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Recent Cases

PROCEDURE—MISSOURI—WHEN AN ORAL INSTRUCTION CONSTITUTES REVERSIBLE ERROR

Riehle v. Broadway Motors, Inc.\textsuperscript{1}

This was an action for damages based on alleged fraudulent misrepresentation in the sale of a used automobile. Defendant corporation, a new and used car dealer, sold plaintiff a used 1957 Ford Tudor Sedan. While dealing with defendant’s salesman, plaintiff noticed that the speedometer on the car registered approximately 23,500 miles. Plaintiff gave $1,050 cash and his 1950 Chevrolet. Plaintiff testified that he immediately had trouble with the car: that it burned an excessive amount of oil and smoked. Plaintiff returned the car to defendant several times and miscellaneous repair work was done. Plaintiff paid half the labor and half the material expense, which amounted to about $55 or $60. In addition, plaintiff had repair work done elsewhere, the aggregate repair costs being $261.

The former owner of the car testified that when he traded it to defendant there was in excess of 70,000 miles on the speedometer. Several expert witnesses then testified that the amount of mileage, while alone not a sure and safe criterion by which to measure value, is one determinative factor and that most prospective buyers regard it as very important.

At the close of all the testimony, the following instruction was given to the jury:

If you find in favor of the plaintiff for actual damages in any amount . . . and you further find and believe that the defendant’s acts as submitted for your determination in Instruction No. 1, and upon which plaintiff’s right of recovery depends, were done maliciously, if at all, then in addition to compensation for actual damages, if any, you also may award plaintiff such amount as punitive damages as you may deem proper under all the facts and evidence . . .\textsuperscript{2}

After deliberation, the jury returned a verdict finding the issues in favor of the plaintiff and assessing defendant no actual damages but $250 punitive damages. The court then orally instructed:

Members of the jury, under the instructions of the Court, there must be some finding for actual damages; that is, if you are going to find the issues for the plaintiff on the count of punitive damages, there must be some finding with respect to the actual damages. And the amount of actual damages, if any, is entirely up to the discretion of the jury.\textsuperscript{3}

\begin{itemize}
  \item 1. 350 S.W.2d 89 (K.C. Ct. App. 1961).
  \item 2. Id. at 91.
  \item 3. Id. at 92.
\end{itemize}
Plaintiff's motion for a mistrial was overruled and the jury, after further deliberating, awarded plaintiff $55 actual and $250 punitive damages. Plaintiff appealed to the Kansas City Court of Appeals, contending that the above statements amounted to verbal instructions, and were therefore reversible error. The judgment was affirmed, the appellate court holding that the oral instructions did not constitute reversible error since they were made in the presence of counsel and neither amounted to a misdirection nor were confusing to the jury.

Missouri Supreme Court Rule 70.01(a), relating to instructions, provides in part:

At the close of all the evidence, or at such earlier time during the trial as the court may reasonably direct, any party may request that the court instruct the jury in writing on the law applicable to the issues in evidence in the case. Such instructions so requested shall be submitted in writing by the party requesting the same . . . . The court may also instruct the jury in writing of its own motion.

On the other hand, rule 83.13(b) further provides:

No appellate court shall reverse any judgment, unless it believes that error was committed by the trial court against the appellant, materially affecting the merits of the action.

Thus it would seem that while all instructions are required to be in writing, if oral instructions are given the decision will be reversed on appeal only if the instructions were prejudicial to the cause of the appellant.

This in turn raises a question as to what criteria will be applied in determining whether an oral instruction was prejudicial. Various American courts which have been faced with the problem have advanced at least three different concepts, and, unfortunately, it seems that Missouri courts may, at one time or another, have adopted all three.

The first concept is that an oral instruction is prejudicial simply because it is given orally. In other words, there is a conclusive presumption that a verbal instruction is prejudicial. The only Missouri case which could be construed to support this idea is a court of appeals decision, Fitzsimmons v. Commerce Trust Co. In that case, the jury returned to request an additional instruction bearing upon the question of compounding interest in an action for the conversion of a promissory note. In reference to the court's oral instruction thereon, the Kansas City Court of Appeals, in reversing, stated: "The court thereupon gave an oral instruction. This was contrary to statute."

However, while not receiving appreciable support in Missouri, this theory has received considerable support in other jurisdictions which have statutes on oral instructions and prejudicial error similar to the Missouri court rules. Thus, in

4. 200 S.W. 437, 438 (K.C. Ct. App. 1918). Accord, Walsh v. St. Louis Drayage Co., 40 Mo. App. 339 (St. L. Ct. App. 1890), wherein the court implied that the fact that an instruction was oral might make it erroneous, but refused to reverse because the instruction was on a conceded fact; Skinner v. Stifel, 55 Mo. App. 9 (St. L. Ct. App. 1893).
Huntington v. Hamilton, the Appellate Court of Indiana, in referring to an oral instruction, held:

Unquestionably it is the law of this state that a court which instructs a jury orally, in whole or part, after written instructions have been requested properly, commits reversible error and prejudice is conclusively presumed.

Again, in State v. Murphy, a West Virginia case, it was said:

Section 22, chapter 131, Barnes' Code 1923, requires all instructions, whether given at the instance of the parties or on the court's own motion, to be reduced to writing, and we have recently held this statute mandatory.

Both the West Virginia and Indiana statutes on written instructions and prejudicial error substantially approximate the Missouri court rules.

