category of petty crimes or offenses that are not subject to the sixth and fourteenth amendment jury trial provisions.[39] In both cases, however, the defendant was charged with DWI. In view of the consequences of conviction, it is unrealistic to classify DWI as a minor or petty offense.

Texas courts have admitted a driver's incriminating statement, even though he was not given a *Miranda* warning, as part of the "res gestae" of the offense.[40] These courts hold that *Miranda* does not apply to a statement that is admissible under the res gestae exception to the hearsay rule,[41] even though *Miranda* applies to the same statement if it is offered as an admission.[42] This approach completely skirts the driver's constitutional privilege against self-incrimination.

The New York legislature has declared that traffic infractions are not crimes.[43] On the basis of this, the New York Court of Appeals has held that a driver's statement cannot incriminate, and is therefore admissible at trial despite the absence of a valid *Miranda* warning.[44] This rationale might also encompass violations of municipal traffic ordinances that by definition are not crimes.[45] Further, it is arguable that a motor vehicle

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33. *See* State v. Bliss, 238 A.2d 848 (Del. 1968); State v. Macuk, 57 N.J. 1, 268 A.2d 1 (1970).

34. 476 S.W.2d at 556.

35. § 559.070, RSMo 1969. Note that in *Neal* this statute is misprinted as § 599.070. 476 S.W.2d at 556.

36. The *Neal* decision itself is arguably not subject to this particular criticism, because it applies "in only those *misdemeanor offenses* involving motor vehicles." *Id.* at 553 (emphasis added). In Missouri, manslaughter is a felony. § 559.140, RSMo 1969.

37. County of Dade v. Callahan, 259 So. 2d 504 (Fla. 1971); State v. Desjardins, 110 N.H. 511, 272 A.2d 599 (1970).

38. 391 U.S. 145 (1968).

39. U.S. CONST. amends. VI & XIV.

40. Higgins v. State, 473 S.W.2d 493 (Tex. Crim. App. 1971); Tilley v. State, 462 S.W.2d 594 (Tex. Crim. App. 1971); Parsley v. State, 453 S.W.2d 475 (Tex. Crim. App. 1970).

41. Under this exception, the driver's out-of-court statement is admissible where it was made contemporaneous to an act that it tends to explain. Staley v. Royal Pines Park, Inc., 202 N.C. 155, 157, 162 S.E. 202, 203 (1932).

42. Parsley v. State, 453 S.W.2d 475, 476 (Tex. Crim. App. 1970); Moore v. State, 440 S.W.2d 643, 645 (Tex. Crim. App. 1969).

43. N.Y. VEH. & TRAF. LAW § 155 (McKinney 1970).

44. People v. Bliss, 53 Misc. 2d 472, 278 N.Y.S.2d 732 (1967).

45. Individual municipal ordinances should be consulted.

code is basically a public welfare standard, violation of which is not a true crime.[46]

The United States Supreme Court has not accepted a case involving the applicability of *Miranda* to misdemeanors, minor offenses, and traffic violations. The Court denied certiorari in *State v. Pyle*,[47] an Ohio case that held *Miranda* inapplicable in misdemeanors. Although denial of certiorari has no conclusive legal effect, it might indicate an attitude on the part of the Court not to interfere with state limitations on *Miranda*. Recent Supreme Court decisions also indicate a narrower view of the self-incrimination clause.[48]

It is questionable whether the state courts have shown a valid reason why the requirement of warnings of constitutional rights set out in *Miranda* should be restricted. Although the Supreme Court has remained silent on the matter, it is judicial precedent that should be applied to all crimes.[49] Any time a defendant is in custody a *Miranda* warning should precede interrogation. Defendant Neal made an incriminating statement without first being fully advised of his constitutional rights. Evidence of this statement should have been excluded at trial.

STEPHEN B. MACDONALD

ENVIRONMENTAL LAW—JUDICIAL REVIEW UNDER THE NATIONAL ENVIRONMENTAL POLICY ACT

Environmental Defense Fund v. Corps of Engineers[1] *(Gilham Dam)*

Construction of the Gilham Dam on the Cossatot River in Arkansas was part of a larger plan known as the Millwood Project. The Project called for the construction of five other dams on other rivers, the completion of which would make the Cossatot the last major free-flowing stream in the Ouachita Mountains of Southeast Oklahoma and Southwest Arkansas, providing natural beauty and a variety of water flow to outdoorsmen. At the time relevant here, the Gilham portion of the project was two-

46. In Missouri, violation of the motor vehicle code is a crime. § 302.340, RSMo 1969. Even if it were not it is unreasonable to classify DWI as noncriminal because the penalty includes possible imprisonment. *See* statute cited note 30 *supra*.

47. 48 Ohio Op. 2d 82, 249 N.E.2d 826 (Sup. Ct.), *cert. denied*, 396 U.S. 1007 (1969).

48. *See* California v. Byers, 402 U.S. 424 (1971); Harris v. New York, 401 U.S. 222 (1971). In *Byers*, the Court upheld a California ruling on the validity of a hit-and-run statute, implying it is permissible to compel an incriminating statement, if done in the name of public policy. *California v. Byers, supra* at 427. In *Harris*, the Court said that a statement, otherwise inadmissible under *Miranda*, was admissible to impeach the credibility of the defendant. *Harris v. New York, supra* at 226.

49. The Arizona courts appear to have reached the conclusion that a *Miranda* warning should be given when the arresting officer lacks personal knowledge of all the elements of the offense. Campbell v. Superior Court, 106 Ariz. 542, 552, 479 P.2d 685, 695 (1971) (dictum); State v. Tellez, 6 Ariz. App. 251, 255, 431 P.2d 691, 695 (1967). This implies, however, that it is permissible to violate the Constitution and not give a warning when the officer has observed all the elements of the offense.

1. 470 F.2d 289 (8th Cir.), *cert. denied*, 409 U.S. 1072 (1972). *aff'g* 325 F. Supp. 728 (E.D. Ark. 1971), 325 F. Supp. 749 (E.D. Ark. 1971), 342 F. Supp. 1211 (E.D. Ark. 1972).

thirds completed and had cost 9.5 million dolars, although work on the dam had not begun.

The Environmental Defense Fund sought to halt construction of the Gilham Dam in a series of actions before the Federal District Court for the Eastern District of Arkansas. It succeeded when the district court issued a temporary injunction halting construction in its fifth memorandum opinion.[2] The court provided that the injunction would be vacated when the defendants, the Corps of Engineers, complied fully with the provisions of the National Environmental Policy Act[3] (hereinafter NEPA) by preparing an Environmental Impact Statement (hereinafter EIS) detailing the environmental consequences of the project and the possible alternatives to the proposed course of action.[4] The court also found that, although construction of the dam would deprive the area of the unique qualities of a free-flowing stream and an abundance of recreational waters were already provided by other dams, the dam would provide needed flood control and water supply benefits.[5] This balancing of interests was irrelevant, however, because the court held that there could be no judicial review of the merits of an agency decision to continue construction of the dam.[6] The defendants thereafter submitted an EIS which complied with the requirements of NEPA and the injunction was vacated.[7] The Eighth Circuit Court of Appeals affirmed, but modified the decision to allow limited review of the merits of agency decisions. Looking at the merits, the court found that the agency decision to complete the dam was not arbitrary or capricious in view of the water supply and flood control benefits. Thus, judicial intervention was unwarranted.[8]

In the National Environmental Policy Act Congress expressed its concern over the federal government's mismanagement of the environment. Section 101 of NEPA[9] provides federal agencies with statutory authority

2. Environmental Defense Fund v. Corps of Engineers, 325 F. Supp. 749 (E.D. Ark. 1971).

3. National Environmental Policy Act of 1969 § 101 (b), 42 U.S.C. § 4331 (1970).

4. Environmental Defense Fund v. Corps of Engineers, 325 F. Supp. 749, 753 (E.D. Ark. 1971).

5. 325 F. Supp. at 745.

6. The court stated:

> Plaintiffs contend that NEPA creates some "substantive" rights in addition to its procedural requirements. . . . [They] claim that [§ 101 of NEPA] creates rights in the plaintiffs and others to "safe, healthful, productive, and aesthetically and culturally pleasing surroundings;" and to an environment which supports diversity and variety of individual choice, ... The court disagrees.

325 F. Supp. at 755.

7. Environmental Defense Fund v. Corps of Engineers, 342 F. Supp. 1211 (E.D. Ark. 1972).

8. Environmental Defense Fund v. Corps of Engineers, 470 F.2d 289, 300-01 (8th Cir. 1972).

9. National Environmental Policy Act of 1969 § 101 (b), 42 U.S.C. § 4331 (b) (1970) provides:

> In order to carry out the policy set forth in this chapter, it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may [preserve and enhance the quality of the environment].

to consider environmental factors in decisions on programs affecting the environment[10] and a national environmental policy to guide their actions.[11] Congress, in section 101, did not establish protection of the environment as an exclusive goal, but instead intended "a reordering of priorities, so that environmental costs and benefits [would] assume their proper place along with other considerations."[12] Thus, section 101 allows agencies discretion in weighing environmental against nonenvironmental factors.[13] Indeed, some courts have found the section so flexible as to preclude judicial review of the merits of agency decisions.[14]

Section 102 of NEPA[15] establishes procedural guidelines for agencies to follow to insure that they consider environmental factors in their decisionmaking process. Section 102 (2) (C) requires the preparation of an EIS for all

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10. *See* Udall v. FPC, 387 U.S. 428 (1967). *See also* Sierra Club v. FPC, 407 U.S. 926, 927 (1972,) *denying cert. to* 453 F.2d 463 (2d Cir. 1971); New Hampshire v. AEC, 406 F.2d 170 (1st Cir.), *cert. denied,* 395 U.S. 962 (1969). *See also* S. Rep. No. 296, 91st Cong., 1st Sess. 9 (1969).

11. S. Rep. No. 296, 91st Cong., 1st Sess. 5 (1969) states:

> As a result of this failure to formulate a comprehensive national policy, environmental decision making largely continues . . . as it has in the past. Policy is established by default and inaction. Environmental problems are only dealt with when they reach crisis proportions . . . . Important decisions concerning the use and shape of man's future environment continue to be made in small but steady increments which perpetuate rather than avoid the recognized mistakes of previous decades.

12. Calvert Cliffs' Coordinating Comm. v. AEC, 449 F.2d 1109, 1112 (D.C. Cir. 1971).

13. *Id.*

14. National Helium Corp. v. Morton, 455 F.2d 650 (10th Cir. 1971); Conservation Council of North Carolina v. Froehlke, 340 F. Supp. 222 (M.D.N.C. 1972), *rev'd per curiam,* 473 F.2d 664 (4th Cir. 1973); Environmental Defense Fund v. Corps of Engineers, 325 F. Supp. 749 (E.D. Ark. 1971), *rev'd,* 470 F.2d 289 (8th Cir. 1972).

15. National Environmental Policy Act of 1969 § 102, 42 U.S.C. § 4332 (1970) (emphasis added) provides:

> The Congress authorizes and directs that, *to the fullest extent possible:* (1) the policies, regulations, and public laws of the United States *shall* be intrepreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall—
>
> (A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment;
>
> (B) identify and develop methods and procedures . . . which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decision making along with economic and technical considerations;
>
> (C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—
>
> (i) the environmental impact of the proposed action, (ii) any adverse environmental effects . . . (iii) alternatives to the proposed action . . . . Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. . . .
>
> (D) study, develop, and describe appropriate alternatives to recommended courses of action . . . .

programs significantly affecting the quality of the human environment.[16] Unlike the discretionary provisions of section 101, the guidelines of section 102 require strict compliance.[17]

A threshold question is whether NEPA applies retroactively to agency programs begun before its enactment.[18] Courts have taken four approaches to this issue. Some courts, applying a presumption against retroactive legislation, have found no explicit Congressional intent to apply NEPA retroactively and hence have not required that pre-existing programs comply with NEPA.[19] Other courts have refused to apply NEPA to pre-existing programs if private contracts had been let before the effective date of the act.[20] A third approach is to apply NEPA to pre-existing projects only if "practicable."[21] The district court in *Gilham Dam* illustrates the fourth approach, holding that Congress intended not only that new programs be required to comply with NEPA, but that all existing programs be improved and upgraded "regardless of how much money has already been spent thereon and regardless of the degree of the completion of the work."[22] The court of appeals denied the Corps of Engineers' contention that the Gilham Dam project should be exempt from NEPA.[23]

The substantive issue that *Gilham Dam* dealt with is the scope of judicial review of agency action to determine if it complied with NEPA. Judicial review is relevant in three contexts: 1) whether the procedures adopted by the agency for preparation of the EIS comply with NEPA; 2) whether the agency's procedure in reaching a decision assures either the full, good faith consideration of environmental factors or an opportunity for such consideration as required by NEPA; and 3) whether the agency's substantive decision is clearly erroneous in view of the environmental goals of the act.

The procedural requirements relating to the EIS contained in section 102 (2) (C) of NEPA have been strictly enforced[24] and noncomplying pro-

16. *See* statute quoted note 15 *supra.*

17. Calvert Cliff's Coordinating Comm. v. AEC, 449 F.2d 1109, 1114 (D.C. Cir. 1971). Congress recognized that enforcement in specific situations would be difficult. Nevertheless

> [NEPA] incorporates certain "action-forcing" provisions and procedures which are designed to assure that all Federal agencies plan and work toward the challenge of a better environment.
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> S. Rep. No. 296, 91st Cong., 1st Sess. 9 (1969).

18. In *Gilham Dam* the Corps of Engineers contended that NEPA should not be retroactively applied to the Millwood Project. Environmental Defense Fund v. Corps of Engineers, 325 F. Supp. 749, 756-57 (E.D. Ark. 1971).

19. Elliot v. Volpe, 328 F. Supp. 831 (D. Mass. 1971); Brooks v. Volpe, 319 F. Supp. 90 (W.D. Wash. 1970), *rev'd,* 460 F.2d 1193 (9th Cir. 1972); Investment Syndicates, Inc. v. Richmond, 318 F. Supp. 1038 (D. Ore. 1970).

20. *See* Pennsylvania Environmental Council, Inc. v. Bartlett, 454 F.2d 613 (3rd Cir. 1971); *cf.* Greene County Planning Bd. v. FPC, 455 F.2d 412 (2d Cir. 1972). These courts reason that federal action was substantially complete before the effective date.

21. Environmental Law Fund v. Volpe, 340 F. Supp. 1328 (N.D. Calif. 1972). The court did not define the term "practicable."

22. 325 F. Supp. at 746.

23. 470 F.2d at 296.

24. Calvert Cliffs' Coordinating Comm. v. AEC, 449 F.2d 1109, 1112 (D.C. Cir. 1971).

grams halted by injunction.[25] Although NEPA requires the agency to seek the advice of other federal authorities with jurisdiction or particular expertise,[26] the agency must issue its own EIS.[27] The statement must be prepared prior to any formal hearings,[28] and it must disclose all possible environmental consequences, even those that the agency believes insignificant or improbable.[29]

A second aspect of judicial review under NEPA is whether, assuming it adequately prepares an EIS, the agency actually considers its contents in reaching a decision.[30] Some courts have construed the procedural requirements of NEPA as compelling actual consideration of environmental factors in the agency's decision-making process apart from the preparation of the EIS. In *Calvert Cliffs' Coordinating Commission v. AEC*,[31] the court held that section 102(2)(C)[32] indicated "a congressional intent that environmental factors . . . be *considered* through the agency process."[33] The court also held that sections 102(2)(A) and (B) required a balancing of environmental costs against economic and technical benefits in every instance, indicating that agency decisions reached without consideration and balancing of environmental factors would be reversed.[34] The *Gilham Dam* court cited *Calvert Cliffs* with approval, stating that "[t]he unequivocal intent of NEPA is to require agencies to consider . . . environmental goals . . . not just to file detailed impact studies which will fill governmental

25. Environmental Defense Fund v. Froehlke, 477 F.2d 1033, 1037 (8th Cir. 1973); Calvert Cliffs' Coordinating Comm. v. AEC, 449 F.2d 1109, 1112 (D.C. Cir. 1971); Administrative Procedure Act § 10(e), 5 U.S.C. § 706(2)(D) (1970).

26. *See* National Environmental Policy Act of 1969 § 102(2)(C)(iii) 42 U.S.C. § 4332(2)(C) (1970), quoted in note 15 *supra*.

27. Greene County Planning Bd. v. FPC, 455 F.2d 412 (2d Cir. 1972). In a proceeding considering an application for construction of a high voltage powerline, the FPC substituted the EIS of the applicant for its own. The court said:

> The danger of this procedure, and one obvious shortcoming, is the potential, if not likelihood, that the applicant's statement will be based on self-serving assumptions. . . . [while] intervenors generally have limited resourses, both in terms of money and technical expertise, and thus may not be able to provide an effective analysis of environmental factors.

Id. at 420.

28. *Id.* at 419.

29. 325 F. Supp. at 759. The EIS should not be limited to consideration of traditional areas of consideration involving tangible, measurable factors, but should also consider such intangible, immeasurable factors as aesthetics and psychological impact. Hanly v. Mitchell, 460 F.2d 640 (2d Cir. 1972). In addition to considering environmental impact and alternatives in the light of present circumstances, the EIS should consider likely future developments. Greene County Planning Bd. v. FPC, 455 F.2d 412, 424 (2d Cir. 1972).

30. An agency may have a longstanding practice of excluding environmental factors from consideration and of dealing with particular situations in particular ways. *See* Liroff, *Administrative, Judicial, and Natural Systems: Agency Response to the National Environmental Policy Act of 1969*, 3 LOYOLA U.L.J. 19, 27 (1972). Good faith consideration of environmental factors may be avoided in cases where it could result in project abandonment or threaten the job security of agency employees and decisionmakers.

31. 449 F.2d 1109 (D.C. Cir. 1971).

32. *See* statute quoted note 15 *supra*.

33. Calvert Cliffs' Coordinating Comm. v. AEC, 449 F.2d 1109, 1117-18 (D.C. Cir. 1971).

34. *Id.* at 1115.

archives."[35] Other courts, however, have held that NEPA requires only that the agency procedures provide an adequate *opportunity* to consider environmental factors.[36]

Where the agency's prescribed procedures make the lack of opportunity for consideration of environmental factors apparent,[37] the courts have reversed agency decisions or have required substitute procedures.[38] But where the prescribed procedure is adequate the courts are reluctant to look at the agency's actual practice to determine if there was in fact good faith consideration of environmental factors. For example, courts have been reluctant to undertake evidentiary hearings to determine such matters of compliance as whether the EIS was read fully or the environmental consequences discussed adequately. Thus, formal administrative findings that purport to give full consideration to environmental factors will probably preclude further judicial inquiry.[39] Affidavits prepared for litigation after the project commences will not, however.[40] Where there is strong evidence of bad faith[41] or improper behavior, effective judicial review may require an evidentiary hearing and cross-examination of the decision-makers themselves.[42]

Some courts have gone beyond review of the agency's decision-making process and procedures and have reviewed the merits of the agency's decision.[43] *Gilham Dam* held that Congress intended NEPA to be more than

35. 470 F.2d at 298.

36. *See* National Helium Corp. v. Morton, 455 F.2d 650 (10th Cir. 1971); Conservation Council of North Carolina v. Froehlke, 340 F. Supp. 222 (M.D.N.C. 1972), *rev'd per curiam,* 473 F.2d 665 (4th Cir. 1973).

37. *See* Calvert Cliffs' Coordinating Comm. v. AEC, 449 F.2d 1109 (D.C. Cir. 1971) (agency rules precluded review of certain environmental factors unless specifically raised). Courts have also considered whether the *actual operation* of agency procedure fails to provide adequate opportunity for consideration of environmental factors. *See Id.* at 1128, noting that if agency procedure forstalled consideration of environmental factors until after construction, alteration costs would be high and consideration of the ecological factors would become a "hollow exercise." *See also* Sierra Club v. FPC, 407 U.S. 926 (1972) (dissenting opinion); Greene County Planning Bd. v. FPC, 455 F.2d 412 (2d Cir. 1972).

38. Greene County Planning Bd. v. FPC, 455 F.2d 412 (2d Cir. 1972) (challengers of contemplated agency action must be given an opportunity to cross-examine agency witnesses as to the EIS). *See* Administrative Procedure Act § 10 (e), 5 U.S.C. § 706 (1970).

39. *See* United States v. Morgan, 313 U.S. 409 (1941).

40. Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971).

41. In a subsequent opinion, the *Gilham Dam* court rejected plaintiff's claim that the institutional bias alone of the Corps of Engineers made the EIS defective and held that NEPA required only good faith objectivity, not subjective impartiality. 342 F. Supp. at 1222-23.

42. *See* Citizens to Perserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 420 (1971) (dictum) & case cited note 38 *supra.*

43. *See* cases cited note 37 *supra.* Other courts have held that the substantive merits of agency decisions are not judicially reviewable. *See* National Helium Corp. v. Morton, 455 F.2d 650 (10th Cir. 1971); Conservation Council of North Carolina v. Froehlke, 340 F. Supp. 222 (M.D.N.C. 1972), *rev'd per curiam,* 473 F.2d 665 (4th Cir. 1973); Environmental Defense Fund v. Corps of Engineers, 325 F. Supp. 749 (1971), *rev'd,* 470 F.2d 289 (8th Cir. 1972). These courts read § 101 (b) (quoted note 9 *supra)* as a statement of Congressional policy and not an intention to limit the authority of any agency or to create any judicially enforceable rights.

an environmental full-disclosure law; the act was intended to effect substantive changes in decision-making and require agencies to implement its environmental goals.[44] The court concluded that agency decisions were subject to a limited substantive review and would be overturned if arbitrary, capricious, or clearly inolving an error in judgment.[45]

Each of the three aspects of judicial review discussed above seeks to effect the goal of NEPA—federal agency consideration of environmental factors in decision-making. Whether the courts view that goal as mandatory or discretionary will affect the type of review exercised. Procedural review can only assure that environmental factors will be brought to the agency's attention. Substantive review of agency decisions is the only practical means of assuring actual consideration and therefore best promotes the goal of NEPA. *Gilham Dam* furthers that goal by recognizing the need for substantive review, albeit a limited one.

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EVIDENCE—INADMISSIBILITY OF VICTIM'S PRIOR VIOLENT ACTS TO SHOW DEFENDANT'S APPREHENSION—A RULE WITHOUT REASON

State v. Nelson[1]

On July 20, 1970, defendant, Richard Nelson, struck his former employer, Mr. Elmer Howe, on the head with a ballpeen hammer. Subsequently, defendant was convicted of assault with intent to kill without malice aforethought. At trial, defendant contended that he had struck Mr. Howe in self-defense. In support of this contention, defendant offered testimony of a third party that Mr. Howe had previously "used a knife" on him (the third party), and that the defendant was informed of this fact. From this testimony, defendant sought to show that he struck Mr. Howe out of fear of danger to his life or of great bodily harm. The trial court refused this offer of evidence. On appeal, the Missouri Supreme Court affirmed, holding as follows:

> [T]he general rule, and the rule recognized in this State, is that "the reputation or character of the person killed [or assaulted]

The compromise between the House and Senate versions rejected language arguably more consistent with the creation of substantive rights. *See* H. Rep. No. 765, 91st Cong., 1st Sess. 8 (1969).

44. 470 F.2d at 298-300.

45. *Id.* The court noted that agency action is subject to review under the Administrative Procedure Act except where there is a statutory prohibition on review or where agency action has been committed to agency discretion by law, the latter exception being narrowly construed. *Id.* at 298-99 n.14. Although NEPA does not mention judicial review, the court said that "the prospect of substantive review should improve the quality of agency decisions and should make it more likely that the broad purposes of the NEPA will be realized." *Id.* at 299. Environmental Defense Fund, Inc. v. Froehlke, 473 F.2d 346 (8th Cir. 1972).

1. 484 S.W.2d 306 (Mo. 1972).

for turbulence and violence cannot be established by proof of specific acts of violence on his part against persons other than the defendant."[2]

The court did not elaborate on this statement.

A defendant might offer evidence of a victim's prior violent acts for two different purposes in support of his claim of self-defense.[3] One purpose would be to show that the victim had a violent character and hence is more likely to have been the aggressor,[4] a fact essential to a successful claim of self-defense.[5] A majority of jurisdictions refuse to admit evidence of prior violent acts on persons other than the defendant when offered for this purpose, reasoning that the probative value of such evidence is outweighed by other considerations.[6] It has been thought that admission of the evidence is unduly time consuming and confuses the jury by focusing their attention on collateral issues.[7] To be relevant to show character, each of the prior acts must be true. The jury, therefore, could be required to decide the facts of several different episodes in addition to the one on trial. Balanced against these considerations is the relatively weak inference that one who has been violent in the past was the aggressor in a particular case. Thus most courts, including Missouri, refuse to admit evidence of prior violent acts to show that the victim was the aggressor; they do, however admit general character evidence for this purpose.[8]

In addition to showing who was the probable aggressor, evidence of the victim's past violent acts, known to the defendant, as in *Nelson*,[9] is relevant in determining the reasonableness of the defendant's apprehension of danger.[10] A majority of jurisdictions admit the evidence when offered

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2. *Id.* at 308, *quoting* State v. Hicks, 438 S.W.2d 215, 219 (Mo. 1969).

3. The principles of relevancy discussed in this note apply with equal force whether the defendant is charged with homicide or assault. *See* 2 J. WIGMORE, EVIDENCE § 248, at 65 (3d ed. 1940).

4. The evidence is relevant when offered for this purpose. 1 J. WIGMORE, *supra* note 3, §§ 63, 198.

5. *See* 40 AM. JUR. 2D *Homicide* § 145, at 433 n.13 (1968).

6. State v. Cavenor, 356 Mo. 602, 611, 202 S.W.2d 869, 874 (1947); 40 AM. JUR. 2D *Homicide* § 306, at 574, n.14 (1968). *But cf.* State v. Creighton, 330 Mo. 1176, 1198, 52 S.W.2d 556, 564 (1932), holding admissible evidence of the victim's previous hostile acts where they were so close in time to the main incident that it was likely they continued until that time.

7. 40 AM. JR. 2D *Homicide* § 306, at 574 n.13 (1968).

8. This is an exception to the general rule that character evidence is inadmissible to show conduct consistent with that character. Witnesses can testify only as to their knowledge of the victim's reputation in the community, not as to their own opinion of the victim or as to any specific acts. 40 AM. JUR. 2D *Homicide* § 306, at 574 n.11 (1968).

9. 484 S.W.2d at 308.

10. Use of deadly force in self-defense is generally justified if it is actually or apparently necessary to save the defendant from imminent death or great bodily harm. See 40 AM. JUR. 2D *Homicide* § 151, at 439 n.11 (1968).

Admission of such evidence is not inconsistent with the general rule that character evidence is inadmissible to show conduct consistent with that character because the evidence is not offered to prove anything about the victim's conduct; it is offered only to prove the effect on the defendant of his belief that the victim has been violent in the past.

for this purpose.[11] In this situation, the probative value of the evidence is greater because the inference it permits is stronger. Thus, it is more persuasive to reason that prior violent acts of the victim, known to the defendant, in fact made the defendant apprehensive of danger than it is to suggest that simply because the victim has been violent in the past, he was in fact the aggressor in the instant case. Also, the evidence is less confusing to the jury. The jury need only consider how belief of a victim's prior violent acts affects the defendant's state of mind[12] (by considering how it would affect their own), as opposed to speculating on how such acts reflect the victim's character and whether one with such a character is more likely than another to be an aggressor.[13] Further, the jury need not decide if the evidence is true;[14] the mere fact that the defendant believed it makes it relevant.

State v. Hicks[15] (hereinafter *Hicks I*) was the first Missouri case to consider the relevance and materiality of evidence of a victim's violent character to show defendant's apprehension of danger. In that case there was evidence of the decedent's violent character in the trial record, but the case report does not disclose whether it was of general reputation or prior specific acts. An issue was whether the trial court erred in refusing to instruct the jury that they should consider the defendant's knowledge of the decedent's violent character in appraising the reasonableness of the defendant's act.[16] The Missouri Supreme Court reasoned as follows:

> The menacing attitude of a person generally peaceable and law-abiding would often excite no just apprehension of danger, whilst similar conduct of a fierce, vindictive and passionate man would naturally alarm our fears and make us prompt in anticipating his purpose. When danger is threatened and impending we are not compelled to stand with our arms folded until it is too late to strike, but the law permits us to act on reasonable fear; and therefore when the killing has been under circumstances that create a

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11. *See, e.g.,* Holt v. State, 170 Tenn. 76, 88-90, 92 S.W.2d 397, 400-01 (1936); Dempsey v. State, 159 Tex. Crim. 602, 606-07, 266 S.W.2d 875, 877 (1954); 40 AM. JUR. 2D *Homicide* § 306, at 575 n.17, 18 (1968). According to Wigmore, '[t]he state of the law as a whole has come to favor the admissibility of such facts." 2 J. WIGMORE, *supra* note 3, § 248, at 62.

