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Case Notes

CASE NOTES

Constitutional Law—Federal Statute Denying Public Employees the Right to Assert the Right to Strike Declared Unconstitutional.—The National Association of Letter Carriers, the certified bargaining representative of some six thousand bargaining units of postal employees, brought suit to have declared unconstitutional a federal statute[1] which prohibited employees of the federal government from asserting the right to strike and from joining any organization which they knew asserted such a right. The plaintiff conceded, for purposes of this action, that Congress may prohibit government employees from actually striking,[2] and confined this suit to the resolution of whether Congress may impinge on their freedoms of speech and association, as provided in the first amendment. A three judge district court's holding that the statute was an unwarranted invasion of the constitutionally protected rights of public employees[3] rejected the government's contention that the word "asserts" should

1. 5 U.S.C. § 7311 (Supp. IV, 1969) provides: "Any individual may not accept or hold a position in the Government of the United States or the government of the District of Columbia if he—

. . .

(3) participates in a strike, or asserts the right to strike, against the Government of the United States or the government of the District of Columbia; or

(4) is a member of any organization of employees of the Government of the United States or of individuals employed by the government of the District of Columbia that he knows asserts the right to strike against the Government of the United States or the government of the District of Columbia."

This suit also challenged the following parts of the Post Office oath: "I do not and will not assert the right to strike against the Government of the United States or any agency thereof while an employee of the Government of the United States or any agency thereof. I do further swear (or affirm) that I am not knowingly a member of an organization of Government employees that asserts the right to strike against the Government of the United States or any agency thereof and I will not, while an employee of the Government of the United States or any agency thereof, knowingly become a member of such an organization."

2. The prohibition of the right to strike by public employees is currently being challenged. United Federation of Postal Clerks v. Blount, Civil No. 3279-69 (D.D.C., filed Nov. 19, 1969). However, despite this suit, postal employees in New York City, impatient with Congressional footdragging concerning postal reform and increased wage proposals, recently voted to go on strike for the first time in the history of the national postal system. N.Y. Times, March 19, 1970, at 1, col. 8. The strike soon spread across the nation. N.Y. Times, March 20, 1970, at 1, col. 8.

3. National Ass'n of Letter Carriers v. Blount, 305 F. Supp. 546, 550 (D.D.C. 1969), cert. granted, 38 U.S.L.W. 3419 (U.S. April 27, 1970) (No. 1270). Before reaching the merits, the court rejected the government's argument that since the statute concerns only individuals, the plaintiff lacked standing. The court reasoned that if the association asserts the right to strike, its members will be subject to criminal prosecution. Therefore, the association is being injured in that individuals will be inhibited from joining the association. Id. at 548. Furthermore, the federal courts have frequently let associations vindicate the rights of its members. E.g., NAACP v. Button, 371 U.S. 415, 428 (1963); Louisiana ex rel. Gremillion v. NAACP, 366 U.S. 293, 296 (1961).

be construed to mean "incites,"[4] thus narrowing the proscribed conduct. The court noted that the government's construction left the statute unconstitutionally vague.[5] *National Association of Letter Carriers v. Blount*, 305 F. Supp. 546 (D.D.C. 1969), *cert. granted*, 38 U.S.L.W. 3419 (U.S. April 27, 1970) (No. 1270).

In the early part of this century it was generally conceded that the state, as an employer, could demand any qualification it deemed reasonable from its employees as a condition of employment.[6] This demand often involved the deprivation of one of the employee's constitutional rights.[7] The courts, however, disposed of any constitutional conflict by stating that one could freely choose to regain his constitutional rights by simply leaving the employ of the state.[8]

In addition, the court rejected the government's argument that the mere statement that members of the association intend to violate the statute failed to establish a justiciable controversy. The court stated that the threat of criminal sanctions had the effect of inhibiting members' first amendment rights, and thus the case was ripe for decision. 305 F. Supp. at 549. See note 18 infra.

4. 305 F. Supp. at 550. The court so held despite a discussion in the House of Representatives which indicated a Congressional intent to the contrary. In reply to a question by Rep. McCormack as to the meaning of the word "asserts," Rep. Tumulty said the word did not mean the mere declaration of opinion, but required some overt act. He felt the word was tantamount to incitement. 101 Cong. Rec. 10,765 (1955).

5. 305 F. Supp. at 550.

6. See, e.g., McAuliffe v. Mayor & Bd. of Aldermen, 155 Mass. 216, 29 N.E. 517 (1892) (city policemen forbidden to become members of, or solicit funds for, any political committee); Hutchinson v. Magee, 278 Pa. 119, 122 A. 234 (1923) (fire department regulation forbidding officers to become members of an association which a few years before had organized a strike of city firemen upheld); McNatt v. Lawther, 223 S.W. 503 (Tex. Civ. App. 1920) (city employees prohibited from joining any organization unless it first received approval from appropriate city official, and, after creation of such organization, withdrawal of approval by city official mandated dissolution of the organization, on pain of dismissal); Brownell v. Russell, 76 Vt. 326, 57 A. 103 (1904) (city charter forbade members of the police department from taking part in any political caucus or canvassing).

7. E.g., in People ex rel. Clifford v. Scannell, 74 App. Div. 406, 77 N.Y.S. 704 (1st Dep't 1902), aff'd mem. 173 N.Y. 606, 66 N.E. 1114 (1903), Clifford, a member of the Firemen's Mutual Benefit Association, was dismissed for violating a rule of the fire department that prohibited employees from joining associations for the purpose of influencing legislation on their own behalf. Clifford appeared before a legislative revision commission, in uniform, to urge legislation on behalf of the firemen. He also issued circulars, published an article, and gave interviews calculated to stimulate legislative and popular sympathy for the firemen. The court rejected his claim that he had conducted these activities as a citizen, not as a fireman. The court ruled that the need of the fire department for discipline to maintain an efficient corps outweighed the individual's rights to freely petition others and exercise his freedom of speech. Id. at 413-14, N.Y.S. at 709-10.

There were other instances during the first half of this century in which the constitutional rights of public employees to speak and associate freely were systematically denied. E.g., Ricks v. Department of State Civil Serv., 200 La. 341, 8 So. 2d 49 (1942); State ex rel. Baldwin v. Strain, 152 Neb. 763, 42 N.W.2d 796 (1950); Stowe v. Ryan, 135 Ore. 371, 296 P. 857 (1931); State ex rel. Curtis v. Steinkellner, 247 Wis. 1, 18 N.W.2d 355 (1945).

8. E.g., United States v. Curtis, 12 F. 824, 840 (C.C.S.D.N.Y.), aff'd sub nom. Ex parte

The first amendment rights of federal employees were further restricted by the "gag rules"[9] of the early 1900's. Congress recognized and corrected the abuses and injustices engendered by the "gag rules"[10] with the passage of the Lloyd-LaFollette Act of 1912[11] which provided federal employees with the right to petition Congress, either as individuals or collectively, for wage increases and other benefits connected with their employment. This act represented a first step in recognizing that public employees were being seriously hampered in their collective bargaining efforts; however subsequent labor legislation, which has greatly improved the bargaining status of private employees, has expressly excluded the public employees.[12] While the Lloyd-LaFollette Act did establish the right to organize, this remained a naked right which did not materially improve the public employees' bargaining position.[13]

Curtis, 106 U.S. 371 (1882); State v. Kirby, 349 Mo. 988, 1006, 163 S.W.2d 990, 996 (1942); Duffy v. Cooke, 239 Pa. 427, 442, 86 A. 1076, 1081 (1913).

The philosophy of the period is well summarized in the statement of Justice Holmes, then a member of Massachusetts' highest court: "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman." McAuliffe v. Mayor & Bd. of Aldermen, 155 Mass. 216, 220, 29 N.E. 517 (1892).

9. These were executive orders which prohibited public employees from voicing any job dissatisfaction with their employer, Congress. The first "gag rule" in the form of an executive order was issued by President Theodore Roosevelt on Jan. 31, 1902 and restricted the first amendment right of association and speech in that federal employees were prohibited from organizing and petitioning Congress for pay increases or any attempt to gain influence for their own interests. (Reprinted in 48 Cong. Rec. 5223 (1912)). President Taft issued a similar executive order, Exec. Order No. 1142, on Nov. 26, 1909. (Reprinted in 48 Cong. Rec. 5223 (1912)).

10. Through the curtailment of the rights of federal employees, the executive department of government maintained control of the federal bureaucracy in order to promote discipline, efficiency and morale and checked the possibility of the civil servants establishing any political power. See 29 U.S. Civil Serv. Comm'n Ann. Rep. 24 (1913).

11. Act of Aug. 24, 1912, ch. 389, § 6, 37 Stat. 555.

12. E.g., Taft-Hartley Act of 1947, 29 U.S.C. §§ 152(2), (3) (1964); Norris-LaGuardia Act of 1932, 29 U.S.C. §§ 102, 104, 107, 113 (1964), which the Supreme Court held in United States v. United Mine Workers, 330 U.S. 258, 270-76 (1947), not applicable to the federal government as employer.

13. Public employees have not been given the formal safeguard procedures that labor legislation has granted to private employees. The following three prohibitions against public employees seriously weaken their position at the bargaining table: (1) strikes and picketing are prohibited activities and the prohibition of such activities is not unconstitutional or a violation of civil rights. E.g., C.I.O. v. Dallas, 198 S.W.2d 143, 145 (Tex. Civ. App. 1946); Railway Mail Ass'n v. Corsi, 293 N.Y. 315, 56 N.E.2d 721 (1944); rev'd on other grounds, 326 U.S. 88 (1945). (2) any type of closed shop, union shop, or other form of union security agreement between a government agency and a union representing employees is invalid. E.g., Petrucci v. Hogan, 5 Misc. 2d 480, 27 N.Y.S.2d 718 (Sup. Ct. 1941). (3) any agreement for automatic dues checkoff, absent a wage assignment from each individual employee concerned, is invalid. E.g., Kirkpatrick v. Reid, 193 Misc. 702, 85 N.Y.S.2d 378 (Sup. Ct. 1948); Mugford v. Mayor & City Council, 185 Md. 266, 44 A.2d 745 (1946).

The Hatch Act,[14] enacted by Congress in 1939, presented the Supreme Court with its first real opportunity to examine a federal statute which restricted a public employee's first amendment right of free speech. In *United Public Workers v. Mitchell*,[15] the Supreme Court considered the constitutionality of a section of the Hatch Act which forbade employees of the executive branch of the government to take any active part in political management or in political campaigns.[16] The Court used a balancing test by measuring the extent to which guaranteed freedoms protect the individual, as against the evil of political partisanship by government employees.[17] Employing this test the Court decided to uphold the statute,[18] but did not clearly specify what rights of appellant were being weighed.[19]

14. Act of Aug. 2, 1839, ch. 410, 53 Stat. 1147, as amended, Act of July 19, 1940, ch. 640, 54 Stat. 767 (codified at 5 U.S.C. §§ 118i, k-n (1964) and 18 U.S.C. §§ 594 et seq. (1964).

15. 330 U.S. 75 (1947).

16. It should be noted that the position of the employee and his duties in the campaign are irrelevant. In Mitchell, plaintiff, a roller in the U.S. mint, was acting as a committeeman in a local ward. He claimed the Hatch Act infringed his first amendment rights and arbitrarily discriminated against federal employees in that he wished to engage in acts of political management and campaigning, and was being unreasonably prohibited from exercising that right solely because he was a federal employee. The government argued that the Act was necessary to prevent public employees from "playing politics" with a resultant loss of efficiency and public confidence, and possibly giving rise to favoritism in the government service.

17. 330 U.S. at 96.

18. Id. at 103. The Court dismissed the complaint brought by several other plaintiffs, holding that the mere existence of a statute that infringed upon first amendment freedoms was insufficient to constitute a case or controversy under the constitution; rather the person bringing the suit must be directly threatened by the statute. Id. at 89-90. Such a conclusion might seem to dictate that the court in Blount should dismiss the complaint as not justiciable. However, as the court pointed out, the "chilling effect" doctrine seemed to have replaced Mitchell, at least in first amendment cases. 305 F. Supp. at 549. This doctrine says that a justiciable case or controversy is established by an allegation that a general threat of enforcement of an official policy chills the exercise of first amendment freedoms. National Student Ass'n v. Hershey, 412 F.2d 1103 (D.C. Cir. 1969); Wolff v. Selective Serv. Local Bd. No. 16, 372 F.2d 817 (2d. Cir. 1967). See generally 44 N.Y.U.L. Rev. 1165 (1969). The court in Blount decided that the threat of loss of employment had a sufficient chilling effect on the public employees' freedoms of speech and association to warrant court intervention. 305 F. Supp. at 549.

19. The Court stated that Congress may regulate the conduct of government employees, even to the extent of encroaching upon the Bill of Rights. However, the Court will interfere only when the regulation passes beyond the then existing concept of government power. "That conception develops from practice, history, and changing educational, social and economic conditions." 330 U.S. at 102. Thus, without considering if the Congress could encroach further on the rights of government employees, the Court merely said that Congress may do so here. While this approach may seem dubious today, it at least represented a gain from Ex parte Curtis, 106 U.S. 371 (1882), where the Court upheld the constitutionality of an act which prohibited government employees from requesting, giving to, or receiving from other government employees money or anything of value for political purposes. Act of Aug. 15, 1876, ch. 287, § 6, 19 Stat. 169. The Court spoke of the benefit government received from the act, but did not even discuss the infringed rights of the employees.