The second concept applied by Missouri courts seems to be that oral instructions will be considered prejudicial unless the contents of the instructions favored the appellant. In an 1847 Missouri Supreme Court decision, for instance, Judge Scott, referring to an oral instruction given by the lower court, stated:

If oral instructions should be given, and it could not be ascertained what they were, under the late law, it would be a cause for reversing the judgment. But if they are preserved in the bill of exceptions, and it appears that they are favorable to the party complaining, or did not at all affect his rights as a suitor, it would be difficult to find a ground on which to place such a construction of the statute as would overturn the judgment.

5. 118 Ind. App. 88, 98, 73 N.E.2d 352, 356 (1947); Cutler v. Davidson, 82 Ind. App. 495, 146 N.E. 584 (1925).
7. IND. ANN. STAT. § 2-2010 (1933):
All instructions requested shall be plainly written . . . All instructions given by the court of its own motion shall be in writing when either party has requested that the court instruct the jury in writing . . . ;
IND. ANN. STAT. § 2-3231 (1933):
No judgment . . . shall be stayed or reversed, in whole or part, where it shall appear to the court that the merits of the cause have been fairly tried and determined in the court below;
W. VA. CODE ch. 56, art. 6, § 5653:
Upon the trial of any case, civil or criminal, before a jury, either party may pray the court to give the jury any instruction which has been reduced to writing and submitted to the other party . . . Every such instruction which shall propound correctly law applicable to the case not covered by other instructions shall be given by the court to the jury as a part of a written charge by the court . . . . The court may, on its own motion, . . . in writing define to the jury the issues involved and instruct them on the law governing the case, but all such instructions shall first be submitted to counsel on each side with opportunity to object there-to . . . ;

See also W. VA. CODE ch. 58, art. 1, § 5752; Harman v. Appalachian Power Co., 77 W. Va. 48, 52, 86 S.E. 917, 918 (1915), where the court says: "As to what is harmless error, there is no exclusive test. Any thing conclusively showing lack of prejudice suffices."

In similar fashion, in *Peck v. Springfield Traction Co.*, a Kansas City Court of Appeals case, it was said:

Communications from the court to the jury by way of instructions . . . should be in writing. In this view the last clause or sentence of the foregoing remarks of the court was irregular, but it was uttered in [appellant's] behalf. . . . In such circumstances, it could not have been prejudicial to [appellant] and is no cause for complaint by it.

On the other hand, it should be observed that no court in Missouri has reversed solely upon the fact that the instruction was oral and that the contents favored the appellee. This concept has been established only by way of dictum.

The third approach is that an oral instruction is reversible error only if the contents thereof constitute reversible error. This seems to be the concept relied upon in the instant case, although concededly by way of dictum, since the instruction was in fact given in favor of the appellant and could have been affirmed under the second theory above. The court went much further, however, and proclaimed:

We believe the Court not only had the right but was under a duty to direct the jury further in an attempt to secure a proper verdict. And if its explanatory remarks were made in the presence of counsel (as they were), if such oral instructions did not amount to misdirection, and if same were not confusing to the jury, then the Court should not be convicted of error for such action.10

This view seems to have been rather recently embraced by the Supreme Court of Missouri in *Counts v. Thompson*, wherein Judge Hyde, in response to appellant's contention that certain oral replies to questions from the jury were reversible error, said:

There was nothing incorrect in what the judge said to the jury, and if defendant considered that more specific directions were necessary, it should have offered an additional instruction.

The effect of such reasoning is, of course, to eliminate the requirement of the rule that all instructions be in writing. Under this approach, an oral instruction is ground for reversal only if its contents constitute prejudicial error, and the fact that it is oral rather than written would seem to make no difference.

In favor of such a holding, it may be noted that the rationale is in strict compliance with Missouri Supreme Court Rule 83.13(b), quoted above. Such a decision therefore eliminates the necessity of reversing on a mere formality when the case is otherwise decided correctly.

11. 222 S.W.2d 487, 494 (Mo. 1949). The jury returned and inquired of the court, "What is the maximum fee or percentage basis allowed by Missouri law to plaintiff's counsel?" The court asked defendant what he wanted the court to do. Defendant requested the court discharge the jury. Upon the oral request of the plaintiff the court orally told the jury they were not to consider plaintiff's attorney fees at all in reaching a verdict. Judgment was for plaintiff. Defendant appealed on the ground, among others, that this was an oral instruction and therefore reversible error. *Held;* affirmed. See also Baker v. Fortney, 299 S.W.2d 563 (K.C. Ct. App. 1957); Boyd v. Pennewell, 78 S.W.2d 456 (St. L. Ct. App. 1935).
In this writer's opinion, however, the first stated theory—that the giving of any oral instruction is per se reversible error—is the most firmly grounded. To begin with, Missouri Supreme Court Rule 70.01(a) provides that with all instructions, including those given by the court on its own motion:

The court shall afford ample opportunity for counsel to examine the instructions before the same are given and to make objections out of the hearing of the jury.

