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Recent Cases

CRIMINAL LAW—PROBATION AFTER PLEA OF NOT GUILTY

United States v. Wiley

Defendant was convicted in the United States district court of possessing certain stolen items. He appealed, raising the questions of sufficiency of the evidence and of propriety of the district court's refusal to consider his application for probation solely because he entered a plea of "not guilty." The probation statute provides that upon entering a "judgment of conviction" any court having jurisdiction to try the offense may grant probation. The court of appeals held that the words "judgment of conviction" contemplate either judgment entered on a plea of guilty or judgment entered on a verdict after trial on a plea of not guilty, and that, while a court might take into consideration whether defendant had entered a not guilty plea when he had only a frivolous defense, the court could not deny probation solely because defendant had elected not to enter a guilty plea. After affirming the conviction on the evidence, the court remanded the case to the district court for consideration of defendant's application for probation.

One judge concurred in the affirmation of conviction on the evidence, but dissented to the remanding of the case, on the basis that the district court had received defendant's application for probation, but had acted unfavorably upon it.

The difference of opinion in the court is over a question of fact—did the district court exercise its discretion—and a discussion of either the majority decision or the dissent on this point would have little merit. If the district court did refuse to consider the application for probation simply because defendant entered a plea of not guilty, the upper court, because of the applicable statute, especially when read in the light of its legislative history, and for other reasons to be pointed out presently, reached the proper result. On the other hand, if as the dissenting judge maintains, the district court had received the application, but acted unfavorably upon it, the view expressed in the dissent is supported by ample authority, which almost uniformly holds that probation rests in the sound discretion of the court. The district court stated:

1. 267 F.2d 453 (7th Cir. 1959) (Hastings, J., dissenting).
3. The present statute is based on Act of March 4, 1923, ch. 521, § 2, 43 Stat. 1259. The words "after conviction or after a plea of guilty or nolo contendere" were omitted from the first sentence as unnecessary.
4. See, e.g., Birnbaum v. United States, 107 F.2d 885 (4th Cir. 1939); People v. Good, 287 Mich. 110, 282 N.W. 920 (1938); People v. Superior Court in and for Imperial County, 208 Cal. 692, 284 Pac. 451 (1930); Rode v Baird, 196 Ind. 335, 144 N.E. 415 (1924); Petition of Gabis, 240 Mass. 465, 134 N.E. 267 (1922).
'Had there been a plea of guilty in this case probably probation might have been considered under certain terms, but you are all well aware of the standing policy here that once a defendant stands trial that element of grace is removed from the consideration of the Court in the imposition of sentence.  

Thus it appears that the majority opinion meets the problem squarely.

Regardless of the factual issue, the language of the court raises several significant questions: Can the attitude expressed be a representative policy, that is, do other courts entertain such an attitude and apply such a policy where defendants who plead "not guilty" are concerned; if so, what are the reasons given for, and arguments against, the application of such a policy? 

In answer to the first question, one author says, presumably with special reference to, though not necessarily limited to, Missouri courts:

To the limitations on the powers of trial courts to grant probation imposed by statute, many judges, particularly at circuit court level, have engrafted an additional, almost inflexible, and certainly self-perpetuating doctrine: No petitioner will be granted probation unless his conviction is the result of a plea of guilty, rather than trial and verdict. So prevalent is this unwritten rule that many consider it not only to have the force of law, but to be the law.  

(Emphasis added.)

There are few reported cases in which the exact problem has been presented, but the infrequency of reported cases that deal with the question does not necessarily prove that the attitude does not widely exist. There appear to be only three appellate decisions, in addition to the case under consideration, in which a lower court's view has been that a defendant who pleads "not guilty" is not to be considered for probation; all of these were reversed on appeal. On the other hand, there are many cases in which the courts in dictum recognize in definitive language that probation may be granted after either a plea of guilty or a finding of guilt.

The reasons for refusing to consider probation after a plea of "not guilty" are all closely related, and all unconvincing. These reasons seem to be based on a feeling that probation is only for those who admit their guilt, and on a concern for the public pocketbook, to the effect that the defendant has put the state to the expense of a trial, and utilized the time of public prosecutors and the judge, and is therefore entitled to no further consideration. Also, seemingly one writer...
believes that to consider probation after a trial would offend the sanctity of a jury's verdict.\textsuperscript{10}

This reasoning may be overcome in part by merely stating that as to the expense of trial, there is, or can be, a general condition in each grant of probation that the probationer must, within a stated time, pay his court costs; and as to "utilizing" the time of the judge and the prosecutor, they have done nothing but that which they hold their offices to do. But on their face these arguments are to some degree superficial, and more cogent arguments by way of rebuttal are evident.