The balancing test was again used in *Adler v. Board of Education*.[20] In *Adler*, the appellant challenged the constitutionality of a New York State law which rendered ineligible for employment in the public school system a person who was a member of any organization which advocated the overthrow of the government by force, violence, or any unlawful means.[21] The Court, although recognizing the right of teachers to assemble, speak, think and believe as they will, discussed the right and duty of the state to maintain the integrity of the school system, and decided in favor of the state.[22] Thus the Court, in balancing the first amendment rights of public employees against the authority of the state to condition employment on grounds it deemed necessary, decided in favor of restricting the rights of public employees.[23] It is apparent then that while public employees may have won the right to organize in 1912, little real progress in public employees' freedom of speech or association had been made since that time.

In *Wieman v. Updegraff*,[24] which was decided the same year as *Adler*, the Supreme Court clarified its position that public employees "have no right to work for the state." Here the Court struck down a state loyalty oath that required a state employee to swear that he was not, nor had been for the past five years, a member of any organization listed by the United States Attorney General as subversive.[25] The Court concluded that barring persons from state employment solely on the basis of membership in such organizations, regardless of their knowledge or dedication to the goals of the organization, was patently arbitrary and discriminatory, and thus violative of the due process clause of the fourteenth amendment.[26] The Court dismissed the concept of whether or not there exists a right to work for the state as irrelevant.[27]

Any doubt as to the remaining validity of *Adler* was clearly disspelled in *Keyishian v. Board of Regents*[28] where the Supreme Court expressly rejected the idea that public employees must surrender their constitutional rights when employed by the government.[29] In *Keyishian* the Court struck down a series

20. 342 U.S. 485 (1952).

21. N.Y. Educ. Law § 3022 (1953).

22. 342 U.S. at 492-93.

23. Justice Minton, for the majority, stated: "[public employees] have no right to work for the State in the school system on their own terms. They may work for the school system upon the reasonable terms laid down by the proper authorities of New York." Id. at 492 (citation omitted).

24. 344 U.S. 183 (1952).

25. Okla. Sess. Laws, tit. 51, ch. 1, § 2 (1962).

26. 344 U.S. at 192.

27. Id.

28. 385 U.S. 589 (1967). Accord, Elfbrandt v. Russell, 384 U.S. 11 (1966), in which the first amendment right of freedom of association was held to apply to public employees as well as private citizens. 384 U.S. at 17.

29. Id. at 605-06. This was not a novel idea since the Supreme Court had already rejected a number of loyalty oaths as too vague, indicating that public employees were entitled to at least some first amendment rights. E.g., Baggett v. Bullitt, 377 U.S. 360 (1964); Cramp v. Board of Pub. Instruction, 368 U.S. 278 (1961).

of New York statutes designed to prevent "subversives" from teaching in the school system. The statutes required the dismissal of teachers guilty of seditious or treasonable acts,[30] or who advocated the overthrow of the government by force, violence or any unlawful means, or published any material urging such unlawful overthrow, or joined any group of persons advocating such an overthrow of the government.[31] In addition, membership in the Communist Party was prima facie evidence for disqualification.[32] Appellants refused to sign an oath declaring they were not members of the Communist Party, and brought suit seeking to have the entire New York program declared unconstitutional. The Court struck down the statutes holding that mere membership in an organization, even though one is fully aware of the unlawful aims of the organization, without the specific intent to further those aims, is violative of constitutional protections.[33] Thus it appears under the ruling of *Keyishian* that public employees are similarly entitled to constitutional protection just as private employees.[34]

The Supreme Court has at times also resorted to the "less drastic means" test[35] in first amendment cases, regardless of whether the government derived a needed benefit at the expense of a private right.[36] In *Shelton v. Tucker*,[37] the Court used this test to strike down an Arkansas statute[38] which required every teacher in the public schools to file annually a listing of every organization of which he had been a member, or to which he had contributed, during the last five years.[39] The Court ruled that the statute was too broad, since it forced teachers to reveal all their associations, even those which clearly presented no threat to the government.[40] Justice Stewart pointed out that where Congress acts to protect the national interest, "even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of the less drastic means for achieving the same basic purpose."[41]

30. N.Y. Civ. Serv. Law § 105(3) (1959).

31. N.Y. Civ. Serv. Law § 105(1) (1959).

32. Id.

33. 385 U.S. at 609-10.

34. See also Sullivan, Free Speech and the Public Employee, 58 Ill. B.J. 174, 185 (1969); Note, 81 Harv. L. Rev. 110, 166-71 (1967).

35. E.g., United States v. Robel, 389 U.S. 258, 268 (1967); Shelton v. Tucker, 364 U.S. 479, 488 (1960). When the government can accomplish a given end by a variety of equally effective means, the "less drastic means" test dictates that it choose the means least restrictive of individual liberties. For a discussion of the "less drastic means" test, see Note, 78 Yale L.J. 464 (1969).

36. E.g., Griswold v. Connecticut, 381 U.S. 479 (1965); NAACP v. Alabama, 377 U.S. 288 (1964).

37. 364 U.S. 479 (1960).

38. Act 10, § 2 [1959] Ark. Acts 2d Extraord. Sess. 2018.

39. 364 U.S. at 490.

40. Id. at 488.

41. Id. (footnotes omitted). In cases where the government has allegedly used too broad

In *United States v. Robel*[42] the Court again used the "less drastic means" test, this time to invalidate[43] a federal statute[44] which prohibited federal employees working at a defense facility from being members of the Communist Party. The Court declared the statute unconstitutional because it prohibited all members of the Communist Party from engaging in defense work, even though a particular member might not seek the overthrow of the United States government, or might lack the specific intent of furthering the unlawful aims of the Party.[45] The Court discussed the need for precision of regulation in areas of constitutionally protected rights,[46] and reiterated the holding of *Shelton* by stating: "Congress must achieve its goal by means which have a 'less drastic' impact on the continued vitality of First Amendment freedoms."[47] The Court recognized that it could have balanced the governmental interests against the asserted first amendment rights of the appellee, but refused to label one right more important than the other, suggesting that there is no need to balance the conflicts when Congress can be more circumspect in denying first amendment rights.[48]

In *Blount*, the proscription against asserting the right to strike would therefore appear unconstitutional under the "less drastic means" test as interpreted by earlier case law.[49] As the court in *Blount* pointed out, the statute proscribed all government employees from asserting the right to strike, even those who would legitimately advocate a change in the law to legalize strikes by government employees.[50] The court cited the *Keyishian* case, among others, as illustrative of the fact that the Supreme Court has struck down legislation and

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a sweep in proscribing constitutionally protected rights, the aggrieved party has an opportunity to salvage his rights by appealing to other means of preserving the national interests that would not impinge on his rights. It has even been suggested that the government assume the burden of proof that no "less drastic means" are available to it. Sherbert v. Verner, 374 U.S. 398, 407 (1963); Talley v. California, 362 U.S. 60, 66-67 (1960) (Harlan, J., concurring).

42. 389 U.S. 258 (1967).

43. Id. at 267-68.

44. Subversives Activities Control Act of 1950, ch. 1024, § 5(a)(1)(D), 64 Stat. 992.

45. 389 U.S. at 262.

46. Id. at 265.

47. Id. at 268 (footnote omitted).

48. Id. at n.20.

49. There was no need for the court in Blount to weigh the rights of public employees against the interests of government, since in first amendment cases the "less drastic means" test alone can justify the court's decision in striking down the statute. However, in a recent Supreme Court case a balancing test was used in upholding a public employee's first amendment rights. Pickering v. Board of Educ., 391 U.S. 563 (1968). This case concerned public employee criticism of government officials which the Court felt compelled to weigh against the efficient running of government. It seems therefore that if the statute was not too broad under the "less drastic means" test, then it would be subject to a balancing test, as in Pickering.

50. 305 F. Supp. at 550. The court rejected the government's contention that in practice it enforces the statute only against those who actually commit overt acts to incite others to strike. Id.

loyalty oaths which result in the abandonment of the freedoms of speech and association.[51] The court did not differentiate between public and private employees' rights, and recent Supreme Court decisions support this position.[52]

The court's decision in *Blount* that federal employees' first amendment right of freedom of association was being violated by the government is also supported by a recent Supreme Court decision, *Elfbrandt v. Russell*.[53] In *Elfbrandt* state employees were subject to prosecution if they knowingly and willfully became members of any group devoted to the overthrow of the United States government. The Court ruled that mere knowledge of the unlawful aim of the group was insufficient to warrant the prosecution of members.[54] The statute was held unconstitutional because, absent a showing of specific intent, it amounted to guilt by association.[55] Thus a statute that condemns all members of an organization, as the one in *Blount*, impinges on constitutionally protected freedoms.[56]

The decision in *Blount* follows the line of Supreme Court cases expanding the rights of public employees since the *Mitchell* and *Adler* decisions. If *Mitchell* has any validity today, it appears to be strictly confined to political activity by government employees. It is apparent that the court in *Blount* considered the public employee entitled to the same first amendment rights as private employees, following the view of the Supreme Court in *Elfbrandt* and *Keyishian*. However, the court went beyond those decisions in permitting public employees to advocate the right to strike. These constitutional safeguards can only improve the public employees' bargaining position with the government.[57]

51. Id. See, e.g., United States v. Robel, 389 U.S. 258 (1967); Whitehill v. Elkins, 389 U.S. 54 (1967); Stewart v. Washington, 301 F. Supp. 610 (D.D.C. 1969). The court in Stewart declared unconstitutional the first two sections of the statute under consideration in Blount, 5 U.S.C. § 3333 (Supp. IV, 1969) and 5 U.S.C. § 7311(1), (2) (Supp. IV, 1969) which, read together, required employees of the federal government to take an oath that they do not advocate the overthrow of the Government of the United States, nor are members of any organization which so advocates.

52. E.g., Elfbrandt v. Russell, 384 U.S. 11 (1966) in which the Supreme Court ruled that freedom of association applied to public employees as well as private employees. Id. at 17.

53. 384 U.S. 11 (1966).

54. Id. at 16.

55. Id. at 19.

56. See Schware v. Board of Bar Examiners, 353 U.S. 232, 246 (1957); Schneiderman v. United States, 320 U.S. 118, 135-36 (1943). The court in Blount was also justified in striking down the statute for its overbreadth in denying public employees their freedom of speech. 305 F. Supp. at 550. There are many Supreme Court decisions which have struck down similar statutes for overbreadth. E.g., NAACP v. Button, 371 U.S. 415 (1963); Shelton v. Tucker, 364 U.S. 479 (1960); Cantwell v. Connecticut, 310 U.S. 296 (1940). See generally 42 N.Y.U.L. Rev. 750 (1967). Furthermore, it has been held that the mere advocacy of an illegal aim, without some overt incitement, is fully protected by the first amendment. E.g., Street v. New York, 394 U.S. 576 (1969); Yates v. United States, 354 U.S. 298 (1957); Stromberg v. California, 283 U.S. 359 (1931).

57. Today it is apparent that public employees can no longer be compelled to surrender their first amendment rights when they enter government service. Pickering v. Board of Educ., 391 U.S. 563 (1968); Keyishian v. Board of Regents, 385 U.S. 589 (1967); Shelton v.

The decision in *Blount*, however, did not grant public employees the right to strike, nor should it in any way interfere with the efficient operation of government. The decision provided the public employees with a voice, and with the right to make that voice even stronger by joining together in associations which assert the right to strike. In this manner people close to the operation of government are better able to criticize and improve the efficiency of government, and to bargain with the government, as employer, from a position of strength.

International Law—State of Residence of Majority of Shareholders of Expropriated Corporation Held Not to Have Standing to Sue.—The Barcelona, Light and Power Company, Limited was incorporated in 1911 in Toronto, Canada and maintained its principal office there. It formed a number of subsidiary companies, mostly Canadian incorporated, for the purpose of developing an electric power system in Catalonia, Spain. When the Spanish civil war erupted, the company, through its subsidiaries, was the major supplier of Catalonia's electricity requirements. During these years a large portion of Barcelona Traction's share capital passed from Canadian and United States nationals to Belgian nationals.[1]

In 1936, the servicing of foreign and domestic bonds which had been issued earlier by the company[2] was suspended due to the Spanish civil war.[3] The servicing of foreign bonds was never resumed. Because of this, Barcelona Traction made a proposal for reimbursement of the debt. This proposal was rejected by the Spanish authorities,[4] and the Belgian government put in a claim on

Tucker, 364 U.S. 479 (1960); Wieman v. Updegraff, 344 U.S. 183 (1952). Nevertheless, despite their advances, public employees still do not share the same full constitutional privileges as their counterparts in the private sector. See notes 12-13 supra. When their constitutional rights are at odds with a government interest, the courts should use a balancing test. However, when the proscribed regulation is too broad, the statute should fall due to overbreadth under the "less drastic means" test. When the proscribed action is more than necessary to the fulfillment of the legislative purpose, or where the proscribed action is inherently vague, the Court will strike the statute down. Dombrowski v. Pfister, 380 U.S. 479 (1965); Aptheker v. Secretary of State, 378 U.S. 500 (1964); NAACP v. Button, 371 U.S. 415 (1963).

1. Although Spain contended that the ownership by Belgian nationals was not proven, it was presumed for the purposes of standing.

2. The shares passed both to individuals and to a Belgian Corporation (Societe Internationale d'Energie Electrique).

3. The Company issued several series of bonds, some in local currency (pesetas), and others in sterling. The sterling bonds were serviced out of transfers to Barcelona Traction effected by its subsidiaries operating in Spain.

