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OHIO: INTRAFAMILY IMMUNITY ABOLISHED WITHOUT RESER-
The Editors Dedicate this Issue to the Memory of Eugene W. Young, Professor of Law of the Salmon P. Chase College of Law, 1967-1984.
A DEDICATION TO EUGENE W. YOUNGS

It is most appropriate and altogether fitting that this issue of the Northern Kentucky Law Review be dedicated to Eugene W. Youngs, Emeritus Professor of Law of the Salmon P. Chase College of Law. Gene’s tenure at the law school, which spans some 17 years, began prior to the merger of the law school with Northern Kentucky University and continued 12 years and beyond. This period of time in the life of the law school was critical to its continuation as a vital force in the legal community of greater Cincinnati and perhaps ranks as only second in importance to the Ray Hutchens years in the entire history of the school.

Youngs began his association with Chase in 1967 and retired in 1981. During this period of time his importance to colleagues, students, and to the institution cannot be measured by adjectives. Rather his “presence” at the law school is something that all facets and components felt and deeply appreciated.

If one had to choose one characteristic of Gene’s personality that shines through all of his Chase years it undoubtedly would be his warm personality and his ability to relate to everybody. One trait of his personality that characterized it was his immense sense of humor. It had a substantial, lasting, and positive effect on the law school. One aspect of his sense of humor that periodically surfaced was his use of “sayings” to emphasize some part of his life at Chase. One of these sayings that seemed to perfectly characterize Gene’s “Chase life” was “it only costs a little more to go first class.” Gene paid “a little more to go first class” by his effort and dedication to Chase College of Law and its people.

FBI Years

Gene Youngs, born in 1912 in Milwaukee, Wisconsin, attended public schools in Milwaukee and graduated from the University

1. Ray Hutchens, Dean of the law school from 1947 to 1967 is generally credited with saving the law school by engineering its A.B.A. accreditation in 1954. For further information on Dean Hutchens, see 12 N. Ky. L. Rev. vii (1985).
of Wisconsin with an A.B. degree in 1935. Upon graduation he immediately enrolled in Harvard Law School and graduated in 1938 with the LL.B. degree. After admission to the Ohio Bar in 1939 he began his legal career by an association with a private law firm. When he had completed one year of private practice he accepted an invitation to join the Federal Bureau of Investigation, thus embarking on the first of his two primary occupational endeavors.

Gene's tenure with the F.B.I. spanned 23 years (1939-62) and during that period he was assigned to various locations around the United States. Youngs was a special agent and developed expertise in two areas: selective service and police safety. His first major assignment was in the category of selective service. Stationed in New York City, Gene became a primary agent for the agency in matters involving soldiers absent without leave from the armed services, and matters involving draft-dodging. He remained in this capacity throughout World War II. After the termination of World War II, Youngs became an expert in police safety matters and traveled around the country to teach local police department personnel these essential techniques. It was said of him by the agency hierarchy that no one in the United States knew more about the subject of police operational safety than agent Eugene Youngs. His entire record with the F.B.I. was held up to other agents as an example of professional excellence and one for others to emulate. In 1962 Youngs decided that it was time to move on in his career and he retired from the F.B.I. Still a young man with many productive years ahead of him, Gene chose to take a "breather" to chart his future, and he and his wife took up residence in Paris, France. While there he studied both the French language and its people; and he contemplated his future. When he returned to the United States he once again tried his hand at the private practice of law. Pursuant to that end, Gene rented office space in downtown Cincinnati, purchased some "tools of the trade" (furniture and books), and began to refresh his study of the law. Slowly he acquired a clientele and for a few years engaged in general law practice as a sole practitioner. When asked one time if he had a speciality he replied "yes—charity".

This venture into law practice was successful by any measure and he continued to grow in both legal knowledge and ability for the remainder of the period prior to launching his new career of law school teaching.
Law School Years

Youngs' settled peace and contentment in private practice was suddenly interrupted when an opportunity surfaced out of the blue. The abrupt departure of one of the fulltime members of the law faculty at the Salmon P. Chase College of Law created an opening which needed to be filled. Through a third party source, the Dean of the law school learned to the identity of Eugene Youngs (the Dean did not know much about Youngs at that time). A telephone call to Youngs, followed by a luncheon meeting, set into motion a chain of events which culminated in Youngs' hiring on as a fulltime faculty member in the fall of 1967. Although there is not any evidence to substantiate the theory, undoubtedly Gene opted for law school teaching rather than the fulltime practice of law because teaching afforded him the opportunity to engage in the kinds of intellectual pursuits that he had aspired to ever since leaving Harvard Law School in 1938. At least his immediate energetic and obviously happy dive into academe would tend to support this theory.

Youngs took to the law school with little difficulty and totally immersed himself into that world by participating in a variety of scholarly pursuits. First and foremost was the research that was requisite to a thorough and penetrating understanding of his particular law subject areas. He was a master at detail accumulation, encompassing not only the accumulation of every facet of the target subject but also all of its tangential associations and relationships. When he finally placed his imprimatur of approval on his research, a careful observer would conclude that the subject had been placed, sized, compared, analogized, structured, outlined, digested and absorbed. Of course the students were the primary beneficiaries of his research as his classroom lectures and socratic excursions were patterned carefully after the research.

There was another manifestation of Professor Youngs research—publication. During his tenure at the law school Gene authored two articles of noteworthy significance, both published in the Northern Kentucky Law Review. The first of these articles was

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2. Youngs engaged in considerable classroom teaching in his capacity as police safety instructor.
3. Students in Youngs' property classes consistently claimed that his coverage was extraordinarily thorough and completely canvassed the area.
published in 1978 and dealt with the problem of the unexpected longevity of a life tenant. Gene’s article focused on the problems created for practitioners in the area of Estate Planning. His treatment of the substantive development of the subject matter was typical of his research and resulted in an article that was thorough, incisive, and extremely helpful to the audience at which it was directed. Numerous practitioners (a substantial number of which were Youngs’ former students) expressed appreciation for the article after reading and adopting it to their techniques of practice.

The second Youngs’ article was a long, thorough, and extremely challenging exploration of future interest law in Kentucky. Undoubtedly the “bible” in the area, the article’s subject matter ranged over the entire area of future interest law from remainders to the rule against perpetuities. As almost any lawyer (and all law students) can attest, the area of future interests is extremely complex, difficult to comprehend, and frequently a “trap for the unwary.” Typically, Youngs undertook exhaustive research, organized an outline in sometimes diverse sub-areas, and presented it to readers in a clear, concise, and amazingly useful format. After a careful reading and an intelligent digesting of Youngs’ article, every practitioner in the state of Kentucky could fully understand the complex subject matter and use the information gained to his professional advantage. For years after the publication of this article, Professor Youngs was to receive communications of appreciation from the practicing lawyers of Kentucky. In the area of research and publication it can be said that Professor Youngs contributed substantially to the interests of students and practicing lawyers alike.

Gene Youngs was a masterful teacher. His superb ability to prepare, organize, and present complicated and difficult subject matter is legend among his former students. He had a fertile mind and a penetrating style of inquiry that challenged students to respond to his class leadership and to do so in a most satisfying manner. Gene knew what questions to ask of students and how to ask them. He injected dry and subtle humor into his class sessions and, as is typical of superb program organizers, he was able

to emphasize his salient points and maintain a high level of interest in, and dedication to, the topic at hand. The typical Youngs' class was intellectual, lively, electrifying, and marvelously rewarding for the students participating in it. One example which illustrates the "electrifying effect of some of his classes," often cited by Youngs' former students, occurred in a class in which Youngs apparently wanted to demonstrate how different accounts of the same happening could be acquired and restated by people viewing the happening. Of course the "charade" was pre-arranged by Youngs and two students in his class. One of the "actors" continued to blow cigarette smoke in the face of a second "actor" next to him while the class session carried on. Finally after about fifteen minutes of his harassment, the smoke saturated student leaped out of his seat and shouted to the smoke polluter "I've had enough of your smoke attack. Step outside and I will tell you exactly what I think of you." The other student jumped up from his seat and they both left the classroom and slammed the door. Almost immediately thereafter the remaining members of the class were shocked almost out of their wits when a loud single gunshot was heard. There was perfect silence in the classroom. Shortly thereafter the two actor students returned to the classroom, assured everyone that the gunshot was a blank cartridge and that both of them were still good friends. Then, after calm had returned, Professor Youngs asked each student to write a narrative explaining exactly what had happened, including what was said, who was doing what, how many shots were fired, who left the classroom first, etc. Youngs reported to the class at the following meeting after having read all the accounts, that the diversion in the narratives was what he had anticipated—there was no substantial consensus on any one part of the event.

This was not the only example of Gene's ability to highlight a classroom session. He seemed to be able to emphasize his points very well with humor, stories, anecdotes, or demonstrable evidence of some sort or another. In the final analysis, Gene Youngs was a superb teacher capable of stimulating students to obtain the maximum level of educational development to match their innate abilities and aptitudes.

6. Both of these students were police officers obtaining their legal education in the evening program.
Although Gene was an accomplished researcher, author, and teacher, perhaps his most significant contribution to the law school community was his leadership ability. Every organization, if it is to attain any level of excellence, must have leaders that provide a solid base for growth and stability. Gene was one of the law school “greybeards” who was called upon time after time to provide situational common sense maturity when those attributes were most definitely needed. At times which were critical to the growth of the law school he was asked to chair such essential law school committees as Tenure and Promotion, Curriculum, and Library. These committee matters always played an important part in the shaping of the future of any law school and this was especially true in the early years following the merger of the law school with Northern Kentucky University in 1972.\(^7\)

Gene was viewed as a “senior partner” by his law school colleagues and his advice and counsel were frequently requested by them and was always offered. Without question, he provided, or was responsible for the provision of most of the psychological and philosophical mortar that held together the bricks that eventually formed the foundation for the current law school. His leadership has had a lasting and permanent effect on the character of the law school.

Gene was loved by all of his colleagues and his students. One reason for this affection (there were many others) was his ability to relate to people and provide a common bond of friendship. In the early years after the merger, the law school did not publish either a law review\(^8\) or a student newspaper. Such communication vehicles provide not only a means of communicating ideas and information but also a sort of community of interest which tends to bind together in a common cause what would otherwise be separate and diverse interests. Gene, in order to fill this need for a community of interest, started to write and publish\(^9\) what he called “an underground newspaper.” Essentially, it was a newsletter that contained humor, items of personal interest to faculty and students, and bits and pieces pertinent to the law school community.

\(^7\) At the time of the merger the university was named Northern Kentucky State College.
\(^8\) The Northern Kentucky Law Forum was first published in the Spring of 1973.
\(^9\) He used his personal typewriter and a Xerox machine to actually produce the newsletter.
As rudimentary as it was, it commanded such a high level of attention that others (students and faculty) began to assist in its publication. Everyone associated with the law school eagerly looked forward to its publication. There are many who suggested that this little "Chasette" took the place of a formal law school newsletter; more than likely it was the precursor of the law school newspaper that eventuated.

Post Retirement and Postmortem

Youngs retired from the law school in 1981 in the midst of a serious health problem. He was awarded the Emeritus status by the university and continued to serve in an advisory capacity to several law school committees and activities. He declined in energy and vigor as his serious illness reached the terminal stage; however, his interminable spirit of affection and respect for his Chase Law School colleagues shone brightly to the end. If one thing can be said about Gene Youngs that assumes a place higher on the scale than any other it would be that he paid the price to live first class by his expenditure of dedication, affection, and energy. He will be fondly remembered by all as a person worthy of a high place in the history of Chase College of Law.

W. Jack Grosse*

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* Professor, Salmon P. Chase College of Law; M.B.A., Xavier University (1954); J.D., Chase College of Law (1962); LL.M. Case Western Reserve University (1969); LL.D., Northern Kentucky University (1972).
I trust that you will pardon a few personal notes by way of introduction to what I have to say this evening, not so much by way of apologia, as to indicate where I am going by telling you from whence I come. First, however, I would remind you that this is an essay and an essay, as Felix Frankfurter once told us, "is tentative, reflective, suggestive, contradictory, and incomplete. It mirrors the perversities and complexities of life." Unfortunately, academic lawyers, unlike scientists, never have the satisfaction of proving their theses to be right, although they can be proved to be wrong. In my dotage, as you will note in the text that follows, I have taken to quoting Oliver Wendell Holmes more and more often, for, like my parents, he has proved to grow wiser as I have become older. Among his insights that have proved themselves to me is his warning not to confuse the obvious with the necessary or certitude with certainty. And so I claim no grasp on Truth. I aspire only to an honest effort to reason from questionable premises to dubious conclusions.

I confess the dreadful fact that I am only a lawyer, a lawyer who teaches and not a scholar whose discipline is law, not a practitioner, and certainly not a statesman. I learned my law in an old-fashioned school, by which I do not mean Harvard. I mean that

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my mentors, from whom I learned an attitude toward constitutional law more than its content, were Thomas Reed Powell, Learned Hand, and Felix Frankfurter, themselves students in the same way of Oliver Wendell Holmes. Although I am a graduate of the Harvard Law School, I am not a follower of the sect of Luddites now ensconced there. Although I am a member of the University of Chicago faculty, I claim no kinship with the economic school of jurisprudence in fashion there now. I find the Chicago School to be heartless and the Harvard School to be mindless. Both seem to discount the importance of the individual and individuality in our conception of a free and responsible democratic government.

Professor Paul Freund once began a lecture on Mr. Justice Brandeis in this fashion:

A critic as unperceptive as he was unfriendly once remarked that Charles Evans Hughes possessed one of the finest minds of the eighteenth century. A more plausible observer might maintain that Louis D. Brandeis had one of the finest minds of the nineteenth century. It is certain that most of the central features of the twentieth century were antipathetic to his view of man and man's potentialities.3

I think of myself as the critic did of Hughes or perhaps as Freund did of Brandeis. I find the problems of the mass urbanized society in which the individual is subordinated to the class to which he belongs or is assigned highly uncongenial. Except for modern plumbing and sanitation, and the electric light, I cannot think that much real progress has been made over the recent centuries. Indeed, I am so antediluvian as to be unable to use a word processor or to understand any computer more complex than an abacus. You are warned then that I may very well be viewing my subject through the wrong end of the telescope.

Let me begin then by attempting to speak of the Constitution itself as an expression of public policy. Just as with law, I am informed, public policy may be divided into the two categories of the substantive and the procedural.4 And when one looks at the text of the Constitution, it is readily apparent that the public policy expressed in it is essentially procedural rather than substantive.

3. P.A. Freund, Mr. Justice Brandeis, in Mr. Justice 177 (A. Dunham & P. Kurland eds. 1956).
In effect, it assigns or allocates the functions of making substantive public policy to different parts of government and specifies the manner in which that policy must be made if it is to be legitimate. It does not, generally, say what the substantive policy thus created should be.

It is also evident from the text that the lion's share of the substantive policy-making function in the national government was assigned to the legislative branch, largely by article I, § 8, although provision was made for recommendations to the legislature by the President in article II. There is no suggestion of a policy-making function for the judicial branch at all. Generally, the substantive policy is left to be made by a branch of government authorized to do so by the Constitution. If it says who shall make the rules and how they should be made, it does not ordinarily say what those rules should be.

Except to a seventeenth- or eighteenth-century mind, this may come as a surprise. We now have in excess of four hundred and sixty volumes of United States Supreme Court Reports which are full to bursting with substantive constitutional commands. But, for the most part, these are inventions or concoctions of the Supreme Court rather than commands of the Constitution. I do not mean to quibble. I know that there are ambiguities and interstices in the constitutional text which have to be resolved by some authority and the Supreme Court is perhaps as good an agency as any to charge with this function. But it is one thing to fill a gap that the founders left and another to make it. It is one thing to resolve an ambiguity and still another to create an ambiguity in order to resolve it. My revered master, revered by a few of us at least, Mr. Justice Frankfurter, found Justice Marshall's dictum in M'Culloch v. Maryland, that "it is a constitution we are expounding," 5 "the single most important utterance in the literature of constitutional law—most important because most comprehensive and comprehending." 6 When a great mind like Marshall's communicates with another great mind like Frankfurter's, the communication may be charged with meaning that it is not given to ordinary mortals to comprehend. While I fully understand that a constitution is not to be construed as a contract, or even as a statute, because of its

function as a limit on government, Marshall's proposition has come
to signify that the words of the Constitution may be freely
deconstructed to suit the desires of the interpreter. Thus, Marshall's
words may, indeed, be the most important of all judicial dicta on
the Constitution, but if so they are also the most destructive of
the notion of the Constitution as a limitation on governmental
authority. And surely the founders thought that they were creating
a national government of limited powers, limited by constitutional
provisions, in order to assure the liberty of the people. It will be
remembered that in *M'Culloch*, Marshall's opinion read the words
"necessary and proper" to mean not required and authorized but
only reasonable and relevant,\(^7\) i.e., necessary = reasonable, proper
= relevant: a more potent formula than \(E = mc^2\). All this rested
on Marshall's idea that it would be illogical to establish a great
nation with limited powers, although that is exactly what the
creators had in mind in 1787.

That the enforcement of the procedural public policy expressed
in the Constitution was left to the judiciary by way of the power
of judicial review is, I think, a valid assumption both from legislative
history and the structure of the instrument. That is what Justice
Marshall held in *Marbury v. Madison.*\(^8\) And that is all that he held
in *Marbury*, however much the Court likes to quote his more
expansive dicta: "It is emphatically the province and duty of the
judicial department to say what the law is."\(^9\) The Court has,
however, taken it upon itself to convert some of the clearly
procedural policy of the Constitution into a license to itself to write
substantive constitutional rules at will. The most egregious
examples of this transmutation are to be found in the Court's
readings of the due process clauses of the fifth and fourteenth
amendments and the equal protection clause of the fourteenth.

There is no suggestion in the origins of these provisions that
they had substantive rather than procedural meaning. In effect
they were restatements of what our English cousins have come
to call "the rule of law." Rules of substantive public policy were
not to be arbitrarily imposed but were to be created only through

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8. 5 U.S. (1 Cranch) 137 (1803).
9. *Id.* at 177.
observation of long-established legislative or judicial processes. Indeed, many of the elements of due process are specifically enunciated in article I, §§ 9, 10, and in the Bill of Rights. Moreover, as the equal protection clause says, the same substantive rules were to be applied to all persons within the jurisdiction. No one was to be above the law, none to be below it. But that is not the way the Justices have read these provisions.

Nor were they alone. For example, listen to Professor Felix Frankfurter, as he then was, writing in The New Republic in 1924:

[T]hese broad “guarantees” in favor of the individual are expressed in words so undefined, either by their intrinsic meaning, or by history, or by tradition that they leave the individual Justice free, if indeed they do not actually compel him, to fill in the vacuum with his own controlling notions of economic, social, and industrial facts with reference to which they were invoked. These judicial judgments are thus bound to be determined by the experience, the environment, the fears, the imagination of the different justices.°

I am always tempted to substitute: “These judicial judgments are thus bound to be determined by the experience, the environment, the fears, the imagination of a majority of nine willful men who would make themselves—indeed, have made themselves—the prime policy-makers of the national government, at least, in domestic affairs.” I do not gainsay the accuracy of the Frankfurter description of the judicial process under the fifth and fourteenth amendments. I merely decry it.

I should much prefer the Holmesian proposition:

I think the proper course is to recognize that a state legislature can do whatever it sees fit to do unless it is restrained by some express prohibition in the Constitution of the United States or of the State, and that courts should be careful not to extend such prohibitions beyond their obvious meaning by reading into them conceptions of public policy that the particular Court may happen to entertain."1

Let you not misunderstand me or, of more importance, do not misunderstand Mr. Justice Holmes. None knew better than he that judicial judgments, and certainly those that changed existing rules were, in fact, expressions of public policy. His opinions and his

writings are replete with acknowledgments of the role of policy-making in the judicial function. Thus, he wrote, while still on the Supreme Judicial Court of Massachusetts:

The true grounds of decision are considerations of policy and of social advantage, and it is vain to suppose that solutions can be attained merely by logic and the general propositions of law which nobody disputes. Propositions as to public policy rarely are unanimously accepted, and still more rarely, are capable of unanswerable proof. They require a special training to enable anyone even to form an intelligent opinion about them. In the early stages of law, at least, they generally are acted on rather as inarticulate instincts than as definite ideas for which a rational defence is ready.12

To say that the judicial process at times is, like the legislative process, simply a process of formulation of public policy, however, does not acknowledge the limited area in which the judiciary is charged with making substantive policy. Within the realm of the common law, in the absence of Constitution and statute, Holmes noted, "I recognize without hesitation that judges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions."13 That is a far different notion from the conception of the judicial function assumed by the Supreme Court under the due process clauses and the equal protection clause.

Indeed, at the common law—and the common law is the rock on which the Constitution was erected—it was long recognized that the making of substantive public policy is primarily a legislative and not a judicial function. Baron Parke, in the House of Lords, put the classic attitude in these terms:

It is the province of the statesman and not of the lawyer to discuss and of the Legislature to determine, what is best for the public good, and to provide for it by proper enactments. It is the province of the judge to expound the law, to declare public policy as he finds it in the written and unwritten law. Public policy is a proper ground for a decision only in the sense of the the policy of the law, not in the sense of mere judicial notions as to what is best for the public good.14

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Let me invoke a more contemporary and less alien voice to the same end. I refer here to Robert H. Jackson, whose book, The Struggle for Judicial Supremacy, was published almost simultaneously with his appointment as a Justice of the Supreme Court in 1941. In a chapter entitled "Government by Lawsuit," he wrote:

Judicial justice is well adapted to ensure that established legislative rules are fairly and equitably applied to individual cases. But it is inherently ill-suited, and never can be suited, to devising or enacting rules of general social policy.

...Custom decrees that the Supreme Court shall be composed only of lawyers, though the Constitution does not say so...Thus government by lawsuit leads to a final decision guided by the learning and limited by the understanding of a single profession—the law.

It is no condemnation of that profession to doubt its capacity to furnish single-handed the rounded and comprehensive wisdom to govern all society.

...In stressing this I do not join those who seek to deflate the whole judicial process. It is precisely because I value the role that the judiciary performs in the peaceful ordering of our society that I deprecate the ill-starred adventures of the judiciary that have recurringly jeopardized its essential usefulness.

Nor am I unmindful of the hard-won heritage of an independent judiciary which for over two hundred years has maintained the "rule of law" in England, the living principle that not even the king is above the law. But again, the rule of law is in unsafe hands when courts cease to function as courts and become organs for control of policy.15

Of course, all this was said before our law schools began to be taught by the Leonardo da Vincis who have mastered all knowledge and who turn out students of such wisdom and omniscience that, on graduation, they can be relied upon to produce Supreme Court opinions and establish our fundamental social policies.

Supreme Court opinions—as I tell my undergraduate students—(I need not tell my law students because they already know everything when they arrive) are made up, in varying proportions, of four elements, in addition to the statement of facts which may or may not resemble those in the record. First, there are the propositions or principles allegedly derived from constitutional or statutory language; second, judicial precedents which, these days,

are more likely to refer to lengthy obiter dicta rather than holdings in previous cases; third, the *practicalities* of the situation which license or inhibit the scope of judicial adventurism; and finally, and not least, the *personal predilections* of each of the judges, for it must be understood that, in Hamiltonian terms, the judiciary now exerts WILL as well as JUDGMENT if not yet FORCE. Each of the four elements, separately or in combination, may be subsumed under the rubric of public policy. So, too, may the opinions reflect attitudes of the press, whether in the news columns or on the editorial pages as when the Court turned turtle in the so-called “released time cases” and when the Court resorted to what it called “public policy” to decide the recent *Bob Jones* tax exemption for racially segregatory religious school case. Of course, the personal predilections of the Justices and the pressures of the press are dealt with only sub silentio in the Court’s opinions. Most often, the opinions, both majority and minority, claim to be compelled by constitutional or statutory language and judicial precedents.

The only point I am making here is that the Court has little to rely on in the Constitution itself as a basis for its substantive policy-making decisions under the due process and equal protection clauses. As Mr. Justice Holmes wrote to Frederick Pollock as long ago as 1924: “The 14th Amendment is a roguish thing.” There is, however, much in the Constitution to legitimate the Court’s policy-making in procedural areas, especially those marked by the fourth through the eighth amendments and sections 9 and 10 of article I. It should be noted, moreover, that with regard to civil and criminal procedure, the Court operates in fields in which judges and lawyers may legitimately claim both the necessary experience and expertise on which to base its judgments. So, too, the allocation of policy-making powers among the branches of government and the specific limitations can be found in the constitutional text. And, while it would be logical for each branch of government to decide for itself which powers of policy-making were allotted to it by the Constitution, the founding fathers did speak in the conventions, both originating and ratifying, as if the courts

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would have the power of judicial review specifically to cabin each branch within its constitutional limits, lest each arrogate to itself more than its entitlement. Thus, while it is not properly the Court's role to substitute its judgment on the merits of public policy for those of the elected branches, it has been the accepted judicial task to determine when one of them has exceeded its authority.

You may have noted an ellipsis in my remarks about the public policy framed by the Constitution itself, for I have made no mention of the first amendment, one of the more important expressions of substantive policies. The problem here is not so much whether the Constitution establishes a substantive rule, but what that substantive rule is. And here we get into the very deep waters of whether the framers' intent or contemporary conception is to have priority of place. For reasons I cannot expand on now, I think it fairly clear that the written document intended only to ban prior restraint on speech and press, as Blackstone had pronounced, and that the religion clauses endorsed the views of Jefferson and Madison rather than Roger Williams. The real difficulty now derives from the fact that the original purpose was only to limit the national government and not the states. When it was discovered in the twentieth century that the first amendment was, indeed, incorporated part and parcel into the fourteenth, and thus applicable to the states, there was no way to read it in terms of what its authors contemplated. What license this should have created for the Court is hard to say, but the Court has followed its own fancy in the application of the first amendment. And as Dr. Samuel Johnson once put it: "All power of fancy over reason is a degree of insanity."20

So much for the public policy made by the Constitution itself. It created a structure of government not a code of governance. The structure was to be self-regulating, largely through the check by frequent popular elections. The Court was not envisioned as, in Learned Hand's terms, a group of Platonic Guardians to supply the ultimate wisdom if and when the other branches failed.21 But all that I have said is based on the notions held only by troglodytes these days, that we are governed by the Constitution, as it was

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20. S. JOHNSON, RASSELAS XLIV (1759).
composed by the 1787 Convention and in the amendments thereto, rather than by constitutional law which is a product of the cerebrations of the Justices of the Supreme Court. You should note that even that keen "eighteenth-century mind," Charles Evans Hughes, reported as early as 1908: "We are under a Constitution, but the Constitution is what the judges say it is, and the judiciary is the safeguard of our liberty and our property under the Constitution."\textsuperscript{22} Perhaps the "eighteenth-century" aspect of his statement is to be found in his reference to the Court as a guardian of property rights as well as liberty.

There is, however, another view of public policy that has to be considered. This is public policy not in the sense of the rules of governance for our society but public policy as the ambience within which those rules are to be made, what Mr. Justice Holmes called, in a different context, "a brooding omnipresence in the sky,"\textsuperscript{23} and what an earlier generation might have referred to as the \textit{Zeitgeist}, which The Oxford English Dictionary defines as "the spirit or genius which marks the thought or feeling of a period or age."\textsuperscript{24}

There was such an ambience that surrounded the origins of the Constitution. It may be expressed in terms of the end of monarchy and autocracy and the beginning of responsible, representative democracy. There was to be no privilege or prerogative for peers, prelates, or princes. The governors of the people were to be selected by the people, to come from the people, and to return to the people, preferably after short terms of office. All to the end that government not be tyrannical, wilful, or arbitrary. The power of each branch was to be severely cabined by an elaborate system of checks and balances of each branch of government by the others as well as by the people. The national government was to be one of limited, delegated powers, sharing sovereignty with the states. Strong state power was thought to be of the essence of freedom of the people. In a way, the original \textit{Zeitgeist} was to be found in the spirit of the Declaration of Independence, which has remained a shadowy background to, if not a part of, constitutional rule.

If, however, there has been one consistent theme that has dominated the development of constitutional law, and not least of

\textsuperscript{22} L.M. Pusey, \textit{Charles Evans Hughes} 204 (1951).
\textsuperscript{23} Southern Pacific Co. v. Jensen, 244 U.S. at 222.
\textsuperscript{24} \textit{The Oxford English Dictionary} v. XII, 88 (1933 & photo. reprint 1970).
Supreme Court adjudication, throughout history, it has been the persistent devotion to centralization of all government power. There can be no doubt that what the constitution writers created was a federalism. Protest as you will, however, and as politicians do, federalism is now totally gone from the American constitutional structure. There are today no governmental powers that can be exercised by state government except under the authorization or with the acquiescence of the national government. Surely today state government is only a reminder of our earlier Constitution, "just as," to use a Holmesian metaphor, "the clavicle in the cat only tells of the existence of some earlier creature to which a collar bone was useful."\textsuperscript{25} Oh, there are remnants of state sovereignty: each state has two representatives in the Senate and the electoral college continues as an all but useless function in terms of states. But in fact, we are no less a unitary government than France or Japan. Administrative functions are left to the states and there are some who would like to return some national burdens if not national income to them. Policy-making is, however, in Washington, D.C., and it is exercised down to the lowest levels of the police power, even with regard to maximum highway speed and minimum drinking age. And, while the Court has been the effective means of bringing this result about, it should be remembered that the Court did not thrust power on the national government, it only legitimated it. But legitimate it, it did.

I do not mean to tell you that ancient battles are not still rehearsed from time to time in the Supreme Court. In some manner or other Mr. Justice Rehnquist persuaded his brethren to bow in favor of state exemption from compliance with federal wage and hour regulations for its own employees in \textit{National League of Cities v. Usury}\textsuperscript{26} on the theory that there was meaning in the tenth amendment. But what was hailed as a watershed proved no more than a hillock. The 1976 decision was overruled in another five to four decision by the Court on February 19, 1985.\textsuperscript{27} Mr. Justice Blackmun changed his mind. "Equal Justice under Law" reads the facade of the Supreme Court building, but its true motto should be "e pluribus unum."

\textsuperscript{25} O.W. Holmes, \textit{Book Notes and Uncollected Letters} 9 (1936).
\textsuperscript{26} 426 U.S. 833 (1976).
No doubt most students who are, these days, taught no American history would be surprised to learn that the members of the federal and state conventions of 1787-88 fought heatedly over the question whether provision should be made for any area where no state would be sovereign and where a national capital could be established. There was strong objection to exclusive jurisdiction for the national government over any territory within the United States. For, to them, the absence of state government meant the absence of liberty. There was also a great fear that a national capital would mean a national court in the sense of a Versailles, where the inhabitants would be totally aloof from the people and where government would exist only to benefit the courtiers. I wonder whether, if these disputants of 1787-88 could return for a visit to Washington, D.C. today, they would realize their fears about a national capital leeching on the vitals of American society had been baseless.

The principal judicial means for nationalization was the persistent reconstruction of the commerce clause, first, by expanding the meaning of commerce and then by expanding the meaning of interstate commerce, and finally by including all local commerce if it could be said to affect or compete with interstate commerce—as it always could. So far as substantive public policy is concerned, it would now be possible for the national government to enact most of its laws under the Supreme Court’s version of the commerce clause. And the negation of the reserved powers of the states was pretty well marked by the legitimation of the grant-in-aid as means of formulating state policy. The sixteenth amendment had created the deep pocket that Uncle Sam could use to bribe states to bring their public policies in line with the desires of the central government. In 1923, in an opinion by the arch-conservative Mr. Justice Sutherland, the extortion implicit in grants-in-aid was validated as not contravening the tenth amendment.28 The ultimate primacy of the nation over the states is not a recent innovation of our judicial Constitution makers.

No other doctrine has brooded so omnipresently over the Court as its commitment to nationalization, whatever the Constitution might say or its authors may have intended. But there have been equally strong policies also more influential on Supreme Court decisions than the mere words of the basic document. Consider the

notion of laissez-faire which together with social Darwinism provided the Zeitgeist for the late nineteenth and early twentieth centuries. The label "freedom of contract" was invoked in substitution for the words of the Constitution. The zenith of laissez-faire public policy was probably reached in *Lochner v. New York*, where the Court struck down, by a vote of five to four, a state law setting a maximum ten-hour day and sixty-hour week for bakery workers. It was in this case that Mr. Justice Holmes uttered what may be his most famous dissent:

This case is decided upon an economic theory which a large part of the country does not entertain. If it were a question whether I agreed with the theory, I should desire to study it further and long before making up my mind. But I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of the majority to embody their opinions in law. It is settled by various decisions of this court that state constitutions and state laws may regulate life in many ways which we as legislators might think injudicious or if you like as tyrannical as this, and which equally interfere with liberty of contract... The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics... [A] constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of laissez faire.  

The fact is that Holmes was wrong. As of 1905, the Constitution did embody Mr. Herbert Spencer's Social Statics, just as surely as if it had been included *in haec verba* in the terms of the document. That was the public policy of the day that was a higher law than the Constitution. And, perhaps it will give many of you some comfort to realize that many of the academics recently appointed to the federal appellate courts by President Reagan—at least some of whom stand in line for promotion to the high court, with or without Reverend Falwell's approval—would think that a renaissance of *Lochner* would not be a bad thing. For them, the overriding public policy is to be found in Adam Smith's *Wealth of Nations*. Indeed, much of our history seems to show an oscillation between an overriding belief that wealth is virtue and poverty is sin and its opposite that wealth is sin and poverty is virtue.

29. 198 U.S. 45 (1905).
30. 198 U.S. at 75 (Holmes, J., dissenting).
In any event, so far as laissez-faire in the realm of economic regulation is concerned, it died a resounding death with the Great Depression. What its phoenix-like qualities may be remains to be seen.\textsuperscript{31}

If, however, Supreme Court intolerance of economic regulation is to be reversed, it is going to take some doing. Modern Supreme Courts do nothing by halves and, with a single major exception that was later overruled,\textsuperscript{32} the Warren and Burger Courts' scutcheons remain unblotted by any case in which economic regulations have been invalidated as violative of the due process or equal protection clauses. At the moment, it would seem that, however arbitrary the economic regulation, it does not violate the Constitution.

Since the demise of economic due process, which followed the Roosevelt Court-packing plan, no equivalently broad jurisprudential spirit has hovered over the judicial policy-making function. The Stone Court was prone to favor labor unions, but that was in accord with the directions of Congress. It showed greater concern for some rights of criminal defendants, especially with regard to coerced confessions, while revealing the usual ambivalence toward the fourth amendment's search and seizure provisions, an ambivalence that has persisted to this day. The equal protection clause remained largely the last resort of desperate litigants. The war powers of both the President and the Congress were exalted, especially while the war was being waged, but even afterwards. (Perhaps the Court had learned a practical lesson from the inept attempts of the Civil War Court to limit Lincoln's war powers.) The concept of the developing welfare state was defended. The rights of aliens suffered in a xenophobic atmosphere. The Cold War tested the limits of freedom of political speech. Unpopular religious minorities were afforded protection and a strict notion of separation of church and state was born.

On the whole, however, during both the Stone and Vinson Courts, the judiciary stayed in its basket. When it made public policy, it did so interstitially. It mostly paid due homage to the constitutional structure and congressional mandates. The nation no less

\textsuperscript{31} See McCloskey, Economic Due Process and the Supreme Court: An Exhumation and Reburial, 1962 SUP. CT. REV. 34.

than the Court worried about the limits of tolerance for those ideologies against which we had done battle. To what degree should we afford freedom to those who, given the chance, would take that very freedom from us? To what degree was the threat to our polity and civility greater from domestic demagogues and bigots than from alien subversion?

The Court was regarded as liberal, if not radical, primarily because it sustained rather than thwarted the public policies of big government. In Clinton Rossiter's unfortunately accurate term, "constitutional dictatorship," marked by the expanded power of the executive and the bureaucracy at the expense of Congress was largely unchallenged by the judiciary, except for the landmark Steel Seizure Case, in which a politically divided Court favored the powers of Congress over the claims of the President. That was probably the last victory for congressional power in any contest waged with the President in the courts.

The Court performed its tasks during the Stone-Vinson era more or less within the confines marked by the Constitution. Except for the persistent over-riding commitment to centralization of government authority, which has never disappeared, there seemed to be no higher law directing its conclusions. With the arrival of the Warren Court, or what could be called, ironically perhaps, the Eisenhower Court, after the President whose appointments included, in addition to the Chief Justice, Justices Brennan, Stewart, and Harlan, the Justices began to march to a new drumbeat. Egalitarianism replaced laissez-faire as the judicial Zeitgeist and with egalitarianism came the revival of the notion of judicial supremacy which was the essence of economic due process, but this time in an even more virulent form.

I do not propose here to rehearse even the names of the myriad of innovative, not to say revolutionary, decisions of the Warren and Burger Courts. They are all of sufficiently recent memory that the names of a few should suffice to refresh your recollection. Brown v. Board of Education, of course, is probably the single most important decision of the Supreme Court since M'Culloch v.

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Maryland, although its holding did not change the concept of the equal protection clause, that a state was required not to classify persons according to race. Indeed, Brown probably does not even deserve the accolade of spawning the equal protection clause revolution. Those laurels properly belong to a Vinson Court decision, Shelley v. Kramer,\(^36\) which outlawed enforcement of racial restrictive covenants. But, as Alexander Bickel said, “Brown v. Board of Education was the beginning,”\(^37\) and it was the beginning of the extensive doctrine of egalitarianism that coloured so much of the Supreme Court jurisprudence that followed in its wake. Baker v. Carr\(^38\) insinuated the doctrine of “one-man, one-vote” (now “one-person, one vote”) into a Constitution which had clearly left the question of legislative apportionment to state legislatures. Mapp v. Ohio\(^39\) began the conversion of the Supreme Court reports into the equivalent of a loose-leaf code of criminal procedure to be followed by both the state and federal courts. Miranda v. Arizona\(^40\) marked a technique of enacting so-called prophylactic rules for police behavior, which made it irrelevant to any particular case whether the defendant had been harmed by police misfeasance.

Contrary to newspaper reports, the Burger Court has been largely an extension of the Warren Court both in its activism and its egalitarianism. Again, I would offer here just a few examples. But for a capacity to make constitutional bricks without any constitutional straws, certainly no prior case can be equaled by that of the abortion decisions.\(^41\) However much I like the results—and I do—I can find no justification for their promulgation as a constitutional judgment by the Supreme Court. So, too, the gutting of the elements of the common law jury has been without justification. The devotion to egalitarianism may be found not only in the Burger Court’s extension of Brown far beyond its rationale, but in its treatment of the gender discrimination cases, and its favoring—if not always consistently—of expansive notions of affirmative action.

\(^36\) 334 U.S. 1 (1948).
\(^40\) 384 U.S. 436 (1966).
\(^41\) E.g., Roe v. Wade, 410 U.S. 113 (1973).
Surely, there have been places where the Burger Court has refused to expand Warren Court notions as its predecessor might have done. It refused to compel states to extend equal contributions to all students in all school districts. And some criminal procedure doctrines have not been carried to their logical conclusions. But, as Professor Vincent Blasi, who is anything but a conservative constitutionalist, wrote in his book entitled "The Burger Court, The Counter-Revolution That Wasn't": "the 1970s and early 1980s may well be looked upon as the period during which the activist approach to judicial review solidified its position in American judicial practice. . . . By almost any measure the Burger Court has been an activist court."

The problem with contemporary judicial activism is not, however, merely its rejection of legislative and administrative public policy because it conflicts with its own. It lies, rather, in the extension of authority from the power to negate legislative policy—the most that could be claimed for the constitutional authorization of judicial review—to a power to initiate and enforce the legislative policy that it creates. It can no longer be said that the judiciary is merely juridical in its power; it is now legislative and executive as well.

Courts not only ban racial segregation in schools, they administer school systems, subordinating all other educational values to the attempt to create racially proportional urban schools. They have not been very effective in achieving their goals, witness Washington, D.C., Philadelphia, Chicago, Boston, Atlanta, Los Angeles, etc., but not for lack of trying. They allocate and reallocate federal and state welfare funds. They no longer merely condemn overcrowded prisons, they undertake to manage them, with about the same success as they have had with the schools. They set priorities in expenditure of state budgets and determine which form of treatment is best for the mentally deranged or retarded. They impose punishments on litigants in civil suits without the requirement of legislative authorization or proof beyond a reasonable doubt. They bind persons by judgments who have never been parties to the lawsuits in which their rights are purportedly adjudicated. What the judges have not managed to do is to bring

their own dockets under control by rapid and efficient disposition of cases.

The federal judiciary is exercising all the authority that the elected representatives in Congress have, although they are not representative of any constituency nor responsible to any. A legislator is chosen by, and removable by, his constituency. A federal judge chooses the constituency he wishes to represent and is, for all practical purposes, not removable at all.

There are many among us who have applauded this accretion of power by the judiciary. Some, like Judge J. Skelly Wright, reason from the "rightness" of the judicial actions to the validity of the judicial power. Presumably, if the courts turn from their egalitarian bent, Judge Wright will no longer justify their authority to act. Some, like Professor Abram Chayes, find the expansion of judicial power justified by the necessity to control government by bureaucracy, which is no more democratic than are the courts.

A.A. Berle, of New Deal Brain Trust fame, reasoned that the expanded meaning of the equal protection clause requires the assumption of authority to enforce the new meaning. The egalitarian Zeitgeist is thus indissolubly linked with judicial activism. It was in 1969 that Berle wrote:

Ultimate legislative power within the United States has come to rest in the Supreme Court of the United States.

... The process by which a measure of legislative power devolved on the Supreme Court is interesting. It is the product of a mandate contained in the Fourteenth Amendment, multiplied by the forced intrusion of laws into fields of activity originally supposed to be outside statist action.

... The second stage of the revolution came when, faced with state "inaction," the federal courts assumed the task of filling the vacuum, remedying the failure. In plain English, this meant undertaking by decree to enact the rules that state legislation has failed to provide. The second phase was the really revolutionary development and, incidentally, set up the Supreme Court as a revolutionary committee.

44. See Wright, Professor Bickel, The Scholarly Tradition and the Supreme Court, 84 HARV. L. REV. 769 (1970).
Berle worried, however, that the Court having lifted itself by its own bootstraps might, to change the metaphor, be hoist by its own petard. He acknowledges the problem is one of the Court as a "benevolent dictatorship," and his words are highly reminiscent of the classic argument of James Bradley Thayer for judicial restraint:

Acquiescent acceptance of any benevolent dictatorship in time deadens the public to its responsibility for apprehending needs and dangers and demanding that their elected executives and legislators take appropriate measures. As John Stuart Mill observed, it compromises the future. Nonacceptance, on the other hand, piles up political pressures focused against the institution itself. Judicial legislation is not a substitute for political and legislative institutional processes. The will of the most enlightened Court is not the same as the will of the elected representatives of the people, and may cease to be the will of the people itself. Acceptance of its mandates based on respect for the Court is not the same as acceptance of active laws commanding popular assent after political debate.8

My coda is simple and relatively short. I think that the Justices of the Supreme Court, like most officers of government, suffer from a chronic case of arrogance complicated by the bureaucratic watchwords, "the rules don't apply to me." The disease is endemic. It affects professors and lawyers, social and physical scientists, and, certainly candidates for public office, those who run them, and those who serve them. Unfortunately there appears to be no antitoxin. But, take heart. As Ralph Waldo Emerson once said: "These times of ours are serious and full of calamity, but all times are essentially the same."49

The notion of the Supreme Court as the ultimate maker of policy in our democracy, as the savior of the nation's Constitution through its discretion to change it, is not a new one. For example, in 1906, Holmes wrote to Lord Pollock:

Brooks [Adams] at present is in a great stir and thinks a world crisis is at hand, for us among others, and that our Court may have a last word, as to who shall be the master in the great battle between the many and the few. I think this notion is greatly exaggerated and half-cracked.50

48. A. BERLE, supra note 45, at 402.
49. R. EMERSON, UNCOLLECTED LECTURES 14 (1932).
50. 1 HOLMES-POLLOCK LETTERS, supra note 19, at 124.
If, however, I can decry the arrogation of power by the judiciary as both illegitimate and largely fruitless as a solvent for our more intractible social and economic problems, I am still at a loss to offer an articulable standard for imposing external constraints on the Justices that will not at the same time destroy their legitimate and necessary function of inhibiting at least some of the grosser forms of unconstitutional adventurism undertaken by the other two branches of the national government and by the states. And so I am left, as I shall leave you, with the words that are part of our heritage from Alexander Bickel, who was brought up in the same school as was I:

"We do not confine the judges, we caution them. That, after all, is the legacy of Felix Frankfurter's career."
I. INTRODUCTION

The purpose of this article is to provide a basic understanding of the law of products liability in the Commonwealth of Kentucky. Not all conceivable issues are addressed but those confronted by the case law and statutes are discussed. Those are the issues which arise in a majority of cases.

On the surface at least, Kentucky recognizes the three basic theories of recovery in a products action. Those theories are: warranty, negligence and strict liability based on Section 402A of the Restatement (Second) of Torts.1 When reviewing the Kentucky law in the area, two problems arise. First, because strict liability is a relatively new theory, its manner of application is not completely settled. As a result, Kentucky courts on occasion seem to mix the principles involved in strict liability and those involved in negligence. The passage of the Product Liability Act of Kentucky in 1978 has also caused problems.2 To date, no published opinion which interprets the application of the Act has been rendered by

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1. RESTATEMENT (SECOND) OF TORTS § 402A (1965). As early as 1266 A.D., the common law imposed criminal penalties on “persons who supplied ‘corrupt’ food and drink” intended for human consumption. In the early 1900’s, American state courts began to depart from “the general rule that a supplier of chattels was not liable to third persons in the absence of negligence or privity of contract,” by holding the provisioner strictly liable to the ultimate consumer even though the provisioner had exercised utmost care in the preparation and sale of the product. In these civil actions, the courts indulged in various legal fictions to find liability, including implied warranty, assignment of the seller’s warranty and third party beneficiary contracts in favor of the ultimate consumers. In more recent years, courts have held “that the basis is merely one of strict liability in tort, which is not dependent upon either contract or negligence.” Since 1950, the rule of strict liability has been progressively extended beyond “seller(s) of food for human consumption” to include “the sale of any product which, if it should prove to be defective, may be expected to cause physical harm to the consumer or his property.” Id. comment b at 348-9.

an appellate court of this Commonwealth. This article discusses the apparent changes in the law made by the Act. Many questions, however, simply do not have clear answers.

II. THEORIES OF RECOVERY

A. Liability Based on Warranty

Generally, two types of warranties provided by the Uniform Commercial Code [hereinafter UCC] are available for application in a products case. A warranty can be either express or implied. Both types are given by a “seller.” “Seller” is defined as “a person who sells or contracts to sell goods.”

1. Express Warranty

Kentucky Revised Statute [hereinafter referred to as KRS] § 355.2-313(1) is the UCC section which provides for express warranties. That section states that an express warranty can be created in three ways:

(a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.

(b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.

3. It should be noted, however, that Anderson v. Black & Decker, Inc., 597 F.Supp. 1298 (E.D. Ky. 1984) discusses the role of the plaintiff’s negligence in a product case. The opinion is more fully discussed at Section VI C supra but concludes that contributory negligence remains as a complete bar to recovery. Id. at 1302.

4. In addition to the theories discussed infra, see also American Motors Corp. v. Addington, 31 KY. LAW SUMMARY [hereinafter K.L.S.] at 4 (Ky. App. Mar. 30, 1984) review granted, 31 K.L.S. 15 at 19 (Ky. Nov. 8, 1984). Relying on the interplay among KY. REV. STAT. ANN. § 367.170, (Baldwin 1984) which prevents false, misleading, or deceptive acts; KY. REV. STAT. ANN § 367.170 (Baldwin 1984) via an action brought in the circuit court; and KY. REV. STAT. ANN. § 446.070 (Baldwin 1984), which allows recovery by a person who is injured from an offender who violates any statute, the court held that the Kentucky Consumer Protection Act creates a cause of action for bodily injury. In Addington (a Jeep rollover case), the plaintiff testified that she had relied on Jeep commercials in making her purchase.

5. KY. REV. STAT. ANN. § 355.2-103(d) (Baldwin 1984)[hereinafter K.R.S.]
(c) Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.6

The words "warrant" or "guarantee" need not be used to create an express warranty.7 Mere sales puffing, however, will not create an express warranty.8

In Overstreet v. Norden Laboratories, Inc.,9 the plaintiff sued the manufacturer of a drug claiming the drug caused mares on the plaintiff's farm to abort foals. Plaintiff purchased the drug after seeing advertisements and brochures circulated by the defendant.10 The court quoted the pre-code case of Wedding v. Duncan,11 for the appropriate test to use in deciding whether an express warranty had arisen.

[Whether the seller assumes to assert a fact of which the buyer is ignorant, or whether he merely states an opinion or expresses a judgment about a thing as to which they may each be expected to have an opinion and exercise a judgment.12

Moreover, in order for an action on the express warranty to arise, the warranty must be "part of the basis of the bargain" and be "relied upon as one of the inducements for purchasing the product."13

2. Implied Warranty

Implied warranties under the UCC may be of two types. First is the warranty of merchantability. This warranty arises by operation of law as part of the contract for sale and, therefore, does not require reliance as an element of a purchaser's recovery.14

Section 355.2-314(1) of the Kentucky Revised Statutes provides in relevant part: "Unless excluded or modified (KRS § 355.2-316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to

6. Id. K.R.S. § 355.2-313(1).
7. Id. K.R.S. § 355.2-313(2).
8. Id.
9. 669 F.2d 1286 (6th Cir. 1982) (applying Kentucky law).
10. Id. at 1288.
11. 310 Ky. 374, 220 S.W.2d 564 (1949).
12. Overstreet, 669 F.2d at 1290-91.
13. Id. at 1291.
14. Id. at 1289.
goods of that kind." To be merchantable, the goods must meet the following conditions:

(a) pass without objection in the trade under the contract description; and

(b) in the case of fungible goods, are of fair average quality within the description; and

(c) are fit for the ordinary purposes for which such goods are used; and

(d) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and

(e) are adequately contained, packaged, and labeled as the agreement may require; and

(f) conform to the promises or affirmations of fact made on the container or label if any.

Other implied warranties may arise from the course of dealing or the usage of trade.

Second, KRS § 355.2-315 provides for implied warranty of fitness for a particular purpose. If the seller, at the time of contracting, has reason to know

(1) a “particular purpose for which the goods are required”; and

(2) “that the buyer is relying on the seller’s skill or judgment to select or furnish goods” suited for that purpose;

then, unless modified, an implied warranty that the goods are suited for that purpose arises.

Note that the case law in Kentucky is scarce regarding UCC warranty liability in a products liability context. As a result, the interpretation of the UCC offered by other jurisdictions will have to be reviewed to determine what may be required by each particular case.

15. K.R.S. § 355.2-314(1). Section 355.2-316 sets out rules of construction, designed to protect the buyer from unfair surprise and the seller from fraudulent warranty claims. K.R.S. § 355.2-316.
16. Id. K.R.S. § 355.2-314(2).
17. Id. K.R.S. § 355.2-314(3).
18. Id. K.R.S. § 355.2-315.
19. Id.
B. Liability Based On Negligence

Negligence is recognized in Kentucky as a theory of recovery in a products case. The use of both strict liability and negligence as theories of recovery has caused some confusion when Kentucky courts attempt to distinguish the two. The source of confusion seems to be that both theories utilize a concept of foreseeability. It is clear, however, that negligence is not the basis of strict liability, and the two theories of recovery should be mutually exclusive.