In the first place such an attitude on the part of courts seems to ignore the language of the statutes on probation. The power of probation is largely statutory;\textsuperscript{11} if all states do not recognize it as so created, they seemingly recognize it as limited by statute.\textsuperscript{12} The court in the principal case points out that the policy as expressed by the district court contravenes the legislative policy as set forth by the statute. The Missouri statutes on the question, which in this respect are representative,\textsuperscript{13} are equally clear as to the legislative intent. In the two statutes relating to municipal court judges, probation is said to be allowable to those "who shall plead guilty or on trial shall be convicted . . . ."\textsuperscript{14} Another statute refers to "conviction," but in no way restricts the manner of arriving at that stage.\textsuperscript{15} Missouri Supreme Court Rule 27.07(b) precludes the use of a probation officer's report "unless the defendant has pleaded guilty or been found guilty." The intent of the legislature seems clear, and a policy which says that a defendant who pleads "not guilty" is not to be considered for probation conflicts with such legislative intent.

The basic objection to the application of such a policy is that it rears before the defendant the choice of pleading guilty and foregoing his constitutional right to trial by jury, with possibility of probation as a consideration, or pleading not guilty, with imprisonment assured if convicted. Perhaps the placing of such a choice before a defendant might not be greatly criticized

\textsuperscript{10} See cases cited note 8 supra. See also Judge Lynne's Sound Views on Probation, 17 Ala. Law. 28 (1956).
\textsuperscript{11} The courts of some states have taken the attitude that they have inherent power to suspend sentence. \textit{E.g.}, State v. Simmington, 235 N.C. 612, 70 S.E.2d 842 (1952); Varela v. Merrill, 51 Ariz. 64, 74 P.2d 569 (1937); People v. Court of Sessions, 141 N.Y. 288 (1894). Most courts, however, have denied that they have such power in the absence of statute. The Supreme Court early took this position in regard to federal courts. \textit{Ex parte} United States, 242 U.S. 27 (1916). In Freeman v. State, 220 Miss. 777, 72 So. 2d 139 (1954), the Supreme Court of Mississippi held that the judgment of a county court suspending sentence prior to the act which extended the probation statute to county courts in 1950, was void. See also, Webster, \textit{The Evolution of Probation in American Law}, 1 BUFFALO L. REV. 249 (1952).
\textsuperscript{13} \textit{W}AITE, \textit{The Prevention of Repeated Crimes}, Appendix A, p. 95 (1943).
\textsuperscript{14} §§ 74.653, 98.250, RSMo 1949.
\textsuperscript{15} § 549.080, RSMo 1949. Any person convicted of a felony, except certain felonies, is eligible for "parole."
if every man knew when he was legally responsible; but such is not the case because this is something no man in our society can positively know. A man may very well think that he is innocent, or may simply think he can never be convicted, and desire to test that legal conclusion; a man under our system of justice, and with our constitutional guarantees, should be allowed to do just that without any compulsion to deter that desire. To create such a choice is to exercise a species of judicial coercion, which very conceivably might bring a wavering "guilty" from the lips of a frustrated defendant. Quite to the contrary of the policy under consideration, courts, when accepting pleas of guilty, should withhold all indication that the defendant might be placed on probation. The danger that probation might be used to bargain a plea of guilty must be guarded against. Also it can be said that the policy, with its coercive effect, does much to overcome the basic presumption of innocence to which every defendant is entitled.

The basic purpose and theory behind probation is that the public will be the ultimate beneficiary. The public is benefited by possible reclamation of one of its citizens. In terms of dollars this means incalculable sums saved because probation costs are less than one-tenth that of institutional care, probationers are wage earners, can make restitution, pay court costs and taxes, and their families are not dependent on public assistance or charity. Many social values, implicit in the concept of probation, are apparent; advances in our social thinking by recognition of the validity of the correctional approach to the offender as opposed to the purely punitive approach; maintenance of the unity of society by holding families together, and thereby helping to strengthen the concept of the individual's social responsibility; strengthening of the concept of the community's responsibility to the individual by keeping the offender in the community; conversely, strengthening of the concept of the individual's responsibility to the community by requiring him to function as a citizen and helping him to do so; and increasing the public's understanding and acceptance of crime as a social problem. If these considerations, all of which obviously make society the rich beneficiary of a successful probation program, are to be given their due regard, necessarily each offender must be treated in an individualized way. Probation cannot achieve all its possibilities if the courts categorize, thus allowing procedures to become rigid and uniform. Therefore it is apparent that establishing a rule that a defendant who pleads "not guilty" is not to be considered for probation is contrary to the fundamental purpose and theory of probation.

Probation should depend upon considerations of the defendant's past conduct, his probable future conduct, and the ends of justice, all to the betterment of the welfare of society, and not upon whether or not a defendant exercises his consti-

18. Gentry, supra note 16.
tutional right to trial by jury. Contrary to this, many courts say, as does the district court in the principal case, that the granting of probation is a matter of grace. But it should not be; it is a power that should be exercised when, and if, it appears compatible with public interest. If all courts realize this, and adhere to it, there may never be another case where probation is refused solely because a defendant has pleaded "not guilty."