4. In 1940 the Spanish exchange control authorized the resumption of interest payments on the peseta bonds but refused to permit the transfer of foreign currency without which interest payments could not be resumed.

behalf of its resident shareholders. The Spanish government, however, refused to remedy the situation.[5]

In 1948 three Spanish holders of recently acquired Barcelona Traction bonds petitioned a Spanish court for a declaration adjudging the company bankrupt because of its failure to pay interest on the bonds. Three days later a judgment declaring the company bankrupt was rendered. A commissioner in bankruptcy was appointed and an order made for seizure of the assets of Barcelona Traction and its subsidiaries. Pursuant to the judgment, the commissioner replaced the management personnel and, after further proceedings, new shares of the company were issued and the former shares invalidated. The new shares were then purchased by a Spanish company organized for that purpose which thereby gained complete control of the enterprise for Spain.

After the bankruptcy declaration, the Belgian, British, Canadian, and American governments made representations to the Spanish government stating their interest in the situation of the bondholders resident in their respective nations. By 1951 Britain, the United States and Canada, which was protecting the interests of its corporate nationals, had ceased their efforts.[6] The Belgian government, however, maintaining that it represented a preponderance of the shareholders, brought an action in the International Court of Justice in 1958. Essentially the action was one for damages allegedly caused to the Barcelona Traction, Light and Power Company, Limited because of the actions of the Spanish government. The Spanish government made four preliminary objections, the most crucial of which was that the Belgian government had no standing to sue. Proceedings were suspended at this point while the parties attempted to resolve the dispute through negotiations. Upon their failure to do so, the case was reinstated and a hearing was held in 1964[7] to decide the preliminary objections. The court dismissed the first two objections[8] and joined the third (standing) and the fourth (exhaustion of local [Spanish] remedies) for consideration on the merits.

After an extensive trial, the International Court of Justice finally decided the case in 1970. Although it heard arguments on the merits of the claim, the court held, 15-1,[9] that the Belgian government lacked standing to sue because Bar-

5. The Spanish government stated that authorization of the transfers would not be forthcoming until it was proven that the foreign currency was to be used to repay debts arising out of the genuine importation of foreign capital into Spain.

6. Shortly before this time, a tripartite commission (with representatives of Britain, Canada and the United States) had concluded that the Spanish refusal to authorize the transfers was justified, whereupon these three countries ceased their efforts.

7. Barcelona, Traction, Light and Power Co., Ltd., Preliminary Objections, [1964] I.C.J. 6.

8. The first two preliminary objections raised by Spain concerned the effect of discontinuing the proceeding and the effect of the dissolution of the Permanent Court of International Justice on the present claim.

9. The statute of the International Court of Justice states: "If the court includes upon the Bench no judge of the nationality of the parties, each of these parties may proceed to choose a judge. . . ." 59 Stat. 1055, 1059 art. 34-1(3) (1945). Accordingly a Belgian judge (Riphagen) was appointed. His was the lone dissent.

celona Traction, as a Canadian corporation, was a juristic national of only that state and its claim could not be espoused by Belgium merely because the majority of shareholders were Belgian nationals. *Case Concerning Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, [1970] I.C.J., 9 Int'l Legal Materials 227 (1970).

The statute of the International Court of Justice provides that only states can be parties to actions brought before the court.[10] Consequently, if an individual is to be represented before the court, his claim must be espoused by his state. The problem which then arises is how to determine the nationality of a particular claimant since, "[i]t is the bond of nationality between the state and the individual which alone confers upon the state the right of diplomatic protection."[11]

Concerning diplomatic protection of an individual, nationality is determined by one of several factors: his place of birth;[12] his country of naturalization[13] (a status which, if bona fide, would have priority over place of birth), and other transactions between an individual and a nation which would constitute a sufficient nexus to be determinative.[14] In the case of conflicting factors, habitual residence and "factors such as the centre of his interests, his family ties, his participation in public life, attachment shown by him for a given country and inculcated in his children"[15] will also be considered. In general, however, the court will prefer the "real and effective nationality."[16]

In the corporate sphere, three possible determinants of corporate nationality have traditionally been suggested: the nationality of its shareholders,[17] the nation under whose laws it is incorporated,[18] and the national situs of its *siege sociale*.[19]

Several arguments have been advanced against the first suggestion—that is,

10. 59 Stat. 1055, 1059 art. 34-1 (1945).

11. Panevezys-Saldutiskis Railways Case [1939] P.C.I.J., ser A/B, No. 76 at 16. "A State which puts forward a claim before . . . [a]n international tribunal must be in a position to show that it has locus standi for that purpose. The principal and almost exclusive factor creating that locus standi is the nationality of the claimant. . . ." 1 L. Oppenheim, International Law: A Treatise 347 (8th ed. 1955).

12. C. Fenwick, International Law 302 (4th ed. 1965).

13. Id. at 306; H. Jacobini, International Law: A Text 132-33 (rev. ed. 1968).

14. Kunz, The Nottebohm Judgment, 54 Am. J. Int'l L. 536, 551 (1960). "An individual has the nationality of a state that confers it upon him provided there exists a genuine link between the state and the individual." Restatement of the Foreign Relations Law of the United States § 26 (1965).

15. The Nottebohm Case, [1955] I.C.J. 4, 22.

16. Id.

17. In Re Mexico Plantagen G.m.b.H. (1931-32) Ann. Dig. 265 (No. 135).

18. H. Henn, Corporations § 77 (1961).

19. I. G. Schwartzenberger, International Law 393 (3d ed. 1957). The author proposes two additional tests of corporate nationality: the domicile of the corporation; and the beneficial ownership. Although these have not generally been recognized, it is noteworthy that they "pierce the corporate veil" and examine the actual material interests in the corporation.

that the nationality of the shareholders dictates that of the corporation.[20] A corporation is a juridical person distinct from its members.[21] To allow the nationality of the shareholders to determine that of the corporation would be to dilute this principle. Moreover, in the modern world of international business, many corporations have shareholders in numerous countries.[22] Frequently, one corporation holds shares in another. To employ this method of determination, in this latter instance, would lead to the dissipation of the corporate nationality beyond all traces of recognition. One commentator, in considering such a situation, suggested, "it might well be, in such circumstances, that the number of possible state claimants in respect of an injury to one large company could comprise half the world."[23] In rejecting this contention in the *Barcelona Traction* case, the International Court of Justice observed further that since Barcelona Traction was in receivership and thus unliquidated in Canada, its shareholders had no right to the corporate assets.[24] A corporate right is not *ipso facto* a shareholder right.[25]

A concept of nationality based strictly on the nation in which the corporation has its *siege sociale* is equally problematical. In *In re Mexico Plantagen G.m.b.H.*[26] the presiding claims commissioner rejected the idea "because the principal seat of business of a corporation may change frequently in accordance with the needs or convenience of the corporation."[27] Frequently the *siege sociale* is not the actual center of corporate activity. Some support for the idea existed, however, in France and Italy, in the early part of the twentieth century,[28] but in the present case it was not considered since the *siege sociale* of Barcelona Traction was already in the incorporating state.

In the case under discussion the court accepted the principle that a corporation is a national of the country where it is incorporated.[29] The United States has recognized this principle since 1865,[30] when the United States government was asked to intercede with the Colombian government on behalf of American

20. Although the nationality of corporate shareholders was considered in cases concerned with trade with enemy laws, this is generally recognized as a unique and necessary precaution taken for defense purposes. H. Henn, supra note 18, at § 88 (1961); W. Gould, An Introduction to International Law 442-45 (1957); Domke, "Piercing the Corporate Veil" in the Laws of Economic Warfare, 1955 Wis. L. Rev. 77. But see Philippine Sugar Estates Dev. Co. v. United States, 39 Ct. Cl. 225 (1904).

21. I G. Hornstein, Corporation Law and Practice § 12 (1959).

22. Jones, Claims on Behalf of Nationals Who Are Shareholders in Foreign Companies, 26 Brit. Y.B. Int'l L. 225, 235 (1949).

23. Id.

24. Case Concerning Barcelona Traction, Light and Power Co., Ltd., [1970] I.C.J., 9 Int'l Legal Materials 227, 261 (1970) [hereinafter cited as Barcelona Traction, page number being that of Int'l Legal Materials]. Similar decisions are discussed in 6 J. Moore, Digest of International Law 644-46 (1906).

25. H. Ballantine, Corporations § 119 (rev. ed. 1946); H. Henn, supra note 18, at § 352.

26. [1931-32] Ann. Dig. 265 (No. 135).

27. Id. at 266.

28. E. Borchard, The Diplomatic Protection of Citizens Abroad 618 (1915).

29. Barcelona Traction at 268.

shareholders of Columbian corporations. The request was refused, the United States reasoning that a corporation organized pursuant to a local law should have recourse only to the local government, thus no official intervention was warranted.[31] In 1924, in *Beyn Meyer & Co. v. Miller*,[32] the United States Supreme Court held that the nationality of the shareholders did not affect the corporation but that the nation of incorporation was conclusive as to nationality.[33]

In 1932, the *Mexico Plantagen* case was decided on the same principle of corporate nationality, based on the place of incorporation. The commissioner specifically rejected both the *siege sociale*[34] and the shareholder[35] concepts of determination. Similarly, in *Agency of Canadian Car and Foundry*,[36] where the United States was presenting a claim on behalf of a New York corporation whose shares were Canadian owned, the principle was again affirmed. The Commissioner stated that the corporation was a United States national because it was incorporated under its laws.[37]

The International Court of Justice in the *Barcelona Traction* case noted that Canada had made significant efforts on behalf of the corporation. Belgium cooperated in these efforts. The court felt that this conduct indicated recognition by Belgium of the Canadian nationality and authority.[38]

The Belgian government argued in the alternative that even if Barcelona Traction were found to be a Canadian national, Belgium, nonetheless, had a concurrent right to protect the interests of its shareholder[39] nationals, since there was no express international law to the contrary,[40] and because the shareholders of Barcelona Traction would have no remedy unless this right were recognized. However, when dealing with matters of corporate law, international tribunals usually refer to and adopt municipal law since the corporate concept develops *within* nations.[41] This principle of municipal law is that one must proceed in the name of the corporation to seek redress of a wrong done to it.[42]

30. J. Moore, supra note 24, at 644.

31. Id.

32. 266 U.S. 457 (1924).

33. The Court held that a preponderance of enemy shareholders did not render a corporation liable to the treatment set forth by the trade-with-the-enemy laws because the place of incorporation determined the corporation's nationality.

34. [1931-32] Ann. Dig. 265 (No. 135).

35. Id. at 266.

36. 5 G. Hackworth, Digest of International Law 833 (1927).

37. Id. at 835. The Commissioner relied on Hamburg American Co. v. United States, 277 U.S. 138 (1928).

38. Barcelona Traction at 269.

39. Id. at 271.

40. Id. at 264.

41. Id. at 263. "In this field international law is called upon to recognize institutions of municipal law that have an important and extensive role in the international field." Id. at 260. See also G. Schwarzenberger, supra note 19, at 393.

42. H. Ballantine, supra note 25, § 120; H. Henn, supra note 18, § 92, G. Hornstein, supra note 21, § 711; Annot., 59 A.L.R. 1091 (1929).

Certain exceptions to this rule have developed because of peculiar situations which have arisen in the international sector. Each exception must be examined to determine whether the expropriation of Barcelona Traction is analogous.

The first exception involves an injury inflicted by the state under whose laws the corporation was formed.[43] Were there no such exception, a state could seize a corporation, compensate its nationals for their shares, and totally disregard the foreign interests involved since these foreign interests would be incapable of proceeding against this state.[44] In the *Ziat Ben Kiran* case,[45] a Spanish corporation suffered damage due to a riot in the Spanish zone of Morocco in 1921. Britain brought a claim against Spain for negligence on behalf of one of its nationals who was a majority shareholder in the corporation. Spain contested Britain's standing to bring such a claim since the corporation was not a British national. This objection was rejected by the claims commission because it would have been inequitable to preclude Britain from suing since its national suffered direct injury, and since the nation of incorporation was the defendant in the proceeding.[46]

Another similar decision was reached in the *El Triunfo* claim.[47] In 1894 the government of Salvador granted a concession to establish a steamboat service to two United States citizens on the condition that they form a corporation under Salvadorean law. The corporation was so formed and all the shares were owned by United States nationals. Because of certain internal irregularities in the corporation, its lawful directors were replaced with others who bankrupted the corporation in furtherance of their personal interests. The Salvadorean government then awarded the concession to another company. The United States, on behalf of an American shareholder, attempted to intervene. The Salvadorean government objected contending that since the corporation was a Salvadorean national, the entire matter was internal. The decision of the arbitrator was that under the circumstances, equity justified United States espousal of the claim.[48]

The exception illustrated by these cases, however, cannot be validly applied in the Barcelona Traction situation. Since it was a Canadian corporation allegedly injured by Spain, Canada always had the option to bring an action on the corporation's behalf.

Another exception involves the situation where the corporation becomes defunct, and therefore incapable of proceeding on its own behalf. This was il-

43. This exception was first suggested in 1932. Beckett, Diplomatic Claims in Respect of Injuries to Companies, 17 Grotius Soc'y 175 (1932).

44. Actually the foreign shareholders, at great expense, could go to the defendant state and litigate this question, the justiciability of which would be, at best, uncertain.

45. [1923-24] Ann. Dig. 129 (No. 102).