In a 1976 case, the court offered the following statement in distinguishing the two theories of recovery.

The difference is that negligence depends on what a prudent manufacturer, engaged in a business similar to that of the defendant, by the exercise of ordinary care actually should have discovered and foreseen, whereas strict liability depends on what he would have anticipated had he been (but regardless of whether he actually was or should have been) aware of the condition of and potentialities inhering in the product when he put it on the market. Where the one is actual, the other is postulated.

Thus, with negligence one must determine whether the defendant in the exercise of ordinary care should have discovered and foreseen. On the other hand, strict liability presumes the manufacturer was aware of the defect and asks what he would have anticipated knowing of such defect.

The law of negligence as applied in a products case is illustrated by C.D. Herme, Inc. v. R. C. Tway Company, Inc. In that case, the plaintiff purchased a semi-trailer manufactured by defendant. The first time the semi-trailer was used it broke loose causing

23. Id. at 200.
24. See also C & S Fuel, Inc. v. Clark Equip. Co., 552 F.Supp. 340, 343-44 (E.D. Ky. 1982). There, the court noted that under a strict liability theory, the defendant is charged with hindsight. "That is, it is legally responsible for risks which could not have been known or appreciated at the time of manufacture, but come to light later, either before or after the accident complained of." Negligence, on the other hand, depends on what the defendant knew or should have known.
25. 294 S.W.2d 534 (Ky. 1956).
damage to the trailer and its cargo. Plaintiff alleged the connecting device was made of defective steel which could have been discovered in the exercise of reasonable care.\textsuperscript{26}

The court rejected any requirements of privity,\textsuperscript{27} and found no reason why a manufacturer’s liability could not be based on ordinary principles of negligence.\textsuperscript{28}

This means simply that a manufacturer should be required to exercise reasonable care to avoid foreseeable injury. There is no reason to retain the old concepts of inherently, intrinsically or imminently dangerous articles, because the law of negligence contemplates that the care shall be commensurate with the risk involved.\textsuperscript{29}

This liability can, for example, be based on the manufacturer’s failure to make such inspections and tests during the course of manufacture and afterwards which are reasonably necessary to secure production of a safe product.\textsuperscript{30} In summary the court stated:

It would seem that ordinarily the question of whether reasonable care has been exercised will be for the jury, to be answered in accordance with the risk of danger involved, the availability of suitable safety methods, and the practicality and economic feasibility of employing methods designed to insure a safe product.\textsuperscript{31}

\section*{C. Strict Liability In Tort}

\subsection*{1. Liability Based on “Product in a Defective Condition Unreasonably Dangerous.”}

Section 402A of the Restatement (Second) of Torts (1965) provides:

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

(a) the seller is engaged in the business of selling such a product, and

\begin{itemize}
\item \textsuperscript{26} Id. at 536.
\item \textsuperscript{27} Id. at 537.
\item \textsuperscript{28} Id. at 536.
\item \textsuperscript{29} Id.
\item \textsuperscript{30} Id. at 537.
\item \textsuperscript{31} Id. at 537-8.
\end{itemize}
(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in Subsection (1) applies although

(a) the seller has exercised all possible care in the preparation and sale of his product, and

(b) the user or consumer has not bought the product or entered into any contractual relation with the seller.22

In Dealers Transport Company, Inc. v. Battery Distributing Company,33 the court was persuaded to adopt the strict liability theory of Section 402A. In its pristine form, the rule stated in Section 402A applies, and imposes liability upon “any person engaged in the business of selling products for use or consumption.”34 A product may be in “a defective condition unreasonably dangerous” in one of three ways:

1) Mismanufacture or accident;

2) Misdesign; or

3) Inadequate instructions or warnings.35

Dealers Transport itself appears to involve the problem of mismanufacture. The fusible plugs involved were designed to relieve pressure from the tanks when the temperature therein reached 212°F. For some reason, probably a problem in the manufacturing process, they did not do so.36

In Nichols v. Union Underwear Co., Inc.,37 the court distinguished mismanufacture and misdesign cases. Design defect cases start from the premise that the design selected is the defective condition and is unreasonably dangerous.38 Actual knowledge of the design is

33. 402 S.W.2d 441 (Ky. 1966). That case involved an explosion of an acetylene gas tank due to alleged mismanufacture of fusible safety plugs.
34. RESTATEMENT (SECOND) OF TORTS § 402A comment f (1965).
35. See Ulrich v. Kasco Abrasives Co., 532 S.W.2d at 200.
36. This situation should be compared with the problem of misdesign. If the plugs had been designed to relieve pressure from the tanks when they reached, for example, 800°F., but the tanks would explode when they reached 700°F., then a problem of misdesign would be presented.
37. 602 S.W.2d 429 (Ky. 1980).
38. Id. at 433.
irrelevant. In design cases the feasibility of making a safer product is usually the issue. Whereas such is not the case in a mismanufacture case.

Kentucky's approach to strict liability in design defect cases is closely related to, if not indistinguishable from, negligence cases. Jones v. Hutchinson Manufacturing, Inc., offers the best illustration of the Kentucky standard governing design defect cases as applying negligence concepts. In that case a child slid into a grain auger manufactured by defendant and was severely injured. After the mishap, the owner of the auger installed a protective shield and the machine operated satisfactorily.

Though addressing strict liability, the court framed the standard applicable in misdesign cases in terms of negligence and stated:

We think it apparent that when the claim asserted is against a manufacturer for deficient design of its product the distinction between the so-called strict liability principle and negligence is of no practical significance so far as the standard of conduct required the defendant is concerned. In either event the standard required is reasonable care.

The manufacturer is simply under a duty to use reasonable care to design a reasonably safe product and does not have to design the best possible product. Further, a design defect is not established by proof that an alternative design would have prevented the particular injury.

One important limitation on recovery based on misdesign has been set forth in the case law. In McCabe Powers Body Co. v. Sharp, plaintiff's decedent was injured when he fell through the open side of a "bucket" on an aerial boom. The defendant manufacturer constructed the boom in accordance with the specifications provided by the buyer. In denying recovery the court concluded that "where a product is manufactured according to plans and specifications furnished by the buyer and the alleged defect is open and

39. Id.
41. 502 S.W.2d 66 (Ky. 1973).
42. Id. at 68.
43. Id. at 69-70.
44. Id. at 69.
45. Id. at 70.
46. 594 S.W.2d 592 (Ky. 1980).
obvious, the manufacturer is protected from liability for injuries occasioned by use of the product." The court recognized, however, that there may be cases in which the buyer's plans and specifications contain design defects so "extraordinarily dangerous" that the manufacturer should either decline to produce the product or issue warnings concerning its hazards.

The holding in McCabe is consistent with the idea that if the defendant did nothing to put the product in a defective condition unreasonably dangerous, there should be no liability. In Garrison v. Rohm and Haas Co., the plaintiff was injured when a large carton of plexiglas fell from a dolly and struck him. Plaintiff sued the manufacturer of the dolly claiming the product was misdesigned. The dolly had been constructed in accordance with the buyer's instructions and specifications. The court held that the defendant could not be viewed as having designed the product where the buyer supplied the design. The court also held that the defendant is not required to test for design safety where he is making something to particular specifications supplied by the customer.

The discussion of the different ways in which a product may be unreasonably dangerous may be purely academic. "The product either is or is not unreasonably dangerous to a person who should be expected to use or be exposed to it. If it is, it can make no difference whether it is dangerous by design or by accident." The question becomes, therefore, what is the standard utilized in Kentucky for determining whether a product is unreasonably dangerous?

2. The Test of "Unreasonably Dangerous."

As intimated above, whether the product is "unreasonably dangerous" is the operative determination in a products case premised on strict liability. Further, that determination is a condition precedent to the application of strict liability principles.

In Nichols, plaintiff's child was badly burned when the child's
T-shirt caught fire. The court expressly rejected that "consumer expectation test" of "unreasonably dangerous." When that test of unreasonably dangerous is used liability is imposed only if the product is dangerous to an extent beyond that which would be contemplated by an ordinary adult purchaser with ordinary knowledge regarding the product's inherent characteristics. The court rejected that standard because it makes "the obviousness of the danger ... the sole determinant of the reasonableness of a danger rather than simply being one of many factors." The effect of using such a test, reasoned the court, would be to insulate the manufacturer from liability because the product he distributes is patently dangerous.

The court proceeded to adopt a test of "unreasonably dangerous" which focuses on the viewpoint of the defendant. The following jury instruction was formulated by the court for use in the determination of whether the product is unreasonably dangerous.

You will find for the plaintiff only if you are satisfied from the evidence that the [product] ... created such a risk of [injury] ... that an ordinarily prudent company engaged in [its manufacture] being fully aware of the risk, would not have put it on the market; otherwise you will find for the defendant.

In other words, knowledge of the risk that is created by the product is imputed to the defendant and it is assumed that he is aware of that risk. Then the court will simply ask whether a reasonable defendant, with such knowledge of the risk, would have placed the goods into the stream of commerce. If so, the defendant is not liable. If not, the defendant is liable.

Considerations such as feasibility of making a safer product; patency of the danger, warnings and instructions, subsequent maintenance and repair, misuse, and the products' inherently unsafe characteristics, while they have a bearing on the question as to whether the product was manufactured "in a defective condition unreasonably dangerous," are all factors bearing on the principal question rather than separate legal questions.
Finally, it should be noted that the plaintiff must establish "a reasonable probability" that the unreasonably dangerous condition existed at the time the product left the defendant's hands. 61

3. Unavoidably Unsafe Products

"There are some products which, in the present state of human knowledge, are quite incapable of being made safe for their intended and ordinary use." 62 Drugs are an example of that type of product.

Such a product, properly prepared, and accompanied by proper directions and warning, is not defective, nor is it unreasonably dangerous. ... The seller of such products, again with the qualification that they are properly prepared and marketed, and proper warning is given, where the situation calls for it, is not to be held to strict liability for unfortunate consequences attending their use, merely because he has undertaken to supply the public with an apparently useful and desirable product, attended with a known but apparently reasonable risk. 63

There are simply some products which are incapable of being made safe yet their utility to society justifies their use.

In McMichael v. American Red Cross, 64 the court dealt with the concept of an unavoidably unsafe product in reviewing a claim that a blood transfusion caused hepatitis. Relying on comment k under Section 402A the court concluded that the blood was "unavoidably unsafe" and for that reason it was not "unreasonably dangerous." 65 That is true because there was no method available at the time in question by which hepatitis could be effectively excluded or its presence determined. 66 It should be noted, however, that the

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62. See, e.g., Restatement (Second) of Torts § 402A comment k (1965).
63. Id. (emphasis in original).
64. 532 S.W.2d 7 (Ky. 1975).
65. Id. at 9.
66. Id.
existence of the unavoidably unsafe theory to preclude the imposition of strict liability upon a product defendant does not relieve that defendant from its duty to adequately warn of the dangers inherent in the product.\textsuperscript{67}

4. Liability Based Upon Failure to Adequately Warn.

It is clear that a product defendant may be held liable based upon its failure to adequately warn because failure to warn is one way in which a product can be found unreasonably dangerous. This area of products law, however, is somewhat confused in Kentucky because the courts do not seem to be sure what theory of recovery a failure to give adequate warning falls under. But the failure to warn can give rise to liability of the defendant for either negligence or strict liability.\textsuperscript{68}

In \textit{Post v. American Cleaning Equipment Corp.},\textsuperscript{69} the court noted that the manufacturer must give that “quantum of warning which would be calculated to adequately guard against the inherent danger which was known to the [manufacturer] and which [the manufacturer] could reasonably foresee might occur in the expected usage” of the product.\textsuperscript{70} The court defined “adequate warning” as “such degree of warning as will afford to the user of the equipment, by the exercise of reasonable care on his own part, fair and adequate notice of the possible consequences of use or even misuse of the equipment.”\textsuperscript{71}

It has also been stated that the manufacturer is under a duty “to provide such warning as would be reasonably sufficient to bring the danger to an expected user’s attention and be understood by him.”\textsuperscript{72} It is interesting to note that the court seemed content in \textit{Bloyd} to define the reasonable use which the manufacturer has

\textsuperscript{67}. \textit{Id.} It should also be noted that the court expressed the view that the concept of an unavoidably unsafe product whether based in tort or implied warranty, could be used to preclude liability. \textit{Id.} at 11-12.

\textsuperscript{68}. See \textit{Holbrook v. Rose}, 458 S.W.2d 155 (Ky. 1970).

\textsuperscript{69}. 437 S.W.2d 516 (Ky. 1969).

\textsuperscript{70}. \textit{Id.} at 520. In \textit{Post}, the plaintiff was injured when he plugged a vacuum cleaner into a 220 volt outlet when the vacuum cleaner was designed only for use with 115 volt current. \textit{Id.} at 517. The court acknowledged, in passing, Kentucky’s adoption of a strict liability theory of recovery. \textit{Id.} at 519. Beyond that, it is difficult to tell whether the court was utilizing a negligence or a strict liability standard.

\textsuperscript{71}. \textit{Id.} at 522 (emphasis added).

\textsuperscript{72}. \textit{Sturm, Ruger & Co., Inc. v. Bloyd}, 586 S.W.2d 19 at 21 (Ky. 1979) (Bystander was injured when a gun manufactured by the defendant was dropped to the floor and discharged).
a duty to anticipate as "that use being in keeping with the written warning."\textsuperscript{73}

Comment j to Section 402A addresses the product defendant's duty to warn. That comment provides that "[I]n order to prevent the product from being unreasonably dangerous, the seller may be required to give directions or warning. . . ."\textsuperscript{74} That same comment provides, however, that "a seller is not required to warn with respect to products . . . when the danger, or potentiality of danger, is generally known and recognized."\textsuperscript{75} Where the warning is given as required, "the seller may reasonably assume that it will be read and heeded."\textsuperscript{76} If the product bears such a warning and the product is safe if used in accordance with the warning then the product is neither defective nor unreasonably dangerous.\textsuperscript{77} Kentucky's application of the duty to warn has been recognized as one which requires the defendant to "warn the consumer of the [product] of unreasonably dangerous consequences of foreseen applications of it and even of foreseeable misuse."\textsuperscript{78}

The nature of the duty to warn in Kentucky cannot be over emphasized where the theory of recovery is strict liability. It has been stated that the issue in a product liability case wherein Section 402A is invoked is simple. "The product either is or is not unreasonably dangerous to a person who should be expected to use or be exposed to it."\textsuperscript{79}

If the danger is unreasonable because it is not obvious and may not be apprehended by [a person reasonably anticipated as a user], then it may be obviated by an adequate warning, so provided or affixed that in the ordinary course of events it will reach and should be understood by that person. \textit{Whether such a warning is so provided is nothing more than one of the factors determining whether the product is unreasonably dangerous.}\textsuperscript{80}

\textsuperscript{73} Id. at 22.
\textsuperscript{74} \textit{RESTATEMENT (SECOND) OF TORTS} § 402A comment j (1965).
\textsuperscript{75} Id.
\textsuperscript{76} Id.
\textsuperscript{77} Id.
\textsuperscript{78} Taylor v. General Motors Inc., 537 F.Supp. 949 (E.D. Ky. 1982). The federal district court applied Kentucky law to a case where a blade detached from a fan on a car engine, causing serious injury.
\textsuperscript{79} \textit{Ultrich}, 532 S.W.2d at 200.
\textsuperscript{80} Id. (emphasis added).
Kentucky courts have recently attempted to clarify the nature of the duty to warn. In *Lewis v. Inland Steel Co.*, the plaintiff's decedent was killed when a steel drum exploded after decedent filled it with air pressure. Suit was brought against the manufacturer of the drum, the distributor of the drum and the purchaser (decedent's employer). The evidence showed that the drums were not designed as "stress vessels" and were not designed to be "evacuated by the use of air pressure." No warnings against such uses were issued by the manufacturer, but there was no evidence of a manufacturing defect.

The court held that the trial court's instructions to the jury were erroneous because they were not in conformance with *Nichols*. The court reasoned that the use of an instruction based on *Post* was erroneous because *Post* dealt with the adequacy of a warning. In *Lewis* the court perceived the issue as whether the product was defectively designed because of the failure to give any warning. "In short, this is a *Nichols* case rather than a *Post* case."

The court ruled that there should be no instruction on the duty to warn against the use of air pressure because the failure to warn "is merely one of the evidentiary factors going to the ultimate issue of whether the drum was manufactured in a defective condition unreasonably dangerous to the ultimate consumer. . . ." No instruction should be given on the adequacy of warning where no warning at all is given because if no warning is given there is no issue regarding the adequacy of the warning.

In *Montgomery Elevator Co. v. McCullough*, the court addressed the manufacturer's duty to warn the ultimate consumer or user of a product where warnings have been given to an intermediate purchaser. In that case, the plaintiff, a 10 year old boy, suffered an amputation injury when his tennis shoe was caught in the space between the treads and the side skirts of an escalator located in

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82. Id.
83. Id.
84. Id. at 7.
85. Id.
86. Id.
87. Id.
88. Id.
89. Id. at 8.
90. 676 S.W.2d 776 (Ky. 1984).
the defendant's department store. The escalator was purchased from Montgomery Elevator and maintained by the department store. Montgomery Elevator was found liable at trial and on discretionary review claimed it was entitled to a directed verdict.\textsuperscript{91}

Plaintiff's claim sounded in defective design. Montgomery Elevator, however, argued that it was not liable because it sent letters to the department store (purchaser) after installation of the elevator advising the department store of the propensity of the escalator to catch tennis shoes. The letters suggested remedial measures and offered for sale a "kit" to prevent such accidents. The department store took none of the suggested remedial measures.\textsuperscript{92} The court stated the issues involved as follows:

What is the effect of such letters from the manufacturer to the purchaser when the claim is on behalf of a third party not sharing in their transactions? Are they a complete defense, a question of intervening or superseding cause for the jury to consider, or no defense whatsoever?\textsuperscript{93}

The court addressed the question of whether the purchaser's failure to act in response to the letters cut off the manufacturer's responsibility. The court noted that one of the risks that induced courts to impose strict liability upon the makers of defective products is the danger that purchasers will continue to use dangerous machinery without safety alterations.\textsuperscript{94} The court's rejection of Montgomery Elevator's arguments is summarized in the following passage:

[As a general rule the purchaser's failure to remedy a defect in the product is no defense for the manufacturer where the claim is based on the defective condition of the product at the time of manufacture and is made on behalf of an ultimate user or bystander who has not been adequately warned of the danger. The manufacturer has a non-delegable duty to provide a product reasonably safe for its foreseeable uses, a duty not abrogated by warning to the immediate purchaser. The purchaser who has notice of the dangerous condition may be concurrently liable to the ultimate user for failure to provide adequate warning, for failure to remedy the defect or on

\textsuperscript{91} Id. at 778.
\textsuperscript{92} Id.
\textsuperscript{93} Id. at 779.
\textsuperscript{94} Id. at 780.
some other basis, but the purchaser’s failure to act is not an
intervening cause except in extraordinary circumstances.95

The extraordinary circumstances referred to in Montgomery
Elevator are found in Bohnert Equipment Co., Inc. v. Kendall,96 where
the plaintiff employee was injured when a crane he was operating
broke loose from the ceiling attachment and fell on him. Accord-
ing to the manufacturer and distributor, warning was given to the
plant engineer that the ceiling runway on which the crane operated
needed bracing. The plant engineer denied receiving such a warn-
ing and assumption of any responsibility to have the braces
installed.97

The duty to warn is deemed satisfied where the warning was
given to a skilled supervisor though not to the one injured while
following the directions of such skilled supervisor.98 The court,
therefore, recommended the following jury instruction.

[It was the duty of the defendants . . . to communicate their warn-
ing to [the skilled supervisor] . . . in charge of maintenance of the
[product], fair and adequate notice of the danger and possible conse-
quences of using or even misusing of the equipment, except for those
dangers and consequences which the jury believes were obvious to
a reasonable [skilled supervisor] under the same or similar
circumstances as those present in the case.99 If such fair and ade-
quate warning was given or if the owner of the equipment agreed
to assume responsibility for the prompt correction of the defect, then
you must find for the defendants. Otherwise you will find for the
plaintiff.100

It should be noted, however, that Montgomery Elevator expressly
limited Bohnert to its facts, i.e., where the manufacturer claimed
the purchaser was notified of the defect and the purchaser assumed
responsibility for it.101

But, in some circumstances, there is room to argue that where
an employee seeks recovery from the manufacturer after he is
injured by a product used in performing his work and which the

95. Id. at 782 (emphasis added).
96. 569 S.W.2d 161 (Ky. 1978).
97. Id. at 165.
98. Id. at 166.
99. Id.
100. Id.
101. 676 S.W.2d at 782.
employee owns, the manufacturer is freed from liability. In that situation the manufacturer may be entitled to rely on the owner of the machine to assume the responsibility of keeping it in safe working order.\textsuperscript{102} "The owner's failure to do so (and to warn the operator accordingly) might constitute superseding negligence if it could be found that the [product] was unreasonably dangerous in the first place."\textsuperscript{103}

Directions or warning regarding the product's use are "not required when the danger or potential danger is generally known and recognized and is within common knowledge and understanding."\textsuperscript{104}

III. WHO ARE PROPER PLAINTIFFS IN A KENTUCKY PRODUCTS LIABILITY ACTION?

The Product Liability Act of Kentucky does not appear to directly affect who may seek recovery in a Kentucky products case. Therefore, who may seek recovery in a Kentucky products action will be discussed in this section. The question of who is a proper defendant in a Kentucky products case will be discussed below in addressing the Product Liability Act.

If the theory of recovery is warranty, it should be noted that Kentucky has adopted the most narrow of the three alternative provisions promulgated by the drafters of the Uniform Commercial Code regarding who may recover in an action based on express or implied warranty. KRS § 355.2-318 provides:

A seller's warranty whether express or implied extends to any natural person who is in the family or household of his buyer or who is a guest in his home if it is reasonable to expect that such person may use, consume, or be affected by the goods and who is

\textsuperscript{102.} Ulrich, 532 S.W.2d at 201.
\textsuperscript{103.} Id.
\textsuperscript{104.} McCabe Powers Body Co., 594 S.W.2d at 594. Plaintiff, who had fallen through the open side of a "bucket" on an aerial boom, alleged that his injuries resulted from the defective design of the bucket. See also C & S Fuel, Inc. v. Clark Equip. Co., 552 F.Supp. 340 (E.D. Ky. 1982), where the court stated "that there is a duty to provide a warning as a reasonably safe design." Id. at 347, and McWaters v. Steel Service Co., Inc. 597 F.2d 79 (6th Cir. 1979), applying Kentucky law, the court held that a supplier of basic construction materials, having no control over the manner in which the materials will be used by a contractor, is under no duty to warn of the danger of using the materials without proper safeguards. Id. at 80.
injured in person by breach of the warranty. A seller may not exclude
or limit the operation of this section.\textsuperscript{105}

The last sentence of the statute needs explanation. The 1983
Kentucky Commentary to that section explains its purpose.\textsuperscript{106} The
beneficiaries of the statute are given the "benefit of the same
warranty which the buyer received in the contract of sale."\textsuperscript{107} But
the statute "does not mean that a seller is precluded from excluding
or disclaiming a warranty. . . ."\textsuperscript{108} "What this last sentence forbids
is exclusion of liability by the seller to the persons to whom the
warranties which he has made to his buyer would extend under
this section."\textsuperscript{109}

It should be noted that the lack of privity may still offer a valid
defense to a products defendant in a Kentucky products case. In
Williams v. Fulmer,\textsuperscript{110} the court held that Dealer's Transport Co.
v. Battery Distributing Co.,\textsuperscript{111} eliminated the privity requirement
only for a property damage claim. In Williams, the evidence showed
that the plaintiff was at least the third purchaser of the helmet
involved in the case. The court held that even though privity is
not required in a strict liability claim, because Kentucky adopted
the strictest alternative to UCC \textsection 2-318, privity is still required
in a personal injury action based on warranty.\textsuperscript{112}

When the theory of recovery is negligence, "a manufacturer
should be required to exercise reasonable care to avoid foreseeable
injury."\textsuperscript{113} Thus it appears that the question of who may recover
on a negligence theory is governed by the ordinary principles of
foreseeability. Indeed, in Ford Motor Co. v. Atcher,\textsuperscript{114} the court
quoted the first Restatement of Torts and stated that the manufac-
turer is liable to those who lawfully use the product for a purpose
for which it is manufactured and to those whom the supplier should

\begin{itemize}
  \item \textsuperscript{105} K.R.S. \textsection 355.2-318.
  \item \textsuperscript{106} Id.
  \item \textsuperscript{107} Id.
  \item \textsuperscript{108} Id.
  \item \textsuperscript{109} Id.
  \item \textsuperscript{110} 31 K.L.S. 10, 18 (Ky. App. 1984) \textit{review granted}, 31 K.L.S. 15 at 19 (Ky. Nov. 8,
  \item \textsuperscript{111} 1984), (a wrongful death action involving an allegedly defective motorcycle helmet).
  \item \textsuperscript{111} 402 S.W.2d 444 (1965).
  \item \textsuperscript{112} 31 K.L.S. at 19.
  \item \textsuperscript{113} C.D. Herme v. R.C. Tway Co., 294 S.W. 2d 534, 536 (Ky. 1956) (emphasis added).
  \item \textsuperscript{114} 310 S.W. 2d 510, 511 (Ky. 1957) (where a minor was injured when the door to a
car which defendant had manufactured came open).
\end{itemize}
expect to be in the vicinity of its probable use.\textsuperscript{115} Simply put, the "foreseeable plaintiff" may sue on a negligence theory.

When the theory of recovery is strict liability the important question is whether a mere "bystander" is allowed to seek recovery. In \textit{Embs v. Pepsi-Cola Bottling Co.},\textsuperscript{116} the court held "[t]he protections of Section 402A of the Restatement of Torts (Second) extend to bystanders whose injury from the defective product is \textit{reasonably foreseeable}."\textsuperscript{117} Thus, one does not have to be a consumer, user or purchaser of a product to be a strict liability plaintiff.

\section*{IV. CAUSATION}

No matter what theory of recovery a Kentucky products plaintiff sets forth, "the product must be a legal cause of the harm."\textsuperscript{118} Such "legal causation may be established by a quantum of circumstantial evidence from which a jury may reasonably infer that the product was the legal cause of the harm."\textsuperscript{119} "[T]he essence of the test concerning the sufficiency of plaintiff's circumstantial evidence concerning the causation is that the proof must be sufficient to tip the balance from 'possibility' to 'probability'."\textsuperscript{120} More recently, in \textit{Perkins v. Trailco Manufacturing and Sales Co.},\textsuperscript{121} the Supreme Court of Kentucky stated that, "The proper inquiry is whether it would be unreasonable under the facts for a jury to find the defects complained of were a 'substantial factor in the cause of the accident'."\textsuperscript{122} The burden of proof is on the plaintiff to show that the circumstances surrounding the accident are such so as to justify a reasonable inference of probability rather than mere possibility that the defendant was responsible for the injuries.\textsuperscript{123}

\begin{footnotes}
115. \textit{Id.}
116. 528 S.W. 2d 703, (Ky. 1975)
117. \textit{Id.} at 706 (emphasis added).
118. Holbrook v. Rose, 458 S.W. 2d 155, 157 (Ky. 1970) (wherein plaintiff-decedent died after being administered a worm medicine manufactured by the defendant).
119. \textit{Id.}
120. \textit{Id.} at 158.
121. 613 S.W. 2d 855, 857 (Ky. 1981).
122. \textit{Id.} at 857.
123. \textit{Id.} at 858. The duty to warn has been analyzed in a causation posture as well. \textit{See} section II, of text at C(4) \textit{supra}.
\end{footnotes}
V. APPLICABLE STATUTES OF LIMITATION IN KENTUCKY PRODUCTS CASES

The Products Liability Act of Kentucky does not provide a separate statute of limitations for product liability actions. If the plaintiff's theory of recovery is warranty, one must look to the Uniform Commercial Code for the relevant statute of limitation. KRS § 355.2-725(1) provides that "an action for breach of any contract for sale must be commenced within four years after the cause of action has accrued." The parties to the deal may reduce the period to not less than one year, but they may not extend the period. "The cause of action accrues when the breach occurs regardless of the aggrieved party's lack of knowledge of the breach." A breach of warranty occurs when the tender of delivery is made unless the warranty explicitly extends to future performance of the goods and discovery of any breach must await the time of the performance. In the latter situation, "the cause of action accrues when the breach is or should have been discovered."

Application of that UCC statute of limitation seems fairly clear where the plaintiff is seeking recovery for damage to the product itself. The statute's application is not so clear, however, where the plaintiff is using a warranty theory to recover for personal injuries. KRS 413.140(1) provides in relevant part:

The following actions shall be commenced within one (1) year after the cause of action accrued: (a) an action for an injury to the person of the plaintiff. . . .

In *Teel v. American Steel Foundaries*, the plaintiffs filed suit against the manufacturer of a tractor-trailer rig alleging they were injured by reason of a defective wheel on the rig. One of the plaintiff's theories of recovery was breach of express and implied warranty under the UCC. The court noted the apparent conflict between KRS § 413.140(1)(a) and KRS §. 355.2-725 and stated:

124. Of the thirty-one states which have enacted products liability protection, twenty-seven have included a specific statute of limitations.
125. K.R.S. § 355.2-725(1).
126. Id.
127. K.R.S. § 355.2-725(2).
128. Id.
129. Id.
130. K.R.S. § 413.140(1).
132. Id. at 340.
In the absence of clear mandate from the Kentucky state courts, it cannot be said beyond a doubt that \$ 413.140(1)(a) should apply to plaintiff's breach of warranty claim rather than \$ 355.2-725. The four-year limitations period of \$ 355.2-725 should, therefore, be applied to plaintiff's breach of warranty claim...\textsuperscript{133}

It should be noted that the court's conclusion is supported by KRS \$ 355.2-715(2)(b) which allows recoveries for injuries to person or property proximately resulting from any breach of warranty by a seller.\textsuperscript{134}

The \textit{Teel} court's analysis proved to be correct. In \textit{Williams v. Fulmer},\textsuperscript{135} the court held that when an action is brought on multiple grounds, the UCC four year statute of limitation should govern the warranty aspects of the claim with the one year statute of limitation governing the other aspects of the claim.\textsuperscript{136} The court found that the enactment of the UCC expresses a legislative intent that the code occupy the field of commercial transactions.\textsuperscript{137}

As to product actions based on the theories of negligence or strict liability in tort, it seems clear that the one-year statute of limitation should apply.\textsuperscript{138} In \textit{Louisville Trust Co. v. Johns-Manville Products},\textsuperscript{139} plaintiff sued on a product liability theory for wrongful death. The court applied the one-year period of limitations. Moreover, the court extended the "discovery rule" to products liability action seeking relief for latent diseases.\textsuperscript{140} Thus, the period of limitations begins to run from the date when the injury was discovered or should have been discovered in the exercise of ordinary care and diligence.\textsuperscript{141} The filing of a "John Doe" complaint will not, however, toll the statute of limitations. In \textit{Richmond v. Louisville and Jefferson County Metropolitan Sewer District},\textsuperscript{142} the plaintiff sued a "John Doe" defendant. The defendant was then substituted for the "John Doe." The court held that summary judgment should have been entered in favor of the defendant since

\textsuperscript{133} \textit{Id.} at 342.
\textsuperscript{134} See K.R.S. \$ 355.2-715(2)(b).
\textsuperscript{136} \textit{Williams}, 31 K.L.S. at 19.
\textsuperscript{137} \textit{Id.}
\textsuperscript{138} K.R.S. \$ 413.140(1)(a).
\textsuperscript{139} 580 S.W.2d 497 (Ky. 1979) (where plaintiff's decedent died as a result of exposure to asbestos).
\textsuperscript{140} \textit{Id.} at 501
\textsuperscript{141} \textit{Id.}
\textsuperscript{142} 572 S.W.2d 601 (Ky. App. 1977).
personal jurisdiction could not be obtained over him before the Motor Vehicle Reparation Act expiration of the period of limitations.\textsuperscript{143}

If the plaintiff's claim arises out of a motor vehicle accident, however, the two year statute of limitations will govern.\textsuperscript{144} In \textit{Bailey v. Reeves},\textsuperscript{145} the court stated that the only actions abolished by the Act were those against "the owner, registrant operator or occupant of a motor vehicle with respect to which security has been provided as required" by the Motor Vehicle Reparation Act.\textsuperscript{146} Against all other persons, motorists and non-motorists the action may be commenced not later than two years after the injury, death or last reparation benefit payment.\textsuperscript{147}

The failure of the Product Liability Act of Kentucky to provide a specific statute of limitation has led one author to suggest that the five-year statute of limitation contained in KRS § 413.120(2) may be applicable.\textsuperscript{148} That statute sets forth a five year period of limitations for actions "upon liability created by statute when no other time is fixed by the statute creating the liability."\textsuperscript{149} In response, it should be said that the Product Liability Act creates no liability which is new. Indeed, when passing the Product Liability Act, the legislature clearly stated its intent as follows:

\begin{quote}
WHEREAS, it is in the interest of the public, consumers, manufacturers, wholesalers, retailers and insurers, for the General Assembly to codify certain existing legal precedents and to establish certain guidelines which shall govern the rights of all participants in product liability litigation. . . .
\end{quote}

Thus, it is clear that the legislature did not intend to create any new liability. Rather, it sought to codify and establish guidelines governing pre-existing causes of action. The five-year period of limitation should not, therefore, be applicable.

VI. THE PRODUCT LIABILITY ACT OF KENTUCKY\textsuperscript{151}

The Product Liability Act of Kentucky is intended to govern

\begin{itemize}
\item \textsuperscript{143} Id. at 605.
\item \textsuperscript{144} K.R.S. § 304.39-230(6) (a provision in the Motor Vehicles Reparation Act).
\item \textsuperscript{145} 662 S.W.2d 832 (Ky. 1984).
\item \textsuperscript{146} Id. at 835.
\item \textsuperscript{147} Id.
\item \textsuperscript{148} EADES, KY. PRODUCTS LIABILITY § 8-12, n.1(1981).
\item \textsuperscript{149} K.R.S. § 413.120(2) (Baldwin 1984).
\item \textsuperscript{150} Product Liability Act of Kentucky, 1978 KY. ACTS ch. 91.
\item \textsuperscript{151} K.R.S. §§ 411.300-350.
\end{itemize}
all actions resulting from injury caused by a product.

[A] 'product liability action' shall include any action brought for or on account of personal injury, death or property damage caused by or resulting from the manufacturer, construction, design, formulation, development of standards, preparation, processing, assembly, testing, listing, certifying, warning, instructing, marketing, advertising, packaging or labeling of any product.\textsuperscript{152}

That observation is important because the Act alters, drastically in some situations, application of case law principles governing products actions. Matters governed by the Act are addressed below.

A. Evidentiary Matters Covered in the Product Liability Act

(1) Rebuttable Presumptions that the Product Is Not Defective.

(i) Conformance to industry standards or the state of the art.

KRS § 411.310(2) provides that "if the design, methods of manufacture, and testing conform to the generally recognized and prevailing standards or state of the art"\textsuperscript{153} at the time the product was prepared, then the product is presumed not to be defective. The presumption can be "rebutted by preponderance of evidence to the contrary."\textsuperscript{154} It is stated that the presumption is tied to an industry's acceptance of manufacturing processes and advances in the state of the art.\textsuperscript{155} It should be emphasized that the manufacturer need only show that it is in conformance with either the prevailing industry standards or the state of the art in order to give rise to the presumption.

The Kentucky Court of Appeals recently addressed the effect of this particular presumption. \textit{International Harvester Co. v. Riffe,}\textsuperscript{156} is of little precedential value, however, since in denying discretionary review the Kentucky Supreme Court ordered the opinion not be published.\textsuperscript{157} But the case is illustrative of how an appellate court in Kentucky will handle issues under the Product Liability Act.

\textsuperscript{152} Id. at § 411.300(1).
\textsuperscript{153} Id. § 411.310(2).
\textsuperscript{154} Id.
\textsuperscript{155} 2 L. FRUMER & M. FRIEDMAN. PRODUCTS LIABILITY, § 16 A [4][i] (1983) [hereinafter "FRUMER"].
\textsuperscript{156} 2 PROD. LIAB. REP. (CCH) ¶ 9661 (June 3, 1983).
\textsuperscript{157} See CR 76.28(4)(c).
In *Riffe*, plaintiff's decedent was killed when a front-end loader manufactured by the defendant rolled over. The product was not equipped with a roll cage and no manufacturer placed a roll cage on its product at the time the loader in question was built. Further, there was evidence that the state of the art did not allow the manufacture of safe roll cages at that time.\(^\text{158}\)

The court interpreted KRS § 411.310(2) in favor of the defendant since there was evidence that it had complied with both the prevailing standards in the industry and the state of the art.\(^\text{159}\)

The court, moreover, found that *Nichols*,\(^\text{160}\) was not controlling because of the action taken by the legislature when it passed the Product Liability Act. The court stated:

> The legislature's creation of the presumption reflects a concern for the rising tide of plaintiff's verdicts in defective design claims and is an attempt to define a standard of care to which a manufacturer may be held in products liability cases. Conformity with industry standards or the state of the art should prevent one from being held liable for defective design, but if a preponderance of the evidence indicates that the industry has adopted careless standards, liability may be imposed. Once a manufacturer establishes the presumption of a nondefective design by specific proof of conformity with industry standards or the state of the art, a plaintiff can only overcome the presumption by a preponderance of the specific evidence to the contrary. Only then is there a question for a jury to decide.\(^\text{161}\)

So in spite of the adoption of strict liability, if the presumption in KRS § 411.310(2) arises, it seems that a plaintiff, to be successful will have in fact have to prove negligence. Further, the words of the statute appear inconsistent with statements that an industry cannot be permitted to set its own uncontrolled standards.\(^\text{162}\)

(ii) Length of time the product has been out of seller's hands.

KRS § 411.310(1) provides that if personal injury, death, or property damage occurred either more than five (5) years after the date of sale to the first consumer, or more than eight (8) years

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159. *Id.* at ¶ 23,906.
160. 602 S.W.2d at 429.
161. *Riffe* at ¶ 23,906 (emphasis added).
after the date of the manufacture, then it is presumed, until rebutted by preponderance of the evidence, that the product is not defective. It has been suggested that one way to rebut this presumption is by evidence of prior accidents involving the product in question.

(2.) Evidence of Post-Injury Modification of the Product.

KRS § 411.330 provides that evidence of improvements, alterations . . . in product design, manufacture, warning or other incidences of the manufacturing process "shall be admissible in evidence only after the same has been offered to the court in a hearing out of the presence of the jury and the court has ruled that the evidence is relevant and material." It should be remembered that the general rule is that post-injury modifications are not admissible. But it is stated that the effect of the Kentucky statute is that the admissibility of evidence of post-injury modification is left to the discretion of the trial court after it finds the evidence is relevant.

B. Alteration of the Product By the User or a Third Party

It should be remembered that Section 402A requires that before there is strict liability, the product must "reach the user or consumer without substantial change in the condition in which it is sold." There is little case law interpreting this requirement but it is clear that a substantial change insulates the defendant from liability.

In C & S Fuel, Inc. v. Clark Equipment Co., the plaintiff brought suit to recover the value of a tractor shovel which burned due to an alleged design defect. It was alleged that the defect permitted leaking hydraulic fluid to get into the engine where the fluid would ignite. The minimal safety shield designed to partially prevent the problem had been partially cut away by persons unknown.

163. K.R.S. § 411.310(1).
164. Frumer, supra note 155, v. 2a at § 16C [4].
166. Frumer supra note 155, v. 2a at § 16C [9].
167. Id.
168. Restatement (Second) of Torts § 402A (emphasis added).
Plaintiff argued that the alteration was foreseeable. In finding for the defendant, the court explored the meaning of "substantial change." 170

By reference to Southwire Co. v. Beloit Eastern Corp. 171 the court stated that it believed Kentucky courts would accept the following definition of "substantial change" which will relieve a products defendant from liability.

Any change which increases the likelihood of a malfunction, which is the proximate cause of the harm complained of, and which is independent of the expected and intended use to which the product is put is a substantial change. 172

The reason for that approach is that the court should give a products defendant the benefit of the doubt since the defendant has already had the burden of strict liability thrust upon him. 173 The defendant "should be strictly liable only for its own design, not for someone else's." 174

KRS § 411.320(1) provides that a manufacturer shall be liable only for the damage that would have occurred if the product had been used in its original, unaltered and unmodified condition. The section further states that if a plaintiff performed an unauthorized alteration or modification of the product which "was a substantial cause of the occurrence that caused injury or damage to the plaintiff, the defendant shall not be liable whether or not said defendant was at fault or the product was defective." 175

Unforeseeable misuses or alterations have always been an effective defense in products liability actions, whether the plaintiff's claim sounds in negligence, warranty or strict liability. 176 But the Kentucky statutes say nothing regarding whether the alteration or misuse must be foreseeable or not so as to provide a defense.

170. Id. at 345.
174. Id. See also Cox v. General Motors Corp., 514 S.W.2d 197 (Ky. 1974) (where plaintiff was injured when a wheel of the car in which he was riding fell off. The car had been modified in several ways so as to make it suitable for drag racing. In denying recovery, the court held that the accident must be the proximate result of the alleged design defect and not a result of subsequent mishandling and modification. Id. at 200).
175. K.R.S. § 411.320(1).
176. FRUMER, supra note 155, at v. 2A at § 16C [3][iii] (footnotes omitted).
“To the extent that [this statute] would permit a manufacturer to escape liability for minor foreseeable alterations or modifications, they should be amended. At the very least, the manufacturer should be required to warn of dangers arising from foreseeable alterations.”

In *Head v. Biro Manufacturing Co., Inc.*, the court addressed the effect of an alteration upon the plaintiff's recovery. In that case, the plaintiff was severely injured when her hand was pulled into a meatgrinder. The grinder was manufactured by the defendant in 1951 with a safety guard. Plaintiff was injured on January 19, 1979. The safety guard had been removed by someone and it was not disputed that the plaintiff's injuries would not have occurred had the safety guard been replaced.

The court stated that the Product Liability Act “is not intended to codify Section 402A entirely as interpreted by the Comments thereto.” Instead, KRS § 411.320(1) provides that a manufacturer is only liable for personal injury “that would have occurred if the product had been used in its original, unaltered and unmodified condition.” Thus, “where a reasonably foreseeable or anticipated use of a product involves an unexpected material alteration to that product after it leaves the hands of the manufacturer and personal injury is due solely to the alteration, . . . the injured party is precluded from recovery against the manufacturer by KRS § 411.320.” That language seems to retain the requirement that the alteration must be unforeseeable in order to insulate the defendant from liability.

C. The Role of the Plaintiff's Negligence in Kentucky Products Cases

The general role of contributory negligence in a products liability action where the claim sounds in strict liability is summarized as follows:

Since the liability with which this Section deals is not based upon negligence of the seller, but is strict liability, the rule applies to

177. Id.
178. PROD. LIAB. REP. (CCH) ¶ 9229 (1982).
179. Id. at ¶ 21,811.
180. Id. at ¶ 21,812.
181. Id. at ¶ 21,811.
182. Id. at ¶ 21,812.
strict liability cases (see § 524) applies. Contributory negligence of
the plaintiff is not a defense when such negligence consists merely
in a failure to discover the defect in the product, or to guard the
possibility of its existence. On the other hand, the form of con-
tributory negligence which consists involuntarily and unreasonably
proceeding to encounter a known danger and commonly passes under
the name of assumption of risk, is a defense under this Section as
in other cases of strict liability. If the user or consumer discovers
the defect and is aware of the danger, and nevertheless proceeds
unreasonably to make use of the product and is injured by it, he
is barred from recovery.183

On the other hand, in a products case based on negligence, con-
tributory negligence, in the sense that the plaintiff has failed to
exercise reasonable care for his own safety is a complete defense.184

Kentucky, however, seems to have departed from the prevail-
ing rule. KRS § 411.320(3) provides that if the plaintiff fails to
exercise ordinary care in the circumstances in his use of the pro-
duct and that failure was substantial cause of the injury, then the
defendant is not liable.185 The rule holds true even if the product
is, in fact, defective. "Only Kentucky . . . has codified a contributory
negligence defense in a product liability action."186

Whether Kentucky has successfully codified a contributory
negligence defense to product liability actions is now in question.
In Hilen v. Hays,187 the Supreme Court of Kentucky, speaking
through the pen of Justice Leibson, discarded the traditional rule
of contributory negligence and adopted the doctrine of pure
comparative negligence. In a comment that may be best characteriz-
ed as cryptic, Justice Leibson stated that KRS § 411.320

[W]as intended to settle an ongoing controversy as to whether
contributory negligence is a defense to a products liability action.
It may be arguable that the statute is capable of being construed
as providing for contributory negligence as a complete defense to
a products liability action (a question which remains open for a case
in point), but from its background it is clear that the legislative
purpose was to deal with the availability of contributory negligence
as a defense in products cases and not with whether contributory

183. RESTATEMENT (SECOND) OF TORTS § 402A, comment n.
184. FRUMER, supra note 155, v. 1A at § 13.01.
185. K.R.S. § 411.320(3).
186. FRUMER, supra note 155, v. 1A at § 13.01. The authors note that other states have opted
for a comparative negligence approach in their codifications.
187. 673 S.W.2d 713 (Ky. 1984).
negligence should result in a complete bar or a proportionate recovery.\textsuperscript{188}

Though Justice Leibson gave a clear signal that he intends to apply comparative negligence in a products liability case despite KRS § 411.320(3), it appears that it will take some masterful judicial slight-of-hand in order for him to do so. The statute clearly states that if the plaintiff fails to exercise ordinary care and that failure was a substantial cause of the injury then the defendant "shall not be liable...."\textsuperscript{189}

Very recently, the Kentucky Court of Appeals applied comparative negligence in a products liability case without addressing KRS § 411.320. In \textit{Lewis v. Inland Steel Co.},\textsuperscript{190} the decedent's fellow employees had designed a makeshift system for evacuating the contents of the drum by the use of air pressure. Some of the employees had observed air buildup in some of the drums which was evidenced by rocking and permanent bulging of the drums. Their response on those occasions was merely to allow some of the air pressure to escape.\textsuperscript{191} Plaintiff argued that the decedent's negligence is not a valid defense in an action based upon strict liability. The court disagreed and held that the jury must be instructed on the plaintiff's negligence when the issue is present in the case.\textsuperscript{192}

The court proceeded to state that the instruction on the plaintiff's negligence should conform to the \textit{comparative negligence} doctrine set forth in \textit{Hilen v. Hays}.\textsuperscript{193} The court did not address the product liability act provision codifying contributory negligence as a complete defense.\textsuperscript{194}

\begin{footnotes}
\textsuperscript{188} Id. at 715.
\textsuperscript{189} K.R.S. § 411.320(3) (emphasis added).
\textsuperscript{191} Id. at 7.
\textsuperscript{192} Id. In \textit{Lewis}, there was evidence that the decedent knew or should have known that the drum would explode if air was used to evacuate its contents.
\textsuperscript{193} Id. at 8.
\textsuperscript{194} The reader should note that the accident involved in \textit{Lewis} occurred prior to the adoption of the Product Liability Act. One possible explanation for the court's failure to deal with the contributory/comparative negligence issue is the court's belief that the product liability act does not apply retroactively to actions arising before its adoption. Thus the case, the court could have believed, was governed by the common law regarding products liability and because the common law was altered to apply comparative negligence to all trials held after July 5, 1984, a retrial in \textit{Lewis} should be governed by comparative negligence. That explanation was not, however, offered by the court.
\end{footnotes}
In Anderson v. Black & Decker, Inc.,\textsuperscript{195} however, Judge Bertlesman opined that KRS 411.320(3) means exactly what it says and ruled that contributory negligence is a complete bar to recovery. Basically, Judge Bertlesman cited two reasons for his conclusion. First, the General Assembly clearly intended to restrict liability in products cases when it passed the Product Liability Act.\textsuperscript{196} Second, the court concluded that a Kentucky court faced with the issue would uphold the plain meaning of the statute.\textsuperscript{197}

It should be remembered that Parker v. Redden,\textsuperscript{198} abolished, as a defense, pure assumption of risk wherein a plaintiff may be barred from recovery even though he acted reasonably. In Kentucky, therefore, when a defendant is seeking a defense based on the plaintiff's conduct the only question is whether the plaintiff observed the standard of reasonable care.\textsuperscript{199}

D. Who are Proper Defendants in a Kentucky Products Case?

Initially, it should be noted that privity is no longer a prerequisite to a Kentucky products action.\textsuperscript{200} When the theory of recovery is strict liability "Comment f [of Section 402A] makes it abundantly clear that ... any person engaged in the business of supplying products for use or consumption, including any manufacture of such product and any wholesaler or retail dealer or distributor" may be held liable.\textsuperscript{201}

The Product Liability Act, however, places limits on who may be successfully sued.\textsuperscript{202} That statute seems to limit liability to the manufacturer in a product liability action if the following three conditions are met:

1. The manufacturer is identified and subject to the jurisdiction of the court.

\textsuperscript{195} 597 F.Supp. 1298 (1984) (where the plaintiff cut his arm on a saw).
\textsuperscript{196} Id. at 1300.
\textsuperscript{197} Id. at 1301 (citing Bailey v. Reeves, S.W.2d 832, 834 (Ky. 1984) and Commonwealth v. Boarman, 610 S.W.2d 922, 924 (Ky. App. 1980) (an opinion cited with approval by Justice Leibson in Bailey)).
\textsuperscript{198} 421 S.W.2d 586, 592 (Ky. 1967).
\textsuperscript{199} Id. at 593.
\textsuperscript{200} Dealers Transport Co. v. Battery Distributing Co., 402 S.W.2d 441, 446 (Ky. 1966).
\textsuperscript{201} See Embs v. Pepsi-Cola Bottling Co., 528 S.W.2d 703, 705 (Ky. 1975).
\textsuperscript{202} K.R.S. § 411.340.
2. Any implicated wholesaler, distributor, retailer shows by a preponderance of the evidence that the product was sold by him in its original manufactured condition or package, or in the same condition that such product was in when it was received by that party.

3. The implicated wholesaler, distributor or retailer has not breached any express warranty and did not know nor should not have known at the time of distribution or sale that the product involved was in a defective condition unreasonably dangerous to the user or consumer.²⁰³

It is apparent that the Product Liability Act places severe limits upon a plaintiff seeking to recover from a "middle man" or retailer.

One question should be addressed regarding that statute. KRS 411.340 speaks in terms of "the manufacturer."²⁰⁴ The statute ignores the possibility, indeed the probability, that there will be more than one manufacturer. Products consisting of component parts offer an obvious example of a situation in which more than one manufacturer may be involved. It has been suggested that in light of general products law which would impose liability on both the component parts manufacturer and the principle manufacturer, both should remain liable.²⁰⁵ Moreover, since a distributor's avoidance of liability is dependent on having jurisdiction over "the manufacturer," jurisdiction should be gained over all manufacturers before any distributor is free from liability.²⁰⁶

SUMMARY

In summary, Kentucky recognizes the three basic theories of warranty, negligence and strict liability in a product liability case. The Product Liability Act, however, inserts some peculiarities into Kentucky law. For firm answers we must patiently await judicial clarification.