DANIEL H. COLEMAN

SUIT BY MINOR AGAINST NEGLIGENT PARENT

Wurth v. Wurth

Plaintiff, a minor, sued her father to recover for personal injuries sustained in an automobile collision. The collision occurred while the father was driving the plaintiff to work. The sufficiency of the evidence to sustain a finding of negligence of the father was not controverted. Plaintiff began work at the age of nineteen and had been working one and one-half years before her injury. Generally she paid all of her own bills while working, including expenses of clothing, medical bills and room and board (which she paid to her parents). She had paid, or was personally obligated to pay, all the expenses incurred in the treatment of the injuries she received. There was no evidence offered by the defendant that he paid for any of her expenses or assumed any of her obligations. The question as to whether or not the plaintiff was emancipated was submitted to the jury and answered in the affirmative. The trial judge set aside the verdict for the plaintiff on the grounds that plaintiff had not been emancipated and an unemancipated minor could not sue a parent. On appeal, the supreme court set aside the judgment of the trial court with directions to reinstate the jury verdict.

The English common law said nothing about the matter of a child being able to sue its parents in tort. But causes of action in matters affecting property seem always to have been freely recognized on the part of either the parent or child.


1. 322 S.W.2d 745 (Mo. 1959) (en banc).
2. SCHOULER, DOMESTIC RELATIONS § 267 (3 ed. 1882). In English law, the term "emancipation" is generally used in reference to matters of parochial settlement and support of paupers. Little is said concerning the emancipation of minor children by their fathers, because the English municipal system is very different from our own and, except for custody, gives rise to little controversy. The doctrine has been maintained that during the minority of the child he will remain, under most circumstances, unemancipated. In fact, there can be no emancipation of an infant unless he marries and becomes the head of the family or contracts some other relation so as to wholly and permanently exclude parental control. In the case of Rex v. Rotherfield Grays, 1 B.&C. 345, 107 Eng. Rep. 128 (1823), an infant was held not to have been emancipated by his enlistment.
The initial case in the United States involving this problem established the rule that an unemancipated child cannot sue a parent in tort.\(^4\)

The reason most commonly given for denying such an action is that parental authority and harmonious family relations should be maintained, and to allow such an action by the child would endanger both. If a situation exists where the suit will not affect these relations, which is the case when an emancipated child sues his parents, the reason for the rule fails and it should not be applied.\(^6\)

Emancipation of a child consists of the relinquishing by the parent of control and authority over the child and conferring on him the right to his earnings.\(^8\) Emancipation is the complete severance of the parent and filial relationship;\(^7\) this occurs when the child is placed in a new relationship inconsistent with the former relationship as a part of the parent's family.\(^8\) The effect of emancipation is to give the child the right to his earnings, disposal of his own time, and in a great measure, the control of his own person. Also it relieves the parents of all legal obligation to support the minor child.\(^9\)

Emancipation may be effected by operation of law (a) when there is an abandonment and renunciation by the parent(s) and his (their) failure to support the child;\(^10\) (b) when a minor enlists in the military service (this emancipation is effective only so long as the minor is in the military service);\(^11\) (c) when a child attains majority;\(^12\) and (d) when a child marries with the consent of the parents.\(^13\) According to the usual view a child who has married without the consent of his parents is also considered emancipated.\(^14\)

4. Hewellette v. George, 68 Miss. 703, 9 So. 885 (1891).
10. Inhabitants of Carthage v. Inhabitants of Canton, 97 Me. 473, 477, 54 Atl. 1104, 1105 (1903). In this case the court, however, specifically stated:
    It is undoubtedly true that the mere separation of father and child, or the mere failure of the former to contribute to the support of the latter, are not sufficient for the purpose of showing such a voluntary abandonment and renunciation as are necessary to constitute an emancipation. These conditions may be accounted for by reason of the misfortune or destitution of the father, without disclosing any intention upon his part to permanently terminate the parental and filial relations.
11. Iroquois Iron Co. v. Industrial Comm'n, 294 Ill. 106, 128 N.E. 289 (1920); Swenson v. Swenson, supra note 6. The minor puts himself under control of the government which is a relationship inconsistent with the control and care of the parent, and thus severs the filial relationship as if he were of age.
12. Schouler, op. cit. supra note 2, § 269.
14. Ibid.
What constitutes emancipation is a matter of law.\textsuperscript{15} Whether emancipation exists in a particular case is a question of fact to be decided by a jury, weighing all the facts and circumstances of each case.\textsuperscript{16} The burden of proving emancipation is on the person alleging it, whether it be used as the basis of a cause of action or as a defense;\textsuperscript{17} there is no presumption of emancipation.\textsuperscript{18}

Emancipation results from some juristic, or other act, of the parent and not from any act of the minor.\textsuperscript{19} Emancipation may be effected either by an express agreement, or may be implied from the facts of a particular case. An express agreement, either oral or written, between the parent and the child to the effect that the parent surrenders all his rights to the custody, care and earnings of the child and renounces parental duties will effect an emancipation. When the parent by his conduct impliedly consents to the relinquishment of the same rights and duties, an implied emancipation results.\textsuperscript{20} A partial emancipation occurs when there is something less than a complete surrender of the parental rights to custody, care and earnings of the child.\textsuperscript{21} A partial emancipation is an emancipation for certain purposes only, such as a parent releasing his right to the child's earnings,\textsuperscript{22} which would not enable the child to sue his parents.