Under the latter two concepts, the court could orally instruct the jury and thereby allow counsel only an instant to make an objection, and yet not commit reversible error. This would seem to be ignoring the provisions of the above rule, although the argument is weakened by the Missouri Supreme Court rule which provides that counsel may preserve error by objecting generally to instructions at the time they are given, providing the specific objection is set forth at the time of the motion for a new trial.12

Secondly, the third concept, and to a lesser degree the second, have the effect of completely ignoring the requirement that instructions be in writing, a provision which, quite arguably, was meant to be mandatory. The court had the power to instruct juries in writing long before enactment of the statute from which the present court rules are drawn. The enactment of the original statute in 183813 and subsequent statutes would, therefore, seem to indicate the intention of the legislature to make written instructions mandatory. By adopting the selfsame language in promulgating its court rules, it is readily inferable that the Missouri Supreme Court also intended for its rule to be mandatory.

Lastly, if instructions are given orally the jury will be unable to take them to the jury room, as they are allowed to do with written instructions.14 A jury's ability to do this is one of the great advantages of the Missouri rule on instructions.15 With the second and third concepts, the court is encouraged to disregard completely this advantage. Furthermore, if part of the instructions are taken to the jury room, as written ones are, and part are not, as with oral instructions, the written instructions which are so taken may receive a greater degree of consideration since they can be easily referred to by the jury while deliberating.

It will be noted that no Missouri Supreme Court decision has ever adopted the first concept herein, and only one, an 1847 decision, the second. Thus, it appears that the Supreme Court of Missouri will reverse an oral instruction only if its contents constitute reversible error. However, since as of this date such language is only dictum, it would seem better, both to escape the risk of reversal and to obtain justice for all concerned, for a court to give its instructions only in writing.

Leslie M. Crouch

12. Mo. R. Civ. P. 70.02.
14. Mo. R. Civ. P. 70.01(b).
PROMISSORY ESTOPPEL—RELIANCE ON BID OF A SUBCONTRACTOR

Sharp Brothers Contracting Co. v. Commercial Restoration, Inc. 1

Defendant-subcontractor learned that plaintiff-contractor intended to bid for a construction contract. One week before the bids were to be opened, defendant sent a form to plaintiff, offering to do certain work for $1,200. Under “Remarks,” the form recited: “Above quotations on our regular contract form will be mailed upon request. Prices quoted are subject to acceptance within 10 days from date. . . .”2 The day before the bids were opened, plaintiff’s agent informed the defendant that he had used defendant’s offer in making his bid. The plaintiff’s bid proved to be low, and he was awarded the general contract. Almost three months passed before the city council passed an ordinance formally awarding the contract. Two days after this was done, the plaintiff sent a memorandum to the defendant, accepting the defendant’s offer. The stated deadline for acceptance had long since passed. The defendant ignored all the plaintiff’s memoranda, and refused to do the work. The work cost more than the amount for which the defendant had offered to perform it.

Plaintiff-contractor sued for breach of contract, basing the case upon promissory estoppel. The trial court entered judgment for the defendant-subcontractor. On appeal to the Kansas City Court of Appeals, held, affirmed. “An offer comes to an end at the expiration of the time given for its acceptance, a limitation of time within which an offer is to run being equivalent to the withdrawal of the offer at the end of the time named.”3 The court declined to follow a recent California case4 which applied the doctrine of promissory estoppel to similar facts.

Except for employment contracts,5 perhaps no other type of commercial transaction has offered the courts such intriguing possibilities for the application of Section 90 of the Restatement of Contracts 6 as the relationship between con-

2. Ibid.
3. Id. at 252, quoting from 17 C.J.S. Contracts § 51, at 399 (1939).
6. Courts have had little difficulty in applying the doctrine of promissory estoppel in cases where the promise relied on was not of the sort calling for a return promise. For example, the case in which Missouri first specifically recognized Section 90 of the Restatement of Contracts, Feinberg v. Pfeiffer Co., 322 S.W.2d 163 (St. L. Ct. App. 1959), 26 Mo. L. Rev. 356, 361 (1961), involved a promise of a pension to an employee which induced the employee to relinquish her position with the defendant. In the field of commercial transactions, where the promise calls for a promise in return, however, the courts have been much more reluctant to apply section 90.
7. Restatement, Contracts § 90 (1932): “A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise.”
tractors preparing bids on a project and subcontractors seeking contracts for the specialized work involved. Although there have been relatively few court decisions in the area (only four, prior to the principal case), much has been written on the problem. One study suggests that informal controls in the construction industry keep most of the disputes out of litigation.

Of the four reported cases applying section 90 to the contractor-subcontractor problem, the first, still the best known, and perhaps the only case wherein a court has come squarely to grips with the problem is James Baird Co. v. Gimbel Bros., decided by the Court of Appeals for the Second Circuit in 1933. A merchant sent an offer to contractors whom he expected to bid on a building, offering to furnish the linoleum. He added, "[W]e are offering these prices for reasonable [sic] prompt acceptance after the general contract has been awarded." The court, in an opinion by Learned Hand, held that the offer called for an acceptance and thus that any promise involved was conditional, upon which the contractor had no right to rely until he had fulfilled the condition by accepting. The court concluded that "there is no room in such a situation for the doctrine of promissory estoppel."

Two later cases, the first from the Seventh Circuit in 1941, the second from South Dakota in 1946, contain dicta applying section 90 to the offer of a subcontractor. In the former, the court simply appended, at the end of an opinion deciding the case upon other grounds, an announcement that it would not have followed the Baird case if the question had been before the court. In the latter case, the South Dakota court purported to base its decision upon section 90, but closer analysis of the contract in the case indicates that the contractor had in fact accepted the subcontractor's offer, with the contract made conditional upon the bid being awarded to the contractor.