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²⁰³ Id.
²⁰⁴ Id. (emphasis added).
²⁰⁵ EADES, KY. PRODUCTS LIABILITY, §§ 2-7 (1981).
²⁰⁶ Id.
THE CHANGING FACE OF CRIMINAL PROCEDURE 
FOR THE GENERAL PRACTITIONER

A. Thomas Johnson*

INTRODUCTION

This article is an overview of recent United States Supreme Court decisions and Kentucky Appellate Court decisions. In making the selection, it was not intended to present an exhaustive list of all important decisions. What is attempted is a culling of those decisions considered most important for the general criminal law practitioner in the State of Kentucky.

I. THE FOURTH AMENDMENT¹

A. The Warrant Clause

Almost everyone is aware by now that Illinois v. Gates² was a landmark case. In Gates, the Bloomingdale, Illinois, Police Department conducted an investigation sparked by an anonymous letter alleging that Gates and his wife were dealing in narcotics. Based on the tip and certain corroborative evidence, which involved the surveillance of legal but "suspicious" activity because it tended to corroborate the tip, the police sought and obtained a search warrant for the Gates' car and home.³ When the warrant was executed, the police found a large quantity of marijuana.⁴ The trial court suppressed the evidence,⁵ and that decision was affirmed by the Appellate courts in Illinois.⁶ The Gates petitioned the United States Supreme Court and the Court granted certiorari in 1982. Gates is significant for it revised the standard for probable cause

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1. U.S. Const. amend. IV.
3. Id. at 2326.
4. Id.
5. Id. at 2320-21.
under the fourth amendment by overruling the fixed and rigorous standards set out in *Aguilar v. Texas,*\(^7\) and *Spinelli v. United States.*\(^8\) The catch phrases of the latter two cases are only faintly and cryptically reechoed in *Gates:*

> The task of the issuing magistrate is simply to make a practical, common sense decision whether, given all the circumstances set forth in the affidavit before him, including the “veracity” and “the basis of knowledge” of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. . . . We are convinced that this flexible, easily applied standard will better achieve the accommodation of public and private interests that the Fourth Amendment requires than does the approach that has developed from *Aguilar* and *Spinelli* (citations omitted).\(^9\)

The quotation asserts that the new standard is a flexible one, and that a balancing approach or an “accommodation” must be undertaken by the issuing magistrate. Additionally, the question of how a balance should be struck is to be determined according to the totality of the circumstances.\(^10\) Last term, the United States Supreme Court left no doubt that in *Gates* it did not merely “refine” the familiar two-prong test but that it:

> Rejected it [the test] as hypertechnical and divorced from ‘the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.’\(^11\)

The defense practitioner’s traditional fall-back position from a restricted federal interpretation of constitutional issues is to look to state law and see if it provides more liberal protection for the individual. State law may be applied as long as it is consistent with federal constitutional guarantees.\(^12\) On the issue of probable cause, it appears that Kentucky closely follows the recent federal

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7. 378 U.S. 108 (1964) (the magistrate must be informed of some of the circumstances from which the informant concluded that the things were where he said they were, and some of the underlying circumstances from which the officer concluded that the informant was credible or his information reliable). *Id.* at 114.

8. 393 U.S. 410 (1969) (an informant’s tip must set forth a reason to believe that the informant is reliable and the reasons the informant had for concluding that criminal activity was occurring, beyond casual rumor or reputation). *Id.*


10. *Id.*


interpretations. A 1984 decision, *Beemer v. Commonwealth*, adopts the *Gates* approach: Justice Vance, writing for the majority, quoted extensively from *Gates* in his opinion. The opinion overthrows several Kentucky decisions interpreting the Kentucky Constitution's probable cause requirement, leaving no doubt about the stance Kentucky will take.

Autumn of 1984 brought further changes. It seemed almost anticlimactic when the United States Supreme Court handed down *Massachusetts v. Sheppard,* and *United States v. Leon,* which significantly curtailed the effectiveness of the exclusionary rule in fourth amendment cases. The United States Supreme Court had *sua sponte* ordered reargument on this issue in the *Gates* context when it was considering *Gates.* In *Gates,* however, the Court abandoned the *Aguilar-Spinelli* two-pronged test and replaced it with the flexible "totality of circumstances approach" to probable cause. The Court found in *Gates* that the magistrate's decision to issue a warrant based on the affidavit should be sustained because there was a "substantial basis" for concluding that probable cause existed. Hence, the Court did not need to reach the issue that it had ordered the parties to brief in *Gates*; which was the applicability of the exclusionary rule in the context of a search warrant lacking probable cause or in other ways invalid where an executing officer executes it in good faith. The Court, however, did have the opportunity to decide this issue in the fall of 1984. *Massachusetts v. Sheppard* and *United States v. Leon* do much to curtail the effectiveness of the exclusionary rule in such a context.

*Leon,* like *Gates,* is another confidential informant search/warrant/drug offense case. In *Leon,* the United States District Court

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15. The Supreme Court of Kentucky expressly overruled Berkshire v. Commonwealth, 471 S.W.2d 695 (Ky. 1971); Thompson v. Commonwealth, 472 S.W.2d 884 (Ky. 1971); and Buchenburger v. Commonwealth, 482 S.W.2d 747 (Ky. 1972) in *Beemer*, 665 S.W.2d at 915.
19. *Id.* at 2336.
20. *Id.* at 2321.
sat as the trial court, and held that the search warrant, which was
issued by a state court judge who had found probable cause, ac-
tually lacked probable cause, but found that the officer who had
executed the warrant did so in good faith.\textsuperscript{24} \textit{Sheppard} presented
a similar problem in the context of a different type of crime. In
\textit{Sheppard}, the state trial court held that the search warrant, issued
by a state court judge who had found probable cause, was a faci-
ally invalid warrant because it did not describe with particularity
the items to be seized as evidence of a robbery, but that the police
had acted in good faith in executing the warrant.\textsuperscript{25} In \textit{Leon} and
\textit{Sheppard}, the incriminating evidence was either excluded from trial
or, on appeal, convictions based on admitting such evidence were
reversed under \textit{Mapp v. Ohio},\textsuperscript{26} \textit{Weeks v. United States},\textsuperscript{27} and their
progeny.\textsuperscript{28}

On review to the United States Supreme Court, the Court
reversed both decisions and created a "good faith" exception to
the exclusionary rule.\textsuperscript{29} The Court deferred to the police officers
in both cases stating that it was the \textit{issuing magistrate} who created
the error of constitutional dimension and in neither case did the
executing officer act in such a way that it could be said that he
capitalized on the error.\textsuperscript{30}

In short, the United States Supreme Court looked to the purpose
of the exclusionary rule in both cases and found that its purpose
was to deter unlawful police behavior, and that such a purpose
would not be served by applying the rule where the police acted
in good faith. Some of the indicia of bad faith turn on finding that
the warrant or affidavit is so lacking in indicia of probable cause
or in particularity of description of items and places to be seized
or searched as to render belief in the validity of the warrant en-
tirely unreasonable.\textsuperscript{31} It should be noted that the Court also con-
ceded that the exclusionary rule would remain applicable if the

\textsuperscript{24} \textit{Id.} at 3411.
\textsuperscript{25} \textit{Sheppard}, 104 S. Ct. at 3428.
\textsuperscript{26} 367 U.S. 643 (1961) (which applied the exclusionary rule to the states).
\textsuperscript{27} 232 U.S. 383 (1914) (which originally applied the exclusionary rule to federal
prosecutions).
\textsuperscript{28} See \textit{Stone v. Powell}, 428 U.S. 465 (1976); \textit{United States v. Peltier}, 422 U.S. 531 (1975);
\textsuperscript{29} \textit{Leon}, 104 S. Ct. at 3423; \textit{Sheppard}, 104 S. Ct. at 3429-30.
\textsuperscript{30} \textit{Leon}, 104 S. Ct. at 3421; \textit{Sheppard}, 104 S. Ct. at 3429.
\textsuperscript{31} See \textit{Leon}, 104 S. Ct. at 3422; \textit{Sheppard}, 104 S. Ct. at 3429; and \textit{Gates}, 103 S. Ct. 2317,
2347 (White, J., concurring).
issuing magistrate wholly abandoned his neutral and detached role in issuing the warrant.\textsuperscript{32}

It must be emphasized that the \textit{Gates} decision mandates deference to the issuing magistrate by the reviewing court:

[T]he duty of a reviewing court is simply to ensure that the magistrate had a "substantial basis for . . . concluding" that probable cause existed.\textsuperscript{33}

This deference was reemphasized in \textit{Massachusetts v. Upton}\textsuperscript{34} where the court rejected any after-the-fact \textit{de novo} probable cause determination performed by a reviewing court as being inconsistent with "the desire to encourage use of the warrant process by police officers . . ."\textsuperscript{35}

It is no secret that as a result of these cases the practice of the criminal defense attorney—as well as that of his adversary—is dramatically altered. These decisions affecting probable cause and warrants, and the review thereof, are decisions which affect arrest and search warrants of all types. They are decisions which affect the use of pretrial suppression motions and motions to dismiss. The usefulness of such motions is obviously weakened as the nation makes room to accommodate more effective police work.

\textit{Leon} and \textit{Sheppard} mandate that the question of whether the exclusionary rule should apply in a particular context is to be determined by balancing the alleged social costs of the rule's application against the extra degree of deterrence of unlawful police activity achieved by excluding the evidence at issue. Nothing fancy is involved and the new rule appears to be a simple cost-benefit formula. The problem is that there is really no reliable way to quantify or weigh the types of things that should be balanced. It requires a value judgment on the part of a judge to balance the costs and the benefits without the help of other guidelines.

\textbf{B. The Warrantless Area}

Perhaps the most interesting aspect in the changing times of the fourth amendment is that the United States Supreme Court is studying and redefining more than just situations that involve

\textsuperscript{32} \textit{Leon}, 104 S. Ct. at 3422; see also \textit{Lo-Ji Sales, Inc. v. New York}, 422 U.S. 319 (1979).


\textsuperscript{34} 104 S. Ct. 2085 (1984).

\textsuperscript{35} \textit{Id.} at 2088.
the issuing of a warrant. It must be recalled that if a “search” or “seizure” is reasonable then the warrant requirements of the fourth amendment may not be applicable ab initio. The precedent here is *Terry v. Ohio*, the “stop and frisk” case. Chief Justice Warren stated in *Terry* that “‘search’ and ‘seizure’ are not talismans.” He also stated that a stop is a seizure and that a pat down is a search. The issue is the reasonableness of both in light of the circumstances which justified the interference in the first place. Hence, the warrant clause with its attendant requirement of probable cause is inapplicable if the stop and pat down are “reasonable.” This decision was rendered despite the then fresh holding of *Katz v. United States*, that most “searches conducted outside the judicial process without prior approval by a judge or magistrate are *per se* unreasonable. . . .”

It is intriguing here to note how the Warren Court determined reasonableness under the first clause of the fourth amendment and to compare this to what *Gates* said about probable cause under the warrant clause, the second clause of the fourth amendment. The Warren Court held:

In order to assess the reasonableness of Officer McFadden’s conduct as a general proposition, it is necessary ‘first to focus upon the governmental interest which allegedly justifies official intrusion upon the constitutionally protected interests of the private citizen’ for there is ‘no ready test for determining reasonableness other than by balancing the need to search [or seize] against the invasion which the search [or seizure] entails.’

The balancing of costs of individual privacy versus social benefits is the predominant notion—as in *Gates* for probable cause.

In *Michigan v. Long*, Justice O’Connor dealt with the stop of a defendant’s vehicle after he was observed driving erratically. After the defendant exited the car, the officers noticed a knife

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37. Id. at 19.
38. Id.
40. Id. at 357.
43. 103 S. Ct. 3469 (1983).
on the floorboard as the defendant was about to re-enter the car to get his license and registration. This occurred prior to the defendant being placed under arrest. The officers subjected the defendant to a pat down (which revealed no weapons) and searched the automobile's passenger compartment, lifting an armrest inside the vehicle which revealed a bag of marijuana. The defendant was arrested and charged with possession of marijuana. At the trial of the case the evidence of the marijuana was admitted and the defendant was convicted.\^4 The decision of the trial court was affirmed at the state appellate level, but was reversed by the Michigan Supreme Court.\^5 The United States Supreme Court held that the officers could have reasonably believed that there was a danger that the detainee would gain access to a weapon, and upheld the decision to admit the evidence because the evidence was produced as a result of a Terry-type stop.\^6 In so holding, the court stated that the search, although intruding into the passenger compartment of the vehicle, was limited to those areas in which a weapon could be placed or hidden. The trial court had determined that the leather marijuana pouch could have contained a weapon so it was reasonable to have searched the leather pouch.\^7 The Terry mandate that the officer be able to point to "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the intrusion,"\^8 seemed to have been met, and the United States Supreme Court per Justice O'Connor so found.\^9 The important point is the scope of the intrusion that was upheld under Terry principles.

\textit{U.S. v. Sharpe}\^10 holds similarly that a twenty minute detention is a reasonable detention under Terry principles.

In \textit{U.S. v. Johns},\(^1\) the United States Supreme Court upheld a warrantless search for packages three days after their removal.

\begin{thebibliography}{9}
\bibitem{1} Id. at 3473.
\bibitem{3} \textit{Long}, 103 S. Ct. at 3481.
\bibitem{4} Id.
\bibitem{5} \textit{Terry}, 392 U.S. at 21.
\bibitem{6} \textit{Long}, 103 S. Ct. at 3481.
\bibitem{7} 105 S. Ct. 1566 (1985).
\bibitem{8} 105 S. Ct. 881 (1985).
\end{thebibliography}
from vehicles police had probable cause to believe contained contraband. The vehicles had been immobilized and their occupants arrested after customs officials, who had been watching the drug smuggling operation involving these vehicles observed several packages being loaded into them from two small airplanes at a remote air strip. Justice O'Connor maintained the delay in making the search of the packages themselves was not unreasonable nor outside the scope of United States v. Ross,\(^{52}\) which justified the more or less contemporaneous search of all parts of a motor vehicle when there is probable cause to search the vehicle itself.

Analogously, in a sixth amendment case,\(^{53}\) the United States Supreme Court held that the ordinary stop of an automobile does not call into play a rendition of Miranda\(^{54}\) rights before the defendant is asked questions or performs sobriety tests at this stop. The holding was based on the principles enunciated in Terry and the “comparatively nonthreatening character of detentions of this sort.”\(^{55}\)

Although the holding is not overly clear, the same rationale appears to have been applied in Kentucky in Graham v. Commonwealth,\(^{56}\) which must be read along with its companion (codesendant) case, Whisman v. Commonwealth,\(^{57}\) in which the same issue was decided in the same way but on different grounds by different appellate panels. In Graham, the Kentucky Court of Appeals concluded that anonymous tips stating that someone in a white Camaro was waving a gun at 2:00 A.M. at an intersection in Maysville would provide a basis for a Terry-type stop of a white Camaro that was in the general location shortly after the tips were received.\(^{58}\) The car was stopped, and prior to any arrest, the officers noted pills on the floorboard in plain view. One of the detainees stated that the pills were his prescribed medication for an amputated leg.\(^{59}\) The officers also opened the glovebox and found a gun. The record indicated that the officers were afraid of being

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52. 102 S. Ct. 2157 (1982).
55. Berkemer, 104 S. Ct. at 3151.
58. Graham, 667 S.W.2d at 699.
59. Id. at 698.
shot because of the report they had received about the gun. The Graham panel apparently validated the search as a Terry-type stop and search. This is especially obvious when read against Whisman, which uses Gates in finding probable cause to support a warrantless search of the vehicle and all of its parts. If this analysis is correct, the Graham panel's decision seems consistent with the Michigan v. Long expansion of the Terry-type stop and search.

The Whisman panel approach falls into line with the Kentucky Supreme Court's decision in Estep v. Commonwealth, which held that where probable cause exists for the warrantless stop and search of an automobile (believed to have been used in a robbery based on a tip stating the license number of the car used in the robbery), even in the absence of exigent circumstances, "every part of the vehicle and its compartments and contents that may conceal the object of the search" may be lawfully searched. In the Estep case, it appears that the defendant had already exited the car and had been placed under arrest before the search occurred. No exigency existed for the warrantless search of all of the parts of the car, including the glovebox where the gun used in the robbery was found, but the decision admitting the gun into evidence was upheld.

In short, it appears that in the warrantless search area Kentucky law is falling into line with the position taken by the United States Supreme Court. It is clear that the flexing of the probable cause standard for a warrant requirement and the broadening of the Terry-type stop and search is changing fourth amendment practice in Kentucky, as well as in the federal courts. A balancing and consideration of the totality of circumstances is required. These circumstances balance the need for privacy of the individual against the need for police protection and the need for police to gain evidence of the crime for the public's protection. Just how much weight is to be put on each item is left open.

An important question for the near future appears to be whether the United States Supreme Court and/or the Kentucky courts will

60. Id.
61. Id.
62. Whisman, 667 S.W.2d at 397.
63. 663 S.W.2d 213 (Ky. 1983).
64. Id. at 215.
65. Id.
66. Id. at 216.
consider the good faith exception to the exclusionary rule in the context of a warrantless search or a *Terry*-type stop and search. It is one thing to check the good faith of the executing officer in the background of a prior decision by a warrant-issuing magistrate, but it is quite another to check good faith where there is no intervening warrant upon which the officer can base his actions.

II. SIXTH AMENDMENT

It would seem that with all the changes occurring with interpretations of the fourth amendment that other changes in the interpretations of other primarily criminal law provisions of the Bill of Rights would proportionately pale into insignificance. However, that is not the case. The times are changing in other areas as well.

One especially significant case is *New York v. Quarles*, and the exception it creates for the *Miranda* warnings rule. In *Quarles*, police officers were approached by a woman who told them that she had just been raped at gunpoint. She gave a description of her assailant and said that the person had gone into a nearby supermarket. The police entered the supermarket, spotted the defendant and apprehended him. In the process of apprehending him, the officers discovered that he had on an empty shoulder holster. The defendant was handcuffed and surrounded by four peace officers when he was asked about the location of the gun. The questioning took place prior to reading him the *Miranda* rights. The defendant pointed to the location of the gun (among some empty cartons) and said "the gun is over there." The gun was suppressed at trial, as was the statement of the defendant. The decision was upheld by higher state appellate court.

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67. U.S. CONST. amend. VI.
69. Id. at 2630.
71. *Miranda* rights must be given once a person is in police custody which entails inquiry into "whether there is a "formal arrest or restraint on freedom of movement" of the degree associated with a formal arrest." *Quarles*, 104 S. Ct. at 2631, quoting California v. Beheler, 103 S. Ct. 3517 (1983).
fit squarely within the *Miranda* context. The United States Supreme Court per Justice Rehnquist held, however, that there is a “public safety” exception to the mandate that *Miranda* warnings be given under such circumstances, and that the evidence and statement would be admissible at trial even though the defendant was not read his *Miranda* rights prior to being asked the question. The exception is based on the need to protect the public from, in this case, a carelessly pitched gun. The Court appears to hold that the availability of the public safety exception does not depend upon the motivation of the individual officers involved in the proceedings. The Court refused to consider whether the officers’ question was motivated by a desire to obtain evidence that could be used against the accused or by a bona fide concern for public safety. The Court found it sufficient that the question was “reasonably related” to public safety. Justice Rehnquist stated that:

> [W]e think police officers can and will distinguish almost instinctively between questions necessary to secure their own safety or the safety of the public and questions designed solely to elicit testimony from a suspect.

Justices Marshall, Brennan and Stevens dissented.

In the same vein, *Nix v. Williams,* created an “inevitable discovery” exception to the exclusionary rule. The Court had before it the same defendant as in *Brewer v. Williams,* (the “Christian burial” speech case in which statements obtained in the absence of the defendant’s counsel during the rendition of the “speech” were held inadmissible because the accused’s previously invoked sixth amendment right to counsel was violated). The *Nix* court held that while the statements may not be admissible, the evidence (“fruit of the poisonous tree, as it were”) regarding the body would

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72. Quarles, 104 S. Ct. at 2633.
73. Id.
74. Id. at 2632.
75. Id. at 2633.
76. 104 S. Ct. 2626, 2641 (Marshall, J., dissenting) (O’Connor, J., dissented in part and concurred in part).
79. The “fruit of the poisonous tree” doctrine was first announced in *Silverthorne Lumber Co. v. United States,* 251 U.S. 385 (1920). This exception had not been recognized previously by the United States Supreme Court, but had been endorsed by every federal court of appeals. See *Nix,* 104 S. Ct. at 2507 n. 2.
be admissible under the theory that the body would ultimately have been recovered anyway. The state court had found that the body would have been recovered in any event because it was located in an area that was being subjected to an intensive search.

Finally, Oregon v. Bradshaw, is especially significant for the practitioner. In Bradshaw, the defendant had invoked his sixth amendment right to counsel after being placed in custody and subjected to interrogation. Once the defendant invoked his sixth amendment right to counsel the interrogation ceased. A short time later, however, the defendant asked of an officer "well, what is going to happen to me now?" and a general discussion followed, concerning the charges and where the defendant was to be taken. During the course of the discussion the officer suggested that the defendant take a polygraph test and the defendant agreed to do so. The defendant took the test and then gave a complete confession. The Court held that there is a two-step approach to see if there has been a waiver of a previously invoked right to counsel. First, the defendant must initiate the conversation which opens the door to interrogation, and second, the government must show a knowing waiver. In this particular case, the significance of the decision is that the rather innocuous question asked by the defendant was considered to have opened the door to a general discussion about the investigation. The Court considered the question as different from a question, for example, about a drink of water. It held that the question "well, what is going to happen to me now?" by the defendant did in fact initiate the whole interrogation process.

The Quarles type situation is probably a bit beyond the control of defense counsel as well as of prosecutors. Let the hope be expressed that Justice Rehnquist is correct that the police will in fact distinguish valid public safety inquiry from other types of inquiry designed to gain evidence and make only "public safety" inquiries prior to reading a suspect his Miranda rights.

The moral to be learned from these sixth amendment cases is
that defense counsel must instruct his client to keep silent after invoking the right to counsel/right to remain silent. It should be noted that a defendant's invocation of his sixth amendment rights need not be articulated with great clarity. In *Smith v. Illinois*, the United States Supreme Court held that once the defendant does, however ambiguously or incoherently, seem to invoke his desire to have his lawyer present, all interrogation must immediately cease. A valid waiver is not established by showing that the accused, in fact, responded to further police-initiated custodial interrogation. While *Bradshaw* places the risk on the defendant of initiating a previously interrupted process of interrogation, *Smith* places the onus on the police to stop the interrogation once the defendant invokes his rights, however incoherently.

A final significant case in the sixth amendment area for practicing criminal lawyers is *Strickland v. Washington*, in which the United States Supreme Court set the standard for ineffective assistance of counsel as analogous to that of basic tort law negligence. The questions to be asked are, first, considering all the circumstances, did the attorney's performance fall below an objective standard of reasonableness, and second, was there a reasonable probability that, but for the attorney's errors or omissions, the result at trial would have been different. Basically, the same standard applies in Kentucky law as a result of *Henderson v. Commonwealth*, Such standard applies to both appointed and retained counsel.

**III. THE FIFTH AMENDMENT**

There are two significant fifth amendment cases for the practicing criminal lawyer here. In *California v. Trombetta*, the United States Supreme Court held that the due process clause of the fourteenth amendment does not require the prosecution to save breath
samples in drunk driving cases involving breathalyzer results. The defendant had claimed at trial an independent analysis of the breath sample would have enabled him to impeach the incriminating test results and thus provide some exculpatory evidence. The trial court found that the arresting officers and existing technology had the capacity to preserve the breath samples. The trial court, however, also found that the officers did not destroy the samples with any intent to deprive the defendant of evidence. The United States Supreme Court also found that the evidence did not possess exculpatory value that was apparent before the evidence was destroyed, and that the evidence was not of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means. The Court also found that the test itself was highly reliable, that the results of the test itself were highly reliable and that the test and its results were impeachable in other ways. Hence, the breath sample did not have to be provided to the defendant. The Court left open whether such samples would have to be provided if any one or more of the conditions it discussed were not present.

In this area Kentucky may provide more protection for the individual. Green v. Commonwealth held that a defendant has the right to test drug samples which are to be used as evidence against him at trial. The Kentucky Court of Appeals held that the state crime lab's unnecessary, though unintentional, destruction of a sample, makes the report results inadmissible unless the defendant

95. Id. at 2531.
96. Id. at 2531, n. 3.
98. Trombetta, 104 S. Ct. at 2534-35 (the Court noted that the defendant had the right to impeach the evidence on the basis of operator error, improper calibration, or certain interferences known to affect the results of these tests).
99. Id. at 2534 (the conditions were that the defendant is able to obtain comparable evidence by other means, and the evidence must possess exculpatory value that is apparent prior to destruction).
100. 31 Ky. Law Sum. at 2 (Cir. Ct. Fayette County. 8/10/84) (pending motion for discretionary review by the Kentucky Supreme Court).
101. KY. R. CRIM. P. 7.24(1)(b) allows the defendant access to "results or reports of ... scientific tests or experiments made in connection with the particular case." KY. R. CRIM. P. 7.24(2) allows the defendant "to inspect ... tangible objects ... upon a showing that the items sought may be material to the preparation of his defense."
attends the actual testing, or obtains notes of the expert who performed the test, or receives other information sufficient to enable him to obtain his own expert evaluation. Note that this decision turns on a rule of criminal procedure and not the sixth amendment. It would seem that such reasoning could be applied to the drunk driving case despite Trombetta.

IV. TEN SIGNIFICANT KENTUCKY STATE COURT DECISIONS WHICH AFFECT THE PRACTICE OF CRIMINAL LAW

1. Commonwealth v. Callahan

The Callahan case holds clearly and simply that reasonable doubt may not be defined by any jury instruction and that counsel may not attempt to define it at any point during the trial, including voir dire, closing or opening.

2. Commonwealth v. Gadd

The Gadd case is important under Kentucky’s persistent felony offender statute, Kentucky Revised Statute 532.080, and in turn has an impact upon Kentucky Rules of Criminal Procedure [hereinafter cited as RCr] 11.42 and Kentucky Rules of Civil Procedure [hereinafter cited as CR] 60.02. Gross v. Commonwealth had foreclosed the reopening of a judgment of conviction under CR 60.02 in a subsequent proceeding because the question of the constitutional invalidity of the predicate conviction had not been brought up during the persistent felon trial; and Alvey v. Commonwealth, foreclosed the reopening of such a judgment by

\[\begin{align*}
102 & \text{ Green, } 31 \text{ Ky. Law Sum. } 11 \text{ at } 2. \\
103 & \text{ 104 S. Ct. } 2528 \text{ (1984).} \\
104 & \text{ 675 S.W.2d } 391 \text{ (Ky. } 1984). \\
105 & \text{ Id. at } 393. \\
106 & \text{ 665 S.W.2d } 915 \text{ (Ky. } 1984). \\
107 & \text{ Ky. Rev. Stat. § } 532.080 \text{ (1985) provides for more stringent sentencing of persons found to be persistent felony offenders, which is anyone who is presently convicted of a felony after one (second degree) or more (first degree) previous felony convictions, than the sentencing requirements of Ky. Rev. Stat. § } 532.060 \text{ provide. Ky. R. Crim. P. } 11.42 \text{ allows the defendant to collaterally attack his sentence directly in the court that passed sentence on him. Ky. R. Civ. P. } 60.02 \text{ allows relief from final judgment of a court if grounds such as mistake, inadvertance, surprise, excusable neglect, newly discovered evidence, perjury, fraud or other reason of extraordinary nature justifying relief is found.} \\
108 & \text{ 648 S.W.2d } 853 \text{ (Ky. } 1983). \\
109 & \text{ 648 S.W.2d } 858 \text{ (Ky. } 1983). \\
\end{align*}\]
a motion under RCr 11.42 in the same context. Gadd states that the question of the underlying constitutional invalidity of the predicate conviction (judgment) must be raised by the defendant and decided before the trial by pretrial motion in the persistent felony offender case. In essence, it is not reversible error for the trial judge at the persistent felony offender trial not to admit evidence at trial of the constitutional invalidity of the predicate conviction on grounds that the issue of the constitutional validity of the predicate conviction has been waived by the defendant's failure to bring it up by pretrial motion. The rule could not be clearer.

3. **Wright v. Commonwealth**

The case of *Wright v. Commonwealth* makes life a little easier for the criminal defense attorney and may increase the pretrial workload for the Commonwealth attorney. The case interprets RCr 7.26 and holds that it is within the discretion of the trial court to order pre-trial production of prosecution witness statements for examination by defense counsel. Previously the rule had been almost universally interpreted to allow production of such material only during trial and prior to the witness's testifying. Obviously the more time the defense has to examine such statements the better he can prepare the cross-examination.

4. **Richmond v. Commonwealth**

It is only fair that life be made easier for the other side as well, hence the Kentucky Supreme Court's decision in *Richmond v. Commonwealth* which makes clear that any and all district and circuit judges have the power and authority to issue warrants of any kind, and that such warrants, signed anywhere in the state run "to the four corners of the realm." The holding presents a potential open door that may lead to forum shopping for warrant issuers.

110. Gadd, 665 S.W.2d at 918.
111. 637 S.W.2d 635 (Ky. 1982).
112. KY. R. CRIM. P. 7.26 allows the defendant to demand production of any statements made by witnesses who are to be called by the Commonwealth, before the witness is called to testify.
113. Wright, 637 S.W.2d at 636.
114. 637 S.W.2d 642 (Ky. 1982).
115. Id. at 645.
5. Commonwealth v. Howard\textsuperscript{118}

The case holds that under RCr 7.20 and 7.22 prior testimony (at a pretrial motion hearing, for example) of a now unavailable witness is admissible at trial if found by the trial court to be reliable and trustworthy, formerly subject to cross-examination, and pertinent to the same offense charged.\textsuperscript{117} An additional requirement is that the party seeking to introduce it must have made diligent but unsuccessful attempts to have the witness available at the trial.\textsuperscript{118} In a very real way, this allows the use of a type of "deposition" at a criminal trial. In Howard, a prosecution witness testified at a bond reduction hearing initiated by the defendant, but this same prosecuting witness could not be located for trial. Her testimony from the transcript of the bond reduction hearing was not allowed at the trial of the case, but the court of appeals reversed on this issue.\textsuperscript{119}

6. Commonwealth v. Richardson\textsuperscript{120}

Richardson overruled Cotton v. Commonwealth\textsuperscript{121} and promulgated a new rule in this state for impeachment by prior felony conviction. The new rule states that such impeachment may be accomplished by the use of any felony so long as it is not too remote in time. The question must first be asked of the defendant if he has been so convicted. If he admits the conviction, that is the end of the matter. If he denies it, the Commonwealth may prove the previous conviction by the record, but in no instance can the nature of the offense be disclosed to the jury by oral testimony or by the jury's seeing the actual record.\textsuperscript{122} The effect of the holding is to reinstate the rule of Cowan v. Commonwealth.\textsuperscript{123}

\textsuperscript{116} 665 S.W. 2d 320 (Ky. Ct. App. 1984). KY. R. CRIM. P. 7.20 allows the use of deposition testimony at trial or hearing if certain conditions are met. It also provides for objections to such testimony. KY. R. CRIM. P. 7.22 allows previous testimony, in the form of a duly authenticated transcript, from a previous trial of the same offense to be used as a deposition.

\textsuperscript{117} Howard, 665 S.W.2d at 323.

\textsuperscript{118} Id. at 322.

\textsuperscript{119} Id.

\textsuperscript{120} 674 S.W.2d 515 (Ky. 1984).

\textsuperscript{121} 454 S.W.2d 698 (Ky. 1970).

\textsuperscript{122} Richardson, 674 S.W.2d at 517-18.

\textsuperscript{123} 407 S.W.2d 695 (Ky. 1966).
7. *Ice v. Commonwealth*\(^{124}\)

The case holds that the defendant has the burden to prove insanity. The prosecution does not have the burden to affirmatively prove sanity after the defendant has put on proof of his insanity. If there is any evidence of insanity, a jury issue is presented.\(^ {125}\)

8. *Commonwealth v. Karnes*\(^{126}\)

This case considered the question whether the circuit court committed reversible error by dismissing the case due to double jeopardy since the indictment was returned subsequent to the assumption of jurisdiction by the district court before an indictment came down.\(^ {127}\) There is no question but that the district court can dispose of the case entirely by reducing the charges to misdemeanors which are within its subject matter jurisdiction. But if a charge issues in the form of an indictment from the circuit court prior to dismissal or other final disposition by the district court, the Kentucky Supreme Court clearly states that as soon as the indictment issues the district court loses jurisdiction and must dismiss it or transfer it to the circuit court. If the district court has entered final judgment disposing of the case as a misdemeanor prior to indictment, however, that judgment remains and disposes of the case regardless of the subsequent indictment.\(^ {128}\)

It appears that principles of comity should apply in this situation and that the court first chosen should be allowed to proceed until it disposes of the case. It seems that allowing the circuit court to interrupt and take precedence grants the prosecution an advantage the defendant lacks.


Criminal appellate practitioners should take note of *Wine v. Commonwealth* which mitigates the harsh consequence of dismissing an appeal for counsel's failure to timely file his brief on appeal.

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124. 667 S.W.2d 671 (Ky. 1984).
125. *Id.* at 678.
126. 657 S.W.2d 583 (Ky. 1983).
127. *Id.*
128. *Id.* at 583-84.
(The case involved court appointed counsel which may or may not be relevant.) At the time of this writing Wine is pending discretionary review by the Kentucky Supreme Court. The appellate court in this case stated:

The proper remedy for inexcusable neglect by court appointed counsel is not dismissal of the appeal of the client who has not condoned or is ignorant of the neglect. The proper remedy lies with professional disciplinary proceedings, and, where appropriate, the contempt powers of the court..."

It should be noted that regardless of the outcome of Wine, new CR 73.02(2) effective January 1, 1985, now recognizes less harsh alternatives than dismissal for failure to timely comply with the appellate rules (except for the untimely filing of the notice of appeal or notice of cross appeal, the consequence of which apparently remains dismissal of the appeal).

Further, such an error as that which occurred in Wine has due process impact as the United States Supreme Court recognized recently in Evitts v. Lucey in reversing a dismissal of an appeal to the Kentucky Court of Appeals for counsel’s failure to timely file his Statement of Appeal. The Kentucky Supreme Court had affirmed. Lucey had been convicted at the trial court level. He then sought federal habeas corpus relief which was granted and upheld on the basis that Douglas v. California mandates that due process requires effective assistance of counsel on the first appeal of right (the court found the first appeal to the Kentucky Court of Appeals is an appeal of right in Kentucky) and a dismissal on procedural grounds similar to those involved here would foreclose that right to effective assistance of counsel on the first appeal of right. This is an important case for all appellate practitioners, and will probably add more cases to the already crowded appellate dockets.

10. Slone v. Commonwealth

Finally, the court of appeals has reiterated the ruling of Bell

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130. Id. at 2.
131. Ky. R. Civ. P. 73.02 (2).
133. 83 S. Ct. 792 (1963).
that counsel who objects at trial must obtain a ruling by the trial court on the objection or else the objection will be considered waived and that issue will not be preserved for appeal.

CONCLUSION

The ten significant Kentucky decisions cited and described above are and should function as "red flags" for the criminal law practitioner in this state. The rules set out in the cases are clear and succinct and should be of benefit to even the occasional criminal practitioner.

The study of the recent decisions relative to the fourth, fifth and sixth amendments to the United States Constitution by the United States Supreme Court, and by the Kentucky courts, may prove troublesome to some practitioners as defense attorneys for the swing of the pendulum has indeed occurred. The defense practitioner must now look for new challenges and perhaps keep raising those of old, just as the prosecution bar was forced to do during the era of the Warren Court and the early years of the Burger Court.

135. 473 S.W.2d 820 (Ky. 1971).
136. Stone, 677 S.W.2d at 897.
THE SOCIAL SECURITY ADMINISTRATION'S POLICY OF NON-ACQUIESCENCE

James Roy Williams*

INTRODUCTION

The Social Security Administration, as an agency of the executive branch of the federal government, has followed a policy of non-acquiescence in decisions of federal courts involving claims for benefits under the Social Security Act. When the Social Security Administration [hereinafter referred to as the Administration] disagrees with a decision of a federal district or circuit court, instead of appealing the decision, the Administration may simply disregard the effect of the decision except in the case to which it applies, and thereby ignore any precedential effect to the decision.1 This article will discuss implications of the policy of non-acquiescence, individual and class action challenges to the policy, and concerns of Congress about the policy.

I. THE POLICY OF NON-ACQUIESCENCE AS FOLLOWED BY THE SOCIAL SECURITY ADMINISTRATION

The policy of non-acquiescence is an established written policy which the Administration has followed for several years2 and one which the Administration expects its personnel to follow consistently.3 As stated in a recent memorandum, the Administration abides only by decisions rendered by the United States Supreme Court, and does not consider itself bound by decisions

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1. See Non-acquiescence, 5 SOCIAL SECURITY FORUM 9 (April 1983). (The SOCIAL SECURITY FORUM is published by the National Organization of Social Security Claimants Representatives, P.O. Box 794, Pearl River, New York 10965.)

2. See Ass'n of Admin. Law Judges, Inc. v. Schweiker, No. 83-0124 (D.C., decided Sept. 10, 1984). (In this suit brought by the administrative law judges of the Social Security Administration, there was testimony by Burton Berkley of the Social Security Administration that this policy has existed since the Social Security Administration was established.)

3. See SOCIAL SECURITY ADMINISTRATION, OFFICE OF HEARINGS AND APPEALS, OHA HANDBOOK SECTION 1-161 (Transmittal Sheet Number 1-9, issued December, 1979). This section instructs the administrative law judges not to follow federal court decisions which are inconsistent with the Administration's previous interpretation of the law, regulations or rulings.
of federal district courts or circuit courts of appeals except in the individual case being litigated. Federal court decisions, thus, have no precedential effect on other cases with similar facts.

Briefly, the policy works this way. If claimant A has applied for disability benefits, has exhausted his administrative remedies within the Administration, and has filed an appeal to federal court; and, if the federal court decides in his favor, the Administration will honor the decision unless it decides to appeal. If claimant B files an application for disability benefits alleging that the same medical condition disables him as disabled A, and if he has similar medical findings as claimant A had, the Social Security Administration is not required to follow the court’s decision regarding claimant A. In fact, it may deny claimant B’s application for benefits throughout the administrative process, thereby forcing claimant B to litigate his claim in the same court. Any precedential value of the court’s decision in claimant A’s case is ignored by the Administration.

Furthermore, there is no mechanism within the Administration to disseminate court decisions to personnel working for the Administration, and the practice usually followed is that such decisions are not routinely passed on to administrative law judges or other personnel. Thus, it is possible that administrative law judges may be unfamiliar with local court precedents in the region in which they hear Social Security cases. Moreover, the administrative law judges are instructed by the Administration not to follow federal

5. See Non-acquiescence, 5 SOCIAL SECURITY FORUM 9 (April 1983).
6. This is rarely done by the Social Security Administration. Rather, the Administration will usually pay disability benefits to the claimant. For example, of forty-four cases appealed from district courts to the U.S. Court of Appeals for the Eighth Circuit from 1980-1983, only two were brought by the Social Security Administration. See Heaney, Why the High Rate of Reversals in Social Security Disability Cases?, 7 HAMLINE L. REV. 1, 10 (1984).
7. NATIONAL LAW JOURNAL, October 17, 1983, at 1, col. 1.
8. MASHAW, GOETZ, GOODMAN, SCHWARTZ, VERKUIL, AND CARROW, SOCIAL SECURITY HEARINGS AND APPEALS, [hereinafter cited as MASHAW] 140 (1978). "[I]t (the Social Security Administration) lacks established institutional mechanisms for internalizing such decisions" of the federal district and circuit courts. Id.
9. Id. at 141. The book notes that: "The legal materials available to the average ALJ are meager. . . . The extent to which ALJ’s acquire knowledge of local judicial precedents is unclear."
court decisions which are inconsistent with the Administration's previous interpretation of the law.  

A. Formal and Non-Formal Rulings

The policy of non-acquiescence takes two forms. The Administration may first publish a formal ruling of non-acquiescence. However, this has rarely been done. The second form of non-acquiescence is the more common. After a court has ruled contrary to the Administration's position, the precedent is not incorporated or even mentioned in subsequent handling of claims. In addition, employees of the Administration and administrative law judges are often not told about the federal court decisions, although it is the Administration's policy that all social security rulings at the administrative level are binding on the administrative law judges.

B. Policy Justification

The justification given by the Administration for the policy of non-acquiescence is that such a policy assures national uniformity in administering a national program. This assures that claimants applying for benefits throughout the United States will be governed by the same rules and regulations. The Administration also defends the policy by arguing that other federal agencies, specifically the National Labor Relations Board and the Internal Revenue Service, also follow a policy of non-acquiescence with federal court decisions. These appear to be the only justifications given by the Administration for following the policy.

10. See supra note 3 and accompanying text.
11. See 5 SOCIAL SECURITY FORUM 9, 12 (April 1983) for a list of rulings.
12. Id. at 12 noting that the Social Security Administration had, until June, 1983, only issued seven rulings of non-acquiescence.
13. Id. at 9.
14. See MASHAW, supra note 8 and accompanying text.
16. MASHAW, supra note 8, at 112.
17. See 5 SOCIAL SECURITY FORUM 10, 13 (April 1983). However, it appears that the policies of these agencies differ from the policies of the Social Security Administration. For further discussion of the legality of the policies followed by the National Labor Relations Board and the Internal Revenue Service, see infra notes 31-55 and accompanying text.
18. In 1984, the Social Security Administration argued that a decision of the United
II. IMPLEMENTATION OF THE POLICY: DUAL STANDARDS OF EVALUATION

Differences between Social Security Regulations and court decisions have arisen in connection with the evaluation of subjective complaints of disabling pain and the weight to be given to a conclusion of disability expressed by a treating physician. The Administration, through its Regulations, has taken a strict view regarding claimants alleging disability because of subjective complaints of pain. The Administration requires such claimants to prove objective abnormalities which would document the severity of the pain alleged. Should the claimant for disability benefits not be able to prove by objective medical findings that he has pain which causes severe functional restrictions on his ability to work, the Administration will determine that his complaints of pain are not credible, and that he is not disabled because of such complaints.

On the other hand, the majority of courts which have dealt with the issue of subjective complaints of pain have taken a more liberal position, holding that a claimant's subjective complaints of pain are admissible evidence of disability, even if such complaints are

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States Supreme Court, United States v. Mendoza, ___ U.S. ___, 104 S. Ct. 568 (1984), permitted non-acquiescence. However, this decision only held that the doctrine of nonmutual collateral estoppel did not prevent the federal government from relitigating constitutional issues which had been adjudicated against it in a different lawsuit brought by another party. It does not allow an agency of the federal government to non-acquiesce with federal court decisions and was distinguished by other courts on this ground. See e.g., Holden v. Heckler, 594 F. Supp. 463, 491 (N.D. Ohio 1984) (citing Hyatt v. Heckler, 579 F. Supp. 985, 1002 (D. N.C. 1984)).

19. 20 C.F.R. § 404.1529 (1984) which provides:

If you have a physical or mental impairment, you may have symptoms (like pain, shortness of breath, weakness or nervousness). We consider all your symptoms, including pain, and the extent to which signs and laboratory findings confirm these symptoms. The effects of all symptoms, including severe and prolonged pain, must be evaluated on the basis of a medically determinable impairment which can be shown to be the case of the symptom. *We will never find that you are disabled based on your symptoms, including pain, unless medical signs or findings show that there is a medical condition that could be reasonably expected to produce those symptoms.* (emphasis added).

not totally supported by objective medical data. Courts have also held that pain itself can be a disabling condition. Thus, the courts have considered all relevant medical and lay evidence in evaluating pain, including subjective complaints of pain and reports of a physician who has treated a person for many years, as well as other objective medical data to determine whether a person is disabled because of pain. These judicially mandated requirements impose a greater duty on the Administration to evaluate disability based on complaints of pain than does the Administration's own regulation.

As a result, a person alleging disability because of subjective complaints of pain is confronted by two different standards of adjudication—one mandated by the Administration and the other more liberal standard adopted by most federal courts. Throughout the lengthy Social Security administrative process, a claimant's subjective complaints of pain are evaluated only by objective medical evidence as required by the Regulations. Only after exhausting all administrative appeals can the applicant then file suit in federal district court, where the more liberal standard for evaluating pain will most likely be applied.

21. See, e.g., Simpson v. Schweiker, 691 F.2d 966, 970 (11th Cir. 1982) (where the Court stated that pain can be disabling even when its existence is unsupported by objective medical evidence). See also Benson v. Schweiker, 652 F.2d 406 (5th Cir. 1981); Smith v. Califano, 637 F.2d 968 (3rd Cir. 1981); Myers v. Califano, 611 F.2d 980 (4th Cir. 1980).


23. See Duncan v. Harris, 518 F. Supp. 751 (E.D. Ark. 1980) (for a list of relevant factors to be considered when evaluating complaints of pain as the basis of a disability claim).

24. 20 C.F.R. § 404.1529 (1984), for the full text of this regulation, see supra note 18.

25. Id at § 404.1529.

26. There are four levels of administrative determinations in the Social Security administrative process. After a person applies for Social Security disability benefits, he receives an initial determination of his application. 20 C.F.R. § 404.901-904 (1984). If his application is denied, he must request reconsideration. 20 C.F.R. § 404.907 (1984). If he loses on reconsideration, he must request a hearing before an Administrative Law Judge. 20 C.F.R. § 404.200 (1984). If he is not successful there, he must request review before the Appeals Council. 20 C.F.R. § 404.967 (1984). The decision of the Appeals Council is the final decision of the Social Security Administration. Only after exhausting these administrative remedies may a claimant file suit in federal district court. 42 U.S.C. § 405(g) and (h) (1984).


28. The Social Security Administration's standard for evaluating pain may be changed as a result of recent litigation about the dual standards of evaluation of pain. See e.g., Polaski v. Heckler, 739 F.2d 1320 (8th Cir. 1984) (in a class action suit originally filed in the District of Minnesota, the Social Security Administration entered into an agreement on the standard
A similar result has occurred in evaluating conclusions of disability expressed by a treating physician in a claim for benefits. The Social Security Administration has declared that a conclusion of disability expressed by a treating physician is not determinative on the issue of disability, but the weight to be given such a conclusion depends on the extent to which it is supported by objective medical data. Thus, it is not unusual to find a situation where the Administration does not give any substantial weight to a conclusion by a physician that a patient is disabled, even when the physician has treated the claimant for several years and is very familiar with his medical condition. At times, the Administration will give greater weight to the report of a doctor who examined the claimant only one time at the request of the Social Security Administration in connection with his application for disability benefits than to a report from a physician who has treated a person over a long period of time. In such instances, the fact that

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29. 20 C.F.R. §§ 404.1527 and 404.1528 (1984) which provide:

§ 404.1527 Conclusion by physicians concerning your disability.

We are responsible for determining whether you are disabled. Therefore, a statement by your physician that you are "disabled" or "unable to work" does not mean that we will determine that you are disabled. We have to review the medical findings and other evidence that support a physician's statement that you are "disabled."

§ 404.1528 Symptoms, signs, and laboratory findings.

Medical findings consist of symptoms, signs and laboratory findings:

(a) Symptoms are your own description of your physical or mental impairment. Your statements alone are not enough to establish that there is a physical or mental impairment.

(b) Signs are anatomical, physiological, or psychological abnormalities which can be observed, apart from your statements (symptoms). Signs must be shown by medically acceptable clinical diagnostic techniques. Psychiatric signs are medically demonstrable phenomena which indicate specific abnormalities of behavior, affect, thought, memory, orientation and contact with reality. They must also be shown by observable facts that can be medically described and evaluated.

(c) Laboratory findings are anatomical, physiological, or psychological phenomena which can be shown by the use of medically acceptable laboratory diagnostic techniques. Some of these diagnostic techniques include chemical tests, electrophysiological studies (electrocardiogram, electroencephalogram, etc.), roentgenological studies (X-rays), and psychological tests.


31. 20 C.F.R. § 404.1517 (1984) (providing for consultative examinations to be done at the request of the Social Security Administration. The examinations are to be performed by a physician who is under contract with the Social Security Administration.).
a physician has treated a person for several years will, according to the Administration, not entitle the report of the treating doctor to any greater weight. 32 Most courts, on the other hand, have held that a report submitted from a physician who has treated a person over a long period of time is entitled to greater weight than the report of a one-time examination performed at the request of the Administration to assess disability. 33 The Court of Appeals for the Second Circuit, for example, has held that when there is no contrary evidence, the treating physician’s expert opinion is binding as to whether a disabling impairment exists. 34 It is apparent that rulings from the courts require great weight and deference be given to conclusions of disability expressed by a treating physician, especially when the conclusion of disability is supported by a record of lengthy treatment of the patient or by objective medical data to substantiate the allegation of disability by the claimant. The Administration continues to abide by the provisions of its Regulation, 35 however, which directs that a conclusion of disability by a treating doctor is not entitled to any substantial weight and is only one opinion to be considered by the finder of fact. 36

Such a dual system of adjudicating disability forces the claimant to appeal his case throughout the Social Security administrative process, be denied at all levels, and then appeal to federal court before the claimant might be granted a finding that the conclusion of disability by his treating physician is entitled to great, or controlling, weight in his case. The two examples relating to pain as a disabling impairment and to conclusions of disability by a treating physician are the two most common examples of the differences between the Administration’s Regulations and court precedents in interpreting the Social Security Regulations. As a result of non-acquiescence, the Administration evaluates claims pursuant to less stringent guidelines than required by federal case law. Moreover, the claimant is forced to undergo a lengthy appeals

33. See, e.g., Wiggins v. Schweiker, 679 F.2d 1387 (11th Cir. 1982); Cotter v. Harris, 642 F.2d 700 (3d Cir. 1981); Allen v. Califano, 613 F.2d 139 (6th Cir. 1980); and Bastien v. Califano, 572 F.2d 908 (2d Cir. 1978).
34. See, e.g., Eidea v. Secretary of Health, Educ. and Welfare, 616 F.2d 63 (2d Cir. 1980); Alvarado v. Califano, 605 F.2d 34 (2d Cir. 1979).
36. Id. at § 404.1527.
process before the less stringent standard would even be applied to his case.

III. CHALLENGES TO THE POLICY OF NON-ACQUIESCENCE AND COURT DECISIONS RELATING TO THE POLICY

It is not surprising to find that courts confronted with the policy of non-acquiescence have not reacted favorably.37 Much of the litigation concerning the policy came to a head with the passage of a bill in 1980 requiring periodic review of beneficiaries receiving disability benefits.38 A question quickly arose regarding the standard to be applied on this review. Must the Administration show improvement in the disabled person's condition before it could terminate benefits, or could the Administration terminate benefits even if no improvement was shown? The Administration in August, 1980, published a statement in the Federal Register that benefits could be terminated even if there was no showing of improvement, based solely on the current medical evidence which might show an ability to work.39 However, courts confronted with the standard to be applied in termination cases, prior to 198040 and since that time,41 have concluded that it is the obligation of the Administration to show improvement before terminating benefits. The Administration, however, has ignored these court decisions and continues to review cases under a standard allowing termination of benefits even if no improvement is shown.42 This creates a confrontation between the administrative edicts of the Administration and the court precedents, resulting in class action suits being filed on behalf of plaintiffs whose benefits are being terminated under a standard which courts have declared should not be used to terminate benefits.