It is not necessary, that a child leave home, or work away from home, in order to sever filial ties.\textsuperscript{23} The fact that the parents give a minor child room and board is only one fact to be considered and is not decisive in determining if the filial relationship has been severed.\textsuperscript{24} A parent may authorize his minor child to make his own contracts of employment, collect and spend the money earned from such employment, and still not emancipate him from parental custody or control.\textsuperscript{25} In most of the cases, waiver by the parent of the right to the child's earnings is not sufficient in itself for a complete emancipation, but only effects a partial emancipa-
tion.26 These cases require in addition a complete severance of the filial relations. Where one of the additional major facts was that the parents neither claimed nor asserted any right to control the child's activities, there is a strong inference of emancipation.27

In the principal case, the court seems to conclude that total emancipation was effected because the plaintiff earned her own living and paid her own expenses. The court made no mention as to whether the parents claimed or asserted any right to control her activities. This liberality seems desirable in the light of modern trends. In today's society, minor children, as a general rule, are not solely supported by their parents until majority even though they reside in the family home. When a minor has paid all of the expenses arising out of the parent's tort, or is personally liable for such expenses, he should not have a disability placed upon him, making it impossible to recover damages in a suit against his parent. On these facts alone, he should be considered emancipated from his parents. A minor that is self-supporting is in a position to choose his own residence. The fact that he chooses to live in his parents home and, therefore, must obey the family regulations should not be the determining fact of his emancipation; he may be obligated to obey a certain number of regulations regardless of where he chooses to establish his residence. Therefore, it appears that the court properly excluded consideration of the plaintiff's abode.

MARTHA JANE PETERMAN

TORTS—LACK OF PRIVITY NO DEFENSE TO PERSONS ENGAGED IN THE UNAUTHORIZED PRACTICE OF LAW

Bishanja v. Irving2

The defendant, a notary public and accountant, prepared a will for the decedent in which the plaintiff was the sole beneficiary. As a result of defendant's negligence the will was not properly attested as required by law,2 and the plaintiff received only one-eighth of the estate by intestate succession. The plaintiff sued

26. LuKin v. Harvey, supra note 25; Taubert v. Taubert, 103 Minn. 247, 114 N.W. 763 (1908); Detwiler v. Detwiler, supra note 19.

27. Wood v. Wood, supra note 8. In Detwiler v. Detwiler, supra note 19, where the parents alleged emancipation of their son, it was held that the parents did not meet the burden of proof to show total emancipation. The son had been gainfully employed outside of the family relationship since leaving school at the age of seventeen but had continued to live in his parent's home, paying them board. Although the parents never found occasion to do so, he was subject to their discipline, and this was the basis for the court's holding that the son had not been totally emancipated. The court stated, 162 Pa. Super. at 386, 57 A.2d at 428:

True, his parents have not found it necessary to exercise control over his conduct in relation to them, but only because defendant 'is a good boy' and conforms to the established pattern of the home. Nowhere is there any evidence from which it could be inferred that he would not have to submit to discipline from his parents if his conduct were otherwise.

for damages caused by the defendant's negligence. The district court of appeals, in affirming judgment for the plaintiff, found that the acts of the unlicensed defendant, in preparing the will were in violation of a state licensing statute and constituted negligence per se. On appeal, the supreme court affirmed the result, but on a different theory. The court held that the notary public owed a duty to the plaintiff regardless of lack of privity because he knew that the transaction was intended to affect directly the plaintiff's interests.

The doctrine that privity of contract is required, for liability arising out of contractual relations, has long been recognized, and privity was long required for tort liability which arose out of contractual undertakings. This doctrine in liability for negligence has been undergoing considerable change where there is damage to a person or to his property, that is, to tangible interest. The leading case of MacPherson v. Buick Motor Co. established the now generally accepted doctrine that a supplier of chattels may be liable to a third person for damage caused by negligence to his person or property whether or not there is privity. Since the MacPherson case there have been an increasing number of exceptions to the privity rule. Actually, the exceptions have almost destroyed the privity rule where there is damage to tangible interests.

