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AUTOMOBILES—ACTIONABLE NEGLIGENCE IN CHAIN COLLISION IN MISSOURI

Gass v. Knittig

Plaintiff was injured in a chain reaction collision on a four-lane highway in St. Louis County. The car in which he was riding was in the outer southbound lane. Defendant No. 1 was driving first in a line of cars in the inside northbound lane. Having made the proper signals, she slowed to a stop to let plaintiff's car clear the intersection in which she wished to turn left. Almost immediately after her car had stopped it was struck by the car following, which was driven by defendant No. 2. He, in turn, was struck from the rear by the car of defendant No. 3 (appellant). At this time defendant No. 4, who had been driving in the outer northbound lane at about 40 m.p.h., turned into the inside lane, about 50 to 75 feet behind appellant, in order to pass a truck he had been following. He had not previously noticed the three cars ahead and, unable to stop or re-enter the outer lane, swerved to his left to avoid the pile-up. He collided head-on with the car in which plaintiff was riding.

Plaintiff brought suit for his injuries against all the drivers of the northbound cars. Defendant No. 1 received a directed verdict and defendant No. 2 a jury verdict. Defendants No. 3 and No. 4 were held liable for concurring negligence. Only defendant No. 3 appealed.

The St. Louis Court of Appeals reversed the judgment against appellant on the basis that her negligence was not actionable as to plaintiff. Although finding appellant negligent in running into the rear end of defendant No. 2's car, the court concluded her negligence was not the proximate cause of plaintiff's injuries. The court pointed out that the act of each defendant must be a responsible cause of the accident. It is irrelevant that a defendant is negligent to others if his negligence is not harmful to plaintiff. From this the court reasoned that appellant's negligence was not harmful to plaintiff because his injuries would have resulted anyway. It was necessary for appellant to stop, whether lawfully or negligently, and it was defendant No. 4's failure and inability to stop in turn that resulted in the collision injuring plaintiff.

The court went even further in relieving appellant of liability by pointing out she had done her utmost to prevent the accident. The court reasoned that defendant No. 4, in attempting to pass the truck, needed every bit of time and

1. 396 S.W.2d 26 (St. L. Mo. App. 1965).
2. Id. at 27. From this it may be assumed that these parties' conduct was not negligent to plaintiff.
3. Id. at 28.
space he could possibly get to bring his car under control. By slamming into defendant No. 2's car rather than slowing gradually, appellant allowed defendant No. 4 the ultimate limit of space and time. Rather than breaching any duty to plaintiff, appellant discharged it with "the last full measure of devotion."

But was appellant's negligence actually irrelevant as to plaintiff? Could not her negligent conduct really have been the proximate cause of his injuries? It is generally accepted that a negligent act cannot be the proximate cause of an accident if the accident would have occurred even though the particular defendant drove carefully. The conduct must produce the injury through a natural and continuous sequence which is unbroken by any efficient intervening cause.

The St. Louis Court of Appeals seemed to treat the negligent conduct of defendant No. 4 as the sole cause of the injuries suffered by plaintiff. But the facts of the case could be construed to indicate appellant's negligence was a proximate cause of plaintiff's injuries by concurring with the negligence of defendant No. 4.

Appellant came to a sudden stop on a lane of a highway by slamming into the car in front and giving no warning to the traffic behind. The court found this was negligence on her part, so it may be assumed that by the exercise of care appellant could have slowed to a stop giving the proper signals. What effect might such a careful stop with the attendant warning signals have had on defendant No. 4's actions?

Appellant was going from 30 to 35 m.p.h. and her total stopping distance at that speed would have been from 114 to 145 feet from the point of perception. This is the approximate distance she would have traveled from the time of signaling if she had exercised care and recognized the danger and if she had begun signaling at the earliest point of time. Add that figure to the 50 or 75 feet between appellant and defendant No. 4 when the latter started to pass the truck in front of him, and it is possible that defendant No. 4, going 40 m.p.h., would have had time to stop, had he had a warning signal when appellant should have first realized there was a necessity to stop.

It is even possible that if defendant No. 4 had seen warning brake lights on appellant's car ahead, he would have never attempted to pass the truck by pulling

4. Id. at 29.
6. 5A Am. Jur., op. cit. supra note 5, § 236.
7. At page 28 of 396 S.W.2d, the court states: "We think it demonstrable in this case that defendant No. 3 [appellant] did not violate any duty she owed to plaintiff and that her collision with No. 2 was in nowise causally connected with the ensuing accident between plaintiff and No. 4." This indicates that the court must have considered defendant No. 4's negligence at least an intervening cause in relation to the negligent conduct of appellant in the chain collision.
10. By the Uniform Table of Driver Stopping Distances, cited note 9 supra, defendant No. 4's total stopping distance would have been 178 feet. It seems possible that if he had timely warning from appellant, he would have had time in the exercise of reasonable care to come to a stop behind appellant, thus avoiding a collision altogether.
into the inside lane. His failure to see the pile-up ahead was negligent; but had appellant made the proper signal, there might not have been that failure on the part of defendant No. 4. Thus, in two different respects, appellant's negligence in failing to signal could have concurred with the negligence of defendant No. 4 to cause plaintiff's injuries and constitute a proximate cause.\footnote{11}

Appellant's actions might have been the proximate cause in yet another way. If she had noticed the collision ahead and swerved into the outside lane to avoid it, she would not have added her car to the pile-up, thus allowing defendant No. 4 more time and space in which to stop his car.

It seems possible, therefore, that that appellant's negligence could have caused plaintiff's injuries. It also seems possible that negligence was a breach of duty owed to plaintiff and thus was actionable to plaintiff.

The duties owed by appellant were numerous, as they are for all drivers. Operators of motor vehicles in Missouri are held to the standard of the highest degree of care.\footnote{12} They are held liable for failure to give a warning signal before stopping in front of traffic,\footnote{13} an action required by state statute when stopping or checking the speed of their cars would reasonably affect the movement of other cars.\footnote{14} Drivers following other traffic must keep a lookout to observe the cars ahead and their movements, keep their cars under control to prevent running into them if they should slow or stop, and keep a sufficient distance behind to avoid danger in case of a sudden stopping.\footnote{16} Did appellant owe any of these duties to plaintiff?

Besides the general duty "to so control his [her] car as to endeavor to avoid injury to people [s]he might meet or pass on the highway,"\footnote{16} appellant had the duty to refrain from conduct which could foreseeably result in injury to plaintiff. It is not necessary that appellant have anticipated the particular injury, manner in which it occurred, or person to whom it occurred.\footnote{17} As the St. Louis Court of Appeals held in \textit{Setzer v. Ulrich}:

\footnote{11. 7 Am. Jur. 2d Automobiles and Highway Traffic § 370 (1963).}
\footnote{12. § 304.010(1), RSMo 1959.}
\footnote{13. For cases holding defendants liable for negligence see: Terrell v. McKnight, 360 Mo. 19, 226 S.W.2d 714 (1950); Woods v. Chinn, 224 S.W.2d 583 (St. L. Mo. App. 1949); Matthews v. Mound City Cab Co., 205 S.W.2d 243 (St. L. Mo. App. 1947); Bowman v. Moore, 237 Mo. App. 1163, 167 S.W.2d 675 (K.C. Ct. App. 1942); Setzer v. Ulrich, 90 S.W.2d 154 (St. L. Mo. App. 1936); Ritz v. Cousins Lumber Co., 227 Mo. App. 1167, 59 S.W.2d 1072 (1933). See also: Schroeder v. Rawlings, 344 Mo. 630, 127 S.W.2d 678 (1939), aff'd, 348 Mo. 790, 155 S.W.2d 189 (1941); O'Donnell v. St. Louis Public Service Co., 246 S.W.2d 539 (St. L. Mo. App. 1952). For cases holding plaintiffs liable for contributory negligence see: White v. Rohrer, 267 S.W.2d 31 (Mo. 1954); Robb v. St. Louis Public Service Co., 352 Mo. 566, 178 S.W.2d 443 (1944); Berthold v. Danz, 27 S.W.2d 448 (St. L. Mo. App. 1930); Schreiber v. Andrews, 234 S.W. 862 (St. L. Mo. App. 1921).}
\footnote{14. § 304.019(1), (4), RSMo 1959.}
\footnote{15. Terrell v. McKnight, \textit{supra} note 13; Matthews v. Mound City Cab Co., \textit{supra} note 13.}
\footnote{16. Ritz v. Cousins Lumber Co., \textit{supra} note 13, at 1172, 59 S.W.2d at 1075.}
\footnote{17. Bowman v. Moore, \textit{supra} note 13; Setzer v. Ulrich, \textit{supra} note 13; Ritz v. Cousins Lumber Co., \textit{supra} note 13.}
It is only essential that in the exercise of due care he could or might have foreseen or anticipated that some injury might result. In other words, if a person does an act, and he knows, or by the exercise of reasonable foresight should have known, that in the event of a subsequent occurrence, which is not unlikely to happen, injury may result from his act, and such subsequent occurrence does happen and injury does result, the act committed is negligent, and will be deemed to be the proximate cause of the injury.\(^\text{18}\)

Not only did appellant owe a duty to plaintiff as a traveler on the highway, but also she had a duty to avoid causing the injury to plaintiff which she reasonably could have foreseen. Concurrent negligence, common to these chain reaction collisions, often involves a sudden and negligent stop by one driver which is compounded by the negligence of the several drivers behind, who are following too closely or are failing to keep a proper lookout.\(^\text{19}\) Appellant’s and defendant No. 4’s negligence, quite possibly concurring in this manner, seems to have breached a duty to persons in the car approaching in the opposite lane and to have resulted in plaintiff’s injuries.

The court in Gass reversed the judgment against appellant on the basis that no case could be made against her, not only on the theory submitted to the jury,\(^\text{20}\) but on any theory.\(^\text{21}\) Although it took a practical and most interesting view as to appellant’s liability for plaintiff’s injuries, it would seem that a case could have been made against appellant on the theory of concurrent negligence. If the court had remanded the case, the jury could have determined whether or not the facts warranted finding that appellant’s acts constituted concurrent negligence resulting in injury to the plaintiff.

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18. 90 S.W.2d 154, 156 (St. L. Mo. App. 1936).
19. For a discussion of the negligence of a driver following another car and a comparison of the Rear-End Collision Doctrine in Missouri and in Kansas see Jacobson, The Rear-End Collision Doctrine as a Theory of Negligence in Kansas, 28 U. KAN. CITY L. REV. 41 (1959-60) and cases cited: State ex rel. Spears v. McCullen, 357 Mo. 686, 210 S.W.2d 68 (1948); Jones v. Central States Oil Co., 350 Mo. 91, 164 S.W.2d 914 (1942); Richardson v. Kansas City Rys. Co., 288 Mo. 258, 231 S.W. 938 (1921); Schafstette v. St. Louis & M.R.R. Co., 175 Mo. 142, 74 S.W. 826 (1903); Doggendorf v. St. Louis Public Service Co., 333 S.W.2d 302 (St. L. Mo. App. 1960); Hughes v. St. Louis Public Service Co., 251 S.W.2d 360 (St. L. Mo. App. 1952); Jones v. Austin, 154 S.W.2d 378 (St. L. Mo. App. 1941); Hollensbe v. Pevely Dairy Co., 38 S.W.2d 273 (St. L. Mo. App. 1931).
20. The plaintiff’s main instruction to the jury was on the rear end collision doctrine.
LABOR RELATIONS—FEDERAL PRE-EMPTION OF STATE LIBEL ACTIONS

Linn v. United Plant Guard Workers of America, Local 114

Petitioner Linn, an assistant general manager of Pinkerton's National Detective Agency, Inc., filed this suit against the Union, two of its officers and a Pinkerton employee, one Doyle. The complaint alleged that during a campaign to organize Pinkerton's employees in Detroit, the respondents (defendants below) had circulated among the employees leaflets accusing petitioner of lying to Pinkerton's Saginaw employees, depriving them of their right to vote in NLRB elections, and charging that they had been robbed of pay increases, presumably by petitioner. The leaflets also expressed confidence that the "Saginaw men will file criminal charges," and that "Somebody may go to Jail!" The complaint alleged that the statements were false and that defendants knew they were false. It did not allege actual or special damage but prayed for the recovery of one million dollars on the ground that the accusations were libel per se. All respondents except Doyle moved to dismiss, asserting that the subject matter was within the exclusive jurisdiction of the National Labor Relations Board (NLRB).

Prior to this action Pinkerton had filed 8(b)(1)(A) charges under National Labor Relations Act (NLRA) section with the NLRB. The Regional Director refused to issue a complaint on the ground that the Union was not responsible for the distribution of the leaflets.

The District Court dismissed this complaint on the ground that the NLRB had exclusive jurisdiction over the subject matter. The Court of Appeals for the 6th Circuit affirmed. The Supreme Court granted certiorari and reversed in a five to four decision. The Court stated, "Where either party to a labor dispute circulates false and defamatory statements during a Union organizing campaign, the court does have jurisdiction to apply state remedies if the complaint pleads and proves that the statements were made with malice and injured him." Petitioner was given leave to amend his complaint to conform to these requirements.

The general rule regarding federal pre-emption in labor relations is that if the conduct in question is arguably either protected by section 7 or prohibited by section 8 of the NLRA, the NLRB has exclusive jurisdiction to settle the dispute. The purpose of such a policy is to effectuate the Congressional intent to have a uniform national labor policy encouraging collective bargaining, administered by a board of special competence.

2. Id. at 56.
3. 337 F.2d 68 (6th Cir. 1964).
4. 381 U.S. 923 (1965). Justice Clark wrote the majority opinion and was joined by Justices Stewart, Brennan, White and Harlan. Justice Black wrote a dissenting opinion as did Justice Fortas, who was joined by the Chief Justice and Justice Douglas.
5. Linn v. United Plant Guard Workers, Local 114, supra note 1, at 55.
However, there are exceptions to the general rule, judicially created on a case-by-case basis. San Diego Bldg. Trades Council v. Garmon\(^7\) announced that state remedies had not been done away with where the conduct involved was “a merely peripheral concern of the Labor Management Relations Act” or “touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling Congressional direction,” intent to deprive the states of power to act could not be inferred.

The dispute in the noted case focused upon the scope of the Garmon exception. The majority believed that malicious libel was only a “peripheral concern” of the Labor Management Relations Act\(^8\) because the Board is not empowered to redress private injury. The damage sustained by the plaintiff in a libel suit is a private wrong, while the unfair labor practice procedure\(^9\) resolves only the labor dispute. Under Justice Clark’s analysis, the two remedies are not conflicting, will not lead to inconsistent results and do not overlap because they deal with two distinctly different interests.