41. See Patti v. Schweiker, 669 F.2d 582 (9th Cir. 1982); Simpson v. Schweiker, 691 F.2d 966 (11th Cir. 1982); Cassiday v. Schweiker, 663 F.2d 745, 749 (7th Cir. 1981); Weber v. Harris, 640 F.2d 176 (8th Cir. 1981); Finnegan v. Matthews, 641 F.2d 1340 (9th Cir. 1981).
42. In addition to 20 C.F.R. § 404.1594 (1980), the Social Security Administration also issued Social Security Ruling 81-6 telling administrative law judges not to apply a medical improvement standard in cessation of disability cases.
A. Reliance on Marbury v. Madison

An important case on this matter, Lopez v. Heckler, involved a class action suit brought on behalf of Social Security beneficiaries whose benefits were being terminated in states covered by the Ninth Circuit Court of Appeals. The court held that the plaintiffs had shown that the Administration was "deliberately and unequivocally flouting the procedures she [the Secretary of Health and Human Services] is required by law to follow." Citing Marbury v. Madison, the court opined that the Secretary of Health and Human Services, as a member of the executive branch of the federal government, was required to apply federal law as interpreted by the courts. Noting that Justice Marshall had stated in Marbury that "[I]t is emphatically, the province and duty of the judicial department, to say what the law is," the court concluded that his proposition could not be seriously doubted. The court then granted injunctive relief to the plaintiffs and required the Administration to find evidence of medical improvement prior to terminating disability benefits.

Injunctive relief required the Administration to follow the decisions of the federal courts rather than forcing a claimant whose benefits had been terminated to appeal throughout the Social Security administrative process, have his benefits stopped, and then file an appeal in federal court which could require a lengthy period of time to be adjudicated. Moreover, the claimant would have been denied further disability benefits during the appeals process if benefits were terminated at the administrative level. The benefits would have been restored only after the claimant appealed to federal court and received a decision from the federal court finding that the claimant remained disabled because his medical condition had not improved. Because the appeals process in federal court

43. 725 F.2d 1489 (9th Cir. 1984).
44. Id. at 1503.
45. 5 U.S. (1 Cranch) 137 (1803).
46. Lopez, 725 F.2d at 1503.
47. Marbury, 5 U.S. at 177.
48. Lopez, 725 F.2d at 1503.
49. Id.
50. Pub. L. No. 97-455 (January 12, 1983) (allowing a disability recipient whose benefits are being terminated to elect to continue receiving such benefits until he has a hearing and receives a decision from an administrative law judge).
could take several months or years, injunctive relief was critical in *Lopez v. Heckler*.  

Other courts faced with the policy of non-acquiescence in matters not involving the termination of disability benefits have almost uniformly held that the policy is invalid and that the Administration may not ignore court precedents. In *Hillhouse v. Harris*, both the district court and the Court of Appeals for the Eighth Circuit discussed the stance of the Social Security Appeals Council on non-acquiescence. Both courts were critical of this policy, citing *Marbury v. Madison* and holding that the Administration was required to follow the law as set down by courts. The panel in the Eighth Circuit specifically quoted *Marbury v. Madison* and stated "... the Secretary will ignore that principle at her peril." Justice McMillan of the Eighth Circuit, in a concurring opinion, declared that if the Secretary persisted in pursuing non-acquiescence in the Eighth Circuit, he would seek to bring contempt proceedings against her, both in her official and her individual capacities. A judge in the Northern District of Ohio, when confronted with the policy, termed it "utterly meritless."

**B. Other Administrative Agencies and Non-acquiescence**

The Social Security Administration has not fared well when it has attempted to draw a parallel to the National Labor Relations Board's [hereinafter referred to as the NLRB] policy of non-acquiescence. The NLRB's policy of non-acquiescence has also not been well received by the courts. The court in *Ithaca College v. NLRB* specifically noted that this policy was "intolerable if the rule of law is to prevail." Thus, it appears that reliance on NLRB
precedent will also be met with resistance by the courts.\textsuperscript{61}

While the Internal Revenue Service [hereinafter referred to as the IRS] also has a policy of non-acquiescence, its policy can be distinguished from the Social Security Administration's policy. The IRS follows circuit court decisions within the jurisdiction of the circuit. However, its non-acquiescence ruling indicates that it will not follow the precedent of one circuit court in another circuit.\textsuperscript{62} The IRS generally follows a policy of litigating that issue in other circuits to create a split among the circuits and therefore create a ground for Supreme Court review.\textsuperscript{63} However, the Social Security Administration rarely requests further review by the United States Supreme Court but instead declines to follow the decisions of the district or circuit courts in future cases. From the foregoing analysis it is clear that the Administration's comparison of its policy with that of other federal agencies such as the NLRB and the IRS does not validate the Administration's actions.

In recent years, plaintiffs confronted with application of the policy of non-acquiescence have filed class action suits requesting injunctive relief against the Administration's own Regulations interpreting various subject matters when such Regulations conflict with established court precedents. Examples include suits challenging the Administration's Regulations involving evaluation of people alleging disability because of mental impairments,\textsuperscript{64} evaluation of complaints of pain in determining disability,\textsuperscript{65} and evaluation of disability due to high blood pressure or diabetes.\textsuperscript{66} In each of these cases, a class was certified, and the courts issued injunctive relief, ordering the Administration to apply court precedents in determining disability. Should the Administration continue to adhere to its policy of non-acquiescence, future class action suits requesting injunctive relief may arise.

\textsuperscript{61} But see Yellow Taxi Co. of Minneapolis v. NLRB, 721 F.2d 366 (D.C. Cir. 1983) (where the court stated that the NLRB is not required to conform its rulings to every decision by a court of appeals and that no absolute rule can be applied to every case. Id. at 383. However, the court was critical of the NLRB's non-acquiescence with federal court decisions.) This case is the only exception this writer could find to court decisions holding that the NLRB must follow court precedents.

\textsuperscript{62} See statement of Elena Ackel, 5 SOCIAL SECURITY FORUM 13 (April 1983).

\textsuperscript{63} Id at 13.

\textsuperscript{64} Mental Health Ass'n of Minnesota v. Schweiker, 554 F. Supp. 157 (D. Minn. 1982).

\textsuperscript{65} Polaski v. Heckler, 739 F.2d 1320 (8th Cir. 1984).

IV. CONGRESSIONAL CONCERN ABOUT THE POLICY OF NON-ACQUIESCENCE

In recent years, the Congress has shown concern about the policy of non-acquiescence. The Disability Benefits Reform Act of 1984 was passed in the 98th Congress.\(^67\) When this bill was originally introduced, it contained provisions in both the House of Representatives and the Senate versions dealing with non-acquiescence.

The House version, the more stringent of the two proposals, would have required the Administration to follow decisions of the circuit courts of appeals or appeal decisions of the circuit courts of appeals to the United States Supreme Court.\(^68\) The Senate bill only required the Administration to notify Congress and to print in the Federal Register an explanation of the decision of the Administration to acquiesce or non-acquiesce in a decision of a circuit court of appeals.\(^69\) The Senate version noted, however, that the Senate was not sanctioning the policy of non-acquiescence.\(^70\)

Because of the different versions of the two bills, a conference committee from the House and Senate was appointed to iron out the differences. After deliberations, the conference committee deleted all non-acquiescence language from the final bill. Thus Congress took no action on the policy on non-acquiescence. The report of the conference committee indicated, however, that they were not approving the policy of non-acquiescence but had several reservations about the policy.\(^71\) The conference committee urged resolution of the issue of the legality of the policy of non-acquiescence by appeal to the United States Supreme Court or by a legislative remedy from Congress.\(^72\)

While the action of the conference committee may clarify somewhat the viewpoint of Congress on this issue, it seems unlikely

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\(^{69}\) Id at 36-38.

\(^{70}\) Id.

\(^{71}\) Id. at 37.

\(^{72}\) Id. at 37-38.

The conferees do not intend that the agreement to drop both provisions be interpreted as approval of 'non-acquiescence' by a federal agency to an interpretation of a U.S. Circuit Court of Appeals as a general practice. On the contrary, the conferees note that questions have been raised about the constitutional basis of non-acquiescence and many of the conferees have strong concerns about some of the ways in which the policy has been applied, even if constitutional.
that this alone will force the Administration to abandon its long-held policy of non-acquiescence. In fact, the failure of the conference committee to agree on a provision regarding the policy of non-acquiescence indicates some disagreement among members of Congress over how to effectively deal with the policy. While nobody can predict whether Congress will act on the policy of non-acquiescence, it seems unlikely that legislation dealing solely with the policy of non-acquiescence will be enacted. Rather, legislation dealing with the policy of non-acquiescence will most likely be part of an act dealing with further changes in the Social Security disability program. Until the need for such changes arises, one should not expect Congress to deal with the policy on non-acquiescence.

CONCLUSION

The implications of the policy of non-acquiescence are varied for the applicant for Social Security benefits and for the attorney representing the applicant. The applicant is faced with dual standards of adjudication—one mandated by the Administration in its Regulations, and the other, often less stringent standard set down by courts. While the attorney who represents a claimant for Social Security benefits must be familiar with the Social Security Act, Regulations, and judicial precedents, the attorney who argues established case law to the Social Security Administration may find that the Administration gives no weight to judicial precedents, and his reliance on court decisions is futile. It may then be necessary to appeal to federal court so that judicial precedents are applied to the client's case. The result is a lengthy appeals process during which the applicant receives no Social Security benefits.

The policy of non-acquiescence causes more applications to be wrongfully denied than if the policy were not followed. Attorneys must necessarily file more appeals in federal courts to insure that judicial precedents are applied to their clients' cases. The result is a time-consuming process which increases the caseload of federal courts and which complicates the attempt to obtain benefits for a person who the courts, in a case with similar facts, have previously decided is entitled to benefits. In spite of these harsh results, and in spite of criticism of the policy by federal courts and by Congress, it appears unlikely that the Social Security Administration will abandon its policy on non-acquiescence until ordered to do so by the United States Supreme Court or by Congress.
COMMENTS

IN THE WAKE OF BLANKENSHIP: FOLLOWING FOOTPRINTS INTO THE MIRE OF INTENTIONAL TORTS IN THE WORKPLACE IN OHIO

INTRODUCTION

On March 3, 1982, the Ohio Supreme Court announced its decision in Blankenship v. Cincinnati Milacron Chemicals, Inc.¹ For the next three years courts across Ohio struggled to apply it to the situations before them. Much of the opinion had the characteristics of an allegory: it could be read to hold different meanings depending on individual interpretation.

The court’s one-sentence syllabus is couched in the negative. It does not say what one may do, rather it states what one is not precluded from doing. “An employee is not precluded by Section 35, Article II of the Ohio Constitution, or by R.C. 4123.74 and 4123.741 from enforcing his common law remedies against his employer for an intentional tort.”² The syllabus does not address the issue of what an intentional tort is. A definition can certainly be gleaned from the field of tort law, but is that field comparable to the law of workers’ compensation? Because of the differences between the two, the wholesale importation of tort concepts into workers’ compensation may not be advisable. Should an intentional tort be limited to actual, specific intent to injure, or is wilful or wanton misconduct sufficient to state a claim? The former is consistent with general workers’ compensation law, the latter with tort law.

Neither the court’s syllabus nor its opinion deals with the problem of election of remedies or double recovery. Should a plaintiff who has taken workers’ compensation be allowed to bring an action at law in intentional tort? If the tortious action dissolves the exclusive remedy of workers’ compensation and allows a suit at law, is it not logically inconsistent to allow both remedies?

The courts that considered these issues split in their decisions.

¹ 69 Ohio St. 2d 608, 433 N.E.2d 572 (1982).
² Id. at 608, 433 N.E.2d at 573.
The availability of a remedy varied greatly from court to court. Even access to the judicial system varied greatly. On December 31, 1984, the Ohio Supreme Court announced their opinion in *Jones v. VIP Development Co.*, which purports to resolve the splits of authority that have developed. The opinion confronts these issues squarely and presents unambiguous holdings.

It is not, however, a true sequel to, nor a reaffirmation of, *Blankenship*. This is evident immediately upon casual inspection. The fact that Justice William Brown wrote the majority opinion in *Blankenship* and filed a separate dissenting opinion in *Jones* is clear evidence of this. The opinions are inconsistent on a number of points. What appeared clear in *Blankenship* has been disregarded in *Jones*.

This article will trace the development of these issues from *Blankenship* through *Jones*, and will attempt to elucidate the effects that *Jones* will have on the workers' compensation law of Ohio. The extent of this effect can be seen by a comparison with other jurisdictions that have previously considered the questions.

I. BACKGROUND

Workers' compensation law is best understood when one recognizes that it is a truly separate and distinct area of the law. The area of the law to which it is most superficially akin is torts. But to say that workers' compensation is a tort system is erroneous. It has supplanted the tort system, because the tort system simply did not meet the needs of either the injured employee or the employer in an industrialized society.

Workers' compensation can more readily be likened to strict liability, but with some reservations. The principal reservation is that the employee must have sustained an injury "in the course of, and arising out of, the injured employee's employment." If this qualification is met, the employee will receive compensation. This language is broad in scope and contemplates a great many activities. This is necessarily so because of the wide variety of employment activities workers may undertake. Its generality is enhanced by

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3. 15 Ohio St. 3d 90, 472 N.E.2d 1046 (1984).
the rule of construction that the statute be liberally construed in favor of the employee.\(^5\)

The employer’s quid pro quo in this is that he is to be shielded from damages at common law for injuries that are compensable as above.\(^6\) Even though the rate of recovery for employees was abysmally low at common law,\(^7\) recovery was not certain and awards could be subject to wide fluctuations. Through the compensation system costs are somewhat controllable and can be budgeted.

It is this balance which is a general characteristic of workers’ compensation. The employee is virtually assured of a quick and easy recovery that will compensate him for lost wages and medical expenses. The employer gives up virtually all defenses to the claim in exchange for immunity from tort liability. This is the way the system worked in Ohio for almost sixty years.\(^8\)

With the advent of *Blankenship v. Cincinnati Milacron Chemicals, Inc.*, the employee was no longer precluded by statute from pursuing his common law remedy for an intentional tort.\(^9\) The reasoning was that an injury sustained due to an intentional tort was not an injury in the course of employment.\(^10\) The workers’ compensation laws were read to protect the employer only for his negligent acts.\(^11\) This result had been previously reached by various Ohio courts, but had never been decided at the supreme court level.\(^12\)

5. *Id.* at § 4123.95 (Page Supp. 1983).
7. See J. Young, *Workmen’s Compensation Law of Ohio* 6-8 (2d ed. 1974) (recovery was achieved in approximately 36% of the fatal industrial accidents studied between 1905 and 1910).
8. *Ohio Gen. Code* § Sec. 1465-76 allowed for an election by the employee if his injury was caused by the wilful act of his employer. This section was repealed by implication by an amendment to *Ohio Const.* art. II § 35 effective January 1, 1924. Section 1465-76 was expressly repealed by the legislature in 1931. 114 Ohio Laws 26, 39. Bevis v. Armco Steel Corp., 86 Ohio App. 525, 528, 93 N.E.2d 33, 35 (1949). The exclusivity of the remedy was impaired in *Blankenship* in 1982.
10. *Id.* at 612-13, 433 N.E.2d at 576.
11. *Id.* at 614, 433 N.E.2d at 577.
This is not the sole exception to the exclusivity rule in Ohio. The dual capacity exception has also been recognized. This doctrine will allow a common law action when an employer assumes a legal obligation to the employee separate and distinct from those that arise from his status as an employer. The doctrine is relatively self-restricting and has not been widely successful in Ohio.

Another exception recognized elsewhere, but not in Ohio by that name, is the dual injury doctrine. This rule postulates that a common law remedy exists for the aggravation of a previous compensable injury or illness, if the existence of the previous injury was fraudulently concealed by the employer. These are the facts in Blankenship, and some of the logical difficulties discussed later might have been avoided if the court had recognized this exception rather than placing the case under the general intentional tort exception.

II. ELECTION OF REMEDIES

One of the major stumbling blocks in the post-Blankenship line of cases was the problem of election of remedies. The split of authority that developed was clear and the differences distinct. The consequences of the split were that there was a great deal of confusion between both the various state appellate courts and the federal courts, and there was no uniformity of application. The remedy one received was largely dependent on the court in which one's case was heard (and sometimes by the judge who heard it).

A. The Cumulative or Supplemental Remedy Theory

The courts that applied this theory held that a plaintiff was not

13. Guy v. Arthur H. Thomas Co., 55 Ohio St. 2d 183, 378 N.E.2d 488 (1978) (employee was rendered ill in the course of employment and negligently diagnosed by physician employee of mutual employer); Mercer v. Uniroyal, Inc., 49 Ohio App. 2d 279, 361 N.E.2d 492 (1976) (failure of tire that had been manufactured by the employer while installed on vehicle employee was operating caused injury).

14. For cases in which the exception was held not to apply, see Freese v. Consolidated Rail Corp., 4 Ohio St. 3d 5, 445 N.E.2d 1110 (1983) (motorcycle policeman injured due to road condition alleged that municipal employer had duty to keep roadway in good repair); Simpkins v. Delco Moraine Div., 3 Ohio App. 3d 275, 444 N.E.2d 1064 (1981) (injury resulted from use of machinery manufactured by employer but not intended for public sale); Knous v. Ridge Machine Co., 64 Ohio App. 2d 251, 413 N.E. 2d 1218 (1979).

15. 2A A. LARSON, WORKMEN'S COMPENSATION LAW § 68.32(c) (1982) [hereinafter cited as LARSON].
barred from pursuing a recovery by a suit at law when he had previously received workers' compensation benefits. These courts relied primarily on speculation, because the Ohio Supreme Court did not address the issue in Blankenship.

The Ohio Supreme Court did, however, in Nayman v. Kilbane, lend colorable credence to this theory. This case dealt with a writ of prohibition, sought by the employer, to prevent the common pleas court from hearing the employee's suit. The supreme court agreed with the appellate court, and dismissed the complaint, thus allowing the trial court to hear the case. The election of remedies problem is not addressed in the majority opinion. In the dissenting opinion, Justice Holmes stated, however:

Here, this employee had filed a claim for his injuries with the [Industrial] Commission, and had in fact been awarded compensation from the Workers' Compensation Fund for these injuries. In essence, it should be held that this employee either had waived, or should be estopped from, bringing a civil action alleging the commission of an "intentional tort" by his employer. The inference drawn by some courts was that the majority was equally aware of the prior receipt of benefits and still chose to allow the trial court to hear the action; therefore, the plaintiff was not estopped from bringing his suit by receipt of benefits. However, the majority's holding was "confined to the mere proposition that the common pleas court possesses the jurisdiction . . . to determine whether a cognizable claim exists." It is apparent that this argument was not on solid footing. It was not even based on obiter dicta, rather it was predicated on what was not said.

An interesting, but somewhat convoluted, argument in favor of this theory was posited in Walker v. Mid-States Terminal, Inc.

16. 1 Ohio St. 3d 269, 439 N.E.2d 888 (1982).
17. Id. at 272, 439 N.E.2d at 891.
18. See, e.g., Gross v. Kenton Structural and Ornamental Ironworks, 581 F. Supp. 390, 395 (S.D. Ohio 1984) ("As the Supreme Court refers to the employee's acceptance of workers' compensation benefits within its discussion, one can reasonably conclude that the Supreme Court did not find that the plaintiff's acceptance of benefits . . . prevented the action from proceeding.").
This argument distinguishes between the employer’s conduct and the employee’s injury, and makes them essentially separate events. The court notes that the opinion in Blankenship states, “Since an employer’s intentional conduct does not arise out of employment, R.C. 4123.74 does not bestow upon employers immunity from civil liability for their intentional torts” (emphasis in original).21 It also notes “that where an employee asserts in his complaint a claim for damages based on an intentional tort, ‘ * * * the substance of the claim is not an “injury * * * received or contracted by any employee in the course of or arising out of his employment.’”22 In sum, the court held:

[W]e find that the Ohio Supreme Court drew the distinction regarding intentional tort on the basis of whether the employer’s conduct arose out of the employment and not whether the injury occurred in the course of employment as to the employee. Thus, the employee would not be precluded from pursuing his remedy under the workers’ compensation law in that the injury arose in the course of his employment. (emphasis in original).23

Thus, the argument in Walker runs that the worker can collect compensation because the injury occurred in the course of his employment. He can also sue because the employer’s conduct did not arise out of the employment situation. The one event has two components, each with its own remedy. The fallacy, however, is that there can be redress for mere conduct. It is a commonly accepted rule of law that one must have damages in order to seek a remedy. Here, the injury is the subject of a separate action in which compensation is the exclusive remedy. The action at law becomes one for mere conduct or insult which, without damages, is not capable of redress.

Another approach that was taken was to simply state that Nayman settled the issue. The Court of Appeals for Cuyahoga County in Hamlin v. Snow Metal Products stated that the suit was brought to prevent the trial court from taking jurisdiction “on the grounds that the employee had filed for, and, received an award from the Bureau.”24 The court further noted that the Ohio Supreme

21. Id. slip op. at 13 (quoting Blankenship at 613, 433 N.E.2d at 576).
22. Id. slip op. at 12 (quoting Blankenship at 613, 433 N.E.2d at 576).
23. Id. slip op. at 14.
Court found that "despite the filing for and receipt of Bureau Benefits, an injured worker is not precluded from bringing an action at common law." As noted above, Nayman involved a dispute over whether the court of common pleas or the Industrial Commission had jurisdiction of the plaintiff's claim. The court in Hamlin took the inference previously discussed and elevated it to the status of an explicit holding.

The Federal District Court for the Southern District of Ohio (Western Division), in Gross v. Kenton Structural & Ornamental Ironworks, held in favor of this position in a lengthy and well-researched opinion. However, the court relied heavily on common pleas court decisions, which, although not binding, it found persuasive. The problem is that these decisions were often overturned on appeal. This is not fatal, however, because the courts merely shifted position, much like players on a field, without changing the weight of authority. For example, the Court of Common Pleas in Lake County found, in Gains v. Webster Manufacturing Co., that prior receipt was not a bar, and that benefits received should not be set off against the award. On appeal, however, the case was overturned on the basis of election of remedies as well as the definition of intentional tort. By the same token, the court noted the common pleas court decision in Walker which held that the plaintiff was estopped by the prior receipt of benefits. On appeal, the plaintiff in Walker was not estopped from pursuing the supplemental remedy. As these decisions were not binding on the federal court, and only the players changed, the arguments raised are valid.

The opinion in Gross is interesting for its subsequent history outside the district court. The inferences from Blankenship previously noted were relied upon fairly heavily. The court also relied upon

25. Id. at 21.
what was seen as the intent of the supreme court in deciding Blankenship and Nayman.\textsuperscript{31} The supreme court then used the Gross opinion in support of its decision in Jones.\textsuperscript{32} Wholly aside from the fact that the supreme court neglects two other cases from the Southern District of Ohio,\textsuperscript{33} this logic is circuitous and ultimately grounded in speculation.

The court in Gross went on to discuss the related issue of whether the findings of the Industrial Commission were final determinations of the nature of the injury. It noted that the findings of the commission in an undisputed claim could not have a preclusive effect, because there would have been no evidentiary hearing.\textsuperscript{34} Even if the claim were disputed there would be no preclusive effect, the court reasoned, because there would not be an identity of issues between the administrative hearing and the judicial determination, due to the different purposes served by each and the remedies sought.\textsuperscript{35}

In Davis v. Rockwell International Corp.\textsuperscript{36} the court followed the prior decision in Gross, but added a provision that allowed a set-off for benefits previously received. Other courts had not addressed the issue, rather it was felt that workers’ compensation benefits were not meant to be complete relief, so any recovery at law was supplemental to the compensation previously received.\textsuperscript{37}

Another variation on the theme is found in Pugh v. Wheeling-Pittsburgh Steel Corp.\textsuperscript{38} in which the Court of Appeals for Jefferson County also held that the receipt of compensation benefits did not bar an action at law. However, because of the logical inconsistency between the remedies, the court noted that if the

\textsuperscript{31} Gross, 581 F. Supp. at 394-95.

\textsuperscript{32} Jones at 99, 472 N.E.2d at 1054-55.


\textsuperscript{34} 581 F. Supp. at 395.

\textsuperscript{35} Id. at 395-96. See also Bradfield v. Stop-n-Go Inc. No. 8709 (Ct. App. Montgomery Cty. Sept. 21, 1984). Cf. LeValley v. Glasco Plastics Inc., No. 1910 (Ct. App. Clark Cty. May 3, 1984) (“if the employee receives benefits, 1) the commission has found the injury occurred in the course of and arose from employment, and 2) the employee has agreed the injury was the result of a negligent act . . . Appellant . . . is now collaterally estopped from maintaining that the illness in issue did not occur in the course of and arise from her employment.” Id. slip op. at CL 012-3).

\textsuperscript{36} No. C82-1417 (N.D. Ohio October 18, 1984).

\textsuperscript{37} See Gross, 581 F. Supp. at 394.

employee's injury is found to be the result of an intentional tort he would be required to repay the benefits received (to whom is not clear in the opinion). Because the court says "repay" and not "set-off," this might pose problems for the plaintiff who receives nominal damages, or damages that are less than the benefits previously received.

It can be seen that, while these cases all reached essentially the same result, the foundational underpinnings varied. The rationales differed, and were often based on speculation or what may be termed "juridical horse-sense," but the results were relatively uniform. The plaintiff could withstand the employer's motion for summary judgment, and the action could continue.

There is little uniformity among other jurisdictions on the issue of supplemental remedies. Some states have expressly allowed them by statute, while others have applied the election theory to bar the suit after receipt of benefits. The states that allow supplemental remedies typically allow an action for the excess of damages over that received from workers' compensation.

B. The Estoppel or Waiver Theory

The application of this theory acts as a bar to the plaintiff's claim. Generally the claim is dismissed on a motion for summary judgment. The rationale for the theory is that if the injury was accidental in nature, then workers' compensation is the exclusive remedy, as long as the injury arose in the course of the employment. When the employee files for and receives workers' compensation benefits he is admitting that the injury was accidental (the product of negligence by the employer, at worst) and arose in the course of the employment. An intentional tort cannot be the product of an accident. It is logically inconsistent to think that an event

39. See, e.g. OR. REV. STAT. § 656.156(2) (1983) (similar statutory provisions to W. Va.); TEX. REV. CIV. STAT. ANN. art. 8306(5) (Vernon 1967 & Supp. 1984) (allows recovery of exemplary damages over and above compensation award where employee died due to "wilful act or omission or gross negligence" of employer); WASH. REV. CODE ANN. § 51.24.020 (Supp. 1984) (similar statutory provisions); W. VA. CODE § 23-4-2(b) (Supp. 1984) ("If injury or death result to any employee from the deliberate intention of his employer to cause such injury or death, the employee . . . shall have the privilege to take under this chapter, and shall also have a cause of action against the employer, as if this chapter had not been enacted, for any excess of damages over the amount received or receivable under this chapter").

40. See infra notes 60-65.

41. See supra note 39.
can be intended (certain of occurrence) for the purpose of a suit at law, while it was accidental (some risk of harm due to negligence) for the purpose of compensation benefits. The two remedies are options exclusive of each other. The election to take one precludes the claimant from taking the other.

Some support for this theory is found in the Blankenship opinion, although it is not specifically addressed. The court draws a distinction between accidental injuries (which are in the course of employment) and intentionally inflicted injuries (which are outside the course of employment). The court notes that “at some point, the employment relationship terminates and the intentionally inflicted injury cannot be considered compensable under a system that has been promulgated to insure against accidents which occur within the scope of employment.” The intent of the opinion appears clearly to remove the action from workers’ compensation exclusivity. This would lead one to believe that the injury then would not be compensable under that scheme.

A good example of the theory is found in Gains v. Webster Manufacturing Co., in which the Court of Appeals for Lake County stated that “[t]he thrust of Blankenship is that when an intentional tort is committed by an employer the subsequent injury to the employee is neither accidental nor arising within the scope of employment.” Workers’ compensation only covers those injuries “received or contracted ... in the course of or arising out of ... employment.” The court went on to note that “An employer’s intentional conduct, however, does not arise within the delineation of employment and does not shield against civil liability.” From this the court deduces that it is logically inconsistent to participate in workers’ compensation claiming an accidental injury, then allege that it was actually an intentional tort. This court explicitly rejected the dichotomy that was the basis for the decision in the later Walker case.

42. Blankenship at 613 n.7, 433 N.E.2d at 576 n.7.
44. Id. at ___, 466 N.E.2d at 578.
45. OHIO REV. CODE ANN. § 4123.01(c) (Page Supp. 1983).
46. Gains at ___, 466 N.E.2d at 578-79.
47. Gains was decided on December 30, 1983, while Walker was decided on March 9, 1984.
The court in *Gains* made no mention of the *Nayman* case, and the inference that can be drawn therefrom. This issue was addressed in *Pratt v. National Distillers and Chemical Corp.* The court noted that the Ohio Supreme Court had confined its decision to the jurisdictional question. It also noted that the court in *Blankenship* had not addressed the issue, although the fact that the plaintiffs were seeking or receiving benefits was in evidence before the appellate court. In spite of the foregoing, the court stated that it could "discern no definitive resolution of the election of remedies issue in the foregoing pronouncements." Instead, the court chose to rely on *Gains* and to a lesser extent on *Ritchie v. Dravo Corp.* The decision in *Hamlin* was noted in a footnote and dismissed because the remedies issue was not brought before that court as an error, but was gratuitously decided by the court. The court held that the prior receipt of benefits barred the later suit.

The issue of election of remedies was decided rather abruptly in *Ritchie v. Dravo Corp.* The court noted that *Blankenship* held that "an injury caused by the intentionally tortious conduct of an employer is not an injury received in the course of an arising out of the employee's employment." The court concluded, "In other words, an employee who is injured by the intentional conduct of his employer may bring a civil action in a court of law but may not seek to recover under the provisions of the Workers' Compensation Act." This pronouncement appears to have the anomalous effect of making a suit at law the exclusive remedy for the employee upon whom the employer has inflicted an intentional tort. It is not reasonable to believe that this is the true intent of the case, but rather that Judge Duncan is restating the election of remedies commonly seen elsewhere.

The opinion in *Ritchie* places some reliance on *Varnes v. Willis*.
Day Moving and Storage Co., a common pleas court decision from Lucas County. A number of opinions have made reference to this opinion, presumably because it was published and also because it is a well-reasoned opinion. It noted that intentionally caused and negligently caused injuries are mutually exclusive. Thus an injured employee cannot collect compensation benefits if the injury was the result of an intentional tort. If the employee does receive benefits, then ipso facto it was not an injury caused by an intentional tort. The interesting point in regard to this case is that the appeal was dismissed subsequent to a settlement. Since the Lucas County Court of Appeals reached a contrary result in Walker, it is doubtful that Varnes had continuing validity as persuasive authority on this issue.

Other jurisdictions have applied the estoppel or waiver theory either by statute or case law. For example, Kentucky allows an employee injured through the "deliberate intention of his employer to produce such injury" to pursue a suit at law in lieu of compensation. A suit at law acts as a waiver of compensation. Similarly, a claim for compensation waives all rights to sue. Arizona provides for a similar election. New York courts have reached a similar result. This bar has been applied in cases where the claimant was unaware that the conduct was tortious at the time compensation benefits were received. Cases in North Dakota have construed its statutory provision to include estoppel against a suit for supplemental injuries not subject to compensation, where injuries received in the same accident were compensated.

C. Comments on Election of Remedies

Conceptually the estoppel or waiver theory may be more appealing than the supplemental theory. The estoppel theory is

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56. No. CI 82-1949 (C.P. Lucas Cty. April 1, 1983) (noted at 6 OH. B. REP. 506 (1983)).
57. 6 OH.B. REP. 506 (1983).
58. Id. at 511.
59. No. 82-1949 (C.P. Lucas Cty. April 1, 1983) (noted at 6 OH.B. REP. 506).
61. ARIZ. REV. STAT. ANN. § 23-1022(A) (Supp. 1984) ("the injured employee may either claim compensation or maintain an action at law for damages").
logically consistent because a claimant should not be able to claim an accidental injury and get compensation, then at a later date allege that the act was intentional and sue at law. On the other hand, the supplemental theory is grounded in public policy, the construction of the Workers' Compensation Act\textsuperscript{66} and the inferences derived from the cases previously mentioned. However, in actual practice, neither approach is entirely satisfactory.

The election of remedies approach has been called "a harsh and technical rule of procedure that is not favored in Ohio."\textsuperscript{67} It is not difficult to envision applications in which its use would be harsh. Assume for example that an employee is injured through the intentionally tortious conduct of the employer. The employee is greatly injured and suffers extensive damages. He can either take workers' compensation benefits immediately in order to pay his medical bills and continue his support of his family, or he can plunge into litigation of the accident and gamble that some time in the future he will be fully compensated for his injuries. Unless he has other interim means of support, this latter course would take no small measure of courage and conviction.

Furthermore, pursuing the litigation poses hazards later on. If he pursues his remedy in this avenue for more than two years before an unsuccessful conclusion is reached, his claim for compensation may be forever barred.\textsuperscript{68} It is also not clear what effect his suit might have on a later timely claim for compensation, because the election of remedies rule can be a two-edged sword.

In a practical sense, can the claimant really be held to his election? There are generally three prerequisites to the application of the election doctrine. These are the existence of two or more remedies, the inconsistency of the remedies, and a choice of one of them.\textsuperscript{69} Without benefit of counsel can the average employee make an informed choice of remedy? Would the average


\textsuperscript{67.} \textit{Davis v. Rockwell Int'l}, No. C82-1417 (N.D. Ohio October 18, 1984).

\textsuperscript{68.} \textit{Ohio Rev. Code Ann.} § 4123.84 (Page 1980) (however, notice given by filing of action may be sufficient).

employee be aware that he may be making an election when he filed a claim for compensation?

The supplemental theory is not necessarily more equitable. The major obstacle is the problem of the double recovery by the injured employee. It is inequitable to force the employer to pay into the state fund for coverage and have compensation paid out to the employee (thus probably increasing the employer's premium), and then also to be liable in tort on top of the compensation. It is even more inequitable for the self-insured employer for whom the compensation is an out of pocket expense. One solution might be to allow evidence at trial of compensation benefits paid. This, however, would be prejudicial to the plaintiff.

A second solution would be to allow a set-off for compensation paid. For the benefits already paid this presents no real problems. (Query: should the amount of the set-off be paid back to the state fund in the case of a state-insured employee? If the fund is seen as a type of insurance the answer may be "no"; but if the injury is not of the type meant to be insured against, the answer may be "yes.") A problem does arise in the set-off for future benefits. One solution would be to cut off all compensation benefits as of the date of the judgment. This will present an unforeseen hazard for the plaintiff who is successful at trial but receives only nominal damages. Another solution would be to actuarially reduce the future benefits to present value, and then set off that amount, but allow the claimant to continue to receive benefits. This could potentially leave the claimant (especially a young claimant) in no better nor worse position than he previously occupied, except for his liability for legal fees. A third alternative might be to allow the employer to pay out the present value of the future benefits as a lump sum and then receive a set-off or credit for this amount against the amount of the judgment. It is apparent that no simple solution may exist, and that the best course would probably be for the court to have the power to exercise its discretion in determining and structuring the judgment.

In conclusion, the two avenues left the courts in something of a dilemma. The estoppel theory is logical, but harsh. The supplemental remedy theory may subject the employer to double liability, and is based more on policy than logic. Jones resolves the issue, but in a rather less than satisfactory way.
D. The Jones Decision

The Ohio Supreme Court, in Jones v. VIP Development Co.,\textsuperscript{70} has decided the election of remedies issue. The opinion quite simply holds that an injured worker may file a claim for compensation benefits, then bring an action at law sounding in intentional tort.\textsuperscript{71} The court further holds that the employee is not bound to an election. Thus the court offers the proponents of the election theory no solace: the amount of benefits received by the worker is not available for set-off against the judgment.\textsuperscript{72}

While the court's holding is clear, the legal reasoning upon which it is founded is somewhat tenuous. The court notes that allowing such a suit does not constitute double recovery.\textsuperscript{73} This is because the "common law award represents a supplemental remedy for pain and suffering, and spousal loss of services" (emphasis in original).\textsuperscript{74} The award also allows the imposition of punitive sanctions.\textsuperscript{75} It would appear that it may be difficult to try a case like this, because evidence of lost wages and medical expenses would not be at issue (the plaintiff having already received compensation therefor). Logically, this evidence should be excluded because it would confuse or prejudice the jury. The determination of damages may be the result of speculation by the jury, with no objective guideposts by which to steer.

The problem of setting off the compensation is resolved on the basis of an insurance analogy. Workers' compensation is said to be "in the nature of an occupational insurance, and, like general insurance, cannot be deducted and treated as an offset."\textsuperscript{76} This is an odd variant of the collateral source rule. Typically a collateral source is one independent of the tort-feasor, as where the plaintiff has received payments from his own health insurance.\textsuperscript{77} The rationale is that the tort-feasor should not benefit from his victim's

\textsuperscript{70} 15 Ohio St. 3d 90, 472 N.E.2d 1046 (1984).
\textsuperscript{71} Id. at 100, 472 N.E.2d at 1055.
\textsuperscript{72} Id.
\textsuperscript{73} Id. at 99, 472 N.E.2d at 1055.
\textsuperscript{74} Id.
\textsuperscript{75} Id.
\textsuperscript{76} Id at 100, 472 N.E.2d at 1055 (quoting from Trumbull Cliffs Furnace Co. v. Schachovsky, 111 Ohio St. 791, 796-97, 146 N.E. 306, 308 (1924)).
\textsuperscript{77} BLACK'S LAW DICTIONARY 238 (5th ed. 1979).
providence in obtaining such insurance. Here, however, the tortfeasor has obtained the "insurance" to insure himself against this type of occurrence, and is denied its benefits.

The problem of future benefits was not resolved by Jones directly. It may appear that to allow the plaintiff to continue to receive benefits after receiving a judgment award would be inequitable; however, it is probable that the supreme court would allow it. The reasoning of the court in disallowing a set-off is informative here. As noted above, the common law remedy is meant to be supplemental to the compensation.\textsuperscript{78} Thus, following the judgment, the plaintiff would continue to receive compensation benefits for lost wages and medical expenses, while the award would compensate him for pain and suffering, and his spouse for loss of services. Since the remedies serve different purposes they will probably be treated independently and allowed to coexist.

The result reached in Jones will be disheartening for and troublesome to Ohio employers. The issue of election of remedies itself was correctly decided, because putting the claimant to an election would have harsh results and would make the remedy under Blankenship unobtainable for the vast majority of claimants. However, the employer should have been allowed a set-off for past compensation benefits paid, and provision made for future compensation benefits payable. This portion of the amount recovered will inevitably be a double recovery in actual practice, regardless of the terms in which it is couched by the court.

III. WHAT CONSTITUTES AN INTENTIONAL TORT?

The Ohio Supreme Court in Blankenship did not pass on the issue of what constituted an intentional tort. Indeed, the issue was specifically reserved when the court noted:

\[\text{[I]t is for the trier of fact to initially determine whether the alleged conduct constitutes an intentional injury. . . .[T]he facts will demonstrate whether an intentional tort occurred or whether the injuries received by appellants were incurred in the course of and arising from appellants' employment such that the workers' compensation remedy would be exclusive.}\textsuperscript{79}

Since the court was ruling on the appeal from a motion to dismiss\textsuperscript{80}

\textsuperscript{78} Jones at 99, 472 N.E.2d at 1055.
\textsuperscript{79} Blankenship at 615, 433 N.E.2d at 578.
\textsuperscript{80} OH. R. CIV. P. 12(B)(6).
that had been granted by the trial court prior to introduction of evidence, there were virtually no facts upon which to rule. The problem, however, was that the court gave no guidance as to its conception of what an intentional tort is in the workers' compensation field. Without standards by which to be guided, the lower courts split on the issue. The fundamental dichotomy here is between requiring actual, deliberate intent to injure, and allowing an action for wilful misconduct.

A. Deliberate or Specific Intent Required

The courts which have applied this theory have not entertained the suit unless the plaintiff can demonstrate that the employer acted with the deliberate intention of actually causing injury to the plaintiff. A high probability of harm is not sufficient. The harm must be certain to occur. The employer must actually intend that it will happen. Plaintiffs, not surprisingly, have been largely unsuccessful in the courts which require deliberate intent.

In an early case, Gildersleeve v. Newton Steel Co.,\(^1\) the Ohio Supreme Court, in addressing the forerunner of the present statute,\(^2\) laid down two requirements for recovery for an injury due to the employer's "wilful act." These requirements are "First, that the act be done knowingly and purposely; and, second, that it be done with the direct object of injuring another."\(^3\) In this case a metal closet door had been wired to carry 200 volts of electricity, and the employee was injured when he contacted it. The court held that the plaintiff had not proven that the employer had intended to injure him or anyone else, so liability was denied.

In a similar vein, the employer in Gains v. Webster Manufacturing Co., had removed a safety cover from a discharge chute which fed coal to a boiler. The employee reached into the chute and became trapped. The court held that "intentional conduct must have had as its purpose the intention to inflict injury," and reversed the trial court's verdict for the plaintiff.\(^4\)

The court in Hamlin v. Snow Metal Products followed a slightly

\(^1\) 109 Ohio St. 341, 142 N.E. 678 (1924).
\(^2\) See supra note 8.
\(^3\) Gildersleeve at 348, 142 N.E. at 680.
\(^4\) Ohio App. at __, 466 N.E.2d at 578.
less stringent requirement. The court noted that "[t]he employer must desire to bring about the injury which results from his act or he must believe that an injurious result is certain." 85 The court held that the employer’s conduct was not intentionally tortious when its employees were exposed to potentially toxic chemical fumes, and the employer assured them there was no danger.

Other cases in this line have reached a similar result following the same reasoning. 86 This result is in accord with the vast majority of jurisdictions. Larson states:

Since the legal justification for the common-law action is the non-accidental character of the injury from the defendant employer’s standpoint, the common-law liability of the employer cannot, under the almost unanimous rule, be stretched to include accidental injuries caused by the gross, wanton, wilful, deliberate, intentional, reckless, culpable, or malicious negligence, breach of statute or other misconduct of the employer short of genuine intentional injury. 87

In support of his "almost unanimous rule" Larson notes cases from thirty-one states that require specific intent, 88 while only two cases are noted which allowed actions for less egregious conduct. 89 Of these latter two cases, Mandolidis v. Elkins Industries Inc. has been sharply curtailed by subsequent legislation. 90 The other case, Blankenship, has been affirmed and expanded by Jones.

B. Wilful or Wanton Misconduct

As we shall see some courts, relying more on what can be inferred from Blankenship and Nayman than on what the cases actually said, have held that actual intent to injure is not required. This conclusion arises from the facts of the cases and the supreme court’s disposition of them. "The facts of Blankenship, as stated

87. LARSON, supra note 15, § 68.13 at 13-8, 13-9 (footnotes omitted).
88. LARSON, supra note 15, § 68.13 n.11 at 13-9 to 13-21.
89. LARSON, supra note 15, § 68.13 n.10.1 at 13-8 and 13-9 (the only exceptions to the rule that are noted are Mandolidis v. Elkins Ind. Inc., 161 W. Va. 695, 246 S.E.2d 907 (1978) and Blankenship).
90. W. VA. CODE § 23-4-2(c) (Supp. 1984) (effective 90 days following February 7, 1983).
by the Supreme Court, certainly do not indicate that the Supreme Court would require such proof [of actual intent]."

The court in *Gross v. Kenton Structural and Ornamental Ironworks* relied upon such an inference. The court also noted that the *Blankenship* opinion relies on the *Mandolidis* opinion, in which specific intent was not required. In *Gross* the employee was killed when a stairway collapsed at a construction site. Defendant's motion for summary judgment was denied because the court felt that "failure to warn of a known danger may amount to intentional tortious conduct." There remained a substantial question of fact as to the extent of the defendant employer's knowledge of the hazard.

A similar result was reached in *Davis v. Rockwell International,* although the inference was construed more expansively. The court noted that *Blankenship* and *Mandolidis* could be read to define intentional tort as any conduct beyond mere recklessness. In this case the employee was attempting to clean a fiberglass molding machine when his hand became caught between two rollers. The complaint alleged that the machine was in a dangerous condition when the employee used it. The defendant employer's motion for summary judgment was denied.

The Court of Appeals for Lucas County agreed with this theory in *Walker v. Mid-States Terminal, Inc. *, although the terminology is different. The court there held that conduct "which was willfully violative of [defendant] Stout's safety policies and in wanton disregard of appellants' safety" raised an issue of intentional tort. This result was in accord with the later case of *Haase v. Mather Co.*

Other cases appeared to allow actions for conduct that was less than actually intentional, but the actual holding is difficult to
determine. This is often the case because the conduct complained of was found to be less than wanton and wilful misconduct as a matter of law.\textsuperscript{101} Thus, this level might have been considered a threshold, but not necessarily sufficient because the court did not actually reach the issue.\textsuperscript{102}

There are other jurisdictions which appear, by statute, to allow actions for wilful and wanton misconduct. For example, Texas allows an action for the death of an employee which is “occasioned by homicide from the wilful act or omission or gross negligence of any person, firm or corporation.”\textsuperscript{103} However, the case law appears to allow a cause of action for conduct more egregious than gross negligence, i.e., something more closely akin to actual intent.\textsuperscript{104}

The statutes in Arizona use the “wilful misconduct”\textsuperscript{105} terminology, but wilful misconduct is later defined as “an act done knowingly and purposely with the direct object of injuring another.”\textsuperscript{106} The case law appears to interpret these provisions as requiring actual intent.\textsuperscript{107}

In actual practice, Ohio appears to be the only state which allows an action for wilful and wanton misconduct, or as Jones restates it, “an act . . . committed with the belief that . . . injury is substantially certain to occur.”\textsuperscript{108}

\textbf{C. The Resolution in Jones}

What the court implied in Blankenship and Nayman it made law in Jones. The Jones court holds, much to the dismay of Blankenship critics, that “an intentional tort is an act committed with the

\begin{itemize}
  \item \textsuperscript{101} Hamrick (available Feb. 19, 1985, on LEXIS, States library, Ohio file).
  \item \textsuperscript{102} In White, No. 84AP-247 (Ct. App. Franklin Cty.), the court of appeals reversed the trial court's grant of summary judgment for the defendant on other grounds, even though the plaintiff had alleged only “wilful, reckless and wanton misconduct” by the defendant. (available Feb. 19, 1985, on LEXIS, States library, Ohio file).
  \item \textsuperscript{103} TEx. REV. CIv. STAT. ANN art. 8306(5) (Vernon 1976 & Supp. 1984).
  \item \textsuperscript{104} See, e.g., Wooley v. Southwestern Portland Cement Co., 272 F.2d 906 (5th Cir. 1959); Castleberry v. Goolsby Bldg. Corp., 617 S.W.2d 665 (Tex. 1981); cf. Burk Royalty Co. v. Walls, 616 S.W.2d 911 (Tex. 1981) (act must demonstrate such an entire want of care as to raise the belief that the act or omission was the result of conscious indifference to the right or welfare of the persons affected). See generally LARSON, supra note 15, \S\S 68.13, 69.23.
  \item \textsuperscript{105} ARIZ. REV. STAT. ANN. \S 23-1022(A) (Supp. 1984).
  \item \textsuperscript{106} Id. at \S 23-1022(B).
  \item \textsuperscript{108} Jones at 95, 472 N.E.2d at 1051.
\end{itemize}
intent to injure another, or committed with the belief that such injury is substantially certain to occur.” Had the holding ended with the first clause, Ohio would have fallen in line with virtually every other jurisdiction that allows an action for workplace intentional torts. The first clause is facially misleading because it appears to require actual intent, while it is actually a gratuitous phrase. The conditions in which this test will be met will certainly be covered by the second test. Therefore, the test lies in the “substantially certain to occur” requirement. The court has held that the second clause quoted above may be used to find employers liable who are guilty of conduct far less reprehensible than that performed with actual intent to injure.

For example, in deciding Gains v. City of Painesville, a companion case in Jones, the court held that the wilful removal of a safety cover on a coal chute was intentionally tortious conduct when an employee reached his hand into the chute and got caught in the machinery. “Plaintiff must merely demonstrate that the defendant employer removed the safety cover from the discharge chute despite a belief that injury was substantially certain to result.” Considering the court of appeals noted that plaintiff’s own counsel stated at trial “the evidence would not establish that appellant intended to kill or injure Mr. Gains,” it is apparent that a great shift away from actual intent has occurred.

In Hamlin v. Snow Metal Products, the third companion case in Jones, the plaintiffs alleged injury due to high levels of acid and metal fumes in the air of the workplace. The supreme court reversed the court of appeals’ decision and reinstated the jury verdict for the plaintiffs. The Ohio Supreme Court held that the company had knowledge of the exposure, of the harmful effects of the fumes, and that the company misrepresented the nature of the hazard to the employees. The court here affirms the inference that the conduct in Blankenship was indeed tortious, in

109. Id.
110. 15 Ohio St. 3d 90, 472 N.E.2d 1046 (1984).
111. Id. at 96, 472 N.E.2d at 1052.
112. Gains, __ Ohio App. at __, 466 N.E.2d at 578.
113. 15 Ohio St. 3d 90, 472 N.E.2d 1046 (1984).
114. Id. at 97, 472 N.E.2d at 1053.
their opinion, and finds generally that a failure to warn of a known hazard may be an intentional tort.

*Hamlin* is also a case of interest because through it the court held that punitive damages could be awarded. According to the testimony of certain of the plaintiffs at trial, certain management personnel of the company responded to their "reports of health problems with lascivious, sexist and grossly insulting remarks." The comments have little or nothing to do with the injuries alleged. The court of appeals referred to the comments as being "indicative of gross insensitivity," but held that they must "be part and parcel of the actions or forces which injure" in order for the plaintiffs to recover for them. This connection between injury and insult apparently is not necessary in the supreme court's opinion.

The facts in *Jones v. VIP Development Co.* indicate that the supreme court was willing to go to great lengths to find a basis for an action in intentional tort. The plaintiff alleged that the employer "took no steps to inspect, and make safe the premises, nor to warn frequenters of the dangers to be encountered from the high voltage distribution lines on the premises." The plaintiff was injured when a section of conduit being moved came in contact with the power lines. The complaint sounded in negligence. Summary judgment was granted in favor of the employer at trial. The sole assignment of error was in actuality an allegation of intentional tort not raised at the trial level. Accordingly, the court of appeals ruled that it could not be raised on appeal, and overruled the assignment of error. The supreme court held that even though the complaint did "not employ the terms 'intentional' or 'wilful,' the absence of these passwords is not dispositive. Nor is the use of the word 'negligence' fatal, where the conduct described actually constitutes an intentional tort." This retrospective application may allow plaintiffs who did not allege more than negligence at trial to now amend their complaint and appeal on the basis of intentional tort.