The exception to the privity doctrine as established by the MacPherson case was not applied to persons negligently supplying information or services to guide others in business transactions. This was generally true in the case of abstractors and attorneys. An early California case, Buckley v. Gray, held that a person named

3. See statute, supra note 2.
5. Winterbottom v. Wright, 10 M. & W. 109, 114-15, 152 Eng. Rep. 402, 405 (1842). The court said: Unless we confine the operation of such contracts as this to the parties who entered into them, the most absurd and outrageous consequences, to which I can see no limit, would ensue. . . . The only safe rule is to confine the right to recover to those who enter into the contract: if we go one step beyond that, there is no reason why we should not go fifty.

See also Huset v. J. I. Case Threshing Mach. Co., 120 Fed. 865 (8th Cir. 1903); 2 Harper & James, Torts §84-85 (2d ed. 1955).


9. 110 Cal. 339, 42 Pac. 900 (1895).
as a beneficiary could not recover damages from an attorney who owed no duty to the beneficiary. In *Michael v. Murphy*,¹⁰ on facts similar to the principal case, it was held that a notary public owed a duty only to his client and was not liable to a third person who was beneficiary of a will.

Recovery has been allowed in some cases where the parties were not in privity and there was damage to intangible interests. Generally, the result reached in these cases has followed the supplier of chattel cases instead of the cases involving abstracters or attorneys. The case of *Glanzer v. Shepard*,¹¹ was strongly relied on in the principal case. In that case a purchaser of beans overpaid the vendor in reliance on an erroneous certificate prepared by a public weigher who was employed by the vendor. One copy of the certificate was sent to the vendor and a duplicate copy to the vendee. In holding the weigher liable to the vendee, the court stated that the weigher's use of the certificate was, to the weigher's knowledge, the "end and aim" of the transaction. "Diligence was owing, not only to him that ordered, but also to him that relied."¹²

The doctrine in the *Glanzer* case was limited to some extent in the later case of *Ultramares Corp. v. Touche, Niven & Co.*,¹³ where recovery was denied to third persons who had advanced money to a company because of negligently prepared accounting statements by public accountants. One of the main arguments for denying recovery was the possibility of unlimited liability to an unknown class of persons. This has been one of the paramount reasons for the requirement of privity.¹⁴ In view of the extent to which liability has been extended in the tangible interest cases,¹⁵ it appears that this reason can no longer logically applied to the intangible interest problem. By the use of insurance, liability to a third person for injury to his intangible interests can be protected against as in the case of tangible interests. In the instant case the extent of injury was reasonably certain, depending upon any subsequent increases or decreases in the testator's estate.

Obviously, recovery should not be allowed in every case to a person disappointed in the failure of a contract to which he is not a party. To hold the weigher liable in the *Glanzer* case the test was, "did the weigher know that the certificate was the 'end and aim' of the transaction between the vendor and the vendee." In the principal case the duty to a third person is found by the balancing of various factors which include the extent the transaction was intended to affect the plaintiff, foreseeability of harm to the plaintiff, the certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury, and the policy of preventing future harm.

¹². 233 N.Y. at 242, 135 N.E. at 277.
¹³. 255 N.Y. 170, 174 N.E. 441 (1931).
¹⁴. See note 6 supra.
There seems to be a strong trend in favor of holding a person liable where he negligently supplies information or services which cause harm to a third person's financial interests. The Restatement of Torts\textsuperscript{16} states that a person who negligently supplies information in the course of his business or profession, to guide another in a business transaction, may be held liable regardless of privity. Also, many states have statutes making abstracters liable for damage arising out of the abstracter's negligence.

No one other than the beneficiary could sue for the harm caused by the defendant's negligence because he caused no damage to anyone else. Also, the fact that the notary in the principal case could be charged with a misdemeanor is no redress to the beneficiary. The court, by allowing the beneficiary to sue in tort, granted what appears to be the only just remedy. It seems that by using the various factors set out in the Biakanja case as a test, the courts can move with safety to protect some of the more obvious intangible interests of third parties. The principal case has taken a new approach to problems in an area long overdue for revision in holding that a person engaged in the unauthorized practice of law may be held liable in tort to one with whom he is not in privity; this is both just to those harmed by such negligence and a strong deterrent to the unauthorized practice of law.

A subsequent California case\textsuperscript{17} states that the Buckley case was overruled by the principal case. Since the Buckley case involved the liability of an attorney to a third party in the drafting of a will, then quaere, is the principal case broad enough to apply to attorney?

BYRON KENT SNAPP

TORTS—MISSOURI—INVASION OF PRIVACY—ORAL COMMUNICATIONS

Biederman's of Springfield, Inc. v. Wright\textsuperscript{1}

Plaintiff brought this action for the balance due on account for merchandise purchased by defendants. Defendants filed separate counterclaims because of the allegedly tortious conduct of plaintiff's agent in attempting to collect the account. Defendant-wife's counterclaim alleged that an agent of plaintiff went to the cafe in which defendant-wife worked as a waitress on three separate occasions and followed her around the restaurant stating in a loud voice that she and her husband had refused to pay their bill, that they were deadbeats and did not intend to pay for their furniture when they got it, and that he intended to get both of them fired from their jobs. The circuit court sustained plaintiff's motion to dismiss the counter-

\textsuperscript{16} § 552 (1938).