Justice Fortas, for the minority, felt that since the statements made about Linn were charges related to his occupational responsibility during an organizational campaign by respondent’s union, the alleged defamation was very definitely part of a labor dispute and was therefore not merely a “peripheral concern” of the Act.\(^10\)

The essential conflict concerning the “overriding state interest” requirement of Garmon is between the desire to tolerate rough speech in labor disputes and the state’s interest in protecting its citizens from libels. Justice Clark concedes that Congress intended to encourage free debate in labor disputes,\(^11\) but insists that it never intended to tolerate malicious libel which is never constitutionally protected,\(^12\) “[T]he use of the known lie as a tool is at once at odds with the premises of democratic government and with the orderly manner in which economic, social or political change is to be effected.”\(^13\) Moreover, even where objectionable language has been tolerated in unfair labor practice proceedings, the Board has indicated that the result might have been different had there been “actual malice,” an “intent to falsify” or a “malevolent desire to injure.”\(^14\) The majority opinion

\(^7\) San Diego Bldg. Trades Council v. Garmon, supra note 6.
\(^8\) Linn v. United Plant Guard Workers, Local 114, supra note 1, at 61.
\(^9\) The Board may set aside an election if the defamatory language has been such as to misrepresent a material fact, opportunity for reply has been lacking, and the misrepresentation has had an impact on the free choice of the employees participating in the election. See Hollywood Ceramics Co., 14 N.L.R.B. 221, at 223-224 (1962); F. H. Snow Canning Co., 119 N.L.R.B. 714, at 717-718 (1957).
\(^10\) Linn v. United Plant Guard Workers, Local 114, supra note 1 at 70. Justice Fortas went on to say, however, that “The foregoing considerations do not apply to the extent that the use of verbal weapons during labor disputes is not confined to any issue in the dispute, or involves a person who is neither party to nor agent of a party to the dispute. In such instances, perhaps the courts ought to be free to redress whatever private wrong has been suffered.”
\(^11\) Id. at 61-62.
\(^12\) Id. at 63.
\(^13\) Id. at 67, quoting Garrison v. Louisiana, 379 U.S. 64, 75 (1964).
\(^14\) Id. at 61.

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stated that freedom of speech does not become unduly restricted by allowing suits such as this one since the right to maintain the action is limited by the requirements imposed in *New York Times Co. v. Sullivan*: 15 proof of actual malice and damages. 16 Also significant is the fact that if a defamed individual is denied state remedies he can obtain no relief for his injury. 17

Justice Black insists that there are no overriding state interests which would prevent pre-emption because it was not the intent of Congress to "purify the language of labor disputes, but to bring about agreements by collective bargaining." 18 To allow libel suits in such circumstances would impede fruitful collective bargaining by creating feelings of personal vengeance. 19

Justice Fortas challenged Justice Clark's interpretation of the *Garmon* exception regarding "overriding state interest." He contends that never has the Court allowed an independent judicial remedy in an area arguably subject to NLRB cognizance where there was no violence, threat of violence or intimidation, 20 and that the state's interest in protecting its citizens from libel is not such an interest as will prevent pre-emption. 21 Congress did not intend for state courts to

16. Linn v. United Plant Guard Workers, Local 114, *supra* note 1, at 61. "[T]he exercise of state jurisdiction is a] peripheral concern of the LMRA, provided it is limited to redressing libel issued with knowledge of its falsity, or with reckless disregard of whether it was true or false."
17. *Id.* at 64: "The Board's lack of concern with the 'personal' injury cause by malicious libel, together with its inability to provide redress to the maligned party, vitiates the ordinary arguments for pre-emption."
18. *Id.* at 68.
19. *Id.* He also reiterates that all libel suits abridge freedom of speech.
20. *Id.* at 69. These actions are to be distinguished in kind from proceedings under NLRA section 301. That provision is specifically directed to suits for violations of contracts between an employer and a union. See, e.g., Textile Workers Union v. Lincoln Mills of Alabama, 353 U.S. 448 (1957); Zdanok v. Glidden, 288 F.2d 99 (2d Cir. 1961).
In Salzhandler v. Caputo, 316 F.2d 445 (2d Cir. 1963), cert. denied 375 U.S. 946 (1963), the Court held that a Union could not punish its members for libelling other members. However, there was dictum to the effect that "libelous statements may be made the bases of civil suit between those concerned." See also note 32, infra.

International Ass'n of Machinists v. Gonzales, 356 U.S. 617 (1958), allowed a state action for damages for loss of wages, mental and physical suffering brought by an employee who was expelled from a union for falsely attacking another man's character. The Court held that although the conduct was arguably an 8(b)(2) violation, the plaintiff's rights were in contract and the NLRB could therefore grant no relief.
21. Linn v. United Plant Guard Workers, Local 114, *supra* note 1, at 69. An examination of the cases cited on this precise point by the Court in *Garmon* gives some support to Mr. Justice Fortas's position. All of the disputes in those cases involved violence or threats of violence: UAW v. Russell, 356 U.S. 634 (1958) (picket line blocking plaintiff's access to work; threats of bodily harm; standing in front of auto so as to block entrance to plant); Youngdahl v. Rainfair, Inc., 355 U.S. 131 (1957) (parking lot strewn with tacks; tacks scattered in driveway of plant manager's home and homes of non-strikers; threat to "wipe the sidewalk" with plant manager; harassment of manager by shouting and telephoning his home; snake put in plant; tires of non-strikers' cars punctured, and
have jurisdiction over such libel suits because "lusty speech provides a useful safety valve for the tensions which often accompany such controversies." He pointed out that labor-management disputes take place within a unique framework and implied that those who participate understand the language used and that the Court's decision threatens the "equilibrium" which has been achieved in the successful resolution of union-management controversies.

Justice Fortas is convinced that the protection afforded by requiring proof of malice and injury is illusory. He says that "malice" is subjective in its meaning, what it is depends on the ingenuity of trial counsel and the predelictions of judge and jury. "Injury," similarly, is "not limited to physical trauma." He summarized his views:

In a libel suit, the outcome is determined by standards alien to the subject matter of labor relations, by considerations which do not take into account the complex and subtle values that are at stake, and by a jury unfamiliar with the quality of rhetoric customary in labor disputes. The outcome, in fact, is more apt to reflect immediate community attitudes toward unionization than appreciation for the underlying, long-term perplexities of the interplay of management and labor in a democratic society.

The effect of Linn v. United Plant Guard Workers of America, Local 114 remains to be seen. The Court's opinion maintains that collective bargaining will not be disrupted by allowing libel suits because they deal with a problem totally distinct from labor disputes—individual injury. The majority also met the argument that its decision will result in an avoidance by allegedly defamed parties of appropriate Board remedies for conduct that is also an unfair labor practice. That is, injured persons will not seek an administrative remedy when they know they can sue in court for money damages. Clark says this will not follow because, just as the Board cannot redress private injury in this context, neither can a judicial tribunal resolve the labor dispute. Therefore, the Board remedies will still be sought, since both parties must continue their day-to-day working relationship.

more); UAW v. Wisconsin Employment Relations Bd., 351 U.S. 266 (1956) (mass picketing obstructing ingress to and egress from the plant; threatening employees who desired to work and their families with physical injury); United Constr. Workers v. Laburnum Constr. Corp., 347 U.S. 656 (1954) (threats and intimidation of employer's officers and employees with violence to such a degree that employer was compelled to abandon all its projects in that area).

22. Linn v. United Plant Guard Workers, Local 114, supra note 1, at 73.
23. Id.
24. Id. at 71. Moreover, Justice Fortas says that the alleged libel in this case "... is hardly incendiary. To the experienced eye, it is pale and anemic when compared with the rich and colorful charges freely exchanged in the heat of many labor disputes."
25. Id. at 71.
26. Linn v. United Plant Guard Workers, Local 114, supra note 1, at 64. Justice Clark also expressed his view that the harm for which a complainant may recover "may include general injury to reputation, consequent mental suffering, alienation of associates, specific items of pecuniary loss, or whatever form of harm would be recognized by state tort law."
Clark does not seem at all convinced himself that his requirements of malice and injury will protect small employers and unions from possible extinction because of a large libel judgment. Fortas feels that these requirements afford little or no protection. Because of the differences between the context of labor disputes and the framework within which ordinary libel suits arise, and because of the inability of juries to comprehend the situation, he feels that the stability of small employers and unions is endangered by this decision.