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115. *Id.* at 98, 472 N.E.2d at 1053 (certain of these remarks are incorporated in the court of appeals' decision, No. 46229, slip op. at 22-24).
117. *Jones* at 95, 472 N.E.2d at 1051.
118. *Id.* at 90, 472 N.E.2d at 1048.
121. *Jones* at 96, 472 N.E.2d at 1052.
An interesting but unmentioned point in this opinion is the relation of specific safety requirements\(^1\) to an action in intentional tort. It would appear that a violation of a specific safety requirement could often be construed as an intentional tort.\(^2\) Thus, conceivably, an employee could receive the maximum compensation award plus up to 50\% more in additional compensation, and then sue at law. Presumably this additional amount would not be subject to set-off either, even though the purpose of the additional compensation may be punitive in effect.

The availability of the common law defenses was not mentioned in the opinion, but it is probable that they will not be very useful. For example, contributory negligence is not a defense that is available where the defendant's conduct was intentional, wilful or wanton.\(^3\) Further, contributory negligence has been supplanted statutorily and replaced with a comparative negligence test.\(^4\) Thus the employer will not get a bar to the action, but may get a reduction in the award to the extent the employee was negligent. The defense of assumption of the risk has been merged with contributory negligence, so that this defense is now also subject to the statutory limitations of comparative negligence.\(^5\)

The defense of the fellow servant rule may also be of little use. The fellow servant himself is not subject to liability for an injury received by another employee in the course of and arising out of the latter employee's employment.\(^6\) If it is an intentional tort, however, it is not an injury sustained in the course of and arising

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122. OHIO CONST. art. II, § 35 provides for the imposition by the Industrial Commission of additional compensation ranging from 15\% to 50\% of the maximum compensation award allowable for injuries that result from a violation of a specific safety requirement. These requirements are published by the Industrial Commission. OHIO ADMIN. CODE § 4121:1-5 (1984).
123. While it is difficult to determine from the facts presented in the opinions, it would appear that the act in Gains is a violation of OHIO ADMIN. CODE § 4121:1-5-04 (guarding of mechanical power transmission apparatus).
127. OHIO REV. CODE ANN. § 4123.74.1 (Page 1980); see Kaiser v. Strall, 5 Ohio St. 3d 91, 449 N.E.2d 1 (1983) (employee precluded from pursuing a common law negligence action against co-employee when compensation benefits had been received for the injury; had the complaint sounded in intentional tort, however, the result might have been different). Jones at 100, 472 N.E.2d at 1055.
out of the employment. The fellow servant's liability thus is unclear. The value of these defenses is not known at present, because they are largely untried. With the elimination of the other avenues for defeating a claim closed by the Jones decision, it is possible that these defenses will see more litigation in the future.

IV. DISCUSSION

The Ohio Supreme Court in Blankenship held that an employee was not precluded by statute from enforcing his common law remedies against his employer for an intentional tort. The decision in Jones gives a broad definition of what the court considers an intentional tort to be. This definition goes well beyond what the vast majority of jurisdictions consider an intentional tort.

The effect that this ruling will have on individual employers or the economy of Ohio is yet to be seen. The experience of West Virginia, whose supreme court decisions were something of a role model for Ohio's, is informative. The decision there in Mandolidis v. Elkins Industries was analogous to Blankenship. The definition of deliberate intent in that opinion encompasses "wilful, wanton and reckless misconduct . . . undertaken with a knowledge and an appreciation of the high degree of risk of physical harm to another created thereby." The subsequent experience of West Virginia was probably similar to what Ohio will experience.

The ensuing litigation in West Virginia resulted in a number of very large jury verdicts for the plaintiffs. The jury verdict in one case was for $4,000,000, which was reportedly three times the value of the company's total assets. Other exaggerated jury verdicts were also obtained.

129. Id.
131. Id. at 914.
134. Note, Wake of Mandolidis, supra note 132, at 927-29.
The legislature of West Virginia reacted to these developments with a two-pronged attack. First, the statute was amended to overrule the language in *Mandolidis* that allows a tort action if the employer "engages in wilful, wanton, and reckless misconduct." To accomplish this the statute requires that it be proven that the employer "acted with a consciously, subjectively and deliberately formed intention to produce the specific result of injury or death to an employee," or that specific findings are made as to the seriousness of the safety violation, the employer's actual knowledge of the hazard, and the employer's appreciation of the high degree of risk and strong probability of injury or death as a result. The statute also specifically precludes liability for punitive or exemplary damages. Second, the legislature created an "Employers' Excess Liability Fund" which will provide insurance coverage for excess liability over workers' compensation benefits if liability is found under the above sections. The fund is voluntary and consists of premium payments made by subscribing employers. Thus, not only is it now more difficult to succeed in an intentional tort action in West Virginia, but the employer is also insured against such excess liability. This appears to be an eminently reasonable solution to the problem. The intentionally injured employee has retained his right of action for additional damages, but the employer is granted protection from exaggerated common law damages.

It is obvious from the foregoing analysis that the supreme court has placed Ohio employers in an exceedingly precarious position. The specter of excessive liability looms large over them. Their bargaining position is greatly diminished because the employee will be compensated as his suit progresses. If the employee retains counsel on a contingent fee basis to pursue the common law remedy, he will risk little, while the employer is put, at a minimum, to the expense of defending the suit.

Employers are certain to react to the situation. Undoubtedly attempts will be made to make workplaces safer, but this will not

136. *Mandolidis*, 246 S.E.2d 907, 909 (paragraph number 1 of court's syllabus).
138. Id. at § 23-4-2(C)(2)(ii).
139. Id. at § 23-4-2(C)(2)(iii).
141. Id. at § 23-4C-2.
solve the problem. The range of conduct which can be seen as intentionally tortious is too broad to allow of easy resolution on this basis. Indeed, what employer has not known of a hazard present, or failed to make safe the premises, as alleged in Jones.\textsuperscript{142}

Employers are neither omniscient nor omnipresent, and accidents will always occur despite their best efforts. A supervisory employee, or a co-employee, may set up a condition that causes such an injury before the employer is aware of it. Admittedly, many such occurrences will not be found to be intentionally tortious, but it will require a trial on the merits to make this determination.

Employers may also begin contesting more claims than in the past. If the employee indicates that he may pursue a remedy at law, or perhaps the incident merely smacks of intentional tort, it may be in the employer's best interest to deny the claim. This action might lessen the employer's exposure to double liability by limiting the compensation received. It also would put the employee in a less advantageous financial position, and make him more amenable to settlement. However, unless the employer has valid reasons for denying the claim, this course of action may only compound his difficulties. It is unfortunate that this course of action returns our industrial society to a time when remedies were not swift and certain, to a time when employers and employees were adversaries without a middle ground.

V. RECOMMENDATIONS

It is not a fortuitous and coincidental occurrence that virtually every other state that has considered this problem has resolved it differently than Ohio. Ohio is not blazing new trails into an uncharted domain. There are seen the footsteps of other states that have travelled this route. And there are seen the footsteps of those same states in retreat.

It is not to be expected that the Ohio Supreme Court will correct its own excesses. While the Supreme Court of West Virginia merely redefined "deliberate intention" which was already in the statute,\textsuperscript{143} the Ohio Supreme Court went out of its way to redefine injury in the course of employment\textsuperscript{144} to come to this result. The

\begin{footnotes}
\item[142] Jones at 95, 472 N.E.2d at 1051-52.
\item[143] W. VA. CODE § 23-4-2 (1981).
\item[144] Blankenship at 612-13, 433 N.E.2d at 576.
\end{footnotes}
unexpected degree of clarity with which the subject was reaffirmed in Jones does not bode well for reversal in the near future.

It will take action by the legislature to restore the balance in the workers' compensation system. Injured employees need to have an adequate remedy. But their employers also need assurances that these remedies will not make continuation of the enterprise difficult, if not impossible. The example set by West Virginia should be followed in Ohio.

First, an intentional tort in the workplace should be defined as an act committed with preconceived deliberate and specific intent to injure the worker or another. The injury must be the direct result of such act. This definition must remove from consideration all occurrences of an accidental nature, and may appear unduly restrictive. However, as Larson notes:

[O]ne must remind oneself that what is being tested here is not the degree of gravity or depravity of the employer's conduct, but rather the narrow issue of intentional versus accidental quality of the precise event producing injury. The intentional removal of a safety device or toleration of a dangerous condition may or may not set the stage for an accidental injury later. But in any normal use of the words, it cannot be said, if such injury does happen, that this was deliberate infliction of harm comparable to an intentional left jab to the chin.\textsuperscript{145}

This is meant to be an extraordinary remedy for extraordinary occurrences. The compensation afforded by workers' compensation is meant to be the exclusive remedy for ordinary accidental occurrences.

Second, the plaintiff should not be put to an election, because this would make a suit at law a paper remedy unobtainable by virtually all injured employees. For a truly intentionally injured employee, as defined above, the suit should be an available remedy. However, the suit should only be for excess damages over compensation received. The employer must be allowed to set off the compensation already paid. Further, the future compensation benefits payable at the time of judgment should be reduced to present value and paid to the plaintiff in a lump sum. This figure should then also be set off against the judgment.

Third, the legislature should follow the lead of West Virginia

\textsuperscript{145} Larson, supra note 15, § 68.13 at 13-27.
and establish an excess liability fund to cover employers who are found liable as above. This should be a voluntary fund that is in the nature of insurance. Commercial insurance is ordinarily unavailable for coverage of intentional acts.

Fourth, punitive and exemplary damages should be prohibited. The verdict in favor of the plaintiff is already punitive in nature, because the plaintiff was compensated for lost wages and medical expenses. Juries may also have a tendency to punish corporate employers on the basis of perceived community opinion rather than on the facts of the case. 146

It is imperative that the legislature move to correct this situation. If it is not corrected, the existence of small businesses may be imperiled, while even medium to large companies may be threatened. As to companies contemplating a choice between relocation to Ohio and another state, virtually any other state will offer a more liability-free environment that will be preferable.

The Ohio Supreme Court has destroyed the balance which is the hallmark of workers' compensation legislation. It has returned employers to the liability situation that they were in before the passage of the Workers' Compensation Act; but now they must also bear the burden of compensating the worker during the litigation, without hope of a reduction in the amount of the award.

The court may, in this area, win a battle but lose the war. A plaintiff may succeed in obtaining what the court would deem an adequate award, but in the process put the employers of Ohio out of business. Or, in the alternative, this may drive the costs of Ohio products out of the range of their non-Ohio competitors. Can Ohio afford either of these alternatives?

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146. See Note, Wake of Mandolidis supra note 132, at 915-16, n.157.
MEDICAL MALPRACTICE STATUTES: SPECIAL PROTECTION FOR A PRIVILEGED FEW?

Medical malpractice statutes,1 hastily enacted in the mid-1970’s by many state legislatures responding to what insurers of health care providers claimed was an emergency situation or “crisis,”2 have come under increasing attack as violative of both the Constitution of the United States and the constitutions of the states.3 Once highly praised by many commentators as the answer to the problem of increased insurance rates for physicians which supposedly threatened the public health and welfare,4 these statutes are now being labeled the “self-serving” result of intensive lobbying efforts of the medical profession and its insurers.5

Initially held unconstitutional by some trial courts6 and by the

1. Medical malpractice statutes were enacted as a legislative response to pressure from health care professionals and insurance carriers in the mid-1970s and were designed to alleviate a malpractice “crisis” of inadequate health care for the public resulting from the inability of physicians to procure malpractice insurance. See Note, Ohio’s Attempts to Halt the Medical Malpractice Crisis: Effective or Meaningless? 9 U. DAYTON L. REV. 361 (1984).

2. The Ohio Supreme Court described the Ohio statute as an “emergency measure necessary for the immediate preservation of the public peace, health and safety” and as “necessary to insure a continuance of health care delivery to the citizens of Ohio.” Beatty v. Akron City Hospital, 67 Ohio St. 2d 483, 494, 424 N.E.2d 586, 593 (1981).


4. Redish, Legislative Response to the Medical Malpractice Insurance Crisis: Constitutional Implications, 55 TEX. L. REV. 759 (1977) [hereinafter cited as Redish]. In this article, prepared for and funded by the American Hospital Association, Professor Redish concludes that most of the constitutional objections to the medical malpractice statutes are insubstantial and that the wisdom of the proposals as a matter of public policy is a controversial issue for legislative determination.

5. E.g., Cunningham & Lane, Malpractice—the Illusory Crisis, 54 FLORIDA BAR JOURNAL 114 (1980).

Supreme Court of Illinois, the statutes were held to be constitutional by a majority of the jurisdictions in which various provisions of the statutes were challenged on constitutional grounds. Some courts, however, have conducted a more critical examination of the situation supposedly necessitating special medical malpractice laws, to determine if such a crisis actually exists and if such statutes are, in fact, necessary.

8. Seoane v. Ortho Pharmaceuticals, 660 F.2d 146 (5th Cir. 1981) (submission of claim to screening panel prior to commencement of suit bears a rational relationship to the legitimate state interest of lowering the cost of, and assuring the availability of, medical care and does not violate equal protection guarantee); D'Antonio v. Northampton-Accomack Memorial Hospital, 628 F.2d 287 (4th Cir. 1980) (different treatment of medical malpractice plaintiffs from other tort plaintiffs under the Virginia medical malpractice act does not violate equal protection and admission of a screening panel's decision into evidence at trial does not violate the right to a jury trial); Hines v. Elkhart General Hospital, 603 F.2d 646 (7th Cir. 1979) (submission of claim to medical review panel does not violate right to trial by jury and does not violate equal protection); Eastin v. Broomfield, 116 Ariz. 576, 570 P.2d 744 (1977) (mandatory referral of medical malpractice claim to medical liability review panel not violative of equal protection guarantees); Johnson v. St. Vincent Hospital, 404 N.E.2d 585 (Ind. 1980) (equal protection guarantees not violated by medical malpractice statute which requires submission of claim to pretrial panel places limits on recovery); Rudolph v. Iowa Methodist Medical Center, 292 N.W.2d 550 (Iowa 1980) (statute abrogating the collateral source rule, at least partially in cases against designated health care providers, is not unconstitutional); Everett v. Goldman, 359 So.2d 1256 (La. 1978) (mandatory use of medical review panel violates neither equal protection nor substantive due process guarantees); Attorney General v. Johnson, 282 Md. 168, 385 A.2d 57 (1978) (no equal protection violation from mandatory use of health claims arbitration panel nor from the admissibility and presumption of correctness of panel decision at a subsequent trial); Paro v. Longwood Hospital, Mass. 369 N.E.2d 985 (1977) (mandatory screening before a medical malpractice tribunal and requirement that a claimant whose claim has been rejected by the medical malpractice tribunal post bond before further prosecution violates neither equal protection nor substantive due process); Prendergast v. Nelson, 199 Neb. 97, 256 N.W.2d 657 (1977) (use of medical review panel violates neither equal protection nor due process); Comiskey v. Arlen, 55 A.D.2d 304, 390 N.Y.S.2d 122 (1976) (admission of panel's decision at subsequent trial does not deny claimant a right to a jury trial); Beatty v. Akron City Hospital, 67 Ohio St. 2d 483, 424 N.E.2d 586 (1981) (submission of arbitrator's report as evidence in a jury trial does not violate right to a fair and impartial jury trial and does not conflict with the right of equal protection guaranteed by both the United States and the Ohio Constitutions); State ex rel. Strykowski v. Wilkie, 81 Wis.2d 491, 261 N.W.2d 434 (1977) (a mandatory panel review of all medical malpractice claims is violative of neither equal protection nor due process guarantees). But see Beatty, 67 Ohio St. 2d at 499, 424 N.E.2d at 595 (Brown, J., dissenting); Justice Brown, in dissent, maintained "Even if a substantial majority of state and federal courts found no constitutional infirmity in their medical malpractice statutes, I remain unpersuaded by sheer numerosity. If justice consists of counting noses, then the function of this court could be performed by a tabulating machine." Id.
9. See, e.g., Jones v. Board of Medicine, 97 Idaho 859, 555 P.2d 399 (1976) cert. denied, 431 U.S. 914 (1977). (case remanded to lower court for determination of whether there was an actual malpractice crisis); Arneson v. Olson, 270 N.W.2d 125, 136 (N.D. 1978) (striking
This Comment will review the history of the medical malpractice crisis and discuss the reasons for the enactment of special statutes to protect health care providers, especially doctors. It will then discuss the various provisions of medical malpractice statutes in general, the major constitutional issues raised by the more controversial provisions of the various statutes, and the level of judicial scrutiny used by the courts to evaluate the statutes when challenged. Finally, it will consider possible solutions to some of the problems encountered in the practical application of the statutes by the states and suggest alternatives or modifications to the statutes that might be utilized by state legislatures in dealing with medical malpractice problems in the future.

10. Although some states protect all health care providers under their medical malpractice statutes, many do not. An Ohio trial court has pointed out "[I]t is notable that the special consideration given to the medical profession by these statutes is not given to lawyers or dentists or others who are subject to malpractice suits." Graley v. Satayatham, 74 Ohio Op. 2d 316, 320, 343 N.E.2d 832, 837.

11. A majority of states have enacted statutes whose objective is to cut down on the number of claims brought which would supposedly cut down on the cost of insurance premiums and, in so doing, alleviate the malpractice crisis. See, e.g., MONT. CODE ANN §§ 27-6-102 (1983) ("The purpose of this chapter is to prevent where possible the filing in court of actions against health care providers... for professional liability in situations where the facts do not permit at least a reasonable inference of malpractice... "); N.M. STAT. ANN. §§ 41-5-21 (1978) ("The purpose of the Medical Malpractice Act is to promote the health and welfare of the people of New Mexico by making available professional liability for health care providers in New Mexico"); UTAH CODE ANN § 78-14-2 (1977 & Supp. 1983) ("The legislature finds and declares that the number of suits and claims for damages... arising from health care has increased greatly in recent years... Because of these increases the insurance industry has substantially increased the cost of medical malpractice insurance."). Other jurisdictions have merely provided for the availability of malpractice insurance. See, e.g., COLO. REV. STAT. §§ 10-4-901 to 4-913 (Supp. 1984) (ensuring the continuing availability of necessary health care services in this state by establishing a temporary market for medical malpractice insurance coverage for Colorado health care providers in the event medical malpractice insurance is not available from the voluntary market or the cost becomes so unreasonably high as to be practically unavailable); KY. REV. STAT. ANN. §§ 304.40-010 to -320 (Baldwin 1981 and Supp. 1984) (declaring that health care liability insurance is necessary for the general health and economic welfare of the people and providing for a mandatory program to assure an adequate supply of health care liability insurance coverage in the Commonwealth); MINN. STAT. §§ 62F.01 to 62F-14 (1982) (creating a temporary joint under-writing association to provide medical malpractice insurance coverage to any licensed health care provider unable to obtain this insurance through ordinary methods).

12. This article will not attempt to discuss all the different state statutes as this would be futile because legislation in this area is a constantly changing and on-going process.
I. THE MEDICAL MALPRACTICE "CRISIS"

A. The "Crisis" of the Mid-1970s

Since 1976, law reviews and journals have published volumes on the so-called medical malpractice "crisis" of the mid-1970s with its "sky-rocketing" insurance rates for physicians which allegedly could make medical care for the public practically unavailable. 13 During this time, physicians and representatives of the insurance companies lobbied both state and federal legislatures for protective legislation. 14 The insurance companies complained that the increased number of medical malpractice suits being brought and the excessive amounts being awarded to plaintiffs in malpractice actions were forcing them to raise the cost of premiums for physicians purchasing medical malpractice insurance to a prohibitively high level or to stop selling malpractice insurance altogether. 15 They also claimed that the higher premiums charged to physicians were based on sound actuarial principles and were essential because of the uncertainty of the number of future claims and the size of the awards. 16 The insurers contended that it took longer to dispose of medical malpractice actions than other tort cases and that this uncertainty was a problem for insurance companies trying to determine the amount of money needed on reserve to pay successful medical malpractice claimants. 17

Insurance companies refer to the amount of time that passes between payment of medical malpractice premiums and the final disposition of a malpractice claim as the "long-tail" on medical

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13. Redish, supra note 4, at 759-60. Between 1960 and 1970, insurance rates for surgeons increased 949.2% and 540.8% for non-surgical physicians. Id. at 759. "It appeared that the cost of malpractice insurance to physicians had soared to a point where physicians talked openly of leaving the state to avoid prohibitive insurance premiums. Other physicians actually went on strike, refusing to furnish medical care except in extreme emergency, thereby placing the people of the state in great peril." Halpern v. Gozan, 85 Misc. 2d 753, 755, 381 N.Y.S.2d 744, 746 (1976).


The greater the period of time in which a plaintiff is allowed to bring a claim, that is, the longer the tail on the malpractice claim, the more difficult it is for an insurer to actuarially predict with certainty the amount of money it must keep on reserve to protect against future claims. Consequently, an insurer who cannot forecast the number of claims per year with some degree of certainty must keep large sums on reserve to cover both expected and unexpected losses. During the “crisis,” lobbyists for the insurance companies argued that to prevent “long-tail” problems, legislatures should shorten the statute of limitations, thereby reducing the number of claims brought. The insurers claimed that their inability to accurately predict future claims resulted in tremendous losses as the “long tail” lashed out and forced them to withdraw from the unprofitable malpractice market. Thus, the medical malpractice crisis was created.

The explanation offered by the insurance companies was not accepted by everyone. Some commentators noted speculative investments by the companies in the stock market that reduced their surpluses. Others criticized the insurance companies for dropping the less stable medical malpractice insurance and replacing it with more profitable lines of insurance, such as life insurance, and for their questionable claims of losses when their figures “included projected future claims, but omitted interest earned on claims.

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18. Id. at 316.
20. Id. at 362.
21. SUBCOMM. ON HEALTH AND THE ENVIRONMENT OF THE COMM. ON INTERSTATE AND FOREIGN COMMERCE, 94th CONG. 21st SESS. REPORT OF THE NATIONAL CONFERENCE ON MEDICAL MALPRACTICE (1975) [hereinafter cited as REPORT, NATIONAL CONFERENCE]. Many legislatures responded by enacting new laws which shortened the statute of limitations for medical malpractice suits and set an absolute outer time limit in which a claim could be filed. Note, supra note 1, at 363. The Ohio statute, for example, provides that medical malpractice claims “shall be brought within one year after the cause thereof accrued . . . .” OHIO REV. CODE ANN. § 2305.11(A) (Page Supp. 1983). The statute also states that “[n]o event shall any medical claim against a physician . . . be brought more than four years after the act or omission constituting the alleged malpractice occurred.” Id. at § 2305.11(B).
22. Note, supra note 14, at 283.
23. Cunningham & Lane, supra note 5, at 116. Many trial attorneys contend that the medical malpractice crisis of 1975 resulted from overinvestment in the market by insurance companies which reduced their surplus funds in excess of 50%. The insurance companies then reduced their premium volume by dropping the least stable lines of insurance, medical malpractice. With only a few companies left supplying medical malpractice insurance, the remaining insurers could monopolize the malpractice insurance market and set their own price. Id.
24. See also Report, Medical Subcommittee, supra note 16.
reserves set aside for future losses." Other explanations have been offered for the crisis situation. These include: a weakening of the doctor-patient relationship resulting from increased specialization, a loss of trust and confidence in the medical profession by consumers of health care, general economic inflation, and an increasingly litigious society. Many doctors, however, insisted that the biggest factor in bringing about the crisis was the traditional tort system with its long delays, extensive pretrial discovery procedures, medical experts, and legal and administrative expenses.

Doctors, fearful of prohibitive insurance rates, joined the insurance companies and lobbied for immediate reforms to curtail the payment of large frequent awards by insurers of physicians to medical malpractice claimants. As noted, lobbying physicians and insurance companies did not confine their efforts to state legislatures, but took their cause to the federal government as well. The lobbyists testified before Congress and encouraged federal involvement.

At the National Conference on Medical Malpractice held in Arlington, Virginia on March 20 and 21, 1975, physicians and representatives of the insurance companies cited "rapidly skyrocketing costs of insurance premiums" and the increasing unavailability of malpractice insurance for physicians as critical issues in need of resolution. According to one speaker, the dramatic increase in the number of claims and the "staggering" size of the settlements and judgments forced the underwriters to increase premiums or cease providing coverage altogether, making it "a pretty scary situation." Other conference speakers, representing physicians and

25. Report, Medical Subcommittee, supra note 16, at 2. See also Comment, After Mattos, supra note 17, nn. 14-17.
28. Cunningham & Lane, supra note 5, at 116.
31. Id. Senator Kennedy stated that the State Insurance Commissioners had been negligent and that the federal government should become involved, stating "To allow the states, one by one to take stop gap holding actions will take more time than we can afford." Id. at 7-8. Kennedy advocated, and stated that he had introduced, a bill to make the government a medical malpractice insurer on a no-fault basis in which an injured patient would receive benefits no matter who was at fault. Id. at 9. The representatives of the insurance
insurers, concluded that changes in the tort law would solve the problems of medical malpractice litigation. These speakers urged reforms such as: a shorter statute of limitations, a limitation on contingency fees by attorneys, a limitation of guarantees to cure to those in writing, a limitation on windfall recoveries, periodic payments of awards, a ceiling on the amount of damages recoverable, elimination of the doctrine of *res ipsa*, speedier trials, and arbitration.  

Robert Cartwright, representing the American Trial Lawyers Association, countered that doctors cause malpractice, not lawyers. He pointed out that much good, the counting of sponges after surgery, for example, has resulted from lawsuits. Mr. Cartwright supported his position by reading from page fifty-five of the 1974 Health, Education and Welfare legislative report: "At the present time medical malpractice litigation is clearly the most significant external pressure prompting physicians to practice quality medicine."

The lobbyists, however, were successful in convincing lawmakers that a crisis situation existed. Nearly every state responded to the lobbying of physicians and their insurers by enacting some form of legislation. The legislation was designed to relieve doctors

companies stoutly rejected this proposal. Id. at 23. Kennedy further stated that he had introduced a bill by which all claims resulting from medical injury would be subject to nonbinding arbitration to assure the injured patient a faster, less costly alternative to litigation. Id. Kennedy also advocated minimal standards of licensure and re-licensure of physicians at the state level. Id.

32. Id. at 11, 23.
33. Id. at 26.
34. Id. at 37.
35. The statutes enacted in the different states were far from uniform. See, e.g., MD. CTS. & JUD. PROC. CODE ANN. §§ 3-2A-1 to 2A-09 (Supp. 1984) (providing for mandatory nonbinding arbitration of claims for the consideration of liability and damages and for the admissibility of the panel decision which is clothed in a presumption of correctness at a subsequent trial); MICH. COMP. LAWS ANN. §§ 600.5001 to .5041 (1983) (providing for voluntary binding arbitration of medical malpractice claims); KY. REV. STAT. ANN. §§ 304.40-010 to .40-330 (Baldwin 1981 and Supp. 1984) (providing for the availability of health care liability insurance only). Section 304-40.030 of the Kentucky statute was repealed by the 1984 General Assembly after the Kentucky Supreme Court, although taking judicial notice of the medical malpractice crisis, ruled the section unconstitutional in McGuffey v. Hall, 557 S.W.2d 401 (1977). See also Comment, Alternatives to Litigation: Pretrial Screening and Arbitration of Medical Malpractice Claims: Has Missouri Taken a Giant Step Backward? 50 U. MO.-KAN. CITY L. REV. 182, 184 (1982). Ohio, as a typical example, enacted House Bill 682 on July 24, 1975 which provided for: mandatory pretrial arbitration of all medical claims, a standard of competency for medical expert witnesses, a presumption of validity of a patient's written consent, a $200,000.00 limitation on the amount recoverable for general damages in any medical claim not involving death, a professional review organization, and an absolute
of the "oppressive" insurance rates in response to "evidence" presented by the medical profession and the insurance industry that a crisis situation existed. The legislators ostensibly were not so much concerned with the problems directly confronting the medical profession and its insurers as they were with a perceived threat to the health and welfare of the public if health care services were seriously curtailed. In Pennsylvania, for example, the law-makers were convinced a crisis existed when a leading insurance company, Argonaut, announced it would no longer write medical malpractice insurance in the state. The Insurance Commissioner prevented Argonaut's withdrawal from the state by agreeing to the company's request to raise premiums by 207%, which made medical malpractice insurance available to those physicians who could afford to pay for it. In Carter v. Sparkman, the Florida Supreme Court accepted the legislative conclusion that a public health crisis did exist and stated that when imminent danger to the public health exists the state may place conditions on an individual's access to the courts in the valid exercise of a state's police power.

B. Is There a Medical Malpractice Crisis Today?

Whether or not a medical malpractice crisis existed in 1975 is, as one writer has aptly stated, "academic" today, the legislators believed one existed and passed laws to remedy the situation.

36. See Cunningham & Lane, supra note 5, at 115.
37. Id.; see State ex rel. Cardinal Glennon Memorial Hospital v. Gaertner, 583 S.W.2d 107, 117 (Mo. 1979) (Morgan, C. J., dissenting). The lawmakers feared that the public welfare would be endangered if they failed to act. See also Comment, After Mattos, supra note 17.
38. See Comment, supra note 17, at 313.
39. Id. at 313 n.4 (citations omitted).
The question today is whether or not these statutes have reduced the cost of insurance premiums paid by physicians by reducing the number of claims brought and the damage awards paid to claimants. The answer is "No." Ten years after the medical profession announced the crisis, doctors say both the number of suits brought and the dollar amounts of the awards are increasing. The physicians admit that medical malpractice insurance is now available but complain that it costs too much. Plaintiffs' lawyers counter that the doctors are trying to win the sympathy of the lawmakers, that malpractice is increasing, and that the tort system is the only way to keep the doctors "on their toes." Doctors, however, are convinced that the tort system is at fault and, led by the American Medical Association, are forming medical coalitions to push for further tort reform at the state level.

According to the American Medical Association, malpractice suits nearly tripled between 1978 and 1983, from 3.3 suits to 8 suits per 100 physicians. The doctors blame the increases in claims on the current tort system which they allege is inequitable in that medical malpractice premiums equal one percent of the $350 billion national health care bill. Middleton, supra note 42, at 9, col. 2. This, she said, comes to about three percent of the doctors' gross income and has increased only slightly since 1980. "It is Ms. Danson's contention that the insurance companies are making a profit on medical malpractice. Her position is supported by a recent report of the New York Bar Association that a doctor-owned insurance company in New York paid out $127,231,000.00 in claims between 1975 and 1982, but received $264,174,000.00 in investment income in addition to $795,812,000.00 earned from premiums during the same period. Kelner v. Kelner, Medical Malpractice: Is There a Crisis? N.Y.L.J., Feb. 8, 1984, p. 1, at 6, col. 2."
it allows injured patients to recover unduly high damages.\textsuperscript{47} This inequitable situation, the doctors contend, results in increased cost of insurance premiums that forces doctors to practice defensive medicine at a cost of $15.1 billion annually.\textsuperscript{48} These doctors intend to return to the state legislatures and lobby for reforms similar to those they won ten years ago but with uniform application to all tort actions.\textsuperscript{49} They undoubtedly will insist that there is a "crisis" that must be resolved in favor of the physicians or the public will suffer. The physicians and their insurance carriers have been accused of conducting a "never-ending search for a crisis with which to frighten government regulators and legislators . . . a crisis which never arrives."\textsuperscript{50}

Thus, in 1976, physicians blamed their inability to obtain malpractice insurance on an increased number of claims and large awards to plaintiffs. While the numbers have not decreased, medical malpractice insurance is available today.\textsuperscript{51} The problem of securing insurance for health care providers was resolved in nearly every state by the statutory creation of Joint Underwriting Associations which supplied insurance coverage to high risk physicians and health care providers.\textsuperscript{52} The physicians paid premiums to the Joint Underwriting Association, based on the charges of the most recent company insuring physicians in the state.\textsuperscript{53} Policyholders were assessed any additional amounts needed in case of a deficiency.\textsuperscript{54} State legislatures have also provided for establishment of self-insurance trusts by groups of doctors.\textsuperscript{55}
insurance companies and the Joint Underwriting Associations are thriving and have helped to alleviate the situation of inadequate reserves that insurance companies found themselves in a few years ago. 56 According to the president of the Physician's Insurance Company of Ohio (PICA), the answer was simply to charge adequate premiums in the first place. 57 PICA's vice president recently stated that the situation in Ohio has stabilized and that there is no chance of a repeat crisis in Ohio. 58 The statutorily created insurance companies are not the only insurance companies enjoying success. From 1975 until 1982 three leading private carriers, representing 31% of the business, reported to A.M. Best Company earned premiums of $2 billion, paid losses of $535 million, and earned investment income on loss reserves of $660 million. 59

Today many attorneys and courts are dissatisfied with the medical malpractice statutes for the above reasons. They are also dissatisfied with the practical application of the statutes, especially the delays associated with the pretrial screening panels created by many of the statutes. 60 The Pennsylvania Supreme Court, in Parker v. Children's Hospital, 61 initially upheld the state's medical malpractice statutes as constitutional, stating "[I]t is an accepted principle of constitutional law that deference to a co-equal branch of government requires that we accord a reasonable period of time to test the effectiveness of legislation." In dissent, Justice Larson referred to the backlog of cases waiting to be heard by a panel and called the Medical Malpractice Act an "unworkable mess" which had not achieved a single objective. 62 The Pennsylvania legislature amended the Act in December 1979, in an attempt to remedy the backlog problem, 63 but the state's supreme court merely noted that

56. E.g., Note, supra note 1, at 38-88.
57. Id.
58. Id.
59. See Shrager, supra note 50. Best reports that St. Paul has written $1.1 billion worth of medical malpractice insurance, earning $180 million in investment income and paying losses of $183 million. Aetna has written $2 billion worth of insurance during the same time period, earning $208 million and paying losses of $224 million. Medical Liability Mutual Insurance Company, writing a total of $795 million of insurance, earned $272 million in investment income and paid out only $127 million. Id.
60. See Aldana v. Holub, 381 So. 2d 231 (Fla. 1980); Mattos v. Thompson, 491 Pa. 385, 421 A.2d 190 (1980).
62. Id. at 132, 394 A.2d at 945 (Larsen, J., dissenting).
63. Comment, supra note 17, at 324. At the time of the amendments, 69% of the cases remained unresolved and of 3,970 cases filed since the statute's enactment four years earlier,
such remedial legislation was "too little, too late," and declared unconstitutional a section of the statute which gave the arbitration panels original and exclusive jurisdiction over medical malpractice claims. 4

The Supreme Court of Florida also initially upheld that state's medical malpractice statute. In *Carter v. Sparkman*, 5 the Florida high court rejected the argument that the expense and delay of mediation proceedings violated the Florida guarantee of access to the courts. The court acknowledged, however, that "the prelitigation burden cast upon the claimant reaches the outer limits of constitutional tolerance." 6

Four years later, in *Aldana v. Holub*, 7 the court reversed itself and found the medical malpractice statute unconstitutional. The court based its decision on "the unfortunate fact that the medical mediation statute has proven unworkable and inequitable in practical operation," and further stated that, "[t]o now increase the prelitigation burden cast upon the claimant by permitting continuances and extensions of time under [the statute] would transcend those outer limits of constitutional tolerance." 8

The Pennsylvania and Florida cases illustrate the problems that have arisen during the past ten years as the various provisions of the different statutes have been subjected to repeated constitutional challenges. The pretrial screening panel, or mandatory arbitration as it was called by some states, was hit first and hardest by constitutional challenges. 9 In Ohio, for example, the state's
highest court upheld the constitutionality of the medical malpractice statute providing for mandatory arbitration of all medical claims in 1981, but litigation continues as other statutory provisions are being challenged. In *Schwan v. Riverside Methodist Hospital*, the Ohio Supreme Court considered Section 2305.11(B) of the Ohio Revised Code which deals with malpractice litigants who are minors. The Court acknowledged a presumption of constitutionality traditionally given to acts of the General Assembly, but held Section 2305.11(B) unconstitutional as a violation of the right of medical malpractice litigants who are minors to equal protection as guaranteed in Section 2, Article I of the Ohio Constitution. The next year, however, the Ohio court emphasized in *Opalko v. Marymount Hospital, Inc.* that only that latter portion of the statute relating to minors was unconstitutional, not the four year absolute bar.

Other provisions of the Ohio statute remain open for constitutional challenge and, like the medical malpractice acts of other states, invite more litigation. Only one conclusion can be drawn as to the situation that exists today: the statutes have not achieved their objectives and must be modified or replaced before the medical malpractice situation can improve.

II. MEDICAL MALPRACTICE STATUTES

Every state has responded to the medical malpractice crisis by

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Constitution); State ex rel. Cardinal Glennon Memorial Hospital, 583 S.W.2d 107 (Mo. 1979) (Medical malpractice statute providing that claim against a health care provider must be referred to a screening panel before it is filed in court violates the Missouri constitutional provision guaranteeing access to the courts without sale, denial or delay).

71. 6 Ohio St. 3d 300, 452 N.E.2d 1337 (1983).
72. Section 2305.11(B) provides: “In no event shall any medical claim against a physician . . . be brought more than four years after the act or omission constituting the alleged malpractice occurred. The limitations . . . apply to all persons regardless of legal disability and notwithstanding section 2305.16 of the Revised Code, provided that a minor who has not attained his tenth birthday shall have until his fourteenth birthday in which to file an action for malpractice against a physician or hospital.” Ohio Rev. Code Ann. § 2305.11(B) (Page Supp. 1983). Section 2305.16 provides, in part: “Unless otherwise specially provided in sections 2305.04 to 2305.14, inclusive . . . of the Revised Code, if a person entitled to bring any action mentioned in such sections. . . .is, at the time the cause of action accrues, within the age of minority, . . . such person may bring it within the respective times limited by such sections, after such disability is removed. . . .” Ohio Rev. Code Ann. § 2305.16 (Page 1981).
73. Schwan, 6 Ohio St. 3d at 303, 452 N.E.2d at 1339.
74. 9 Ohio St. 3d 63, 64, 458 N.E.2d 847, 849 (1984).
enacting some kind of legislation intended to lower insurance premiums, which would supposedly lead to a stabilization or lowering of medical expenses for the consumer.\textsuperscript{75} While no two medical malpractice statutes are identical, certain provisions are common to many of the statutes. The most common provisions are: informed consent,\textsuperscript{76} periodic payments,\textsuperscript{77} standard of care,\textsuperscript{78} attorney's fees,\textsuperscript{79} the \textit{ad damnum} clause,\textsuperscript{80} the collateral source rule,\textsuperscript{81} notice of intent

\textsuperscript{75} See supra note 11. The legislation dealing with joint underwriting associations and physician-owned insurance companies is beyond the scope of this article except to acknowledge the effect of such legislation on the availability of medical malpractice insurance. \textit{Id.}

\textsuperscript{76} The doctrine of informed consent requires a physician to inform the patient of all material facts concerning the course of medical treatment to enable the patient to make an intelligent and informed decision as to his care. A typical statute sets forth the elements of proof necessary to prove a breach of the duty by the physician to secure an informed consent and the contents of a consent form. \textit{E.g.}, \textit{WASH. REV. CODE ANN.} § 7.70.050-70.060 (1984).

\textsuperscript{77} A minority of states allow the court to authorize payment of a judgment in installment plans instead of a lump sum. \textit{E.g.}, \textit{WASH. REV. STAT. ANN.} § 4.56.240 (1984). In American Bank and Trust Company \textit{v.} Community Hospital, 33 Cal. 3d 674, 660 P.2d 829, 190 Cal. Rptr. 371 (1983) the court found that since the medical malpractice statute was not achieving its goals, the periodic payments to the medical tort victim was a denial of equal protection. \textit{But see} American Bank \& Trust Company \textit{v.} Community Hospital, 36 Cal. 3d 359, 683 P.2d 670, 204 Cal. Rptr. 671 (1984) (section of statute that authorized the periodic payment of damages in medical malpractice actions ruled constitutional).

\textsuperscript{78} Some states legislate a statewide standard of care. \textit{E.g.}, \textit{WASH. REV. STAT. ANN.} § 7.70.040 (1984) (the degree of care, skill and learning expected of a reasonably prudent health care provider in the profession or class to which he belongs, in the state of Washington, acting in the same or similar circumstances).

\textsuperscript{79} Some states give the court discretion to determine the reasonableness of the attorney's fees, on its own motion or at the request of the plaintiff or the plaintiff's attorney. \textit{E.g.}, \textit{ARIZ. REV. CODE ANN.} § 12-568 (1976); \textit{But see} Carson \textit{v.} Maurer, 120 N.H. 925, 944-45, 424 A.2d 825 (1980) (Provision which establishes a contingency fee scale for attorneys representing parties in medical injury acts is unconstitutional as interfering with freedom of contract and discriminates against medical malpractice claimants by making their cases less attractive to the plaintiff bar).

\textsuperscript{80} See \textit{e.g.}, \textit{ALASKA STAT.} § 09.55.547 (1984) (The pleadings "may not contain an ad damnum clause or monetary amount claimed against the defendant health care provider, except as necessary for jurisdictional purposes."); \textit{N.M. STAT. ANN.} § 41-5-4 (1978) ("No dollar amount or figure shall be included in the demand in any complaint asserting a malpractice claim. . . "); \textit{UTH. CODE ANN.} § 78-14-7 (1977) ("No dollar amount shall be specified in the prayer of a complaint filed in a malpractice action against a health care provider.").

\textsuperscript{81} The collateral source rule prohibits presentation to the jury of evidence of compensation payable to the plaintiff from sources other than the defendant. California's medical malpractice statute, for example, precludes a collateral source which has provided medical expenses or other benefits to the plaintiff in a medical malpractice case from obtaining reimbursement or those expenses from a medical malpractice defendant. \textit{See CAL. CIV. CODE} § 3333.1(b) (West Supp. 1984). This section of the medical malpractice statutes was ruled constitutional in Barme \textit{v.} Wood, 37 Cal. App. 3d 174, 689 P.2d 446, 207 Cal. Rptr. 816 (1984).
to sue, a statute of limitations, a ceiling on the amount recoverable, binding arbitration, and pretrial screening panels. There are less common but very controversial provisions such as the requirement by some states that a claimant who is unsuccessful at the pretrial screening level must post a bond before proceeding to trial. Every statute includes a provision making malpractice insurance available. Many statutes also include provisions that relate, for example, to qualifications of expert witnesses and to professional review organizations.

82. E.g., Ark. Stat. Ann. § 34.2617 (1979) ("No action for medical injury shall be commenced until at least sixty (60) days after service upon the person alleged to be liable. . . .") The Arkansas Supreme Court recently held the statute constitutional as bearing a "fair and substantial relationship" to the legislative objective of reducing the cost of malpractice insurance, Jackson v. Ozment, 283 Ark. 100, 671 S.W.2d 736, 737 (1984) quoting Gay v. Rabon, 280 Ark. 5, 652 S.W.2d 836 (1983).

83. A typical statute provides that an action must be brought "within three years of the act or omission . . . or one year of the time the patient or his representative discovered or reasonably should have discovered [the injury] except that in no event shall an action be commenced more than eight years after said act . . . the limitations in this section shall not apply to persons under a legal disability." Wash. Rev. Code Ann. 4.16.350 (Supp. 1984).


85. See, e.g., Alaska Stat. § 09.55.535 (Supp. 1981) (providing for voluntary pre- or post-treatment arbitration agreement between patient and health care provider); Ga. Code Ann. §§ 9-9-110 to -9-133 (1982) (providing that arbitration agreement is enforceable only if made subsequent to the alleged malpractice and after a controversy has occurred and if the claimant is represented by an attorney at the time the agreement is entered into); Mich. Comp. Laws Ann. §§ 600.5001 to -5040 (1984) (providing for pre-and post-claim voluntary agreements to submit to binding arbitration).


89. E.g., Ohio Rev. Code Ann. § 2743.43 (Page 1981). A competent expert witness in Ohio is a licensed medical or osteopathic doctor or surgeon who devotes three-fourths of his professional time to active clinical practice or instruction in an accredited university. See Ripps, supra note 35, at 32-33.

While the statutes enacted in different states vary in content, they are uniform in their stated purpose. This purpose is succinctly declared in the New Mexico statute: "The purpose of the Medical Malpractice Act ... is to promote the health and welfare of the people of New Mexico by making available professional liability insurance for health care providers in New Mexico." It is the health care providers, however, who have benefitted most from the statutes. In fact, a major criticism of the medical malpractice statutes is that the statutes are special legislation for a privileged class.

This writer contends that this criticism is, in fact, valid. Physicians, using threats and scare techniques have pushed state legislatures into enacting poorly thought-out legislation in an almost hysterical atmosphere. The insurance companies and doctors dictated to the legislatures the provisions necessary to halt the crisis. The legislatures overreacted and did exactly as they were told. Only the more controversial provisions of the medical malpractice statutes will be considered in detail here. These include those involving: the shortened statute of limitations; limitations on recovery; attorney's fees; the elimination of the *ad damnum* clause; the abrogation or modification of the collateral source rule; and the establishment of pretrial screening and arbitration panels.

A. Statutes of Limitations

Of the various provisions of medical malpractice statutes, the shortened statute of limitations is probably most illustrative of the influence of the insurance companies on the lawmakers. The insurance companies claimed that the extended period of time which may elapse between an act of negligence and the ultimate closing of the committee's function. The records of review groups are not subject to discovery or admissible in evidence in a civil proceeding. Ripps, *supra* note 35, at 28.  
91. N.M. STAT. ANN. § 41.5-1 to .5-28 (1978).
93. In Lewis v. Glendale Adventist Hospital, No. NC-C8018G, slip op. at 2 (Cal. Super. Ct. 1978), the plaintiff claimed $1.7 million in pain and suffering damages. The defendant moved to strike the statement of damages, relying on the state's medical malpractice statute limiting recovery. The court denied the motion, noting that the statute, enacted in a "hysterical atmosphere," was violative of equal protection. See Note, *Limitation of Damages*, supra note 3, at 1292, n.36.
94. See *supra* notes 76-86 and accompanying text.
of the claim, the "long tail" on malpractice claims, contributed to the crisis because of the interpretation of the statute of limitations by most courts. The courts, in order to avoid very harsh results in cases in which the injured victim had no way of knowing of his injury until a significant amount of time had passed, have traditionally interpreted statutes of limitation very broadly. In Ohio, for example, the statute of limitations ran for only one year after the cause of action "accrued", but the courts made three exceptions to the one year rule. The courts would toll the statute until the original patient-physician relationship terminated, until a foreign object left in the body was, or should have been, discovered, or until a disability, such as minority, was lifted. Many courts, including the Ohio Supreme Court, recently began interpreting the statute even more liberally, holding that a cause of action for medical malpractice accrues when the patient discovers or, in the exercise of reasonable diligence, should have discovered his injury. The insurance companies blamed this "discovery rule" and the various judicial interpretations extending the time in which a claim may be brought for reducing the companies' ability to predict future liability with any certainty. A big problem for insurers today is the lack of definite or uniform standards as to what constitutes discovery. There is always a factual question as to when the plaintiff knew enough to start the statute running. The insurance companies, therefore, recommended a shorter, fixed statute of limitations in medical malpractice cases in order to mitigate the long tail problem. The insurance companies claimed a more restrictive statute of limitations would enable them to make better predictions and would allow the companies to reduce the cost of insurance premiums, which, in turn, would reduce medical costs.

95. See Cunningham & Lane, supra note 5, at 118.
96. See Comment, Ohio Statute of Limitations, supra note 41, at 773.
97. Id.
99. See Comment, supra note 41, at 772.
100. See Note, supra note 1, at 369.
101. Comment, supra note 17, at 319. A maximum statutory limit on potential claims enables insurers to more accurately predict the number of suits arising from the acts of the insured each year; therefore, theoretically, if an insurer can lower the risk of unforeseen losses, it will need less funds on reserve. Note, supra note 1, at 371.
The practical value of a statute that favors the physician by limiting the time in which a plaintiff may bring a malpractice action is questionable, especially in light of a government report which shows that eighty-eight to ninety-five percent of the medical injuries are reported during the first twenty-four months, and ninety-seven percent within forty-eight months. The insurance carriers, however, argue that because ninety-seven percent of all malpractice claims were filed within four years of the date of injury, a shorter statute of limitations would harm only a few victims. The problem with this argument is, obviously, that these "few victims" are being denied their right to bring an action and are clearly being denied equal protection of the law.

Most medical malpractice statutes of limitation also favor the physicians and health care providers by setting an absolute outside time limit in which a claim may be brought, notwithstanding the discovery rule, and by cutting down on the amount of time a minor has in which to bring a claim. These shortened statutes of limitation clearly favor the defendant doctor at the expense of the plaintiff. Because only three percent of the injured plaintiffs wait longer than four years to file a claim, the statutes unfairly burden these plaintiffs and cannot be said to further the purpose of the medical malpractice statutes. And, as one commentator noted, "[A]n incompetent or negligent physician who injures a patient may knowingly and willingly conceal his negligence and be immune from liability for malpractice if the victim is not fortunate enough to have discovered the injury and filed suit within [the outside absolute time limit]."
B. Limitation on Recovery

A second and very controversial provision that favors physicians to the detriment of the most seriously injured claimants places an absolute limit on the amount of damages the claimant may recover.\textsuperscript{107} Statutes containing this provision have been criticized as discriminating against plaintiffs with medical malpractice claims when compared with plaintiffs in other tort actions. Medical malpractice plaintiffs, whose damages exceed the statutory limit are also discriminated against when compared with those whose damage claims do not exceed the statutory limits.\textsuperscript{108} The limitations imposed on recovery generally range from $100,000 to $1 million.\textsuperscript{109} It is hard to imagine a statutory provision that more blatantly favors a special class than one that limits the damages an injured person may recovery from a tortfeasor. No such consideration is afforded any other professional who negligently injures another person.\textsuperscript{110}

C. Attorney's Fees

The statutory provisions concerned with attorney's fees are equally controversial. Opponents of the contingency fee system accuse "greedy attorneys" of causing the crisis by bringing nonmeritorious suits which increase the costs of insurance and medical care.\textsuperscript{111} Without the contingency fee system, however, many meritorious suits could not be brought, according to proponents of the contingency fee system.\textsuperscript{112} These statutes also vary from state to state with some states merely reviewing the fees,\textsuperscript{113} and

\textsuperscript{107} Limits on recovery are statutorily provided for in several different ways: a flat limitation of liability to a specific dollar amount; a limit on the physician's personal liability with any excess liability paid from a common patients' compensation fund; or an absolute limit on recovery for paid and suffering. See Richards, Statutes Limiting Medical Malpractice Damages, 32 FED'N INS. COUNS. Q. 247, 248-249 (1982).
\textsuperscript{108} \textit{Id.} at 250. See also Carson v. Maurer, 120 N.H. 925, 941, 424 A.2d 825, 836 (1980) (A $250,000.00 limit on pain and suffering is arbitrary and precludes only the most seriously injured victims from receiving full compensation).
\textsuperscript{109} \textit{See Note, supra} note 1, at 383-84.
\textsuperscript{110} Granelli, Legal Malpractice Claim Results in $2.1 Million Verdict, 3 NAT'L L.J., May 4, 1981, at 2, col. 3.
\textsuperscript{111} Comment, \textit{supra} note 102, at 608-609.
\textsuperscript{112} \textit{Id.} at 609.
\textsuperscript{113} \textit{E.g.}, TENN. CODE ANN. § 29-26-120, (1980).
others setting very strict limits on the amount an attorney may charge.\textsuperscript{114}

D. The Ad Damnum Clause

The lobbyists for the medical profession and insurance carriers were successful in convincing the legislators of many states that the elimination of the \textit{ad damnum} clause from the pleadings would help prevent the large jury verdicts that the lobbyists claimed were causing the crisis.\textsuperscript{115} The insurers’ theory was that a large dollar amount claimed as damages would unduly impress the jurors and give them inflated ideas of the worth of the claim.\textsuperscript{116} Other reasons offered for the preclusion of the amount of relief demanded include: the curtailment of publicity, the avoidance of intimidation of physicians by large dollar amounts, and the prevention of unreasonable expectations of large judgments or settlements by the claimant.\textsuperscript{117} One Ohio trial court held the Ohio statute eliminating the \textit{ad damnum} clause in medical cases\textsuperscript{118} unconstitutional on state and federal equal protection grounds and violative of the Ohio Rules of Civil Procedure.\textsuperscript{119}

E. The Collateral Source Rule

Still another provision that very clearly favors the physician-defendant in a medical malpractice case is the modification or abrogation or the collateral source rule. The collateral source rule, which precludes the jury from considering the amount of compensation the claimant has received from outside health insurance policies, has a twofold purpose: first, to avoid penalizing plaintiffs for purchasing health care protection, and second, to prevent

\begin{itemize}
\item[114.] The New Jersey plan is one of the most restrictive contingency fee limitation schemes N.J. Sup. Ct. R. 1:21-7, aff’d, Am. Trial Law. A. v. N.J. Sup. Ct., ___ N.J. ___. One commentator reports that the Florida Medical Association is urging Florida to adopt “The New Jersey Plan.” Comment, supra note 102, at 609.
\item[115.] See supra note 80 and accompanying text.
\item[116.] Note, supra note 1, at 374.
\item[117.] Ripps, supra note 35, at 31.
\item[118.] OHIO REV. CODE ANN. § 2307.42 (Page 1981) reads in part: Any complaint or other pleading which sets forth a medical claim . . . shall contain the following:
\item (C) A demand for judgment for the relief to which the pleader claims he is entitled, except that the amount of relief in damages thereof shall not be stated.
\item[119.] Graley v. Stayatham, 74 Ohio Op. 2d 316, 343 N.E.2d 832.
\end{itemize}
rewarding defendants because of the plaintiff's foresight. The partial or complete elimination of the collateral source rule cuts down on high damage awards by allowing certain insurance benefits of the claimant to contribute to the award, thereby reducing the actual amount the defendant is required to pay. The courts have enforced such provisions and some have even allowed insurance monies paid by the claimant to be credited to the defendant.