1. 322 S.W.2d 892 (Mo. 1959).
claims on the ground that such pleadings failed to state claims upon which relief could be granted. On appeal from this judgment, held, reversed and remanded. The Supreme Court held that merely because the counterclaims were based on oral communications did not make them insufficient as a matter of law.²

The law respecting the right of privacy is relatively modern, having first been asserted in 1890.³ Although earlier cases had involved what we would today call a right of privacy, the decisions were based on some historically recognized ground, such as a right of property,⁴ a breach of trust,⁵ or implied contract.⁶ The leading case of Prince Albert v. Strange⁷ stressed the idea that the unauthorized publication of etchings made by the Queen and Prince Albert for their private amusement amounted to an invasion of their privacy; but the court based its decision granting injunctive relief on property rights and breach of trust.

The first American case to recognize a right of privacy as such was Pavesich v. New England Life Ins. Co.⁸ Although two other jurisdictions had previously held that the right did not exist,⁹ the court said:

[AI] violation of the right of privacy is a direct invasion of a legal right of the individual.¹⁰

Missouri recognized the doctrine as early as 1911,¹¹ although the court classified the right of privacy as a property right.¹² The Missouri Supreme Court, in a later case, Barber v. Time,¹³ however, relying on an article by Dean Green,¹⁴ based the right of privacy on an "appropriation of an interest in personality."¹⁵ The Missouri Supreme Court has recently cited with approval the Barber case.¹⁶

Some courts have held that a creditor has a right to take reasonable action to obtain payment from his debtor although the action taken may result in some invasion of the debtor's right of privacy. If a creditor were not allowed this reasonable action, he may be induced to proceed with legal action without first

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2. Id. at 897.
4. E.g., Gee v. Pritchard, 2 Swans. 402, 36 Eng. Rep. 670 (Ch. 1818), where an injunction was granted to restrain the publication of a private letter on the grounds that the writer had a property right in the letter, and it would be a breach of trust to publish it.
8. 122 Ga. 190, 50 S.E. 68 (1905).
10. 122 Ga. at 201-02, 50 S.E. at 73.
12. Id. at 658-60, 134 S.W. at 1078-79.
13. 358 Mo. 1199, 159 S.W.2d 291 (1942).
15. 348 Mo. at 1205, 159 S.W.2d at 294.
16. State v. Nolan, 316 S.W.2d 630, 634 (Mo. 1958). Here, in a criminal case, the accused contended that the Habitual Criminal Act, by invading the right of privacy, was unconstitutional. The court disallowed the contention, but, citing Barber v. Time, reaffirmed the existence of the right of privacy in Missouri.
warning the debtor, rather than risk being sued for an invasion of the debtor's right of privacy. With today's increasingly large number of credit transactions, one can imagine the torrent of litigation in our courts if each creditor pursued legal action to collect his debts.

Debt collections have been held not to invade the right of privacy where the creditor sent letters to the debtor's employer. Other attempts to collect debts by friendly garnishment have been held to invade the right of privacy. Attempts to collect debts have been held actionable on grounds other than an invasion of the right of privacy, such as intentionally produced mental distress, or libel.

When the doctrine of right of privacy was first developed it was advocated that it should be limited so as not to allow recovery for oral invasion unless there were special damages shown. On the basis of the "trifling" injuries caused by oral communications, Warren and Brandeis said: "The same reasons exist for distinguishing between oral and written publications of private matters, as is afforded in the law of defamation by the restricted liability for slander as compared with the liability for libel." But the reason for such distinction in defamation should not apply to the law of the right of privacy. The right to freedom from defamation concerns one's reputation, whereas the right of privacy concerns one's peace of mind. It would be as injurious to one's peace of mind to have his innermost

23. Id. at 217.
secrets opened to the public by an oral communication as by a written one. Granted, that if the interest were that of reputation, a written communication would generally be more devastating. But to violate one's right to seclusion and privacy by unwarranted and undesired publicity by spoken words may so unveil the plaintiff's private affairs that it would be an injustice to deny him recovery on the grounds that his life was opened to the public by word of mouth rather than the printed page. In recent years a right of action for an invasion of the right of privacy by means of an oral communication has been allowed in a few jurisdictions.\textsuperscript{25} "The oral dissemination of private matter may be as rapid as the wagging tongue of gossip and as devastating as the printed page. . . .\textsuperscript{26}

Most courts that have refused redress for invasion of privacy by oral communications have relied on Warren and Brandeis' limitation that there shall be no recovery "in the absence of special damage,"\textsuperscript{27} and seem to accept it without qualification. These courts have dogmatically stated that they will not recognize a cause of action for invasion of the right of privacy by an oral communication.\textsuperscript{28} The principal case has also followed Warren and Brandeis, but has recognized the inherent qualification in their limitation; the \textit{Biederman} case has allowed such redress if the oral communication caused special damages. The court said that there is an insufficient basis for reasoning that there can be no recovery for an invasion of the right of privacy by an oral communication. " . . . [T]he oral publication [here] would seem to be more productive of emotional distress and widespread and lasting damage than a written communication."\textsuperscript{29} The supreme court has desirably interpreted the basic rule of Warren and Brandeis regarding oral communications invading the right of privacy, apparently protecting the debtor in Missouri from harrassment, unwarranted publicity and ridicule by an over-anxious creditor.