In some jurisdictions a foundation must be laid before evidence of the victim's prior hostile acts is admissible to show defendant's reasonable apprehension. This foundation consists of some evidence of an initial overt hostile act by the victim. The justification for this requirement is that if there is no such evidence of an overt hostile act by the victim, then self-defense cannot be submitted to the jury anyway. *See* 2 J. WIGMORE, *supra* note 3, § 246 (1)a, at 46, 47; 40 AM. JUR. 2D *Homicide* §§ 303-04, at 571,72.

12. *See, e.g.;* State v. Jackson, 94 Ariz. 117, 121, 382 P.2d 229, 231 (1963).

13. 2 J. WIGMORE, *supra* note 3, § 248, at 63-64.

14. *See, e.g.,* State v. Jackson, 94 Ariz. 117, 382 P.2d 229 (1963).

15. 27 Mo. 588 (1859).

16. *Id.* at 590. The instruction in question read as follows:

> If the jury believe from the evidence that the deceased was of rash, turbulent and violent disposition, and that the defendant had knowledge of such disposition, then it is a circumstance for the consideration of the jury in considering the reasonable cause for defendant's apprehension of great personal injury to himself.

Id.

> doubt as to whether the act was committed in malice, or from a sense of real danger, the jury have the right to consider *any testimony* that will explain the motive that prompted the accused.[17]

Thus, the court recognized that the defendant's knowledge of the victim's violent character is material in determining the reasonableness of defendant's apprehension of danger.[18] Further, the use of "any testimony" to prove the victim's violent character could include prior specific acts of violence. Yet, no Missouri court has since used *Hicks I* as authority for admitting evidence of a victim's prior violent acts (against a third person) to show that defendant's apprehension was reasonable.

In *State v. Elkins*,[19] the court held that the victim's prior threats to kill the defendant, unknown to the defendant, were admissible to show the victim was the aggressor.[20] But the court refused to allow evidence of particular character traits of the victim to prove the defendant's reasonable apprehension, saying that such proof is limited to general character evidence.[21] The court gave no reason or authority for this statement. The Missouri cases between *Elkins* and *Nelson* dealing with prior violent acts of an assaulted victim are similarly unrevealing.[22]

One reason Missouri does not recognize the majority rule may be that our courts have not distinguished the two purposes for which evidence of prior violent acts may be offered.[23] As noted above, most jurisdictions admit such evidence to show the reasonableness of the defendant's apprehension;[24] but not to show that the victim was the aggressor.[25] In *Nelson*, the evidence was offered for the former purpose. The court, however, cited two cases in support of its holding without considering the purpose for which the evidence was offered in either case. In one, *State v. Hicks*[26] (hereinafter *Hicks II*), that purpose is unclear. The defendant, charged with murder, offered evidence that the decedent had been arrested 47 times. The court upheld the trial court's refusal of this offer, stating simply that it was fol-

17. *Id.* at 590-91 (emphasis added). Quesenberry v. State, 3 Stew. & Port. 308, 316 (Ala. 1833), cited as authority for the holding in *Hicks I*, supports the proposition that the victim's specific acts of violence are admissible to show the reasonableness of defendant's apprehension.

18. It is unclear whether the defendant in *Hicks I* asserted a claim of self-defense, or wanted the evidence of the victim's violent character considered to negative the element of malice. For purposes of the present discussion it makes no difference; in both cases the evidence is relevant (or not relevant) for the same reason, *i.e.*, it shows how defendant's knowledge affected his state of mind.

19. 63 Mo. 159 (1876).

20. *Id.* at 164-65.

21. *Id.* at 165.

22. An early line of Missouri cases held that even *general* character evidence is inadmissible to show that decedent was the likely aggressor, unless such character was known to the defendant. The defendant's knowledge is totally irrelevant for this purpose. Wigmore states, "it is strange that the Missouri Court is unable to see the point." 1 J. WIGMORE, *supra* note 3, § 63, at 469 n.1.

23. State v. Wilson, 250 Mo. 323, 329-30, 157 S.W. 313, 315-16 (1913) is one of the few Missouri cases which discusses the two ways such evidence is relevant. The case is well reasoned, but deals with prior violent acts of a deceased against defendant himself.

24. *See* authorities cited note 11 *supra*.

25. *See* authorities cited note 6 *supra*.

26. 438 S.W.2d 215 (Mo. 1969).

lowing the general rule. Although the defendant did know of the victim's general reputation for violence, the opinion is unclear whether he knew of his victim's previous arrests.[27] Therefore, the defendant's knowledge was probably not an important fact.[28] Because the defendant's knowledge of the arrests is important only if the evidence is offered to show his state of mind, it is likely that the evidence was offered to prove that the victim was the aggressor.[29] *Hicks II* probably supports *Nelson* only if the distinction between the purposes for which the evidence is offered is ignored.

In the other case cited in *Nelson, State v. Duncan,*[30] the defendant did not know of the victim's prior violent acts at the time of the homicide.[31] Thus, evidence of them could not have been offered to prove the reasonableness of the defendant's apprehension.[32]

It is submitted that the different purposes for which evidence of a victim's prior violent acts may be offered require different rules of admissibility. The rule that such specific acts are inadmissible regardless has never been carefully examined or justified in a Missouri opinion. When the evidence is offered to show the defendant's apprehension of danger, its probative value is greater and the counterveiling considerations weaker than when offered to show the victim is the aggressor.[33] Missouri decisions have not recognized this, and have assumed that the general rule is the same regardless of the purpose for which the evidence is offered. Missouri should align itself with the majority position.[34] To quote from *Hicks I,* "When danger is threatened and impending we are not compelled to stand with our arms folded until it is too late to strike, but the law permits us to act on reasonable fear . . . ."[35]—or does it?

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27. *Id.* at 218.

28. That the defendant had known the victim only two days increases the probability that the defendant did not know of the arrests.

29. The mere fact that one has to guess at such a vital fact may indicate the court was not aware that such evidence can be offered for two separate purposes.

30. 467 S.W.2d 866 (Mo. 1971).

31. *Id.* at 868.

32. The court in *Nelson* cited a third case, State v. Smart, 328 S.W.2d 569 (Mo. 1959), in which the court stated that prior violent acts of a decedent are inadmissible to show that he had a violent disposition. The statement is dicta, however, because at trial the defendant offered no evidence of the victim's violent character.

33. *See* p. — *supra.*

34. *See* authorities cited note 11 *supra.*

35. 27 Mo. 590, 591 (1859).

INCOME TAXATION—TREATMENT OF PAYMENTS BY EMPLOYER TO EMPLOYEE'S WIDOW

Estate of Carter v. Commissioner[1]

Sydney Carter was employed for 38 years by Salomon Bros. & Hutzler [hereinafter Salomon Bros.], a partnership engaged in the brokerage business. At the time of his death on March 1, 1960, Carter was working under a yearly employment contract entitling him to a $15,000 annual salary plus a percentage of the firm's net profits provided he was still employed by the firm on September 30, 1960. Salomon Bros. had no policy or practice of making payments to survivors of valued employees, nor was it obligated to make such payments. Nevertheless, the firm, pursuant to a decision of its administrative committee, made payments to Mrs. Carter of $60,130.84, the amount her husband would have earned under the contract had he lived until September 30. Payment was made even though Carter had been fully compensated for his services at his death.

Minutes of the committee meeting at which the payments were authorized were not kept. Two committee members testified, however, that they felt sympathy for the widow and that the payments would not have been made if Carter had not been survived by a wife and son. Although the committee made no investigation or inquiry into the widow's financial condition before deciding to make the payments, several of the committee members knew that Carter had been hospitalized 20 times during his employment. In fact, on several of those occasions they had offered financial assistance to Mrs. Carter.[2]

Salomon Bros. did not withhold any income or social security taxes from the payments to Mrs. Carter, nor did it deduct the payments on its tax return as compensation.[3] On her 1960 joint tax return, Mrs. Carter did not report as income the $60,130.84 received from the firm. The Commissioner of Internal Revenue assessed a deficiency, contending the payments were compensation.[4] On the basis of all the surrounding facts and circumstances, the Tax Court held that Salomon Bros. intended the payments to be compensation under section 61 (a) of the Internal Revenue

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1. 453 F.2d 61 (2d Cir. 1971).

2. *Id.* at 62-63. Thus, the committee's failure to inquire further into the widow's financial condition (*see* text accompanying notes 40 and 48 *infra*) is insignificant.

3. The Tax Court in *Carter* found that the payments were deducted by Salomon Bros. in the partnership tax return for its 1960 fiscal year; the Internal Revenue Service, however, had disallowed the deduction. At the time *Carter* was decided, Salomon Bros. had filed a refund suit in the United States Court of Claims. *Estate of Carter,* 29 CCH Tax Ct. Mem. 1407, 1408 (1970), *rev'd,* 453 F.2d 61 (2d Cir. 1971). The court of appeals noted that the partnership had filed "an information return (Form 1099) describing the payments representing what would have been Carter's percentage share of the profits as 'salaries, fees, commissions or other compensation.'" But, because there was testimony that the firm would not deduct the payments as wages, the information return was not in the record, and the Commissioner did not claim that the payments were deducted as compensation. The court assumed, for purposes of the appeal, that the payments were not deducted by Salomon Bros. as wages. 453 F.2d at 63-64.

4. *Id.*

Code of 1954.[5] On appeal, the Second Circuit Court of Appeals reversed, holding that the payments were gifts and thus were excludible under section 102 (a).[6]

Section 61 (a) provides that gross income shall include all income from whatever source derived, including compensation for services. Section 102 (a) provides that gross income shall not include the value of property acquired by gift.[7] Thus, the issue in *Carter* was whether an employer's payment to the employee's widow constituted a gift or compensation for the deceased employee's services. The resolution of this issue depends on the interpretation and application of section 102. The legislative history of section 102 is not helpful in that regard.[8]

Courts agree that the transferor's intent determines whether a payment constitutes compensation or a gift.[9] But because this test is purely subjective, it provides an unworkable standard.[10] Thus, the courts have had to establish objective criteria for ascertaining the transferor's intent. Further, they have had to determine the extent to which an appellate court may substitute its judgment for that of the trier of fact on the question of the transferor's intent.

Between 1924 and 1937,[11] the Board of Tax Appeals and the lower federal courts developed various guidelines for determining whether payments made by corporations to employees or former employees were compensation or gifts. Although there was considerable disagreements among the courts as to what standards or principles were to be used and what factors were relevant, the popular position seemed to be that gifts could not be made in a business context.[12] In *Noel v. Parrott*,[13] the court noted that the directors were without authority to give away the corporate assets and thus held that they could not have intended the payment as a

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5. Estate of Carter, 29 CCH Tax Ct. Mem. 1407 (1970), *rev'd*, 453 F.2d 61 (2d Cir. 1971). Unless otherwise indicated, all textual references to sections are to the INT. REV. CODE of 1954.

6. 453 F.2d at 70.

7. Section 101 (b) excludes from gross income amounts, not exceeding $5,000, received by the beneficiaries or the estate of an employee if such amounts are paid by reason of the death of the employee. Section 101 (b) does not apply to gifts, the entire value of which is excluded from gross income by §102. *See* Duberstein v. Commissioner, 363 U.S. 278 (1960); Bogardus v. Commissioner, 302 U.S. 34 (1937); United States v. Frankel, 302 F.2d 666 (8th Cir.), *cert. denied*, 371 U.S. 903 (1962); Wilner v. United States, 195 F. Supp. 786, 787-90 (S.D.N.Y. 1961); Cowan v. United States, 191 F. Supp. 703, 705 (N.D. Ga. 1960); Reed v. United States, 177 F. Supp. 205 (W.D. Ky. 1959), *aff'd per curiam*, 277 F.2d 456 (6th Cir. 1960).

8. Duberstein v. Commissioner, 363 U.S. 278, 284 (1960). For a further discussion of the legislative history, see Klein, *An Enigma in the Federal Income Tax: The Meaning of the Word "Gift"*, 48 MINN. L. REV. 215 (1963).

9. Duberstein v. Commissioner, 363 U.S. 278, 284 (1960); Bogardus v. Commissioner, 302 U.S. 34, 43 (1937).

10. Crown, *Payments to Corporate Executives' Widow*, N.Y.U. 19th INST. ON FED. TAX 815 (1961); Yohlin, *Payments to Widows of Employees*, 40 TAXES 208 (1962).

11. The first reported case dealing with the definition of "gift" was John H. Parrott, 1 B.T.A. 1 (1924), *aff'd*, 15 F.2d 669 (4th Cir. 1926).

12. But *see* Blair v. Rosseter, 33 F.2d 286 (9th Cir. 1929).

13. 15 F.2d 669 (4th Cir. 1926).

gift. In *Ira A. Kip*,[14] the Board of Tax Appeals relied on the assumption that corporations normally expect some benefit or return from any payment and said that corporations do not make gifts in the ordinary sense. Other cases relied heavily on contemporaneous statements or resolutions to determine the transferor's state of mind. Thus, courts frequently held a payment to be compensation where the employer had declared that it was in recognition of past services, even though the employer was under no obligation to make the payment.[15]

In 1937, the Supreme Court partially resolved the conflict among the lower courts in *Bogardus v. Commissioner*.[16] Although the Court failed to clarify the meaning of the term "gift," it did reject the restrictive approach, described above, by recognizing that a gift could be made in a business context. The Court stated that "a gift is none the less a gift because inspired by a gratitude for the past faithful service of the recipient."[17]

The Court also established basic criteria that a payment must meet in order to qualify as a gift: (1) The transfer must not be motivated by a legal or moral obligation; (2) it must not be a payment for services, past or future; and (3) there must be no expectation that gain will be derived from the payment.[18] However, the Court also said that a payment merely in recognition of past services was not compensation for those past services, thus establishing that the employer's characterization of the payment is not controlling. The Court's approach was to determine the underlying motives for making the payments.[19]

More significantly, the Court concluded that the determination of the employer's intent was "a conclusion of law or at least a determination of a mixed question of law and fact. . . . It is subject to judicial review and, on such review, the court may substitute its judgment for that of the board."[20] A strong dissent argued that the determination of intent was for the trier of fact, and "[i]f there was opportunity for opposing inferences, the judgment of the [trier of fact] controls."[21]

Following the *Bogardus* approach, the lower federal courts established objective criteria for the classification of payments to widows of corporate employees. The Tax Court in *Estate of Arthur W. Hellstrom*[22] held that the intent to make a gift was established upon proof that: (1) The payment was made directly to the widow rather than to the estate; (2) the decedent had been fully compensated at his death; (3) the company making the payment realized no economic benefit as a result of making the payment; and (4) the widow performed no services for the corporation.[23]

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14. 3 B.T.A. 50 (1925).
15. Hall v. Commissioner, 89 F.2d 441 (4th Cir. 1937); Simpkinson v. Commissioner, 89 F.2d 397 (5th Cir. 1937); Bogardus v. Helvering, 88 F.2d 646 (2d Cir.), *rev'd sub nom.* Bogardus v. Commissioner, 302 U.S. 34 (1937).
16. 302 U.S. 34 (1937).
17. *Id.* at 44.
18. *Id.* at 41.
19. *See id.* at 43.
20. *Id.* at 39, *quoting from* Helvering v. Tex-Penn Oil Co., 300 U.S. 481, 491 (1937).
21. *Id.* at 45.
22. 24 T.C. 916 (1955).
23. *Id.* at 920.

Except for the requirement that the payment be made directly to the widow,[24] both the federal district courts and the Tax Court employed this same basic approach. Under the watchful eye of appellate courts employing the *Bogardus* scope of review, some consistency in the interpretation and application of section 102 existed for the first time.

The Supreme Court's decision in *Duberstein v. Commissioner*[25] brought and end to this consistency. The Court in *Duberstein* considered whether a corporate payment to a business associate constituted a gift.[26] The Commissioner advocated a new test that would have disallowed gift treatment for payments made in a business context. Although the Supreme Court rejected this test,[27] it did review the law in this area. First, the Court restated the basic criteria set forth in *Bogardus* for determining whether a payment made in a business setting is a gift.[28] Second, the Court reaffirmed the *Bogardus* rule that the dominant intent of the transferor is controlling, but further qualified this rule by requiring that in order for the payment to be a gift "the dominant reason that explains [the transferor's] action in making the transfer" must be a "detached and disinterested generosity, out of affection, respect, admiration, charity or like impulses."[29] Third, the Court said that Congress did not use the word "gift" in section 102 in the common law sense.[30] Instead, Congress used the term in a more "colloquial" sense, such that the meaning must be determined by the image the word evokes in the mind of the average man. In other words, the standard is established by examining one's own reaction and experiences.[31] Finally, adopting the approach espoused by the dissenting opinion in *Bogardus,* the *Duberstein* Court held that the determination of whether a gift had been made was primarily one of fact. The Court reasoned that the non-technical nature of the applicable standard and the differing factual situations of each case demand that primary weight be given to findings of the trier of fact.[32]

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24. The Tax Court later said that the fact that the employer made the payment to the estate was not, by itself, sufficient to compel the conclusion that the payment was compensation rather than a gift. *See* Estate of Frank J. Foote, 28 T.C. 547 (1957).

25. 363 U.S. 278 (1960).

26. *Id.* In *Duberstein,* the taxpayer agreed to provide the names of potential customers to a business corporation. The corporation reciprocated by giving the taxpayer a Cadillac, the value of which the taxpayer did not include in his gross income for 1951. The Court, in an 8-1 decision, held that the value of the automobile was taxable income. Although the case did not involve payments to an employee's widow, it applies to that situation because it establishes the guiding principles for determining what constitutes a gift under § 102.

27. *Id.* at 287-89.

28. *See* text accompanying note 18 *supra.*

29. 363 U.S. at 285 (citations omitted).

30. *Id.* Although it has been argued that in saying this the Court made a considerable departure from the previous law, it is clear that the Court intended no drastic change, because (1) the Court refused to adopt a new test and (2) the Court stated that the governing principles "are necessarily general and have already been spelled out in the opinions of this Court." *Id.* at 284.

31. Klein, *An Enigma in the Federal Income Tax: The Meaning of the Word "Gift",* 48 MINN. L. REV. 215 (1963).

32. Duberstein v. Commissioner, 363 U.S. 278, 289-90 (1960). § 7482(a) provides

Justice Frankfurter, in a concurring opinion, criticized the limited appellate review approach adopted by the majority. He warned that this approach would result in inconsistent decisions among the courts under section 102.[33]

As the cases in the Tax Court and federal district courts subsequent to *Duberstein* indicate, Justice Frankfurter's fears were justified. The Tax Court, conscious of the limited appellate review and apparently relying on the Supreme Court's presumably narrower "colloquial" meaning of "gift," viewed *Duberstein* as a substantial change in the gift-income law.[34] As a result, the Tax Court, which had previously held gratuitious employee death benefits to be tax-free under *Hellstrom,* began treating such payments as taxable compensation for the services of the decedent.[35]

> The United States Courts of Appeals shall have exclusive jurisdiction to review the decisions of the Tax Court . . . in the same manner and to the same extent as decisions of the district courts in civil actions without a jury . . . .

The purpose of this legislation was to remove the favored position of the Tax Court in terms of scope of appellate review created by the Court's ruling in Dobson v. Commissioner, 320 U.S. 489 (1943). Under the restricted appellate review approach of *Duberstein,* a determination by the Tax Court or a judge without a jury must stand unless "clearly erroneous." *See* FED. R. CIV. P. 52(a). Commenting on rule 52, the Supreme Court said:

> A finding is "clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.

Duberstein v. Commissioner, 363 U.S. 278, 291 (1960), *quoted from* United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948). A jury's finding made upon correct instructions must stand if there is reasonable evidence to support that finding. Thus, when an inference drawn from the basic facts is reasonable, the determination of the jury must be upheld. United States v. Kasynski, 284 F.2d 143 (10th Cir. 1960).

33. 363 U.S. at 297. In referring to the general governing principles adopted by the court, Frankfurter also criticized the Court's failure to clear up the ambiguities inherent in the "intent" test. Indeed, because certain basic fact situations recur so frequently under § 102, the Court should have been able to develop more specific guidelines for determining when a gift was intended.

34. Yohlin, *Payments to Widows of Employees,* 40 TAXES 208 (1962). In this article, the author questions the appropriateness of the Tax Court's reliance on the language of *Duberstein* because of the factual distinction between *Duberstein* and the cases involving employee death benefits. In *Duberstein,* the payment was made directly to the person who rendered the services. This is persuasive evidence that the payment was intended to be compensation, especially where the recipient had not been otherwise rewarded. In the Tax Court cases, the payments were not made to the employee, who had already been fully compensated, but rather to the widow. Yohlin contends that this circumstance is more consistent with "generosity," "charity," or "like impulses." *Id.* at 214.

35. *See* Estate of Julius B. Cronheim, 20 CCH Tax Ct. Mem. 1144 (1961), *aff'd,* 323 F.2d 706 (8th Cir. 1963); Estate of W. R. Olsen, 20 CCH Tax Ct. Mem. 807 (1961), *rev'd,* 302 F.2d 671 (8th Cir.), *cert. denied,* 371 U.S. 903 (1962); Mildred W. Smith, 20 CCH Tax Ct. Mem. 775 (1961), *aff'd,* 305 F.2d 778 (3d Cir.), *cert. denied,* 371 U.S. 904 (1962); Estate of Irving B. Cooper, 20 CCH Tax Ct. Mem. 774 (1961); Mary Fischer, 20 CCH Tax Ct. Mem. 318 (1961); Estate of Rose A. Russek, 20 CCH Tax Ct. Mem. 123 (1961); Estate of Martin Kuntz, Sr., 19 CCH Tax Ct. Mem. 1379 (1960), *rev'd,* 300 F.2d 849 (6th Cir.), *cert. denied,* 371 U.S. 903 (1962); Estate of Mervin G. Pierpont, 35 T.C. 65 (1960), *rev'd sub nom.* Poyner v. Commissioner, 301 F.2d 287 (4th Cir. 1962).

The Tax Court delineated its new approach in *Estate of Mervin G. Pierpoint,*[36] *Estate of Marvin Kuntz, Jr.,*[37] and *Estate of W. R. Olsen.*[38] In *Pierpoint,* even though the *Hellstrom* factors were present, the Tax Court cited *Duberstein* to justify a determination that payments to the widow were additional compensation for the decedent's services. The court stated that the controlling factors were (1) language in the resolution characterizing the payments as a "continuation of his salary"[39] and (2) the corporation's failure to consider the widow's financial condition in determining to make the payments.[40] In *Kuntz* and *Olsen,* the *Hellstrom* factors were again present, but the Tax Court found that language in the resolution to the effect that the payments were in recognition of services rendered conclusively established that the employer's intent was to compensate the decedent.[41]

Although these decisions were all reversed on appeal,[42] the Tax Court continued to hold that such payments were income.[43] While rec-

36. 35 T.C. 65 (1960).
37. 19 CCH Tax Ct. Mem. 1379 (1960).
38. 20 CCH Tax Ct. Mem. 807 (1961).
39. *But see* Duberstein v. Commissioner, 363 U.S. 278, 286 (1960); Bogardus v. Commissioner, 302 U.S. 34 (1937). In both cases the donor's characterization was considered relevant but not controlling.
40. 35 T.C. at 68-69.
41. 19 CCH Tax Ct. Mem. at 1380; 20 CCH Tax Ct. Mem. at 807.
42. In reversing the Tax Court's decision in *Pierpont,* the court of appeals stressed that Duberstein did not destroy the authority of the earlier Tax Court cases. The court stated that under those cases, "essentially identical facts were held sufficient to support the conclusion that the dominant motive was sympathy for the taxpayer's widowed position. Poyner v. Commissioner, 301 F.2d 287, 291 (4th Cir. 1962), *rev'g* Estate of Mervin G. Pierpoint, 35 T.C. 65 (1960). Likewise, the Tax Court's decision in *Kuntz* was reversed on the ground that the language of the resolution was not controlling. The Sixth Circuit stated that, in view of the evidence, it was left with the firm conviction that the Tax Court had been mistaken as to the factual inferences to be drawn from the language of the resolution characterizing the nature of the payment. Estate of Kuntz v. Commissioner, 300 F.2d 849, 852 (6th Cir. 1962), *rev'g* 19 CCH Tax Ct. Mem. 1379 (1960). The Tax Court's determination was also upset in *Olsen.* Estate of Olsen v. Commissioner, 302 F.2d 671 (8th Cir. 1962), *rev'g* 20 CCH Tax Ct. Mem. 807 (1961).
43. *See* Estate of Harry Schwartz, 26 CCH Tax Ct. Mem. 957 (1967); Edith L. Joyce, 25 CCH Tax Ct. Mem. 914 (1966) (payments were made pursuant to an established plan and without consideration of widow's needs); Estate of William Enyart, 24 CCH Tax Ct. Mem. 1447 (1965) ($10,000 lump sum payment authorized at a special directors' meeting following the funeral was held to be a gift; but, additional $1,000 monthly payments authorized later were held taxable); Estate of Frances C. Cross, 23 CCH Tax Ct. Mem. 1542 (1964) (widow independently wealthy; closely held family corporation; payments also being made to other former employees); Katharine Shaw Dickson, 23 CCH Tax Ct. Mem. 1161 (1964) (widow financially secure; decedent served for two years without compensation; payments also had been made to other parting employees); Ida Maltzman, 23 CCH Tax Ct. Mem. 829 (1964) (corporation family-owned and -controlled; widow financially secure); Estate of James J. Doumakes, 22 CCH Tax Ct. Mem. 1247 (1963) (family-held corporation; widow served on board of directors; but, directors aware of critical financial position of widow; resolution said payment was gratuitous; *Hellstrom* factors present); Lucille McCrea Evans, 39 T.C. 570 (1962), *aff'd,* 330 F.2d 518 (6th Cir. 1964) (directors had knowledge of widow's financial condition, but widow served as president and chairman of the board of directors following her husband's death).

ognizing that it was not free to eliminate the gift exclusion of section 102, the Tax Court applied the exclusion as narrowly as the language of the statute permitted. The decisions also indicated that, if possible, the Tax Court would not find section 102 applicable to transfers made in a business context, in spite of the *Duberstein* Court's explicit rejection of such a test.

While the Tax Court has consistently relied on *Duberstein* to justify the determination that payments to an executive's widow constituted compensation, the federal district courts have used the language of *Duberstein* to justify contrary results. The district courts generally have viewed *Duberstein* as reaffirming the authority of *Bogardus* and such subsequent cases as *Hellstrom*. This position was articulated in *Poyner v. Commissioner*,[44] where the court said:

> The Supreme Court in *Duberstein* did not destroy the authority of the earlier Tax Court cases and the guides enunciated in them for discovering motivation.
>
> On the other hand, *Duberstein* can not be read as limiting inquiry by the trier of fact solely to the factors recognized by the earlier decisions. The objective is to discover which motive is dominant in a field of co-existing motives. In the task of sorting out the varying motives, the development of more reliable criteria by the triers of fact should not be curtailed.[45]

Thus, the district courts have been concerned primarily with sophistication of the basic *Hellstrom* criteria and development of additional relevant criteria. As a result, they have tended to treat such payments as income only where they were made pursuant to an established plan or practice,[46] where the decedent's family controlled the corporation,[47] or

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44. 301 F.2d 287 (4th Cir. 1962).

45. *Id.* at 291-92.

46. Payments made pursuant to an established plan or practice are usually considered taxable, because the employee, if he knows of the plan, normally regards these fringe benefits as additional compensation. Moreover, in establishing such a plan, the corporation is usually motivated by the anticipation of resulting economic benefit, such as improved employee relations and inducement of new employees. Tomlinson v. Hine, 329 F.2d 462, 465-66 (5th Cir. 1964); Cronheim's Estate v. Commissioner, 323 F.2d 706, 711 (8th Cir. 1963); Gaugler v. United States, 312 F.2d 681 (2d Cir. 1963); Spear v. Vinal, 240 F. Supp. 33, 34 (D. Neb. 1965); Froehlinger v. United States, 217 F. Supp. 13 (D. Md. 1963), *aff'd*, 331 F.2d 849 (4th Cir. 1964). But the practice of making payments on a consideration of each individual case with no uniform method for determining their amount or duration would be of little incentive to employees and therefore of little economic benefit to the company. Thus, the existence of such a plan or practice does not indicate that the payment was intended to be compensation. Harper v. United States, 454 F.2d 222 (9th Cir. 1971); Schleyer v. United States, 63-2 U.S. Tax Cas. 89,223 (E.D. Mo. 1963).