It is doubtful that the abrogation of either the *ad damnum* clause or the collateral source rule significantly lowered or stabilized the insurance rates. In Ohio, where the insurance rates have stabilized, the stabilization is believed to have occurred when underwriters began charging adequate premium rates. Therefore, the need for such statutory provisions today is questionable. Circumstances have changed in the past nine years and "[m]edical malpractice underwriting in Ohio now appears to be quite a lucrative field." The changed circumstances and uncertain constitutionality of many of the provisions of the medical malpractice statutes mandate reconsideration by the legislatures.

F. Arbitration and Pre-trial Screening Panels

Probably the most controversial provisions of the medical malpractice reform legislation are those dealing with pretrial screening or arbitration of claims. Screening panels and arbitration are totally different procedures but often cause confusion because some states allow for both types of panels and use the terms interchangeably. Voluntary arbitration is a non-judicial substitute for trial. Screening panels, called arbitration panels

120. Redish, *supra* note 4, at 764.
121. *See* Rudolph v. Iowa Methodist Medical Center, 293 N.W.2d 550 (Iowa 1980). The Ohio statute allows a defendant's damages to be reduced by any collateral sources except insurance proceeds paid by or on behalf of an injured victim or paid directly by the victim's employer. *Ohio Rev. Code Ann.* § 2305.27 (Page Supp. 1981).
122. *Note*, *supra* note 1, at 386. Adjustments made to malpractice premiums in Ohio since 1976 range from a 145% increase on June 1, 1976 to a 17.9% increase on April 1, 1983. *Id.* at 386 n.213.
124. *Note*, *supra* note 1, at 386.
125. *E.g., Ohio Rev. Code Ann.* § 2711.21 (Page Supp. 1981). The Ohio statute calls for mandatory arbitration which is a pretrial screening panel of any medical claim. *Id.* The arbitrator's report is admissible as evidence in a subsequent jury trial. *Id.* at § 2711.21(C).
126. *See* Comment, *Maryland Perspective*, *supra* note 3, at 78 n.15.
in Maryland and Ohio, are adversary proceedings in which both parties present evidence and an advisory opinion is rendered. 127 The parties may reject the panel's decision and proceed to trial, but there is a strong incentive for the loser to settle because the panel's decision is usually admissible as evidence in a subsequent trial. 128

The pretrial screening panels have been challenged as violative of the right to a jury trial, the rights of equal protection and due process, and of the constitutional requirement of separation of powers. 129 The legislative intent in establishing the screening and arbitration panels was to encourage a speedy and informal settlement of medical malpractice claims without formal trial. 130 Theoretically, the panel would resolve the issue and, in so doing, reduce costs and publicity. 131 The nature and function of the panels vary from state to state. The major differences in panels relate to whether submission of the claim to a panel is voluntary or mandatory, and whether the panel's findings are admissible as evidence in a subsequent trial. 132 Some statutes provide that the claim must be submitted to a screening panel before the claim may be filed in court. 133

Voluntary binding arbitration must meet rigid standards because it replaces the jury trial and renders a final, binding decision. 134 When the standards are not met, questions of contracts of adhesion and unconscionability arise. To remedy these problems, the

127. Id. at 78.
128. Id.
130. Redish, supra note 4, at 767.
131. Id.
132. See supra note 86.
133. See Comment, A Comparison of the Model Uniform Product Liability Act Arbitration Provision and Past Missouri and Illinois Medical Malpractice Screening Legislation, 24 ST. LOUIS U.L.J. 554, 559 (1980). See also State ex rel Cardinal Glennon Memorial Hospital v. Gaertner, 583 S.W.2d 107 (Mo. 1979) (statute requiring submission of claim to panel before filing in court unconstitutional as denial of access to courts).
134. See supra note 85. The Michigan statute provides:
statutes of several states provide that signing an arbitration agree-
ment cannot be a condition precedent to the patient's receiving
 treatment. 135 The statutes also set out the composition of the panel
or arbitration board, most of which include a judge, a physician,
and an attorney. 136 There are exceptions, however, such as the Ohio
statute which allows the plaintiff, the defendant, and the court
to choose one member each, 137 and the Indiana statute which pro-
vides for three voting health care providers and one non-voting

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600.5041. Agreements to arbitrate, health care providers.

Sec. 5041. (1) A person who receives health care from a health care provider
may, if offered, execute an agreement to arbitrate a dispute, controversy, or issue
arising out of health care or treatment by a health care provider who is not an
employee of a hospital.

(2) The agreement to arbitrate shall provide that its execution is not a prere-
quisite to health care or treatment.

(3) The agreement shall provide that the person receiving health care treatment
or his legal representative may revoke the agreement within 60 days after execu-
tion by notifying the health care provider in writing. A health care provider may
not revoke the agreement after its execution.

(4) An agreement under this section shall expire 1 year after its execution and
may be renewed by execution of a new agreement.

(5) The agreement shall contain the following provision in 12-point boldface type
immediately above the space for signature of the parties: "This agreement to arbi-
trate is not a prerequisite to health care or treatment and may be revoked within
60 days after execution by notification in writing".

(6) The form of the agreement promulgated shall be accompanied by an informa-
tion brochure which clearly details the agreement and revocation provision. The
brochure shall be furnished the person receiving health care at the time of execu-
tion. The person receiving health care shall be furnished with either an original or
duplicate original of the agreement.

(7) An agreement to arbitrate which includes the provisions of this section shall
be presumed valid.


135. E.g., MICH. COMP. LAWS ANN. § 600.5041(2) (1984). See also Ramirez v. Superior Court,
103 Cal. App. 3d 746, __ P.2d __, 163 Cal. Rptr. (Arbitration agreement held invalid
because mother who was upset when bringing child to hospital emergency room believed
she had to sign all papers before her child could be treated).

136. See, e.g., ARIZ. REV. STAT. ANN § 12-567(B)(1976)(providing for one superior court judge,
one attorney, and one physician on a screening panel); MASS. ANN. LAWS ch. 231 § 60B
(MichieLaw Co-op 1984)(providing for "a tribunal consisting of a single justice of the superior
court, a physician licensed to practice medicine in the Commonwealth... and an attorney
authorized to practice law in the Commonwealth" on a screening panel); MICH. COMP. LAWS
ANN. § 600.5044(2) (Supp. 1982-83)(providing for an attorney to act as chairperson, a physi-
cian, and a layperson on an arbitration board).

137. OHIO REV. CODE ANN. § 2711.21 (Page Supp. 1981). One problem with a statute such as
Ohio's, where each party chooses one arbitrator, is that the outcome may inequitably
rest on the vote of the chairperson who may be an attorney who normally represents only
plaintiffs or only defendants. This could lead to a claim of an appearance of bias. See Note,
supra note 1, at 380-381.
attorney who acts as chairman. A chief criticism of the voluntary arbitration boards is that the requirement of a physician on the panel violates the claimant's right to a hearing before an impartial tribunal. In Maryland, for example, one insurance company insures ninety percent of the state's doctors, therefore, some fear that doctors will be biased against claimants because of the possible effect on the doctor's own insurance rates. This is more important with the final, binding decision of the arbitration board because the decision of the screening panel may be appealed to the courts, thus ensuring the right to a fair and impartial tribunal—eventually.

Many critics feel the pretrial screening panels have failed to reduce awards and litigation costs and have become an expensive process that is the equivalent of a second trial. The additional time and expense required to pursue a claim through two proceedings may well be prohibitive for many claimants. The screening panels are also criticized as creating unnecessary delay in settling claims and as having a chilling effect when a decision on liability is admissible at a subsequent jury trial. The dissatisfaction being exhibited toward the panels is evidenced by a statement made by a panelist, "The only effective remedy is swift and incisive excision—repeal in entirety of [the panel statute]."

III. CONSTITUTIONAL ISSUES RAISED BY THE MEDICAL MALPRACTICE STATUTES

The various provisions of the medical malpractice statutes constantly are being challenged in the courts. Only the major constitutional challenges will be discussed here. These include: first,
violation of the constitutional requirement of separation of powers or the judicial powers provision of state constitutions; second, violation of the right to a trial by jury; third, denial of due process of law by denying, among other things, the right of access to the courts and the fundamental right to bring a tort action; and fourth, the equal protection of the laws.

A violation of the right to equal protection of the laws is the most frequently asserted challenge to the medical malpractice statutes. The courts, in ruling on the constitutionality of the provision providing for a limitation on recovery, have come to different conclusions. See, e.g., Jones v. Board of Medicine, 97 Idaho 859, 555 P.2d 399 (1976) (court concluded that more facts were needed to determine whether the statutory classification of malpractice claimants had a fair and substantial relationship to the achievement of the legislature's objective in adopting the statute); Prendergast v. Nelson, 199 Neb. 97, 256 N.W.2d 657 (1977) (court held limitations on recovery in malpractice legislation was not special legislation denying malpractice claimants equal protection of the laws); Carson v. Maurer 120
A. Separation of Powers

The United States Constitution and most state constitutions provide that the three branches of government, the legislative, executive and judicial, shall remain separate and distinct, and one shall not be subject to the control of another. The New Hampshire Constitution is illustrative:

[Art.] 37th. [Separation of Powers] In the government of this state, the three essential powers thereof, to wit, the legislative, executive, and judicial, ought to be kept as separate from, and independent of, each other, as the nature of a free government will admit, or as is consistent with that chain of connection that binds the whole fabric of the constitution in one in dissoluble bond of unity and amity. 149

The question that arises in regard to medical malpractice statues providing for pretrial screening or arbitration is whether the panel usurps judicial power in violation of the separation of powers principle. The answer to this question depends on whether the panel is considered to have an administrative or judicial function. If the panel has judicial function, there should be, theoretically, no separation of powers problem because judicial power is within its proper department. If the panel has an administrative function, then the procedure is subject to challenge. 150 As a practical matter, however, all kinds of problems can arise. In Maryland, for example, the Health Claims Arbitration Office is recognized as a unit of the executive branch, but the panels themselves are considered to be under the judicial branch. 151 In Missouri, the supreme court found that the Missouri panel statute “imposes non-judicial functions upon judicial officers outside the realm of judicial matters” in violation of Article II, Section 1 of the Missouri Constitution. 152 The Missouri statute required that a judge of the circuit court sit on the panel. 153 The

N.H. 925, 424 A.2d 825 (1980) (court found malpractice statute violated equal protection rights by creating arbitrary damage limitation which precluded only the most seriously injured victims of medical negligence from receiving full compensation for their injuries).

149. N.H. CONST. pt. 1, art. 37.
150. See Comment, Maryland Perspective, supra note 3, at 82.
151. Id.
152. State ex rel. Cardinal Glennon Memorial Hospital v. Gaertner, 583 S.W.2d 107, 111-12 (Mo. 1979).
153. Mo. REV. STAT. § 538.025 (1977) (ruled unconstitutional in State v. Gaertner, 583 S.W.2d 107 (Mo. 1979)).
Illinois high court held the Illinois panel statute unconstitutional also, but characterized the Illinois panel as having an administrative, not judicial, function. In Wright v. Central Du Page Hospital Association, the court stated that the panel legislation was an improper delegation of judicial power to a non-judicial body. While the Missouri court apparently did not see the panel as performing a judicial function, the Illinois court looked at the adversarial nature of the Illinois panel and concluded that its function was judicial. The court stated, "The application of principles of law is inherently a judicial function." 

In evaluating the Pennsylvania mediation panel, one writer determined that the panel, though characterized as an administrative agency, was judicial in nature. Of the ten indicia used by a federal court to determine whether a body was exercising a judicial function, only the power of contempt was not granted to the Pennsylvania panel. The majority of courts addressing the separation of powers issue have found no constitutional violation. Reasoning that as long as the parties are permitted to reject the decision of the panel and proceed to a traditional jury trial, there is no infringement upon the powers of the judiciary. 

155. The court noted that "Witnesses are to be examined and evidence introduced 'as at a trial in the circuit court.'" 63 Ill. 2d at 322. 347 N.E.2d at 739.
156. Id. (citation omitted). But see Attorney General v. Johnson, 282 Md. 274, 385 A.2d 57 (1978). The Maryland court was unpersuaded by the Wright decision and held that because the parties may accept or reject the decision, the panel is not performing a judicial function. Id. at ___. 385 A.2d at 67.
159. Id.
161. See Comment, Alternatives, supra note 35, at 191.
B. Right to a Jury Trial

The Constitution of the Commonwealth of Pennsylvania provides: “Trial by jury shall be as heretofore and the right thereof remains inviolate. . . .” 162 The United States Supreme Court has never applied the seventh amendment right to a jury trial to the states through the fourteenth amendment, 163 although nearly every state guarantees to its citizens the right to a civil jury trial. 164 Because medical malpractice is a tort, the claimant is guaranteed a right to present his case to the jury and a right to have a jury determine the facts in controversy. 165 Some of the earliest challenges to the medical malpractice statutes involved the claim that the pretrial mediation panels violated the claimant’s right to a jury trial, either by causing such unnecessary delay and expense that the claimant was effectively precluded from pursuing his claim into the regular court system, or, as evidence in a subsequent trial, by coercing the jury to relinquish its position as primary fact-finder and make the panel’s decision its own. 166

Although one Ohio trial court was persuaded by the above argument, 167 the majority of courts agreed with the New York trial court which addressed the issue in Halpern v. Gozan. 168 The Halpern court, rejecting the argument that the statute violated the plaintiff’s right to a jury trial, stated:

But one asks: Despite all of the opportunities for examination and exploration of the recommendation, can it be said realistically that a jury could render a verdict inconsistent with the panel’s findings? Or stated conversely: Would not the impact of the recommendation

164. See, e.g., FLA. CONST. art. II, § 22 (“The right of trial by jury shall be secure to all and remain inviolate”); N.C. CONST. art. I, § 25 (“In all controversies at law respecting property, the ancient mode of trial by jury . . . shall remain sacred and inviolable”); OR. CONST. art. VII, § 3 (“In actions at law . . . the right of trial by jury shall be preserved”).
165. See Comment, Maryland Perspective, supra note 3, at 89.
166. See Simon v. St. Elizabeth Medical Center, 3 Ohio Op. 3d 164, 355 N.E.2d 903 (1976). The Simon court noted that the right to proceed to a jury trial still existed under the Ohio medical malpractice statute but that it placed an “unusual burden” on the plaintiff which might deter him from proceeding. Id. at 168, 355 N.E.2d at 908. The court held that the statutory provisions which permit the introduction into evidence and exposure to the jury of the arbitrator’s decision violated the plaintiff’s right to a jury trial. Id.
167. Id.
be so overpowering as to remove de facto the essential elements of fairness and openmindedness which are so crucial to the total fabric of our jury system, thereby infecting it with prejudicial taint? The response to both questions remains the same. For if the trial court instructs the jury with clarity and simplicity, their true roles as the exclusive finders of fact will prevail. That “the recommendation shall not be binding upon the jury... but shall be accorded such weight as the jury... chooses to ascribe to it”. With the proper instructions by the court, there could be no constitutional infirmity to contaminate the purity of the jurors’ prerogatives.

Historically, jurors for the most part have proven their independence. They guard their roles with a unique jealousy. They accept with obvious pride the admonitions of the trial court that they are the “sole judges of the facts”. They show their independence and resentment when the “province that is theirs” is threatened by suggestion, device or artifice. While they sit in judgment of their peers, they rise to heights of great importance during this brief period of their civic lives—a posture brought about by the major determinations they are asked to make and by the continuous deference and solicitous manner of the advocates who seek their favor. It is in this backdrop of the total trial where the real challenge of the new law must stand up to review and not in a vacuum, isolated from the other components of evidence, the whole of which comprise the entire compound to be considered. In this regard, it becomes evident that the new law, if carefully pursued and thoughtfully articulated does not represent an incursion upon constitutional guarantees, but rather, reflects the proper extension of legislative prerogatives.169

While the claim of infringement of the right to a jury trial is most often associated with pretrial screening panels, it is also alleged in certain voluntary arbitration proceedings. As previously noted, the true arbitration statutes provide for a final decision whereas the screening panels render a decision which is advisory only or which may be appealed to the regular court system.170 Arbitration, then, literally replaces the jury trial to which the claimant is entitled under most state constitutions. The Michigan statute,171 as representative of the voluntary arbitration statutes in general, has been challenged as a contract of adhesion and as unconscionable

169. Id. at ____, 381 N.Y.S.2d at 748-49.
170. See Note, supra note 139, at 1846.
because the patient signs the arbitration agreement in the coercive environment of a hospital. Because of this a "knowing and intelligent waiver" is required before a person may waive his right to a jury trial. Certainly questions will arise as to whether the waiver was truly "voluntary," but, generally, voluntary arbitration statutes are not as likely to be challenged as pretrial screening panels. If followed to the letter the arbitration statutes should pass constitutional muster. Screening panels, however, are another matter.

The rationale behind the creation of mandatory, pretrial screening panels to hear medical malpractice claims is based partly on the belief that the medical malpractice crisis is attributable to excesses of the jury system: that is, the jury's "inability to sort out spurious and unmeritorious claims" and the jury's "tendency to return astronomically high damage awards." The screening panel's decision is not final in the sense the arbitration panel's decision is final. The screening panel's decision is final only if accepted by both parties; otherwise, it will be appealed. On appeal, the parties will have an opportunity for a jury trial. Thus it cannot literally be said that the panel takes the place of a jury trial. This has not been alleged in the cases in which the panels have been challenged. The challengers have, instead, alleged that delay or the unfairness resulting when the decision is admitted into evidence at a subsequent jury trial effectively deprived the claimants of their right to trial by jury.

172. See Note, supra note 139 at 1847 n.22.
174. See Comment, supra note 35 at 187. This description of the jury in the context of its inability to make a proper decision when a case is presented to it is a far cry from the description of the jury in Halpern v. Gozan in the context of its being able to make a correct decision even when presented with a panel decision adverse to one of the parties. See supra note 169 and accompanying text.
175. E.g., Mattos v. Thompson, 491 Pa. 385, 391, 421 A.2d 190, 193 (1980) (although no violation of the right to a jury trial, unduly postponing that right was held to be unconstitutional).
176. Id.
177. The Ohio Supreme Court has held that submission of the decision to the jury only provides additional evidence to be considered which should be no different from any other expert testimony received at trial. Beatty, 67 Ohio St. 2d at 490, 424 N.E.2d at 591. The court pointed out that the decision would be admissible only if the trial court finds the hearing and decision free from prejudice to either party. Id. at 487, 424 N.E.2d at 589.
The challengers' reasoning for the position that the malpractice statute screening panels deprive the claimant of his constitutional right to a jury trial is twofold: the process is very expensive and it may influence the jury. First, the additional time and expense of two proceedings is the equivalent of two full fledged jury trials. Second, the admission of the panel's decision would so influence and overwhelm the jury that it would not render its own verdict.

While some courts have accepted this rationale, others have held the procedural right to a jury trial is not absolute, and it may be limited if the substantive right is preserved. The elements of the substantive right include: first, review by impartial and qualified jurors; second, who are selected in a manner prescribed by law; third, who decide the facts; fourth, under the direction and supervision of a judge. This right must remain inviolate.

The claimant's position may be summed up by stating that in most states the claimant has a constitutional right to a jury trial as "heretofore enjoyed" or, as it was at common law, and that the statutory requirement of a pretrial panel is an impediment, if not to the jury trial itself, to a speedy jury trial. The claimant might also argue that he must submit his claim to a panel of experts rather than a jury of his peers and that admission of the expert's opinions at a subsequent jury trial may prejudice his case. The majority of courts have not agreed. These courts appear to be

See also Beeler v. Downy, 387 Mass. 609, 618, 442 N.E.2d 19, 24 (1982) (holding that prejudicial opinion of panel not admissible at trial as it would violate the defendant's right to a jury trial).

178. See Comment, supra note 102, at 604. See also Simon v. Saint Elizabeth Medical Center, 3 Ohio Op. 3d 164, 168, 355 N.E.2d 903, 907.

179. See Comment, Maryland Perspective, supra note 3, at 92.

180. E.g., Simon v. Saint Elizabeth Medical Center, 3 Ohio Op. 164, 355 N.E.2d 903. "Compulsory Arbitration . . . in effect, puts 'strings' upon one's right to trial by jury thus, in reality, making it a far less effective right than would otherwise be the case." Id. at 168, 355 N.E.2d at 908. The Ohio Supreme Court later ruled that the compulsory arbitration did not violate the right to a jury trial. Beatty, 67 Ohio St. 2d at 490, 424 N.E.2d at 591.

181. See Comment, A Comparison, supra note 133, at 563.

182. Id.

183. All states except Colorado and Louisiana guarantee some form of constitutional protection of a civil jury trial. See Redish, supra note 4, at 792, n.203.

184. See supra note 179 and accompanying text. It might be argued that since no such pretrial procedure was required at common law, the constitution will not allow the state to further qualify the right to trial by jury. Lenore, Mandatory Medical Malpractice Mediation Panels—A Constitutional Examination, 44 INS. COUNS. J. 416, 420 (1977).

185. The Ohio Supreme Court, holding that the Ohio statute is compatible with a fair
following the rule that although the substantive elements of the right to trial by jury are held "inviolate," modification of the form of the jury trial is permitted. These courts have held that the right to a jury trial is not impermissibly restricted or denied by submitting the claim to a panel, but that the panel decisions constitute an alternative approach to a complex subject and provide guidance to the jury in reaching its decision.\(^\text{187}\) One court has held, however, that medical malpractice statutes constitute "an impermissible restriction on the right to trial by jury, . . . 'a 'prerequisite' [that] imposes a burden on the exercise of [the right to a jury trial] by malpractice claimants."\(^\text{188}\)

The dissatisfaction with the medical malpractice statutes today is especially strong in the context of the traditional jury trial. The delays are discouraging to claimants, and, according to some, are encouraged by defendant insurance companies who are earning interest on the reserve funds.\(^\text{189}\) Delays are becoming more commonplace because it is increasingly difficult to find doctors who will serve on the panels who are not biased, involved in a suit themselves, too busy, or tied up with the lawyers and doctors involved.\(^\text{190}\) Because of the possibility of "undermin[ing] public confidence in the impartiality and unbiased nature of our system of justice," it has been urged that "conferring of semi-judicial robes upon doctors sitting as judges of their medical peers should not be done lightly."\(^\text{191}\)


\(^\text{188.}\) Lenore, supra note 184, at 422 (quoting Wright v. Central DuPage Hosp. A., 63 Ill. 2d 313, 324, 347 N.E.2d 736, 741, 743 (1976)).

\(^\text{189.}\) See generally Cunningham & Lane, supra note 5. See also Shrager, supra note 50.

\(^\text{190.}\) Kelner & Kelner, Malpractice Panels: Success or Failure? N.Y.L.J. Aug. 31, 1982 at 1, col. 1 [hereinafter cited as Kelner]; see also Sakayan, Arbitration and Screening Panels: Recent Experience and Trends, 17 Forum 682, 688 (1982). The panel member selection process is delayed because potential physician panelists are not willing to serve, are not qualified, have professional bias or friendships that prevent their serving, or have scheduling problems. Id.

\(^\text{191.}\) Kelner, supra note 190, at 22, col. 3.
Nor have the panels decreased the costs involved. In fact, costs have increased in that the parties are forced to bear the costs of two proceedings. The non-binding pretrial panel procedure is an extra financial burden on "claimants or defendants who fully intend to litigate from the start... at which they must reveal their evidence and strategy, but which serves no useful purpose for them."\textsuperscript{192} It was reported that in New York in 1982 the cost of panel preparation and attendance was approximately $1,500.00 per party.\textsuperscript{193} If the panel decision is accepted by all parties and is final, costs should be reduced according to a major study by the Health, Education and Welfare Department, but with a \textit{de novo} review of the decision, the costs are compounded.\textsuperscript{194} The delays and additional costs of a pretrial panel hearing places an onerous burden on the rejecting party, who is frequently the claimant.\textsuperscript{195}

Thus, it seems apparent that the pretrial panels have not achieved their objectives of affording the parties a speedier resolution of claims at reduced costs. Theoretically, the overall time for settling a dispute is shorter for screening panels than for ordinary litigation,\textsuperscript{196} but in reality, this has not been the case.\textsuperscript{197} And, as one writer has remarked, "[P]ractically speaking, it is hard to believe that an adverse panel decision would not impair the plaintiff's case."\textsuperscript{198} To persuade the jury that the panel's decision is incorrect is made more difficult because of the added weight juries traditionally accord opinions of experts. Even though the jury does, in fact, remain the final arbiter, this added weight amounts to, at least, "strings" on the right to a jury trial.\textsuperscript{199}

\begin{footnotesize}
\begin{enumerate}
\item 192. Ripps, supra note 35, at 35.
\item 193. Kelner, supra note 190, at 22, col. 4.
\item 194. See Quinn, supra note 26, at 93-94 and n.129.
\item 195. See Comment, supra note 14, at 288 n.44. The Montana Panel Act may be a barrier, not a sieve, and may discourage all claims, not just frivolous claims. Statistics reveal that the panel decisions are favorable to the claimant in only twenty-three to twenty-five percent of the cases. The data calls for reconsideration of a statement by the Montana Supreme Court in Linder v. Smith, ___ Mont. ___ , 629 P.2d 1187. 1192 (1981), that the Panel Act does not impose an impermissible burden on the judicial process. \textit{Id.}
\item 196. See supra note 26, at 94 (citing U.S. DEPT. OF HEALTH, EDUCATION AND WELFARE, REPORT OF THE SECRETARY'S COMMISSION ON MEDICAL MALPRACTICE (1973)).
\item 197. See Matthews, 491 Pa. at 396, 421 A.2d at 196. (arbitration act unconstitutionally infringes right to a jury trial because the procedure caused "oppressive delay"). See also Comment, supra note 15, at 462 n.26.
\item 198. Quinn, supra note 26, at 96. This is especially true in jurisdictions such as Maryland where its panel decision is clothed with a presumption of correctness.
\item 199. See supra note 180 and accompanying text.
\end{enumerate}
\end{footnotesize}
The question then is whether the mediation panel with its delays and the possibility that its decision will be admitted into evidence "constitutes an onerous condition, restriction, or regulation that makes the jury trial right 'practically unavailable.'"\textsuperscript{200} One certainly could argue that the expense and delay of two separate proceedings, the mediation panel and a trial \textit{de novo}, coerces a party into accepting the panel's decision.\textsuperscript{201} The expense, delay, and knowledge that an adverse decision will be admitted into evidence at a trial \textit{de novo}, at the least, would have a chilling effect on a claimant contemplating a jury trial. It would, in other words, make the right to a jury trial "practically unavailable."\textsuperscript{202}

As noted, the vast majority of cases dealing with the right to a jury trial have involved arbitration and screening panels. With the passage of time it is likely that many potential medical malpractice claimants will discover they have been injured by the negligence of a physician but are barred from suing because of a fixed statute of limitations. The Arizona Supreme Court was faced with this situation recently. In \textit{Kenyon v. Hammer},\textsuperscript{203} the court noted that the three year absolute statute of limitations for medical claims had run before the plaintiff could possibly have discovered her injury and was thus denied her fundamental right to bring her claim before the court.\textsuperscript{204} The court, however, did not discuss the violation of the right to a jury trial, finding instead that the statutory classification of medical malpractice claimants "violated equal protection and was therefore unconstitutional."\textsuperscript{205}


\textsuperscript{201} Parker v. Children's Hospital, 483 Pa. 106, 394 A.2d 932 (1978).

\textsuperscript{202} It has been argued that the mediation provisions of the medical malpractice statutes are similar to provisions in Worker's Compensation statutes in that the claimant gives up his right to a jury trial for a \textit{quid pro quo}. Under the Worker's Compensation statutes, a worker is assured of compensation if he proves he was injured in the course of his employment. See \textit{Comment, A Comparison}, supra note 133, at 568. The courts are divided as to whether the legislature must provide a \textit{quid pro quo} when a common law right, such as the right to a jury trial, is taken away. The United States Supreme Court has inferred as much. See \textit{New York Cent. R.R. v. White}, 243 U.S. 188 (1917). Other courts have rejected the \textit{quid pro quo} argument. In \textit{Jones v. Board of Medicine}, 97 Idaho 859, 555 P.2d 399 (1976) the Idaho Supreme Court stated that "the United States Supreme Court in \textit{White} did not intend to engraft upon the traditional due process test an additional standard when the challenged statute involves the alteration of some prior existing common law doctrine." \textit{Id.} at __, 555 P.2d at 409.

\textsuperscript{203} 142 Ariz. 69, 688 P.2d 961 (1984).

\textsuperscript{204} \textit{Id.} at __, 688 P.2d at 968, 975.

\textsuperscript{205} \textit{Id.} at __, 688 P.2d at 979.
Similarly, the Rhode Island Supreme Court did not reach the right to a jury trial issue in a recent case in which the court voided the Rhode Island statute in its entirety.\textsuperscript{206} The court stated:

Although we decline to reach this issue, it is doubtful that § 10-19-4 of the statute, which provides for the dismissal of actions with prejudice upon a "finding of fact" by the trial justice, could pass constitutional muster. The law, as written, provides no recourse for a plaintiff whose claim is denied by the hearing justice, thereby infringing upon his right to a jury trial. As we pointed out in \textit{Dyer v. Keefe}, 97 R.I. 418, 420, 198 A.2d 159, 160 (1964): "[T]rial by jury is inviolate. The state constitution so declares... The right is thus placed absolutely beyond the power of the legislature to alter or abolish it."\textsuperscript{207}

\textbf{C. Access to the Courts}

Closely related to the jury trial issue is a due process issue. Many medical malpractice claimants allege that they were denied due process of law in that the state statute deprived them of the right of access to the courts and of a hearing before a fair and impartial tribunal.\textsuperscript{208} Access to the courts is guaranteed by many state constitutions which contain "open court" provisions.\textsuperscript{209} A typical open court provision states: "All courts shall be open and every person for an injury done to person, reputation or property shall have justice administered without sale, denial or delay..."\textsuperscript{210} Many courts have considered the question of whether or not certain provisions of the medical malpractice statutes such as pretrial screening panels, damage limits and fixed statutes of limitation violate the state constitutional guarantee of access to the courts. In \textit{Jones v. State Board of Medicine},\textsuperscript{211} the state supreme court

\textsuperscript{207.} \textit{Id.} at ___, 459 A.2d at 91 n.13.
\textsuperscript{208.} J. NOWAK, R. ROTUNDA & J. YOUNG, \textit{CONSTITUTIONAL LAW}, 526-27 (2d ed. 1983) [hereinafter cited as NOWAK]. "[D]ue process restricts the ways in which legislatures may limit individual freedom.... Where the power of the government is to be used against an individual, there is a right to a fair procedure...." \textit{Id.} It is clear that legislatures, by enacting medical malpractice panel statutes, are limiting the individual's freedom of access to the courts.
reversed a lower court which had determined that a statutory provision limiting damages recoverable in a medical malpractice case violated the Idaho constitution which provided: "Courts of justice shall be open to every person, and a speedy remedy afforded for every injury of person, property or character, and right and justice shall be administered without sale, denial, delay or prejudice." 212

The trial court reasoned that the constitutional guarantee of access to the courts was a common law right that could not be altered unless substitute remedies or procedures were provided. 213 The high court disagreed, noting that the state's prevailing common law prevailed in the state by legislative enactment and could be repealed by the legislature either expressly or by the passage of a law inconsistent with the common law on a particular subject. 214 The Jones court also noted that the decision of the panel is advisory only and since neither party is bound by it there is no impediment to going to court. 215

Other courts considering the due process—access to the courts issue have upheld the statutory provisions for similar reasons. In State ex rel. Strykowski v. Wilkie, 216 the petitioners argued that the right of access to the courts is a fundamental right and that the panel review process denied them due process of law guaranteed by the Fourteenth Amendment of the United States Constitution and Art. I, Sec. 1 of the Wisconsin Constitution. The respondent countered that there is no right of access to the courts, "except in the narrow category of cases involving such fundamental human relationships as marriage and divorce." 217 The supreme court stated, "Whatever the precise status of the right of access to the courts, it is clear that due process is satisfied if the statutory provisions provide an opportunity to be heard in court at a meaningful time and in a meaningful manner." 218 The court found no

213. Jones, 97 Idaho at ___, 555 P.2d at 404. See also supra note 203. The defendant in Wright v. Central DuPage Hospital, 63 Ill. 2d 313, 328, 347 N.E.2d 736, 742 (1976) argued that there was a "societal quid pro quo" in that as a substitute for the right of access to the courts, there would be decreased liability on the part of physicians which would decrease insurance premiums and ultimately reduce medical costs for the consumer. This argument was rejected by the court.
216. 81 Wis. 2d 491, 261 N.W.2d 434 (1978).
217. Id. at 512, 261 N.W.2d at 444.
due process violation in requiring a party to seek “administrative resolution of its claims” before bringing them to the court.\textsuperscript{219}

On the other hand, it has been determined that certain provisions of the medical malpractice statutes do deprive the plaintiff of a constitutionally guaranteed right of access to the courts. The Arizona Supreme Court, for example, while upholding the constitutionality of the pretrial screening panel, found that a requirement that the party seeking a \textit{de novo} trial after an adverse panel decision post a $2,000.00 bond violated the constitution “by denying access to the courts” to indigents and by placing a “heavier burden” upon non-indigent’s access to the courts.\textsuperscript{220} In 1982, the Missouri Supreme Court struck down Missouri’s pretrial screening statute as an unconstitutional denial of free access to the courts.\textsuperscript{221} The Missouri statute required the claimant to submit his claim to the review board \textit{before} he filed in court. A different result has been reached where the statute provides for a review panel \textit{after} the filing of the claim.\textsuperscript{222}

Statutes providing for voluntary binding arbitration also have been challenged on due process grounds by plaintiffs who claim the right to a hearing by a fair and impartial tribunal is impossible when a physician is a member of the panel.\textsuperscript{223} Plaintiffs argue that the person signing the agreement is unlikely to know that a physician will sit on the panel and is even more unlikely to know of

\begin{thebibliography}{99}
\bibitem{219} Strykowski at 513, 261 N.W.2d at 444 citing West Penn Power Co. v. Train, 522 F.2d 302, 313 (3d Cir. 1975). \textit{See also} Comiskey v. Arlen, 55 A.D. 2d 304, 390 N.Y.S.2d 122, 123 (1976) (no denial of access to the courts because the jury is the ultimate arbiter); \textit{but see} Jiron v. Mahlab, 99 N.M. 425, 659 P.2d 311, 313 (1983) (holding that because the Medical Malpractice Act requires speed and no undue delay there is no violation of the plaintiff’s right of access to the courts unless undue delay prejudices the plaintiff by loss of witnesses or parties).

\bibitem{220} Eastin v. Broomfield 116 Ariz. 576, 586, 570 P.2d 744, 754. \textit{But see} Paro v. Longwood Hospital, 373 Mass. 645, 369 N.E.2d 985 (1977) (holding that posting of a $2,000.00 bond as a precondition to a trial in court does not violate free access to the courts because the trial judge has discretion to reduce the bond for indigent parties).

\bibitem{221} \textit{See State ex rel.} Cardinal Glennon Memorial Hospital v. Gaertner, 583 S.W.2d 107 (Mo. 1979). The Missouri court relied on an Illinois case which held that the requirement of sixty days’ notice of filing of a divorce case was a denial of access to the courts in violation of the constitution. \textit{Id.} at 110 citing People \textit{ex rel.} Christiansen v. Connell, 2 Ill. 2d 332, 118 N.E.2d 262 (1954).

\bibitem{222} \textit{E.g.}, Comiskey v. Arlen, 55 A.D. 2d 304, 390 N.Y.S.2d 122 (1976). The filing in Missouri preceded the acquisition of personal jurisdiction over the defendant. \textit{See Note, Constitutional Law, supra note 3, at 318.}

\bibitem{223} \textit{See Note, supra note 139 at 1847.}
\end{thebibliography}
the potential bias that may result.224 A physician on the panel may have a pecuniary interest in the outcome of the case since malpractice insurance premiums are affected by arbitration awards.225 More importantly, physicians as a group have biased feelings toward malpractice claimants and are most reluctant to testify, as evidenced by the well-known "conspiracy of silence."226 Pecuniary interest of physicians in the outcome of the arbitration plus the subconscious affinity and empathy for fellow physicians create a "constitutionally intolerable risk of bias" in the arbitration proceedings.227

The malpractice statutes providing for physicians to sit on arbitration and pretrial screening panels are supported by the insurance and health care lobbyists. "It is unlikely that the insurance and health care industries would have given their approval to legislation creating alternate forums for the resolution of malpractice disputes if the requirement of a physician member on the panel was absent."228 The desirability of a physician on an arbitration or screening panel from the defendant physician's point of view is illustrated by the following letter written in 1976 by the then president of the Florida Medical Association:

Dear Fellow Physicians:

In September of 1976 in the President's Page of the FMA Journal entitled "Will it Float?" I called to your attention the importance of the medical mediation panels which were created by the 1975 Legislature. The mediation panels were functioning well in some counties, while having been ruled unconstitutional in others. The State Supreme Court clarified in May of 1976, by a vote of 7-0, to uphold the mediation panels as being constitutional. Even more significant, they stated that the problem of medical malpractice is of such magnitude that they were willing to go to the outer limits of constitutionality in order to solve this problem.

If the mediation panels are to be given a fair trial, we will need our most knowledgeable, our most respected and our most capable physicians in Florida to volunteer their effort on behalf of our

224. Id. at 1851-1856, 1870.
225. Id.
226. Id. at 1864. The "conspiracy of silence" refers to the traditional reluctance of physicians to testify on behalf of malpractice claimants against other physicians.
227. Id.
patients and our colleagues. I realize that this will require a sacrifice of time and effort by you, however, this is a golden opportunity for each of us to serve our fellow physicians in his hour of need. Imagine yourself in a medical malpractice situation wherein you are the defendant and in need of the support, wisdom and counsel of your colleagues and none was forthcoming. There have been incidents wherein physicians, when asked to serve on the panels, have been reluctant to give of their time.

I urge each of you when asked to serve on a mediation panel to accept this assignment to assist your colleague. No greater honor can be bestowed upon a physician than to be asked to attend one of his colleagues or a member of his family when they have need for your services. Similarly, being asked to serve on a mediation panel when a colleague’s medical judgment and reputation are being questioned is a request which should not be taken lightly; we should be eager to assist and not turn our back on him. None of us are immune to the possibility of being sued and each in turn will need a fair hearing with one of our colleagues present, if and when it occurs.

The Mediation Panel Law was actively supported, both in legislation and litigation, by the Florida Medical Association. If the concept fails, let it not do so because we as physicians did not give it our best effort. Thank you.

Jack A. MaCris, M.D., President

To be “constitutionally tolerable” the arbitration process must be free of not only actual bias but of “even the probability of unfairness.” There is certainly a probability of unfairness any time a physician sits in judgment of one of his peers. Perhaps the remedy for this particular situation is to include a physician, but as an expert witness, not as a judge.

In a very recent case, the Arizona medical malpractice statute of limitations was challenged as denying the plaintiff the fundamental right to bring a tort action. In Kenyon v. Hammer, the plaintiff, following the birth of her first child, did not receive an injection of the drug, RhoGAM, which suppresses the immune response which Rh negative mothers may develop after the birth of an Rh positive baby. If the drug is not administered within

230. See Note, supra note 139, at 1853 (quoting Withrow v. Larkin, 421 U.S. 35 (1975)).
232. Id. at ____, 688 P.2d at 963.
seventy-two hours of delivery, the mother with Rh negative blood runs an increased risk of building up antibodies against Rh positive blood which may adversely affect future pregnancies.\textsuperscript{233} Seven years later, Ms. Kenyon delivered a second child. The second child was born dead, its Rh positive red blood cells destroyed by antibodies from its mother's bloodstream.\textsuperscript{234} The court rejected the defendant physician's argument that the fixed three year statute of limitations for medical claims began to run on the date of the negligent act. The court stated that such reasoning would mean abolition of the cause of action before it could have been brought.\textsuperscript{235} This, in the Arizona Supreme Court's opinion, would abrogate the fundamental right to bring a tort action in violation of the Arizona Constitution.\textsuperscript{236} The court, holding that the action accrued on the date the injury occurred, not on the date the negligent act occurred, did not rule on whether the fixed statute of limitations deprived the plaintiff of a fundamental right. The court stated that it would apply a strict scrutiny analysis in such a situation.\textsuperscript{237} Before declaring the statute unconstitutional on equal protection grounds, the court stated that it agreed with the South Dakota Supreme Court's view of statutes which fix the time of accrual as the time of the negligent act.\textsuperscript{238} The South Dakota court has stated:

Our constitution ... is solid core upon which our state laws must be premised. Clearly and unequivocally, our constitution directs that the courts of this state shall be open to the injured and oppressed. We are unable to view this constitutional mandate as a faint echo to be skirted or ignored. Our constitution is free to provide greater protections for our citizens than are required under the federal constitution. ... Our constitution has spoken and it is our duty to listen.

[The statutes] are a locked dead bolt and shackle on our courtroom doors. We are unwilling to couch [these statutes] in wishful language which portends their effect is somehow constitutional. [These] are statutes of nullification which stamp out citizens' causes of action before they accrue.\textsuperscript{239}

\textsuperscript{233} Id. \\
\textsuperscript{234} Id. \\
\textsuperscript{235} Id. at ____, 688 P.2d at 966-67. \\
\textsuperscript{236} Id. \\
\textsuperscript{237} ARIZ.CONST. art 18, § 6 provides: "The right of action to recover damages for injuries shall never be abrogated and the amount recovered shall not be subject to any statutory limitation." Kenyon, ____ Ariz. at ____, 688 P.2d at 966. The court noted that the Arizona requirement is more specific and stronger than the open court provisions of most states. Id. \\
\textsuperscript{238} Kenyon, ____ Ariz. at ____, 688 P.2d at 967. \\
\textsuperscript{239} Id. at ____, 688 P.2d at 966.
The medical malpractice statutes, especially the provisions requiring plaintiffs to submit their claims to panels and those provisions limiting the time in which the claim may be brought, effectively close the doors of the courts to many medical malpractice claimants. The claimant is thus denied the due process guaranteed by the fourteenth amendment to the federal constitution and the right of access guaranteed by most state constitutions.

D. Equal Protection

The medical malpractice statutes are probably most vulnerable, at least today, to the claim that they deprive the claimant of his constitutional right to equal protection of the law.240 The fourteenth amendment to the Constitution states, "No state shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws."241 The states also guarantee that citizens similarly situated shall receive equal treatment.242 Medical malpractice statutes, however, do not treat all persons similarly situated equally.243 By granting special privileges to physicians, the legislatures have created constitutionally intolerable classifications of tort claimants. First, a heavy burden is placed on claimants bringing an action against a physician that other tort plaintiffs do not have to bear.244 Second, statutory provisions such as limitations on the amount recoverable discriminate against the more seriously injured claimant as compared to a claimant with fewer injuries who received a full recovery.245 The statutes abolishing the collateral source rule

241. U.S. CONST. amend. XIV, § 1, cl. 2. See also NOWAK, supra note 208, at 587. "Equal protection is the guarantee that similar people will be dealt with in a similar manner and that people of different circumstances will not be treated as if they were the same."
243. See Comment, supra note 133, at 573, See also Comment, supra note 17, at 328.
244. Note, Iowa Code Section 147.136 Which Abolishes the Collateral Source Rule in Medical Malpractice Cases is Not Constitutional, Based on a Rational Relation Test, 29 DRAKE L. REV. 849, 851 (1980).
245. The New Hampshire Supreme Court, concluding that New Hampshire's $250,000 damage limit violated the equal protection guarantee, stated: "It is simply unfair and unreasonable to impose the burden of supporting the medical care industry solely upon those persons who are most severely injured and therefore most in need of compensation." Carson v. Maurer 120 N.H. 925, 942, 424 A.2d 825, 837 (1980).
further classify malpractice claimants into those who have purchased insurance to protect themselves and those who have not. The legislature must be able to justify such classifications before they are constitutionally permissible. Whether or not the courts justify the statute is ultimately determined by the standard of judicial scrutiny the court applies.

In deciding whether or not a classification is a denial of equal protection, the court will first determine whether the law is valid “on its face” and, in some cases, look at the nature and purpose of the classification. Even if the court finds a legislatively created classification, it does not necessarily follow that an equal protection violation exists. Traditionally, the courts have applied two levels of scrutiny, the strict scrutiny standard and a rational basis test to determine whether a violation exists. Strict scrutiny is applied when the classification affects a fundamental right, or involves a suspect class. A suspect classification is generally based on alienage, race, or national origin, and stems from a reference by Justice Stone to “discrete and insular minorities” who need judicial protection. Before any legislation subject to strict scrutiny will be upheld by the courts, “the classifications thus drawn must be shown to be the least restrictive means available to serve a compelling state interest.” When the strict scrutiny test is applied, it is generally “strict in theory, and fatal in fact; resulting in invalidation of the statute.”

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246. See Note, supra note 244, at 853.
247. See Comment, supra note 35 at 191.
248. Nowak, supra note 208, at 587.
250. Nowak, supra note 208, at 591.
251. Most of the specific guarantees of the first eight amendments to the United States Constitution are considered fundamental rights. See Comment, A Maryland Perspective, supra note 3, at 85, n.65. See also Comment, supra note 35, at 191 (citing the right to travel from state to state as a fundamental right). A fundamental right is usually “explicitly or implicitly guaranteed by the Constitution.” San Antonio School District v. Rodriguez, 411 U.S. 1, 33-34 (1973).
252. See Comment, supra note 35, at 191.
254. Nowak, supra note 209, at 592 (quoting United States v. Carolene Product Co., 304 U.S. 144, 153 n.4 (1938)).
255. See Case Comment, Limitation of Damages, supra note 3, at 1293-94.
256. See Comment, supra note 17, at 328 (quoting Gunther, The Supreme Court, 1971 Term—Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 HARVARD L. REV. 1, 8 (1982)).
With the rational basis test, however, the legislation is nearly always upheld. Under this test, the statute is constitutional if a rational relationship exists between the objective of the statute and the classification created.\textsuperscript{257} In \textit{Johnson v. St. Vincent Hospital, Inc.},\textsuperscript{258} for example, the court acknowledged "the different and more burdensome treatment accorded medical malpractice tort claimants . . ." but found that a rational basis for the legislation existed, namely the medical malpractice crisis.

The minimal scrutiny, rational basis test was used almost exclusively by the first courts to consider the constitutionality of medical malpractice statutes. The only question was whether it was "conceivable" that the legislation was rationally related to an end of government which was not prohibited by the Constitution.\textsuperscript{259} More recently, however, the courts are taking a closer look at the actual situation to see if a "crisis" really exists.\textsuperscript{260} The reviewing court of today is less likely to unquestioningly accept the government's asserted purpose underlying the statutes.\textsuperscript{261} The courts are more likely to use the intermediate level of review, the so-called "means scrutiny" standard,\textsuperscript{262} and to inquire into the legislative purposes for the classification.\textsuperscript{263} In \textit{Carson v. Mauer},\textsuperscript{264} the New Hampshire Supreme Court stated that the rights involved in medical malpractice cases, while not fundamental, were "sufficiently important" to require "a more rigorous judicial scrutiny." A court applying such heightened scrutiny must inquire into whether a crisis exists in fact and whether the challenged legislation substantially alleviates that crisis.\textsuperscript{265} The North Dakota Supreme Court

\begin{footnotesize}
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\item \textsuperscript{257} McGowan v. Maryland, 366 U.S. 420, 426 (1961).
\item \textsuperscript{258} 404 Ind. 585, 404 N.E.2d 585, 597 (1980).
\item \textsuperscript{259} NOWAK, supra note 208 at 591.
\item \textsuperscript{260} E.g., Jones v. State Board of Medicine, 97 Idaho 859, 555 P.2d 399, 417 (1976); cert. denied, 431 U.S. 914 (1977).
\item \textsuperscript{261} See Comment, \textit{Limitation of Damages}, supra note 3, at 1294.
\item \textsuperscript{262} The United States Supreme Court has refused to apply the intermediate standard in cases other than those involving sex and illegitimacy. E.g., Craig v. Boren, 429 U.S. 190 (1976) ("classification by gender must serve important government objectives and must be substantially related to the achievement of those objectives"); Levy v. Louisiana, 391 U.S. 68 (1968) (classifications based on illegitimacy will be subject to greater scrutiny than general economies or social welfare legislation).
\item \textsuperscript{263} Jones v. State Board of Medicine, 97 Idaho 859, 555 P.2d 399, 407 (1976), cert. denied, 431 U.S. 914 (1977).
\item \textsuperscript{264} 120 N.H. at 931-32, 424 A.2d at 830.
\item \textsuperscript{265} Jones v. State Board of Medicine, 97 Idaho 859, 555 P.2d 399 (1976), cert. denied, 431 U.S. 914 (1977). The test assumes the validity of the legislative end, but questions the means chosen to achieve the ends. Redish, supra note 4, at 777.
\end{enumerate}
\end{footnotesize}
was one of the earliest courts to apply the means scrutiny test. The court, finding that no crisis existed in North Dakota, struck the $300,000.00 statutory limitation on recovery in medical malpractice cases as violative of the equal protection clauses of both the North Dakota Constitution and the United States Constitution.266

One writer has criticized the courts for blandly applying the rational basis test as a substitute for critical analysis when “[T]he means-oriented scrutiny test . . . would raise the level of the minimal scrutiny of the statute from virtual abdication to genuine judicial inquiry.”267 There are also two very practical reasons for applying the means scrutiny test to medical malpractice legislation today. First, the legislation was a response to a perceived “crisis” which no longer exists. Circumstances have changed in that physicians can get insurance today.268 Second, the statutes are not achieving their goals of effecting speedy resolution of claims. In Indiana, of 2302 cases filed by May 31, 1983, 1136 were still pending and only eighteen percent had had panel decisions rendered.269 The average pendency of cases reaching a panel decision was 23.4 months, with one case still pending after 84.34 months.270

The use of the means scrutiny test is deemed unfortunate by some writers. In an article funded by the American Hospital Association, the author stated, “It is . . . unfortunate that the leading decision to date [Jones] considering an equal protection challenge to medical malpractice legislation employed the supposed intermediate standard of review.”271 He noted that the Jones court questioned the existence of a crisis which would have been accepted under the rational basis test.272 The courts, however, are using the intermediate level test in increasing numbers, and even when they do not, they are more likely to find that since no crisis exists today, there is no rational basis for the medical malpractice statutes.273

268. See supra notes 56-59 and accompanying text. See also Cunningham & Lane, supra note 5, at 119.
270. Id.
271. See Redish, supra note 4, at 780.
272. Id. at 781, n.132.
Most of the early cases involved pretrial screening panels and the majority of jurisdictions found no constitutional infirmity when the panels were challenged in the courts. In the most recent cases, the courts have found equal protection violations in the application of the other provisions, especially the fixed statute of limitations.