46. Id. at 130; Beckett, supra note 43, makes a similar argument based on a hypothetical set of facts, at 188-93.

47. J. Moore, supra note 24, at 649.

48. Id. at 651 (adopting the reasoning of the Delagoa Railway case discussed in text accompanying notes 49-50 infra).

lustrated in the *Delagoa Railway*[49] case. Here British and American citizens formed a corporation under Portuguese law for the purpose of constructing a railway. During the course of construction, a dispute arose between the Portuguese authorities and the directors of the corporation over the exact point of termination of the railway, whereupon the Portuguese government cancelled the concession and seized the railroad. Both Britain and the United States protested on the basis of the interests of their nationals. The United States in justifying its intervention stated, "the Portuguese company, being without remedy and having practically ceased to exist, the only recourse of those whose property had been confiscated [sic] is the intervention of their respective governments."[50] The question was finally referred to a tribunal of Swiss jurists who allowed the claim and made an award.[51]

In the present case, Barcelona Traction was in receivership in Canada. As the court pointed out, such a status, far from impairing the rights of the corporation, actually preserves the corporate entity and its rights.[52] Canada was still capable of proceeding on its behalf. For this reason, the exception is inapplicable.

A third exception is found in the situation where a treaty between the shareholders' state and the expropriating state recognizes the right of each to sue on behalf of its shareholder nationals regardless of the nationality of the corporation. Examples of such treaties are found in the documents executed after World War I where it was agreed that the shareholders of any corporation that had been seized by Germany were entitled to indemnification.[53] These treaties are *sui generis*, however, and none existed between Belgium and Spain.

The International Court of Justice considered all these exceptions to the general rule and rightly concluded that none were applicable to the shareholders of Barcelona Traction. The court went further, however, and established a policy reason for its decision. "[T]he adoption of the theory of diplomatic protection of shareholders as such, by opening the door to competing diplomatic claims, could create an atmosphere of confusion and insecurity in international economic relations."[54]

In a separate opinion Judge Fitzmaurice, although concurring in the result, disagreed on the question of standing. While agreeing with the majority as to the present state of the law, the judge found this present law to be unsatisfactory.[55] Judge Fitzmaurice proposed that anytime the government of the incor-

49. Id. at 647, U.S. For. Rel. 1902, 848-852.

50. J. Moore, supra note 24, at 648.

51. Id. at 649.

52. Barcelona Traction at 267.

53. "Claims conventions not connected with the war were made between 1923 and 1926 by the United States with Panama and with Mexico, and also with Mexico by France, Germany, Spain and the United Kingdom." Jones, supra note 22, at 253 (footnotes omitted). In addition see the commercial treaty between the United States and Japan of 1953 (protocol), 1953, 4 U.S.T. 2063, T.I.A.S. No. 2863, 206 U.N.T.S. 143 (1953).

54. Barcelona Traction at 274.

55. Barcelona Traction at 278 (Fitzmaurice, J., concurring). "A vacuum with respect to

porating state elects not to espouse a claim of the corporation, a nation whose nationals are shareholders should be permitted to do so.[56] The problem of numerous claims, he asserted, would be minimal in that each nation would be entitled to a pro rata share of recovery based on the number of shares it represented.[57] Judge Jessup, the United States representative on the court,[58] lent additional force to this contention in a separate opinion which concurred only with the result reached by the majority. He noted that Canada had no abiding interest in Barcelona Traction.[59] The connections between them were limited only to its incorporation there as a matter of convenience and the receivership proceedings. Arguing analogously to the *Nottebohm* case, Judge Jessup wrote that the test should be the "real and effective" nationality and the nexus between the corporation and its shareholders in this instance was more substantial.[60] He thus indirectly questioned the validity of all the determinants of corporate nationality heretofore discussed insofar as they are uniform. His reasoning was undoubtedly based on the American corporate concepts of shareholder derivative suits,[61] citizenship for diversity purposes,[62] the convenience of the "Delaware corporation,"[63] and the concept of beneficial ownership.[64] While American corporate law is the most developed in the world, the decisions upon which the International Court of Justice based its determination are all several decades old.

Another point to be considered was raised in 1964 by Judge Wellington Koo in the preliminary *Barcelona Traction* decision.[65] In a separate opinion[66] he

protection should not be tolerated: otherwise shareholders would be left in an entirely helpless condition and the result would be injustice and inequality which would be harmful for the healthy development of international investment." Id. at 290-91 (Tanaka, J., concurring).

56. Id. at 282.

57. Id. at n.21.

58. Judge Jessup retired from the court after this decision.

59. Id. at 306. (Jessup, J., concurring).

60. Id. at 307.

61. In the United States, if a corporation refuses to seek redress, a shareholder can bring an action in the name of and on behalf of the corporation. H. Ballantine, supra note 25, § 143; H. Henn, supra note 18, § 352.

62. The citizenship of a corporation for purposes of satisfying the diversity of citizenship requirement is not only the state of incorporation, but any state in which it conducts business. 28 U.S.C. § 1391(c) (1964).

63. "Among the 600 largest American corporations listed by Fortune, 202 are organized in Delaware. . . ." This is directly traceable to the convenience of the Delaware corporation laws. R. Baker & W. Carey, Cases and Materials on Corporations 9 (3d abr. ed. 1959). Canada likewise provided a "charter of convenience" for Barcelona Traction. Barcelona Traction at 306 (Jessup, J., concurring).

64. The concept of beneficial ownership "enable[s] States to ignore the corporate character of an entity under municipal law and transform claims of members or creditors of such a corporation into claims against the State in which the corporation is domiciled or incorporated." G. Schwartzenberger, supra note 19, at 406.

65. Barcelona Traction, Light & Power Co., Ltd., Preliminary Objections, [1964] I.C.J. 6.

66. Id. at 51-65.

argued that the objection as to standing should be dismissed. The exceptions to the general rule, discussed above, that the shareholder nations cannot sue, are based on both equitable and pragmatic considerations. The shareholders of Barcelona Traction were equally worthy of such treatment since Canada was merely a convenient state of incorporation and the only remedy the shareholders now have is through the intervention of the Belgian government.[67]

One final point should be noted with specific reference to the practice of providing for shareholder suits by treaty. The existence of such treaties is testimony to the inadequacy of the law in this area. The parties, recognizing this inadequacy, are thus able to correct it by means of a contractual agreement to the contrary.[68]

The *Barcelona Traction* decision is open to criticism: first, it does not reflect the expansion of international business and the corresponding development of corporate sophistication;[69] second, the court circuitously avoided the problem of providing some protection to shareholders whose corporation or whose government elects not to seek redress for a wrong done to them; and third, it is inconsistent with the rationale underlying the exceptions to the rule. In each case the exception arose when a need for protection was demonstrated.[70] Perhaps, an additional exception should have been carved from the rule to encompass the *Barcelona Traction* situation.

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67. "[I]f the action of the national State of the company is fruitless or if it feels disinclined to take steps to protect the company or discontinue its intervention without securing the desired result, there is no real reason why the national State of the shareholders should be precluded from exercising its own right to intervene on their behalf for effective protection." Id. at 59.

68. These provisions are commonly in two forms: either they require "prompt, just and effective compensation in event of expropriation," or that any "'enterprise' in which nationals or companies of one party have a 'substantial interest' must be accorded, in the other, 'not less than national treatment and most-favored-nation treatment in all matters relating to the taking of privately owned enterprises into public ownership . . . .'" Walker, Provisions on Companies in United States Commercial Treaties, 50 Am. J. Int'l L. 388-89 (1956) (footnote omitted).

69. "As the concept of corporate personality has become more complex and the activities of modern private corporations of different kinds have rapidly grown in variety and range, often extending to the territories of many States with different municipal law systems, their organization has taken on many forms of structure with an increasing number of constituent and associated elements. They often have subsidiaries with varying degrees of ownership and different classes of shareholders with differentiated rights of voting and sharing in the profits or dividends. Because of this fact of rapid growth and development of modern joint stock companies and corporations, the problem of their protection has likewise become more complex." Barcelona Traction, Light & Power Co., Ltd., Preliminary Objections, [1964] I.C.J. 6, 57 (Koo, J., concurring).

70. For a proposed remedy for shareholders see Restatement of the Foreign Relations Law of the United States § 173 (1965).

Landlord-Tenant—Implied Warranty of Habitability.—After a brief inspection, plaintiff leased defendant's furnished house for two short-term intervals. However, an advanced state of rat infestation required abandonment of the premises three days later. Thereafter, plaintiff brought an action to recover his deposit and rent payment. The trial court found a constructive eviction and a breach of an implied warranty of habitability, entitling plaintiff to recover.[1] On appeal, the Supreme Court of Hawaii affirmed, relying entirely on the implied warranty of habitability and rejecting the constructive eviction doctrine. *Lemle v. Breeden*, 462 P.2d 470 (Hawaii 1969).

At common law, a lease was regarded primarily as a conveyance of an interest in land,[2] for which rent was the consideration.[3] Thus, the lessor's basic affirmative obligation was merely to deliver undisturbed possession of the land for the term of the lease.[4] The tenant alone was responsible for any necessary repairs or services, such as heat and water.[5] Absent fraud, material misrepresentation,[6] or a provision to the contrary in the lease,[7] the tenant bore the risk that the property might be unsuitable for its intended use.[8]

An early exception to this strict rule of *caveat emptor* developed with short term leases of furnished dwellings. In the English case of *Smith v. Marrable*,[9]

1. See Lemle v. Breeden, 462 P.2d 470, 472 (Hawaii 1969).

2. Evans v. Faught, 231 Cal. App. 2d 698, 42 Cal. Rptr. 133 (Dist. Ct. App. 1965); Koehler v. Southmoor Bank & Trust Co., 40 Ill. App. 2d 195, 189 N.E.2d 22 (1963); Royal Oak Wholesale Co. v. Ford, 1 Mich. App. 463, 136 N.W.2d 765 (1965); Michaels v. Brookchester, Inc., 26 N.J. 379, 140 A.2d 199 (1958).

3. Automobile Supply Co. v. Scene-in-Action Corp., 340 Ill. 196, 172 N.E. 35 (1930); Fifth Ave. Bldg. Co. v. Kernochan, 221 N.Y. 370, 117 N.E. 579 (1917).

4. See United States v. 15.3 Acres of Land, 154 F. Supp. 770 (M.D. Pa. 1957). See also Mitchell's, Inc. v. Friedman, 294 S.W.2d 740 (Tex Civ. App. 1956), rev'd on other grounds, 157 Tex. 424, 303 S.W.2d 775 (1957).

There is a split of authority as to whether the lessor actually has to deliver possession to the lessee, e.g., by removing trespassers or holdovers occupying the leased premises at the beginning of the term. See, e.g., Oriental Oil Co. v. Lindsey, 33 S.W.2d 768 (Tex. Civ. App. 1930) (tenant-subtenant, duty exists). Contra, Rice v. Biltmore Apartments, Co., 141 Md. 507, 119 A. 364 (1922). In New York, the duty exists by statute. N.Y. Real Prop. Law § 223-a (1968).

5. Suydam v. Jackson, 54 N.Y. 450 (1873); Gaddis v. Consolidated Freightways, Inc., 239 Ore. 553, 398 P.2d 749 (1965). See also United States v. Bostwick, 94 U.S. 53 (1876).

6. See, e.g., Eskin v. Freedman, 53 Ill. App. 2d 144, 203 N.E.2d 24 (1964); Cole v. Lord, 160 Me. 223, 202 A.2d 560 (1964); Daly v. Wise, 132 N.Y. 306, 30 N.E. 837 (1892); Perkins v. Marsh, 179 Wash. 362, 37 P.2d 689 (1934).

7. Heisenbuttel v. Comnas, 14 Misc. 2d 509, 177 N.Y.S.2d 850 (Westchester County Ct. 1958); Corcione v. Ruggieri, 87 R.I. 182, 139 A.2d 388 (1958).

8. Lawler v. Capital City Life Ins. Co., 68 F.2d 438 (D.C. Cir. 1933); Carney v. Bercault, 348 Mass. 502, 204 N.E.2d 448 (1965); Perkins v. Marsh, 179 Wash. 362, 37 P.2d 689 (1934). However, the lessor had a duty to disclose any latent defects which could not be discovered by a reasonable inspection. Cole v. Lord, 160 Me. 223, 202 A.2d 560 (1964); Faber v. Creswick, 31 N.J. 234, 156 A.2d 252 (1959) (failure to disclose concealed dangerous condition which caused injury held to allow action by injured person against lessor); Gaines v. Jordan, 64 Wash. 2d 661, 393 P.2d 629 (1964).

9. 152 Eng. Rep. 693 (Ex. 1843).

a warranty of habitability was implied in the lease. In *Smith*, the defendant-lessee rented a furnished house for "five or six weeks,"[10] but was forced to vacate the premises after one week, due to severe pest infestation. In an action by the lessor for the rent for the remainder of the term, the court said: "A man who lets a ready-furnished house surely does so under the implied condition or obligation . . . that the house is in a fit state to be inhabited."[11] This rule generally has been followed in the United States,[12] although the warranty only applies to defects existing at the beginning of the lease.[13]

As time progressed, the increased complexity of urban life[14] led landlords contractually to assume many of the tenants' former obligations.[15] Thus, the lessor ordinarily covenants to make certain repairs, and to provide heat, water and other essential services.[16] However, the landlord's obligations under the lease have been construed as independent of those of the tenant.[17] Thus, non-performance of the lessor's obligations does not affect the lessee's duty to pay rent.[18] This duty would be abated only where the lessee rightfully abandoned the premises, relying on the lessor's breach of the covenant of quiet enjoyment which is implied in all leases,[19] requiring an eviction by the lessor,[20] persons claiming through him,[21] or holders of paramount title.[22] The lessee's sole remedy for the lessor's failure to make repairs or provide services was a damage action for breach of covenant.[23]

To alleviate the harsh effects of this rule, the courts developed the doctrine of constructive eviction, whereby a tenant could rescind the lease and cease

10. Id.

11. Id. at 694 (Lord Abinger, C.B.).

12. See Davenport v. Squibb, 320 Mass. 629, 70 N.E.2d 793 (1947).

13. See, e.g., Hacker v. Nitschke, 310 Mass. 754, 39 N.E.2d 644 (1942); Delamater v. Foreman, 184 Minn. 428, 239 N.W. 148 (1931). Another exception to the caveat emptor rule is the warranty of fitness implied in a lease for a particular purpose where the building is under construction. See Woolford v. Electric Appliances, Inc., 24 Cal. App. 2d 385, 75 P.2d 112 (Dist. Ct. App. 1938).