The fourth decision was Drennan v. Star, the California case mentioned previously. It was there held that the contractor's reliance made the subcontractor's offer irrevocable, the holding being based upon section 90. However, the court did not apply section 90 to the subcontractor's promise itself; instead, it found a subsidiary promise not to revoke the bid until the contractor had a reasonable opportunity to accept, and applied section 90 to this implied-in-law subsidiary promise. The theory as to a subsidiary promise was drawn by analogy from section

9. Ibid.
10. 64 F.2d 344 (2d Cir. 1933).
11. Id. at 345.
12. Id. at 346. The decision was widely criticized. See, e.g., 1 WILLISTON, CONTRACTS § 139, at 494 n.25 (rev. ed. 1936); Note, 28 ILL. L. REV. 419, 426 (1933); Note, 22 MINN. L. REV. 843 (1938). But see 1 CORBIN, CONTRACTS 351 (1950); Sharp, Promissory Liability, 7 U. CHI. L. REV. 1 (1939).
15. See also Raff Co. v. Murphy, 110 Conn. 234, 197 Atl. 709 (1929); 1 CORBIN, CONTRACTS § 148, at 482 n.64 (1950).
16. Supra note 4.
45 of the Restatement, dealing with part performance by an offeree under a unilateral contract, and was premised upon the fact that the subcontractor had not specifically stated that his offer was to be revocable at any time prior to acceptance.27

Thus, of the four cases prior to the present Missouri case, one squarely refused to apply section 90 to a situation where the offer called for an acceptance; two cases contained contrary dicta favoring such an application; and the fourth, while applying section 90, employed rather novel reasoning in so doing.28

In the present case, the plaintiff-contractor raised on appeal practically all the arguments raised in the preceding cases, but did not, apparently, specifically invoke section 90. The court held that no contract had been formed, because the subcontractor’s communication was an offer which was not accepted within the 10-day time limit specified. The Drennan case was distinguished, it being noted that the California court had stated that, “Had defendant’s bid expressly stated or clearly implied that it was revocable at any time before acceptance we would treat it accordingly.”19

At least one noted author in the field has construed Sharp Bros. as following Learned Hand’s reasoning in James Baird.20 On the other hand, the opinion, while alluding briefly to Northwestern Engineering21 and Drennan, does not mention by name section 90 of the Restatement, promissory estoppel, the Baird case or Feinberg v. Pfeiffer Co.22 Do these omissions raise doubt as to the weight to be accorded the decision?

Sharp Bros. does seem to stand for at least this: that where an offeror places a time limit upon his offer, there can be no reliance such as is necessary for promissory estoppel, because the stated time limit informs the offeree, “you may not rely upon this offer after the time limit has expired.” However, the case cannot be safely said to go as far as Learned Hand’s opinion in Baird, rejecting the application of promissory estoppel to any commercial transaction wherein the offeror simply calls

18. See R. J. Daum Constr. Co. v. Child, 122 Utah 194, 247 P.2d 817 (1952). This case cites Baird and Northwestern Engineering as authority for a rule that promissory estoppel can not apply when the offer is rejected. The facts of the case indicate that a contractor, after relying upon a subcontractor’s bid and winning the contract, submitted for the subcontractor’s signature a “proposed written contract” which was in reality a counter offer, thus rejecting the subcontractor’s offer (bid). Since one can hardly be said to rely upon an offer which he rejects, this result appears sound. See also Williams v. Favret, 161 F.2d 822 (5th Cir. 1947). The subcontractor here required that he be informed if his bid was used, in order that he might keep it open, and the contractor did so inform him. The court held that this was not an acceptance of the subcontractor’s offer. The contractor was simply keeping the subcontractor’s offer open by doing as the subcontractor had requested.
22. Supra note 6. This was the first Missouri case to recognize and apply promissory estoppel as such.

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for an acceptance. Quite possibly, only a case involving an offer without such a time limit will settle how far Missouri courts will go in applying promissory estoppel to this type of commercial transaction.23

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23. Possible adoption of the Uniform Commercial Code in Missouri, and its effect upon the problem under discussion, should be noted. See Uniform Commercial Code § 2-205, stating, in effect, that a merchant's assurance that his offer will be held open need not be based upon consideration.
TORTS—LIABILITY OF OCCUPIER OF LAND TO TRESPASSING CHILDREN—THE DANGEROUS SUBSTANCES DOCTRINE

Paisley v. Liebowits

Defendant was a building contractor, engaged in the construction of apartments on a once-vacant lot in St. Louis. One evening, after defendant’s working hours, infant plaintiff came upon the premises and proceeded to play around the remains of a trash fire. A combustible substance left by defendant’s workmen (oleum spirits) was knocked into the fire by plaintiff, ignited, and burned the plaintiff. Plaintiff instituted an action, contending that his injuries were the proximate result of the defendant’s negligence in keeping a dangerous substance upon his premises in such a place that it was accessible to children of tender years and likely to cause them injury. Answering, the defendant alleged that plaintiff was a trespasser or, at most, a bare licensee, and thus without the scope of defendant’s duty of affirmative care. The defendant further contended that oleum spirits was not of such a nature as to bring the case within the rule imposing liability where an explosive is the offending substance. Judgment in the trial court was for the plaintiff.