_Linn_ unquestionably broadens the _Garmon_ exception in favor of the exercise of state jurisdiction. It is not clear exactly whether Clark is saying that judicial remedy is available because (1) libel in this context is not arguably within the protection of section 7 or the prohibitions of section 8, or (2) even though it is arguably within the Board's jurisdiction, the state's interest is so great that libel suits will be allowed notwithstanding the general rule.

There are questions of both law and policy involved. Questions of law are usually decided by reference to legislative history, statutory interpretation and prior decisions. In this area the legislative history is vague; the language of the statute is no help. However, the language of the prior decisions does not appear prima facie to support the Court's conclusions as to what is the meaning of the _Garner-Garmon_ general rule and the exceptions to pre-emption. Questions of policy are rarely susceptible of objective analysis and criticism. The crucial point, recognized and discussed by both majority and dissenting justices, is that uniform national labor policy is of paramount importance, and that judicial remedies cannot be allowed which will disrupt that policy too much. Clark does not feel that it will

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27. _Id._ at 67: 
We believe that under the rules laid down here it can be appropriately re-dressed without curtailment of state libel remedies beyond the actual needs of national labor policy. However, if experience shows that a more complete curtailment, even a total one, should be necessary to prevent impairment of that policy, the Court will be free to reconsider today's holding. We deal here not with a constitutional issue but solely with the degree to which state remedies have been pre-empted by the Act.

28. _Id._ at 61: "In such cases the one issuing such material forfeits his protection under the Act," and at 63: "The injury that the statement might cause to an individual's reputation—whether he be an employer or union official—has no relevance to the Board's function."

29. See _Id._, at 62: "We . . . conclude that a State's concern with redressing malicious libel is 'so deeply rooted in local feeling and responsibility' that it fits within the exception specifically carved out by _Garmon_."

30. See Cox, _Federalism in the Law of Labor Relations_, 67 Harv. L. Rev. 1297, 1310 (1954). Twelve years ago Cox interpreted the pre-emption doctrine to apply whether the state restriction sought to be enforced by court action is statutory or common law and whether it purports to constitute adjudication of private rights or public regulation.

31. See Wollet, _State Power to Regulate Labor Relations_, 33 Wash. L. Rev. 364 (1958), where it is contended that the crucial consideration is the threat to national labor policy. Wollet suggests that a case like UAW v. Russell, _supra_ note 23, involving mass picketing and threats of violence to a worker if he entered the plant, posed such a threat, whereas the situation involved in Gonzales, _supra_ note 20, did not.
do serious damage to allow libel actions, but has reserved the right to change his mind if problems arise in the future. To Fortas, the danger is apparent and imminent.

It appears that the Court could have better compromised the competing interests by using a more restrictive test for allowing libel suits, if such modification of the pre-emption doctrine is needed at all. If the defamatory statements have been disseminated outside the labor-management circle so as to come to the attention of the complainant's social acquaintances, persons not hardened to the "lusty speech" of labor disputes, perhaps a judicial remedy for libel could be allowed. The rationale is that the defamed person is not likely to be severely damaged within his business world where labor, management, Congress and the courts all wish to promote "uninhibited, robust, and wide-open" debate that "may well include vehement, caustic and sometimes unpleasantly sharp attacks."

On the contrary, should his non-business associates, in a world which does not tolerate such utterances, be made aware of the false accusations, then and only then could it be said that the state's interest is "overriding." A better, more conservative approach to resolving the policy question, therefore, would appear to be the adoption of a rule that unless the libel has been actually disseminated by radio, television, newspaper or any other means reasonably calculated to spread beyond the participants in the dispute, state remedies have been pre-empted. The federal case law, however, until this decision, appears to be on the side of federal pre-emption except where the state's interest is the prevention of violence. Nevertheless, since Linn is such a departure from precedent anyway, it would seem to have broadened the Garmon exception sufficiently to permit a more restrictive policy rule in the future.

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32. Meltzer, The Supreme Court, Congress, and State Jurisdiction Over Labor Relations: I, 59 Col. L. Rev. 6 (1959) would undoubtedly disagree. If the conduct is neither prohibited by § 8 [and in Linn, the Regional Director apparently thought it was not] nor protected by § 7 [as Clark contends libel is not], he says, at page 40:

The states would then be awarding damages for activities which are neither prohibited nor protected. In this context, there is more force to the claim that state additions to the substantive, as opposed to the remedial, law of labor relations would derange the balance struck by the federal act. If, in accordance with Garner, the interest in centralized and uniform interpretation precludes the states from granting parallel remedies for activity apparently prohibited by federal law, it would appear, a fortiori, that the states are barred from applying additional substantive standards and thereby limiting conduct ungoverned by the national act.

33. Linn v. United Plant Guard Workers, Local 114, supra note 1, at 62.

INNKEEPER'S LIABILITY FOR THEFT OF A GUEST'S AUTOMOBILE

Phoenix Assur. Co. v. Royale Investment Co.¹

Roy Scott, upon arriving at defendant's hotel to become an overnight guest, turned his automobile over to the hotel doorman. The doorman gave Scott a claim check containing a disclaimer clause² and then parked Scott's automobile on a hotel lot. The particular lot was some distance from the hotel and was generally used by persons attending functions at the hotel rather than by overnight guests. The lot was lighted but left open and unattended from 1:30 a.m. to 8:00 a.m. During this period the car was stolen and wrecked. After paying Scott's claim of §603.32, plaintiff insurance company sued defendant by right of subrogation. Judgment for plaintiff was affirmed on grounds that (1) even if Scott's attention was called to the disclaimer clause, it could not be construed as relieving defendant from negligence liability; (2) defendant's liability was not limited by section 419.010, RSMo 1959 to 200 dollars, because the statute could not be construed to include a guest's automobile, and (3) defendant was merely a bailee for hire of the automobile, making an innkeeper statute inapplicable.

At common law, the great majority of courts held the innkeeper to be virtually an insurer of a guest's property infra hospitium, i.e. within the protection of the inn, unless lost or damaged by act of God, public enemy, or fault of the guest.³ A minority of courts held that the innkeeper could relieve himself of liability for loss of, or damage to, a guest's property infra hospitium by showing freedom from negligence.⁴

In the noted case, the fact that Scott's automobile was parked on a lot some distance from the hotel proper does not prevent the automobile from being infra hospitium. Numerous early cases hold a guest's goods are infra hospitium though not within the inn proper.⁵ A statement of this rule is found in Maloney v.