14. See T. Quinn & E. Phillips, The Law of Landlord-Tenant: A Critical Evaluation of the Past With Guidelines for the Future, 38 Fordham L. Rev. 225, 231-32 (1969).

15. See Id. at 232 & n.9 (where certain clauses in a standard modern lease are enumerated).

16. Id.

17. Id. at 233-34 & nn.11-13.

18. Id.

19. This covenant insures that the landlord will not disturb the tenant's peaceful possession, use, and enjoyment of the demised premises. See Best v. Crown Drug Co., 154 F.2d 736 (8th Cir. 1946); Carolina Helicopter Corp. v. Cutter Realty Co., 263 N.C. 139, 139 S.E.2d 362 (1964); L-M-S Inc. v. Blackwell, 233 S.W.2d 286 (Tex. 1950).

20. Mosbacher v. Cleaners Enterprises, Inc., 19 Misc. 2d 624, 191 N.Y.S.2d 352 (N.Y.C. Mun. Ct. 1959) (dictum); Richker v. Georgandis, 323 S.W.2d 90 (Tex. Civ. App. 1959) (dictum).

21. See Hannan v. Dusch, 154 Va. 356, 153 S.E. 824 (1930).

22. Ganz v. Clark, 252 N.Y. 92, 169 N.E. 100 (1929).

23. Thomson-Houston Elec. Co. v. Durant Land Improvement Co., 144 N.Y. 34, 39 N.E. 7 (1894).

paying rent absent physical dispossession by the landlord.[24] Where the lack of services was so severe,[25] or the premises so defective,[26] as to substantially interfere with the lessee's beneficial use and enjoyment of the property, *and* where the tenant actually vacated the premises,[27] the lease would be rescinded and the rent obligation would terminate as of the date of abandonment.[28] This remedy is of questionable practical value,[29] however, as the lessee must determine whether the defect is sufficient to render the premises untenantable before abandoning them. Should a court disagree with this determination and deny rescission, the lease obligations will continue and the tenant, who has already made a possibly expensive move, will be liable to the landlord for back rent and possibly for damages.[30] Further, in an urban society where the housing shortage is often acute,[31] it is logical to assume that the tenant generally will be more interested in compelling future compliance with the lease and in abating the rent until that time than in abandoning the premises.

Many states have enacted legislation requiring the lessor either to make certain repairs[32] or provide services[33] in an attempt to overcome the inadequacy of the constructive eviction remedy. Penalties include criminal sanctions,[34]

24. 1 American Law of Property § 3.51 (A.J. Casner ed. 1952).

25. Nesson v. Adams, 212 Mass. 429, 99 N.E. 93 (1912) (garbage in corridor of apartment, lack of hot water, elevator service, and lighting). See Overstreet v. Rhodes, 212 Ga. 521, 93 S.E.2d 715 (1956) (severe deterioration); Sewell v. Hukill, 138 Mont. 242, 356 P.2d 39 (1960) (breach of covenant to repair, resulting in extensive leakage).

26. See Washington Choc. Co. v. Kent, 28 Wash. 2d 448, 183 P.2d 514 (1947) (rat infestation).

27. Leider v. 80 William St. Co., 22 App. Div. 2d 952, 255 N.Y.S.2d 999 (2d Dep't 1964) (mem). See Candell v. Western Fed. Savings & Loan Ass'n, 156 Colo. 552, 400 P.2d 909 (1965); A. W. Bannister Co. v. P. J. W. Moodie Lumber Corp., 286 Mass. 424, 190 N.E. 727 (1934); Maki v. Nikula, 224 Ore. 180, 355 P.2d 770 (1960). Abandonment must be within a reasonable time, or the constructive eviction will be deemed to have been waived. Yaffe v. American Fixture, Inc., 345 S.W.2d 195 (Mo. 1961); Merritt v. Tague, 94 Mont. 595, 23 P.2d 340 (1933); Maki v. Nikula, supra. It should be noted that a limited number of courts have abolished the requirement of abandonment under certain circumstances. See T. Quinn & E. Phillips, supra note 13, at 237-38.

28. T. Quinn & E. Phillips, supra note 13, at 235-36. See also Groh v. Kover's Bull Pen, Inc., 221 Cal. App. 2d 611, 34 Cal. Rptr. 637 (Dist. Ct. App. 1963).

29. For a good criticism of this remedy, see T. Quinn & E. Phillips, supra note 13, at 236-37.

30. See Frederick Realty Corp. v. General Oil Co., 249 A.2d 418 (R.I. 1969), where such damages were awarded.

31. See Salsich, Housing and the States, 2 Urban Law. 40 (1970).

32. E.g., Cal. Civ. Code § 1941 (West 1954); Mich. Comp. Laws Ann. § 125.471 (1967); N.Y. Mult. Dwell. Law § 78 (1946).

33. E.g., Mich. Comp. Laws Ann. § 125.471 (1967) (plumbing, heating, ventilation and electric wiring); N.Y. Mult. Dwell. Law § 75 (1946), as amended, id. (Supp. 1969) (water); id. § 77 (1946), as amended, id. (Supp. 1969) (plumbing and drainage); id. § 79 (Supp. 1969) (heat).

34. E.g., N.Y. Mult. Dwell. Law § 304(1), (1-a) (Supp. 1969).

abatement of rent,[35] civil fines,[36] and liability for damages.[37] The operation of these statutes is often cumbersome,[38] however, and they have been subject to much criticism.[39]

Recently, some courts have attempted to infuse more flexibility into the law by adopting the implied warranty of habitability first seen in *Smith v. Marrable*. However, they generally have limited the warranty to the *Smith* facts. In *Pines v. Perssion*,[40] the Supreme Court of Wisconsin disregarded the constructive eviction doctrine and implied a warranty of habitability in a one year lease of a furnished house.[41] Noting that legislative and administrative rules[42] require maintenance in accordance with certain standards, the court concluded:

> Thus, the legislature has made a policy judgment—that it is socially (and politically) desirable to impose these duties on a property owner—which has rendered the old common-law rule obsolete. To follow the old rule of no implied warranty of habitability in leases would, in our opinion, be inconsistent with the current legislative policy concerning housing standards. The need and social desirability of adequate housing for people in this era of rapid population increases is too important to be rebuffed by that obnoxious legal cliché, *caveat emptor*.[43]

In accordance with traditional contract principles, the court found the lessor's implied warranty and the lessee's covenant to pay rent mutually dependent.[44] Thus, breach of the implied warranty constituted a material failure of consideration,[45] abating the rental obligation under the lease and entitling lessees

35. E.g., N.Y. Mult. Dwell. Law § 302-a (Supp. 1969); N.Y. Real Prop. Actions Law § 755 (Supp. 1969). See T. Quinn & E. Phillips, supra note 13, at 248 n.60 and statutes cited.

36. E.g., N.Y. Mult. Dwell. Law § 304(2) (Supp. 1969).

37. Id. § 304(8).

38. To add a violation to the "rent impairing" list of the New York City Housing Department under N.Y. Mult. Dwell. Law § 302-a, a complicated process including public hearings must be followed. Id. § 302-a(2)(d). N.Y. Real Prop. Actions Law § 755(1)(a) (Supp. 1969) requires a serious violation to be recorded by a government bureau before the obligation to pay rent can be abated.

39. See T. Quinn & E. Phillips, supra note 13, at 239-49.

40. 14 Wis. 2d 590, 111 N.W.2d 409 (1961).

41. Although the court noted that caveat emptor remained the general rule, id. at 594-95, 111 N.W.2d at 412, the defects in the electrical wiring, furnace, toilet, kitchen sink, handrail, window screens, and doors were sufficient to justify relief. Id. at 593, 111 N.W.2d at 411.

42. The court noted the safeplace statute, building codes and health regulations as examples. Id. at 595, 111 N.W.2d at 412, Wis. Stat. Ann. § 234.17 (1957) allows the lessee to surrender the leased premises and cease paying rent if the building becomes untenantable for any reason other than his own fault or neglect. See also N.Y. Real Prop. Law § 227 (1968).

43. 14 Wis. 2d at 595-96, 111 N.W.2d at 412-13.

44. Id. at 596, 111 N.W.2d at 413. Where covenants are independent, a breach of one is only a partial breach of the contract which does not necessarily terminate the obligations of the aggrieved party. See 11 S. Williston, A Treatise on the Law of Contracts § 1292 (3d ed. W. Jaeger 1968). On the other hand, a material breach of a dependent covenant would absolve the injured party from his obligation if he so elects. See id. at § 1327.

45. 14 Wis. 2d at 597, 111 N.W.2d at 413.

to recover their deposits and labor expenses incurred in repairing the premises.[46] They were liable only for the reasonable rental value of the premises during their actual occupancy.[47]

Eight years later, the Supreme Court of New Jersey expanded the *Pines* rationale in *Reste Realty Corp. v. Cooper*,[48] a case involving a long-term commercial lease. After a one-year occupancy plagued by recurrent flooding, lessee agreed to renegotiate a five year lease in return for lessor's promise to renew attempts to curtail further flooding. Approximately three years later, lessee was forced to abandon the premises after a nine month period during which lessor refused all calls for help in removing the water. In finding a constructive eviction, the court discussed the trend away from *caveat emptor*, but expressly declined so broad a holding.[49] However, in dictum, the court did state that fairness requires a warranty against latent defects to be implied in every lease.[50] The court also stated: "[W]henever a tenant's right to vacate leased premises comes into existence because he is deprived of their beneficial enjoyment and use on account of acts chargeable to the landlord, it is immaterial whether the right is expressed in terms of breach of a covenant of quiet enjoyment, or material failure of consideration, or material breach of an implied warranty against latent defects."[51]

The *Lemle* court disagreed with this analysis. In holding that leases of dwelling houses contain an implied warranty of habitability,[52] the Supreme Court of Hawaii specifically rejected the constructive eviction doctrine, preferring to apply the more flexible contract principles.[53] The court adopted "the view that a lease is essentially a contractual relationship with an implied warranty of habitability and fitness."[54] As the court did not limit this statement to the *Smith* facts,[55] *Lemle* may be applied to other lease situations, a result

46. Id.

47. Id.

48. 53 N.J. 444, 251 A.2d 268 (1969).

49. Id. at 452-53, 251 A.2d at 272.

50. Id. at 454, 251 A.2d at 273. The court defined latent defects as "those the existence and significance of which are not reasonably apparent to the ordinary prospective tenant." Id.

51. Id. at 461, 251 A.2d at 276-77. However, the implied warranty theory was not mentioned as an alternative means of avoiding the issue of the requisite timely abandonment, which was justified on traditional constructive eviction grounds. Id. at 461-62, 251 A.2d at 277-78.

52. "Legal fictions and artificial exceptions to wooden rules of property law aside, we hold that in the lease of a dwelling house, such as in this case, there is an implied warranty of habitability and fitness for the use intended." 462 P.2d at 474.

53. "The doctrine of constructive eviction, as an admitted judicial fiction designed to operate as though there were a substantial breach of a material covenant in a bilateral contract, no longer serves its purpose when the more flexible concept of implied warranty of habitability is legally available." Id. at 475.

54. Id.

55. In discussing the Smith exceptions, the court stated: "We think that the exception itself is artificial and that it is the general rule of caveat emptor which must be re-examined." 462 P.2d at 473.

desirable for a number of reasons. For example, the *Lemle* court noted that a warranty would give the lessee a choice among the basic contract remedies: damages, rescission, and reformation.[56] In contrast, the constructive eviction remedy is available only where there is an abandonment within a reasonable time, despite the recent housing crisis.[57] Second, an implied warranty of habitability would recognize the modern lease functionally as a sale of habitable living space, potentially incorporating the protections of the law of sales[58] and of tort product liability.[59] The *Lemle* court specifically noted that the reasons for imposing such duties on the manufacturers of chattels are "equally persuasive in leases of real property."[60]

Clearly, the realities of modern life require the re-evaluation of traditional concepts so apparent in *Lemle*. Our statutes, though well-meaning, provide little practical relief. Thus, property law has not evolved sufficiently from a society where possession of land was paramount. Serious attempts to modernize the law, through fictions and artificial exceptions, have created a body of law lacking in both uniformity and equity. Thus, extending the contract doctrine of mutuality of obligations to all leases appears to be the most practical solution.

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56. Id. at 475. For a breach of warranty in sales contracts, the measure of damages generally is the difference between the value of the goods received and their value as warranted. See Uniform Commercial Code § 2-714. Incidental and consequential damages (including damages for personal injury proximately resulting from breach of warranty) also can be recovered in a proper case. Id. § 2-715. Applying this remedy to a lease situation, the tenant would recover the difference between the value of the leasehold conveyed to him, and the value of the estate had it been habitable. He might also recover the reasonable costs incurred incident to the breach, i.e., cost of repairs, as well as for any personal injury proximately resulting from the defects in the premises.