The Supreme Court of Missouri, sitting en banc, affirmed. The infant plaintiff was allowed recovery upon the basis that one who maintains or handles a dangerous substance, such as a volatile liquid, is under a duty to exercise the same degree of care which a reasonably careful person would exercise under the same circumstances, especially for the safety of children, even though their status be that of a trespasser or licensee.

As a general rule, long established in Anglo-American law, an occupier of land is not liable to one who is injured while trespassing upon the premises. Nevertheless, realizing that special consideration must be accorded to trespassing children, whose immature minds may be unable to comprehend the nature of their acts, most American courts have recognized an exception to the general rule of nonliability. Thus, where a child of tender (and, occasionally, not so tender) years is injured by an artificial condition maintained upon another’s land, liability may ensue, even though the child is a trespasser. This exception has come to be known, rather unfortunately, as the “attractive nuisance” doctrine.

Although the doctrine has long been accepted in Missouri, it was early limited by two severe restrictions. Contrary to the rule in most jurisdictions, it was said that the child must have been attracted onto the land by the enticing qualities of the condition itself; his mere meandering into the area of inevitable injury would not suffice. Secondly, the condition which caused the injury must have been one which was “inherently dangerous,” and not a condition created by mere casual

1. 347 S.W.2d 178 (Mo. 1961) (en banc).
2. Prosser, Torts § 76 (2d ed. 1955); Restatement, Torts § 333 (1934).
negligence alone. However, these very restrictions engendered the growth of a separate but parallel doctrine, as later Missouri courts sought methods of allowing recovery without overruling their past decisions. The result in the present case represents an application of this parallel theory: the "dangerous substances" doctrine.

The evolution of parallel doctrines in this area is not a situation peculiar to Missouri, although a majority of American states have by now adopted, in principle, the broad form of the rule as set forth in the Restatement of Torts, and thereby have eliminated the need for alternative theories of relief. For example, several states, laboring under restrictions similar to those found in Missouri, utilize the "playground" rule as an alternative which exists side by side with the "attractive nuisance" doctrine. Under this rule the landowner is bound to guard trespassing children who habitually play on his land from coming in contact with a known danger. The playground must be generally known as such in the immediate vicinity and not merely be an occasional place of play for the local children.

Of the various alternatives to the attractive nuisance doctrine, however, the "dangerous substances" theory is the most widely accepted. Even New York and West Virginia, refusing to apply any form of attractive nuisance liability, allow

6. Restatement, Torts § 339 (1934), states the rule as follows:
   A possessor of land is subject to liability for bodily harm to young children trespassing thereon caused by a structure or other artificial condition which he maintains upon the land, if
   (a) the place where the condition is maintained is one upon which the possessor knows or should know that such children are likely to trespass, and
   (b) the condition is one of which the possessor knows or should know and which he realizes or should realize as involving an unreasonable risk of death or serious bodily harm to such children, and
   (c) the children because of their youth do not discover the condition or realize the risk involved in intermeddling in it or in coming within the area made dangerous by it, and
   (d) the utility to the possessor of maintaining the condition is slight as compared to the risk to young children involved therein.

For cases adopting this statement, see, e.g., Marino v. Valenti, 118 Cal. App.2d 830, 259 P.2d 84 (1953); Heitman v. Lake City, 225 Minn. 117, 30 N.W.2d 18 (1947); Dugan v. Pennsylvania R.R., 387 Pa. 25, 127 A.2d 343 (1956); Morris v. City of Britton, 66 S.D. 121, 279 N.W. 531 (1938). See also Prosser, Trespassing Children, 47 CALIF. L. REV. 427 (1959). This article indicates that there are only seven states which recognize "attractive nuisance" and yet require that the child be attracted onto the premises by the dangerous instrumentality.

8. Cases cited note 7 supra.
recovery where the injury was caused by an explosive or other inherently dangerous substance. Liability is said to be premised upon the duty of a landowner who uses or stores inherently dangerous substances to keep them unavailable to trespassing children whose presence he might anticipate.\textsuperscript{11} The underlying rationale is that children are incapable of appreciating the dangerous nature of such substances, and if the landowner can anticipate the children’s presence, either by actual or by constructive notice, he is duty bound to take the steps necessary to prevent injury.\textsuperscript{12}

The noteworthy feature of the present case is its extension of this theory, beyond the category of things denominated “explosives,” to a class of things known usually as “volatile liquids.” Most prior cases, in Missouri and elsewhere, had applied the rule only to such things as dynamite caps, fireworks, and other types of explosives.\textsuperscript{12} Obviously, then, the extension may be one of some magnitude. However, the step is not without precedent.

For instance, a New York court recently indicated that a highly combustible substance might have the necessary qualifications to be included within the inherently dangerous substances rule. In \textit{Carradine v. City of New York},\textsuperscript{14} a trespassing child had lighted a match in an enclosure situated near a recently discontinued playground. The enclosure was used to store a highly inflammable material; the court, recognizing the high degree of care imposed upon one who maintains an inherently dangerous substance on his land, stated that the degree of care required is commensurate with the risk involved, the character of the material on the premises, and its accessibility to children.\textsuperscript{16}

In reaching that determination, the dangers incident to city life and the reasonable use of property by its owner, including the nature of the trespass and of the hazard on the land, must be weighed in each case.\textsuperscript{18}

Another example, a leading Indiana case, imposed liability where a landowner permitted a steel barrel containing a “greasy substance” to remain on his premises.\textsuperscript{17} Children were accustomed to play in the general area. A nine year old boy dropped a lighted match into the barrel, causing an explosion and ensuing injury. The