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¹ 393 S.W.2d 43 (St. L. Mo. App. 1965).
² "The Hotel assumes no responsibility for cars parked on this lot whether for the car or damages or contents therein. We do not have an attendant at all times. This ticket is not a receipt. It indicates our arrangement concerning parking. All owners placing automobiles with the Hotel parking lot do so subject to the above terms and conditions." Id. at 46.
⁵ See, e.g., Cohen v. Manuel, 91 Me. 274, 39 Atl. 1030 (1898) (innkeeper directed guest to put horse in stable not part of the inn); Hilton v. Adams, 71 Me. 19 (1879) (cattle in pasture outside the inn); Sibley v. Aldrich, 33 N.H. 553 (1856) (horse killed by another horse in defendant's stable); Hallenbake v. Fish, 8 Wend. 547 (N.Y. 1832) (saddle and bridle in barn); Clute v. Wiggins, 14 Johns. R. 174 (N.Y. 1817) (bags of wheat stolen from wagon house); Jones v. Tyler, 3 L.J.K.B. 166 (1834) (gig left in public carriage way by innkeeper's servant). More recent cases: Park-O-Tell Co. v. Roskamp, 223 P.2d 375 (Okla. 1950); Merchant's Fire Assur. Corp. v. Zions Corp., 109 Utah 13, 163 P.2d 319 (1945); Aria v. Bridge House Hotel, Ltd., 137 L.T.R. (n.s.) 299 (1927) (Innkeeper's servant told guest to park car on hotel lot). For a fact situation identical to Phoenix see Williams v. Linnitt, 1 K.B. 165 (1951) (holding innkeeper liable).
Bacon where the guest arrived in town and made arrangements for his baggage to be delivered to the hotel later. After the guest’s baggage was deposited on a platform in front of the hotel by a transfer company, it was stolen. In holding the hotel liable, the court stated:

To be infra hospitium, it is not necessary that property should be left within the walls of the inn, nor within the walls of buildings appurtenant to the inn, nor yet within the limits of the enclosure surrounding such buildings.

The court further held that the hotel customarily received the baggage of its guests on the platform and that the guest’s baggage was delivered to the platform in the customary manner. The baggage being infra hospitium, the hotel was liable.

Other cases hold that mere delivery to the innkeeper’s servant, as in the principal case, is enough to bring the property infra hospitium no matter where the servant later places the goods. Furthermore, it has been held that if the innkeeper’s servant directs a guest to leave his property in a certain place, it is enough to bring the property infra hospitium.

Thus the fact that Scott’s automobile was not within the hotel proper is not controlling, nor is the fact that the parking lot was not connected to the hotel. An innkeeper may be held liable if the guest parks the automobile, or even if the automobile was parked by someone other than the guest, the innkeeper, or the innkeeper’s servant.

The principal case is to be distinguished from Sewell v. Mountain View Hotel, Inc., where a guest’s car was damaged when a drunk, being pursued by police, crashed his car into the parking lot containing the guest’s car. In Sewell, the hotel made no charge for the parking. The guest could choose the particular lot and space, and could keep the keys. The guest could use the car at his discretion without knowledge of the hotel, and the hotel kept no attendant on the lot. In that case, the hotel was not even a bailee of the automobile, since it neither directed the guest’s disposition of the car, nor had custody or possession of it.

While the great majority of courts have held the innkeeper virtually an insurer of a guest’s property infra hospitium, many states have enacted statutes purporting to diminish this absolute liability. Such statutes, when in derogation of common law, are to be strictly construed. When an action is brought against an innkeeper who contends his liability is limited by such a statute, the majority

7. E.g., Jones v. Tyler, supra note 5.
10. Ibid.
11. See, Cohen v. Manuel, supra note 5; Aria v. Bridge House Hotel, Ltd., supra note 5.
12. Supra note 6.
13. 325 S.W.2d 626 (Tenn. 1959).
14. Missouri cases offer examples of some of the strictest construction. In Porter v. Gilkey, 57 Mo. 235 (1874) a statute requiring an innkeeper to post notice in ordinary sized plain English type was held not to be complied with when print was in small type although the guest could just as easily have read it; In
of courts hold that this limitation relates only to an innkeeper’s absolute liability and has no application when the guest’s cause of action is based on negligence.\textsuperscript{15}

Missouri’s statute, section 419.010, RSMo 1959, seems an uncommonly poor example of a statute limiting an innkeeper’s liability:

\begin{quote}
no hotel . . . is liable for the loss of any money, jewelry, wearing apparel, baggage or other property of a guest in a total sum greater than two hundred dollars, unless the hotel . . . by an agreement in writing . . . voluntarily assumes a greater liability with reference to such property. As regards money, jewelry or baggage, an hotel keeper . . . is not liable in any event for the loss thereof or damage thereto, unless the same was actually delivered by the guest to him . . . in the office of the hotel or inn, and the receipt thereof acknowledged by the delivery to the guest a claim check of the hotel . . ., unless the loss or damage occurs through the willful negligence or wrongdoing of the hotel keeper . . . his servants, or employees. This section shall be posted in the office of every hotel and inn and in every guest room thereof, and unless so posted the same does not apply in the case of hotel keepers . . . failing to post same.
\end{quote}

The court in the principal case, applying the rule of strict construction to the statute, concluded that “other property” obviously applies to things carried into the hotel by the guest and does not include a guest’s automobile.\textsuperscript{16} The wording of the statute permits no other inference. Thus, under the Missouri statute, a hotel is in the unusual position of being subject to a higher degree of liability toward a guest’s automobile on a hotel lot than to personal belongings brought into the hotel. Since no statute relates to the liability of an innkeeper for a guest’s automobile, common law absolute liability must attach.

Another deficiency in the Missouri statute is the use of the term “willful negligence.” For a hotel to be liable in excess of 200 dollars for loss or damage to property of a guest brought into the hotel, there must have been willful negligence (probably meaning gross negligence). This, besides doing violence to common law

\textsuperscript{15} E.g., in Rockhill v. Congress Hotel Co., 237 Ill. App. 98, 86 N.E. 740 (1908), a statute stating that an innkeeper was not liable for money, jewelry, or precious stones unless delivered to the innkeeper was held to be no bar to a guest’s recovery in negligence where she failed to deliver her valuables to the innkeeper. In Shiman Bros. & Co. v. Nebraska Nat. Hotel Co., 143 Neb. 404, 9 N.W.2d 807 (1943), a jewelry salesman had jewelry in excess of $45,000 stolen from his trunk. The court held that a statute regulating or limiting the liability of an innkeeper applies only to his common law liability as an insurer and has no application where the guest’s cause of action is based solely on the negligence of the innkeeper in caring for the property entrusted to him. In Sifflette v. Lilly, 130 W. Va. 297, 43 S.E.2d 289 (1947), where plaintiff had clothing valued at $500 stolen from her room, the court held that when the loss is the result of negligence of the innkeeper, the statutory limit does not apply. See 29 Am. Jur. Innkeepers § 89 (1960). Contra, Goodwin v. Georgian Hotel Co., 197 Wash. 173, 84 P.2d 681 (1938), holding that a statute limiting innkeeper’s liability to $1000 applies to losses caused by theft of the innkeeper’s employees or gross negligence of the innkeeper or his employees, but does not apply in case of theft by the innkeeper.

\textsuperscript{16} Phoenix Assur. Co. v. Royale Inv. Co., 393 S.W.2d 43 (St. L. Mo. App. 1965).
principles, is a contradiction in terms.

As a further reason for denying the hotel protection under the statute, the court held the innkeeper statute inapplicable because defendant was merely a bailee for hire.17 The court did not explain the reason for so holding, but it is submitted that the only explanation for this decision can be that the disclaimer clause on the claim check relieved defendant of its absolute liability as an innkeeper and imposed only the liability of a bailee for hire.18

Prior cases holding an innkeeper merely a bailee have been confined primarily to instances where the relationship was not that of innkeeper and guest,19 as where a guest checks out and leaves property in custody of the hotel.20 With respect to automobiles, a bailee for hire relationship has been held to exist where the guest’s automobile is placed in a lot or garage operated by someone other than the hotel.21 But, even in this instance, the hotel may be subject to absolute liability if the guest is not aware of the hotel’s relationship with the private garage, and could reasonably assume that the automobile was still in the custody of the hotel.22

Upon examining the rule of strict liability of a hotel for property _infra hospitium_ retained by the majority of jurisdictions, one is likely to conclude that here lies the perfect example of a rule outliving its reason—travel conditions of the fifteenth century, characterized by highwaymen and robbers and their opportunity for combination with dishonest innkeepers. However, upon closer examination one can see that a reason for the rule still exists. There is greater travel today than ever before and a guest is in no better position to protect himself. As was stated in _Shifflette v. Lilly_:23 "If the door is open to fraudulent and dishonest practices, it may be expected that they will creep in and prevail." It must be remembered that the same rules apply to both one dollar per night “hotels” and the Hilton chain. Thus, a strong policy argument can still be made for making hotels absolutely liable for property of guests _infra hospitium_, and for strictly construing statutes such as Missouri’s, when in derogation of this absolute liability.