47. The relationship between the decedent and those controlling the company at the time the resolution authorizing the payments was made is relevant in determining whether the payment was intended to be income. Where the company is controlled by the decedent's immediate family, the obvious motive for such payments is to get money out of the corporation tax free. Prather v. United States, 296 F. Supp. 1323, 1327 (N.D. Tex. 1969); Corasaniti v. United States, 212 F. Supp. 229, 231-32 (D. Md. 1962); Carson v. United States, 317 F.2d

where the employer failed to consider the widow's financial needs.[48] In the absence of these factors, the district courts have consistently held such payments to be gifts, even in the presence of factors that the Tax Court would have considered strong evidence of intent to compensate, such as the corporation's characterization of the payment as a salary continuation or its computation of the amount of the payment on the basis of decedent's salary.[49] Thus, the district courts have recognized that nontaxable gifts may be made in a commercial setting and may serve some legitimate business purpose, as long as that purpose is not the principal motivation for the payment.[50]

Because of the divergent views of the Tax Court and the district courts at the time of *Carter,* the crucial element in these cases was the choice of forum. If Mrs. Carter had paid the deficiency and sued for a refund in district court, precedent indicates that the court would have held the payment to be a gift. Moreover, because of the limited scope of appellate review, this decision probably would have been upheld on appeal. Thus, the outcome in many cases depended on whether the widow could afford to pay the alleged deficiency and sue for a refund, or whether she had to resort to a determination in the Tax Court before payment.

Although this discrepancy between the Tax Court and the district courts seems quite obvious, both the Supreme Court and Congress have

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370 (Ct. Cl. 1963). *But see* Childers v. United States, 69-2 U.S. Tax Cas. 85,889, at 85,893 (M.D. Tenn. 1969), where the court stated:

> The very nature of the close-corporation structure in the instant case militates in favor of the conclusion that the payments . . . were made out of a feeling of sympathy which one would normally expect to arise in a family enterprise, when one member of the family has suffered a loss.

48. *See* Tomlinson v. Hine, 329 F.2d 462 (5th Cir. 1964); Poyner v. Commissioner, 301 F.2d 287 (4th Cir. 1962); Simpson v. United States, 261 F.2d 497 (7th Cir. 1958), *cert. denied,* 359 U.S. 944 (1959); Prather v. United States, 296 F. Supp. 1323 (N.D. Tex. 1969). *But cf.* Fanning v. Conley, 357 F.2d 37, 41 (2d Cir. 1966) (fact that widow is not financially needy is not controlling if the transferor mistakenly believed she was financially needy).

49. *See* Fanning v. Conley, 357 F.2d 37 (2d Cir. 1966), *aff'g* 243 F. Supp 683 (D. Conn. 1965) (payment equal to one-half of decedent's salary and characterized as "salary continuation"); United States v. Frankel, 302 F.2d 666 (8th Cir.), *cert. denied,* 371 U.S. 903 (1962), *aff'g* 192 F. Supp. 776 (D. Minn. 1961) (amount of payment was equivalent to decedent's salary plus normal bonus); United States v. Kasynski, 284 F.2d 143 (10th Cir. 1960) (affirming district court finding of gift; payment equivalent to two years' salary); Biedenharn v. United States, 300 F. Supp. 1013 (W.D. La. 1969) (*Hellstrom* factors present; directors testified that a gift was intended; payment not made pursuant to established retirement plan; payment was a salary continuation for one year); Falk v. United States, 277 F. Supp. 129 (C.D. Cal. 1967) (*Hellstrom* factors present; no established plan or practice; but: payment was the equivalent of decedent's annual salary; & corporation deducted the payments as an expense); Corasaniti v. United States, 212 F. Supp. 229 (D. Md. 1962) (*Hellstrom* factors present; payments were in response to widow's needs; but: corporation was family-held; & payments were the equivalent of decedent's salary); Cowan v. United States, 191 F. Supp. 703 (N.D. Ga. 1960) (*Hellstrom* factors present; no plan or policy; but widow's needs not considered); Vaughn v. United States, 62-2 U.S. Tax Cas. 85,800 (S.D. Ga. 1962) (*Hellstrom* factors present; no plan or practice; but widow's needs not considered); Schwartz v. United States, 62-2 U.S. Tax Cas. 85,719 (N.D. Tex. 1962) (*Hellstrom* factors present; no established plan or practice; but widow's needs not considered).

50. Fanning v. Conley, 357 F.2d 37, 39 (2d Cir. 1966).

refused to reexamine the problem. As a result, the courts of appeals, even though hampered by their limited scope of review, are in the best position to remedy the situation by insisting on uniform application of the law in the Tax Court and district courts. This was the approach that the Second Circuit took in *Carter*.

In *Carter*, the *Duberstein* "clearly erroneous" rule seemingly required affirmance of the Tax Court's decision.[51] The Second Circuit, however, deviated from the *Duberstein* teaching that "primary weight in this area must be given to the conclusions of the trier of fact"[52] because of its belief that similar fact patterns tend to recur so often that the appellate courts must have a broader scope of review in order to develop reliable, uniform guidelines for the trial courts to follow in determining the gift-income question.[53] The court insisted that the Tax Court, as well as the district courts, follow the guidelines set out in the Second Circuit case of *Fanning v. Conley*.[54] Specifically, the court stated that the factors the Commissioner relied on to negate the inference of gift—Salomon Bros.' references to the payment as a salary continuation, the claim of a tax deduction by Salomon Bros.,[55] and the failure to investigate Mrs. Carter's financial circumstances—were not controlling.[56] Instead, the Court stated

51. While the court of appeals in *Carter* said that the Tax Court was in clear error, Judge Davis, in his dissenting opinion, seems to be correct in his contention that strict adherence to the *Duberstein* scheme of appellate review would require affirmance of the Tax Court's decision. While acknowledging the problems created by *Duberstein*, Judge Davis concluded that the Supreme Court deliberately left the resolution of the matter to Congress rather than to the courts. 453 F.2d at 70.

52. 363 U.S. at 289.

53. 453 F.2d at 69. In this respect, the *Carter* decision recognized the validity of Griswold's criticism of *Duberstein* as an unfortunate enlargement of the function of the trial court. Griswold contended that:

> To overrate the function of the jury . . . is to shirk the function of the court, and to fail to administer justice rationally, consistently, and soundly. . . . Is this not an example of an undue and unfortunate yielding of responsibility to juries and other triers of facts, when what was called for was some clarification of the law applicable in cases of this sort?

Griswold, *Forward: Of Time and Attitudes—Professor Hart and Judge Arnold, The Supreme Court, 1959 Term*, 74 HARV. L. REV. 81, 88-90 (1960).

54. 357 F.2d 37 (2d Cir. 1966).

55. *See* note 3 and accompanying text *supra*.

56. Citing *Duberstein, Fanning*, and *Kasynski*, the court said that "the claim of a tax deduction by the payor . . . [has been] held to be without material probative significance." 453 F.2d at 69. The Supreme Court in *Duberstein* said that the courts should give little or no weight to "the peripheral deductibility of payments as business expenses," since such an inquiry "would summon one difficult and delicate problem of federal tax law as an aid to the solution of another." 363 U.S. at 288. With the enactment of § 274 in 1962, however, the employer's treatment of the payment to the widow provides an even stronger indication of the employer's intent. Prior to § 274, the employer could intend to make a gift to the widow and still validly claim the payment as an ordinary and necessary expense under section 162. Under § 274, however, no deduction is allowed for business gifts exceeding $25 per donee for the taxable year made directly or indirectly to any individual. "Gift" in § 274 is defined as any item excludable from the recipient's income solely by reason of § 102. Section 274 does not affect a payment that could be excluded both under § 102 and another section. Therefore, because payments to an employee's widow may be excluded by the widow to the extent

that the Tax Court should utilize the *Hellstrom* factors and other factors "as experience should prove relevant"[57] in determining the employer's intent in making the transfer. Specifically, the court stressed the managing partner's testimony and other statements made by Salomon Bros. that a gift was intended. The Tax Court had considered such statements to be of slight probative value in establishing the intent of the firm. The Second Circuit concluded that such statements are reliable and should be given considerable weight, because they are contrary to the firm's interest in protecting its deduction of the payment as a business expense.[58]

Carter may be viewed as an attempt by the Second Circuit to obtain uniform results in cases involving payments to an employee's widow, regardless of whether the case was tried in the Tax Court or in a district court. In doing so, the court indicated that it will disregard the limited scope of review rule enunciated in *Duberstein* when necessary to reverse an inconsistent case. Thus, the Second Circuit will be more sympathetic to the taxpayer on appeal of a Tax Court decision if the factors involved in the particular case would likely have led to a taxpayer's verdict had the case been initially decided in a district court.

THOMAS J. KEEDY

JUDICIAL NOTICE—DISPUTABILITY AND APPELLATE PRACTICE REGARDING JUDICIAL NOTICE OF STOPPING DISTANCES

Morrison v. Thomas[1]

This was a suit for damages resulting from an intersection collision. Plaintiff testified that he was traveling at the speed limit, 30 miles per hour. Based on plaintiff's skid marks, however, which exceeded 104 feet in length, defendant's expert witness testified that plaintiff's minimum speed was 41.25 miles per hour. He also stated that at 30 miles per hour the total stopping distance under normal conditions would be 88 feet. On the basis of this testimony and that of an eye witness, the defendant alleged that the plaintiff was contributorily negligent as a matter of law. The trial court

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of $5,000 under § 101 regardless of whether they are a gift under § 102, the employer may claim a deduction up to $5,000, irrespective of whether the payment is a gift from the standpoint of the recipient. But when the payment exceeds $5,000, the amount over $5,000 can be excluded from the recipient's income only if § 102 applies. Thus, when making a payment to an employee's widow, the employer will be entitled to deduct the amount in excess of $5,000 only if the payment is not a gift under § 102. Thus, when the employer claims a deduction under § 162 for the payments made to a widow, the inference that the payment was intended to be compensation and not a gift will be very strong. As a consequence, the enactment of § 274 will probably result in fewer cases involving the problem under discussion, because many employers will not be willing to forego the deduction and will therefore classify the payment as compensation.

57. 453 F.2d at 69.

58. *Id.* at 70.

1. 481 S.W.2d 605 (Mo. App., D.K.C. 1972).

overruled defendant's motion for a directed verdict, and the jury found for the plaintiff.

On appeal, defendant requested that the court judicially notice that plaintiff should have been able to stop his automobile well within the distance available (at least 150 feet), if his speed was in fact 30 miles per hour. Defendant, however, had failed to request judicial notice of this fact at trial. The Kansas City District of the Missouri Court of Appeals refused to judicially notice the distance within which plaintiff should have been able to stop. The court held that judicial notice does not have the conclusive effect the defendant demanded (*i.e.*, converting a question of fact into a pure question of law).[2] Also, the court said that an appellate court should not judicially notice a fact where judicial notice was sought in the first instance on appeal.[3]

Judicial notice[4] can be taken of facts that are common knowledge to the community,[5] verifiable to a certainty by reference to competent, authoritative sources,[6] or matters of science generally accepted by the scientific community.[7] Beyond this, courts disagree on the proper subject matter, purpose, and effect of judicial notice.

The first problem that *Morrison* deals with is whether a fact judicially noticed is conclusive or disputable. Courts, influenced by differing notions of the purpose behind judicial notice, differ on this question. Those courts that favor giving conclusive effect to judicial notice[8] exercise it in a narrow spectrum of truly indisputable facts;[9] whereas, courts that permit contradictory evidence apply judicial notice to a wide range of factual situations.[10]

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2. *Id.* at 607-08.

3. *Id.* at 607.

4. The term "judicial notice" as used in this note applies only to adjudicative facts as opposed to legislative facts. PROP. FED. R. EVID. 201, Comment (a) (Rev. Draft 1971) states:

> Adjudicative facts are simply the facts of the particular case. Legislative facts, on the other hand, are those which have relevance to legal reasoning and the lawmaking process, whether in the formulation of a legal principle or ruling by a judge or court.

For an example of legislative facts see the psychological studies in Brown v. Board of Education, 347 U.S. 483 (1954).

5. Casey v. Phillips Pipeline Co., 199 Kan. 538, 552, 431 P.2d 518, 530 (1967).

6. City of St. Louis v. Niehaus, 236 Mo. 8, 17, 139 S.W. 450, 452 (1911); Fringer v. Venema, 26 Wis. 2d 366, 372-73, 132 N.W.2d 565, 569, *modified*, 133 N.W.2d 809 (1965); PROP. FED. R. EVID. 201 (b) (Rev. Draft 1971).

7. Steed v. State, 80 Ga. App. 360, 363, 56 S.E.2d 171, 174 (1949); Reynolds v. McMan Oil & Gas Co., 11 S.W.2d 778, 784 (Tex. Comm'n App. 1928).

8. State v. Main, 69 Conn. 123, 136, 37 A. 80, 84 (1897); Makos v. Prince, 64 So. 2d 670, 673 (Fla. 1953); Casey v. Phillips Pipeline Co., 199 Kan. 538, 552, 431 P.2d 518, 530 (1967); Pogue v. Smallen, 285 S.W.2d 915, 917 (Mo. 1956); Lemel v. Smith, 64 Nev. 545, 566, 187 P.2d 169, 179 (1947).

9. *See generally* C. MCCORMICK EVIDENCE § 332, at 70 (2d ed. 1972).

10. *Id.* at 769. *See, e.g.*, Meredith v. Fair, 298 F.2d 696, 701 (5th Cir. 1962) (Missisippi maintains a policy of segregation in its schools and colleges); Steed v. State, 80 Ga. App. 360, 363, 56 S.E.2d 171, 174 (1949) (normal periods of gestation); Casey v. Phillips Pipeline Co., 199 Kan. 538, 552, 431 P.2d 518, 530 (1967) (gasoline contains anti-oxidants harmful to growth of vegetation); Reynolds v. McMan Oil & Gas Co., 11 S.W.2d 778, 784 (Tex. Comm'n App. 1928) (gas from an oil well is both oil and gas and from it gasoline is recoverable); Annot., 45 A.L.R.2d 1169 (1956).

Judicial notice in the latter courts is little more than a procedural device useful in expediting trials by dispensing with proof of self-evident facts.[11] A slight majority of legal writers[12] and cases[13] favor disputability of judicially noticed facts. The Proposed Federal Rules of Evidence adopt the position that facts judicially noticed are conclusive,[14] but recognize that procedural fairness requires an opportunity for the opponent "to be heard on the propriety of taking judicial notice and the tenor of the matter noticed."[15]

Timson v. Manufacturer's Coal & Coke Co.[16] firmly established that, in Missouri, facts judicially noticed are disputable.[17] Various writers argue that this approach allows contradictory evidence on a judicially noticed fact and, in effect, treats judicial notice as a "glorified presumption."[18] They argue that this is a misapplication of the doctrine because it encroaches on the fact finding responsibility of the jury.[19] The greatest drawback of the Missouri approach is that permitting contradiction of judi-

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11. *See* 481 S.W.2d at 608; State v. Lawrence, 120 Utah 323, 234 P.2d 600 (1951); 9 J. WIGMORE, EVIDENCE § 2567, at 536 (3d ed. 1940). Under this view judicially noticed facts may be submitted to the jury for determination.

12. J. THAYER, PRELIMINARY TREATISE ON EVIDENCE 308 (1898); 9 J. WIGMORE, *supra* note 11, § 2567.

13. *See, e.g.,* Nielsen v. Carney Groves, Inc., 159 So. 2d 489, 491 (Fla. Dist. Ct. App. 1964); Makos v. Prince, 64 So. 2d 670, 673 (Fla. 1953); Macht v. Hecht Co., 191 Md. 98, 102, 59 A.2d 754, 756 (1948); Piechota v. Rapp, 148 Neb. 442, 451-52, 27 N.W.2d 682, 688 (1947); Lemel v. Smith, 64 Nev. 545, 565-66, 187 P.2d 169, 179 (1947); State v. Lawrence, 120 Utah 323, 328, 234 P.2d 600, 602 (1951); Annot., 45 A.L.R.2d 1169 (1956). *Contra,* Bade v. Drachman, 4 Ariz. 55, 69, 417 P.2d 689, 703 (Ct. App. 1966); Schriver v. Tucker, 42 So. 2d 707, 710 (Fla. 1949); McCoy v. Gilbert, 110 Ohio App. 453, 463, 169 N.E.2d 624, 632-33 (1959); Annot., 45 A.L.R.2d 1169 (1956).

See also E. MORGAN, BASIC PROBLEMS OF EVIDENCE 10 (1963). Morgan believes that few courts really accept contradictory evidence. Morgan says that where they do, they actually have determined that the fact was outside the domain of judicial notice.

Jurisdictions holding that judicial notice is conclusive provide an opportunity for the adverse party to contest the propriety of taking judicial notice. *See* Fringer v. Venema, 26 Wis. 2d 366, 373, 132 N.W.2d 565, 570, *modified,* 133 N.W.2d 809 (1965); Keeffe, Landis & Shaad, *Sense and Nonsense About Judicial Notice,* 2 STAN. L. REV. 664, 668 (1950).

14. PROP. FED. R. EVID. (Rev. Draft 1971). This draft is currently being considered by Congress, and is subject to revision. Comment (9) to rule 201 states:

> [T]he rule contemplates there is to be no evidence in before the jury in disproof. The judge instructs the jury to take judicially noticed facts as established.

15. *Id.* 201 (e), and Comment (e). *See* Chubbs v. City of New York, 324 F. Supp. 1183, 1187-88 (E.D.N.Y. 1971).

16. 220 Mo. 580, 119 S.W. 565 (En Banc 1909).

17. The court said:

> [I]f the facts judicially noticed are disputable, then the party is not and should not be prevented from disputing them, if in fact he can do so. Judicially noticing facts, like many presumptions entertained by the courts, is but a rule of evidence . . . .

Id. at 598, 119 S.W. at 569. *See, e.g.,* Scheufler v. Continental Life Ins. Co., 350 Mo. 886, 896, 169 S.W.2d 359, 365 (1943); Jackson v. Cherokee Drug Co., 434 S.W. 2d 257, 264 (St. L. Mo. App. 1968).

18. *See* E. MORGAN, *supra* note 13, at 10.

19. *See Id.* C. MCCORMICK, *supra* note 9, at 769.

cially noticed facts can confuse the jury. For example, by judicially noticing that plaintiff could have stopped his car within 15 feet a trial court gives an appearance of judicial approval of the fact, and thus jurors tend to accept it as true. This may prejudice their evaluation of contradictory evidence (*e.g.*, that the road was icy).

A sounder approach would be for the court to judicially notice the *average* stopping distance of a similar car under *average* conditions.[20] The rationale for judicial notice logically dictates this approach. Although the court does have access to accepted authorities on average stopping distances,[21] none of the usual grounds for judicial notice (*i.e.*, common knowledge to the community, competent authoritative sources, or generally accepted matters of science) exist in reference to the particular car involved in the instant case. The jury should be instructed to accept the *average statistics* as true, leaving the opponent free to show that his car was not average, or that the conditions were unusual.

Courts that give conclusive effect to judicial notice usually limit its exercise to truly indisputable facts. Thus, once the court determines to take judicial notice, the confusing conflict noted above between the fact judicially noticed and contradictory evidence does not arise.

The second problem *Morrison* deals with is whether an appellate court can judicially notice an adjudicative fact where there was no request for judicial notice at trial. Apparently, a slight majority of courts refuse to take judicial notice in the first instance on appeal.[22] One objection to doing so is that it may remove issues of fact from the jury's consideration.[23] Additionally, there is a strong moral disapproval of a silence that may have lured the trial court into an erroneous decision.[24] Further, as a general principle appellate courts declare that all intendments and presumptions should be indulged in to support the trial court's judgment.[25] Despite these considerations a number of courts have taken judicial notice in the first instance on appeal.[26]

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20. Such statistics are available in 9C BLASHFIELD'S CYCLOPEDIA OF AUTOMOBILE LAW AND PRACTICE § 6237, at 413 (1967).

21. *Id.*

22. *See, e.g.*, Millbrae Ass'n For Residential Survival v. City of Millbrae, 262 Cal. App. 2d 222, 236 n.7, 69 Cal. Rptr. 251, 261 n.7 (1968) (statute controls appellate practice of judicially noticing ordinances); State *ex rel.* Capurso v. Flis, 144 Conn. 473, 477-78, 133 A.2d 901, 903 (1957); Illinois Bell Tel. Co. v. Miner, 11 Ill. App. 2d 44, 64, 136 N.E.2d 1, 11 (1956) (refusal to notice on appeal that phone directories have advertising); Wood v. Northwestern Ins. Co., 46 N.Y. 421 (1871) (refusal to notice on appeal that kerosene is inflammable); Comment, *Judicial Notice by Appellate Courts of Facts and Foreign Laws Not Brought to the Attention of the Trial Court*, 42 MICH. L. REV. 509, 511 (1943).

23. *See* Comment, *The Presently Expanding Concept of Judicial Notice*, 13 VILL. L. REV. 528, 541 (1968). The author therein states that appellate judicial notice may violate the constitutional right to trial by jury.

24. *See* Comment, *supra* note 22, at 515.

25. *Id.*

26. Meredith v. Fair, 298 F.2d 696, 701 (5th Cir. 1962) (appellate court judicially noticed segregation practices in Mississippi despite a contrary finding of fact by the trial court); Autrey v. Swisher, 155 F.2d 18, 22 (5th Cir. 1946) (appellate court considered the average stopping distances of cars, but did not call the process judicial notice); Steed v. State, 80 Ga. App. 360, 363, 56 S.E.2d 171, 174 (1949) (appellate court took judicial notice of normal periods of gesta-

Most courts that permit appellate judicial notice require that the procedure followed provides fairness to the parties. In general, this entails notice to the opponent and an opportunity to show why judicial notice should not be taken.[27] The Proposed Federal Rules of Evidence provide for taking judicial notice at any stage of the proceedings.[28] Presumably, the Federal procedure (*i.e.*, notice and opportunity to protest) is applicable when appellate courts take judicial notice, although the section on procedure is literally applicable to trial courts only.[29]

Missouri courts require that counsel seek judicial notice at trial to afford the opponent an opportunity for rebuttal.[30] This requirement appears to foreclose an appellate court from taking judicial notice. Yet, numerous appellate cases in Missouri involve an appellate court purporting to exercise judicial notice. For example, the court may state that it judicially knows the appellant could have stopped within 15 feet,[31] or that it is "common knowledge" that a car traveling 20 miles per hour can stop within 20 to 25 feet.[32] Are these cases authority for appellate courts taking judicial notice in the first instance on appeal? The answer depends on the subject matter of judicial notice. Judicial notice of some matters may simply dispense with the proponent's burden of coming forward with proof. In such cases the matter is established prima facie until the opponent produces contradictory evidence. Thus, if an appellate court exercised judicial notice of this matter, the opponent would be deprived of an opportunity to contradict.

The considerations are different where an appellate court judicially notices a matter of common sense or knowledge. By definition such a matter is largely indisputable, and hence appellate courts do judicially notice them because, in the court's view, the opponent could not successfully contradict the matter were he given the opportunity to do so.[33] Stopping dis-

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tion); Casey v. Phillips Pipeline Co., 199 Kan. 538, 552, 431 P.2d 518, 530 (1967) (appellate court judicially noticed general qualities of gasoline, and that when applied to a lawn, turf or zoysia, the grass will die); Ziegelasch v. Durr, 183 Kan. 233, 237, 326 P.2d 295, 298 (1958) (appellate court may judicially notice stopping distance charts).

27. Terzian v. California Cas. Indem. Exch., 3 Cal. App. 3d 90, 96 n.7, 83 Cal. Rptr. 255, 258 n.7 (1969); Currie, *Appellate Courts Use of Facts Outside of the Record by Resort to Judicial Notice and Independent Investigation,* 1960 WIS. L. REV. 39, where the author states:

> [F]airness to the parties would seem to require that an appellate court give notice of any comtemplated taking of judicial notice of adjudicative . . . facts if the court deems there is any reasonable probability that the same may turn out to be disputable.

Id. at 51.

28. PROP. FED. R. EVID. 201 (f), and Comment (f) (Rev. Draft 1971).

29. *Id.* 201 (e), and Comment (e).

30. *E.g.*, 481 S.W.2d at 607; Jackson v. Cherokee Drug Co., 434 S.W.2d 257, 264 (St. L. Mo. App. 1968).

31. Rosenbalm v. Thompson, 148 S.W.2d 830, 833 (K.C. Mo. App. 1941).

32. Stimage v. Union Elec. Co., 465 S.W.2d 23, 26 (St. L. Mo. App. 1971). *See also* Wegener v. St. Louis County Transit Co., 357 S.W.2d 943, 947 (Mo. En Banc 1962); Brooks v. Stewart, 335 S.W.2d 104, 112 (Mo. 1960); Cooksey v. Ace Cab Co., 289 S.W.2d 40, 44 (Mo. 1956).

33. "Judicial notice" has been utilized to affirm the trial court—Brooks v. Stewart, 335 S.W.2d 104 (Mo. 1960); Danner v. Weinreich, 323 S.W.2d 746 (Mo. 1959); Jones v. Fritz, 353 S.W.2d 393 (Spr. Mo. App. 1962)—and to reverse—

tances are often matters of common sense and therefore appellate courts do judicially notice them without a prior request at trial. For clarity in discussion, this process will be referred to as "common sense judicial notice."

Appellate courts in Missouri are using common sense judicial notice to give the appearance of legal propriety to reversals based on the higher court's different evaluation of the facts.[34] This is possible because the court uses its own definition of what is common knowledge, a definition that can be narrow or broad depending on the result desired. For example, in *Bollinger v. St. Louis-S.F. Ry.*,[35] plaintiff's vision was obscured while crossing a first track and his car was struck on the second track. Contributory negligence was an issue on appeal. There was some distance between the tracks, but plaintiff claimed he could not bring the car to a halt in that distance. The court reversed and remanded a verdict for the plaintiff, stating,

> [C]ommon knowledge of automobiles, and particularly of Fords, makes us know that at the speed this car was going, not to exceed four or five miles per hour, it could have been stopped, if plaintiff had looked, when quite close to the east track.[36]

The *Bollinger* court, convinced by common sense that the jury's verdict was not supported by the evidence, used the vehicle of common sense judicial notice to reverse. The majority of stopping distance cases involve the same process.[37]

Wegener v. St. Louis County Transit Co., 357 S.W.2d 943 (Mo. En Banc 1962); Hamell v. St. Louis Pub. Serv. Co., 268 S.W.2d 60 (St. L. Mo. App. 1954).

In Stimage v. Union Elec. Co, 465 SW.2d 23 (St. L. Mo. App. 1971), defendant objected to the appellate court judicially noticing stopping distance because supporting evidence was not introduced. The court stated:

> This contention fails to note the difference between judicial notice based upon common knowledge of mankind, and judicial notice based upon the availability of a fact in a record easily available to the court which by statute or court decision carries a presumption of reliability . . . . The judicial notice with which we are dealing, however, is the notice which a court may take of those matters commonly known by mankind, and which a jury may properly consider in arriving at a verdict without independent proof of the fact.

Id. at 26.

34. C. McCORMICK, *supra* note 9, § 333, at 774.

35. 334 Mo. 720, 67 S.W.2d 985 (En Banc 1934).

36. *Id.* at 731, 67 S.W.2d at 991. Whereas most courts would "judicially notice" such a fact, this court applied the more appropriate label of "common knowledge."

37. The following cases state that judicial notice of stopping distance is never appropriate due to variable road conditions and car qualities. Archer v. Aristocrat Ice Cream Co., 87 Ga. App. 567, 571, 74 S.E.2d 470, 473 (1953); McCoy v. Gilbert, 110 Ohio App. 453, 463, 169 N.E.2d 624, 633 (1959). However, the majority of cases permit judicial notice of stopping distance. *See, e.g.*, Rodi v. Florida Greyhound Lines, Inc., 62 So. 2d 355, 358 (Fla. 1952); Ziegelasch v. Durr, 183 Kan. 233, 237, 326 P.2d 295, 298 (1958); Annot., 85 A.L.R.2d 974 (1962).