12. Cases cited note 11 \textit{supra}.
13. Kansas City \textit{ex rel.} Barlow v. Robinson, 322 Mo. 1050, 17 S.W.2d 977 (1929) (en banc); Kennedy v. Independent Quarry and Constr. Co., 316 Mo. 782, 291 S.W. 475 (1926); Diehl v. A. P. Green Fire Brick Co., 299 Mo. 641, 253 S.W. 984 (1923). For a comprehensive survey of the Missouri cases dealing with the explosives exception, see Boyer v. Guidicy Marble, Terrazzo & Tile Co., 246 S.W.2d 742 (Mo. 1952).
15. It should be noted, however, that, presumably operating under this same analysis, other New York courts have refused to include such things as gasoline, Morse v. Buffalo Tank Corp., \textit{supra} note 9, a gasoline tank, Rafos v. Rolnick, 222 N.Y.S.2d 395, 15 App. Div.2d 505 (1961), and varnish, MaGaddino v. Hilo Varnish Corp., 37 N.Y.S.2d 595, 265 App. Div. 839 (1942).
court noted that Indiana cases required that a child be allured onto the land in order to apply the "attractive nuisance" doctrine. Refusing to adopt the Restatement view, the court nevertheless held the landowner liable upon the basis of the dangerous substances exception. The court cited an earlier federal decision from Indiana dealing with dynamite caps, and reasoned that where a dangerous instrumentality is left exposed so that children are likely to come in contact with it, reasonable anticipation of eventual contact will create a duty of care.

The most significant prior holding relative to Missouri law in this area was Alligator Co. v. Dutton, decided by the Court of Appeals for the Eighth Circuit in 1940. A young boy was burned when highly flammable liquid waste material was knocked or thrown into a fire next to which he was sitting. The substance had been procured from defendant's neighboring premises by a friend of the injured child. Purporting to apply Missouri law, the court held the defendant liable, stating that a duty exists on the part of a landowner when using such material to prevent it from coming into the hands of children who frequently play in the area.

It was primarily upon this case that the Missouri Supreme Court relied in reaching its decision in Paisley, although, as the court noted, there had been no precedent in Missouri law for the holding in Alligator. Nevertheless, the court accepted Alligator's inclusion of volatile liquids within the dangerous substances doctrine, and, more specifically, found oleum spirits to be within that definition. The court was careful to point out that the dangerous substances doctrine is a rule separate and distinct from the attractive nuisance doctrine, perhaps prompted by the same basic considerations, but not involving the same limitations.

Insofar as the existence of two separate doctrines covering approximately the same area is a necessity, the decision in Paisley seems fully justified. Surely, if one is to speak in terms of "inherently dangerous" substances, there is little practical distinction between a dynamite cap and a volatile liquid such as the one found in the instant case. One may well question, however, the need for two separate doctrines. The existence of such a state of affairs necessarily results in confusion. If the Missouri courts could sweep away the subtle distinctions so long adhered to and adopt the rule of the Restatement, there would be but one rule, which would encompass every situation now covered by the two. Blind allegiance to stare decisis, necessitating the formulation of new theories for new situations, should be avoided and rejected. The Restatement offers a comprehensive and unambiguous approach which, in this author's opinion, should be adopted.

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18. Luhman v. Hoover, 100 F.2d 127 (6th Cir. 1938).
19. Supra note 17, at 268-69.
20. 109 F.2d 900 (8th Cir. 1940).
CONFLICT OF LAWS—THE SUBSTANTIAL CONTACT TEST IN TORT CHOICE OF LAW AND THE FEDERAL TORT CLAIMS ACT

Richards v. United States

Petitioners, personal representatives of passengers killed in the crash of an American Airlines plane in Missouri, brought suit against the United States under the Federal Tort Claims Act in a federal district court in Oklahoma, where the ill-fated flight had originated. Petitioners claimed that the federal government had been negligent in failing to enforce federal statutes and regulations prohibiting certain conduct by American Airlines in its Oklahoma depot which led to the crash. The United States impleaded American Airlines. Prior to the present action, petitioners had either received or been tendered $15,000, the maximum amount of recovery allowed by the Missouri Wrongful Death Act. They then sought to recover under the Oklahoma Wrongful Death Act, which had no such limitation. The district court held that the complaint failed to state a claim upon which relief could be granted, because the Oklahoma act had no extraterritorial effect and, in the alternative, that Oklahoma choice-of-law rules required the application of Missouri law. The Court of Appeals for the Tenth Circuit affirmed, and the United States Supreme Court granted certiorari.

Held: Affirmed. The Federal Tort Claims Act required application not only of Oklahoma internal law but also Oklahoma conflict of laws rules, thus rendering applicable the Missouri Wrongful Death Act limitation upon the amount of recovery.

I. INTERPRETATION OF THE FEDERAL TORT CLAIMS ACT

Section 1346(b) of the Federal Tort Claims Act provides that the United States shall be liable

for money damages . . . for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

The courts in the present case were concerned with the meaning of the clause “in accordance with the law of the place where the act or omission occurred.” The several courts which had previously handled this clause under choice-of-law situa-

1. 369 U.S. 1 (1962).
3. § 537.090, RSMo 1949. In 1955, shortly after the case first arose, the Missouri statute was amended to allow $25,000 maximum recovery. Mo. Laws 1955, at 778.

https://scholarship.law.missouri.edu/mlr/vol28/iss1/11
tions developed three different interpretations regarding it, one of which was argued by each contestant in this case.