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17. _Id._ at 47.
19. _E.g._, Ross v. Kirkeby Hotels, Inc., 160 N.Y.S.2d 978 (1957). Plaintiff was attending a wedding at the hotel. The case is unusual because defendant hotel tried to show the relationship of innkeeper-guest in order to limit liability under statute.
20. Rosin v. Central Plaza Hotel, Inc., 345 Ill. App. 411, 103 N.E.2d 381 (1952); Alex W. Rothchild & Co. v. Lynch, 171 La. 114, 129 So. 725 (1930); Oklahoma City Hotel Co. Inc. v. Levine, 189 Okla. 331, 116 P.2d 997 (1941) (further holding a disclaimer clause will not relieve liability for negligence); Jackson v. Steinberg, 186 Ore. 129, 200 P.2d 376 (1948); Dallas Hotel Co. v. Richardson, 276 S.W. 765 (Tex. 1925) (further holding a disclaimer clause will not relieve liability for negligence).
23. _Supra_ note 15.
TORTS—PARENTAL LIABILITY FOR ACTS OF MINOR CHILD

*National Dairy Products Corp. v. Freschi*¹

Action by corporate truck owner and servant driver filed jointly against minor child and parents alleging damages to delivery truck and its contents and minor physical injuries to truck driver. Plaintiffs' petition stated that while servant was making daily milk deliveries he observed defendant child, three years of age, enter the truck and release the brake. The driver was injured when he attempted to enter and stop the rolling vehicle.

Summary judgment for defendant child was granted by the trial court. Plaintiffs failed to perfect their appeal on this judgment,² and this issue was not considered on appeal.

The petition alleged that defendant parents had knowledge that their child had the propensity to enter and attempt to drive trucks and that the parents had negligently failed to restrain him. However, plaintiffs' opening statement admitted that they were unable to find any evidence that the child had previously been known to climb into and start vehicles. At the close of plaintiffs' opening statement, the trial court granted defendant parents' motion for directed verdict. Plaintiffs appealed this judgment.

The St. Louis Court of Appeals affirmed the directed verdict stating that plaintiffs had the burden of proving: (1) the child's propensity to do this type of act; and (2) parental knowledge of such propensity.³ Plaintiffs' allegations indicated that in the past the child had climbed into several sewers and manholes as well as a window of a neighboring home and that on the day in question, he probably escaped through his nursery window. Plaintiffs failed to establish a cause of action because their opening statement conceded they could find no evidence to show the child had ever been known to climb into and start an automobile or truck. Such admission was fatal to their action and the lower court correctly granted the directed verdict.

Since this was a case of first impression in Missouri, the court carefully reviewed authorities of other jurisdictions. They concluded that their decision conformed to the generally accepted common law principle that parents are not liable for the torts of their minor child merely because of their relationship.⁴ The child, however, may be liable for his own tort.⁵ There are certain exceptions to this com-

1. 393 S.W.2d 48 (St. L. Mo. App. 1965).
2. *Id.* at 50. The ground for the motion was that the petition stated that the child was three years old and in Missouri there could be no recovery against so young a person for negligence or carelessness.
3. *Id.* at 55.
mum law rule under which recovery may be had from the parent for the torts of his child. The court in the noted case quoted these exceptions from Steinberg v. Cauchois, a leading New York case:

(1) where the relationship of master-servant exists and the child is acting within the scope of his authority accorded by the parent;
(2) where the parent is negligent in entrusting to the child an instrument which, because of its nature, use and purpose, is so dangerous as to constitute in the hands of the child, an unreasonable risk to others;
(3) where a parent is negligent in entrusting to the child an instrumentality which, though not necessarily a dangerous thing of itself, is likely to be put to a dangerous use because of the known propensities of the child;
(4) where the parent's negligence consists entirely of his failure reasonably to restrain the child from vicious conduct imperiling others, when the parent has knowledge of the child's propensity toward such conduct.

vidual, has been held liable for his own torts, and the parent has, at common law, no legal responsibility for them. PROSSER, supra, §117, at 892.

6. See HARPER, TORTS §283 (1933); Cf. 28 TUL. L. REV. 503 (1954).
8. 249 App. Div. 518, 519, 293 N.Y.S. 147, 149 (1937). Defendant child held accountable for the negligent operation of a bicycle on the sidewalk in violation of municipal ordinance. Judgment against parents reversed on law. The court held that none of the exceptions to the general rule could be inferred from the evidence. The dissent would have held the mother liable because she had sufficient knowledge of the child's actions and failed to restrain him.
9. Murphy v. Loeffler, supra note 4 (parent liable under respondeat superior).
12. Charlton v. Jackson, 183 Mo. App. 613, 620, 167 S.W. 670, 671 (St. L. Ct. App. 1914). The court said: "No one can doubt that, if the father knows his indiscreet minor son of tender years is using a firearm in such careless and negligent manner as to endanger the safety of others about him, it is his duty to interpose the parental authority to prevent injury to such persons as may, within the range of reasonable probability, be exposed to injury therefrom."
13. In Capps v. Carpenter, 129 Kan. 462, 283 Pac. 655 (1930), the court held a spring gun which shoots "B-B" size pellets was not a dangerous instrumentality.
15. Bieker v. Owens, 350 S.W.2d 522 (Ark. 1961). In Norton v. Payne, 154 Wash. 241, 281 Pac. 991 (1929) a new trial was granted, the court holding there was sufficient evidence to warrant submitting to the jury the issues of child's previous habits (throwing sticks at other children) and knowledge of such acts by the parents. In Staruck v. County of Otsego, 285 App. Div. 476, 478, 138 N.Y.S.2d 385, 387 (1955), the doctrine was extended to state government and political subdivisions standing in loco parentis to children in their custody.
16. Ellis v. D'Angelo, 116 Cal. App.2d 310, 253 P.2d 675 (1953); Caldwell v. Zaher, 344 Mass. 590, 592, 183 N.E.2d 706, 707 (1962). In reversing defendant's demurrer, the court in Caldwell said: "This duty of parental discipline arises when the parent knows or should know of the child's propensity for the type of harmful conduct complained of, and has an opportunity to take reasonable corrective
(5) where the parent participates in the child's tortious act by consenting to it or by ratifying it later and accepting the fruits.\footnote{17}

In the first exception, liability is predicated upon the ordinary agency or respondeat superior theories, while the fifth exception relates to liability of a joint tortfeasor. In exceptions two, three and four, liability is that of ordinary negligence. Consequently, the parents are not liable for the act of the child himself, they are liable for their own wrongdoing or fault\footnote{18} in not exercising due care to restrain their child and prevent such injury. Exceptions number three and four make it imperative that the parents have sufficient knowledge or notice of their child's prior activity or propensity.\footnote{19}

The St. Louis Court of Appeals then concluded:

We think the rule that may be safely laid down is that where the parents had knowledge of the child's habits, traits or propensities toward the commission of a particular tort and they failed to exercise supervision and control over the child in connection with the commission of the particular type of wrongful act and subsequently a similar act resulted in injury to a complainant liability may be imposed upon the parents.\footnote{20}

The court also considered \textit{Gissen v. Goodwill},\footnote{21} a Florida case of first impression, which closely approximated the instant case. That action was by a hotel employee for injuries sustained when defendant's eight year old child slammed a door on his hand. The Florida court affirmed the judgment for defendants, stating that no cause of action was alleged. Although plaintiff did allege certain specific acts of misconduct on the part of the child, he failed to allege that the child was in the habit of slamming doors. The court said: "A deed brought on by a totally unexpected reaction to a situation which is isolated of origin and provocation could not have been foretold or averted and hence could not render the parents responsible.\footnote{22}

The civil law of Louisiana, patterned in the traditional fashion of the statutory civil law of France, appears to place vicarious liability upon the parents for the measures." \textit{Cf.} 67 C.J.S. \textit{Parent and Child} § 68 (1950); 39 Am. Jur. \textit{Parent and Child} § 58 (1942); \textit{Restatement} (Second), \textit{Torts} § 316 (1965).