In 1977, the Arizona Supreme Court, using the rational basis test, upheld the constitutionality of the pretrial screening panels and abolition of the collateral source rule against claims of violation of the right to a jury trial, violation of the separation of powers doctrine, and denial of equal protection. In the 1984 case of Kenyon v. Hammer, the Arizona court was faced with the question of whether the abolition of the discovery rule in favor of a fixed statute of limitations violated the plaintiff's right to equal protection. The court cited a Montana Supreme Court decision holding that a statute which discriminated between ordinary tort claimants and those with claims against the government violated a fundamental right to bring a tort action and violated the state's equal protection guarantee. The Arizona court found that the three year statute of limitations violated the plaintiff's fundamental right to bring a tort action and, as such, must be tested under the strict scrutiny analysis. The court concluded that the absolute bar three years from the date of injury to most, but not all, medical malpractice claimants "discriminate[s] against and among medical malpractice claimants in a manner which infringes upon fundamental rights. . . ." and was, therefore, violative of equal protection.

The Kenyon case is clearly revolutionary compared to the early cases in which the courts flatly stated that no fundamental rights

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274. See e.g., Seoane v. Ortho Pharmaceuticals, 660 F.2d 146 (5th Cir. 1981) (panel does not violate equal protection right); Eastin v. Broomfield, 116 Ariz. 576, 570 P.2d 744 (1977) (review panel not violative of constitutional rights); Prendergast v. Nelson, 199 Neb. 97, 256 N.W.2d 657 (1977) (use of medical review panel violates neither equal protection or due process).


277. Kenyon, __ Ariz. at __, 688 P.2d at 961.


279. Kenyon, at __, 688 P.2d at 675.

were infringed by the medical malpractice statutes, and refused to use any test except the rational basis test. Since the test used is generally determinative of the outcome in medical malpractice cases, the modern court’s willingness to use the means scrutiny and strict scrutiny tests will mean that more and more statutes will be struck on equal protection grounds.

IV. WHERE TO NOW?

The inevitable conclusion, after a decade of litigation, is that the medical malpractice statutes are unconstitutional and cannot stand. The statutory provisions infringe on rights specifically guaranteed by state and federal constitutions. The right to bring a tort claim, the right of access to the courts, the right to a jury trial, and the right to be treated the same as all others similarly situated are fundamental, constitutional rights that must be respected by the legislatures. Physicians, especially as they band together to make their demands for special legislation, are a powerful and wealthy interest group capable of exerting tremendous pressure on the legislators. The physicians are now pushing for constitutional amendments to limit all tort claimants as they have tried to limit the medical claimants. The legislatures are constantly introducing new bills in an attempt to find a workable solution to what they perceive as a medical malpractice problem. Federal legislation has also been proposed. The proposed legislation, known as the Alternative Medical Liability Act of 1984, would alter the way potential malpractice cases brought by Medicare patients are handled. Under this “quasi no-fault” proposal, the physi-

281. See Note, supra note 244, at 852.
282. See supra notes 45-49 and accompanying text.
283. Id.
284. For example, none of the bills supported by the Washington State Medical Association or the State Judiciary Committee passed during the 1984 Legislative Session. A legislative study of medical malpractice issues is underway and the bills are being considered for re-introduction during the 1985 Legislative Session. Washington State Senate Report of the Senate Judiciary Committee on S. 2920, 3400-02, 3398, 48th Leg. 1983 Sess. (Dec. 10, 1983) and Letter from Dick Armstrong, Staff Counsel, Senate Judiciary Committee, Washington State Senate, dated October 18, 1984. See also Minutes of Joint Subcommittee Studying Virginia’s Medical Malpractice Laws, (H.J.R. 20), November 12, 1984. Florida is considering a “no-fault” system which would compensate all injured patients but at a lower rate than they would have gained in the current litigation arena. Mills, New Malpractice Reform Legislation. Legal Asp. of Med. Prac., July, 1984, at 1-3.
cian defendant could foreclose a civil action by offering to settle for the amount of the plaintiff's net economic loss. By making such an offer within six months of the malpractice, the defendant could avoid litigation with its potentially high verdicts or punitive damages. The merit of such a proposal is, of course, debatable. Some plaintiff's lawyers, however, see a more basic problem. An attorney representing the American Trial Lawyers Association testified before Congress: "The only cause of malpractice is negligence and as long as the medical profession is allowed to continue certain practices undeterred, the problem will grow in seriousness no matter how many Band-Aids are applied to this reparations process."

As the legislatures sit in 1985, they will not be able to ignore the glaring problems caused by legislators who, in the mid-seventies, were too quick to draft legislation in response to what they believed was a crisis situation. It is imperative that the present lawmakers learn from the mistakes made by their predecessors, or by themselves, and consider how any future legislation will affect, not only the physicians' ability to obtain lower insurance rates, but also the injured victim. The search for solutions to the malpractice problem will not be easy. Many hours will be spent in search of alternatives. Some will undoubtedly repeal their medical malpractice statutes entirely while others will try to salvage parts of their statute, repealing only those sections that are blatantly unconstitutional.

A possible alternative to the current system of malpractice claim resolution is voluntary binding arbitration. As previously noted, binding arbitration is a substitute for a jury trial. For this reason, an arbitration agreement is valid only if the patient has knowingly and voluntarily waived his constitutional right to a jury trial. This means that the person waiving his right must be fully informed of the consequences of his agreement to arbitrate and be given an opportunity to revoke for a reasonable period of time.

285. See Middleton, supra note 42 at 10, col. 3.
286. Id.
287. Id. at 11, col. 2.
288. Id.
289. See Note, Michigan Malpractice Act, supra note 138, at 1848.
290. Id. at 1849.
The presence of a physician on the arbitration board gives the impression of bias, even if there is no actual bias. For this reason, to pass constitutional muster, an arbitration panel should not include a physician. A big problem with a voluntary system of arbitration is that it is voluntary. In the case of questionable merit, the claimant is more likely to opt for a jury trial. This, however, seems to be less of a problem than to deny the claimant a jury trial altogether by making the arbitration process mandatory, as suggested by some commentators.

There is provision of some of the malpractice statutes that should be retained and that should help reduce the number of claims brought. These provisions allow, or, better still, require the medical community to discipline errant or incompetent physicians. By enacting such provisions, the legislature acknowledges that the real basis of the malpractice problem is not only insurance, but malpractice itself. Admittedly, such a provision would be most difficult to enforce, considering the traditional reluctance of doctors to testify against other doctors. The Ohio medical malpractice statute has such provision; it lists the grounds for refusing to grant a license to practice medicine and for revoking the license. The Ohio statute also requires that medical and osteopathic physicians and surgeons be re-certified every three years upon the presentation by the physician of evidence of one hundred fifty hours of continuing education during each three year period. Legislation specifically requiring hospitals to investigate any physician who is charged with malpractice and to discipline physicians when necessary would improve the situation.

291. See supra note 228 and accompanying text.
292. See Comment, supra note 17, at 346.
293. "A mandatory arbitration system is the only effective means to combat the medical insurance crisis." Comment supra note 17, at 346.
294. See Comment, supra note 102, at 616.
295. Id.
296. Of 1,561 complaints received by the Florida Board of Medical Examiners from 1973 until 1978, only ten licenses were revoked. See Comment, supra note 102, at 601 (quoting the MIAMI HERALD, June 13, 1982, at E3, col. 3).
297. OHIO REV. CODE ANN. § 4731.22 (Page Supp. 1983). A physician may not, for example, secure a certificate by fraud or misrepresentation, fail to administer drugs with reasonable care, or fail to conform to minimal standards of care.
299. See Comment, supra note 102, at 602.
Another area in need of improvement is the doctor-patient relationship. Better interpersonal relations cannot, of course, be legislated. Doctors and hospitals need to be more responsive to patient complaints. A recent study found that the basic causes of liability were "patient injuries, aggravated by lack of personal rapport in the doctor-patient relationship, unsatisfactory handling of complaints, inadequate information leading to unrealistic expectations about the probable outcome of treatment, and the societal disposition to litigiousness." It follows that it is up to the medical profession to improve relations with patients. It is hard to imagine a patient suing the old "family" doctor who made house calls, treated the entire family for various conditions, delivered the babies, and just sat and talked with his patients. Although these wonderful doctors were not specialists and probably made many errors in judgment, unfortunate results were more likely to be dismissed as unavoidable accidents. The day of house calls is gone forever and specialization is certainly necessary. There is no reason, however, to assume that busy specialists cannot have an effective "bedside manner" and win the confidence and trust of their patients.

The physicians, however, themselves continue to lobby for tort reform. The experiences with medical malpractice statutes in the past ten years should be a warning to lawmakers to proceed with caution in this area. The legislatures must consider not only the needs of doctors and members of special interest groups, but also the competing needs of patients, and try to balance the two.

Perhaps the solution is no legislation at all. In several states the only legislation enacted during the so-called "crisis" dealt with providing adequate insurance through joint underwriting associations and Patient Compensation Funds. Kentucky is such a state. How are physicians in these states protected from frivolous malpractice claims? The situation in Kentucky is interesting and perhaps illustrative of a new trend. In Kentucky, a physician who has been injured because of a frivolous suit filed against him may countersue the plaintiff's attorney for malicious prosecution. Such

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300. See Note, supra note 1, at 387 (quoting Cunningham, Rise in Malpractice Claims Forces Look at Previous Scare, Hosp. Mar. 16, 1981, at 85, 88)).
301. See supra note 45.
302. See Comment, supra note 102, at 617.
303. See supra notes 52-55 and accompanying text.
a countersuit was successful in *Raine v. Drasin*. Of course, the
tort of malicious prosecution is not new, but its use to provide
the physician with a remedy is relatively new. This is because
malicious prosecution suits have never been favored by the courts
and because the plaintiff has the nearly impossible task of proving
malice and probable cause on the part of the defendant. Kentucky
follows the majority, or American, rule which requires the
plaintiff to prove all the elements of malicious prosecution. The
minority, or English, rule requires a showing of some "special in-
jury," i.e., an injury to or interference with the person or property
of the defendant. Special injury means arrest or seizure of assets
which never happens in a malpractice suit; therefore, the physician
is effectively deprived of a remedy. One reason the courts make
it difficult to countersue for malicious prosecution is that public
policy requires that anyone may sue for redress of a wrong "in
good faith and on reasonable grounds" and be protected by the
law. A countersuit cannot be maintained unless certain specific
elements are present. In *Raine*, however, the Kentucky Supreme
Court found that the elements necessary to maintain an action for
malicious prosecution were present. The court awarded damages
to the doctors as compensation for their "mortification, humiliation,
injury to the reputation, character and health, mental suffering,
and general impairment of social and mercantile standard. . . ."

Two other states, Tennessee and Nevada, have recently reached
similar results. Thus, the Kentucky procedure for reducing the
number of nonmeritorious claims may become as effective, or more
effective, than those used by states with complex medical malprac-
tice statutes. As lawyers realize that the courts will not tolerate

304. 621 S.W.2d 895 (Ky. 1981).
305. Note, *Malicious Prosecution of Plaintiff's Counsel for an Unwarranted Medical Malprac-
tice Suit—New Developments in Physician's Countersuits for unfounded Medical Malpractice
306. Id. at 269-270.
307. Id. at 272.
308. Id.
310. The elements necessary to maintain a malicious prosecution suit are (1) institution
or continuation of original judicial proceedings, or of administrative or disciplinary pro-
cedings by the plaintiff; (2) termination of the suit in the defendant's favor; (3) malice;
(4) lack of probable cause; and (5) damage to the defendant. *Raine*, 621 S.W.2d at 899.
311. Id. at 900.
312. See *Peerman v. Sidicane*, 605 S.W.2d 242 (Tenn. Ct. App. 1980); *Bull v. McCuskey*,
97 Nev. 706, 615 P.2d 957 (1980).
frivolous suits which harm physicians when they have not been negligent, and that they, the lawyers, will suffer if such suits are brought, the number of nonmeritorious suits brought should decline rapidly. Winning a malicious prosecution suit would be difficult, but the fact that at least three state supreme courts have sanctioned malicious prosecution as a remedy for physicians should mean that generally only cases with merit will get to court.

Winning a malicious prosecution suit in a state that adheres to the English, or minority, rule would be even more difficult because of the "special injury" requirement.\textsuperscript{313} It has been suggested that the special injury requirement might be met, however, by proof that the allegations are not only malicious and without probable cause but defamatory to the point of causing special injury to the physician's professional reputation.\textsuperscript{314} Such a conclusion stems from a statement by Judge Wilhoitt of the Kentucky Court of Appeals that the allegations of the malpractice complaint in \textit{Raine} were "libelous \textit{per se}."\textsuperscript{315} It is impossible to know whether or not there is any merit to such an argument. It does seem possible, however, that the remedy of malicious prosecution, if backed by the courts, could be as effective a means to protect physicians from frivolous or malicious suits as are most medical malpractice statutes now in effect.

\section*{V. Conclusion}

Ten years ago the physicians in this country were pressing for "reform" of the tort system which they claimed was driving them out of business. Legislatures complied with their demands.\textsuperscript{316} The plethora of suits contesting the constitutionality of the legislation passed in response to the physicians' demands and threats convinces one that the legislatures acted too quickly and without sufficient consideration of the consequences of their actions. Today there is a great need for "reform" of the "reform legislation," or perhaps total elimination of the legislation.

\textsuperscript{313} See \textit{supra} notes 309 and 310 and accompanying text.

\textsuperscript{314} Note, \textit{supra} note 305, at 275.

\textsuperscript{315} \textit{Raine}, 621 S.W.2d at 900.

\textsuperscript{316} "The threat of a doctors' strike creates a crisis which state government must solve" was the message of a special commission selected to report to the Rhode Island House of Representatives. \textit{Boucher v. Sayeed}, \textit{__ R.I. __}, 459 A.2d 87, 89 (1983).
In a recent case, *Boucher v. Sayeed*, the Rhode Island Supreme Court considered the constitutionality of that state's malpractice statute and concluded that the legislature's objectives had not been met. The Rhode Island statute had been amended in 1981. The court, noting that a stable market existed for the purchase of insurance through the Joint Underwriting Association, concluded that no medical malpractice crisis existed in Rhode Island in 1981. Finding no rational basis to support the distinctions between medical malpractice claimants and other tort plaintiffs, or between physicians and other medical tort-feasors such as dentists and nurses, the court struck the Rhode Island statute in its entirety on equal protection grounds.

The *Boucher* court's approach will undoubtedly be followed by many other jurisdictions. The statutes may be struck on equal protection or due process grounds, as violative of the right to a jury trial, as violative of the separation of powers doctrine, or on other constitutional grounds depending on the provision that is successfully challenged. The medical malpractice statutes in general, however, have one common feature, that is, a grant of special privileges to one class of citizens, the physicians. As such, the statutes directly contravene the prohibition against special legislation found in many state constitutions. For instance, the Iowa Constitution provides: "[T]he General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms shall not equally belong to all citizens."

As the Rhode Island court stated in *Boucher*:

Absent a crisis to justify the enactment of such legislation, we can ascertain no satisfactory reason for the separate and unequal treatment that it imposes on medical malpractice litigants. The statute constitutes special class legislation enacted solely for the benefit of specially defined defendant health-care providers. . . . In the absence of an identifiable legitimate governmental interest, these class distinctions constitute a patent violation of one of the most fundamental tenets of equal protection, namely, that persons similarly situated shall be treated in a like manner.

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317. Id. at ___, 459 A.2d at 87.
318. Id. at ___, 459 A.2d at 93.
319. Id. at ___, 459 A.2d at 93. There was no need to apply the means scrutiny or strict scrutiny test as the statute was clearly unconstitutional even under the minimal scrutiny test.
320. Id. at ___, 459 A.2d at 91.
322. Id. at ___, 459 A.2d at 93 (emphasis added).
NOTES

TORTS—NO DEFENSE FOR THE MANUFACTURER—THE SUPREME COURT OF KENTUCKY RESTRICTS THE SHIFTING RESPONSIBILITY DEFENSE IN STRICT PRODUCTS LIABILITY CASES—Montgomery Elevator Co. v. McCullough, 676 S.W.2d 776 (Ky. 1984).

On February 24, 1979, Kevin McCullough, a ten-year-old boy, was riding down a department store escalator when the tennis shoe on his right foot suddenly became trapped and wrenched into the space between the treads and side skirt of the escalator.¹ He suffered a bone-crushing injury which resulted in the amputation of his big toe. Kevin was an unfortunate victim of the “tennis shoe” phenomenon, a widely known problem in the escalator manufacturing industry.² Prior to the accident, the manufacturer of the escalator warned the department store of the escalator’s dangerous propensities and offered to sell the store a safety device which was designed to prevent the “tennis shoe” phenomenon.³ The department store failed to purchase the device and had otherwise made no attempts to prevent foreseeable injuries. Kevin brought an action grounded in negligence against the department store and an action grounded in strict products liability against the manufacturer of the escalator.⁴ The manufacturer argued that the department store’s failure to heed its warnings and purchase the safety

¹. Montgomery Elevator Co. v. McCullough, 676 S.W.2d 776 (Ky. 1984).
². Brief for Appellant Kevin T. McCullough, at 1. Evidence produced at trial showed that the manufacturer had knowledge of some 500 prior accidents which had occurred on escalators of the type which injured Kevin.
³. Brief for Appellant Kevin T. McCullough, Appendix B.
⁴. 676 S.W.2d at 778. Originally Kevin’s claim was filed in the Circuit Court against both the manufacturer and the department store. Before trial the claim against the department store was settled for $30,000. The claim against the manufacturer, based on defective design of the product, was submitted to the jury which awarded $51,511.75. Under an interrogatory which permitted the jury to apportion responsibility between the manufacturer and the department store, the jury found each to be 50% responsible. The manufacturer appealed to the Court of Appeals of Kentucky, claiming that it was entitled to a directed verdict and also claiming trial errors. The Court of Appeals decided against the manufacturer’s claim that it was entitled to a directed verdict, but sustained its claim that there were trial errors in the admission of certain evidence regarding prior accidents. The court remanded the case for a new trial. Both parties appealed to the Supreme Court of Kentucky.
device constituted a superseding cause of Kevin's injuries.  

In *Montgomery Elevator Co. v. McCullough*, the Supreme Court of Kentucky addressed the question of whether the department store's disregard of the manufacturer's warnings insulated the manufacturer from liability to Kevin for his injuries. "The answer," stated the court, is that warnings of defects to the purchaser, "[a]re not a defense . . . where the person injured is a member of the public, a bystander or a user without notice of the dangerous propensities of the product." Justice Leibson, writing for the majority, sends forth a clear warning to the Kentucky manufacturing industry: "The manufacturer has a nondelegable duty to provide a product reasonably safe for its intended uses, a duty not abrogated by warning to the immediate purchaser."  

*Montgomery* sharply limits the scope of what has come to be known as the shifting responsibility defense against a products liability action. Theoretically, "shifting responsibility" occurs when the purchaser of a product has knowledge that a product is in a defective and unreasonably dangerous condition but nevertheless continues to expose innocent third parties to the product's dangers. Under ordinary circumstances a manufacturer is strictly liable for harm which is "caused" by its defective products. Under

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5. 676 S.W.2d at 779 (Ky. 1984).
6. 676 S.W.2d 776 (Ky. 1984).
7. Id. at 779.
8. 676 S.W.2d at 784. Justices Aker, Gant and Chief Justice Stephens concurred with Justice Leibson. Justices Stephenson, Vance and Wintersheimer dissented. Justice Stephenson filed a dissenting opinion which was joined by Justice Wintersheimer. Justice Stephenson questioned the determination that the escalator was defective in the first place as follows: I believe this court is going too far in protecting people against themselves. In normal use, the equipment is not dangerous at all. A piece of equipment with moving parts can seldom, if ever, be rendered completely foolproof against someone using it in an abnormal fashion thereby causing injury.
11. Prosser formulated the theory as follows: "The effect, as a matter of 'proximate cause' of negligence on the part of an intermediate buyer of the product, has arisen in several cases . . . [I]t is ordinarily not reasonably to be expected that one who knows that a chattel is dangerous will pass it on to another without warning. Where the buyer is notified of the danger, or discovers it for himself, and delivers the product without warning, it usually has been held that the responsibility is shifted to him, and that his negligence supersedes the liability of the seller. Id. at 667-68.
12. RESTATEMENT (SECOND) OF TORTS § 402A provides: One who sells any product in a defec-
circumstances in which a purchaser knowingly exposes innocent bystanders to the dangers of a product, however, harm is said to have been caused by the misconduct of the purchaser rather than by the dangerous nature of the product.\textsuperscript{13}

This note will examine various interpretations of when the responsibility for repairing a dangerously defective product should be shifted from the manufacturer to the purchaser. Particular attention will be focused on the Supreme Court of Kentucky's approach to the issue and the impact that the \textit{Montgomery} decision will have on the manufacturing industry in the Commonwealth of Kentucky and abroad.

\section{Products Liability and Defenses}
\subsection{Historical Background}

The roots of the law of products liability may be traced back to the 1842 English Court of Exchequer case of \textit{Winterbottom v. Wright}.'\textsuperscript{14} In \textit{Winterbottom}, the defendant contracted with the Postmaster General to provide mailcoaches and keep them in repair. The plaintiff, a coachman, was injured when the coach collapsed. The coachman brought an action against the defendant alleging that his injuries were caused by the defendant's breach of contract to supply safe coaches.\textsuperscript{15} The court denied recovery on the ground that there was an absence of privity of contract between the coachman and the defendant. Lord Abinger made the following harsh statement, "There is no instance in which a party, who is not privy to the contract entered into with him can maintain any such action."\textsuperscript{16}

\begin{itemize}
\item[(1)] (a) the seller is engaged in the business of selling such a product, and
\item[(b)] it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
\item[(2)] The rule stated in subsection (1) applies although
\item[(a)] the seller has exercised all possible care in the preparation and sale of his product, and
\item[(b)] the user or consumer has not brought the product from or entered into any contractual relation with the seller.
\end{itemize}

\begin{footnotes}
\item[15.] \textit{Id}. at 109, 152 Eng. Rep. at 402.
\item[16.] \textit{Id}. at 115, 152 Eng. Rep. at 405.
\end{footnotes}
Ten years later, the privity requirement of *Winterbottom* was adopted by an American court in the case of *Thomas v. Winchester*. The privity requirement essentially blocked any action against the manufacturer of a dangerously defective product as it was only on rare occasion that a consumer dealt directly with the manufacturer. It was not until the 1916 New York Court of Appeals case of *MacPherson v. Buick Motor Co.* that the foundation of the "citadel of privity" was shaken. In *MacPherson*, the manufacturer sold an automobile with a defective wheel to one of its retail dealers. The dealer in turn sold the automobile to the plaintiff who was injured when the spokes of the wheel crumbled into fragments and the automobile collapsed as he was driving it. Judge Cardozo dispensed with the privity limitation and held that the manufacturer, by placing the automobile on the market, had assumed a duty to the consumer which rested upon negligence, not upon contract:

> We hold . . . that . . . if the nature of the thing is such that it is reasonably certain to place life and limb in peril when negligently made, it is a thing of danger. Its nature gives warning of the consequences to be expected. If to the element of danger there is added knowledge that the thing will be used by persons other than the purchaser . . . then irrespective of contract, the manufacturer of this thing of danger is under a duty to make it carefully.

*MacPherson* signified the beginning of the full-fledged attack on the "citadel of privity" and proved to be the catalyst of the modern theory of strict products liability. In 1960, the Supreme Court of New Jersey struck the fatal blow to the privity requirement in the case of *Henningson v. Bloomfield Motors, Inc.*

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17. 6 N.Y. 397, 57 Am. Dec. 455 (1852).
20. 217 N.Y. 382, 111 N.E. at 1051.
21. Id. at 389, 111 N.E. at 1053, quoted in Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099, 1100 (1960).
22. The rule of *MacPherson* was extended by degrees. Liability was imposed upon sellers for property damage caused by their products even where there was no recognizable risk of personal injury. See, e.g., C.D. Herme, Inc. v. R.C. Tway Co., 294 S.W.2d 534 (Ky. 1956); Cohan v. Associated Fur Farms, Inc., 261 Wis. 584, 53 N.W.2d 788 (1952); Ellis v. Lindmark, 177 Minn. 390, 225 N.W. 395 (1929); Brown v. Bigelow, 325 Mass. 4, 88 N.E.2d 542 (1949).
the plaintiff was seriously injured when a defective steering mechanism in his new car caused him to lose control and crash into a wall. The manufacturer defended on the ground that there was an absence of privity of contract between itself and the plaintiff.24 The court disregarded the manufacturer's argument and ruled that "the demands of social justice" require a manufacturer to absorb the economic burden of losses occasioned by their defective products regardless of the absence of privity.25

Three years after the Henningson decision, Justice Traynor of the Supreme Court of California authored his landmark opinion in the case of Greenman v. Yuba Power Products Inc..26 Justice Traynor abandoned the negligence and contract limitations of MacPherson and Henningson and created what has become popularly known as the theory of strict products liability.27 The rule of Greenman is set forth in simple and unambiguous terms: "The manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being."28 The resounding approval of the Greenman decision resulted in the American Law Institute's 1965 adoption of § 402 A of The Restatement (Second) of Torts [hereinafter referred to as section 402 A and 402 A].29 Section 402 A imposes liability on a manufacturer for harm which is caused by one of its defective and unreasonably dangerous products even where the manufacturer has exercised "all possible care" in the design, preparation and sale of the product.30 The underlying purpose of 402 A is to impose, as a cost

24. Id. at 358, 161 A.2d at 69.
25. Id. at ___, 161 A.2d at 83, quoting Mazetti v. Armour & Co., 75 Wash. 622, 135 P. 633, 635 (1913).
27. Two major treatises, both regularly supplemented, are needed to cover the field of products liability. See R. Hursh & Bailey, American Law of Products Liability (2d ed. 1974); L. Frumer & Friedman, Products Liability (Rev. ed. 1974). Also, two reporting systems have been developed to keep the attorney who specializes in this area as up to date as possible. See CCH Products Liability Reporter and BNA Products Safety and Liability Reporter. For an excellent treatise on the growth of strict products liability law in Kentucky, see Eades, Products Liability, The Law in Kentucky (1981).
28. 59 Cal. at ___, 377 P.2d at 900, 27 Cal. Rptr. at 700.
29. See supra note 12.
30. Id. at note 12.
of doing business, "strict" liability on the manufacturer for harm which is caused by its defective products.\textsuperscript{31}

Since the adoption of 402 A by the American Law Institute, over thirty jurisdictions have adopted either the text of 402 A verbatim or the language of Justice Traynor's \textit{Greenman} opinion.\textsuperscript{32} The Supreme Court of Kentucky adopted the text of section 402 A in 1966.\textsuperscript{33}

\textbf{B. Commonly Accepted Defenses to a Products Liability Action}

Despite the seemingly foolproof "strict liability" appearance of 402 A, manufacturers have devised several ingenious defensive theories designed to limit their liability to consumers. One commonly accepted defensive theory is assumption of risk.\textsuperscript{34} For example, a person who drinks out of a defective bottle, known to be full of broken glass, will have assumed the risk of injury and be barred from suing the manufacturer. Another common defense is the unforeseeable abnormal use of the product.\textsuperscript{35} Thus, where a fifteen-year-old boy was injured when he dove into a vinyl lined swimming pool thirty inches deep, the manufacturer was not held liable.\textsuperscript{36} However, liability will be imposed on manufacturers where

\begin{itemize}
  \item Section 402A at comment c reads something like a Declaration of Independence for the consumer:
    \begin{quote}
      On whatever theory, the justification for the strict liability has been said to be that the seller by marketing his product for use and consumption, has undertaken and assumed a special responsibility toward any member of the consuming public who may be injured by it; that the public has the right to and does expect, in the case of products which it needs and for which it is forced to rely on the seller, that reputable sellers will stand behind their goods; that public policy demands that the burden of accidental injuries caused by products intended for consumption be placed upon those who market them as a cost of production against which liability insurance can be obtained; and that the consumer of such products is entitled to the maximum of protection at the hands of someone, and the proper persons to afford it are those who market the products.
    \end{quote}
  \item For the current status of the various states, see 2 Hursh & Bailey, American Law of Products Liability § 4:41 (1974).
  \item Dealers Transport Co. v. Battery Distrib. Co., Inc., 402 S.W.2d 441 (Ky. 1966).
  \item See, \textit{e.g.}, Cintrone v. Hertz Truck Leasing & Rental Service, 45 N.J. 434, 212 A.2d 769 (1965) (where plaintiff voluntarily assumed the risk of driving a truck with bad brakes); Youtz v. Thompson Tire Co., 46 Cal. App. 2d 672, 116 P.2d 636 (1941) (driving on a tire known to be unsafe); Contra, Ferraro v. Taylor, 197 Minn. 5, 265 N.W. 829 (1936).
  \item See generally Dale & Hilton, \textit{Use of the Product—When is it Abnormal?}, 4 Williamette L.J. 350 (1967).
  \item Colosimo v. May Depart. Store Co., 466 F.2d 1234 (3d Cir. 1972); see also Vincent v. Nicholas E. Tsiknas Co., 337 Mass. 726, 151 N.E.2d 263 (1958) (can opener used to pry open glass jar).
\end{itemize}
the misuse of a product is foreseeable such as where a consumer wears a cocktail robe near the flame of a kitchen stove or stands on an aluminum chair to change a light bulb.

Another commonly accepted defense is derived from the text of 402 A itself. Section 402 A (1)(b) provides that in order for a manufacturer to be held liable, the product must reach the consumer "without substantial change in the condition in which it is sold." An illustrative example of this defense comes from the 1974 Kentucky Court of Appeals case of *Cox v. General Motors Corp.* In *Cox*, the purchaser of a new Chevrolet Chevelle SS 396 made numerous modifications in order to increase the performance of the car so that it could be used for drag racing. Among the modifications made was the replacement of the stock wheels with heavier "chrome-reverse" wheels. When the car was not being used for drag racing the purchaser would remove the custom wheels and install the stock wheels. It was while the purchaser was driving on the stock wheels that the axle bolts to which the wheels were attached broke and one of the wheels struck and injured the plaintiff. The court held that the purchaser's substantial modification of the vehicle, combined with the mistreatment of the car by using it for drag racing, constituted the proximate cause of the plaintiff's injuries. The substantial modification defense has been incorporated into the Product Liability Act of Kentucky which provides as follows: "A manufacturer shall be liable only if the product has been used in its original, unaltered and unmodified condition."

Another defense which has been codified into the Product Liability Act of Kentucky is that of contributory negligence. The act provides, "If the plaintiff failed to exercise ordinary care in the circumstances in the use of the product, and such a failure

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38. Phillips v. Ogle Aluminum Furniture, Inc., 106 Cal. App. 2d 650, 235 P.2d 857 (1951); Perhaps the most extreme application of the foreseeable misuse theory comes from Moran v. Faberge, Inc., 273 Md. 538, 332 A.2d 11 (1975) (where plaintiff's companion poured cologne on a burning candle and the cologne ignited, injuring the plaintiff. In spite of the 27-year accident free history of the cologne, the court held that the jury could find a foreseeable misuse and that the defendant had a duty to warn against it).
39. See supra note 12.
40. 514 S.W.2d 197 (Ky. 1974).
41. Id. at 198-99.
42. Id. at 200.
was a substantial cause of the occurrence of the injury or damage to the plaintiff, defendant shall not be liable whether or not said defendant was at fault or the product was defective." Similar to the defense of contributory negligence, the manufacturer will be insulated from liability where the plaintiff has ignored directions and warnings on how to properly use a product.

While a detailed analysis of the above mentioned defenses is beyond the scope of this note, it is important to have a general understanding of each one in order to recognize the legal principle which underlies them all—superseding cause. In each case, the manufacturer had arguably marketed a defective and unreasonably dangerous product which was the cause in fact of an innocent consumer's injuries; however, another actor or force was found to have been the superseding legal cause of the consumer's injuries. While there is general agreement about the propriety of allowing the use of the above mentioned defenses, there is one defense which stands above all of the others in terms of confusion and disagreement among legal scholars and jurists—the shifting responsibility defense. Shifting responsibility occurs when the manufacturer's duty to repair a defective product is legally discharged and responsibility for repairing the defect is shifted to the purchaser. In the case of Montgomery Elevator Co. v. McCullough, the Supreme Court of Kentucky had occasion to wrestle with the propriety of the shifting responsibility defense. The conclusion reached by the court was that the manufacturer's duty to repair a defective and unreasonably dangerous product is non-delegable and that responsibility will be shifted only under "extraordinary circumstances."

II. THE RATIONALE OF MONTGOMERY

A. Defining the Standard for the Application of 402A

Justice Leibson, the author of the majority opinion in Montgomery, stated that, "The sole question involved in a pro-

46. See infra text accompanying note 84.
47. See supra notes 10 and 11.
48. Id.
49. 676 S.W.2d 776 (Ky. 1984).
50. Id. at 782.
ducts liability case is whether the product is defective..." The Justice noted that the fundamental goal of strict products liability theory is to focus the inquiry on the dangerous nature of the product rather than on the conduct of the manufacturer, which is the focus in negligence cases. The most recent case with which Justice Leibson supported his rationale was the court's 1980 Nichols v. Union Underwear Co., Inc. decision. In the Nichols case, a four-year-old boy was badly burned when his T-shirt caught fire due to an alleged design defect. Justice Leibson noted that Nichols provides a "simple standard" for the trier of fact to use when applying 402A:

The manufacturer is presumed to know the qualities and characteristics, and the actual condition, of his product at the same time he sells it, and the question is whether the product creates 'such a risk' of an accident of the general nature of the one in question 'that an ordinarily prudent company engaged in the manufacture' of such a product 'would not have put it on the market.' Considerations such as feasibility of making a safer product, patenty of danger, warnings and maintenance and repair, misuse, and the product's inherently unsafe characteristics, while they have a bearing on the question as to whether the product was manufactured 'in a defective condition unreasonably dangerous,' are all factors bearing on the principle question rather than separate legal questions. In a particular case, as with any question of substantial factor or intervening cause, they may be decisive.

Justice Leibson's reaffirmation of Nichols and several other problematical causation cases indicate that he recognizes the

51. Id.
52. Id. at 780.
53. 602 S.W.2d 429 (Ky. 1980).
54. Id. at 430.
55. 676 S.W.2d at 780-81 (citing Nichols v. Union Underwear Co., Inc., 602 S.W.2d 429, 433 (1980)).
56. At 676 S.W.2d 776, 781, Justice Leibson reaffirmed Ulrich v. Kasco Abrasives Co., 532 S.W.2d 197 (Ky. 1976) (where the purchaser's failure to follow maintenance instructions was found to have been the sole cause of the disintegration of a grinding wheel and that original design was not a contributing factor); Hercules Powder Co. v. Hicks, 453 S.W.2d 583 (Ky. 1970) (where the contributory fault of an employee who knew of the danger of using a jack hammer where explosives had been used precluded his recovery from the manufacturer for defective design of the explosives); Jones v. Hutchinson Mfg. Inc., 502 S.W.2d 66 (Ky. 1973) (where it was held that the danger of a grain-auger was so apparent that the manufacturer's failure to place shields around the hopper of the auger did not establish defective design).
propriety of some of the traditional defenses against a product liability action such as misuse, contributory negligence, disregard of warnings, and failure to follow directions.

B. Distinguishing Kentucky Precedents

Facing the court were several problematical cases which indicated that the circumstances of the Montgomery case presented an appropriate situation in which responsibility for making the defective elevator safe should have been shifted from the manufacturer to the department store. Chief among these cases was the 1958 Court of Appeals case of Ford Motor Co. v. Atcher. In Atcher, a small boy fell from his mother's automobile when the left rear door came open while the automobile was being driven along the highway. The plaintiff's proof showed that the door sprung open due to defects in the latch mechanism. On three previous occasions the mother had experienced similar problems with the automobile's doors. On one occasion she temporarily tied one of the doors shut with string. The mother never notified the dealer about the defective door from which her son fell. The court held that the mother's continued use of the automobile, with knowledge of the improper functioning of the doors, constituted an intervening cause shifting responsibility from the manufacturer and dealer to the mother.

The harsh result of the Atcher decision provoked immediate
criticism. In Montgomery, Justice Leibson seized the opportunity to distinguish Atcher. The Justice noted initially that Atcher is a thirty-year-old case involving negligence law: "It predates the modern era of the law of products liability which came with 402 A of the Restatement (Second) of Torts in 1965 which shifts the focus from users to the product itself." He concluded that 402 A imposes liability on the manufacturer even if the purchaser deliberately continues to use the product in its unchanged condition. The question seems to be rendered moot as Justice Leibson held that Atcher involved negligence law and is unavailable to insulate a manufacturer in a products liability action.

In addition to the Atcher case, the court was faced with its own 1978 decision in Bohnert Equipment Co., Inc. v. Kendall. The facts of Bohnert were strikingly similar to those of Montgomery. In Bohnert, the manufacturer of an overhead crane warned the purchaser that the crane was improperly braced and that further use of it without repair could result in serious injuries to the purchaser's employees. Despite the repeated efforts of the manufacturer to convince the purchaser that the crane needed extra bracing, the purchaser continued to operate the crane and the plaintiff was subsequently injured when the crane broke away from the ceiling and struck him. There was also evidence that the purchaser specifically agreed to assume the duty of repairing the defective crane.

The Bohnert court found that under the circumstances involved, a jury could find that responsibility for repairing the crane had shifted from the manufacturer to the purchaser. The court began its analysis by citing its 1976 decision in Ulrich v. Kasco Abrasives Co.:
In *Ulrich* we said that a manufacturer was entitled to rely on the owner of the machine to assume the responsibility for keeping it in safe working order. "The owner's failure to do so (and to warn the operator accordingly) might constitute superseding negligence if it could be found that the tool was unreasonably dangerous in the first place..."72

The *Bohnert* court reaffirmed its position as set forth in *Ulrich* and ruled that under the evidence of the case, the warning given to the purchaser would discharge the manufacturer's responsibility if a jury found the warning to be adequate.73 Alternatively, the court stated that responsibility would be shifted if the jury found that the purchaser specifically agreed to assume the duty of repairing the defect.74

It was on this point that Justice Leibson forcefully distinguished *Bohnert*. He interpreted *Bohnert* as holding that responsibility would be shifted *only* where the purchaser specifically agrees to assume the duty of repairing a defect.75 The Justice closed out further debate on the issue by stating, "So much of the *Bohnert* opinion as is subject to broader interpretation is in conflict... and is overruled."76 Justice Leibson's interpretation and edition of previous Kentucky case law led him to the following conclusion:

In the final analysis, as a general rule the purchaser's failure to remedy a defect is no defense to the manufacturer where the claim is based on the defective condition of the product at the time of manufacture and is made on behalf of an ultimate user or bystander who has not been adequately warned of the danger.77

### III. STRICT PRODUCTS LIABILITY AND THE SHIFTING RESPONSIBILITY DEFENSE—AN ANALYSIS OF THE MONTGOMERY DECISION

#### A. Strict Products Liability and the Question of Causation

In *Montgomery*, there was no question that Kevin McCullough's
Injuries were caused in fact by the defective escalator. The focal point of debate however was over who legally caused Kevin's injuries. Section 402A imposes liability on a manufacturer when its defective products "cause" injury to consumers. In Montgomery, the manufacturer argued that Kevin's injuries were legally caused, not by the defective product, but rather by the department store's disregard of warnings and continued exposure of the public to a known danger.

In his 1941 treatise on torts, William Prosser stated: "Proximate cause cannot be reduced to absolute rules. . . It is always to be determined on the facts of each case upon mixed considerations of logic, common sense, justice and precedent." This rational led him to the conclusion that the, "fruitless quest for a universal formula" of causation ought to be abandoned. Prosser's commentaries seem to have inspired the contemporary notion that causation should be determined through a pragmatic process involving considerations of fairness, justice and public policy, as opposed to treating it as a question answerable by orthodox legal doctrine.

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78. Id. at 778.
79. Id. at 779.
80. See supra text accompanying note 12. Santiago v. Package Machinery Co., 123 Ill. App.2d 305, 260 N.E.2d 653 (1969). Strict tort liability does not eliminate the necessity of proving proximate causation where the injury may have been caused by the act of someone interposed between the manufacturer and the injured party.
81. 676 S.W.2d at 778.
82. W. PROSSER, LAW OF TORTS 1050 (1941).
83. Id.
84. See generally White, Tort Law in America, An Intellectual History 92-109 (1980) for an exhaustive study of the evolution of the theory of causation. White notes that early treatises and casebooks devoted no space to the issue of causation. In the early 1900s however, the theory of negligence was rapidly emerging as a major principle in tort law, and the question of legal causation became a focal point of the negligence inquiry. Legendary scholars such as Smith, Green, Bohlen and Beale did battle over the appropriate standards of the causation inquiry. Green's theory seems to have won out, see Green, Rationale of Proximate Cause (1927) as his was the one adopted by Judge Cardozo in the landmark case of Palsgraf v. Long Island Railroad, 248 N.Y. 339, 162 N.E.99 (1928). In Palsgraf, the plaintiff was injured as a result of a freakish chain of events. The court denied recovery under the following test of legal cause:

The risk reasonably to be perceived defines the duty to be obeyed, and the risk imports relation; it is risk to another or to others within the range of apprehension. . . . Negligence like risk, is thus a term of relation. Negligence in the abstract, apart from things related, is surely not a tort, if indeed it is understandable at all.

Id. at 345, 162 N.E. at 100-101. White suggests that Palsgraf represents the turning point in American tort law from treating causation as an issue of objective doctrinal specificity to treating it as a subjective issue to be decided through a process of interest balancing. White at 100.
In the 1974 case of *House v. Kellerman*, the Court of Appeals of Kentucky addressed the amorphous issue of causation as follows:

To begin with, literally speaking there can never be only one 'cause' of any result. Every cause is a collection of many factors, some identifiable and others not, all determined by prior events. The law seeks out only the collective cause or causes for which it lays responsibility on some person or persons.

In *Montgomery*, two factors did indeed converge and cause Kevin McCullough's injuries. One factor was the defective and unreasonably dangerous nature of the escalator. The evidence showed that the manufacturer was aware of some 500 prior accidents which had occurred on escalators of the type which injured Kevin. The evidence further showed that the manufacturer was not only aware of prior accidents caused by the design of its escalator, but that it was simultaneously manufacturing a safer escalator which was designed to meet the more stringent safety standards imposed upon its Canadian purchasers. Lastly, the evidence showed that the manufacturer had abandoned the obsolete design of the escalator which injured Kevin and was marketing a completely different and safer escalator at the time of the accident.

The second factor which the court had to take into consideration was the department store's continued use of the escalator after being warned that the escalator had the dangerous propensity of ingesting tennis shoes. Notice of this problem was given to the department store at least two years prior to the accident. A month before the accident, the manufacturer sent the department store a letter which warned that The National Escalator/Elevator Code Committee would soon require that a safety device, designed to prevent the "tennis shoe" phenomenon, be applied to the type of escalator owned by the department store. Rather than offer to

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85. 519 S.W.2d 380 (Ky. 1974).
86. Id. at 382.
87. 676 S.W.2d at 779.
88. See Brief for Appellant Kevin T. McCullough at 1.
89. Id. at 3.
90. Id. at 2.
91. Id. at Appendix B.
92. Id. at 2.
93. Id. at Appendix B.
apply the safety devices free of charge, however, the manufacturer offered only to install the device for an indeterminate negotiable cost. 94

The fundamental question presented in Montgomery, was whether it was fair to impose liability on the manufacturer when the department store, on notice that the escalator was dangerously defective, continued to operate the escalator and expose innocent bystanders to its hazards. The question provoked a heated debate over the applicability and propriety of the shifting responsibility defense.

B. Sources of the Shifting Responsibility Defense

The shifting responsibility defense is essentially derived from the Restatement (Second) of Torts § 452 [hereinafter cited as section 452]. 95 While section 452 was originally drafted to be applied to negligence cases, several courts have found it equally applicable to products liability cases. 96 Section 452 states that where the duty of an actor to prevent harm to another is found to have shifted from the actor to a third person, the third person’s failure to prevent the harm constitutes a superseding cause of resulting injuries. 97 The comments following section 452 suggest that in determining whether responsibility has shifted, a court should consider factors such as the risk and degree of the danger of the harm, the character and capability of the third person who is to take responsibility, the third person’s knowledge of the danger and the

94. Id.
95. RESTATEMENT (SECOND) OF TORTS § 452 (1965) cited in Montgomery at 780 provides:
(1) Except as stated in Subsection (2), the failure of a third person to act to prevent harm to another threatened by the actor’s negligent conduct is not a superseding cause of such harm.
(2) Where, because of lapse of time or otherwise, the duty to prevent harm to another threatened by the actor’s negligent conduct is found to have shifted from the actor to the third person, the failure of the third person to prevent such harm is a superseding cause.
96. See Balido v. Improved Machinery, Inc., 29 Cal. App. 3d 633, 105 Cal. Rptr. 890 (1972) citing the text of section 452 as applicable to strict products liability cases; In re Related Asbestos Cases 543 F. Supp. 1142 (N.D.Cal. 1982) citing Balido; Ford Motor Company v. Matthews, 291 So.2d 169 (Miss. 1974) citing Balido; Justice Leibson cites section 452 in Montgomery 676 S.W.2d 776 at 780 but limits superseding cause as a defense to “extraordinary” cases.
97. See supra text accompanying note 95.
likelihood that proper care will not be exercised in preventing the danger.\textsuperscript{98}

In many cases, the manufacturer of a mechanical instrumentality may expect that the purchaser will periodically inspect the instrumentality for defects and take precautions for the safety of its ultimate users.\textsuperscript{99} The expectation must nevertheless be reasonable.\textsuperscript{100} If the expectation is found to have been reasonable and a consumer was injured as a result of the purchaser's disregard of a known hazard, responsibility will be said to have shifted from the manufacturer to the purchaser.\textsuperscript{101} Prosser suggested that such an expectation by the manufacturer will be limited under circumstances in which a mechanical instrumentality is capable of producing serious bodily injury or even death.\textsuperscript{102} An illustrative application of the limitation comes from the landmark case of \textit{Vandermark v. Ford Motor Co.}.\textsuperscript{103} In \textit{Vandermark}, the plaintiff was seriously injured when the improperly-adjusted brakes on his new car failed and he struck a tree. The evidence proved that the manufacturer did not deliver cars to its dealers that were ready to be driven but relied on them to make the final inspections, corrections and adjustments necessary to make the cars ready for safe use.\textsuperscript{104} Justice Traynor, writing for the court, held that responsibility could not be shifted: "Since the manufacturer ... cannot delegate its duty to have its cars delivered to the ultimate purchaser free from dangerous defects, it cannot escape liability on the ground that the defect ... may have been caused by something one of its authorized dealers did or failed to do."\textsuperscript{105} Although the purchaser's

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\textsuperscript{98} Restatement (Second) of Torts § 452 at comment f; Illustration 10 provides:

A manufactures and sells an automobile with a defective hood catch, creating the danger that on a rough highway the hood will fly up and obscure the vision of the driver. The car is sold by a dealer to B. A is notified of the defect in its car and the danger, and sends out to its dealers a new safety catch for installation in all such cars, in order to remedy the defect. The dealer calls B, and offers him the new safety catch, warning him of the danger and urging him to install it. B refuses to do so. After driving the car for a year, B sells it to C, who is ignorant of the danger. While C is driving the car, the hood flies up, and C is injured. A is not liable to C.

\textsuperscript{99} \textit{See} Goar v. Village of Stephen, 157 Minn. 228, 196 N.W. 171 (1923).

\textsuperscript{100} \textit{See} PROSSER, HANDBOOK OF LAW OF TORTS 177, 668 (4th ed. 1971).

\textsuperscript{101} \textit{Id.}

\textsuperscript{102} \textit{Id.}

\textsuperscript{103} 61 Cal 2d 256, 37 Cal. Rptr. 896, 391 P. 2d 168 (1964).

\textsuperscript{104} \textit{Id.}

\textsuperscript{105} \textit{Id.} at __, 37 Cal Rptr. at 899, 391 P. 2d at 171.
\end{flushleft}
injury was probably caused by the retailer's negligent adjustment of the brakes, Justice Traynor felt that this intervening factor was of no consequence: "Since liability is strict it encompasses defects regardless of their source..." This interpretation, coming from one of the most influential architects of strict products liability theory, goes far in support of Justice Leibson's premise in Montgomery that the "sole question" in a products liability action is whether the product is defective. While the language suggests that liability is absolute; it is not, and there is a general consensus that under appropriate circumstances, liability should not be imposed upon the manufacturer of a defective product.

C. The Significance of a Manufacturer's Efforts to Repair its Defective Products

It has generally been held that a manufacturer will be absolved from liability where its efforts to repair a defect have been blocked by a noncooperative purchaser. The manufacturer's efforts to repair must be reasonable. Likewise, the purchaser's noncooperation must be unreasonable. In Montgomery, the manufacturer warned the department store that the escalator in question would need a new safety device in order to comply with stricter regulatory standards. However, instead of offering to install the safety device for free, the manufacturer offered only to install the device for a negotiable cost. Had the manufacturer offered to install the safety device for free, the case might very well have been decided in its favor.