The Missouri rule is that a court will not specify the exact distance in which a car may be stopped, but may judicially notice that a vehicle travelling at a certain speed can be stopped within certain limits. *See, e.g.*, Highfill v. Brown, 340 S.W.2d 656, 664 (Mo. En Banc 1960); Spoeneman v. Uhri, 332 Mo. 821, 828-29,

The *Morrison* court refused to judicially notice that plaintiff should have been able to stop his automobile within 104 feet if he was traveling 30 miles per hour.[38] One reason for rejecting defendant's request was that he failed to seek judicial notice of such fact at trial and thereby afford plaintiff an opportunity to offer rebuttal evidence.[39] On its face, this holding appears inconsistent with the prior Missouri cases in which appellate courts professed to judicially notice stopping distances.[40] As a rule, however, judicial notice of stopping distances is discretionary.[41] The court in *City of St. Louis v. Niehaus*[42] explained the function of judicial notice:

> Courts are not bound to take judicial notice of matters of fact. Whether they will do so or not depends on the nature of the subject, the issue involved, and the apparent justice of the case. The rule that permits a court to do so is of practical value in the law of appeal, where the evidence is clearly insufficient to support the judgment.[43]

That the court in *Morrison* did not exercise common sense judicial notice may simply indicate that the jury's resolution of the issue (whether the stopping distance of a car traveling 30 miles per hour is less than 104 feet) did not offend its common sense. Yet, in prior cases the Missouri courts have judicially noticed stopping distances within similar speed and distance ranges.[44] Perhaps the "apparent justice of the case"[45] motivated the *Morrison* court. Still, *Morrison* can be viewed as a retreat from prior appellate practice regarding judicial notice of stopping distance.

The *Morrison* court's treatment of *Hopkins v. Highland Dairy Farms Co.*[46] supports either view of *Morrison.* In *Hopkins,* involving the humanitarian doctrine, the appellate court judicially noticed that plaintiff was driving faster than 30 miles per hour, based on skid marks 90 feet long. Thus, the court properly gave an instruction absolving the defendant if the jury found that the plaintiff's negligence was the sole-cause of the accident. Although this could indicate that the *Hopkins* court took a different view of judicial notice from *Morrison,* the effect of the *Hopkins* court's ruling was to submit the judicially-noticed fact (that the plaintiff

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60 S.W.2d 9, 12 (1933); Stimage v. Union Elec. Co., 465 S.W.2d 23, 26 (St. L. Mo. App. 1971).

The Missouri appellate courts frequently refer to stopping distance charts found in 9C BLASHFIELD'S CYCLOPEDIA OF AUTOMOBILE LAW AND PRACTICE § 6237 (1967). *See, e.g.,* Danner v. Weinreich, 323 S.W.2d 746, 752 (Mo. 1959); Cooksey v. Ace Cab Co., 289 S.W.2d 40, 44 (Mo. 1956); Jones v. Fritz, 353 S.W.2d 393, 397 & n.3 (Spr. Mo. App. 1962).

38. 481 S.W.2d at 607.

39. Plaintiff had offered his own testimony on the issue of how fast he was traveling. *Query:* What other evidence could controvert defendant's stopping distance evidence?

40. *See* cases cited note 32 *supra.*

41. *See, e.g.,* City of St. Louis v. Niehaus, 236 Mo. 8, 139 S.W. 450 (En Banc 1911).

42. *Id.*

43. *Id.* at 16-17, 139 S.W. at 452.

44. *See* cases cited note 32 *supra.*

45. City of St. Louis v. Niehaus, 236 Mo. 8, 16-17, 139 S.W. 450, 452 (En Banc 1911). *See* text accompanying note 43 *supra.*

46. 348 Mo. 1158, 159 S.W.2d 254 (1941).

was speeding) to the jury, not to conclusively establish it. This is, of course, perfectly consistent with *Morrison*.

Morrison reiterates that facts judicially noticed are disputable in Missouri, and, therefore, notice must be sought at trial to give the opponent adequate opportunity to rebut the fact noticed. More significantly, *Morrison* emphasizes that appellate judicial notice based on common knowledge, although available in some cases, is entirely discretionary and may be a result-oriented doctrine.

PAUL T. LUCKENBILL, JR.

LIMITATION OF ACTIONS—ACCRUAL OF ACTION AGAINST ABSTRACTER: MISSOURI CHANGES THE RULE

Thorne v. Johnson[1]

In March, 1957, the Johnsons delivered to Thorne a deed of a one-half interest in a tract of land. On April 4, 1957, Thorne recorded his deed.[2] Thereafter the Johnsons contracted to sell the tract to other parties. The Johnsons asked the Douglas-Stewart Abstract and Investment Company to extend the abstract, and on September 1, 1961, the Abstract Company delivered an abstract and certificate[3] which, although purporting to cover all items of record to date, allegedly failed to show Thorne's outstanding interest. The sale was completed and through intervening transactions, the Johnson Land Development Company, relying on the same abstract, acquired what it thought to be title to the property in 1964.[4]

In October of 1968 Thorne filed suit against the Land Company, the Johnsons, and the holders of the deeds of trust for a partition, accounting, and declaration of the trustees' interests. The intervening grantors were brought into the action on their warranties, and third party petitions were filed against the Abstract Company based on negligent certification of the abstract.

The Abstract Company moved to dismiss each action based on the five-year statute of limitations.[5] The trial court sustained the motion and

1. 483 S.W.2d 658 (Mo. App., D.K.C. 1972).

2. There was allegedly an arrangement between the parties that Thorne would not record his deed. The purpose of the transaction was to faciliate the handling of Thorne's and Johnsons' joint venture interest in the property.

3. The various documents of title that may be involved in a sale of land are discussed in note 29 *infra*.

4. The court noted that, under the holding in Anderson v. Boone County Abstract Co., 418 S.W.2d 123 (Mo. 1967), the Land Company may be barred from recovery for lack of privity.

5. § 516.120, RSMo 1969, provides in relevant part:

Within five years:

(1) All actions upon contracts, obligations, or liabilities, express or implied, except those mentioned in 516.110, and except upon judgments or decrees of a court of record, and except where a different time is herein limited;

. . . .

(5) An action for relief on the ground of fraud, the cause of action in such case to be deemed not to have accrued until the discovery by the aggrieved party, at any time within ten years, of the facts constituting the fraud.

the third-party plaintiffs appealed. The Missouri Court of Appeals, Kansas City District, reversed and remanded, holding that section 516.100, RSMo 1969,[6] precluded accrual of the causes of action until the filing of Thorne's petition. The court noted that the law declared in two prior cases[7]—that the cause of action accrued on delivery of the defective abstract —was changed by a 1919 amendment to that section.[8]

Prior to *Thorne,* Missouri abstracters could take comfort in the general rule that the statute of limitations foreclosed an action filed five years or more from the date of delivery of the abstract.[9] Two pre-1900 decisions established this majority rule in Missouri.

In *Rankin v. Schaeffer,*[10] the plaintiff hired defendants to investigate the title to certain real estate. Plaintiff purchased in reliance on their certificate[11] and afterwards discovered the certificate to be in error. He purchased the outstanding interest and sued for the amount he was unable to recover from his grantor. Although successful at trial, plaintiff's judgment was reversed by the St. Louis Court of Appeals. The court noted that defendant breached his implicit promise to perform his task with care, diligence and skill when he delivered the erroneous certificate. Thus, plaintiff's cause of action accrued then and his action was barred since not commenced within five years of its accrual.[12]

In *Schade v. Gehner*[13] the Missouri Supreme Court followed *Rankin.* Agreeing that the action was contractual, it held that an action accrued upon delivery of the defective abstract, not when the damage was later discovered.[14]

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6. § 516.100, RSMo 1969, provides:

> Civil actions, other than those for the recovery of real property, can only be commenced within the periods prescribed in the following sections, after the causes of action shall have accrued; *provided, that for the purposes of sections 516.100 to 516.370, the cause of action shall not be deemed to accrue when the wrong is done or the technical breach of contract or duty occurs, but when the damage resulting therefrom is sustained and is capable of ascertainment, and, if more than one item of damage, then the last item, so that all resulting damage may be recovered, and full and complete relief obtained.*

The italicized portion was added in 1919. Mo. Laws 1919, at 211, § 1.

7. Schade v. Gehner, 133 Mo. 252, 34 S.W. 576 (1896); Rankin v. Schaeffer, 4 Mo. App. 108 (St. L. Ct. App. 1877).

8. *See* statute quoted note 6 *supra.*

9. 1 AM. JUR. 2D *Abstracts of Title* § 24 (1962); 1 C.J.S. *Abstracts of Title* § 13a (1936); 2 M. GILL, MISSOURI TITLES § 1630, at 1026 (4th ed. 1960).

10. 4 Mo. App. 108 (St. L. Ct. App. 1877).

11. Their certificate was unlike modern certificates. It stated:

> We have examined the title to lots 22, 23, 24, 25, and west half of 26, of the Taylor Place. In our opinion, the title is good and fully vested in fee in George N. Stewart, free from all encumbrances.

Id. Modern certificates are discussed in note 29 *infra.*

12. *Id.* at 111.

13. 133 Mo. 252, 34 S.W. 576 (1896). The facts are similar to *Rankin.* Schade engaged defendant to examine title and render an opinion; defendant rendered an opinion that the title was "all right". Schade purchased but lost in a subsequent ejectment action. His widow filed this action as widow and not as personal representative.

14. The other ground of decision was the widow's lack of standing (privity) to bring the suit. Both grounds were fully sufficient for the decision. *But see* Maher, *The Liability of Abstracters in Missouri,* 34 Mo. L. REV. 420, 422 & n.17 (1969), stating that the limitation holding was only "important dictum."

Both *Rankin* and *Schade* applied the five-year statute of limitations pertaining to implied contracts,[15] but neither decision is clearly based on contract because both frequently use negligence terminology. The choice between tort and contract is significant in determining when a cause of action accrues.[16] It is generally held that a cause of action accrues and the period of limitation begins to run when a right to sue arises.[17] The right to sue in contract, albeit for nominal damages, arises at the time of breach; hence, at that time the cause of action accrues and the period of limitation begins to run.[18] In contrast, because proximately resulting damages are essential to an actionable tort, a tort cause of action does not accrue, nor does the limitation period commence, until such damages have been suffered.[19] The more recent Missouri cases dealing with abstracter's liability base the cause of action on contract and not on tort.[20]

The jurisdictions that have considered the problem of when an action against an abstracter accrues have followed four basic theories.

Contract Theory. A majority of cases appears to say that a cause of action against an abstracter is based on an implied contract[21] that the abstracter will perform his services with due care and diligence[22] and will

15. The *Rankin* court did not state which statute it applied. Presumably it was ch. 103, art. II, §§ 1,3, RSMo 1855 [now §§ 516.120 (1), .100, RSMo 1969, quoted in notes 5 & 6 *supra,* respectively, without the 1919 amendment to § 516.100].

16. The choice may also be significant in determining the applicable limitation period, the period for tort being generally shorter than that for contract. In Missouri the same five-year statute, § 516.120 (quoted note 5 *supra*), is applicable to most torts and implied contracts.

The choice also determines whether a contractual privity requirement is applicable. *Compare* Anderson v. Boone County Abstract Co., 418 S.W.2d 123 (Mo. 1967), *with* Williams v. Polgar, 43 Mich. App. 95, 204 N.W.2d 57 (1972). For a discussion of the potential plaintiffs to whom an abstracter's errors and omissions might render him liable see Maher, *supra* note 14.

Finally, the classification of the action could determine the recoverable damages. *Compare* Hillock v. Idaho Title & Trust Co., 24 Idaho 242, 133 P. 119 (1913), *with* Northwestern Title Security Co. v. Flack, 6 Cal. App. 3d 134, 85 Cal. Rptr. 693 (1970).

17. Unexcelled Chem. Corp. v. United States, 345 U.S. 59, 65 (1952); Hunter v. Hunter, 361 Mo. 799, 804, 237 S.W.2d 100, 103 (1951); Baron v. Kurn, 349 Mo. 1202, 1213, 164 S.W.2d 310, 316 (1942); Columbia *ex rel.* Exchange Nat'l Bank v. Johnson Inv. and Rental Co., 462 S.W.2d 133, 136 (K.C. Mo. App. 1970). *See also* 54 C.J.S. *Limitation of Action* § 161 at 110 (1948).

18. 51 AM. JUR. 2D *Limitation of Actions* § 109 at 681-82 (1970).

19. Rippe v. Sutter, 292 S.W.2d 86 (Mo. 1956); Eoff v. Clay, 9 Mo. App. 176 (St. L. Ct. App. 1880); 51 AM. JUR. 2D *Limitation of Actions* § 110 (1970).

20. Slate v. Boone County Abstract Co., 432 S.W.2d 305 (Mo. 1968); Anderson v. Boone County Abstract Co., 418 S.W.2d 123 (Mo. 1967). Both cases involved the privity issue and not accrual of the cause of action. Although there is no clear holding, the Missouri cases strongly indicate that the cause of action against an abstracter for errors and omissions is in contract.

21. Adams v. Greer, 114 F. Supp. 770 (W.D. Ark. 1953); Phoenix Title & Trust Co. v. Continental Oil Co., 43 Ariz. 219, 29 P.2d 1065 (1934); Lattin v. Gillette, 95 Cal. 317, 30 P. 545 (1892); Russell & Co. v. Polk County Abstract Co., 87 Iowa 233, 54 N.W. 212 (1893); Corcoran v. Abstract & Title Co., 217 Md. 633, 143 A.2d 808 (1958); Commercial Bank of Mott v. Adams County Abstract Co., 73 N.D. 645, 18 N.W.2d 15 (1945); Garland v. Zebold, 98 Okla. 6, 223 P. 682 (1924); 2 M. GILL, MISSOURI TITLES § 1630 (4th ed. 1960).

22. *See* C. FLICK, ABSTRACT AND TITLE PRACTICE § 174, at 135 (2d ed. 1958).

faithfully abstract all items appearing of record which affect the title to the property.[23] Delivery of an abstract deficient because of errors and omissions constitutes a breach of this implied contract.[24] Thus, a cause of action accrues immediately[25] and the statute of limitations begins to run.[26] The statutory period is that applicable to parol or implied contracts.[27] Courts have replied to attempts to apply a written contract limitation period by stating that the certificate of the abstracter is not the basis of the cause of action but is only evidence of the underlying contractual relationship.[28]

Fraud Theory. Cases following the fraud analysis focus on the representations in the certificate[29] and hold that an erroneous certificate con-

23. 1 AM. JUR. 2D *Abstracts of Title* § 5 (1962). *See also* Blair, *Report of Title Examination Standards Committee,* 5 J. Mo. BAR 133, 134 (1949); Eckhardt, *Abstract Certificates, What They Should Cover,* 37 TITLE NEWS, Nov., 1958, at 14.

24. Frequently courts employ the term "negligent breach of contract." It is submitted that a more precise statement would be that in the implied contract the abstracter promises to use that degree of care which the ordinarily careful and prudent abstracter would use under the same or similar circumstances. His failure to use that degree of care constitutes a breach of that implied contract.

25. *See* cases cited note 17 *supra.*

26. Adams v. Greer, 114 F. Supp. 770, 775-76 (W.D. Ark. 1953); Lattin v. Gillette, 95 Cal. 317, 319, 30 P. 545, 546 (1892); Russell & Co. v. Polk County Abstract Co., 87 Iowa 233, 243, 54 N.W. 212, 214 (1893); Arnold v. Barner, 91 Kan. 768, 773, 139 P. 404, 406 (1914); Provident Loan Trust Co. v. Wolcott, 5 Kan. App. 473, 475, 47 P. 8, 9 (1896); Johnson v. Crisler, 156 Miss. 266, 269, 125 So. 724, 725 (1930); Commercial Bank of Mott v. Adams County Abstract Co., 73 N.D. 645, 650, 18 N.W.2d 15, 18 (1945); Garland v. Zebold, 98 Okla. 6, 7, 223 P. 682, 683 (1924); Walker v. Bowman, 27 Okla. 172, 173, 111 P. 319, 320 (1910); 1 AM. JUR. 2D *Abstracts of Title* § 24, at 245-46 (1962); 1 C.J.S. *Abstracts of Title* § 13a, at 399 (1936); 2 M. GILL, MISSOURI TITLES § 1630 (4th ed. 1960); W. NIBLACK, ABSTRACTERS OF TITLE § 35 (1908).

27. Lattin v. Gillette, 95 Cal. 317, 30 P. 545 (1892); Provident Loan Trust Co. v. Wolcott, 5 Kan. App. 473, 47 P. 8 (1896); Lively v. Tablor, 341 Mo. 352, 107 S.W.2d 62 (1937); Herweck v. Rhodes, 327 Mo. 29, 34 S.W.2d 32 (1931); 1AM. JUR. 2D *Abstracts of Title* § 24, at 246 (1962).

28. Adams v. Greer, 114 F. Supp. 770, 775 (W.D. Ark. 1953); Lattin v. Gillette, 95 Cal. 317, 322-23, 30 P. 545, 547 (1892); Provident Loan Trust Co. v. Wolcott, 5 Kan. App. 473, 475, 47 P. 8, 9 (1896); 1 AM. JUR. 2D *Abstracts of Title* § 24, at 246 (1962).

29. There are four separate types of documents which may be in issue in a given case.

(a) The *abstracter's certificate,* in general use throughout nonmetropolitan Missouri, is either appended to or forms the final sheet of the abstract and certifies that the abstract shows all items and matters of record which affect title to the property in question, subject to certain exceptions, usually tax liens for the current year and potential liens against the land such as pending civil actions and bankruptcy proceedings. Such a certificate makes a representation as to the present state and contents of the record, and if false, makes a misrepresentation of that present state of fact. *Query:* Should not this misrepresentation give rise to an immediate action in tort? Only a few cases have so held. *See* note 32 and accompanying text *infra.* As to what these certificates should cover see Eckhardt, *Abstract Certificates, What They Should Cover,* 37 TITLE NEWS, Nov., 1958, at 14; Title Examination Standards of the Missouri Bar, Standard Three, ch. 442, RSMo Appendix (1970).

(b) The *title certificate,* utilized in the greater St. Louis area, is somewhat comparable to the attorney's title opinion and certifies that, for example, John Stiles holds fee simple title to Blackacre, subject to an outstanding deed of trust. It is not a part of an abstract, the equivalent of which is retained by the title company

stitutes actual fraud, constructive fraud, or concealment of a cause of action.[30] The limitation period is usually tolled by statute where fraud is involved.[31] Nevertheless, the cause of action remains contractual and the privity limitation remains viable. The fraud analysis is useful only to delay accrual or toll the statute until such time as the plaintiff discovers the defect.

Tort Theory. Action under this theory is for negligence with the action accruing when damages are sustained or the defect is discovered.[32] This theory relaxes considerably the privity requirement as a limitation on the abstracter's liability.[33]

Analytically similar are cases that treat liability for professional negligence as *sui generis,* thereby making irrelevant the choice between contract

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issuing the certificate. Thus, although somewhat different from the abstracter's certificate, the title certificate is arguably subject to the same analysis. These two documents are what courts refer to in the fraud cases. They should be clearly differentiated from the following two documents.

(c) The *title insurance policy* as such does not involve the abstract nor a title opinion. The policy is a promise to pay any damages the insured sustains by reason of defects in his title, subject to the policy limits and certain enumerated exceptions. Consequently, the policy is subject to a different rule of accrual, *i.e.,* accrual occurs when there has been actual damage. An action on a contract in writing is subject to the ten-year statute of limitations, § 516.110, RSMo 1969.

(d) A few cases have dealt with an aberrational document that might be construed as title insurance or as a title certificate within the meaning of categories a and b above. These documents therefore could be argued under either rule of accrual. Only the particular language involved can suggest which the court will determine it to be. *See* Purcell v. Land Title Guarantee Co., 94 Mo. App. 5, 67 S.W. 726 (K.C. Ct. App. 1902), where the court found a "policy limitation" and sufficient language of promise to treat the document as a title insurance policy and thus delay accrual until actual damage had been sustained. *Cf.* Ballwin Plaza Corp. v. H. B. Deal Constr. Co., 462 S.W.2d 687, 689 (Mo. 1971).

30. Hillock v. Idaho Title & Trust Co., 27 Idaho 440, 126 P. 612 (1912); Schwab v. Cornell, 306 Pa. 536, 540, 160 A. 449, 450 (1932); Chicago, R. I. & Gulf Ry. v. Duncan, 273 S.W. 908 (Tex. Civ. App. 1925). *See also* Trusler, *Extension of Liability of Abstracters,* 18 MICH. L. REV. 127 (1919).

Russell & Co. v. Polk County Abstract Co., 87 Iowa 233, 54 N.W. 212 (1893), one of the leading cases for the majority contract theory, suggests that allegations of fraud might have produced a different result.

31. C. FLICK, ABSTRACT AND TITLE PRACTICE § 174, at 135 (2d ed. 1958). *See* statute quoted note 5 *supra.*

32. Hawkins v. Oakland Title Ins. & Guar. Co., 165 Cal. App. 2d 116, 331 P.2d 742 (1958); Chun v. Park, 51 Hawaii 462, 462 P.2d 905 (1969); Williams v. Polgar, 43 Mich. App. 95, 204 N.W.2d 57 (1972).

The principle has been applied to other professions. In Atkins v. Crosland, 417 S.W.2d 150 (Tex. 1967), a tort action against an accountant who filled out plaintiff's income tax was held to accrue when the Commissioner assessed a deficiency against the taxpayer. Similarly, in Walker v. Pacific Indem. Co., 183 Cal. App. 2d 513, 6 Cal. Rptr. 924 (1960), an action against an insurance broker for alleged negligent failure to procure auto liability insurance in an amount his client requested was held to accrue when a verdict against the client was rendered in excess of the policy limits.

33. In Williams v. Polgar, 43 Mich. App. 95, 204 N.W.2d 57 (1972), after deciding that the action was in tort and not contract and that the statute of limitations had not run, the court stated that the proper question was whether the abstracter had a "duty" to the plaintiff. It concluded that abstracters could be liable to future mortgagees and purchasers whose reliance upon the abstract was forseeable. *Id.* at 59. *See* RESTATEMENT OF TORTS § 552 (1938).

and tort.[34] These cases are treated like tort actions for limitation purposes with accrual occurring at the time of damage or discovery.[35]

Statutory Modifications. Some states have further modified the above theories by statute. These fall into three categories:

(1) Statutes that provide special limitation periods for actions against abstracters, often without consideration of the type of action. These statutes frequently provide for running of the limitations period from the date of the abstract certificate or from the date of the last extension of the abstract.[36]

(2) General statutes of limitation which specifically postpone accrual of actions against the abstracter for errors or omissions until some criteria established in the statute are met.[37]

(3) General statutes of limitation with provisions for postponement of accrual which, for policy reasons, are applied to abstracters to extend their liability. *Thorne* places Missouri in this category but retains the contract analysis favored by the majority of cases.

The *Thorne* court rested its decision on the 1919 amendment to section 516.100.[38] Beginning with the proposition that *Rankin* and *Schade,* if not abrogated, would be dispositive of the question presented, the court found that the legislature's obvious intent in the amendment was to disapprove the timing of accrual in those cases. The timing and circumstances of the 1919 amendment, however, cast doubt on the court's view of the legislature's intent.[39]

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34. Northwestern Title Security Co. v. Flack, 6 Cal. App. 3d 134, 146, 85 Cal. Rptr. 693, 700 (1970); Viotti v. Giomi, 230 Cal. App. 2d 730, 739, 41 Cal. Rptr. 345, 351 (1964); Mumford v. Staton, Whaley & Price, 254 Md. 697, 714, 255 A.2d 359, 367 (1969).

35. *See* cases cited note 34 supra.

36. *See, e.g.,* 1 OKLA. STAT. ANN. § 18 (1961):

> An action for damages by reason of any imperfect or false abstract hereafter compiled may be brought at any time within five (5) years from the date of the abstract certificate.

N.D. CENT. CODE § 28-01-45 (1971 Supp.), adopted in 1969 (N.D. Laws 1969, Ch. 390, § 3), is similar but provides a limitation period of twenty years from the certificate date.

Many of these statutes are part of an abstracters' code and licensing law. For a comprehensive state by state analysis and criticism of these laws see Eckhardt, *Abstracters' Licensing Laws,* 28 Mo. L. REV. 1 (1963).

37. *E.g.,* CAL. CODE ANN. § 339 (1973 Supp.) provides:

> [Within two years a]n action founded upon a contract, obligation or liability, evidenced by a certificate, or abstract or guaranty of title of real property, or by a policy of title insurance; provided, that the cause of action upon a contract, obligation or liability evidenced by a certificate, or abstract or guaranty of title of real property or policy of title insurance shall not be deemed to have accrued until the discovery of the loss or damage suffered by the aggrieved party thereunder.

38. *See* statute quoted note 6 supra.

39. The statutory history of § 516.100, RSMo 1969 does not support the court's interpretation of legislative intent. Following revision and reenactment into its present form in 1849 (Mo. Laws 1849, at 74, § 2), the statute continued substantially unchanged until the 1919 amendment. This amendment was adopted with an emergency clause: "There being some difference of judicial opinion as to the construction of the present law, an emergency exists . . . ." Mo. Laws 1919, at 211, § 2.

The emergency clause no doubt was directed at decisions other than *Rankin*

The amendment states that the cause of action accrues when the defect is capable of ascertainment by the plaintiff.[40] Respondent urged that the Johnsons, the original grantors, knew of the omitted deed and nothing prevented the other plaintiffs from discovering the deed because it appeared of record.[41] Thus, even under the amendment the limitation period would have run. The Johnsons argued,[42] however, that although they knew of the deed to Thorne, its absence from the abstract indicated that their agreement with Thorne not to record had been honored.[43]

The court refused to apply the objective standard of ascertainment adopted in a previous Missouri case,[44] suggesting instead that the proper

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and *Schade*. In Roberts v. Neale, 134 Mo. App. 612, 114 S.W. 1120 (K.C. Ct. App. 1908) (Ellison, J.), plaintiff had discharged his note to defendant in 1897, but continued to pay in ignorance of the discharge until 1902. Plaintiff sued in 1905 for money had and received, but only the 1902 payment was within the five year limit. Plaintiff argued that because one payment was within the statute, it brought all others in. Held, recovery of all excess payments allowed.

Subsequently, in Stark Bro. v. Gooding, 175 Mo. App. 353, 162 S.W. 333 (K.C. Ct. App. 1914) (Ellison, P.J.), a creditor sued for several installments, all but the last one having been due for longer than the limitation period. The court held that recovery of all but the last installment was barred.

Finally, in Boyd v. Buchanan, 176 Mo. App. 56, 162 S.W. 1075 (K.C. Ct. App. 1914) (Ellison, P.J.), plaintiff sought an injunction against the foreclosure of a deed of trust securing a note. The last two interest coupons on the note had been due for longer than the 10 year limitation period, and no principal had ever been paid. The court agreed with plaintiff that the 10 year statute barred foreclosure.

Sabine v. Leonard, 322 S.W.2d 831 (Mo. En Banc 1959), held that the 1919 amendment abrogated *Stark, supra,* and that there is no accrual on installments until the last one becomes due so that all may be recovered in one action.

40. *See* statute quoted note 6 *supra.*

41. Brief for Respondent at 11, 483 S.W.2d 658 (Mo. App., D.K.C. 1972).

42. Brief for Appellant at 12-13, 483 S.W.2d 658 (Mo. App., D.K.C. 1972). Briefs were made available through the courtesy of Don Chapman, Jr., of Chillicothe, Missouri, Attorney for Respondent.