\footnote{17} Ryley \textit{v. Lafferty}, 45 F.2d 641 (D. Idaho, 1930) (parents held liable for knowledge and encouraging their child in beating other children).

\footnote{18} In Bateman \textit{v. Crim}, 34 A.2d 257, 258 (D.C. Mun. App. 1943), the court relieved the parents of liability for child who ran into the plaintiff while playing football on sidewalk: "In our opinion, to render a parent responsible for injuries resulting from the wrongful acts of a minor, his negligence in the exercise of parental supervision must have some specific relation to the act complained of, which is lacking in the present case." Accord, Condell \textit{v. Savo}, 350 Pa. 350, 39 A.2d 51 (1944) (negligence of the parent must be the proximate cause of the injury—a natural and probable consequence of the failure to exercise control over the child).

\footnote{19} Martin \textit{v. Barrett}, 120 Cal. App.2d 625, 261 P.2d 551 (1953). In affirming defendant's demurrer, the court stated that no habitual, intentional or specific misconduct was alleged.

\footnote{20} National Dairy Prod. Corp. \textit{v. Freschi}, \textit{supra} note 1, at 57.

\footnote{21} 80 So.2d 701 (Fla. 1955).

\footnote{22} \textit{Id.} at 705.
acts of their minor children. This statutory liability was discussed and contrasted with the common law by the Missouri Supreme Court in *Baker v. Haldeman*. The court noted that even under the civil law of Louisiana a father may defend against such recovery by showing that he was unable to prevent the acts of his child. This phrase itself indicates some fault on the part of the father.

The liability of parents, under the civil law of Louisiana, has been held to be the consequence of parental authority rather than an attribute of parentage. Fault of the parent or of the child is a requisite for parental liability. Parents cannot be held responsible for injuries accidentally inflicted by their children.

In *Phillips v. D'Amico*, the parent was held responsible when his minor child carelessly shot an airgun, striking plaintiff in the eye with a “B-B” shot. The court said:

> While neither Article 2317 nor Article 2318, contains the word “fault” or the word “negligence,” never, so far as we know, has either been interpreted as creating liability unless there is fault or negligence on the part of someone; either on the part of persons “for whom we are answerable” under Art[icle] 2317, or on the part of “minor or unemancipated children” under Art[icle] 2318.

If the minor be of such tender age as to be incapable of being guilty of fault or negligence, then our Supreme Court has held that there is no liability in the father unless he could have prevented the act which caused the damage and failed to do so.

It seems clear that the common law does not hold parents vicariously liable for the actions of their children, save for the respondeat superior or agency exception. Personal fault of the parents is the basis of their liability. Civil law also requires fault as the basis of parental liability. That is, fault on the part of the child by committing a willful or negligent (if legally capable) act and upon the parent for the lack of exercising proper parental authority over the child.

At times the common law doctrine may produce undesired results. For exam-

23. LA. Civ. CODE ANN. art. 2318 (West 1952).
24. Supra note 11, at 220.
25. Art. 2318 of Louisiana Civil Code reads as follows: “The father, or after his decease, the mother, are [sic] responsible for the damage occasioned by their minor or unemancipated children.

27. Kern v. Knight, 13 La. App. 194, 199, 127 So. 133, 137 (1930) (fault imputed to father when his son injured plaintiff while operating father's automobile without permission).
29. 21 So. 2d 748 (La. App. 1945).
30. Id. at 750.
31. Ibid.
32. Condel v. Savo, supra note 18, at 353 (fault or negligence on part of the parent).
33. Sutton v. Champagne, 141 La. 469, 75 So. 209 (1917) (father held liable by assuming the risk incidental to the inexperience and unskillfulness of the defendant's child handling a dangerous instrumentality, a rifle).
34. It appears that the case at bar would be similarly decided under civil law.
ple a judgment rendered against a penniless infant will probably be uncollectable and plaintiff's injuries will be substantially uncompensated. To avoid such hardships, many courts have indulged in various forms of judicial gymnastics to find parental liability through dubious agency relationships or expanded foreseeability concepts.

Legislators have also been faced with this dilemma. In a time of ever increasing juvenile delinquency and vandalism, the legislatures of an increasing number of states have enacted statutes placing vicarious liability on the parents of children who commit certain prohibited acts. Notable opposition to such legislation has been clearly expressed;35 nonetheless, a majority of our states have recently enacted statutes of this type relating to the willful, deliberate and vandalistic acts of minor children.36 While the statutes vary in procedure, each has a maximum amount recoverable from the parents ranging from 300 dollars to 700 dollars.37

Missouri now has a statute of this type.38 The statute (1) applies to willfully marking, defacing or damaging any public or private real or personal property; (2) places liability on the parent or guardian of any unemancipated minor in their care or custody, against whom judgment has been rendered; (3) imposes maximum parental liability not to exceed 300 dollars; and (4) requires that the parent or guardian be joined as a party defendant in the original action. It should be noted that this statute expressly provides "such payment shall not be a bar to any criminal action or any proceeding against the unemancipated minor committing such damage for the balance of the judgment not paid by the parent or guardian."

The courts have not passed on the constitutionality of this type of statute. One argument for their constitutionality is made by analogy to the Family Automobile statutes, which have been upheld as a valid exercise of the state's police power.39

Furthermore, the Missouri statute, substantially like those of many jurisdictions, applies to the willful destruction of property and not to personal injuries40 or negligent acts of children. Therefore, it would not apply in a situation similar to the instant case, where the plaintiff bases his cause of action on the negligence of the child.

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35. Freer, Parental Liability for Torts of Children, 53 Ky. L.J. 254 (1964). Opinions of various governors vetoing such legislation are given: Governor Harriman of New York, at 260; Governor Rockefeller of New York, at 262; Governor Kerner of Illinois, at 260; and Governor Brown of California, at 256 (increasing California maximum from $300 to $1,000).
36. Id. at 265-66.
37. Id. Comprehensive appendix of various state statutes including details of their provisions.
38. § 537.045, RSMo 1965 Supp. (Title: Parent or guardian liable for damage to property by minor— when— limitation.)
40. Several statutes apply to personal injuries as well as to property damages. See, e.g., CONN. GEN. STAT. REV. § 52-572 (1958); GA. CODE ANN. § 105-113 (1956); LA. CIV. CODE ANN. art. 2318 (West 1952); ME. REV. STAT. ANN. ch. 19 § 217 (1954); R.I. GEN. LAWS ANN. § 9-1-3. Cf. statutes cited note 37 supra.
Rev. Rul. 64-2251 is concerned with a testamentary trust in which the three co-trustees retained the annual commissions allowable on income under New York law, and requested an allowance for the statutory principal commissions subsequent to the years in which they were earned. Later, in supplemental petitions, two of the three trustees executed waivers of the principal commissions prior to entry of the surrogate court decree.