The petitioners adopted the interpretation set forth in Eastern Airlines, Inc. v. Union Trust Co., where the Court of Appeals for the District of Columbia stated that the "law of the place where the act or omission occurred" should be interpreted literally, and that the local internal law—and only the internal law—of the state where the act or omission occurred should apply, which in the present case would be the law of Oklahoma.

American Airlines adopted the view set forth by the Court of Appeals for the Ninth Circuit in United States v. Marshall, interpreting the clause to mean the place where the act or omission had its operative effect, which would be the place of injury or death—Missouri.

The United States adopted a third view, implied by the Second Circuit in Landon v. United States and accepted by the Tenth Circuit in the case at bar, that the "law of the place" meant not only Oklahoma internal law, but also its choice-of-law rules, which would require the application of Missouri law.

It is impossible to say definitely what Congress intended when it included these words in the Federal Tort Claims Act. There is an absence of legislative history on the choice-of-law section in the act. In fact, it has been suggested that Congress never contemplated choice-of-law problems such as that presented in the present case when it enacted the statute, or, if it did, that it contemplated use of the law of the place where the injury or death occurred, and, therefore, that the wording of the act was accidental.

An analysis of the pertinent sections of the act indicates that the conclusion reached by the Supreme Court is the most reasonable one. The Court first rejected American Airlines' argument, that the law of the place where the act or omission had its operative effect should be applied, on the ground that unless a contrary intent is clearly shown the words used in the statute must be given their ordinary meaning. The Court then rejected petitioners' interpretation that only the Okla-


9. Supra note 8.

10. Ibid.

11. Landon v. United States, 197 F.2d 128 (2d Cir. 1952).

12. Supra note 5.


16. The rules of statutory construction are numerous, and for almost every rule of construction there is a contrary rule. Llewellyn, Remarks on the Theory of
homa internal law was to apply. This interpretation might be proper if the clause “in accordance with the law of the place where the act or omission occurred” were read in isolation. However, the court said, that provision should be read in the context of the other parts of the Federal Tort Claims Act. The most significant of these companion sections is section 2674, which provides:

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment. . . . (Emphasis added.)

The court based its decision upon the wording of this latter section. Section 1346(b) deals simply with jurisdiction of the court, whereas section 2674 is the operative section of the act, setting forth the liability of the United States. The former states only that the United States shall be liable “under circumstances where the United States, if a private person, would be liable,” while the latter states that the United States shall be liable “in the same manner and to the same extent as a private individual.” It would seem, therefore that section 2674 is a limitation upon section 1346(b), and that the federal courts can exercise their jurisdiction, given under section 1346(b), to find the United States liable, only “in the same manner and to the same extent” that they would in finding a private individual liable under such circumstances. Since both internal law and choice-of-law rules would be applied in determining the liability of a private individual, they should both be applied in determining the liability of the United States.

Congressional purpose in the enactment of the Federal Tort Claims Act was to take away governmental immunity in certain areas of tort liability and to make the United States subject to liability in the same manner and to the same extent as a private individual, thereby eliminating the numerous private bills presented to Congress. It appears that a flexible interpretation of the act, as given by the Supreme Court in applying Oklahoma choice-of-law rules, better fulfills the purpose of the act than either American Airlines’ interpretation, applying the rigid rule of the law of the place where the act or omission had its operative effect, or the petitioners’ interpretation applying only Oklahoma internal law.

II. The Substantial Contact Test in Tort Choice-of-Law

Above and beyond its interpretation of the Federal Tort Claims Act, Richards sets forth another significant principle of law, which may lead to revolutionary

Appellate Decision and the Rules on Canons About How Statutes are to be Construed, 3 VAND. L. REV. 395 (1950).

The intent of the legislature is the important determination in statutory interpretation. Here the Supreme Court followed the ordinary meaning of the words, since it found no evidence sufficient to rebut that interpretation.

17. See note 6 supra, for a listing of the other sections.


20. Within the context of this case this statement is of no real significance, because the law of Oklahoma has been determined to require the application of the lex loci delicti. However, since the Supreme Court knew that this was the
changes in the area of tort choice-of-law generally. Mr. Chief Justice Warren, expressing the unanimous view of the court, stated:

Where more than one State has sufficiently substantial contact with the activity in question, the forum State, by analysis of the interests possessed by the States involved, could constitutionally apply to the decision of the case the law of one or another state having such an interest in the multi-state activity. (Emphasis added.)

The general tort choice-of-law rule in the state courts throughout the United States has been that the law of the place where the wrong occurred governs. As a practical matter, of course, the "wrong" may be said to have occurred in one of several places, as in the Richards case where it could have occurred in Oklahoma, where the negligent failure to inspect took place, or in Missouri, where the negligence eventually resulted in the crash. But until recently, the courts have equated the law of the place where the injury or death occurred with the law of the place of the "wrong" and have rejected other possibilities. Within the past few years, a few courts have deviated from this strict equation to find that the law of the place of the wrong may be some place other than where the injury or death occurred. However, despite this reinterpretation of language, the general rule as to the place of the "wrong" is still the usual rule applied.