43. *See* note 2 *supra.*

44. Allison v. Missouri Power & Light Co., 59 S.W.2d 771 (St. L. Mo. App. 1933). The facts were, briefly: Plaintiff was struck in the face with a metal bar in 1926. His physician said there had been no damage. Three years later (1929) surgery was required to remove crushed bones, etc., that obstructed plaintiff's airways. Plaintiff filed his action in 1932 and defendant demurred on the ground that § 860, RSMo 1929 [now § 516.100, RSMo 1969] barred the action. Plaintiff appealed an adverse judgment arguing that he was within the meaning of the 1919 amendment. Held, dismissal affirmed, accrual is contemporaneous with the accident; mere developmental damage does not delay accrual. "[T]he resulting damage is sustained and is capable of ascertainment within the contemplation of the statute whenever it is such that it can be discovered or made known." Id. at 773. *Allison* construes the 1919 amendment to require an objective test of ascertainability, which may simply mean the damage is technically discoverable. *See* Davis, *Tort Liability and the Statutes of Limitation,* 33 Mo. L. Rev. 171, 187-95 (1968), criticising the *Allison* rule of objective ascertainability of damage. Because the defect in *Thorne* could be considered "technically ascertainable," if the *Allison* rule were applicable, the cause of action would have accrued, even under the 1919 amendment, at delivery of the abstract.

In explaining its interpretation of § 860, RSMo 1929, the Allison court said that the effect of the statute, as amended, was to make

> accrual of the cause of action contingent, not upon the mere doing of the legal wrong or the technical breach of duty which might sustain no more than an action for nominal damages, but upon the damage resulting

standard is subjective. The test is: was the defect capable of ascertainment by this plaintiff in the exercise of due diligence.[45] The court rejected the contention that recording was constructive notice of the defect (and therefore it was ascertainable) as productive of an absurd result,[46] but suggested that there may be a question for the trier of fact as to the Johnsons' reasonable diligence:

> [i]t may well be that there were some facts which should have put at least Johnson on notice at some early date that Thorne had placed his deed of record. Such facts, if they exist, can be developed upon trial.[47]

The impact of *Thorne* should be considered in three contexts. First, extending the abstracter's potential liability will affect his methods and costs of doing business.[48] As long as the basic relationship remains con-

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> therefrom having been sustained and being capable of ascertainment. *In other words, the statute recognizes the doctrine that, when an injury is complete as a legal injury at the time of the act, the period of limitation will at once commence; that if the action is of a nature to be maintained without proof of actual damage, the period of limitation will begin to run from the time the act is done without regard to any actual damage,* or the injured party's knowledge of the wrong; but, that when the act which gives the cause of action is not legally injurious until certain consequences occur, then the period of limitation will take date from the consequential injury.

Id. at 773, The *Thorne* court limited the italicised portion as dictum, although it was not necessary to distinguish *Allison* and its progeny. The supreme court had already suggested a distinction in Sabine v. Leonard, 332 S.W.2d 831 (Mo. En Banc 1959), where it pointed out that *Allison* dealt with damages developing after accrual and was a personal injury action, not a contract case.

45. 483 S.W.2d at 662. The court found support for its position in Chemical Workers Basic Union v. Arnold Sav. Bank, 411 S.W.2d 159 (Mo. En Banc 1966), where § 516.100 was held not to delay accrual because "with reasonable diligence on the part of plaintiff's officers, they could have discovered the unauthorized act . . . ." *Id.* at 165. Supportive, but not cited by the court, is Lewis v. Thompson, 231 Mo. App. 321, 332, 96 S.W.2d 938, 945 (K.C. Ct. App. 1936), in which an action for a sales commission was held to accrue only when the inventory was actually completed as agreed and its value known, even though it could have been made known earlier. The court stated that "capable of ascertainment" meant "capable of ascertainment and of being known at the time and not merely susceptible of ascertainment." *Id.* at 333, 96 S.W.2d at 946. *See* Maryland Casualty Co. v. Kansas City, 128 F.2d 998, 1004 (8th Cir. 1942).

46. 483 S.W.2d at 663; *accord,* J. H. Trisdale, Inc. v. Shasta County Title Co., 146 Cal. App. 2d 831, 839, 304 P.2d 832, 836 (1956); Chicago, R.I. & Gulf Ry. Co. v. Duncan, 273 S.W. 908, 911 (Tex. Civ. App. 1925).

47. 483 S.W.2d at 663.

48. There is currently some concern within the abstracting profession whether the standard form abstracter's liability policy covers this risk. The language of a policy issued by the St. Paul Fire and Marine Insurance Company is illustrative of the problem.

> IV. POLICY PERIOD AND TERRITORY. This policy applies . . . to any negligent act, error or omission which occurs:
> (A) *During the policy period, and then only if claim is made or suit is brought during the policy period or within one year after the end of the policy period.* If during the period, the INSURED shall have knowledge or become aware of any negligent act, error or omission and shall, during the policy period, give written notice thereof to the Company, then such notice shall be considered a claim . . . .

tractual, however, the parties may be able to limit this liability.[49]

Second, the decision may substantially affect professional liability in general. Because physicians' liability has been specifically controlled by statute[50] and extended by case law,[51] *Thorne* may have little impact on them. For attorneys, however, whose liability is usually held to be contractual,[52] the case may herald expanded accountability.[53] Other professionals, including engineers, surveyors, architects, and accountants, whose professional errors may not be immediately ascertainable, may also be affected.

Missouri Titlegram (August 1972) at 2 (emphasis added). Such policies are usually issued for a one-year term, with option for renewal. If each year is a distinct policy period, then arguably the action must be brought in the year the negligent act occurred, or within one year thereafter.

The amount of time necessary to establish adverse possession limits the liability exposure. In many cases this could occur in 10 years. Because of disabilities, however, the period may be substantially longer.

49. The most obvious example of such limitations are the exceptions contained in the abstracter's certificate that state what that cerificate does not cover. Whether an exculpatory clause limiting the amount of damages would be valid in Missouri is unclear. Some states have recognized and given them effect. *See* Corcoran v. Abstract & Title Company, Inc., 217 Md. 633, 637, 143 A.2d 808, 810 (1958); Broser v. Royal Abstract Corp., 49 Misc. 2d 882, 268 N.Y.S.2d 594 (Sup. Ct. 1966).

Any attempt by a Missouri abstracter to shorten contractually his liability exposure may be precluded by § 431.030, RSMo 1969:

> All parts of any contract or agreement hereafter made or entered into which either directly or indirectly limit or tend to limit the time in which any suit or action may be instituted shall be null and void.

This section has been construed to preserve the uniformity of the statutes of limitation as a matter of public policy. It has been litigated frequently in insurance cases. *See, e.g.,* Asel v. Order of United Comm'l Travelers of America, 355 Mo. 658, 197 S.W.2d 639 (En Banc 1946), *aff'g* 193 S.W. 74 (K.C. Mo. App. 1946).

50. § 516.140, RSMo 1969.

51. Smile v. Lawson, 435 S.W.2d 325, 327 (Mo. En Banc 1968), *construing* the present § 516.280, RSMo 1969.

52. Wilcox v. Plummer, 28 U.S. (4 Pet.) 43 (1830); Maloney v. Graham, 171 Ill. App. 409 (1912); Johnson v. Crisler, 156 Miss. 266, 125 So. 724 (1930); Sullivan v. Stout, 120 N.J.L. 304, 199 A. 1 (Ct. Err. & App. 1938); *See* Annots., 18 A.L.R.3d 978 (1968), 118 A.L.R. 215 (1939).

Missouri law is not settled on this point. The five cases which state the Missouri position are: Altman, Miller & Co., v. Loring, 76 Mo. App. 66 (K.C. Ct. App. 1898); Donahue v. Bragg, 49 Mo. App. 273 (St. L. Ct. App. 1892); Aultman, Miller & Co. v. Adams & Sherlock, 35 Mo. App. 503 (K.C. Ct. App. 1889); McClurg v. Hill, 7 Mo. App. 579 (St. L. Ct. App. 1879) (mem.); Benton v. Craig, 2 Mo. *198 (1830). These cases reveal two divergent analyses between the St. Louis and Kansas City Districts of the Missouri Court of Appeals, with each court ignoring the other's precedents and both ignoring the supreme court.

53. In Mumford v. Staton, Whaley & Price, 254 Md. 697, 255 A.2d 359 (1969), an attorney malpractice action, the court said the cause of action accrued when the defect was discovered:

> It would appear that in recent years the trend has been for courts, in applying limitations to professional malpractice cases, not to become too concerned as to whether the action is grounded in contract or tort, but rather to focus attention on the fact that it is the failure to perform one's professional duties with reasonable skill and diligence which gives rise to the cause of action, whether it be a negligent breach of contract or otherwise.

Id. at 714, 255 A.2d at 367.

Finally, the court limited *Allison v. Missouri Power and Light Co.*[54] to its facts, indicating that the 1919 amendment introduced a subjective test of ascertainability of damages in determining when a cause of action, whether tort or contract, accrues.

Thorne is consonant with Missouri's common law expansion of abstracters' liability,[55] an expansion other states have accomplished only through legislative action.[56] The decision presents a judicial compromise between the interests of the abstracting profession and the interests of the public that relies on the accuracy of their product.

STUART W. CONRAD

NEGLIGENT ENTRUSTMENT—AN EXPANSION OF THE ELEMENT OF SUPPLYING THE CHATTEL IN MISSOURI

Stafford v. Far-Go Van Lines, Inc.[1]

Ira Perry, a long distance truck driver, hired Howard Roberts in Jacksonville, Fla., as a nondriving assistant. Although he paid Roberts from his own funds, Perry sought and obtained approval of the arrangement from his employer, Far-Go Van Lines, Inc.,[2] the beneficial owner of the vehicle.[3] Enroute to Tacoma, Wa., the two men stopped overnight in Kansas City, Mo. Perry left Roberts with the rig in a truck lot, giving Roberts a key so he could sleep in the cab. During the night, Roberts drove the truck to Cameron, Mo., where he crashed into plaintiffs' truck stop. The plaintiffs sued Far-Go, Perry, and Roberts for property damage.

Perry knew Roberts did not have either a driver's license or experience operating such equipment. There was no evidence, however, that Roberts had operated the rig previously or that Perry had ever given him permission to do so.[4] Further, there was no evidence that Far-Go or Perry knew Roberts had recently escaped from a state penitentiary.[5]

The trial resulted in a plaintiffs' verdict for $3,000 against Far-Go and

54. *See* note 44 *supra*. 483 S.W.2d 658, 662 (Mo. App., D.K.C. 1972).

55. *See* Slate v. Boone County Abstract Co., 432 S.W.2d 305 (Mo. 1968), *overruling* Zweigardt v. Birdseye, 57 Mo. App. 462 (K.C. Ct. App. 1894), *noted in* Maher, note 14 *supra*.

56. *See* Eckhardt, *Abstracters' Licensing Laws*, 28 MO. L. REV. 1 (1963).

1. 485 S.W.2d 481 (Mo. App., D.K.C. 1972).

2. 485 S.W.2d at 483-84. For a discussion of the appointment of subagents and subservants, see RESTATEMENT (SECOND) OF AGENCY § 5 (1957).

3. *Id.* at 483. The court infers that Perry, not Far-Go, was the legal owner of the vehicle. Under common law, this would give rise to an independent contractor relationship between Far-Go and Perry, thus relieving Far-Go of liability. RESTATEMENT (SECOND) OF AGENCY § 250, comment a (1957). Therefore, trucking companies frequently lease their equipment from the driver-owner to avoid a master-servant relationship. In Missouri and the majority of jurisdictions, however, the courts have imposed a special rule that holds the company vicariously liable nonetheless. *See* Cotton v. Ship-By-Truck Co., 337 Mo. 270, 278, 85 S.W.2d 80, 84 (1935). *See also* RESTATEMENT (SECOND) OF AGENCY § 214, comment b (1957).

4. 485 S.W.2d at 483.

5. *Id.*

a defendant's verdict for Perry. The jury did not return any verdict regarding Roberts; the trial court, however, entered judgment against him for $3,000 about three weeks after trial.

On appeal by both plaintiffs and defendant Far-Go, the Kansas City District of the Missouri Court of Appeals reversed and remanded for a new trial on the issues of liability and damages. The grounds for reversal were inconsistencies of verdicts,[6] improper entering of judgment against Roberts,[7] and inadequacy of damages.[8] However, pursuant to Far-Go's assertion that the trial court erred in denying its motion for judgment n.o.v., the court had to decide if the plaintiffs had made a submissible case. The court concluded that the evidence supported a plaintiffs' verdict against Far-Go.

The court apparently recognized that Far-Go's liability could be predicated on two different grounds: (1) Far-Go was vicariously liable for Perry's negligent entrustment of the truck to Roberts; or (2) Far-Go was itself negligent in entrusting the truck to Roberts.[9] In either case, plaintiffs' claim was based on negligent entrustment.[10] The essential elements of negligent entrustment are found in section 390 of the Restatement (Second) of Torts (1965), which Missouri courts have adopted[11] and the *Stafford* court quoted:

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6. *Id.* at 491.
7. *Id.* at 492.
8. *Id.* at 493.
9. The court largely ignored the distinction between these two theories. Because the jury found that Perry was not negligent, it was necessary that Far-Go be negligent in its own right. Otherwise a verdict for Perry would necessarily discharge Far-Go.
10. Negligent entrustment and "dangerous instrumentality" are distinguishable theories, although they are closely related. In negligent entrustment the chattel is normally not classified as inherently dangerous; it becomes dangerous because of the user's incompetence. *See generally* PROSSER, LAW OF TORTS 466 (4th ed. 1971); Horack, *The Dangerous Instrument Doctrine,* 26 YALE L.J. 224 (1916).
11. 485 S.W.2d at 485; Bell v. Green, 423 S.W.2d 724, 732 (Mo. 1968). *See also* Tharp v. Monsees, 327 S.W.2d 889, 895 (Mo. 1959); Dinger v. Burnham, 360 Mo. 465, 468, 228 S.W.2d 696, 699 (1950); Thomasson v. Winsett, 310 S.W.2d 33, 36 n.1 (Spr. Mo. App. 1958); Ritchie v. Burton, 292 S.W.2d 599, 607 (Spr. Mo. App. 1956); Lix v. Gastian, 261 S.W.2d 497, 500 (St. L. Mo. App. 1953), all of which adopted the first Restatement version.

The vast majority of Missouri cases involve motor vehicles. *See, e.g.,* Bell v. Green, 423 S.W.2d 724 (Mo. 1968); Dinger v. Burnham, 360 Mo. 465, 228 S.W.2d 696 (1950); Thompson v. Winsett, 310 S.W.2d 33 (Spr. Mo. App. 1958); Ritchie v. Burton, 292 S.W.2d 599 (Spr. Mo. App. 1956); Lix v. Gastian, 261 S.W.2d 497 (St. L. Mo. App. 1953); Saunders v. Prue, 235 Mo. App. 1245, 151 S.W.2d 478 (K.C. Ct. App. 1941); Roark v. Stone, 224 Mo. App. 554, 30 S.W.2d 647 (Spr. Ct. App. 1930); Dailey v. Maxwell, 152 Mo. App. 415, 133 S.W. 351 (K.C. Ct. App. 1911). *See also* Annots., 36 A.L.R. 1137 (1925), 68 A.L.R. 1008 (1930), 100 A.L.R. 920 (1936), 163 A.L.R. 1418 (1946), 168 A.L.R. 1364 (1947), 36 A.L.R.2d 735 (1954), 69 A.L.R.2d 978 (1960), and 19 A.L.R.3d 1175 (1968), listing cases in other jurisdictions applying the doctrine to automobiles.

The doctrine has also been applied to other types of chattels. *See, e.g.,* Central Flying Serv. v. Crigger, 215 Ark. 400, 221 S.W.2d 45 (1949) (airplanes); Miller v. Macalester College, 262 Minn. 418, 428-30, 115 N.W.2d 666, 672-74 (1962) (ladders); Mikel v. Aaker, 256 Minn. 500, 506, 99 N.W.2d 76, 80 (1959) (boats); Tharp v. Monsees, 327 S.W.2d 889, 896 (Mo. 1959) (gasoline); Charlton v. Jackson, 183 Mo. App. 613, 620, 167 S.W. 670, 671 (St. L. Ct. App. 1914) (firearms); Dee v. Parish, 169 Tex. 171, 173 327 S.W.2d 449, 542 (1959) (horses).

> One who supplies directly or through a third person a chattel for the use of another whom the supplier knows or has reason to know to be likely because of his youth, inexperience, or otherwise, to use it in a manner involving unreasonable risk of physical harm to himself and others whom the supplier should expect to share in or be endangered by its use, is subject to liability for physical harm resulting to them.[12]

Negligent entrustment is a theory of recovery independent of the rules of ownership, agency, imputed negligence, and respondeat superior. The entrustor's liability rests on the combination of his negligence in entrusting the chattel to the incompetent user, and the user's negligence in using it.[13] The importance of *Stafford* is its expansion of what constitutes an act of supplying the chattel to an incompetent user.

The court held that the evidence supported a plaintiffs' verdict against Far-Go based on its vicarious liability for the negligence of its agent, Perry. Negligent entrustment requires that the entrustor (Perry) supply the "use" of the chattel. Perry did not entrust the use of the freight rig to Roberts, but only supplied him with a key for a purpose unrelated to operational use. The court cited two cases in support of the proposition that, nevertheless, Perry had supplied the rig for Roberts' use. Each case expoused a different theory for this conclusion. By relying on these cases to hold that the plaintiff had made a submissible case, the court apparently accepted the reasoning of both.

The court cited the California case of *Pierce v. Standow*,[14] which advances a theory of implied consent. There, a mother and son attended the same trade school. Because the mother's classes dismissed later, she gave him the keys each morning so he could wait for her in the car. The mother knew her son had no driver's license and had frequently forbidden him to drive, although the son had frequently indicated he was anxious to do so.[15] The appellate court held that the mother had impliedly consented to the son's *operation* of the car by giving him the power to operate it.[16] Thus, she had in fact supplied him with the use of the vehicle.

It is not necessary to quarrel with the logic in *Pierce*; *Stafford* is distinguishable on its facts. The only notice Perry had that Roberts desired to drive was on one previous occasion when the two had discussed the possibility of Roberts securing a learner's permit so he could share the

12. A wide variety of circumstances have been held to be grounds to put the supplier on notice of possible misuse by the one entrusted with the chattel. *See, e.g.*, Bell v. Green, 423 S.W.2d 724, 732 (Mo. 1968) (physcial exhaustion); Dinger v. Burnham, 360 Mo. 465, 468, 228 S.W.2d 696, 699 (1950) (recklessness); Ritchie v. Burton, 292 S.W.2d 599, 606 (Spr. Mo. App. 1956) (inexperience); Roark v. Stone, 244 Mo. App. 554, 558, 30 S.W.2d 647, 648-49 (Spr. Ct. App. 1930) (youth); Golembe v. Blumberg, 262 App. Div. 759, 27 N.Y.S.2d 692 (1941) (epilepsy); Schneider v. Van Wyckhouse, 54 N.Y.S. 2d 446, 448 (Sup. Ct. Monroe County 1945) (heart condition); Annot., 19 A.L.R.3d 1175 (1968) (intoxication).

13. *See* Woods, *Negligent Entrustment: Evaluation of a Frequently Overlooked Source of Additional Liability*, 20 ARK. L. REV. AND B. ASS'N J. 101, 109 (1966); Note, *The Doctrine of Negligent Entrustment in Texas*, 20 SW. L.J. 202, 206 (1966).

14. 163 Cal. App. 2d 286, 329 P.2d 44 (1958).

15. *Id.* at 289, 329 P.2d at 46.

16. *Id.* at 288, 329 P.2d at 45.

driving load.[17] Further, it is more reasonable to imply consent to operate a family vehicle in the parent-child[18] context than to operate a tractor-trailer rig based on the relationship between Perry and Roberts. Although there was a special relationship between Perry and Roberts, concluding that Perry impliedly consented to Roberts' *operation* of the truck by giving him a key for access to the cab is pure fiction. The doctrine of implied consent in this context is not grounded in logic, however, but in economic responsibility. As necessary as that may appear to be, the doctrine should be kept within logical limits. Instead of approving the doctrine of implied consent, the court should have expounded an accurate explanation of liability.

Perry and Far-Go were not vicariously liable for Roberts' negligence based on traditional agency principles because Roberts' activities were clearly beyond the scope of his employment. I.C.C.-regulated trucking is subject to a different rule, however. Where the negligence is that of the driver, the employer's vicarious liability is virtually absolute, regardless of whether the act is criminal, wilfull, or clearly beyond the scope of employment.[19] The reasoning behind the stricter rule is equally applicable to nondriving assistants, especially where the employer (Far-Go) knew of his presence on the equipment. *Stafford* should have been decided on this theory.

The other case the court cited that indicates entrustment of the keys to Roberts could be entrustment of the use of the rig is *Boland v. Love.*[20] *Boland* argues that it is foreseeable that one with a background like Roberts' would use the keys to operate the vehicle without authorization. In that case, one Love left an employee, Hamilton, in general charge of his property during a protracted absence. While Hamilton was absent, another employee, the gardener, Coates, an ex-convict, an alcoholic, and unqualified to drive, took one of the automobiles, obtaining the keys from above the visor. Both Love and Hamilton knew of Coates' criminal background,[21]

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17. 485 S.W.2d at 484. Current I.C.C. regulations limit the driving time of a single operator to 10 hours, after 8 consecutive hours of off duty time. 49 C.F.R. § 395.3 (1968).

18. At least one jurisdiction has suggested that the greater the degree of relationship existing between the supplier and the user, the greater the likelihood that the courts will find implied consent. *See* Elkinton v. Cal. State Auto Ass'n Interstate Ins. Bureau, 173 Cal. App.2d 338, 344, 343 P.2d 396, 399 (1959). *See also* Annot., 5 A.L.R.2d 600 (1949).

Relationship as a determinative factor of implied consent is not contrary to the doctrine of negligent entrustment. Although liability based on negligent entrustment can exist independently of any relationship between the user and the supplier of the chattel, the existence of such a relationship, and the degree thereof, will affect the amount of evidence required to support a finding of implied consent to use the chattel.

19. *See generally* 49 C.F.R. § 1057.4 (1967). *See also* Mellon Nat'l Bank & Trust Co. v. Sophie Lines, Inc., 289 F.2d 473, 476 (3d Cir. 1961); Cosmopolitan Mut. Ins. Co. v. White, 336 F.Supp. 92, 98 (D. Del. 1972); Brannaker v. Transamerican Freight Lines, Inc., 428 S.W.2d 524, 534-36 (Mo. 1968); Duke v. Thomas, 343 S.W.2d 656, 660 (St. L. Mo. App. 1961); Cox v. Bond Transp., Inc., 53 N.J. 186, 205, 249 A.2d 579, 589, *cert denied,* 395 U.S. 935 (1969).

20. 222 F.2d 27 (D.C. Cir. 1955).

21. *Id.* at 30.

and he was clearly not authorized to drive the vehicles. Love was held vicariously liable in a subsequent damage suit for Hamilton's "entrustment" of the automobile to Coates. Hamilton, however, did not entrust Coates with even the keys to the car; he merely failed to maintain the automobiles securely.[22] The case indicates that simply failing to prevent one with a known criminal background, like Coates, from obtaining the means of using the chattel satisfies the element of supplying the chattel.

The theory of *Boland* is hardly applicable to *Stafford*. Perry had no reason to suspect Roberts was unreliable. Indeed, he had some reason to consider him reliable.[23] Thus, charging Perry, and therefore Far-Go, with knowledge of Roberts' background places on them an affirmative duty to investigate employees, a duty well beyond the usual legal obligation of an employer to use ordinary care in selection of its employees.[24] Far-Go's obligation in this regard could be extensive. One of the two alternative grounds for Far-Go's liability was that Far-Go was negligent in its own right, without regard to its vicarious liability. Thus, simply because the home office had consented to its driver's hiring a nondriving assistant out of his own funds, Far-Go could be liable for negligently entrusting the freight rig to Roberts, based on its failure to investigate his character.[25]

The implications of applying *Boland* to the *Stafford* facts could be broad, as that necessitates an expanded view of the employer's duty to investigate its employees. The court, of course, did not attempt to delineate the scope of this duty. This raises several practical questions for employers. For example, must every potential employee who might work in the vicinity of a motor vehicle[26] be fingerprinted,[27] given a lie detector test,[28] or in-

22. Case law in Missouri supports the proposition that absent special circumstances, it is generally not forseeable that leaving the keys in an automobile will result in unauthorized operation and injury to third parties. The leading Missouri case is Gower v. Lamb, 282 S.W.2d 867 (St. L. Mo. App. 1955), *noted in* 21 Mo. L. REV. 197 (1956) where the court denied recovery from the owner of a vehicle who left the keys in the ignition while the automobile was parked on a main thoroughfare in St. Louis. The court emphasized that the criminal nature of the act lessens the likelihood of its occurrence, and thus evidence approaching actual knowledge by the owner of thieves in the neighborhood would be necessary to support a finding of liability. *See also* Triplett v. Shafer, 300 S.W.2d 528 (K.C. Mo. App. 1957); Zuber v. Clarkson Constr. Co., 363 Mo. 352, 251 S.W.2d 52 (1952); Annot., 45 A.L.R.3d 787 (1972).

23. When Perry first met Roberts in Jacksonville, Fla., Roberts was serving another Far-Go driver as nondriving assistant. Perry and the other driver arranged for Roberts to switch to Perry's rig. Presumably the other driver had been satisfied with Robert's work. 485 S.W.2d at 483.

24. *See* Williams v. Mo. Pac. Ry., 109 Mo. 475, 18 S.W. 1098 (1892); Davis v. Merrill, 133 Va. 69, 112 S.E. 628 (1922); Note, *Employer's Duty to Know Deficiencies of Employees,* 16 CLEV.-MAR. L. REV. 143 (1967). *But cf.* Galentine v. Borglum, 235 Mo. App. 1141, 150 S.W.2d 1088 (K.C. Ct. App. 1941).

25. 485 S.W.2d at 489.

26. As to actual drivers of motor vehicles, current I.C.C. regulations include stringent qualification requirements, including an extended medical examination every 24 months, passage of a road test and written examination, and completion of a detailed application for employment. The regulations also require that the carrier investigate the applicant's driving and employment record for the past three years. 49 C.F.R. § 391.11 (1970). These latter three requirements were not effective until Jan. 1, 1971, and do not apply to drivers regularly employed before that date.

The regulations contain no such requirements for driver's helpers, or other

vestigated through the F.B.I.? Is the employer entitled to rely on the information contained in the employment application? Because there was another ground for the decision in *Stafford,* viz., implied consent,[29] this part of the decision is unnecessary. Perhaps it would best have been deferred to a future case in which it could be more fully delineated.

Before *Stafford,* Missouri required that there be direct entrustment or permissive use to constitute supplying the chattel. *Stafford* adopted two new theories to expand that element of negligent entrustment, but both were stretched considerably to support a plaintiff's verdict. The court's principal concern was probably to ensure that a deserving plaintiff would be able to realize his damages.[30]

JOHN M. CARNAHAN III

TORTS—PARENTAL IMMUNITY DOCTRINE IN MISSOURI

Bahr v. Bahr[1]

Joyce and Matthew Bahr were divorced in 1967. The court awarded Joyce custody of their four year old daughter, Stephanie, and granted Matthew visitation privileges. While visiting her father in 1969, Stephanie was severely burned by a barbecue grill, allegedly due to her father's negligence. Stephanie, by her mother as next friend, brought suit against Matthew to recover for these injuries. The trial court sustained defendant's motion to dismiss based on parental immunity.

On appeal, plaintiff asserted that Missouri should not apply the parental immunity doctrine to actions brought by an unemancipated minor child against a parent for ordinary negligence. The Missouri Supreme Court upheld the doctrine, but remanded the case to give the plaintiff an opportunity to present evidence that no family relationship existed that required its application.

Whether a tort action by a minor child against his parents would lie

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employees that might work in the vicinity of such vehicles. The regulations permit such helpers to accompany the qualified driver, but expressly provide that only qualified drivers can operate said equipment. 49 C.F.R. §§ 392.60-.61 (1968). Thus, neither Perry nor Far-Go could have permitted Roberts to drive the vehicle.

27. *See generally* Annot., 41 A.L.R.3d 732 (1972) for a collection of cases upholding the validity of statutes, ordinances, or regulations requiring fingerprints of individuals engaged in specified occupations.

28. For a discussion of the increased use of lie-detector tests by the business world see *Time,* March 19, 1973, at 73.

29. As suggested previously, implied consent is also an unsatisfactory theory. For a satisfactory alternative theory see text accompanying note 19 *supra.*

30. It is evident from the facts that Roberts would have been unable to personally satisfy the judgment, and the court pointed out that no insurance was in effect. 485 S.W.2d at 493. The rationale for holding the corporate defendant liable is very similar to that offered by some commentators to explain vicarious liability. The employer is better able to respond to the judgment, and the burden can be charged to the expenses of production. *See generally,* BATY, VICARIOUS LIABILITY 154 (1916); MECHEM, OUTLINES OF THE LAW OF AGENCY §§ 349-363 (4th ed. 1952); Laski, *The Basis of Vicarious Liability,* 26 YALE L.J. 105 (1916).