Recision, as an alternative to a damage action for breach of warranty, terminates the contract and allows the aggrieved party to recover what he has given or its value. See 12 S. Williston, supra note 43, §§ 1454, 1454A, 1455, 1462. In a lease situation, rescission would result in the termination of the lease. The tenant would be able to recover any payments made and possibly the value of improvements made on the demised premises.

Reformation is available when there is an agreement between the parties but there is mistake as to its expression. In granting this remedy, the court conforms the agreement to the true intention of the parties. See 3 A. Corbin, Contracts §§ 614-15 (1960). However, this remedy would be of little practical value in the lease situations.

57. See N.Y. Times, March 15, 1970, § 8 (Real Estate), at 1, col. 1: id, March 5, 1970, at 34, col. 3; id., Feb. 18, 1970, at 19, col. 1.

58. See Uniform Commercial Code §§ 2-313 to 2-315. See also Kessler, The Protection of the Consumer Under Modern Sales Law (pt. 1), 74 Yale L.J. 262 (1964); Comment, The Application of the Doctrine of Unconscionability to Warranties: A Move Toward Strict Liability Within the U.C.C., 38 Fordham L. Rev. 73 (1969); Comment, Express Warranties and Greater Consumer Protection From Sales Talk, 50 Marq. L. Rev. 88 (1966).

59. See W. Prosser, Torts, §§ 96-97 (3d ed. 1964); Dickerson, Products Liability: How Good Does A Product Have To Be, 42 Ind. L.J. 301 (1967); Jaeger, Product Liability: The Constructive Warranty, 39 Notre Dame Law. 501 (1964); Kessler, Products Liability, 76 Yale L.J. 887 (1967).

60. 462 P.2d 474.

Torts—Negligent Infliction of Emotional Distress Extended to Bystander Not at the Scene of Injury.—Plaintiff's son was severely injured because of the alleged negligence of the defendant in selling him packaged explosives[1] which subsequently exploded.[2] Within five minutes of the explosion,[3] plaintiff arrived at the scene of the accident, and upon witnessing her son's condition, suffered such extreme emotional distress that she required institutionalization. In her action to recover for negligent infliction of emotional distress the superior court granted summary judgment for the defendant.[4] The court of appeal, in reversing the lower court, held that, if defendant's negligence in packaging the explosives was established at trial, plaintiff could recover despite her failure to actually witness the explosion. *Archibald v. Braverman*, 000 Cal. App. 2d 000, 79 Cal. Rptr. 723 (Dist. Ct. App. 1969).

Actions for negligent infliction of emotional distress caused by witnessing injury to another have long been out of judicial favor.[5] Courts have resorted to various arguments in support of this attitude: the difficulty of proving emotional suffering and the difficulty of calculating damages; the possibility of fraudulent claims; the fear of imposing a duty upon the defendant, the breach of which renders him liable wholly out of proportion to the culpability of his conduct; and a fear that allowance of bystander recovery will lead to unlimited liability.[6] Accordingly various theories were devised to limit the circumstances in which a defendant could be held liable to an emotionally injured bystander. The first of these is the so-called "impact rule" which requires that defendant's negligent conduct result in actual bodily contact to the plaintiff.[7] Such a rule, as might

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1. The court found defendant's conduct violated a law reading in part: "No explosives shall be sold, given, or delivered to any person under 21 years of age. . . ." Cal. Health & Safety Code § 12082 (West. Supp. 1970).

2. "[A]s a result of the explosion, the boy sustained serious personal injuries causing traumatic amputation of the right hand . . . wrist . . . forearm, traumatic amputation of a portion of his left hand, severe lacerations of his body, grave injury to the right eye, and loss of copious amounts of blood. . . ." Archibald v. Braverman, 000 Cal. App. 2d 000, 000, 79 Cal. Rptr. 723, 724 (Dist. Ct. App. 1969).

3. Letter from Zerne P. Haning, Esq., to Fordham Law Review, Nov. 17, 1969. Although it is not stated in the court's opinion, this letter from plaintiff's counsel, indicated she arrived within five minutes of the explosion.

4. Summary judgment was granted on the basis of Amaya v. Home Ice, Fuel & Supply Co., 59 Cal. 2d 295, 379 P.2d 513, 29 Cal. Rptr. 33 (1963), which was overruled prior to the present appeal by Dillon v. Legg, 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968) (Amaya is hereinafter cited without inclusion of the overruling Dillon decision).

5. E.g., Knaub v. Gotwalt, 422 Pa. 267, 220 A.2d 646 (1966); Waube v. Warrington, 216 Wis. 603, 258 N.W. 497 (1935); see Annot., 18 A.L.R.2d 220 (1951); Restatement (Second) of Torts § 313 (1966). This note does not distinguish between cases involving emotional distress causing physical injury to plaintiff, and those in which recovery is sought solely for mental suffering, as the courts themselves have not agreed as to what constitutes "physical" injuries. See Annot., 64 A.L.R.2d 100, 127-28 (1959).

6. See W. Prosser, Torts § 55 (3d ed. 1964) [hereinafter cited as Prosser].

7. E.g., Hendren v. Arkansas City, 122 Kan. 361, 252 P. 218 (1927); Homans v. Boston

be expected, has had harsh,[8] if not absurd, results in its application.[9] To avoid the harshness of the impact test, the "zone of danger" rule developed. Under this theory, while actual impact is not necessary, plaintiff must be found to have been located within the area of danger created by the defendant's negligent conduct.[10] Even if the plaintiff is shown to have been actually frightened and emotionally injured upon witnessing the event, recovery is denied if it appears that he was too far removed from the immediate point of defendant's negligent conduct. The zone of danger rule is limited in turn by the "fear for another" rule.[11] This rule, denies recovery when plaintiff's distress is caused by fear of injury to one other than himself.[12] While these theories are mutually exclusive in application the concept of impact seems to serve as a common bond running through them. Thus, plaintiff must sustain impact, be in the zone threatened with impact, or fear impact to himself. Most jurisdictions apply one variation or another of these theories to determine whether the defendant breached a duty of care to the bystander plaintiff.

As recently as 1963 California denied recovery for mental distress caused by witnessing injury to another. In *Amaya v. Home Ice, Fuel & Supply Co.*[13] a mother was denied recovery for mental distress sustained when she witnessed defendant's truck run over her infant son. The court, although finding that California did not require impact,[14] refused to find that defendant's duty extended to a bystander in the vicinity of the injury, whose distress was caused not by fear for her own safety but fear of injury to another.[15] It held that plaintiff failed to state a cause of action even though defendant directly breached a duty to the victim since plaintiff's emotional injury was merely an

El. Ry., 180 Mass. 456, 62 N.E. 737 (1902); Bosley v. Andrews, 393 Pa. 161, 142 A.2d 263 (1958).

8. See, e.g., Barnett v. Sun Oil Co., 113 Ohio App. 449, 172 N.E.2d 734 (1961); Beaty v. Buckeye Fabric Finishing Co., 179 F. Supp. 688 (E.D. Ark. 1959).

9. As pointed out by Prosser, "courts have found 'impact' in minor contacts with the person. . . ." Prosser § 55, at 350. For some finer examples of "impact" see Christy Bros. Circus v. Turnage, 38 Ga. App. 581, 144 S.E. 680 (1928) (feces landed upon plaintiff's lap); Porter v. Delaware, L. & W. R.R., 73 N.J.L. 405, 63 A. 860 (1906) (dust in the eye); Homans v. Boston El. Ry., 180 Mass. 456, 62 N.E. 737 (1902) (a slight blow).

10. E.g., Orlo v. Connecticut Co., 128 Conn. 231, 21 A.2d 402 (1941); Resavage v. Davies, 199 Md. 479, 86 A.2d 879 (1952); Battalla v. State, 10 N.Y.2d 237, 176 N.E.2d 729, 219 N.Y.S.2d 34 (1961). There is an analogy here to the tort of assault, as assault admits of recovery on proof, not of actual impact but of a threat of imminent physical contact. Cf. Prosser § 10.

11. E.g., Reed v. Moore, 156 Cal. App. 2d 43, 319 P.2d 80 (1957); Strazza v. McKittrick, 146 Conn. 714, 156 A.2d 149 (1959); Southern Ry. v. Jackson, 146 Ga. 243, 91 S.E. 28 (1916).

12. This rule seems unrealistic since its actual effect is to require that plaintiff "allege" that he feared injury to himself. See Dillon v. Legg, 68 Cal. 2d 733, 738 n.4, 441 P.2d 912, 918 n.4, 69 Cal. Rptr. 72, 78 n.4 (1968); Comment, Negligence and the Infliction of Emotional Harm: A Reappraisal of the Nervous Shock Cases, 35 U. Chi. L. Rev. 523 n.44 (1968).

13. 59 Cal. 2d 295, 379 P.2d 513, 29 Cal. Rptr. 33 (1963).

14. Id. at 299, 379 P.2d at 515, 29 Cal. Rptr. at 35.

15. Id. at 315, 379 P.2d at 525, 29 Cal. Rptr. at 45.

indirect consequence of the harm to the actual victim[16] and not a breach of duty as to her.[17]

Within five years of this decision, however, the supreme court of California reversed its position in the landmark case of *Dillon v. Legg*.[18] In *Dillon* a mother and daughter were permitted to recover for emotional distress sustained as a result of witnessing the death of a younger daughter. Refusing to apply either the "zone of danger" and "fear for another" theories in determining liability,[19] the court directly confronted the issue of whether the defendant's duty extended to an emotionally injured bystander. The court underplayed the area of duty[20] and concentrated on foreseeability,[21] maintaining that in the case of a child, it was forseeable that its mother would be in the immediate vicinity and sustain emotional distress upon witnessing an injury to her child.[22] Three tests were formulated to assist in determining when a defendant could be found to have violated a duty of due care to a bystander plaintiff: plaintiff's proximity to the scene of the accident, whether the injury was caused by a direct shock resulting from contemporaneous observance, and plaintiff's relationship to the

16. Id. at 298, 379 P.2d at 514, 29 Cal. Rptr. at 34.

17. Id. at 307, 379 P.2d at 520, 29 Cal. Rptr. at 40. See also Richards v. Stanley, 43 Cal. 2d 60, 271 P.2d 23 (1954); Routh v. Quinn, 20 Cal. 2d 488, 127 P.2d 1 (1942).

18. 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).

19. "We have, indeed, held that impact is not necessary for recovery. . . . The zone-of-danger concept must, then, inevitably collapse because the only reason for the requirement of presence in that zone lies in the fact that one within it will fear the danger of impact." Id. at 733, 441 P.2d at 915, 69 Cal. Rptr. at 75 (citation omitted). "The final anomaly would be the instant case in which the sister . . . would be granted recovery because she was in the 'zone of danger,' but the mother, not far distant, would be barred from recovery." Id. at 747, 441 P.2d at 925, 69 Cal. Rptr. at 85.

20. "[D]uty is not sacrosanct in itself, but only . . . the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection." Id. at 734, 441 P.2d at 916, 69 Cal. Rptr. at 76 (citation omitted). The court reasoned that, in finding no duty was owed to a bystander, past courts had avoided the essential question of "whether the plaintiff's interests are entitled to legal protection against the defendant's conduct." Id. See H. Hart & A. Honoré, Causation in the Law, 230-60 (1962); Comment, Emotional Distress Negligently Inflicted upon Spectator Plaintiff—A Suggested Model for Identifying Protected Plaintiffs Based on Rational Interest, 1969 Utah L. Rev. 369, 400-07; Comment, Negligently Inflicted Emotional Shock From Witnessing the Death or Injury of Another, 10 Ariz. L. Rev. 508, 516-19 (1968); Note, 26 Wash. & Lee L. Rev. 71 (1969); See also Green, Foreseeability in Negligence Law, 61 Colum. L. Rev. 1401 (1961).

21. "[T]he chief element in determining whether defendant owes a duty . . . to plaintiff is the foreseeability of the risk, that factor will be of prime concern in every case." 68 Cal. 2d at 740, 441 P.2d at 920, 69 Cal. Rptr. at 80. The court went on to state that "reasonable foreseeability does not turn on whether . . . an individual would have in actuality foreseen the exact accident . . . [but rather requires the court to decide] what the ordinary man under such circumstances should reasonably have foreseen." Id. at 741, 441 P.2d at 921, 69 Cal. Rptr. at 81. See Note, 43 N.Y.U.L. Rev. 1252 (1968).

22. 68 Cal. 2d at 741, 441 P.2d at 921, 69 Cal. Rptr. at 81.

injured party.[23] The *Dillon* opinion was the first American decision to reject explicitly the mechanical rules theretofore applied.[24]

Archibald is an extension of *Dillon* in its interpretation of *Dillon's* proximity and contemporaneity requirements. The court found these requirements satisfied, stating that "the mother, having witnessed the injuries within moments after the explosion at a time when she was attempting to render aid, fulfilled the 'nearness' requirement in terms of distance as well as time."[25] To impose liability, the court necessarily had to find that injury to a party not at the scene at the time of defendant's negligent conduct was, in fact, foreseeable.