\textbf{Richard H. Breiner}

\textbf{TORTS—MISSOURI—MANUFACTURER'S LIABILITY FOR NEGLIGENT FAILURE TO WARN OF DANGEROUS PRODUCTS}

\textit{Haberly v. Reardon Co.}\textsuperscript{3}

A small boy, while helping his father paint bricks, was blinded in one eye within minutes after his eye came into contact with paint on a brush held by his father. The boy was removing debris from around the bricks while the actual painting was being done by the father. In response to the father's request to clear

\begin{itemize}
  \item \textsuperscript{25} Bowden v. Spiegel, \textit{supra} note 20 (dictum) (telephone calls); Housh v. Peth, \textit{supra} note 19 (telephone calls).
  \item \textsuperscript{26} Bowden v. Spiegel, \textit{supra} note 20, at 796, 216 P.2d at 573.
  \item \textsuperscript{27} Warren & Brandeis, \textit{supra} note 3, at 217.
  \item \textsuperscript{28} See, \textit{e.g.}, Brents v. Morgan, \textit{supra} note 19.
  \item \textsuperscript{29} 322 S.W.2d at 897.
  \item \textsuperscript{1} 319 S.W.2d 859, 861 (Mo. 1958) (en banc) (Storckman, Leedy, and Hyde, JJ., dissenting).
\end{itemize}
away some leaves he had missed, the boy moved from a kneeling position to a position nearer his father and in so doing ran into the paint brush. The following warning appeared on the box containing the paint:

"Caution: Inasmuch as the alkalinity of . . . [this paint] may be irritating to tender or sensitive skin, it is advisable to use a paddle for mixing, and to avoid excessive or prolonged contact with the skin. Portland cement-47%; calcium oxide (hydrated) 44%-aluminum silicate, 4%-tinting materials, sealer and curing agents, total less than 5%.

The son, for his personal injuries, and the father, for expenses incurred and loss of his son's companionship, brought separate actions against the paint manufacturer based on negligence. The trial court joined the two actions. The alleged negligence was the inadequacy of the warning contained on the paint box inasmuch as calcium oxide is highly caustic lime, a fact that is not common knowledge nor was it known by either of the plaintiffs. In the trial court there was a verdict for the plaintiffs and judgment was entered for $15,400. On appeal, held, affirmed.

Negligence in the area of products liability generally arises from (1) defective construction, (2) mislabeling, (3) negligent inspection or (4) the category into which the instant case falls, negligent failure to warn. 3

Missouri courts have long adhered to the doctrine that a manufacturer or other supplier has a duty to warn adequately of dangers in its products which the user would not normally discover. The reasoning employed in some of the earlier cases has not always led to the same result as that reached in the principal case; however, the more recent cases indicate that Missouri has joined the mainstream of decisions in other states. 4


3. The court in McClaren v. Robbins, 349 Mo. 653, 162 S.W.2d 856 (1942), held that a warning that a manufacturer placed on cans of carbon tetrachloride was adequate as a matter of law if it was the same type warning used by other manufacturers. Heizer v. Kingsland & Douglass Mfg. Co., 110 Mo. 605, 19 S.W. 630 (1892), held that a defectively constructed cylinder which revolved at high speeds was not inherently dangerous. In Dempsey v. Virginia Dare Stores, Inc., 239 Mo. App. 355, 186 S.W.2d 217 (K.C. Ct. App. 1945), a fuzzy textured housecoat was held to carry its own inflammable warning to the reasonably alert user as a matter of law, but if its dangers were hidden there was no evidence to show that the supplier-retailer knew of such dangers. Lawson v. Benjamin Ansehl Co., 180 S.W.2d 751 (Spr. Ct. App. 1944), held that although fingernail polish remover carried no warning as to its inflammability it was not dangerous if used for the intended purpose. Quaere as to its use by women who smoke while painting their fingernails.

4. In Orr v. Shell Oil Co., 352 Mo. 288, 294, 177 S.W.2d 608, 612 (1943), the court stated:

The rule is now well settled that a duty is imposed upon the one who furnishes an article which he knows, or ought to know, to be peculiarly dangerous to give notice of its character or bear the natural consequences of his failure to do so. . . . The rule has been extended to cover articles not only inherently dangerous in their nature, but dangerous because of the use to which they are to be put by whoever may use them for the purpose intended. The danger is now the less inherent because it is brought into action by some external force.