A trend away from rigid application of the lex loci delicti (the law of the place where the wrong occurred) has developed in other areas of the law. In several

Oklahoma law, it is reasonable to assume that the Court meant this to be an abstract statement as to the extent to which states might apply whatever law they desired in choice-of-law cases.

In the sentence following the quoted sentence, the Court set forth the possible combinations of law which could be applied in the present case. In the case itself, these were the only possibilities available. Suppose, however, that the action had been brought in a third state, which was the domiciliary state of a decedent: would this have given that state a sufficiently substantial contact with the matter to allow it to apply its own wrongful death act? To the effect that it would, see the dissenting opinion in Pearson v. Northeast Airlines, Inc., 307 F.2d 131 (2d Cir. 1962), rev'd on rehearing en banc and dissenting opinion adopted (2d Cir. November 8, 1962).

21. 369 U.S. at 15. The application of a "contact" test in tort cases was suggested in Schmidt v. Driscoll Hotel, Inc., 249 Minn. 376, 82 N.W.2d 365 (1957), but it has never before been expressed in such barefaced terms.


23. This principle has been applied by the courts so often that it would be impractical to cite cases on the point. See generally, Restatement, Conflict of Laws §§ 377, 378, 391 (1934); Goodrich, Conflict of Laws §§ 93, 102 (3d ed. 1949); Stumberg, Conflict of Laws 182-7 (2d ed. 1951); 11 Am. Jur. Conflict of Laws § 182 (1937); 25 C.J.S. Death § 28 nn.27-30 (1941); Annot., 77 A.L.R.2d 1266, 1273-5 (1961).

areas, a "contact" test has already been in use for some time. The pioneer area was that of workmen's compensation law. There the courts have held that a state having sufficient contact with either the parties or the matter in dispute can apply its own workmen's compensation law, even though the injury occurred in another jurisdiction.\(^5\) This test has also spread to the area of contract law.\(^6\)

As at least one recent case indicates, it appears quite possible that this trend away from strict application of the lex loci delicti may be extended into the area of tort law. In \emph{Schmidt v. Driscoll Hotel, Inc.}\(^7\) defendant Driscoll Hotel, Inc., sold liquor to defendant Sorrenson, causing him to become intoxicated in Minnesota. As a result of this intoxication Sorrenson had an automobile accident in Wisconsin, injuring Schmidt, a passenger in the Sorrenson automobile. Schmidt sued for damages on the theory that the Minnesota Civil Damages Act applied. Under that act, it was illegal to sell alcoholic beverages to an intoxicated person, and any party making such a sale was to be liable for all damages caused thereby. Wisconsin had no such law. The Supreme Court of Minnesota, holding the Minnesota act applicable, said:

We feel that the principles in Restatement, Conflict of Laws, §§ 377 and 378, should not be held applicable to fact situations such as the present to bring about the result described and that a determination to the opposite effect would be more in conformity with principles of equity and justice. Here all parties involved were residents of Minnesota. Defendant was licensed under its laws and required to operate its establishment in compliance therewith. Its violation of the Minnesota statutes occurred here, and its wrongful conduct was complete within Minnesota when, as a result thereof, Sorrenson became intoxicated before leaving its establishment . . . \(^8\)

Thus the Supreme Court of Minnesota, under circumstances where a "contact" test could be applied, rejected the general rule. The Supreme Court of the United States, by virtue of its statement in the \emph{Richards} case, has apparently sanctioned such a result.

The results reached in most tort choice-of-law cases will be the same whether the general choice-of-law rule is applied or whether a "contact" test is applied. It should be remembered, however, that under the "contact" test a court may apply the law of a state which could not be applied under the general choice-of-law rule.\(^9\) Furthermore, courts applying a "contact" test, desiring to avoid the


\(^27\) Supra note 21.

\(^28\) \emph{Id.} at 380, 82 N.W.2d at 368.

\(^29\) See discussion as to application of the law of the domicile, supra note 20.
law of the place where the injury occurred, can merely refuse to apply that law, whereas courts applying the general choice-of-law rule may find it necessary to give tortured interpretations to that law in order to gain the desired result.\(^\text{30}\)

The principal problem created by injecting the "contact" test into the area of tort choice-of-law is in determining what constitutes a "sufficiently substantial contact." It is clear from the *Richards* case that both the place where the negligence occurs and the place where the injury or death occurs have a "sufficiently substantial contact." The extent to which the courts may find sufficient contact beyond these two bases is purely speculative. It is not likely, however, that the courts will be able to lay down a set of definite rules to determine what constitutes a "sufficiently substantial contact," and each case will probably have to rest upon its individual fact situation.

It is this very indefiniteness which may detract from widespread use of the "substantial contact" test. Although a potential step forward in the area of tort choice-of-law has been made, whether it will be excited to growth or whether it will continue to lie dormant must be decided by the courts of the individual states.\(^\text{31}\)

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30. See, e.g., Levy v. Daniel's U-Drive Auto Renting Co., *supra* note 24, in which a contract theory of liability was manufactured in order to impose liability upon the defendant under circumstances where applying the *lex loci delicti* in an action for personal injuries would have relieved the defendant of liability.

31. See Lowe's No. Wilkesboro Hardware, Inc. v. Fidelity Mut. Life Ins. Co., 206 F. Supp. 427 (M.D.N.C. 1962). The court recognized that the *Richards* case approved the application of a "contact" test, yet still applied the *lex loci delicti*. 