1. 478 S.W.2d 400 (Mo. 1972).

at common law is unclear.[2] The modern doctrine of parental immunity for negligently caused injuries developed from three American cases involving intentional torts. In *Hewellette v. George*,[3] a Mississippi court denied recovery to a minor daughter for malicious confinement in an insane asylum. The court cited no authority; the justification for the holding was preservation of family unity. In 1903, a Tennessee court in *McKelvey v. McKelvey*[4] disallowed a minor's suit against his father and stepmother for cruel and inhuman treatment. *Roller v. Roller*[5] stretched the doctrine beyond its logical limits. That court concluded that society's interest in preserving family harmony precluded a child from suing her father for injuries received when he raped her.

Subsequent cases extended parental immunity to negligent torts,[6] and today, a majority of jurisdictions hold that an unemancipated minor child cannot recover in an action against his parent for ordinary negligence.[7] The doctrine has been limited in many jurisdictions,[8] however, and completely abolished in others.[9]

One justification for parental immunity that many courts have espoused is preservation of family harmony.[10] This rationale can be criticized on several grounds. First, property and contract actions by children against their parents, although as potentially disruptive of the family as tort actions, have always been recognized.[11] Similarly, jurisdictions that support parental immunity often sanction suits between siblings,[12] despite the similar potential for family discord that they obviously present. Also, some critics suggest that the public's interest in protecting children from loss caused by parental negligence must be weighed against the family harmony rationale. As Judge Fuld stated, to tell children that their "pains

2. "Neither decision now dictum nor text-writer spoke on the subject. The issue is, and must remain, an insoluble mystery." Dunlap v. Dunlap, 84 N.H. 352, 356, 150 A. 905, 907 (1930); *See* W. PROSSER, THE LAW OF TORTS 865 (4th ed. 1971); McCurdy, *Torts Between Persons in Domestic Relations*, 43 HARV. L. REV. 1030, 1059 (1930). The common law did recognize child-parent property actions. Lamb v. Lamb, 146 N.Y. 317, 41 N.E. 26 (1895); King v. Sells, 193 Wash. 294, 75 P.2d 130 (1938); McCurdy, *supra* at 1057.

3. 68 Miss. 703, 9 So. 885 (1891).

4. 111 Tenn. 388, 77 S.W. 664 (1903).

5. 37 Wash. 242, 79 P. 788 (1905).

6. The cases are collected in Akers & Drummond, *Tort Actions Between Members of the Family—Husband & Wife—Parent & Child*, 26 Mo. L. REV. 152, 183, n.168 (1961).

7. H. CLARK, THE LAW OF DOMESTIC RELATIONS 257 (1968).

8. *See* note 37 *infra*.

9. Five states have abolished the doctrine in general: Hawaii: Petersen v. City and County of Honolulu, 51 Hawaii 484, 462 P.2d 1007 (1969); Louisiana: Jagers v. Royal Indemnity Co., 257 So. 2d 806 (La. 1972); New York: Gelbman v. Gelbman, 23 N.Y.2d 434, 245 N.E.2d 192, 297 N.Y.S.2d 529 (1969); North Dakota: Nuelle v. Wells, 154 N.W.2d 364 (N.D. 1967); Pennsylvania: Falco v. Pados, 444 Pa. 372, 282 A.2d 351 (1971).

10. *See, e.g.*, Barlow v. Iblings, 261 Iowa 713, 156 N.W.2d 105 (1968); Brennecke v. Kilpatrick, 336 S.W.2d 68 (Mo. En Banc 1960).

11. Hebel v. Hebel, 435 P.2d 8 (Alas. 1967); Streenz v. Streenz, 106 Ariz. 86, 471 P.2d 282 (1970); Gelbman v. Gelbman, 23 N.Y.2d 434, 245 N.E.2d 192, 297 N.Y.S.2d 529 (1969).

12. *See* Overlock v. Ruedemann, 147 Conn. 649, 165 A.2d 335 (1960); Midkiff v. Midkiff, 201 Va. 829, 113 S.E.2d 875 (1960).

must be endured for the peace and welfare of the family is something of a mockery."[13]

A closely related argument for upholding the immunity is that suits by unemancipated minor children against their parents could interfere with the rights and obligations of parents to control, discipline and care for their children.[14] Courts fear that the threat of a retaliatory tort action would unduly restrain parental discipline.[15] But most tort suits brought by children against their parents are suits for injuries suffered in automobile accidents and are unrelated to discipline, control and care. Therefore, several courts have adopted the position taken by the Wisconsin Supreme Court in *Goller v. White,*[16] which abrogated the parental immunity doctrine except where the negligent act involves (1) an exercise of parental authority over the child, or (2) an exercise of parental discretion with respect to the provision of food, clothing, housing, medical and dental services, and other care.[17] For the same reasons, other jurisdictions have taken the position that the doctrine is inapplicable where the injuries are suffered as a result of the negligent operation of a motor vehicle.[18] Finally, a California court recently held that although discipline and care are the parents' duty, their conduct with respect thereto must be reasonable to qualify for the immunity.[19]

Another reason advanced for extending the immunity is that a re-

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13. Badigian v. Badigian, 9 N.Y.2d 472, 482, 174 N.E.2d 718, 724, 215 N.Y.S.2d 35, 43 (1961) (Fuld, J., dissenting). This reasoning was later adopted by the New York Court in Gelbman v. Gelbman, 23 N.Y.2d 434, 245 N.E.2d 192, 297 N.Y.S.2d 529 (1969), which overruled *Badigian.*

14. *See* Barlow v. Iblings, 261 Iowa 713, 156 N.W.2d 105 (1968); Luster v. Luster, 299 Mass. 480, 13 N.E.2d 438 (1938); Rodebaugh v. Grand Truck W. R.R., 4 Mich. App. 559, 145 N.W.2d 401 (1966); Small v. Morrison, 185 N.C. 577, 118 S.E. 12 (1923); Matarese v. Matarese, 47 R.I. 131, 131 A. 198 (1925).

15. *See, e.g.,* Borst v. Borst, 41 Wash. 2d 642, 251 P.2d 149 (1952).

16. 20 Wis. 2d 402, 122 N.W.2d 193 (1963).

17. Rigdon v. Rigdon, 465 S.W.2d 921 (Ky. 1971); Plumley v. Klein, 388 Mich. 1, 199 N.W.2d 169 (1972); Silesky v. Kelman, 281 Minn. 431, 161 N.W.2d 631 (1968). For conflicting criticisms of this approach see H. CLARK, *supra* note 7, at 259, and Comment, *Child v. Parent: Erosion of the Immunity Rule,* 19 HASTINGS L.J. 201, 219 (1967).

18. Xaphes v. Mossey, 224 F. Supp. 578 (D.C. Vt. 1963) (applying Vermont law); Hebel v. Hebel, 435 P.2d 8 (Alas. 1967); Streenz v. Streenz, 106 Ariz. 86, 471 P.2d 282 (1970); France v. A.P.A. Transport Corp., 56 N.J. 500, 267 A.2d 490 (1970).

19. Gibson v. Gibson, 3 Cal. 3d 914, 921, 479 P.2d 648, 653, 92 Cal. Rptr. 288, 293 (1971) (the prerogative and duty to exercise authority over a minor child must be exercised within reasonable limits); H. CLARK, *supra* note 7, at 260 ("[a]bolition of the immunity is desirable . . . [but] . . . the parent should have a privilege to use reasonable physical force in disciplining his child . . . ."); RESTATEMENT (SECOND) OF TORTS § 147 (1) (1965):

> "A parent is privileged to apply such force or to impose such reasonable confinement upon his child as he reasonably believes to be necessary for its proper control, training, or education."

But see 7 CAL. WESTERN L. REV. 466 (1971).

Restricting the immunity to reasonable conduct in effect eliminates the immunity because the parent is not liable for injuries caused by reasonable actions anyway.

covery against a parent might deplete the family exchequer.[20] Thus, a recovery by one child against his parent could reduce the resources available for the entire family. The injured child, however, because of his injuries, probably has a legitimate need for a greater percentage of the resources.[21] Further, his own assets of health and strength have been depleted.

Liability insurance has had significant impact on the parental immunity doctrine. While Missouri and other states consider the existence of insurance immaterial,[22] a number of courts have considered it in assessing the validity of the rule.[23] Courts favoring immunity contend that the existence of insurance cannot create a liability where none existed before.[24] The New York Court of Appeals has rejected this argument,[25] stating that the presence of insurance does not create a liability, but instead eliminates a defense to an existing liability.[26]

The major reasons for extending parental immunity vanish when the parent is insured. The family harmony justification is inapplicable since the suit is only nominally between parent and child. The common goal of securing compensation for the injured child may actually unite the family.[27] The family discipline rationale is inapposite because the parent is not threatened with ultimate financial responsibility.[28] And because the parent does not have to pay the judgment, family resources will not be depleted.

Defenders of the parental immunity doctrine contend that the existence of liability insurance justifies retention of the doctrine to prevent collusive suits.[29] A similar possibility of collusion exists in suits between close friends and between relatives, yet these actions are often allowed.[30] Of course, the insurer could exclude actions by children from coverage or charge higher premiums for the additional risk.[31] Nevertheless, some courts

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20. Bulloch v. Bulloch, 45 Ga. App. 1, 163 S.E. 708 (1932); Small v. Morrison, 185 N.C. 577, 118 S.E. 12 (1923); Roller v. Roller, 37 Wash. 242, 79 P. 788 (1905).

21. Briere v. Briere, 107 N.H. 432, 224 A.2d 588 (1966); Borst v. Borst, 41 Wash. 2d 642, 251 P.2d 149 (1952).

22. *See, e.g.*, Baker v. Baker, 364 Mo. 453, 263 S.W.2d 29 (1953).

23. Xaphes v. Mossey, 224 F. Supp. 578 (D.C. Vt. 1963); Hebel v. Hebel, 435 P.2d 8 (Alas. 1967); Streenz v. Streenz, 106 Ariz. 86, 471 P.2d 282 (1970); Gibson v. Gibson, 3 Cal. 3d 914, 479 P.2d 648, 92 Cal. Rptr. 288, (1971); Briere v. Briere, 107 N.H. 432, 224 A.2d 588 (1966); Dunlap v. Dunlap, 84 N.H. 352, 150 A. 905 (1930); France v. A.P.A. Transport Corp., 56 N.J. 500, 267 A.2d 490 (1970); Worrell v. Worrell, 174 Va. 11, 4 S.E.2d 343 (1939); Lusk v. Lusk, 113 W. Va. 17, 166 S.E. 538 (1932); Goller v. White, 20 Wis. 2d 402, 122 N.W.2d 193 (1963).

24. *See, e.g.*, Bulloch v. Bulloch, 45 Ga. App. 1, 163 S.E. 708 (1932).

25. Gelbman v. Gelbman, 23 N.Y.2d 434, 245 N.E.2d 192, 297 N.Y.S.2d 529 (1969).

26. *Id.* at 439, 245 N.E.2d at 194, 297 N.Y.S.2d at 532.

27. Parks v. Parks, 390 Pa. 287, 135 A.2d 65 (1957).

28. Hebel v. Hebel, 435 P.2d 8 (Alas. 1967).

29. Villaret v. Villaret, 169 F.2d 677 (D.C. Cir. 1948). The rationale is similar to that behind the so-called "guest statutes" in force in several jurisdictions.

The parent could also find himself torn between his desire to see his child recover and his duty to aid the insurer. *See* Dean v. Smith, 106 N.H. 314, 211 A.2d 410 (1965); Signs v. Signs, 156 Ohio St. 566, 103 N.E.2d 743 (1952).

30. Suits by children against their parents are also allowed in other contexts. *See* note 11 and accompanying text *supra*.

31. Akers and Drummond, *supra* note 6, at 191.

have upheld parental immunity because of the possibility of collusive suits. Some have used the threat of collusion *and* the threat of disruption of family harmony to uphold the doctrine,[32] even though those reasons conflict when applied to any single case.[33]

The development of the parental immunity doctrine in Missouri has been erratic. In 1932, the Kansas City Court of Appeals arguably rejected the reasoning behind the doctrine.[34] Subsequently, the Springfield Court of Appeals applied the doctrine in accordance with the general rule.[35] In 1953, the Missouri Supreme Court endorsed the doctrine in *Baker v. Baker.*[36]

The chief exception to the present immunity rule in Missouri is, as in other jurisdictions, the emancipation of the child.[37] Missouri has also recog-

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32. *See, e.g.,* Dennis v. Walker, 284 F. Supp. 413 (D.D.C. 1968); Parks v. Parks, 390 Pa. 287, 135 A.2d 65 (1957).

33. In Borst v. Borst, 41 Wash. 2d 642, 251 P.2d 149 (1952), the court stated that if insurance was not considered in determining whether the family harmony argument can be disregarded and immunity therefore denied, neither should it be taken into account in determining whether the possibility of fraud and collusion justifies the immunity. *Id.* at 653, 251 P.2d at 155.

34. Wells v. Wells, 48 S.W.2d 109 (K.C. Mo. App. 1932). In *Wells,* a mother sought recovery for injuries received while riding in an automobile driven by her son. The court rejected the family harmony rationale, noting the lack of similar concern in property and contract actions. The result might have been the same had the son sued the mother. *See* Brown v. Parker, 375 S.W.2d 594 (St. L. Mo. App. 1964) (basis for rule remains the same).

35. Cook v. Cook, 232 Mo. App. 994, 124 S.W.2d 675 (Spr. Ct. App. 1939). In *Cook,* an adopted daughter sued her mother for malicious assault. The court rejected the suit, and considered that the available criminal sanctions were sufficient. The court cited only Corpus Juris as authority [46 C.J. *Parent and Child* § 159 (1928)] and apparently was not aware of the *Wells* decision; awareness of that decision might have produced a different result. *Id.* at 996, 124 S.W.2d at 676. For purposes of liability, the court did not distinguish between adoptive and natural parents.

36. 364 Mo. 453, 263 S.W.2d 29 (1953). A 15 month old infant sued his father for injuries received when the father backed the family car over the infant. The court rejected an absolute parental immunity. *Id.* at 455, 263 S.W.2d at 30. Nevertheless it disallowed the suit on the grounds of public policy. The court reviewed *Wells,* but did not expressly overrule it. *Id.* at 458, 263 S.W.2d at 32.

The *Baker* court, in dicta, discussed two other aspects of the parental immunity doctrine. The court stated that the existence of insurance was immaterial. Also, the court indicated that parental immunity would not bar actions for intentional torts. *Id.* (dictum). But, the court did not overrule *Cook,* which had denied recovery for an intentional tort.

In a later case, the St. Louis Court of Appeals ruled that the immunity ran both ways because both situations disrupted family harmony. The court invoked the doctrine to preclude a suit by a mother for injuries received while a passenger in her son's car. Brown v. Parker, 375 S.W.2d 594 (St. L. Mo. App. 1964).

37. In Wurth v. Wurth, 322 S.W.2d 745 (Mo. En Banc 1959), a 19 year old daughter attempted to recover for injuries sustained as a result of her father's negligent operation of an automobile. The court conceded that an unemancipated minor child cannot recover from his parent for an unintentional tort, but ruled that the plaintiff was in fact emancipated and therefore could recover. This appears to be the only Missouri case involving a tort suit by an emancipated minor child against his parents.

For a general discussion of emancipation see H. CLARK, *supra* note 7, at 240-44.

An additional exception is recognized by several courts, which, while upholding the immunity, does not apply it to injuries caused by the parent's negligence

nized an exception where the parent-child relationship has been destroyed. In *Brennecke v. Kilpatrick*[38] the Missouri Supreme Court dealt with the effect of the negligent parent's death. There, an unemancipated minor child sued her deceased mother's estate, alleging the mother's negligence. The court stated that the immunity is predicated on a procedural desirability invoked for public policy reasons and not on the theory that no cause of action arises.[39] The court also stated:

> The rule is not an absolute . . . but generally exists . . . only when the court concludes that to hold otherwise would seriously disturb the family relations and thus be contrary to public policy. . . .[40]

The court took the position that the policy reasons for the rule had disappeared with the mother's death, the parent-child relationship having been destroyed, and the action was allowed.[41]

In *Bahr,* the Missouri Supreme Court stated that it could: 1) abolish the parental immunity rule;[42] 2) abolish the rule in general but delineate certain exceptions to which immunity would be applied;[43] 3) abolish the immunity but apply a standard of reasonableness "viewed in light of the parental role";[44] or 4) retain the *Brennecke* position, adhering to the immunity rule only when to hold otherwise would "seriously disturb the family relations and thus be contrary to public policy."[45] *Bahr* adopted the latter alternative.

The one serious flaw in the test that *Bahr* embraces is that it fosters litigation. The suit will lie only if it will not "seriously disturb the family relations." This can be ascertained with certainty in some cases—*e.g.,* where the parent is insured.[46] Often, however, the determination will be quite

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occurring in a business or employment activity. Dennis v. Walker, 284 F. Supp. 413 (D.D.C. 1968); Trevarton v. Trevarton, 151 Colo. 418, 378 P.2d 640 (1963); Signs v. Signs, 156 Ohio St. 566, 103 N.E.2d 743 (1952); Borst v. Borst, 41 Wash. 2d. 642, 251 P.2d 149 (1952). *Contra,* Luster v. Luster, 299 Mass. 480, 13 N.E.2d 438 (1938).

This exception, which Missouri has not ruled on, exists because an injury resulting from a parent's vocation is not referrable to the parent-child relationship. Borst v. Borst, 41 Wash. 2d 642, 251 P.2d 149 (1952). While engaged in his business, the parent owes a duty of care to anyone with whom he might come into contact, including his own children. Dunlap v. Dunlap, 84 N.H. 352, 150 A. 905 (1930). Similarly, immunity has been denied where a carrier-passenger or master-servant relation existed between the parent and child at the time of injury. Worrell v. Worrell, 174 Va. 11, 4 S.E.2d 343 (1939); Lusk v. Lusk, 113 W. Va. 17, 166 S.E. 538 (1932); Dunlap v. Dunlap, 84 N.H. 352, 150 A. 905 (1930).

38. 336 S.W.2d 68 (Mo. En Banc 1960).

39. *Id.* at 73.

40. *Id.* at 70.

41. The action would have been barred had the mother survived. *See* Baker v. Baker, 364 Mo. 453, 263 S.W.2d 29 (1953); Brown v. Parker, 375 S.W.2d 594 (St. L. Mo. App. 1964).

42. *See* cases cited note 9 *supra.*

43. *See* notes 17 and 18 and accompanying text *supra.*

44. 478 S.W.2d at 402. *See* note 19 *supra.*

45. Brennecke v. Kilpatrick, 336 S.W.2d 68, 70 (Mo. En Banc 1960).

46. Where the insurance company will pay the damages, the "family harmony" rationale is of little force. *See* text accompanying note 27 *supra.*

speculative. For example, should recovery be permitted where the amount involved is insignificant considering the parent's wealth? The function of the parental immunity doctrine—to keep the family out of court—is frustrated because a lawsuit will often be required to determine if it is applicable. A better approach would be to either abolish the immunity altogether or apply it except in certain objectively ascertainable situations.[47]

STEPHEN B. MACDONALD

WORKMEN'S COMPENSATION—COMPENSATION FOR OCCUPATIONAL DISEASE—APPLICATION OF THE ORDINARY-DISEASES-OF-LIFE EXCLUSIONARY CLAUSE OF THE MISSOURI OCCUPATIONAL DISEASE STATUTE

Collins v. Neevel Luggage Manufacturing Co.[1]

Mrs. Kathryn Collins's duties, as an employee of defendant, included placing metal valances on pieces of luggage on an assembly line. This required her to bend her fingers toward the palms of her hands, exerting pressure downward and inward, approximately one time per second. She performed this task for one hour a day during the week and for six to eight hours on Saturdays. After performing this task for two weeks Mrs. Collins developed pain in her fingers and arms. A neurosurgeon diagnosed her condition as carpal tunnel syndrome.[2] Mrs. Collins filed a claim under the Missouri Workmen's Compensation Act.[3] At the Industrial Commission hearing, claimant's expert witnesses testified that the predominant, though not exclusive, cause of carpal tunnel syndrome is constant trauma resulting from repetitive flexions of the wrists and hands under pressure,

47. Had the *Bahr* court strictly applied the immunity, it could have created a problem with regard to the payment of the child's medical expenses. Because the mother was the custodial parent, she had a duty of caring for child and would have been responsible for the plaintiff's medical expenses resulting from the injury. If the expenses were expected to be substantial, the changed conditions might justify a request for increased child support. *See* Reiter v. Reiter, 225 Ark. 157, 278 S.W.2d 644 (1955); Pearson v. Pearson, 247 Iowa 437, 74 N.W.2d 224 (1956); Grunder v. Grunder, 186 Kan. 766, 352 P.2d 1067 (1960); Warren v. Warren, 218 Md. 212, 146 A.2d 34 (1958).

Yet, if the husband's financial situation was not sufficient the request would be denied. *See* Brown v. Brown, 84 So. 2d 311 (Fla. 1955); Whitney v. Whitney, 325 Mass. 28, 88 N.E.2d 647 (1949); Mowery v. Mowery, 38 N.J. Super. 550, 79 A.2d 793 (1951); Nelson v. Nelson, 225 Ore. 257, 357 P.2d 536 (1960). Thus, Mrs. Bahr would have to pay the plaintiff's medical expenses, although attributable to the noncustodical parent's negligence.

1. 481 S.W.2d 548 (Mo. App., D.K.C. 1972).

2. An expert witness at the Industrial Commission hearing described carpal tunnel syndrome as entrapment of the median nerve in the carpal tunnel on the outside of the wrist, causing sensory numbness and pain in the fingers and hand and a loss of sensory and motor functions of parts of the thumb and fingers. Id. at 550.

3. Ch. 287, RSMo 1969.

and that the repetitive wrist flexions required of claimant caused the disease.[4] The Industrial Commission determined that claimant's carpal tunnel syndrome was an occupational disease and compensable under sections 287.063 and 287.067 of the Missouri Workmen's Compensation Act. The circuit court affirmed the Industrial Commission's award. On appeal by the employer and the insurer, the Missouri Court of Appeals, Kansas City District, affirmed.

Compensable occupational disease is defined by section 287.067, RSMo 1969.[5] Missouri courts have declared that section 287.067 incorporates the legal test of an occupational disease established judicially[6] before enactment of section 287.067 in 1959:[7] the disease must arise out of, be a natural result of, and be peculiar to the employment, and the employment must create a hazard of exposure to the disease greater than occupations generally.[8] However, the statute denies compensation for "[o]rdinary diseases of life to which the general public is exposed outside of the employment."[9] The *Collins* decision significantly clarified the meaning of this exclusionary clause.

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4. 481 S.W.2d at 550.

5. Section 287.067, RSMo 1969, defines occupational disease as:

> [A] disease arising out of and in the course of the employment. Ordinary diseases of life to which the general public is exposed outside of the employment shall not be compensable, except where the said diseases follow as an incident of an occupational disease as defined in this section. A disease shall be deemed to arise out of the employment only if there is apparent to the rational mind upon consideration of all the circumstances a direct causal connection between the conditions under which the work is performed and the occupational disease, and which can be seen to have followed as a natural incident of the work as a result of the exposure occasioned by the nature of the employment as the proximate cause, and which does not come from a hazard to which workmen would have been equally exposed outside of the employment. The disease must be incidental to the character of the business and not independent of the relation of employer and employee. The disease need not to have been foreseen or expected but after its contraction it must appear to have had its origin in a risk connected with the employment and to have flowed from that source as a rational consequence.

6. Subsequent cases have adopted the judicial definition of an occupational disease stated in Sanford v. Valier-Spies Milling Co., 235 S.W.2d 92 (St. L. Mo. App. 1950):

> [A] disease which is the natural incident or result of a particular employment and is peculiar to it, usually developing gradually from the effects of long continued work at the employment, and serving, because of its known relation to the employment, to attach to the employment a risk or hazard which distinguishes it from the ordinary run of occupations and is in excess of that attending employments in general.

Id. at 95. *See, e.g.,* Marie v. Standard Steel Works, 319 S.W.2d 871, 875 (Mo. En Banc 1959); Evans v. Chevrolet Motor Co., 232 Mo. App. 927, 933, 105 S.W.2d 1081, 1084 (St. L. Ct. App. 1937).

7. 481 S.W.2d at 551; Liebrum v. Laclede Gas Co., 419 S.W.2d 517, 521 (St. L. Mo. App. 1967).

8. Liebrum v. Laclede Gas Co., 419 S.W.2d 517, 521 (St. L. Mo. App. 1967).

9. *See* note 5 *supra.* The *Collins* court stated that the language of the ordinary-diseases-of-life exclusionary clause appears to be derived from the Illinois and Indiana precursors to the Missouri statute. 481 S.W.2d at 551. *See* ILL. REV. STAT. Ch. 48, § 172.36d (1969), and IND. ANN. STAT. § 40-2206 (1965).

The appellants in *Collins* argued that carpal tunnel syndrome is an ordinary disease of life to which the general public is exposed within the meaning of the exclusionary clause.[10] Thus, although claimant's work in fact caused her disease,[11] the exclusionary clause barred compensation because the disease was not shown to have resulted from a hazard peculiar to the nature of the employment to which the general public is not exposed.[12] Appellants pointed out that many sources outside of claimant's employment could have caused the disease.[13] A housewife, for example, would make the same movements that claimant made as a part of her daily routine.[14]

The court rejected this contention, reasoning that the constant repetitive movements required of claimant were an unusual condition inherent in her work and exposed her to a degree of risk of contracting carpal tunnel syndrome to which she would not have been exposed outside of her employment.[15] The fact that any housewife would duplicate, to some extent, the movements was not controlling. Instead, the court focused on the relative magnitude of the exposure in the course of the employment compared to the exposure of the general public.[16] The court stated that to deny compensation merely because a disease might be contracted by the general public would be contrary to the legislative purpose of the statute "to render more certain the employee's compensation for occupational disease."[17] The court concluded that it is implicit within the prior judicial definition of occupational disease, and explicit in the provisions of section 287.067, that

> what is distinctively occupational in a particular employment is the peculiar risk or hazard which inheres in the work conditions, and a disease which follows as a natural result of exposure to such occupational risks, an exposure which is greater or different that affects the public generally, is an occupational disease, not an ordinary disease of life.[18]

The court further stated that whether a disease is occupational does not depend on its being literally peculiar to the occupation of the claimant, but on whether there is a "recognizable link between the disease and some distinctive feature of the claimant's job which is common to all jobs of that sort."[19]

Prior to *Collins, Liebrum v. Laclede Gas Co.*[20] created some confusion concerning the scope of the exclusionary clause. The St. Louis Court of Appeals denied compensation to an employee for a pre-existing sclerotic

10. 481 S.W.2d at 552.
11. *Id.* at 554.
12. *Id.*
13. *Id.* at 552.
14. *Id.*
15. *Id.* at 554.
16. *Id.*
17. *Id.* at 552, quoting Marie v. Standard Steel Works, 319 S.W.2d 871, 875 (Mo. En Banc 1959).
18. 481 S.W.2d at 552.
19. *Id.* at 554, *quoting* from Myers v. Rival Mfg. Co., 442 S.W.2d 138, 141 (K.C. Mo. App. 1969) (Industrial Commission's opinion).
20. 419 S.W.2d 517 (St. L. Mo. App. 1967).

heart condition that was aggravated by exposure to ammonia gas during the course of his work. The court concluded that the claimant's sclerotic heart disease was not an occupational disease as defined by section 287.067 for three independent reasons: (1) Claimant's pre-existing heart disease had an origin unrelated to the conditions of his employment, and thus did not arise out of the employment as required by the statute;[21] (2) heart disease is an ordinary disease of life to which the general public is exposed, and there was no evidence that it was incidental to the character of the employer's business;[22] (3) aggravation of a pre-existing ordinary disease of life by work conditions does not create an occupational disease.[23] Confusion resulted from *Liebrum* because of the second independent ground for decision above. The court simply stated that heart disease was an ordinary disease of life to which the general public is exposed,[24] implying perhaps a legal test of occupational disease that considers only the nature of the disease; if the disease is contracted by the general public it cannot be peculiar to the employment and, therefore, occupational, regardless of whether it arose out of and was incidental to the employment. But the court then stated that there was no evidence that the sclerotic heart disease was incidental to the character of the employer's business,[25] implying that the exclusionary clause must be read in conjunction with the rest of section 287.067. Thus, compensation would be denied only when the disease is one contracted by the general public, *and* is not incidental and peculiar to the work (i.e., when claimant is not exposed to a greater degree of risk of contracting the disease than the general public). The *Collins* court concluded that the *Liebrum* court denied compensation not because the general public is exposed to sclerotic heart disease but because claimant did not prove his disease was incidental to the character of the employer's business.[26] The *Collins* interpretation of the exclusionary clause should bar a claim for occupational disease only if the employment does not present a risk or hazard of exposure to the disease greater than that to which the general public is exposed.