See Braun v. Roux Distrib. Co., 312 S.W.2d 758 (Mo. 1958); Worley v. Procter & Gamble Mfg. Co., 253 S.W.2d 532 (St. L. Ct. App. 1952). See also Prosser, Torts §§ 83-84 (1941); Restatement, Torts §§ 388-90, 394 (1934).
In the instant case the court rejected the defendant's contention that the warning on the paint box was adequate as a matter of law and stressed that the adequacy of such warning was for the determination of the jury. This seems to be in line with the Missouri decisions. Although the paint box carried a warning of sorts, its effectiveness to alert a user to the dangers of the paint is highly questionable. In fact, the intimation that the paint might be irritating only to tender skins and only excessive contact should be avoided would have a tendency to allay any fears that the user might have and induce him to use less care than he might have used had no warning at all been given.

Defendant's argument that the father, a truck driver, should have known that the paint contained lime, because the description of the contents included Portland cement and calcium oxide, was weakened considerably by the testimony of defendant's own executive vice-president that he had learned only two weeks before the trial that calcium oxide was lime.

The court also gave little weight to defendant's arguments that it could not foresee that the paint would be lodged in plaintiff's eye in such a manner. The court pointed out that defendant need not have foreseen the exact manner in which the injury occurred, but rather should have anticipated and warned against the hazard of paint lodging in the eye by some accidental means.

As an added element to support its argument that the manner of injury was not foreseeable, defendant contended that the boy's sudden movement and the way


Underlying the manufacturer's liability is the danger reasonably to be foreseen from the intended use of the article. The advertising matter accompanying it may induce the use in such manner as to make an otherwise harmless article a source of danger.

Although the paint involved in the principal case could not, by any means, be classified as harmless, the statement of the New York court would seem applicable to the Haberly case inasmuch as the advertising might make a dangerous product even more dangerous.

7. McLeod v. Linde Air Products Co., 318 Mo. 397, 1 S.W.2d 122 (1927) held that neither the exact manner in which the injury occurred nor the very injury must be foreseen by defendant for it to be liable, so long as defendant's negligence was the cause of the injury, and that the supplied chattel need not be inherently dangerous so long as it became so when applied to its intended use. See Dean v. Kansas City, St. L. & C., 199 Mo. 386, 97 S.W. 910 (1906). See also Note, 25 Iowa L. Rev. 173, 175 (1939) wherein it is stated:

But since reasonable men may differ as to whether an injury was within the area of foreseeable danger, dependent on personal knowledge and experience, the question is normally and properly, as here, left to the determination of the jury.

the father held the brush constituted an intervening force which was not foreseeable and could not have been prevented by a warning. The court refuted this argument by pointing out that had an adequate warning been given it is likely that the father and son would have used more caution. A similar line of reasoning was used in *Winkler v. Macon Gas Co.*, in which the Missouri Supreme Court stated:

> It is possible to be forewarned and have some knowledge and yet it does not follow as a matter of course that one's appreciation of the danger is or necessarily must be such that he is contributorily negligent as a matter of law if he proceeds to act as an ordinary prudent person would in the light of the knowledge and warning.

The decision in the principal case seems to be both logical and in the public interest inasmuch as it may induce manufacturers to warn of the dangers of their products in writing of comparable size and lucidity to that of the writing extolling the virtues of their goods. Although the *Haberly* case was decided under the substantive law of New York, the case may serve as persuasive authority for future decisions of Missouri courts.

Gilbert Dale Stephenson

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8. 361 Mo. 1017, 238 S.W.2d 386 (1951).
9. Id. at 1024, 238 S.W.2d at 390. In Wright v. Carter Products, 244 F.2d 53, 60-61 (2d Cir. 1957), plaintiff was injured as a result of using defendant's "Arrid" and the court declared:
   > 'Though these time-honored defenses (contributory negligence and assumption of risk) are frequently invoked to defeat recovery, they are theoretically inapplicable when the defendant's breach of duty is based on a failure to warn. To allow these defenses is to indulge in circular reasoning, since usually the plaintiff cannot be said to have assumed a risk of which he was ignorant or to have contributed to his own injury when he had no way of reasonably ascertaining that the danger of injury existed.'
See also Tampa Drug Co. v. Wait, 103 So. 2d 603, 609 (Fla. 1958), in which plaintiff was injured while using carbon tetrachloride on which defendant had placed an inadequate warning. The court stated:
   > Implicit in the duty to warn is the duty to warn with a degree of intensity that would cause a reasonable man to exercise for his own safety the caution commensurate with the potential danger. It is the failure to exercise such a degree of caution after proper warning that constitutes contributory negligence in a case such as this.