In so doing the court placed strong reliance on the relationship requirement stating, "[a] tortfeasor who causes injury to a child may reasonably expect that the *mother* will not be *distant* and will, *upon witnessing* the event, suffer emotional trauma."[26] The court was, therefore, able to solve the proximity requirement by expanding the concept to include the "vicinity of the accident," and then finding it quite foreseeable that a mother in such a position should be distressed upon witnessing her child's condition. Thus, the interpretation *Archibald* gives to the proximity and contemporaneity requirements is that plaintiff must be in the vicinity of the accident and view the resultant injury within a *reasonable* time of its occurrence.[27] But, absent a close relationship to the injured party, there is little likelihood that presence in the vicinity and the possibility that a subsequent viewing will result in emotional distress would be considered foreseeable.[28]

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23. "In determining . . . whether defendant should reasonably foresee the injury to plaintiff, or, in other terminology, whether defendant owes plaintiff a duty of due care, the courts will take into account such factors as the following: (1) Whether plaintiff was located near the scene . . . as contrasted with one who was a distance away from it. (2) Whether the shock resulted from a direct emotional impact upon plaintiff from the sensory and contemporaneous observance of the accident. . . . (3) Whether plaintiff and the victim were closely related. . . ."

The evaluation of these factors will indicate the degree of the defendant's foreseeability. . . ." 68 Cal. 2d at 740-41, 441 P.2d at 920-21, 69 Cal. Rptr. at 80-81.

24. "Until 1968 no upper court case in this country has held that a mother could recover for her own injuries due to shock and fear for her child as a result of an accident occurring in her view. . . ." Tobin v. Grossman, 24 N.Y.2d 609, 611, 249 N.E.2d 419, 420, 301 N.Y.S.2d 554, 555 (1969).

25. 000 Cal. App. 2d at 000, 79 Cal. Rptr. at 724-25.

26. Id. (emphasis added) (citation omitted).

27. The court failed to define how soon plaintiff must arrive at the accident scene but simply stated "the shock sustained by the plaintiff must be fairly contemporaneous with the accident rather than follow when the plaintiff is informed of the whole matter at a latter date." Id. (citation omitted). This is an expansion of Dillon as there the court stated plaintiff's shock must result from "contemporaneous observance." Dillon v. Legg, 68 Cal. 2d 728, 740, 441 P.2d 912, 920, 69 Cal. Rptr. 72, 80 (1968).

28. In its opinion the court limited the issue to "whether a mother is entitled to recover for mental and emotional illness . . . when she did not actually witness the tort but viewed the child's injuries within moments after the occurrence. . . ." 000 Cal. App. 2d at 000, 79

The strong concentration on this factor, while at the same time minimizing the need to witness infliction of the injury, may be a step towards dispensing with the necessity of a parent viewing the injured body of his child at all.[29] Thus, it may be argued that when a child is severely injured it should be reasonably forseeable that its mother will suffer upon *learning* of his injury,[30] and a requirement of actually viewing the child in his damaged condition is as arbitrary a limitation as the other theories rejected by *Dillon*. For the present, however, *Archibald* implies that the California court, while the most progressive in the country in bystander recovery,[31] is not yet ready to retreat from its own mechanical rule of thumb, that the plaintiff arrive at the scene of the accident and view his child's condition before the court will find his distress foreseeable.

While the California court has chosen to expand the *Dillon* decision, the New York Court of Appeals has recently in *Tobin v. Grossman*[32] expressly refused to follow the *Dillon* approach. In an action by a mother for her own mental distress caused by witnessing[33] an injury to her child, the New York

Cal. Rptr. at 724. While Dillon stated foreseeability would be the conclusive factor in determining defendant's duty, the Archibald court throughout its opinion stressed relationship to victim, in holding plaintiff's injury foreseeable. 000 Cal. App. 2d at 000, 79 Cal. Rptr. at 725.

29. In a recent New York decision which denied bystander recovery the court noted, "the eyewitness limitation provides no rational practical boundary for liability. The distance from the scene and time of notice of the accident are quite inconsequential for the shock more likely results from the relationship with the injured party than what is seen of the accident." Tobin v. Grossman, 24 N.Y.2d 609, 618-19, 249 N.E.2d 419, 424, 301 N.Y.S.2d 554, 561 (1969). See notes 32-39 supra and accompanying text. Prosser § 55, at 354 admits that such restrictions are quite arbitrary but needed to avoid unlimited liability. 2 F. Harper & F. James, The Law of Torts 1039 (1956), suggests the application of the general principles of negligence since arbitrary rules do more harm than good. See Comment, Fear for Another: Psychological Theory and the Right to Recovery, 1969 Law & Social Order 420, 427-31, criticizing the limitations; Note, 43 N.Y.U.L. Rev. 1252 (1968), which suggests a refinement of these limitations.

30. "Every parent who loses a child or whose child of any age suffers an injury is likely to sustain grievous psychological trauma. . . ." Tobin v. Grossman, 24 N.Y.2d 609, 617, 249 N.E.2d 419, 423, 301 N.Y.S.2d 554, 560 (1969). "[A]dvice that one's child has been killed or injured, by telephone, word of mouth, or whatever means, even if delayed, will have in most cases the same impact." Id. The court, however, refused to hold defendant liable.

31. See, e.g., Elmore v. American Motors Corp., 70 Cal. 2d 578, 451 P.2d 84, 75 Cal. Rptr. 652 (1969), which held that the doctrine of strict liability extends to an injured bystander in an action against a manufacturer of an allegedly defective automobile. A factor influencing the court to adopt the strict liability approach is that of loss distribution. Should the court take cognizance of the existence of liability insurance this "loss distribution" factor could influence the court to extend liability in the bystander distress cases. But see Tobin v. Grossman, 24 N.Y.2d 609, 617, 249 N.E.2d 419, 423, 301 N.Y.S.2d 554, 559-60 (1969). Finding the burden of increasing insurance costs demands rejection of such a solution.

32. 24 N.Y.2d 609, 249 N.E.2d 419, 301 N.Y.S.2d 554 (1969).

33. Plaintiff's complaint alleged she had witnessed the accident, but pre-trial examination revealed she had not. The court took plaintiff's allegations as true but its opinion reflects its awareness that should it rule in plaintiff's favor at the trial level, the case would involve a non-eyewitness plaintiff. Id. at 612, 249 N.E.2d at 420, 301 N.Y.S.2d at 555-56.

court questioned "whether the concept of duty in tort should be extended to third persons, who so not sustain any physical impact in the accident or fear for their own safety."[34] Contrary to both *Dillon*'s and *Archibald*'s stress on the foreseeability of the mother's distress, *Tobin* reasoned that "[i]f foreseeability be the sole test, then once liability is extended the logic of the principle would not and could not remain confined."[35] The court rejected the proximity, contemporaneity and relationship considerations *Dillon* had suggested since "none of these standards are of much help if they are to serve the purpose of holding strict rein on liability . . . ."[36] While *Tobin* was decided before *Archibald* it foreshadowed the *Archibald* result when it stated "[a]ny rule based solely on eye-witnessing the accident could stand only until the first case . . . in which the parent is in the immediate vicinity but did not see the accident."[37] In opting for a policy limiting liability in this area of tort law, the court, in drawing the line where it did, seemed to realize that a decision like *Archibald* could lead to the abolition of the need to view the injury at all.[38] The *Tobin* decision, as had *Amaya*, therefore, viewed bystander distress as only an indirect consequence of defendant's negligence, and refused to extend liability even to a parent. New York thus avoided the burden that will inevitably confront the California court, that of determining when bystander distress is *not* foreseeable, as "foreseeability, once recognized, is not so easily limited."[39]

Recovery for negligent infliction of emotional distress has been and will remain in a state of flux.[40] The policy factors to be considered by a court in deciding such a case are numerous.[41] In addition to these policy factors, courts invariably take a skeptical view of mental distress.[42] Despite these obstacles to

34. Id. at 613, 249 N.E.2d at 421, 301 N.Y.S.2d at 556. See also Tymann, Bystander's Recovery for Psychic Injury in New York, 32 Albany L. Rev. 489 (1968).

35. 24 N.Y.2d at 616, 249 N.E.2d at 423, 301 N.Y.S.2d at 559.

36. Id. at 618, 249 N.E.2d at 424, 301 N.Y.S.2d at 561.

37. Id. at 617, 249 N.E.2d at 423, 301 N.Y.S.2d at 560.

38. Id. at 617, 249 N.E.2d at 423, 301 N.Y.S.2d at 560-61.

39. Id. at 615, 249 N.E.2d at 422, 301 N.Y.S.2d at 558. In future cases New York will apparently resort to the "zone of danger" or "fear for another" theories in determining when the defendant's duty extends to a bystander.

40. 2 F. Harper & F. James, The Law of Torts 1035-36 (1956); Prosser § 55, at 352-54; Amdurky, The Interest in Mental Tranquillity, 13 Buffalo L. Rev. 339 (1963); Brody, Negligently Inflicted Psychic Injuries: A Return to Reason, 7 Vill. L. Rev. 232 (1962); Goodhart, The Shock Cases and Area of Risk, 16 Modern L. Rev. 14 (1953); Magruder, Mental and Emotional Disturbance in the Law of Torts, 49 Harv. L. Rev. 1033 (1936); see Smith, Relation of Emotions to Injury and Disease: Legal Liability for Psychic Stimuli, 30 Va. L. Rev. 193 (1944).

41. 24 N.Y.2d at 615, 249 N.E.2d at 422, 301 N.Y.S.2d at 558; see Comment, Bystander Recovery for Mental Distress, 37 Fordham L. Rev. 429 (1969).

42. Brody, Negligently Inflicted Psychic Injuries: A Return to Reason, 7 Vill. L. Rev. 232-38 (1962). See also Judge Keating's dissent in Tobin demanding stringent proof of injury to avoid spurious claims. 24 N.Y.2d at 620-21, 249 N.E.2d at 425, 301 N.Y.S.2d at 563. See Comment, Fear for Another: Psychological Theory and the Right to Recovery, 1969 Law & Social Order 420, 431-33, which suggests the use of expert testimony to establish plaintiff's injury.

recovery the California court chose to cover new ground in *Dillon* and has extended its position in *Archibald*. In so doing the court has followed Professor Prosser's suggestions as to when recovery should be permitted.[43] Having followed his guidelines in the past, the court might also take heed of his admonition that "[i]t would be an entirely unreasonable burden on all human activity if the defendant who has endangered one man were to be compelled to pay for the lacerated feeling of . . . every bystander shocked at an accident"[44] in deciding where to draw the line. If the California court, in future decisions can demonstrate that the concept of foreseeability enables it to adequately limit the "legal consequences of wrongs to a controllable degree,"[45] other jurisdictions might perhaps be more inclined to follow California's lead.[46] The application of legalistic rules to the bystander cases has proven to be not only unjust but opposed to experience and logic as well.[47] While these arbitrary rules do afford an answer to a highly debatable area of the law the California court's application of general negligence principles to the facts of each case appears to be the more meritorious solution to the problem.

Warranties—Blood Transfusions—Extension of Implied Warranties.— Plaintiff, while a patient at defendant hospital, allegedly became infected with homologous serum hepatitis[1] as a result of a transfusion administered him by the hospital from blood obtained, for a fee from defendant blood bank. Plaintiff sought to recover damages against both defendants on the theories of negligence and breach of implied and express warranties. The lower court granted the hospital's motion to dismiss the warranty cause of action but, in denying a motion for summary judgment by defendant National Blood Bank, Inc., held that a cause of action for breach of warranty might lie against the blood bank

43. See Prosser § 55, at 354.

44. Id. at 353.

45. 24 N.Y.2d at 619, 249 N.E.2d at 424, 301 N.Y.S.2d at 561.

46. In mental distress actions courts have recently dispensed with the impact requirement in favor of a more liberal zone of danger theory. See, e.g., Niederman v. Brodsky, 000 Pa. 000, 261 A.2d 84 (1970); Robb v. Pennsylvania R.R., 210 A.2d 709 (Del. 1965); Falzone v. Busch, 45 N.J. 559, 214 A.2d 12 (1965); Battalla v. State, 10 N.Y.2d 237, 176 N.E.2d 729, 219 N.Y.S.2d 34 (1961). Although these decisions did not involve emotional distress caused by witnessing another's injury, they reflect an effort by the courts to abandon the mechanical rules thought necessary to limit recovery. As this area of the law develops, bystander recovery for emotional distress should follow suit.

47. See notes 8 & 9 supra.

1. "A form of hepatitis (inflamation of the liver) caused by a virus and transmitted by injections of blood (as in transfusions), the injection of blood products . . . or the use of an unsterile syringe, containing the causative virus . . . . The condition is also known by the following names: homologous serum jaundice, inoculation jaundice, post-vaccinal jaundice, and transfusion jaundice." 1 J. Schmidt, Attorneys' Dictionary of Medicine and Word Finder 414 (1969) (italics omitted).

if the facts, as deduced from a full trial, so warranted it. *Carter v. Inter-Faith Hospital of Queens*, 60 Misc. 2d 733, 304 N.Y.S.2d 97 (Sup. Ct. 1969).

The vital importance of the blood transfusion in modern medicine is widely accepted: "The development of the modern blood transfusion in the past half century is recognized by the medical profession as one of its finest achievements. Without today's blood transfusion many of the modern surgical practices would not be possible, and hemorrhage would be a far greater cause of death."[2]

The transfusion of human blood during surgery and other medical treatments is generally regarded to be a safe medical technique.[3] However, there have been some cases in this area seeking recovery for injury or death resulting from infected transfusions.[4] These actions, directed against both hospitals and blood banks, have proceeded primarily on theories of negligence,[5] breach of express warranty,[6] and breach of implied warranty.[7]

A cause of action in negligence generally requires the plaintiff to show the existence of a duty owed to him by the defendant, a breach of that duty by failure to act reasonably, and resulting injury to one within the foreseeable orbit of danger.[8] Most of the cases in the area of blood transfusion which have proceeded on the negligence theory have met with little success. Except in cases involving obvious misfeasance, the problem lies in the difficulty of proving the failure to act reasonably on the part of the hospital or the blood bank. The reason for this is that, until very recently,[9] there had been no test that hospitals

2. Note, Liability for Blood Transfusion Injuries, 42 Minn. L. Rev. 640 (1958) citing Gradwohl, Legal Medicine 524 (1954); Kabat, Blood Group Substances 2 (1956); Davidson, Indications and Contraindications for Whole Blood and its Various Fractions, 24 Am. J. Clin. Path. 349 (1954); Wiener, Grant, Unger & Workman, Medicolegal Aspects of Blood Transfusions, 151 A.M.A.J. 1435 (1953) (footnotes omitted).