In a subsequent case, *Gaddis v. Rudy Patrick Seed Division*,[27] the Kansas City District of the Missouri Court of Appeals reaffirmed its holding in *Collins*. The court ruled that bronchietasis contracted by an employee working in close proximity to plant seeds treated with chemical pesticides and herbicides was an occupational disease. In a footnote the court pointed out that the ordinary-diseases-of-life exclusionary clause

21. *Id.* at 521.
22. *Id.*
23. *Id.* at 522.
24. *Id.* at 521.
25. *Id.*
26. 481 S.W.2d at 552. The *Collins* court recognized that the broad language of *Liebrum* is susceptible of the interpretation appellants urged. Another St. Louis Court of Appeals case denying compensation, Bess v. Coca-Cola Bottling Co. of St. Louis, 469 S.W.2d 40 (St. L. Mo. App. 1971), arguably supported appellants' contention. The court stated, however, that tuberculosis could be an occupational disease if it is shown that the peculiar work conditions create a peculiar risk of contracting the disease. *Id.* at 46.
27. 485 S.W.2d 636 (Mo. App., D.K.C. 1972).

and the requirement that the disease be incidental to the character of the business are closely interrelated and involve the same principle.[28]

Courts in Indiana and Illinois, whose occupational disease statute Missouri copied verbatim,[29] have construed the exclusionary clause of their statutes consistently with the holding in *Collins.*[30] In *Allis-Chalmers Manufacturing Co. v. Industrial Commission,*[31] the Illinois Supreme Court held that a disease is compensable where the exposure in the course of the employment is greater than that to which the general public is exposed.[32] Similarly, in *Schwitzer-Cummins Co. v. Hacker,*[33] the Appellate Court of Indiana held that whether a disease is occupational depends not on whether the disease is common to the public, but whether particular conditions of claimant's work involved a special or inherent risk or hazard of acquiring the disease.[34]

The Missouri Supreme Court has not construed the definition of occupational disease in section 287.067. However, in considering *Marcus v. Steel Constructors, Inc.,*[35] an appeal of an award granting compensation for an occupational disease alleged to have resulted from repeated exposure to benzol fumes, the court remanded the case for additional proof, if available, that the employee had been exposed to benzol fumes.[36] It was acknowledged that many hundreds of substances could have caused the disease.[37] Implicit in this ruling is a construction of section 287.067, consistent with *Collins,* that would allow compensation for a disease that could have many non-occupational causes, i.e., to which the general public is exposed.

The Kansas City District of the Missouri Court of Appeals decided *Collins* and *Gaddis;* the St. Louis Court of Appeals decided *Liebrum.* Appellants' argument in *Collins,* based on *Liebrum,* giving broad scope to the exclusionary clause could, therefore, still be viable in the St. Louis District. This is unlikely for the following reasons: (1) The argument ignores the *Liebrum* court's specific reference to a lack of proof that the disease was incidental to the employer's business; (2) the ruling of the Missouri Supreme Court in *Marcus;* and (3) the influence of the Kansas City District's decision in *Collins,* significantly increased since the reor-

28. *Id.* at 638, n.1. This means that the exclusionary clause is to be read in conjunction with the rest of § 287.067, RSMo 1969. Thus, a disease is an ordinary disease of life only if it is not incidental to the employment, *i.e.,* the employment does not expose claimant to a greater or different degree of risk of contracting the disease than the general public.

29. ILL. REV. STAT. Ch. 48, § 172.36d (1969); IND. ANN. STAT. § 40-2206 (1965). The statute provides a general definition of occupational disease. A minority of states provide a schedule of occupational diseases based on the premise that certain diseases are peculiar to certain occupations. *See* 1A A. LARSON, WORKMAN'S COMPENSATION LAW, § 41.11.

30. For a discussion of the construction given to the exclusionary clause of the Illinois occupational disease statute see Keefe, WORKMAN'S OCCUPATIONAL DISEASES ACT, 67 U. ILL. L.F. 59 (1967).

31. 33 Ill. 2d 268, 211 N.E.2d 276 (1965).

32. *Id.* at 271, 211 N.E.2d at 278.

33. 123 Ind. App. 674, 112 N.E.2d 221 (1953).

34. Id. at 686, 112 N.E.2d at 225.

35. 434 S.W.2d 475 (Mo. 1968).

36. *Id.* at 481.

37. *Id.* at 479.

ganization of the Missouri Courts of Appeals into a single Court of Appeals. The Missouri Supreme Court, if confronted with the issue, should follow the *Collins* rationale, thereby furthering the legislative directive of liberal construction.[38]

GARY MAYES

FEDERAL ESTATE TAX—LIFE INSURANCE—POLICY TRANSFERRED AND PREMIUMS PAID IN CONTEMPLATION OF DEATH BY INSURED NONOWNER

Revenue Ruling 71-497[1]; *Bel v. United States*[2]

In 1960, John Bel purchased a one-year term renewable accidental death policy on his life. He executed the application himself and paid the single premium out of community property funds,[3] but he named his children as owners and beneficiaries of the policy. Within the year, Bel was killed and the insurer paid the $250,000 proceeds to the beneficiaries.

Bel's estate tax return excluded these proceeds from the gross estate and the Commissioner of Internal Revenue assessed a deficiency based on the inclusion of one-half the proceeds. Because Bel had paid the single premium less than three years prior to his death, the Commissioner contended that the payment of proceeds to the beneficiaries was a transfer in contemplation of death. The proceeds were thus includible in his gross estate under section 2035 of the Internal Revenue Code.[4] The executors paid the tax and filed a refund action.

The district court found that the transfer had been made in contemplation of death and held that one-half the dollar amount of the *premiums* paid during the three years prior to death was includible in the gross estate.[5] The Fifth Circuit agreed that the transfer was made in contemplation of death, but held that Bel had transferred the entire policy; therefore, his community share of the *proceeds* was properly includible.[6]

Timely and complete disposition by the insured owner of all incidents of ownership of a life insurance policy may prevent inclusion of the proceeds

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38. § 287.067, RSMo 1969.

1. 1971-2 CUM. BULL. 32.

2. 452 F.2d 683 (5th Cir. 1971), *cert. denied*, 406 U.S. 919 (1972).

3. Bel was a resident of Louisiana, a community property state.

4. Unless otherwise indicated, all statutory references are to the Internal Revenue Code of 1954, as amended. § 2035 (a) provides:

> GENERAL RULE—The value of the gross estate shall include the value of all property to the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise, in contemplation of his death.

5. Bel v. United States, 310 F. Supp. 1189 (W.D. La. 1970). Bel initially purchased the one-year term renewable policy in 1957 and renewed it each succeeding year.

6. Bel v. United States, 452 F.2d. 683 (5th Cir. 1971).

in his gross estate.[7] Prior to 1954, if the insured paid all policy premiums the proceeds were includible in his gross estate regardless of the ownership of the policy.[8] If the insured shared the premium expense with another, then a portion of the proceeds corresponding to the part of the premiums the insured paid were includible.[9] Because this statutory rule was unrelated to the question of the transferor's testamentary intent, an insured who had once paid a premium could never entirely remove the proceeds from his gross estate.[10]

Congress repealed the statutory premium payment test in 1954 with the enactment of section 2042.[11] The legislative history of section 2042 indicates an intent to eliminate estate tax discrimination against life insurance

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7. In any donative transfer consideration should be given to the federal gift tax. Because the gift tax is cumulative, the tax benefits of an *inter vivos* transfer become increasingly attenuated for the donor who has previously made substantial *inter vivos* gifts. *See* C. LOWNDES & R. KRAMER, FEDERAL ESTATE AND GIFT TAXES 251 (2d ed. 1962). The gift tax on life insurance, however, falls on the purchase price instead of the proceeds. Guggenheim v. Rasquin, 312 U.S. 254 (1941).

Two types of life insurance should be distinguished. *Ordinary* or *whole life* insurance provides coverage for the entire life of the insured and includes a savings or investment feature. The insured may elect to surrender his policy for cash and recover a portion of his premium outlay with interest, or he may build up a reserve of funds held by the insurer until the dividends from his investment cover further premium expense. *Term* insurance, on the other hand, is pure insurance protection, providing only for the payment of the face value if the insured dies within a stated period. *See* R. KEETON, BASIC TEXT ON INSURANCE LAW 14 (1971). The purchase of whole life insurance may have a life-related motive; term insurance is more clearly testamentary.

8. INT. REV. CODE of 1939, ch. 3, § 811 (g), 53 Stat. 122, *as amended*, 56 Stat. 944 (1942). Proceeds were also includible on two other tests: (1) designation of the insured's estate as beneficiary or (2) retention by the insured of any incident of ownership. *See* 1 A. CASNER, ESTATE PLANNING 322 (3d ed. 1961). The premium payment test did not unconstitutionally discriminate against life insurance as a form of property. United States v. Manufacturers' National Bank, 363 U.S. 194 (1960).

9. The Revenue Act of 1926, ch. 27, § 302 (g) (now INT. REV. CODE OF 1954, § 2042), provided that proceeds were includible to the extent that the policy was "taken out" by the decedent. The Treasury adopted payment of premiums as the test of includibility of proceeds, first as an alternative criterion (Treas. Reg. 80, Arts. 25, 27 (1934)), and then as the exclusive one (1941-1 CUM. BULL. 427). In 1942 the Code was amended to resolve the ambiguity of "taken out" by adopting the premium payment test. Revenue Act of 1942) § 404, 56 Stat. 944 (1942).

10. *See* LOWNDES & KRAMER, *supra* note 7, at 274-76.

11. § 2042 provides:

The value of the gross estate shall include the value of all property—

1) To the extent of the amount receivable by the executor as insurance under policies on the life of the decedent.

2) To the extent of the amount receivable by all other beneficiaries as insurance under policies on the life of the decedent with respect to which the decedent possessed at his death any of the incidents of ownership, exercisable either alone or in conjunction with any other person. For purposes of the preceding sentence, "incident of ownership" includes a reversionary interest (whether arising by the express terms of the policy or other instrument or by operation of law) only if the value of such reversionary interest exceeded 5 percent of the value of the policy immediately before the death of the decedent.

as a form of property.[12] Proceeds are includible in the gross estate under section 2042 only if the insured retains at his death any of the incidents of ownership in the policy.[13]

Although the insured may avoid inclusion under section 2042 by transferring all incidents of ownership before his death, he must also satisfy the contemplation-of-death rules of section 2035 to avoid inclusion in the gross estate. The purpose of section 2035 is to prevent avoidance of the federal estate tax by returning to the gross estate assets that were disposed of by *inter vivos* transfers, for less than an adequate and full consideration, intended as substitutes for a testamentary disposition.[14] To aid in the administration of the estate tax law, section 2035 (b) provides that gifts made within three years of death are presumed to be in contemplation of death.[15] This presumption can be rebutted by a showing of "life-related" motives.[16] The test is whether the decedent's dominant motive was to avoid estate taxes.[17] This motive includes not only gifts made in apprehension of imminent death, but also estate planning concerns entertained while in good health.[18] Transfers made before the three-year period, however, are conclusively presumed not to be in contemplation of death.

Transfers of the ownership of insurance policies and payments of

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12. S. REP. No. 1622, 83d Cong., 2d Sess. 472 (1954) states in part:
No other property is subject to estate tax where the decedent purchased it and long before his death gave away all rights to the property and to discriminate against insurance in this regard is not justified.
. . . .
[Section 2042] revises existing law so that payment of premiums is no longer a factor in determining the taxability under this section of insurance proceeds.
Id. See also H. REP. No. 1337, 83d Cong., 2d Sess. A316, 1317 (1954).

13. "Incidents of ownership" is a term of art meaning control over the benefits of the policy amounting to substantial ownership. The termination of such control, incident to the passing of the proceeds upon the death of the insured, constitutes a transfer taxable under the estate tax. Chase Nat'l Bank v. United States, 278 U.S. 327 (1929). Incidents of ownership include powers to "change the beneficiary, to surrender or cancel the policy, to assign the policy, to revoke an assignment, to pledge the policy for a loan, or to obtain from the insurer a loan against the surrender value of the policy . . . . Treas. Reg. § 20.2042-1 (c) (2) (1973).

14. United States v. Wells, 283 U.S. 102, 116-17 (1931).

15. § 2035 (b) provides:
If the decedent within a period of 3 years ending with the date of his death (except in case of a bona fide sale for an adequate and full consideration in money or money's worth) transferred an interest in property, relinquished a power, or exercised or released a general power of appointment, such transfer, relinquishment, exercise, or release shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this section and sections 2038 and 2041 (relating to revocable transfers and powers of appointment); but no such transfer, relinquishment, exercise, or release made before such 3 year period shall be treated as having been made in contemplation of death.
See, e.g., Issac W. Baldwin, 18 CCH Tax Ct. Mem. 902 (1959).

16. "Life-related" means not associated with the distribution of property after one's death.

17. Allen v. Trust Co. of Georgia, 326 U.S. 630 (1946); Treas. Reg. § 20.2035 (1973).

18. United States v. Wells, 283 U.S. 102 (1931). *See* LOWNDES & KRAMER, *supra* note 7, at 63-64.

premiums on them are subject to this test. Where the policy owner transfers it to another within three years of his death, the courts are often unwilling to find the presumption of section 2035 (b) rebutted.[19] Conversely, if the decedent survives for three years after the transfer of the policy and makes no premium payments within that period, the proceeds are not included in the gross estate. If, however, the decedent fully transfers ownership of the policy more than three years before his death but continues to pay the premiums, he may have made a transfer proscribed by section 2035. But, is the transfer a transfer of the premium (a gift of cash) or of a corresponding share in the matured value of the policy (the proceeds)?

The Internal Revenue Service announced its position on this issue in Revenue Ruling 67-643.[20] Under the ruling, a premium payment was considered a transfer of an interest in the policy even though the putative transferee already possessed all incidents of ownership. Thus, the proportion that the premium payments the insured made within three years prior to his death bore to the total premiums paid would determine the proportion of the proceeds includible in his gross estate.[21] The ruling thus revived the premium payment test Congress rejected in 1954.[22] The courts, however, did not follow the ruling[23] and limited the amount includible to the dollar amount of premiums paid within the three-year period.[24]

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19. *See* Garret's Estate v. Commissioner, 180 F.2d 955 (2d Cir. 1950); Vanderlip's Estate v. Commissioner, 155 F.2d 152 (2d Cir.), *cert. denied,* 329 U.S. 728 (1946); First Trust and Dep. Co. v. Shaughnessy, 134 F.2d 940 (2d Cir.), *cert. denied,* 320 U.S. 744 (1943); Slifka v. Johnson, 63 F.Supp. 289 (S.D.N.Y. 1945). *But see* Hull's Estate v. Commissioner, 325 F.2d 367 (3d Cir. 1963) (gift to divorcee daughter for security); Verne C. Hunt, 14 T. C. 1182 (1950) (gift to place policies beyond reach of possible judgment creditors); Louis Baskind, 10 P-H B.T.A. Mem. 546 (1941) (gift as part of planned series of cash gifts to children).

20. 1967-2 CUM. BULL. 327. The ruling also applied to policies owned initially by others if decedent made contributions.

21. *Id.*

22. Although the Senate committee report on § 2042 (*See* note 12 *supra*) made payment of premiums irrelevant to the taxability of life insurance proceeds only "under this section" and there is no indication that Congress sought to change the contemplation-of-death rules under § 2035 or to alter the taxability of life insurance under other Code provisions, this method of valuation of the interests transferred went beyond the express mandate of § 2035. *See* notes 35, 37 *infra.*

23. *See* Gorman v. United States, 288 F. Supp. 225 (E.D. Mich. 1968).

24. In Inez G. Coleman, 52 T.C. 921 (1969), the decedent–insured paid the premiums for five years on her children's policies (the record does not disclose the type of policy). The Tax Court limited inclusion to the value of the premium payments because they represented the only diversion of funds from the estate.

> Decedent held no interest whatsoever in the policy or its proceeds . . . . To be sure, these payments kept the economic substance of the policy alive. But the decisive point is that what these payments created or maintained was theirs and not hers. In these circumstances . . . the only thing diverted from her estate was the money paid.

52 T.C. at 923.

First Nat'l Bank of Midland v. United States, 423 F.2d 1286 (5th Cir. 1970), involved whole life policies that the decedent–insured purchased for his daughters eight years prior to his death. The court found that the right to collect the proceeds existed in the beneficiaries from the inception of the policies and therefore that there was nothing to transfer except the prmiums themselves, which were includible at their value when transferred. An earlier district court case, Gorman v. United States, 288 F. Supp 225 (E.D. Mich. 1968), raised the issue of coverage

Revenue Ruling 71-497[25] revoked 67-643 and preserved the government's appeal in *Bel,* then pending. The two hypothetical cases posed in the ruling show that the Internal Revenue Service now considers the date the insured purchases or assigns the policy as the determinative factor.

In *situation 1,* the decedent purchased and assigned to another both a whole life policy and a five-year term policy on his life. He continued to pay the premiums for four years, until his death. The ruling states that only an amount equal to the premiums paid in the last three years is includible with respect to either policy. This ruling indicates that premium payments in contemplation of death on policies owned by another for more than three years before the insured's death do not transfer any interest in such policies.[26] *Situation 2* is *Bel*: nine months prior to death decedent purchased a one-year term policy on his life for another and paid the full premium. The proceeds are ruled includible, and the premium payment is conceptualized as a transfer of "the economic benefit . . . in substance . . . of the right to insurance for the one-year period."[27] *Bel* thus holds that where the decedent procures a term policy on his life for a beneficiary within the three-year period, there is a presumptive transfer in contemplation of death thereof, regardless of who initially possesses the incidents of ownership.[28] For estate tax purposes, the policy is valued at the full amount of the proceeds because the insurer is a mere "third party conduit" for the decedent's transfer.[29]

The remainder of this casenote discusses two questions: (1) Whether the five-year term annual premium policy in situation one in the ruling should be treated differently from the one-year term annually renewable policy in situation two (*Bel*); and (2) whether the payment of a premium on a term policy is a transfer of an interest in the policy proceeds.

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beginning within the three-year period. Nine months before his death the insured had purchased a five-year renewable term policy in his wife's name. The government argued that the decedent's payment of the premiums made the proceeds taxable to his estate and also contended that the proceeds were fully includible because the policy had been purchased within the presumptive three–year period. The court held only the value of the premiums includible and attacked Rev. Rul. 67-643 as administrative usurpation. *Id.* at 230.

25. 1971-2 CUM. BULL. 329.

26. The ruling states that the government will follow the decision in *Midland. See* note 24 *supra.*

27. 1971-2 CUM. BULL. 329.

28. The court said that "by paying the premium, [Bel] designated ownership of the policy and created in his children all of the contractual rights to the insurance benefits. These were acts of transfer." 452 F.2d at 691. *Bel* relied on Chase Nat'l Bank v. United States, 278 U.S. 329 (1929), which in dictum stated that transfers of insurance policies may include property other than that passing directly from the insured to the transferee. *Id.* at 327. The *Bel* court used this statement to justify inclusion of the proceeds rather than the dollar amount of premiums. *Chase,* however, did not consider the relationship of premiums to proceeds.

Bel's implicit approval of Rev. Rul. 71-497 indicates that the 1954 adoption of § 2042 had no effect on § 2035. 425 F.2d at 690. *See also* Treas. Reg. § 20. 2042-1 (a) (2) (1973).

Where the decedent purchases the policy for another, as in *Bel,* it is arguable that "upon a technical construction" of § 2035, a decedent cannot transfer what he never owned. Detroit Bank & Trust Co. v. United States, 467 F.2d 964, 968-69 (6th Cir. 1972), following *Bel. See* 8 HOUSTON L. REV. 168, 172 (1970).

29. 452 F.2d at 690.

The reasoning behind the different results in situations one and two turns on the assumption that a complete transfer of rights in the policy can occur at a particular point in time. Where a term policy is purchased for another, this transfer occurs at the time of purchase. Where the insured initially owns but then assigns the term policy, the transfer occurs at the time of the assignment. In both cases the transfer occurs when someone other than the insured acquires the incidents of ownership. Because this transfer occurs in situation one before the three-year period it is not a transfer in contemplation of death. Because the transfer does occur within the three-year period in situation two, that transfer is presumptively in contemplation of death.

This conceptualization of an ascertainable, completed transfer at a time certain is probably sound only in regard to single-premium insurance policies. The transfer, by purchase or assignment, of such policies is indeed complete because all rights in the policy and the proceeds are vested after the transfer. Transfer of single-premium policies is thus analogous to the transfer of most chattels.

Most term policies, however, involve continuing premium payments. Continued payment is essential to preserving the beneficial rights in the policy, the principal one of which is the right to receive the proceeds. The initial transfer, by purchase or assignment, is of little consequence absent the subsequent premium payments. Each premium payment recreates the "bundle of rights"[30] the policy represents. Nothing more is transferred to the beneficiaries in the initial transfer than is transferred later when each premium is paid. Thus, there is no difference between a five-year annual premium term policy and a one-year term policy renewable annually.[31] In either case the entire "bundle of rights" the policy represents will disappear if no premium is paid, and will be vested for another year if the premium is paid. Thus, in determining whether a transfer in contemplation has been made, the date of the initial "transfer," by assignment or purchase, is ir-

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30. The court in *Bel* stated that

> the premium paid by the decedent less than one year prior to his death engendered the entire right, title, and interest which the decedent's children had in the accidental death policy. Essentially, every stick in the bundle of rights constituting the policy had a genesis within three years of the decedent's death.

The court's use of the term "bundle of rights" is misleading when applied to term insurance. Virtually the only beneficial interest is the proceeds. *See* Howard, *The Estate Tax Impact of Paying Life Insurance Premiums in Contemplation of Death,* 5 FORUM 97, 106 (1970); note 31 *infra.*

31. *Bel* treated annual renewals of a renewable policy as successive acquisitions of new policies. *See* 1 A. CASNER, ESTATE PLANNING 328 n. 85a (Supp. 1973). This rule curtails estate tax benefits for a common type of policy. *See* Rosenberg, *Section 2035—Premiums Made in Contemplation of Death—The* Bel *Has Sounded,* 605 INS. L.J. 311, 318 (1973).

There is one possible difference in the two types of policies. A five-year term policy has a fixed (level) premium whereas a one-year term renewable policy may have an increasing premium. Thus, the insured's initial transfer of the former may convey more to the beneficiary than the subsequent premium payments do, the added benefit being the right to the insurance coverage in the future for a fixed amount. It is submitted that this is not significant enough to justify different treatment for the two types of policies.

relevant. It would seem the same estate tax consequences should obtain in both situations one and two.

What that consequence should be—proceeds or only premiums includible—depends on whether the payment of a premium is a transfer of an interest in the proceeds.[32] The most persuasive argument for an affirmative answer to this question is that each premium payment recreates and vests the beneficial rights in the policy. It is difficult to avoid the conclusion that the premium payment thus transfers to the beneficiary an interest in the proceeds. It can be argued, however, that section 2035, because it purports to include in the gross estate those assets that would have been included absent the testamentary gift,[33] does not reach the "appreciation" of property after it has been transferred to the donee. Clearly, in the case of a transfer of cash, the appreciation the donee may realize through his use of it is not includible.[34] The gross estate arguably never included the value of the proceeds—only the premiums.

Assuming that the payment of premiums is a transfer of an interest in the proceeds, at least theoretically, Congress may have rejected, pursuant to enactment of section 2042, the idea that premium payment alone should render proceeds includible in the gross estate.[35] Section 2035 and 2042 are not in *para materia*,[36] however, and the enactment of section 2042, eliminating the statutory premium payment test, does not necessarily restrict section 2035. There is evidence both ways on the question whether

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32. If premium payment is viewed as a transfer of an interest in the proceeds, then the corresponding proportional part of the proceeds should arguably be included in the gross estate.

33. Igleheart v. Commissioner, 77 F.2d 704, 711 (5th Cir. 1935). The gift tax, of course, impacts only on the premiums paid. Treas. Reg. § 25.2511-1 (h) (8) 1973. Courts have, however, adopted expanded concepts of transfer in other contexts, such as a gift for a prearranged purpose. In Geoffrey G. Davies, 40 T.C. 525 (1963), decedent paid a sum of cash to the account of the donee in a bank in England for the purpose of purchasing land in Hawaii. The Tax Court construed the gift tax statutes to find this transaction to be a gift of realty in the United States.

An expanded concept of "transfer," in regard to a transfer with a retained life interest under § 2036, is illustrated by United States v. O'Malley, 383 U.S. 627 (1966), where decedent had established irrevocable trusts, each of which provided that the trustees could at their discretion pay income to the beneficiaries or accumulate it. The Supreme Court held that a transfer was made, not only of the property originally transferred, but also of that portion of the res representing accumulated income.

34. Cash transferred in contemplation of death is to be valued at face amount, regardless of gains or losses resulting from the utilization of such cash by the donee during the interim period before death. *See* Humphrey's Estate v. Commissioner, 162 F.2d 1 (5th Cir. 1947), in which business losses suffered by legatees were held not to affect the value of the bequest of the business.

35. The 1954 repeal of the statutory premium payment test was contested in a House committee minority report. H. REP. No. 1337, 83d Cong., 2d Sess. B14 (1954). It urged reenactment on the grounds that life insurance is a special type of property, designed to serve as a will substitute, (*Id.* at B15), and it was rejected. The refusal of Congress in 1957 to enact a proposed partial reinstatement of the premium payment test strengthens the 1954 policy determination. H.R. 8381, 85th Cong., 1st Sess. § 56 (1957).

36. 452 F.2d at 690; Treas. Reg. § 20.2042-1 (a) (2) (1973).

Congress intended to dispatch the premium payment test as an "independent generating force for includability"[37] for all purposes. If so, then the proceeds of term policies with annual premium or renewal should not be includible in the gross estate in any case, regardless of when purchased or assigned. Conversely, if the Congressional action pursuant to section 2042 has no bearing on section 2035, and if premium payment on a term policy is in fact a transfer of an interest in the proceeds, such payment will always render a proportional part of the proceeds includible.

It is submitted that the above conclusion—that the date of the initial transfer of the policy should not determine whether the three-year presumption will operate—is equally applicable to whole life policies with annual premiums. Doubtless, the "bundle of rights" involved in whole life policies is greater,[38] and an ascertainable time when vested rights in the investment feature of the policy are transferred can be identified.[39] As to the insurance, as opposed to investment, portion of the policy, however, continued annual payment of the premiums is essential to preserve the rights in the proceeds, just as in the case of term insurance.[40] Each succeeding premium payment is thus a transfer of an interest in the proceeds. Whether the proceeds are properly includible, or only the premiums applicable thereto, should depend not on when the policy was assigned or purchased, but on the same considerations applicable to term insurance.[41]

It is unclear whether a whole life policy assigned to or purchased for another within the three-year period is covered by Revenue Ruling 71-497

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37. S. REP. No. 1622, *supra,* note 12, states that premium payment is irrelevant in determining includibility under § 2042. A fair connotation, however, is that Congress believed the inclusion of life insurance proceeds in the gross estate was unfair when based solely on premium payment, regardless what section is involved. The court in Inez v. Coleman, 52 T.C. 921 (1969), thought it quite possible that the Congressional rejection of the premium payment test was applicable under § 2035:

> Nevertheless, it is clear from the legislative history that Congress sought to inter the premium payment test with the ashes of the 1939 Code as an independent generating force for the includability of insurance proceeds.

Id. at 922.