The Internal Revenue Service ruled that under New York law the failure to retain principal commissions did not constitute a waiver that over a period of several years services were performed, that personal dominion was exercised over the additional principal commissions, and as a result the services performed were not of a gratuitous nature. Cited as authority for the Ruling was Helvering v. Horst, which held that the power to dispose of income is the equivalent of ownership of it, or as the court stated, "the fruit is not to be attributed to a different tree from that on which it grew," and Weil v. Commissioner, setting out the doctrine of constructive receipt which treats as taxable income any amount which is subject to the demand of the taxpayer even though not actually paid.

Thus the commissions though not paid constituted income to the trustees. And because the waiver increased the shares received by the beneficiaries, as a result of the reduced trust expense, it constituted a gift for federal gift tax purposes.

This Ruling was distinguished from Rev. Rul. 56-472T on the basis of intent to render gratuitous services. In Rev. Rul. 56-472 an executor who was entitled to a five per cent statutory commission entered into an agreement for less than the statutory fee prior to performance of services without exercising any dominion or control over the commissions so waived, and prior to the time in which he was entitled to receive any commissions. The Revenue Service ruled that this manifested an intention to render gratuitous services. Since under state law the waiver was binding, the difference between the amount to which he was entitled and what he agreed to receive would not be considered as constructively received income and would not constitute a gift.

The importance of the two Rulings can be readily seen because often it is advantageous to waive commissions which constitute taxable income in order to increase the gift in the form of a bequest, devise, inheritance, or beneficiary's share which is tax free. In the typical situation, the wife as the executrix and sole beneficiary under her husband's will can increase her tax free inheritance by waiving

1. 1964-2 CUM. BULL. 15.
4. 311 U.S. 112 (1940).
5. Id. at 120.
6. 173 F.2d 805 (2d Cir. 1949).
8. See, e.g., Rose v. Grant, 39 F.2d 338 (5th Cir. 1930).
9. INT. REV. CODE OF 1954, § 102(a). Compare Clarke v. United States, 189 F.2d 101 (3d Cir. 1951), where the executrix gave up her claim for commissions so others would give up their claims, and the court held the commissions taxable income.

http://scholarship.law.missouri.edu/mlr/vol31/iss3/8
taxable commissions. Another family situation is where a son or daughter serving as executor(trix) of a parent’s will exercises his right of waiver, thereby reducing taxable income and increasing tax free gifts to family beneficiaries. Although a waiver situation usually involves family members, the advantages of increasing a tax free gift by waiving commissions can be used by any fiduciary who is beneficiary of the trust or estate. The proper situation also exists where the fiduciary is not a beneficiary yet the recipients are objects of his bounty even if someone else the fiduciary is interested in benefiting.

Commissions which have been paid or will be paid are an allowable deduction on the estate tax return, or, if the executor so elects, on the estate's income tax return. If a bequest is made in lieu of commissions, or if commissions are waived, the estate will lose the deduction. If the fiduciary is in a high tax bracket, a tax free gift may more than offset the loss of the commission deduction to the estate or trust. Often it is difficult to determine at an early date which is the wiser course of action. According to these two Rulings the waiver will have to be in writing and before any services or duties which would indicate or imply a prior acceptance or dominion over the amounts waived are performed. Several writers have indicated that the best course of action is to file the written waiver with the probate court so that a definite date will be established at the time the fiduciary accepts his appointment. One writer suggests that because of the early time required for the waiver it is often desirable to delay probate for the allowable time under local law in order to more readily ascertain whether a waiver would be advantageous.

Another situation that might present itself concerns an executor or trustee who dies or resigns without a waiver being followed by a newly appointed fiduciary who attempts to waive. Following the reasoning of the two Rulings it would seem that before the newly appointed fiduciary comes in and exercises dominion or starts performance, he should be able to waive his share of the applicable commissions even if his predecessor did not.

Conceivably the argument could be made that a waiver was always intended even though the waiver was made late or after services were rendered. However, the success of such an argument seems questionable not only because of the difficulty of proving such an assertion, but because the Revenue Service seems to take an objective view of all waivers, emphasizing the factor of timeliness. In other words, if the waiver is before services are performed, the commissions will not be taxable, but if it is after services are performed they will be taxable. As a result, the taxpayer will probably meet with little success in making such an argument particularly at the administrative level.

11. INT. REV. CODE OF 1954, § 642(g).
An additional problem concerns whether or not the trust or estate is entitled to deduct those commissions not actually paid but which result in income to the fiduciary and gifts to the beneficiaries as a result of an untimely waiver. Prior cases have required that in order for there to be a deduction, commissions must eventually be paid.\(^1\) When commissions are waived by an executor and the waiver is subsequently withdrawn a deduction has been allowed.\(^2\) Likewise, if the deduction is allowed in advance of payment and is thereafter waived, it has been held that the executor must pay the resulting tax.\(^3\) Also, when one co-executor waives and the commission is paid to the other co-executors without diminution under local law, all will be deductible.\(^4\) However, with one exception,\(^5\) where there is no reasonable expectation that the commissions will ever be paid, courts have denied the deduction,\(^6\) and the Regulations so provide.\(^7\) Still there is the possibility that in the future the courts will depart from the requirement of payment and allow the deduction because of the application of the doctrine of constructive receipt.

Rev. Rul. 64-225\(^8\) should serve as a warning to the lawyer in formulating an estate plan or drawing a will to inform the interested parties of the importance of timeliness if commissions are to be waived. Only in this manner can the tax trap of the last minute waiver by the fiduciary be avoided.\(^9\)

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*Editor's Note: Since this note went to press, Revenue Ruling 66-167 has been promulgated by the Internal Revenue Service. It provides that an executor or other fiduciary in a similar situation can waive his fees without incurring income or gift tax liability. The test is whether the waiver will at least primarily constitute evidence of an intent to render gratuitous services. If it serves any other important objective, it may then be held that the fiduciary has enjoyed a realization of income by controlling the disposition thereof, and has also made a taxable gift of his interest in the assets under his control. Gratuitous intent will usually be held to have been shown if a formal waiver is made by the fiduciary within six months of his appointment. There may also be an implied waiver if the fiduciary does not claim fees at the time of filing his accountings, and the other facts and circumstances are consistent with a fixed intention to serve on a gratuitous basis.

Revenue Ruling 56-472 is clarified and Revenue Ruling 64-225 is distinguished.

\(^1\) See, e.g., Leo J. Dutcher, 34 T.C. 918 (1960); Laird v. Commissioner, 38 B.T.A. 926, 943 (1938).
\(^2\) Siegel, P-H 7 B.T.A.M. 138, 346 (1938).
\(^3\) See, e.g., John E. Cain, 43 B.T.A. 1133 (1941); John F. Degener, 26 B.T.A. 185 (1932).
\(^4\) I. H. Burney, 4 T.C. 449 (1944).
\(^5\) W. C. Van Hoozer Est., 21 B.T.A. 795 (1930). The court held the unpaid commissions deductible without giving its reasoning, and cited as authority for this proposition cases holding payable commissions deductible.
\(^6\) See, e.g., Dutcher, supra note 16; Bretzfelder, 32 B.T.A. 146, 151 (1935).
\(^7\) Treas. Reg. § 20.2053-3(b).
\(^8\) Supra note 1.
\(^9\) It has been assumed by many that Rev. Rul. 64-225 will apply with equal impact to executor's fees. At least at the administrative level, it seems from these two Rulings that the Internal Revenue Service will treat the two as the same.