For example, in the leading case of Ford Motor Co. v. Wagoner, the manufacturer discovered that the hoods on its cars had a

106. Id. at ___, 37 Cal. Rptr. at 898, 391 P. 2d at 170.
107. 676 S.W. 2d 776 at 782.
108. See text accompanying notes 34-45.
109. See Ford Motor Co. v. Wagoner, 183 Tenn. 392, 192 S.W. 2d 840 (1946) (failure of purchaser to accept free repair of defect). The facts of Wagoner have been integrated into RESTATEMENT (SECOND) OF TORTS (1965) § 452 comment f, Illustration 10, see supra note 98. While Wagoner involved negligence law, its rule has been adopted in strict products liability cases, see note 96 and accompanying text.
111. Id. see also Rekab v. Frank Hrubetz and Co. Inc., 261 Mo. 141, 274 A.2d 107 (1971).
112. Brief for Appellant Kevin T. McCullough, Appendix B.
113. Id.
114. 183 Tenn. 392, 192 S.W.2d 840 (1946). See also text accompanying note 109.
tendency to fly open while the cars were moving. The manufacturer fabricated an auxiliary safety catch designed to prevent such occurrences and instructed its retailers to notify purchasers that the auxiliary catch would be installed without charge. The owner of one of the cars refused to have the auxiliary catch installed, and a subsequent purchaser was injured when the hood flew open and he lost control of the car. The court held that the refusal of the first purchaser to accept free installation of the auxiliary catch constituted an independent superseding cause of the accident which terminated the manufacturer's liability.

Perhaps the most extreme example of a purchaser's unreasonable resistance to the manufacturer's efforts to repair a defect comes from the case of Rekab, Inc. v. Frank Hrubetz & Co. In Rekab, the manufacturer sold the defendant a "Hydraulic Paratrooper Ride" to be used as a feature at the defendant's amusement park. Subsequent to the sale, the manufacturer discovered that the ride's supporting spindle was not strong enough and decided to redesign it. He notified the amusement park owner about the deficiency of the original spindle, shipped the newly designed spindle without charge and offered free installation of the spindle by his own mechanic. The amusement park owner continued to operate the ride however, and a patron was injured when the original spindle broke. The court held that the amusement park owner's continued operation of the ride in disregard of the "tintinabular" warning sent by the manufacturer constituted the superseding legal cause of the patron's injuries.

In his Montgomery opinion, Justice Leibson left open the question of whether the manufacturer's liability would be terminated where its offers to repair a defect without charge have been disregarded by a noncooperative purchaser. While the Justice rigidly interpreted section 402 A, he did concede that responsibility should be shifted in cases involving "extraordinary circumstances." He cited the court's 1978 decision of Bohnert

115. Id.
116. Id. at ____, 192 S.W.2d at 842
118. Id.
119. Id. at ____, 274 A.2d at 111.
120. 676 S.W. 2d at 782.
Equipment Co. v. Kendall, as an example of such an exceptional case. In Bohnert, the manufacturer of an overhead crane warned the purchaser that the crane was defective. The evidence showed that the purchaser agreed to assume the duty of repairing the defect. However, the purchaser never repaired the defect and the plaintiff was injured when the crane broke away from the ceiling and struck him.

The Bohnert court found that under the circumstances of the case, a jury could find that responsibility for repairing the defect had shifted from the manufacturer to the purchaser on one of two grounds. Responsibility could be shifted if the jury found that the manufacturer had adequately warned the purchaser of the defect or that the purchaser had agreed to assume the duty of repair. Justice Leibson feared the slippery slope consequences of the first ground and specifically overruled it in Montgomery. He reasoned that the purchaser's disregard of a warning only insulates the manufacturer from liability when the product is safe in the first instance. Subsequent warning, the problem in the Montgomery case, would not be sufficient to shift responsibility where the manufacturer has already marketed a defective product which is unreasonably dangerous. The end result, if the subsequent warning theory were allowed to stand, would be that an ultimate user who is seriously injured or killed by a defective product, would be barred from suing the manufacturer as long as the manufacturer's warnings about the defects have been disregarded by an intermediate party. The injured user would have an action, grounded in negligence, against the intermediate party, and the intermediate party would have an action, grounded on some sort of warranty theory, against the manufacturer. This result, reminiscent of the days of Winterbottom, would indeed be unfair to the innocent ultimate user. Justice Leibson appears to have recognized this potentially harsh consequence and has appropriately

121. 569 S.W.2d 161 (Ky. 1978).
122. Id.
123. Id. at 166.
124. Id.
125. 676 S.W.2d 776 at 782.
126. Id. at 781.
127. Id.
128. See, e.g., KY. REV. STAT. ANN. §§ 355.2-314 to -316.
129. See notes 14-16 and accompanying text.
overruled any interpretation of *Bohnert* beyond the instruction which dealt with the purchaser's assumption of the duty of repairing a defect.\(^\text{120}\)

\[D. \text{ The Future of the Shifting Responsibility Defense After Montgomery}\]

Justice Leibson seemed to have stricken the fatal blow to the shifting responsibility defense when he stated that the "sole question" in a products liability action is whether the product was defective.\(^\text{131}\) However, the Justice left open one avenue which should prove to be fertile ground for future debate on the issue of shifting responsibility when he stated that under "extraordinary circumstances," the purchaser's failure to repair a defect would constitute a superseding legal cause.\(^\text{132}\) The purchaser's assumption of the duty to repair is but one example of such an extraordinary case.\(^\text{133}\) Further exceptions will undoubtedly be carved out where it is found that the manufacturer has made every reasonable effort to repair a defect but has been prevented from doing so by a noncooperative purchaser.

As suggested earlier, the *Montgomery* case may very well have been decided in favor of the manufacturer if it had only offered to repair its defective product free of charge.\(^\text{134}\) While Justice Leibson chose not to dwell on this aspect of the case, it seems to have certainly entered his mind and is evidenced in his rhetorical question: "In the present case . . . the question was why didn't you go and fix the defect instead of just telling the purchaser about it?"\(^\text{135}\) The 1973 California case of *Balido v. Improved Machinery, Inc.*\(^\text{136}\) is instructional in this regard as it dealt particularly with the manufacturer's reluctance to repair its defective products free of charge. The facts of *Balido* were very similar to those of *Montgomery*. In *Balido*, the manufacturer notified the purchaser that its molding press did not meet California's industrial safety

\begin{itemize}
  \item \text{130. 676 S.W.2d at 782.}
  \item \text{131. Id.}
  \item \text{132. Id.}
  \item \text{133. See Bohnert, supra note 121.}
  \item \text{134. See supra notes 91-94 and accompanying text.}
  \item \text{135. 676 S.W.2d at 782.}
  \item \text{136. 29 Cal. App. 3d 633, 105 Cal. Rptr. 890 (1972).}
\end{itemize}
standards and suggested that the purchaser obtain an additional safety device at the cost of five hundred dollars. The manufacturer disregarded the warning and one of its employees lost four fingers after the press malfunctioned and crushed her hand with one hundred and seventy-five tons of pressure. 137

The Balido court ruled that liability should shift only if the manufacturer had taken “all reasonable steps” to repair the defective product. 138 The court, seemingly disturbed with the fact that the manufacturer would only fix the defect for five hundred dollars, indicated that the manufacturer’s efforts to repair its defective product were manifestly unreasonable. 139 Balido proposes that the focus of the shifting responsibility inquiry should be on the purchaser’s failure to cooperate with the conscientious good-faith efforts of the manufacturer to repair its defective product. 140 While Justice Leibson does not go so far as to create a rule such as that set forth in Balido, the Balido rule seems to be entirely consistent with his belief that responsibility should be shifted in cases involving “extraordinary circumstances.” Balido also seems to provide a more instructional guideline for manufacturers in requiring them to “take all reasonable steps” to correct their errors. 141 The efforts of the manufacturer in Montgomery were manifestly unreasonable considering the highly dangerous nature of the escalator; however, future cases should prove that a manufacturer will be allowed to shift responsibility when its good faith efforts to repair a defective product have been thwarted by a non-cooperative intermediate purchaser.

CONCLUSION

Justice Leibson’s Montgomery opinion indicates the majority’s strong support of the public’s expectation that the manufacturer

137. Id.
138. Id. at 648, 105 Cal. Rptr. at 900.
139. While the court allowed the conclusive determination to the trier of fact, it nevertheless stated its position in the following question, “Query: Should Improved have reasonably anticipated that a purchaser of a second-hand press would ignore its warnings of inadequate safety devices and refuse to spend money to purchase additional safety equipment?” Id. at 649, 105 Cal. Rptr. at 901.
140. Id.
141. Id. at 648, 105 Cal. Rptr. at 900.
should absorb the burden of losses occasioned by its defective products as a cost of doing business.44 In the absence of "extraordinary circumstances," the shifting responsibility defense will be an unpromising one for the manufacturers of defective products. The manufacturing industry should take heed of the warning sent by Justice Leibson: "In the final analysis as a general rule the purchaser's failure to remedy a defect is no defense for the manufacturer. . . ."443

DANIEL COHEN

142. See supra text accompanying note 31.
143. 676 S.W. 2d at 782.

**INTRODUCTION**

The intrafamily immunity doctrine bars tort actions between parents and their unemancipated minor children.¹ The doctrine, a product of three American cases,² has no roots in the common law. At common law there was no bar to property or contract actions between parent and child.³ As far as personal tort actions between parent and child, the early authorities are "meager, conflicting, and obscure."⁴ although it was speculated that the English law would permit such actions.⁵ But beginning with *Hewlett v. George*⁶ in 1891, the American courts pronounced a general rule refusing to allow personal tort actions between parent and child.⁷ Many jurisdictions today have totally or partially abrogated this general rule commonly recognized as the intrafamily immunity doctrine.⁸ In 1984, the Ohio

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¹ Intrafamily immunity includes the parental immunity which bars an unemancipated minor child from bringing a tort action against a parent and the child immunity corollary which bars parents from bringing tort actions against their unemancipated minor children.

² *Hewlett v. George*, 68 Miss. 703, 9 So. 885 (1891); *McKelvey v. McKelvey*, 111 Tenn. 388, 77 S.W. 664 (1903); *Roller v. Roller*, 37 Wash. 242, 79 P. 788 (1905).


⁴ McCurdy, *supra* note 3, at 1059.


⁶ 68 Miss. 703, 9 So. 885 (1891). The Southern Reporter spelling of plaintiff's name is Hewellette, however, it appears in official reports as Hewlett.

⁷ Prosser & Keeton, *supra* note 5, at 904. The general rule is applied to personal torts whether intentional or negligent. *See*, e.g., Cook v. Cook, 232 Mo. App. 994, 124 S.W. 2d 675 (1939); Hastings v. Hastings, 33 N.J. 247, 163 A.2d 147 (1960); *McKelvey v. McKelvey*, 111 Tenn. 388, 77 S.W. 644 (1903); Owaby v. Kleyhammer, 194 Tenn. 109, 250 S.W.2d 37 (1952).

⁸ The following are jurisdictions that have adopted a broad view of intrafamily immunity. The majority of these jurisdictions limit the immunity with numerous exceptions.

Supreme Court reviewed four cases involving the intrafamily immunity doctrine. Initially, the majority adhered to the doctrine but five months later abolished it without reservation. This comment will trace the intrafamily immunity doctrine’s history; examine the doctrine’s rationale; analyze Ohio’s past and recent treatment of intrafamily immunity cases; and discuss problems that may arise with abrogating the intrafamily immunity doctrine in toto.

I. BACKGROUND OF THE INTRAFAMILY IMMUNITY DOCTRINE

A. Pre-1891 Cases and Authorities

There is no precedent in the English common law providing for denying a child the right to bring a personal tort action against


Seven states have abolished the intrafamily immunity entirely.


his parent. It is a misapprehension to start with the idea that at common law a child could not sue his parent. The starting point is the same general right to redress for wrongs as any other individual. Although no record actually shows an action could be maintained, there are no cases holding an action could not be maintained. Contrary to denying the action, English cases involving analogous situations indicate that tortious injuries inflicted by those standing in loco parentis were actionable with civil liability being an appropriate remedy. For example, in Fitzgerald v. Northcote, a child plaintiff received damages in a successful action against a schoolmaster for assault and false imprisonment. The court charged the jury “that the authority of the schoolmaster is, while it exists, the same as that of the parent,” but the jury found no circumstances to justify the schoolmaster’s actions.

Early American cases also support the idea of parental liability for tortious behavior. Nelson v. Johansen states that a parent, or one who stands in loco parentis, has the duty to see that his minor child is properly clothed and “if he failed in this through negligence he would be liable for the consequences.” Cases involving excessive punishment of a minor, or conduct threatening a minor’s life or health favor liability, and the right to inflict corporal punishment was limited by “reasonable judgment and discretion in determining when to punish and to what extent.”

12. Dunlap v. Dunlap, 84 N.H. 352, 150 A. 905, 906 (1903); Eversley, supra note 5, at 578.
14. Eversley, supra note 5, at 578; Prosser & Keeton, supra note 5, at 904.
16. Id. at 749.
17. Id. at 751. Excessive, willful or negligent conduct may also constitute a crime. See Regina v. Hopley, 175 Eng. Rep. 1024 (1860) (A schoolmaster was found guilty of manslaughter for severely beating a child. The court stated “By the law of England, a parent or a schoolmaster . . . may . . . inflict moderate and reasonable corporal punishment, always, however with this condition, that it is moderate and reasonable). See also Young v. Rankin, 1874 Sess. Cas. 499 (When the intrafamily immunity issue came before a Scottish court in a case of first impression, the judges agreed there was no common law immunity and held that an unemancipated minor child could sue its parent for negligently inflicted injuries); and Deziel v. Deziel, 1 Dom. L. R. 651 (1953).
18. 18 Neb. 180, 24 N.W. 730 (1885).
19. Id. at ___, 24 N.W. at 731.
Although the pre-1891 textual authorities have been termed "meager, conflicting, and obscure," they too mention reasonableness as limiting parental action. Blackstone stated, "He may lawfully correct his child, being under age, in a reasonable manner."24 When Cooley spoke of parental authority he stated, "the correction must be moderate, and dictated by reason and not passion."25 These early decisions and authorities, as well as the common law principle that unemancipated minor children could sue their parents in contract and property,26 support liability rather than immunity for tortious behavior between parent and child.

B. Judicial Precedent Establishing the Intrafamily Immunity Doctrine

The modern intrafamily immunity doctrine for negligently inflicted injuries arose from three cases which involved willful torts.27 The three decisions favored parental immunity despite earlier analogous decisions that would support liability.28 Many jurisdictions followed this immunity doctrine29 notwithstanding the fact that Hewlett v. George,30 the initial decision, did not cite any authority.31 Hewlett involved a false imprisonment action against a mother for maliciously confining her daughter in an insane asylum. The plaintiff, a minor, had been married, but was separated from her husband at the time of the alleged injuries. The court reversed a judgment for the minor stating that as long as the parent has the duty to care for, guide and control the child, the child must aid, comfort and obey the parent.32 To allow a tort action between parent and child would disrupt the "peace of society, and of the families composing society."33

23. McCurdy, supra note 3, at 1059.
24. 1 W. BLACKSTONE, COMMENTARIES *452.
25. T. COOLEY, A TREATISE ON THE LAW OF TORTS 171 (1880) (footnote omitted).
26. See supra note 3 and accompanying text.
27. Hewlett v. George, 68 Miss. 703, 9 So. 885 (1891); McKelvey v. McKelvey, 111 Tenn. 388, 77 S.W. 664 (1903); Roller v. Roller, 37 Wash. 242, 79 P. 788 (1905).
28. See supra notes 18-22, and accompanying text.
29. See supra note 8 for jurisdictions applying the intrafamily immunity doctrine.
30. 68 Miss. 703, 9 So. 885 (1891).
31. Id. at ___, 9 So. at 887. (The court's rational was simple "a sound public policy ... forbid[s] to the minor child a right to appear in court in the assertion of a claim to civil redress for personal injuries suffered at the hands of the parent.")
32. Id. at ___, 9 So. at 887.
33. Id.
McKelvey v. McKelvey followed Hewlett and denied the plaintiff, a minor child, civil damages from the father and stepmother for cruel treatment inflicted by the stepmother. The court said it followed a common law rule denying a civil remedy to the child and cited Hewlett as support for the rule. Hewlett did not purport to follow a common law rule. The third and most extreme case, Roller v. Roller, involved a father that had been convicted and sentenced for raping his minor daughter. The daughter brought an action for damages. The court reversed a judgment for the plaintiff citing the public policy and societal interest of preserving harmony in domestic relations. The court feared that "if it be once established that a child has a right to sue a parent for tort, there is no practical line of demarcation."

Hewlett, McKelvey and Roller "constitute the great trilogy upon which the American rule of parent-child immunity is based." Although the rule originated in cases involving intentional torts of a parent, it gradually evolved into an absolute bar to recovery. Jurisdictions throughout the country applied the intrafamily immunity doctrine whether the tortious conduct was intentional or negligent, and whether the tortfeasor was parent or child.

C. Rationale and Criticism of the Intrafamily Immunity Doctrine

The justifications for applying the intrafamily immunity doctrine vary from case to case, but the most frequently used rationales

34. 111 Tenn. 388, 77 S.W. 664 (1903).
35. Id.
36. 68 Miss. at ____, 9 So. at 887.
37. 37 Wash. 242, 79 P. 788 (1905).
38. Id. at 244, 79 P. at 789 (preserving harmony in domestic relations is also used as a justification for denying suits between husbands and wives).
39. Id. at 244, 79 P. at 789.
41. See, e.g., Smith v. Smith, 81 Ind. App. 566, 142 N.E. 128 (1924) (action for damages based on alleged cruel, inhuman and malicious treatment); Taubert v. Taubert, 103 Minn. 247, 114 N.W. 763 (1908) (negligence action for injuries sustained while employed in mother's business); and Small v. Morrison, 185 N.C. 577, 118 S.E. 12 (1923) (alleged negligent injury caused by car accident, where car was driven by plaintiff's father).
42. See, e.g., Silverman v. Silverman, 145 Conn. 663, 145 A.2d 826 (1958); Thompson v. Thompson, 264 S.W.2d 667 (Ky. 1954); and Schneider v. Schneider, 160 Md. 18, 152 A. 498 (1930).
include (1) domestic harmony; (2) fraud and collusion; (3) parental discipline and control; and (4) depletion of the family exchequer.

The domestic harmony argument used to deny a child or parent recovery was the basic premise of Hewlett and it has been relied on ever since.43 When the domestic harmony argument prevents recovery, logic often gives way to emotion as exemplified by the following rationale from Small v. Morrison:44

There are some things worth more than money. One of these is the peace of the fireside . . . we should be slow to encourage or permit a minor . . . to run the risk of losing a priceless birthright . . . to gain for the moment a mere mess of pottage, or a few pieces of silver. If this restraining doctrine were not announced by any of the writers of the common law, because no such case was ever brought before the courts of England, it was unmistakably and indelibly carved upon the tablets of Mount Sinai.45

The soundness of the family harmony argument is questionable in light of the fact that suits between parent and child relating to property and contract rights were allowed at common law and are equally disruptive of family harmony.46 A contract or property action may be more threatening to family peace than a tort action because the parent usually has tort liability insurance.48 The existence of tort liability insurance supports the rationale that relief should be denied because the presence of insurance promotes the possibility of fraud and collusion.49 However, the possibility of fraud and collusion exists in all liability insurance cases where suits have been allowed such as between other members of the family, between good friends and between driver and guest.50 Where fraudulent
claims do exist our legal system is capable of ferreting them out without barring meritorious claims.\(^5\)

The rationale that personal injury actions would impair the parent's ability to discipline and control the child has also barred a child's recovery.\(^5\) The theory is that parents would not apply effective sanctions for fear the child would retaliate with a tort action.\(^5\) But the rationale is too broad and covers acts which are outside the field of parental discipline and control.\(^4\) The desired protection could be just as effectively accomplished by applying concepts of reasonable care.\(^5\)

The fourth argument, depletion of the family exchequer, evolves from the idea that to compel the parent to pay damages to a minor child depletes the parent's fund to the detriment of other children.\(^6\) It assumes the negligent parent will pay the damage award.\(^7\) The prevalence of liability insurance makes this argument unrealistic.\(^6\) The argument also does not outweigh the desirability of compensating the injured child for his damage.\(^5\)

D. \textit{Intrafamily Immunity Exceptions}

The validity of the intrafamily immunity's rationale and origin has been questioned.\(^\text{60}\) As a result, courts carved out exceptions to the doctrine when (1) the parent-child relationship no longer

\(^{51}\) Prosser \& Keeton, \textit{ supra note 5}, at 905.

\(^{52}\) See, e.g., Dunlap v. Dunlap, 84 N.H. 352, 150 A. 905, 910 (1930) (rejected parental discipline and control rationale and said, "To assert that children will become unruly . . . seems a far fetched deduction. The true theory appears to us to be that in the discharge of parental duty his position is rather comparable to that of a judge, not accountable for errors, but responsible when he oversteps his jurisdiction.").

\(^{53}\) Id.

\(^{54}\) PROSSER \& KEETON, \textit{ supra note 5}, at 907 (The decision to abrogate the parent-child immunity set off a long overdue landslide).
exists; the parent acts in a business or vocational capacity; and the injury is caused by negligence in a motor vehicle accident. Other courts have abrogated the doctrine by replacing it with a parental authority or discretion test or a reasonable prudent parent standard.

For purposes of tort actions, the parent-child relationship ceases upon emancipation. Even Hewlett recognized the emancipated child's right to sue the parent in tort. Other courts have allowed a child to recover from a parent when the parent's conduct is intentional, willful or wanton by theorizing the parent-child relationship was expressly or impliedly abandoned. As one court noted, "abandonment should be implied in the case of malicious injuries. Such acts . . . indicate . . . abandonment more clearly than words." An exception, based on a similar rationale, exists if the parent is acting in a business or vocational capacity. The rationale for imposing liability is that the parent was not acting in his parental capacity when the injury occurred. The intrafamily immunity doctrine is not recognized because the domestic relationship is merely incidental to the master-servant relationship.

61. E.g., Hale v. Hale, 312 Ky. 867, 230 S.W.2d 610 (1950); Logan v. Reaves, 209 Tenn. 631, 354 S.W.2d 789; Morgan v. Leuck, 137 W. Va. 546, 72 S.E.2d 825 (1952).
62. E.g., Dunlap v. Dunlap, 84 N.H. 352, 150 A. 905 (1930); Signs v. Signs, 156 Ohio St. 566, 103 N.E.2d 743 (1952); Borst v. Borst, 41 Wash.2d 642, 251 P.2d 149 (1952).
67. Hewlett v. George, 68 Miss. 703, 9 So. 885, 887 (1891) ("If by marriage the relation of parent and child had been finally dissolved . . . then it may be the child could successfully maintain an action against the parent for personal injuries.").
70. Dunlap v. Dunlap, 84 N.H. 352, 150 A. 905, 910 (1930) (plaintiff son injured while working for father in father's business—the case has a comprehensive discussion on the immunity's origin and rationale).
71. See cases cited supra note 62.
72. Teramano v. Teramano, 6 Ohio St.2d 177, 216 N.E.2d 375 (1966).
Another exception permits actions for negligently inflicted injuries as a result of motor vehicle accidents.\textsuperscript{73} The exception could be based on the driver-passenger relationship, disregarding the parent-child relationship, but "the principle reason relied on by the courts for allowing an action . . . in an automobile accident case is the prevalence of automobile insurance."\textsuperscript{74} Although the existence of insurance cannot create liability where none before existed, the prevalence of liability insurance is a proper factor in determining the applicability of parental immunity.\textsuperscript{75} The rationalization is that if the reason for a rule of law no longer exists, then the rule itself ceases.\textsuperscript{76} The immunity doctrine does not aid family harmony or protect the family exchequer when it denies an injured child access to the courts and to any liability insurance that the family might maintain.\textsuperscript{77}

Some jurisdictions have abrogated the immunity doctrine and replaced it with an exercise of parental authority or discretion guideline. The leading case of \textit{Goller v. White},\textsuperscript{78} followed by other jurisdictions,\textsuperscript{79} limited a parent's immunity to two situations:

(1) Where the alleged negligent act involves an exercise of parental authority; and

(2) where the alleged negligent act involves an exercise of ordinary parental discretion with respect to the provision of food, clothing, housing, medical and dental services, and other care.\textsuperscript{80}

The first issue is whether or not the act involves parental authority or parental discretion. By focusing on the type of act involved rather than the relationship, it is possible to narrow immunity to those situations where the relationship bears directly on the act. The results preserve the family harmony and parental discipline arguments without barring all remedies by a general denial of liability. The immunity granted is not accorded the parent because

\begin{footnotes}
\item[73.] See cases cited \textit{supra} note 63.
\item[74.] Transamerica Insurance Co. v. Royle, ___ Mont. ___, 656 P.2d 820, 823 (1983).
\item[76.] \textit{Id}.
\item[77.] \textit{Id} at ___, 611 P.2d at 141.
\item[78.] 20 Wis.2d 402, 122 N.W.2d 193 (1963).
\item[80.] Goller v. White, 20 Wis.2d 402, 122 N.W.2d 193, 198 (1963). (\textit{Goller} was the first case to abrogate the intrafamily immunity doctrine).
\end{footnotes}
he is a parent, but because as a parent he pursues a course within the family which society exacts of him. The non-liability is not a reward but enables parents to discharge their parental duties.

A subsequent Wisconsin case interpreted the Goller test and stated that negligent supervision of a playing child does not involve parental discretion with respect to the care of the child. The term “other care” was deemed not to cover all parental conduct associated with the family relationship. Other care specifically did not cover parents’ supervision of their children at play. Thus, by inference, the Goller immunity was limited to the legal obligations of exercising authority over the child and providing actual necessities to the child.

A reasonable prudent parent standard replaced the intrafamily immunity in Gibson v. Gibson. In Gibson, a minor son sued his father for injuries sustained due to the father’s alleged negligence. The son was riding in a car driven by his father that was towing a jeep. The father stopped his car on the highway, at night, and instructed his son to go out onto the highway to correct the position of the jeep’s wheels. Another vehicle struck the son.

The Gibson court rejected the Goller approach for two reasons. First, the court felt that the Goller view would result in drawing arbitrary distinctions concerning when particular conduct falls within the parental immunity guidelines. Second, the court found intolerable the notion that if a parent successfully fell within the guidelines he may act negligently with impunity. The reasonableness of the actions would not be reviewed. The court rationalized that “although a parent has the prerogative and the duty to exercise authority over his minor child, this prerogative must be exercised within reasonable limits.” The court held that the appropriate test is “what would an ordinarily reasonable and prudent parent have done in similar circumstances.”

82. Id.
84. Id. at ___, 177 N.W.2d at 869.
85. Id.
86. Berman, supra note 57, at 44.
87. 3 Cal.3d 914, 479 P.2d 648, 92 Cal. Rptr. 288 (1971).
88. Id. at 916, 479 P.2d at 649, 92 Cal. Rptr. at 289.
89. Id. at 922, 479 P.2d at 653, 92 Cal. Rptr. at 293.
90. Id.
91. Id.
reasonable prudent parent standard and the exceptions to the immunity doctrine reflect the "growing judicial distaste for a rule of law which in one sweep disqualified an entire class of injured minors." 92

II. OHIO'S INTRAFAMILY IMMUNITY DOCTRINE
A. Background

The issue of intrafamily immunity was first before the Ohio Supreme Court in Signs v. Signs. 93 Signs, an unemancipated minor, sustained burns when a fire burst forth near a gasoline pump owned by his father and his father's business partner. The child brought an action against his father alleging negligence. 94 The court implicitly recognized the intrafamily immunity doctrine but immediately carved out an exception. 95 The court noted the tendency of other jurisdictions to limit the intrafamily immunity doctrine and allowed recovery, stating that if there ever was any justification for the immunity it had disappeared in this situation. 96 The court held that an unemancipated child has a clear right to maintain a personal tort action against his parent when the parent acts in a business or vocational capacity. 97 The court rationalized:

[It would seem a fantastic anomaly that in a case where two minor children were negligently injured in the operation of a business, one of them, a stranger, could recover compensation for his injuries and the other one, a minor child of the owner of the business, could not.] 98

92. Id. at 918, 479 P.2d at 650, 92 Cal. Rptr. at 290.
93. 156 Ohio St. 566, 103 N.E.2d 743 (1952). Decisions in the area that preceded Signs include: Stacey v. Fidelity & Casualty Co., 114 Ohio St. 633, 151 N.E. 718 (1926) (A judgment creditor is entitled to direct action against insurer after obtaining judgment against insured); Canen v. Kraft, 41 Ohio App. 120, 180 N.E. 277 (1931) (an unemancipated minor could not recover against his father for injuries sustained in a car accident negligently caused by the father); and Krohngold v. Krohngold, 181 Ohio App. 181, 181 N.E. 910 (1932) (upheld the intrafamily immunity doctrine).

94. Signs at 566, 103 N.E. 21 at 744.
95. Id. at 577, 103 N.E.2d at 748.
96. Id. at 573, 103 N.E.2d at 747. See also Foy v. Foy Electric Co., 231 N.C. 161, 56 S.E.2d 418 (1949) (a child may maintain a tort action against a corporation in which plaintiff's parents owned one-half of the outstanding stock); Minkin v. Minkin, 336 Pa. 49, 7 A.2d 461 (1939) (an unemancipated child may maintain an action against his mother for the death of the child's father as a result of the mother's alleged negligent operation of an automobile).
97. 156 Ohio St. at 577, 103 N.E.2d at 748.
98. Id.
99. Id.
The next significant case in this area is *Teramano v. Teramano*,100 where the court denied a minor child a cause of action against his father. The father, allegedly intoxicated, drove into the family driveway at a high rate of speed. Failing to stop, he struck his minor son, severely injuring the child.101 The court did not consider the father’s actions as constituting a malicious intent to injure or an abandonment of the parental relationship.102 The court stated that if it had a malicious injuries case before it, it might agree with *Dunlap*,103 where that court said malicious injuries should imply abandonment of the parental relationship.104 Explaining the real basis of the *Signs* judgment, the court stated:

If the parental relationship is abandoned, the reason for the immunity ceases to exist. A corollary . . . is . . . where there exists a dual relationship between parent and child such as master and servant, or carrier and passenger, the domestic relationship is merely incidental and becomes so logically irrelevant as to prevent immunity from attaching.105

The third case, *Karam v. Allstate Insurance Co.*,106 denied three minor children the right to recover damages for injuries received in a car accident. The mother, driving the car at the time of the accident, was killed. The three children sued the administrator of the mother’s estate and her liability insurance companies.107 The court’s principal reason for denying the children recovery was one of public policy, the prevention of fraud and collusion.108 The court had recently reaffirmed the adherence to the interspousal immunity doctrine109 and viewed that decision, “as foreshadowing our holding herein.”110 It could not logically accept as meritorious the collusion

100. 6 Ohio St.2d 117, 216 N.E.2d 375 (1966).
101. *Id.*
102. *Id.* at 118, 216 N.E.2d at 375 (1966).
103. 84 N.H. 352, 150 A. 905 (1930). See supra note 70 and accompanying text.
105. *Id.*
107. *Id.* at 227, 436 N.E.2d at 1014.
108. *Id.* at 234, 436 N.E.2d at 1019.
110. 70 Ohio St.2d at 234, 436 N.E.2d at 1019 *cert. denied*, 459 U.S. 1070 (1982).
argument in interspousal immunity but find the same argument insubstantial in child-parent litigation.\footnote{111}{Id. See Primes v. Tyler, 43 Ohio St.2d 195, 331 N.E.2d 723 (1975) (court rejected the fraud and collision argument in an auto-guest situation).}

Until this past year these three decisions formed Ohio's intrafamily immunity law. The rule could be stated as denying a parent or child tort action recovery unless there was abandonment of that relationship.\footnote{112}{See supra notes 93-105 and accompanying text.} Abandonment could be evidenced by a malicious intent to injure or by a parent acting in his business or vocational capacity.\footnote{113}{Id.}

\subsection*{B. Recent Cases—Paving the Way to Abrogation}

In 1984, the Ohio Supreme Court decided four cases involving intrafamily immunity issues.\footnote{114}{Dorsey v. State Farm Mutual Insurance Co., 9 Ohio St.3d 27, 457 N.E.2d 1169 (1984); Mauk v. Mauk, 12 Ohio St.3d 156, ___ N.E.2d ___ (1984); Sumwalt v. Allstate Insurance Co., 12 Ohio St.3d 294, ___ N.E.2d ___ (1984); Kirchner v. Crystal, 15 Ohio St.3d 326, ___ N.E.2d ___ (1984).} Two of these cases narrowed the court's application of Ohio's intrafamily immunity doctrine. As the majority carved out exceptions to the immunity, several justices called for its total abrogation. Five months after adhering to the doctrine the Ohio Supreme Court abolished it without reservation.

The first case was \textit{Dorsey v. State Farm Mutual Insurance Co.}.\footnote{115}{9 Ohio St.3d 27, 457 N.E.2d 1169 (1984).} A car driven by Mrs. Dorsey spun out of control, traveled left of center and collided with another vehicle. Mrs. Dorsey's four minor children were passengers in her car. Mrs. Dorsey died as a result of the injuries she received from the accident. Her children survived, but sustained injuries.\footnote{116}{Id. at 28, 457 N.E.2d at 1169.} The children, through their father, brought suit against the mother's estate alleging negligence. State Farm was asked to defend Mrs. Dorsey, the insured. The court denied coverage based on the parental immunity doctrine.\footnote{117}{Id. at 28, 457 N.E.2d at 1170.}

The court had recently held the interspousal immunity doctrine did not bar an action for wrongful death brought by the estate of a deceased spouse against the surviving spouse.\footnote{118}{Prem v. Cox, 2 Ohio St.3d 149, 443 N.E.2d 511 (1983) (interspousal immunity case allowing a suit by deceased spouse's estate).} It found the
fraud and collusion and family harmony justifications for imposing the interspousal immunity no longer existed when one spouse was dead.119 Similarly, those justifications no longer support the intrafamily immunity doctrine when the parent tortfeasor dies.120 When the parent tortfeasor dies, the parent-child relationship terminates.121 The need to preserve peace and harmony between the child and the deceased parent and the need to insure the parent’s ability to discipline the child no longer exists.122 Moreover, the risks of fraud and collusion lessen when the parent cannot fabricate evidence or structure a lawsuit to allow the child’s recovery against the insurer.123 Because the reasons identified in Karam for upholding the intrafamily immunity were missing in Dorsey, the court overruled Karam.124 It held that the doctrine of parental immunity does not bar unemancipated minor children from bringing an action in negligence against the deceased parent’s estate and the liability insurance company.125

Six months later, however, in Mauk v. Mauk,126 the court held that the intrafamily immunity does bar parents from maintaining a negligence action against their unemancipated minor child. Mr. Mauk was driving his car and Mrs. Mauk was a passenger. Directly in front of them was their son, driving a truck owned by Mr. Mauk, with a fourteen foot extension ladder attached to the top. The ladder fell off the truck and Mr. Mauk attempted to avoid it but lost control of the car. The parents sustained injuries as a result of the accident and filed suit alleging the son had negligently secured the ladder.127

The court believed that two reasons supported the intrafamily immunity doctrine in the present case: (1) preservation of family peace and harmony; and (2) prevention of fraud and collusion.128 The court noted one further consideration—the inconsistency of

120. 9 Ohio St. at 29, 457 N.E.2d at 1171.
121. Id.
122. Id.
123. Id.
124. Id.
125. Id.
126. 12 Ohio St.3d 156, ____ N.E.2d ____ (1984) (4-3 decision).
127. Id.
128. Id at 158, ____ N.E.2d at ____.
an individual as a parent, entrusted with the child's care, to simultaneously pursue a damage action against the child.\textsuperscript{129}

Three justices dissented, indicating their growing disapproval of the intrafamily immunity doctrine.\textsuperscript{130} The dissent stated that the doctrine rested on outmoded, "mythical, absurd and nonsensical reasons,"\textsuperscript{131} and called for total abrogation supported by three reasons: (1) discrimination against plaintiffs analogous to discrimination that made the court reject Ohio's Auto Guest Statute; (2) extensive pretrial discovery to safeguard against fraudulent or collusive claims; and (3) the modern trend to limit or totally abrogate the immunity.\textsuperscript{132}

One week later the Ohio Supreme Court decided \textit{Sumwalt v. Allstate Insurance Co.}\textsuperscript{133} Jane Sumwalt was standing in front of her parked car. Scott, her eleven year old unemancipated child, was in the car. Scott started the engine with the transmission in gear. The car lurched forward, struck, and injured Jane.\textsuperscript{134} Jane filed a declaratory judgment action against Allstate to determine if she had a right to uninsured motorist benefits.\textsuperscript{135} The relevant uninsured policy clause provided:

\textit{We will pay damages for bodily injury . . . which a person insured is legally entitled to recover from the owner or operator of an uninsured auto. Injury must be caused by accident and arise out of the ownership, maintenance, or use of an uninsured auto.}\textsuperscript{136}

The court of appeals held for Allstate, reasoning that the intrafamily tort immunity barred recovery by a parent from an unemancipated minor son based upon his negligence.\textsuperscript{137} Therefore, the parent is not "legally entitled to recover" from the "owner or operator of an uninsured auto."\textsuperscript{138} The Ohio Supreme Court rejected this rationale and held "the insurer liable to its insured for uninsured motorists benefits even where the uninsured tortfeasor is the child
of the insured."\(^{139}\) The court felt *Mauk* was inapplicable and interpreted "legally entitled to recover" as meaning "that the insured must be able to prove the elements of her claim necessary to recover damages."\(^{140}\) The intrafamily immunity defense is personal to the tortfeasor and not available to the insurer. Therefore, "legally entitled to recover" simply means the plaintiff must be able to establish the uninsured motorist's fault which gives rise to damages and prove the extent of those damages.\(^{141}\) Again, three members of the court called for total abrogation of the intrafamily immunity doctrine.

**B. Abrogation**

Five months after the majority denied Mr. and Mrs. Mauk recovery for the alleged negligently inflicted injuries due to their son's truck accident, the Ohio Supreme Court abolished the intrafamily immunity doctrine without reservation in *Kirchner v. Crystal*.\(^{142}\) Douglas Crystal (nee Kirchner) was a passenger in a car driven by his stepfather, Larry Crystal.\(^{143}\) An accident occurred, Douglas sustained personal injuries and sued Mr. Crystal for damages.\(^{144}\) The trial and appellate courts denied the action based on the parental immunity doctrine.\(^{145}\) The Ohio Supreme Court re-examined its position with respect to the parental immunity, abolished it, and remanded the cause for further proceedings.\(^{146}\)

The court found the family harmony, parental control, family exchequer and collusion justifications for the intrafamily immunity "outdated, highly questionable, and unpersuasive."\(^{147}\) In reviewing the traditional justifications the court stated these justifications had not been strong enough to preclude the court from carving

\(^{139}\) *Id.* at 296, ___ N.E.2d at ____.

\(^{140}\) *Id.* at 295, ___ N.E.2d at ____.

\(^{141}\) *Id.* at 296, ___ N.E.2d at ____.

\(^{142}\) 15 Ohio St.3d 326, ___ N.E.2d ____ (1984) (three justices again dissented).

\(^{143}\) *Id.*

\(^{144}\) *Id.*

\(^{145}\) *Id.*

\(^{146}\) *Id.* at 330, ___ N.E.2d at ____ (The court also abrogated the child immunity corollary thus expressly overruling both *Teramano v. Teramano*, 6 Ohio St.2d 117, 216 N.E.2d 375 (1966) (which upheld parental immunity) and *Mauk v. Mauk*, 12 Ohio St.3d, ___ N.E.2d ____ (1984) (which upheld child immunity)).

\(^{147}\) 15 Ohio St.3d at 327, ___ N.E.2d at ____.
out exceptions to the blanket immunity rule.\textsuperscript{148} Abolishing the intrafamily immunity \textit{in toto}, the court rejected Kirchner's request that another exception be carved out with respect to stepparents saying "such an exception would inevitably produce another meaningless distinction without any real difference."\textsuperscript{149}

\textbf{III. \textit{Analysis}}

The Ohio intrafamily immunity cases demonstrate the difficulty in this area of the law. A conflict exists between two very basic concepts, the individual's right to redress for tortious injury \textit{vis à vis} the public interest of preserving the family as a societal unit. Initially, the majority narrowed the immunity's application when it felt public policy considerations were absent. As a result, Dorsey\textsuperscript{150} allowed the unemancipated minor child recovery for negligently inflicted injuries when the tortfeasor parent died.\textsuperscript{151} In \textit{Sumwalt},\textsuperscript{152} although the majority did not expressly base its decision on the absence of public policy considerations, it did say intrafamily immunity is a personal defense available only to the tortfeasor parent or child, not to the insurer.\textsuperscript{153} From \textit{Dorsey} and \textit{Sumwalt} emerged an implicit recognition that the parent or child owed a duty of due care to other family members, but the majority felt the doctrine of intrafamily immunity barred a remedy when the defendant tortfeasor was the parent or child. Because they viewed the public policy considerations supporting the doctrine as paramount, the \textit{Mauk} majority did not allow parents recovery for injuries sustained as a result of their unemancipated minor son's alleged negligence. Several factors, however, indicated it would be increasingly difficult for the majority to continue to uphold the intrafamily immunity doctrine: (1) three justices continued to call for total

\begin{footnotes}
\item 149. 15 Ohio St.3d at 327, \textit{N.E.2d} at \textit{ }.
\item 150. 9 Ohio St.3d 27, \textit{457 N.E.2d 1169} (1984).
\item 151. \textit{Id}.
\item 152. 12 Ohio St.3d 294, \textit{N.E.2d} (1984).
\item 153. \textit{Id}.
\end{footnotes}
abrogation,\textsuperscript{154} (2) the court's earlier position abolishing charitable\textsuperscript{155} and municipal immunities;\textsuperscript{156} and (3) the court's rejection of the fraud and collusion argument in an auto guest situation.\textsuperscript{157} The Mauk minority became the majority in Kirchner v. Crystal,\textsuperscript{158} and abrogated the intrafamily immunity doctrine \textit{in toto}.

In abrogating the intrafamily immunity doctrine, the court addressed the basic justifications for the immunity and rejected them.\textsuperscript{159} Discounting the family harmony argument, the court noted that it is legal for an unemancipated child to sue his parents concerning property rights and found it difficult to understand how "domestic harmony would be undisturbed in one case and be upset in the other."\textsuperscript{160} With respect to the argument that immunity protects the family exchequer, the court believed it could not overlook the prevalence of liability insurance and the fact that virtually no suits are brought except where there is insurance.\textsuperscript{161} The fraud and collusion argument was unanimously rejected in an earlier Ohio case where it was used to support the Ohio Guest Statute.\textsuperscript{162} The court, similarly, rejected the argument in parent-child situations.

\textsuperscript{154} 12 Ohio St.3d 156, ____ N.E.2d ____ (1984). The dissenters argued that the intrafamily immunity was unconstitutional. In Ohio a child could sue the parent (and presumably vice versa) for intentional tort damages, but the child or parent could not sue for a negligence based injury. Because parents and children are denied the right to sue each other for negligent infliction of injury, they are discriminated against as compared with parents and children who may sue each other for intentional infliction of injury. \textit{Id.} at 161, ____ N.E.2d at ____ Moreover, the child's right to sue the parent (and vice versa) in property and contract further demonstrated the discriminatory nature of the Mauk holding.

\textsuperscript{155} 155. Albritton v. Neighborhood Centers, 12 Ohio St.3d 210, ____ N.E.2d ____ (1984). In Albritton, the court balanced the right of charities to benefits and assistance against the right of an individual, negligently injured, to seek compensation and said, "a personal injury is no less painful, disabling, costly, or damage producing simply because it was inflicted by a charitable institution ..." \textit{Id.} at 213, ____ N.E.2d at ____. The same could be said of an injury negligently inflicted by a parent or child.

\textsuperscript{156} 156. Enghauser Manufacturing Co. v. Eriksson Engineering Ltd., 6 Ohio St.3d 31, 451 N.E.2d 228 (1983). The court rationalized that the municipal immunity was "foreign to the spirit of our constitutional guarantee that every subject is entitled to a legal remedy for injuries he may receive in his person . . . ." \textit{Id.} at 34, 451 N.E.2d at 231.

\textsuperscript{157} 157. Primes v. Tyler, 43 Ohio St.2d 195, 331 N.E.2d 723 (1975).

\textsuperscript{158} 158. 15 Ohio St.3d 326, ____ N.E.2d ____ (1984).

\textsuperscript{159} 159. \textit{Id.} at 327, ____ N.E.2d at ____

\textsuperscript{160} 160. \textit{Id.} at 328, ____ N.E.2d at ____

\textsuperscript{161} 161. \textit{Id.} at 329, ____ N.E.2d at ____

\textsuperscript{162} 162. Primes v. Tyler, 43 Ohio St. 195, 331 N.E.2d 723 (1975).
because there are many safeguards against fraudulent or collusive claims. Pretrial discovery procedures, cross-examination and the deterrent of a perjury charge are a few examples of tools that enable the court to sift out fraudulent claims. In reviewing these arguments the court correctly found them no longer valid. The court's total rejection of the parental discipline and control rationale, however, does present additional problems that may need to be answered in the future.

In rejecting the parental discipline and control argument the court relied on the position taken in Gibson v. Gibson, that "the possibility that some cases may involve the exercise of parental authority does not justify continuation of a blanket rule of immunity." The Gibson court recognized, however, that parental discretion and supervision issues would occasionally be raised when children sued their parents in tort, and although Gibson abrogated the broad immunity doctrine, it retained a limited one where basic parental functions were involved. Gibson found "that the parent-child relationship is unique in some aspects and that traditional concepts of negligence cannot be blindly applied to it." The standard to be applied was "the traditional one of reasonableness, but viewed in the light of the parental role," or put another way "what would an ordinarily reasonable and prudent parent have done in similar circumstances." By abolishing the intrafamily immunity doctrine without reservation and not replacing it with a standard similar to Gibson's reasonable prudent parent standard, the Ohio Supreme Court does not give any weight to the "uniqueness" of the parent-child relationship. Therefore, there are no guidelines to deal with cases where a question of parental control will arise, such as an action for alleged negligent parental supervision.

The parental supervision cases in other jurisdictions have not

163. 15 Ohio St.3d at 329, __ N.E.2d at __.
164. Id.
165. 3 Cal.3d 914, 479 P.2d 648, 92 Cal. Rptr. 288 (1971).
166. 15 Ohio St.3d at 328, __ N.E.2d at __ citing Gibson v. Gibson, 3 Cal.3d at 920.
167. 3 Cal.3d at 920, 479 P.2d at 652, 92 Cal. Rptr. at 292.
168. Id.
169. 3 Cal.3d at 921, 479 P.2d at 653, 92 Cal. Rptr. at 293.
drawn a clear picture of parental liability. A New York case, Holodook v. Spencer, exemplifies the problem. New York had abrogated the intrafamily immunity doctrine in Gelbman v. Gelbman, and permitted apportionment of liability among joint or co-tortfeasors in Dole v. Dow Chemical Co. The subsequent case of Holodook dealt with the issue of whether parents may be held liable for negligently supervising their children and whether damages may be apportioned between a parent who negligently supervised his child and a third party who injured the child. Four year old James Holodook allegedly darted out from between parked cars and was struck by a car driven by Spencer. James' father, on his son's behalf, sued for personal injuries and brought a derivative action for medical expenses and loss of service. Spencer brought a third party action for indemnification and apportionment pursuant to Dole against the mother alleging she negligently failed to instruct, control and maintain her child. Spencer also counterclaimed against the father for contribution and apportionment alleging negligent maintenance and supervision of his child.

The court held that a parent did not owe the child a legal duty to supervise, thus the child did not have a cause of action against his parent. As a result, the defendant's secondary right to contribution failed. The court feared the impact of Dole apportionment in other cases.

171. Horn v. Horn, 630 S.W.2d 70 (Ky. 1982) (A father was held liable when he permitted his 15 year old son to ride a motorbike that had no lights or turn signals. Although the father followed behind the son to protect him, the son was injured when he was struck making a left turn). Cf. Nolechek v. Gesuale, 46 N.Y.2d 332, 385 N.E.2d 1268, 413 N.Y.S.2d 340 (1978) (A parent gave a motorcycle to a 16 year old son who was blind in one eye and had poor vision in the other. The court held the father was not liable to the child but may be liable for contribution). For a general discussion of conflicting decisions see PROSSER & KEETON, supra note 5, at 908.

176. Id. at 42, 324 N.E.2d at 341, 364 N.Y.S.2d at 864.
177. Id.
178. Id.
179. Id. at 51, 324 N.E.2d at 346, 364 N.Y.S.2d at 871. But the court went on to say “failure to supervise may entail legal consequence where injury to a third party results, for example, under circumstances where a parent negligently entrusts to his child a dangerous instrumentality . . . .” Id. at 45, 324 N.E.2d at 343, 364 N.Y.S.2d at 866.
180. 36 N.Y.2d at 51, 324 N.E.2d at 346, 364 N.Y.S.2d at 872.
tionment and contribution upon the parent-child relationship. An uninsured parent may be reluctant to seek legal redress on the child's behalf because the parent might be subjected to a Dole claim which would be detrimental to the injured child. Conversely, if the parents did proceed with the child's action and were liable for contribution, this would technically diminish the child's recovery resulting in a strain on the family relationship. Although other jurisdictions recognize the duty to supervise, Holodook rejected adopting a standard of reasonableness to determine adequate parental supervision. The court contended the search for a standard would be in vain "considering the different economic, educational, cultural, ethnic and religious backgrounds which must prevail." Only parents have the "right to determine how much independence, supervision and control a child should have. . . ." The Holodook approach, however, could result in arbitrary line drawing as to whether the actions of the parent fall within the parental supervision immunity. Unfortunately, the approach presently preferred by the Ohio Supreme Court will lead to the issue presented in Holodook.

CONCLUSION

The Ohio Supreme Court correctly abrogated the intrafamily immunity doctrine in Kirchner. The court, however, did not attempt to balance the unique parent-child relationship with the right to redress for tortious injury. The court should now consider implementing the reasonable prudent parent standard to provide a guideline for determining parental liability. The reasonable prudent parent standard does not subject parents to liability for every mistake, but subjects parental conduct to judicial scrutiny so that

181. Id. at 45, 324 N.E.2d at 343, 364 N.Y.S.2d at 867.
182. Id. at 46, 324 N.E.2d at 344, 364 N.Y.S.2d at 868.
183. Id.
185. 36 N.Y.2d at 50, 324 N.E.2d at 346, 364 N.Y.S.2d at 871.
186. Id.
187. Id.
unacceptable conduct results in tort liability, whether it flows from a legal obligation, supervision or discipline. Thus the standard balances parents' rights to discretion in raising their children with the child's right to redress in a meritorious claim.

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190. A mere misjudgment in supervising one's child would not necessarily constitute a tortious breach of duty. In determining whether the bounds of reasonable behavior have been transgressed, all the relevant facts and circumstances would have to be considered. Nolechek v. Gesuale, 46 N.Y.2d 332, 385 N.E.2d 1268, 413 N.Y.S.2d 340 (1978) (Fuchsberg, J., concurring).