38. In First Nat'l Bank v. United States, 423 F.2d 1286 (5th Cir. 1970) (*see* note 24 *supra*), involving a whole life policy purchased for the insured's daughters eight years prior to his death, on which insured paid the premiums, the court found that the right to collect the proceeds existed in the beneficiaries from the inception of the policies; thus, only the premiums themselves could be transferred, not an interest in the proceeds. The court is correct in finding that the right to the proceeds existed from the inception of the policy, but ignores the fact that this right completely disappears upon nonpayment of subsequent premiums. Hence, in terms of the proceeds (as opposed to the cash value), the insured transferred nothing more to the beneficiaries when he purchased the policy than he did when he paid subsequent premiums.

39. Once transferred, the cash surrender value is a vested property interest of the transferee and cannot be lost upon nonpayment of premiums.

40. *See* note 38 *supra.*

41. *E.g.,* whether the Congressional rejection of the premium payment test is applicable under § 2035, whether the premiums can be properly analogized to cash gifts that appreciate in the hands of the donee, whether the proceeds can be considered part of the gross estate, etc. *See* text accompanying notes 32-37 *supra.*

and *Bel.*[42] If so, the investment feature of whole-life insurance may indicate life-related motives and rebut the presumption of a gift in contemplation of death.

Whatever their logical merits, Revenue Ruling 71-497 and *Bel,* until rejected or changed, are the law. It is important that the beneficiary-owner pay as much of the premiums as possible during the first three years. If this is infeasible, the estate planner might advise them to channel funds provided by the donor-insured in such a way that they are traceable to other expenditures in their regular budgets and to pay the insurer out of their own resources. The courts might accept the transaction at face value; they frequently rejected such gambits, however, under the statutory premium payment test, and the old cases are presumably good law for this purpose.[43] For renewable term policies the premium discount plan may be useful.[44]

The estate planner should not neglect opportunities to rebut the statutory presumption. If the donor makes transfers as part of a pattern of disposal of assets or as provision of security for dependents, a foundation is laid for the assertion of life-related motives.[45]

Revenue Ruling 71-497 represents a significant change in the position of the Internal Revenue Service. One can now be confident of the exclusion of proceeds from the gross estate once the insured nonowner has survived three years beyond the date of issuance to the beneficiary. Term policies

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42. Because, under the court's analysis, criticized herein, the genesis of the beneficial rights is within the three-year period, *Bel* and Rev. Rul. 71-497 should apply to whole life policies.

43. Charles B. Wolf, 29 T.C. 441 (1957); Clarence H. Loeb, 29 T.C. 22 (1957); E.A. Showers, 14 T.C. 902 (1950). *See* Simmons, *IRS Rules Premium Payments Within 3 Years of Death Puts Proceeds into Estate,* 28 J. TAX. 146, 148.

44. Under the premium discount plan, the insured-donor would put money for the payment of three additional premiums into a fund at the same time he takes out the policy and pays the first premium. In each following year, he would deposit an additional premium amount in the fund. At his death, three years worth of his most recent gifts would still be in the fund. *See* 1 A. CASNER, ESTATE PLANNING 328 n. 85a. (Supp. 1973). This scheme was proposed as a means of limiting inclusion to the dollar amount of the premiums under Rev. Rul. 67-643. It would be of no use in the *Bel* situation, where the insured dies before the elapse of the first three years, except that it might be tried where annual renewable term policies are purchased. If the insured survives for the first three years, the taxpayer might argue that the proceeds are excludible on his term policy even though contractual rights arose during the presumptive period.

45. *See* Oliver Johnson, 10 T.C. 680 (1948), for a discussion of life-related motives. *See also* Kimbrell, *Planning Insurance Transactions to Avoid Transfers in Contemplation of Death,* 36 U.M.K.C.L. REV. 1 (1968); Freilicher & Freiman, *Life Insurance and Living Motives,* 110 TRUSTS & ESTATES 105-07 (1971). *See* cases cited note 19 *supra.*

The Fifth Circuit has rejected a government contention that accidental death policies are inherently testamentary. First Nat'l Bank v. United States, 463 F.2d 716, 721 (5th Cir. 1972). An irrebutable presumption of testamentary intent is an unconstitutional deprivation of due process. Heiner v. Donnan, 285 U.S. 312 (1932).

Combining accidental death benefits with disability coverage in a corporate group policy has been held to demonstrate life-related motives. Kahn v. United States, 349 F. Supp. 806 (N.D. Ga. 1972).

entail this benefit as much as whole life policies provided that the term exceeds three years. *Bel* and the ruling have won judicial acceptance;[46] its concessions mark the limit of estate tax benefits for life insurance for the foreseeable future.

HUGH R. LAW

FEDERAL COURTS—RIGHT TO A JURY TRIAL IN CIVIL ACTIONS INVOLVING EQUITABLE CLAIMS

Dawson v. Contractors Transport Corp.[1]

The plaintiff worked for a subcontractor, William H. Singleton Co., on the Watergate Apartments construction site. Singleton had a contract with Contractors Transport Corporation [hereinafter Transport] for the delivery of refrigeration equipment. Plaintiff was injured while unloading this equipment. He applied for and received workmen's compensation from Singleton. He then sued the general contractor and Transport for negligence. The general contractor filed a third party complaint against Singleton for indemnification (pursuant to the contract between them). Transport, although precluded by the applicable workmen's compensation statute from seeking contribution from Singleton, filed a cross-claim against it seeking a credit of fifty percent on any judgment rendered against Transport.[2] Plaintiff moved for and was granted a jury trial of his action against the general contractor and Transport.

46. Detroit Bank & Trust Co. v. United States, 467 F.2d 964 (6th Cir. 1972), *cert. denied*, 410 U.S. 929 (1973) (decedent created an irrevocable trust for his children and gave the trustee the funds for a policy on his life six months before his death; on the authority of *Bel* the proceeds were held includible); Kahn v. United States, 349 F. Supp. 806 (N.D. Ga. 1972) (purchase of group insurance by a close corporation for an employee and his wife is transfer within § 2035(a), but presumption rebutted); First Nat'l Bank v. United States, 352 F. Supp. 1157 (D. Ore. 1972) (decedent caused his wife to take out two twenty-year decreasing term policies on his life that were convertible to whole life; insured died within the presumptive period and proceeds held includible).

1. 467 F.2d 727 (D.C. Cir. 1972).

2. This credit is called the *Murray* credit after the case in which it was established, Murray v. United States, 405 F.2d 1361 (D.C. Cir. 1968). The *Dawson* court explained the credit:

> The so-called "*Murray* credit" is an extension of the equitable doctrine of contribution in the context of workmen's compensation claims. Under the principle of contribution, a tortfeasor against whom a judgment is rendered is entitled to recover proportional shares of the judgment from other joint tortfeasors whose negligence contributed to the injury and who are liable to the plaintiff. Since employers covered by workmen's compensation statutes are not liable in tort to their injured employees, other tortfeasors are not entitled to contribution from negligent employers, and thus, before *Murray*, bore the entire burden of the tort damages.
>
> To mitigate the harshness of this result, we held in *Murray* that a person against whom the employee was awarded damages in a tort action could reduce the judgment by 50 percent if he could show that the employer's negligence contributed to the injury.

467 F.2d at 729.

Transport contended that Singleton was solely responsible for plaintiff's injury. The jury, however, returned a general verdict for the general contractor and against Transport. The trial judge ruled against Transport on its cross-claim, finding that Singleton had not been negligent. Transport appealed, contending that under the Seventh Amendment to the United States Constitution the jury should have decided the cross-claim. The District of Columbia Court of Appeals affirmed, holding that that a cross-claim for a judgment credit is equitable in nature and, therefore, the seventh amendment did not require that the factual issues underlying the cross-claim be submitted to the jury.[3]

The seventh amendment[4] traditionally has meant that the right to trial by jury shall be preserved (as opposed to being extended)[5] as that right existed under the English common law[6] as of the date of adoption of the seventh amendment, 1791.[7] Thus, since the right to a jury determination of factual issues was limited to actions at law in England,[8] the seventh amendment guarantees that right only in actions that are legal in nature,[9] and not in cases arising in equity, admiralty,[10] or in administrative proceedings.[11] Further, there is not an automatic constitutional right to a jury trial regarding rights or remedies that Congress has created since the adoption of the seventh amendment.[12]

Prior to the enactment of the Federal Rules of Civil Procedure, law and equity were separate areas of jurisdiction in the federal courts. Separate actions were required to obtain both legal and equitable relief,[13] causing hardship for plaintiffs seeking both.[14] "Equitable clean-up" was the federal courts' response to the problem.[15] Equitable clean-up meant that when any portion of a controversy invoked the subject matter jurisdiction of equity, the court could, at its discretion,[16] retain equitable subject-matter jurisdiction over the remaining legal aspects of the controversy and award legal

3. 467 F.2d at 731.

4. U.S. CONST. amend. VII provides:

> In suits at common law where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of common law.

5. F. JAMES, CIVIL PROCEDURE § 8.1 (1965).

6. Baltimore & C. Line, Inc. v. Redman, 295 U.S. 654, 657 (1935); Slocum v. New York Life Ins. Co., 228 U.S. 364, 377 (1913).

7. Dimick v. Schiedt, 293 U.S. 474, 476 (1935); F. JAMES, *supra* note 5; C. WRIGHT, FEDERAL COURTS § 92, at 404 (2d ed. 1970).

8. 3 W. BLACKSTONE, COMMENTARIES *451.

9. SHIELDS v. THOMAS, 59 U.S. 209, 216 (1855); Parsons v. Bedford, 28 U.S. 474, 479 (1830).

10. United States v. Louisiana, 339 U.S. 699, 706 (1950); Luria v. United States, 231 U.S. 9, 27-28 (1913); Parsons v. Bedford, 28 U.S. 474, 479 (1830).

11. Yakus v. United States, 321 U.S. 414, 447 (1944); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 48 (1936).

12. *See* 47 AM. JUR. 2D JURY § 30 (1969).

13. 5 J. MOORE, FEDERAL PRACTICE § 38.03 (2d ed. 1971).

14. Levin, *Equitable Clean-up and the Jury: A Suggested Orientation,* 100 U. PA. L. REV. 320, 321 (1951).

15. *Id.*

16. James, *Right to a Jury Trial in Civil Actions,* 72 YALE L.J. 655, 683 (1963); O'Neill, *Law or Equity: The Right to Trial by Jury in a Civil Action,* 35 Mo. L. REV. 43, 48-50 (1970).

relief.[17] There was no right to a jury trial for a legal claim so adjudicated because, the reasoning went, the party asserting the legal claim had "waived" his right to a jury trial by raising it in an equitable proceeding.[18]

The Federal Rules of Civil Procedure did away with bifurcated jurisdiction in the federal courts.[19] Moreover, certain of the rules require that legal and equitable claims be asserted in the same action. For example, federal rule 18 effectively compels a party seeking both legal and equitable relief to request both in a single action.[20] Similarly, federal rule 13 (a) requires that a party assert certain counterclaims, including legal counterclaims in equitable actions.[21] Application of equitable cleanup in these situations would result in loss of the right to a jury trial of the issues underlying the claim for legal relief.

Three Supreme Court cases have attempted to resolve the hopeless confusion in which the lower federal courts found themselves when confronted with the problem of the post-rules right to a jury trial.[22] Two of

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17. American Life Ins. Co. v. Stewart, 300 U.S. 203, 215 (1937); Alexander v. Hillman, 296 U.S. 222, 224 (1935); American Mills Co. v. American Sur. Co., 260 U.S. 360, 364-65 (1922); 1 J. POMEROY, EQUITY JURISPRUDENCE §§ 181, 231 (5th ed. 1941).

If the determination of the issues involved in the equitable claim also determined the issues involved in the legal claim, the court could:

(1) award the plaintiff the appropriate legal relief, if the plaintiff had asserted the legal claim, Alexander v. Hillman, 296 U.S. 222, 242 (1935); or
(2) award the defendant the appropriate legal relief, if the legal claim was presented by the defendant as a counterclaim and if the determination of the issues was in his favor, 1 J. POMEROY, *supra*, § 231; or
(3) enjoin the further prosecution of the defendant's legal counterclaim, if the determination was made in the plaintiff's favor, American Life Ins. Co. v. Stewart, 300 U.S. 203, 215 (1937).

However, if the disposition of the equitable claim did not dispose of the legal claim, the court could dismiss the suit for want of subject-matter jurisdiction, American Mills Co. v. American Sur. Co., 260 U.S. 360, 364-65 (1922); or resolve the remaining issues, 1 J. POMEROY, *supra* § 182.

18. American Mills Co. v. American Sur. Co., 260 U.S. 360, 366 (1922); Note, *The Right to Jury Trial Under Merged Procedures,* 65 HARV. L. REV. 453, 455 (1952).

19. The first rule provides that the federal rules will apply to actions both at law and in equity, FED. R. CIV. P. 1. The second declares that there is only one form of action, the civil action, FED. R. CIV. P. 2.

20. C. CLARK, CODE PLEADING § 73 (2d ed. 1947); McCoid, *Right to Jury Trial in the Federal Courts,* 45 IOWA L. REV. 726, 731 (1960).

21. *Cf.* Ring v. Spina, 166 F.2d 546, 550 (2d Cir. 1948).

22. For the view that there was no right to a jury trial in an action combining legal and equitable claims see Tanimura v. United States, 195 F.2d 329 (9th Cir. 1952); Orenstein v. United States, 191 F.2d 184 (1st Cir. 1951); Boucher v. DuBoyes, Inc., 137 F. Supp. 639 (S.D.N.Y. 1955), *aff'd,* 253 F.2d 948 (2d Cir. 1958), *cert. denied,* 357 U.S. 936 (1958).

For the view that there was a right to a jury trial in this situation see Leimer v. Woods, 196 F.2d 828 (8th Cir. 1952); Bruckman v. Hollzer, 152 F.2d 730, 732 (9th Cir. 1946) (distinguished by the same court in *Tanimura*); Banana Distrib. v. United Fruit Co., 19 F.R.D. 11 (S.D.N.Y. 1955); Chappell & Co. v. Cavalier, Cafe, Inc., 13 F.R.D. 321 (D. Mass. 1952).

See also Thermo-Stitch, Inc. v. Chemi-Cord Processing Corp., 294 F.2d 486 (5th Cir. 1961); 39 IOWA L. REV. 350, 351 (1954).

these cases, *Beacon Theatres, Inc. v. Westover*[23] and *Dairy Queen, Inc. v. Wood,*[24] require that where both legal and equitable claims are asserted in a single action, the legal claim must be determined by a jury first, if a prior court determination of the equitable claim would preclude, by collateral estoppel, a subsequent jury determination of a factual issue in the legal claim.[25] Thus, issues of fact common to both claims must be decided by the jury, *if* otherwise the jury would be foreclosed in its consideration of facts involved in the legal issue.[26]

Dawson did not raise this possibility. As to plaintiff's legal claim, the jury was obviously not foreclosed on any issue because it was decided first. The court's subsequent judgment on the equitable cross-claim was consistent with the jury's determination. Even if the court's judgment had

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23. 359 U.S. 500 (1959). The plaintiff sought both a declaratory judgment that a contract between plaintiff and defendant was not in violation of the antitrust laws and an injunction restraining the defendant from bringing future litigation under those laws. Defendant counterclaimed, asserting that the contract was an unreasonable restraint on trade and prayed for treble damages. The lower courts, on the basis of the equitable cleanup doctrine, denied defendant a jury trial. The Supreme Court reversed, holding that because the determination of the plaintiff's equitable claim would, by collateral estoppel, also determine the primary issues in the defendant's legal counterclaim, the defendant had a right to a jury trial first on his claim. The Court held that, except under the most imperative circumstances, parties have a right to a jury trial of factual issues that are common to both the legal and equitable claims in their actions. *Id.* at 510-11.

24. 369 U.S. 469 (1962). *Dairy Queen* followed *Beacon Theatres's* rationale. The plaintiff brought an action for breach of a trademark licensing agreement. Plaintiff sought both temporary and permanent injunctions against the defendant's use of plaintiff's trademark, an accounting to determine the exact amount defendant owed plaintiff, and an injunction, pending the decision, to prevent defendant from collecting the proceeds from its use of the trademark. The Supreme Court found that plaintiff's request for an accounting was essentially a prayer for damages resulting from defendant's breach of contract, and that therefore plaintiff had asserted both legal and equitable claims involving the same facts. Accordingly, the Court, relying on *Beacon Theatres,* granted the plaintiff a jury trial, on the legal claim, holding that "the legal claims involved in the action must be determined prior to any final court determination of respondent's equitable claims" since there were common issues of law and fact. *Id.* at 479.

25. Dairy Queen, Inc. v. Wood, 369 U.S. 469, 479 (1962); Beacon Theatres, Inc., v. Westover, 359 U.S. 500, 510 (1959).

26. The *Dawson* court stated the rule of *Beacon Theatres* and *Dairy Queen* to be that if there are common factual issues, *either* party has the right to a jury determination of those issues. The two claims in *Dawson* did not involve common factual issues, the court concluded, because the defense to plaintiff's claim was that Singleton was *solely* liable, whereas the issue in the cross-claim was whether Singleton was negligent *at all.* The two claims could, however, be viewed as presenting common issues regarding the operative facts of the episode. For example, much of the evidence relevant to plaintiff's assertion of Transport's negligence would also be relevant to whether Singleton was negligent. Under the test the *Dawson* court described, Transport would have a right to a jury determination of those factual issues. That test thus omits a key requirement of *Beacon Theatres,* viz., the operation of collateral estoppel. With a general verdict, of course, the only facts upon which collateral estoppel can operate are those essential to the verdict, *i.e.,* whether Singleton was *solely* negligent. Thus, the court's statement of the *Beacon Theatres* rule is accurate only insofar as it speaks of common facts upon which collateral estoppel can operate.

not been consistent with the jury's, the jury's judgment would have prevailed and plaintiff's right to a jury trial would have remained intact.[27]

The defendant had a right to a jury trial on all fact issues common to his cross-claim and the plaintiff's claim to the extent that, *if* the equitable claim had been decided first, that decision would, by collateral estoppel, foreclose any of the fact issues in the legal claim from jury consideration. A prior court determination that Singleton was not negligent would not so foreclose the jury regarding plaintiff's claim against Transport. This is because (1) there were no common fact issues, or (2) the court's general judgment could not identify and estop collaterally those common fact issues that did exist.

Thus, defendant's right to a jury trial in *Dawson* depended on the characterization of his claim as legal or equitable, and not on whether it presented issues of fact common to plaintiff's claim. A third Supreme Court decision, *Ross v. Berhard,*[28] illuminates the characterization process.

Ross was a shareholder's derivative action in which plaintiff sued the corporation's directors and brokers (the corporation was a closed-end investment company) for violation of the Investment Company Act of 1940,[29] breach of fiduciary duty, waste, and gross negligence. The Supreme Court held that a shareholder's derivative action is essentially two actions: an equitable action to determine if the shareholder may bring suit on the corporation's behalf, and the corporation's legal claim.[30] Thus, *Beacon Theatres* and *Dairy Queen* required that the shareholder receive a jury

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27. *See* Jones v. Schramm, 436 F.2d 899 (D.C. Cir. 1970). *Jones* held that if the jury verdict is inconsistent with the court's determination on the cross-claim for contribution, the jury's verdict controls. To hold otherwise would be to deny jury determination of the legal claim.

28. 396 U.S. 531 (1970).

29. 15 U.S.C. §§ 30(a)(1)-(52) (1970).

30. 396 U.S. at 533. *See* DePinto v. Security Life Ins. Co., 323 F.2d 826 (9th Cir. 1963), *cert. denied,* Gorsuch v. DePinto, 376 U.S. 950 (1964), a court of appeals case decided some six years before *Ross* holding that a shareholder's deritative suit is actually two separate actions.

Several commentators have suggested that *Beacon Theatres, Dairy Queen,* and *Ross* indicate a pro-jury bias on the part of the Supreme Court. C. WRIGHT, *supra* note 7, § 92; *The Supreme Court, 1958 Term,* 73 HARV. L. REV. 186, 187 (1959). Others find the rationale of these three cases deep within the historical roots of the law-equity dichotomy. For instance, a number suggest that the Supreme Court is attempting to prevent the right to a jury trial of a claim from being denied where equity obtained subject-matter jurisdiction over the claim by procedural, as opposed to substantive, means. 5 J. MOORE, *supra* note 13, ¶ 38.16[4]; McCoid, *Procedural Reform and the Right to a Jury Trial: A Study of Beacon Theatres, Inc. v. Westover,* 116 U. PA. L. REV. 1, 12-13 (1967); Note 24 SW. L.J. 860, 964 (1971). In the words of one writer:

> The Beacon Court's principle is directed exactly to those cases where equity jurisdiction was founded on procedural inadequacies at law: where the remedy at law is adequate in light of contemporary procedure, equity lacks jurisdiction, though such jurisdiction might have existed under earlier and different procedure.

McCoid, *supra* at 12-13.

For other interpretations of the underlying rationale of *Beacon Theatres, Dairy Queen,* and *Ross,* see Rothstein, *Beacon Theatres and the Constitutional Right to a Jury Trial,* 51 A.B.A.J. 1145, 1148 (1965); *The Supreme Court, 1969 Term,* 84 HARV. L. REV. 172, 175 (1970); note 81 YALE L.J. 112, 120-21 (1971).

trial on the legal issue, even though equity had to determine beforehand his right to sue in place of the corporation.[31] Although recognizing that a derivative action is traditionally considered equitable, the Court held that the "Seventh Amendment question depends on the nature of the issue to be tried rather than the character of the overall action."[32] Whether an issue is legal in nature depends, the Court said, on three considerations: (1) The pre-merger custom with reference to such questions; (2) the remedy sought; and (3) the practical abilities and limitations of juries.[33]

Dawson distinguished *Ross* as involving an essentially legal claim or right (that of the corporation), whereas the cross-claim in *Dawson* was wholly equitable.[34] The court distinguished between the fact of negligence and negligence as a legal cause of action.[35] The fact of negligence is relevant to actions for contribution, the court stated, yet contribution is an equitable action that may be tried without a jury.[36] Thus, merely because Singleton's alleged negligence was relevant to the cross-claim did not convert it into an essentially legal action.[37]

The dissent by Senior Judge Fahy disagreed with the majority's characterization of the judgment credit claim as equitable. The dissent ap-

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31. The lower federal courts have rejected the idea that the merger of law and equity extends the seventh amendment right to all cases where an equitable remedy is sought in lieu of an inadequate legal remedy.

Klein v. Shell Oil Co., 386 F.2d 659 (8th Cir. 1967) (specific performance requested). Injunctions were requested in: Coca-Cola Co. v. Cahill, 330 F. Supp. 354 (W.D. Okla. 1971); Farmers Chem. Ass'n v. Union Camp Corp., 312 F. Supp. 214 (E.D.N.C. 1970); Adams v. Fazzio Real Estate Co., 268 F. Supp. 630 (E.D. La. 1967). At least one federal court refused to give a party a jury trial where he interposed a "legal defense" to an equitable claim. Kennedy v. Rubin, 254 F. Supp. 190 (N.D. Ill. 1966). Another court refused to rule that, under *Beacon Theatres,* a party is entitled to a prior jury determination of his legal claim if there is a possibility that the party may be prevented from asserting his legal claim to a jury in a subsequent action. Wilkinson v. United States, 189 F. Supp. 413 (D. Ore. 1960).

The lower federal courts have traditionally been reluctant to use the underlying rationale of *Beacon Theatres, Dairy Queen,* and *Ross* as an excuse to broaden the right to a jury trial. To the extent that a case has facts that clearly fall within the purview of those cases, they are of course controlling. *See, e.g.,* Eli Lilly & Co. v. Generix Drug Sales, Inc., 460 F.2d 1096 (5th Cir. 1972); Tights, Inc. v. Stanley, 441 F.2d 336 (4th Cir. 1971); Bruce v. Bohanon, 436 F.2d 733 (10th Cir. 1971); Stockton v. Altman, 432 F.2d 946 (5th Cir. 1970); King v. United Benefit Fire Ins. Co., 377 F.2d 728 (10th Cir.), *cert. denied,* 389 U.S. 857 (1967); AMF Tuboscope, Inc. v. Cunningham, 352 F.2d 150 (10th Cir. 1965); Swofford v. B & W, Inc., 336 F.2d 406 (5th Cir. 1964), *cert. denied,* 379 U.S. 962 (1965); Robine v. Ryan, 310 F.2d 797 (2d Cir. 1962); Thermo-Stitch, Inc. v. Chemi-Cord Processing Corp., 294 F.2d 486 (5th Cir. 1961); Burgess v. General Elec. Co., 285 F. Supp. 788 (D.N.J. 1968); Minnesota Mut. Life Ins. Co. v. Brodish, 200 F. Supp. 777 (E.D. Pa. 1962).

32. 396 U.S. at 538.

33. *Id.* n. 10.

34. 467 F.2d at 731-32.

35. *Id.* at 732.

36. *Id.,* citing for that proposition Jones v. Schramm, 436 F.2d 899, 900-01 (D.C. Cir. 1970).

37. 467 F.2d at 732.

plied[38] the tripartite test for characterization supplied in *Ross*.[39] First, the dissent examined the remedy sought according to how such remedies were treated at English common law prior to 1791 and by American courts prior to 1938,[40] concluding that "contribution was accorded a negligent joint tortfeasor by a court of *law*."[41] As the majority noted, this is highly uncertain.[42] The dissent then looked at "pre-merger custom with reference to trial of the issues," and found that negligence is typically tried to a jury, ignoring the majority's distinction between the fact of negligence and negligence as a cause of action.[43] The dissent's conclusion, however, is that in a suit for a *legal* remedy, based on negligence, there is a constitutional right to a jury trial.[44] This assumes, of course, that contribution is a legal remedy.

The dissent's most compelling argument is based on the third part of the *Ross* test, viz., the feasibility of a jury trial. Judge Fahy noted that the jury, in trying plaintiff's claim, had already heard the relevant evidence.[45] Further, negligence is an issue juries are considered particularly qualified to judge,[46] and the majority noted that the court can, in its discretion, submit equitable issues to the jury.[47]

Finally, the majority gives little substance to the federal policy favoring jury trials. In *Byrd v. Blue Ridge Rural Electric Corp.*,[48] the Supreme Court announced that there was a federal policy favoring jury determination of factual issues.[49] The Court in a later case said that this federal policy was of "historic and continuing strength."[50] This federal policy has been applied in situations similar to *Dawson* in which there are claims that are, by themselves, outside the scope of the seventh amendment, but which are incidental to, or minor in comparison with, the main legal claim and are easily tried to the jury.[51]

The majority and dissent in *Dawson* agree that the tripartite *Ross* test is the proper one to apply to determine the nature of the action. Their dif-

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38. *Id.* at 736.
39. 396 U.S. at 538 n. 10.
40. The date of adoption of the Federal Rules of Civil Procedure.
41. 467 F.2d at 737 (dissenting opinion) (emphasis added).
42. *Id.* at 732 n. 7. The majority stated that the dissent's historical analysis of the cases "demonstrates at most that the early origins of contribution are shrouded in obscurity and confusion." *Id.* It is submitted that the original nature of contribution is too uncertain to be a basis for determining the nature of the action today.
43. *Id.* at 739-40.
44. *Id.* at 740.
45. *Id.* at 734.
46. *Id.* at 740.
47. *Id.* at 730.
48. 356 U.S. 525 (1958).
49. *Id.* at 537-39.
50. Simler v. Connor, 372 U.S. 221 (1963).
51. *See* Fitzgerald v. United States Lines Co., 374 U.S. 16 (1963); Close v. Calmar S.S. Corp., 44 F.R.D. 398 (E.D. Pa. 1968). *But see* United States v. Reynolds, 397 U.S. 14 (1970).

ferent conclusions on the results of the test suggests that considerations of the proper role of juries as factfinders today determines the courts' application of it.[52] Also, the different conclusions portend much future litigation.

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52. At first blush, it appears that the difference between the dissent and the majority lies in their perception of the nature of the Murray credit. This is undoubtedly true. There is, however, another major divergence in their views. The majority points out that an enthusiastic reception of the "expansive nature" of *Ross* might have a "potentially severe impact . . . upon the already overtaxed resources devoted to civil litigation." 467 F.2d at 732 n. 8. Contrast the majority's philosophy with that of Judge Fahy:

> Maintenance of the jury as a fact finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care.

Id. at 734 n. 1 (dissenting opinion).

Perhaps the issue of the suitability of a jury trial in a particular situation should not be relegated to footnotes while the hoary questions of law versus equity do battle in the text. The third *Ross* test, i.e., the suitability of jury determination of the issue, should be the predominant one. This is particularly true where the precise nature of the claim, whether legal or equitable, is reasonably debatable.