3. See Annot., 59 A.L.R.2d 761, 771 (1958).

4. Transfusion is "[t]he transfer of blood from one person to another, usually by the indirect method, i.e., by collecting the blood in a container and then introducing it into the vein of the recipient. The direct method . . . is now seldom used." 2 J. Schmidt, supra note 1, at 827.

5. E.g., Hoder v. Sayet, 196 So. 2d 205 (Dist. Ct. App. Fla. 1967).

6. Payton v. Brooklyn Hosp., 21 App. Div. 2d 898, 252 N.Y.S.2d 419 (2d Dep't 1964) (mem.), aff'd mem., 19 N.Y.2d 610, 224 N.E.2d 891, 278 N.Y.S.2d 398 (1967); Napoli v. St. Peter's Hosp., 213 N.Y.S.2d 6 (Sup. Ct. 1961).

7. Whitehurst v. American Nat'l Red Cross, 1 Ariz. App. 326, 402 P.2d 584 (Ct. App. 1965); Russell v. Community Blood Bank Inc., 185 So. 2d 749 (Dist. Ct. App. Fla. 1966), modified, 196 So. 2d 115 (Fla. 1967). The lower court also analyzed strict liability under Restatement (Second) of Torts § 402A (1965); Jackson v. Muhlenberg Hosp., 53 N.J. 138, 249 A.2d 65 (1969); Perlmutter v. Beth David Hosp., 308 N.Y. 100, 123 N.E.2d 792 (1954); Gile v. Kennewick Pub. Hosp. Dist. 48 Wash. 2d 774, 296 P.2d 662 (1956). In one New York case, Krom v. Sharp & Dohme, Inc., 7 App. Div. 2d 761, 180 N.Y.S.2d 99 (3rd Dep't 1958) (mem.) an attempt to impose warranty liability on a blood bank, claiming that the hospital in purchasing the blood was acting as patient's agent, was held not to state a cause of action.

8. See W. Prosser, Torts § 301 (3d ed. 1964); Restatement (Second) of Torts § 281 (1965). See also Palsgraf v. Long Island R.R., 248 N.Y. 339, 162 N.E. 99 (1928).

9. N.Y. Times, Feb. 4, 1970, at 12, col. 1; id. Oct. 19, 1969, § 1 at 1, col. 2.

or blood banks could have used to determine the presence of the virus in the donated blood.[10]

Actions for breach of express warranty under the Uniform Commercial Code,[11] requiring an express contractual relationship, have been successful in several cases.[12] However, success has, of necessity, been rather limited since proof of the express statements of warranty must be shown to have been made to the patient by an employee of the hospital, usually the doctor.[13] Such an express promise to cure is rarely found today.[14]

Still other cases have proceeded on the theory of breach of implied warranties,[15] contending that the hospital's supplying of "bad" blood to the patient was a breach of the warranty of "merchantability",[16] specifically that of "fitness for ordinary uses"[17]—that is, the hospital and blood bank must provide safe blood for a safe transfusion. Such cases have had mixed results. In *Perlmutter v. Beth David Hospital*,[18] the New York Court of Appeals held that plaintiff failed to state a valid cause of action for breach of implied warranty of "merchantable quality"[19] of the blood against either the hospital or the blood bank. The court's reasoning was that the warranty was applicable only to contracts for sale and that the transaction between hospital and patient viewed in its entirety, was in reality an agreement for care and treatment, with the incidental sale of blood and other necessary commodities.[20] Since "service" predominated, the contract was an indivisible one and the warranty was held not to apply. The court also recognized what a number of commentators felt to be the underlying basis for the decision: "If, however, the court were to stamp as a sale the supplying of blood—or the furnishing of other medical aid—it would mean that the hospital, no matter how careful, no matter that the disease-producing poten-

10. See Perlmutter v. Beth David Hosp., 308 N.Y. 100, 106, 123 N.E.2d 792, 795 (1954). See also notes 32-34 infra and accompanying text.

11. N.Y. U.C.C. § 2-313 (1964).

12. E.g., Napoli v. St. Peter's Hosp., 213 N.Y.S.2d 6 (Sup. Ct. 1961). But see Payton v. Brooklyn Hosp., 21 App. Div. 2d 898, 252 N.Y.S.2d 419 (2d Dep't 1964) (mem.) aff'd mem., 19 N.Y.2d 610, 224 N.E.2d 891, 278 N.Y.S.2d 398 (1964).

13. See, e.g., Payton v. Brooklyn Hosp., 21 App. Div. 2d 898 (2d Dep't 1964) (dissenting opinion).

14. See generally 6 A. Corbin, Contracts § 1327 (1962).

15. Negligence or other specific conduct need not be shown to establish a cause of action in breach of implied warranty. " 'Implied' warranties rest so clearly on a common factual situation or set of conditions that no particular language or action is necessary to evidence them and they will arise . . . unless unmistakably negated." N.Y. U.C.C. § 2-313, Comment 1; see also Farnsworth, Implied Warranties of Quality in Non-Sales Cases, 57 Colum. L. Rev. 653, 670-71 (1957).

16. N.Y. U.C.C. § 2-314 (1964).

17. N.Y. U.C.C. § 2-314(2)(c) (1964).

18. 308 N.Y. 100, 123 N.E.2d 792 (1954).

19. This case was decided under the Uniform Sales Act § 15(2), N.Y. Pers. Prop. Law 96 (1)-(2) (1962), as amended, N.Y. U.C.C. § 2-314 (1964). The language of these two sections is substantially similar.

20. 308 N.Y. at 104, 123 N.E.2d at 794.

tial in the blood could not possibly be discovered, would be held responsible, virtually as an insurer, if anything were to happen to the patient as a result of 'bad' blood."[21] The "Sales-Service" theory of the *Perlmutter* decision has been applied in a number of cases, in different jurisdictions, holding that implied warranties of merchantability do not arise in "service" dominated contracts.[22] This rationale has even been extended to other contracts for service, including those in the commercial area.[23] Three states—Arizona,[24] California,[25] and Massachusetts[26]—have gone so far as to provide by statute that for warranty purposes, the transfer of human blood constitutes a service and not a sale.

However, the *Perlmutter* reasoning is vulnerable. A comparison of earlier New York cases[27] involving leasing agreements, which are not considered contracts for sale[28] but rather analagous to them,[29] seems to indicate that the New York law would not normally have followed the strict "Sales-Service" distinction in *Perlmutter*, had it not been for underlying policy considerations.[30] These and other leasing agreement cases, involving the rental of trucks and other machinery, have proceeded on the theory that a lessor-leasee relationship contains "[m]ost of the significant criteria which in sales transactions give rise to an implied warranty of fitness or which support a cause of action based on strict liability in tort . . . ."[31] A number of other jurisdictions have found implied warranties to be present in various other forms of contracts for services.[32] In the area of blood transfusions, three jurisdictions, Illinois,[33]

21. Id. at 106, 123 N.E.2d at 793-94.

22. Sloneker v. St. Joseph's Hosp., 233 F. Supp. 105 (D. Colo. 1964); Whitehurst v. American Nat'l Red Cross, 1 Ariz. App. 326, 402 P.2d 584 (Ct. App. 1965); Lovett v. Emory Univ. Inc., 116 Ga. App. 277, 156 S.E.2d 923 (1967); Balowitsch v. Minneapolis War Memorial Blood Bank, Inc., 270 Minn. 151, 132 N.W.2d 805 (1965); Gile v. Kennewick Pub. Hosp. Dist., 48 Wash. 2d 774, 296 P.2d 662 (1956) (decided partly on basis of charitable immunity).

23. E.g., Canavan v. City of Mechanicville, 229 N.Y. 473, 128 N.E. 882 (1920); Aegis Prods., Inc. v. Arriflex Corp., 25 App. Div. 2d 639, 268 N.Y.S.2d 185 (1st Dep't 1966). See Comment, Sale of Goods in Service-Predominated Transactions, Fordham L. Rev. 115, 119 (1968).

24. Ariz. Rev. Stat. Ann. § 36-1151 (Supp. 1969).

25. Cal. Health & Safety Code § 1606 (West Supp. 1970).

26. Mass. Gen. Laws Ann. ch. 106 § 2-316(5) (Supp. 1970) (additional subsection added to U.C.C. § 2-316).

27. Hoisting Engine Sales Co. v. Hart, 237 N.Y. 30, 142 N.E. 342 (1923); Gambino v. John Lucas & Co., 263 App. Div. 1054, 34 N.Y.S.2d 383 (4th Dep't 1942).

28. N.Y. U.C.C. § 2-106(1): "'Contract for sale' includes both a present sale of goods and a contract to sell goods at a future time. A 'sale' consists in the passing of title from the seller to the buyer for a price."

29. See Farnsworth, supra note 14, at 655-60.

30. 308 N.Y. at 106, 123 N.E.2d at 795.

31. Cintrone v. Hertz Truck Leasing & Rental Serv., 45 N.J. 434, 456, 212 A.2d 769, 781 (1965).

32. Italia Societa v. Oregon Stevedoring Co., 376 U.S. 315 (1964) (warranty of workmanlike service); Broyles v. Brown Eng'r Co., 275 Ala. 35, 151 So. 2d 767 (1963) (warranty of

Florida,[34] and New Jersey,[35] have seemingly rejected the technical distinction of *Perlmutter*. The Florida District Court of Appeals indicated that "[a]lthough many of the decisions . . . are based on the technical distinction between a service and a sale, the factor underlying the decisions is the inability, in the present state of medical knowledge, to detect or remove the virus which causes serum hepatitis."[36]

The court in *Carter*, aware that all jurisdictions do not accept *Perlmutter's* holding of no liability of the hospital and its extension to include blood banks, apparently decided to study the question anew. In so doing, the court relied heavily on the decisions of the other jurisdictions[37] and on the commentaries of a number of text writers.[38] The court first decided that the transaction with respect to the blood bank was clearly a sale[39] within the meaning of section 2-314 of the Uniform Commercial Code,[40] and that National Blood Bank, Inc.

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plans and specifications to reasonably accomplish purpose) (decision questioned in Note, Implied Warranties in Service Contracts, 39 Notre Dame Law. 680 (1964); Hill v. Polar Pantries, 219 S.C. 263, 64 S.E.2d 885 (1951) (warranty of plans and specifications for specific purpose).

33. Cunningham v. MacNeal Memorial Hosp., 113 Ill. App. 2d 74, 251 N.E.2d 733 (1969). The facts here were essentially the same as in Carter. The court however, in this case, held that a warranty cause of action existed against the hospital and that the case must go to a full trial.

34. The Florida courts have rejected the "Sales-Service" rationale to the extent of allowing warranty recovery against the blood banks, but not against the hospitals. White v. Sarasota County Pub. Hosp. Bd., 206 So. 2d 19 (Dist. Ct. App. Fla. 1968); Hoder v. Sayet, 196 So. 2d 205 (Dist. Ct. App. Fla. 1967); Russell v. Community Blood Bank, Inc., 185 So. 2d 749 (Dist. Ct. App. Fla. 1966), modified, 196 So. 2d 115 ((Fla. 1967) (recovery limited to injuries from substances capable of detection).

35. Jackson v. Muhlenberg Hosp., 53 N.J. 138, 249 A.2d 65 (1969). Some idea of the extent to which the New Jersey courts would extend implied warranties of merchantability under the U.C.C. is shown in Newmark v. Gimbel's, Inc., 102 N.J. Super. 279, 246 A.2d 11 (Super. Ct. App. Div. 1968) involving not a blood transfusion but the administration of a hairdressing product. There the court stated that "[t]he policy reasons applicable in the case of sales would likewise justify the extension of liability for breach of warranty to any commercial transaction where one person supplies a product to another, whether or not the transaction be technically considered as a sale." Id. at 286, 246 A.2d at 15.

36. Russell v. Community Blood Bank, Inc., 185 So. 2d 749, 752 (Dist. Ct. App. Fla. 1966), modified, 196 So. 2d 115 (Fla. 1967). On the appeal, the Florida Supreme Court, while affirming as to the existence of the cause of action, revised the opinion of the District Court of Appeals. The court held that it was error for the lower court to determine, as a matter of law whether or not a recognized method of detecting serum hepatitis exists.

37. White v. Sarasota County Pub. Hosp. Bd., 206 So. 2d 19 (Dist. Ct. App. Fla. 1968); Russell v. Community Blood Bank, Inc., 185 So. 2d 749 (Dist. Ct. App. Fla. 1966), modified, 196 So. 2d 115 (Fla. 1967); Jackson v. Muhlemberg Hosp., 53 N.J. 138, 249 A.2d 65 (1969).

38. 2 L. Frumer & Friedman, Products Liability § 16.03[4] (1968); Restatement (Second) of Torts § 402A Comment a (1965).

39. N.Y. U.C.C. § 2-106(1) (1964).

40. 60 Misc. 2d 733, 736, 304 N.Y.S.2d 97, 100 (Sup. Ct. 1969).

was clearly a "merchant"[41] with respect to the sale of blood and thus the implied warranty of merchantability could attach to its sale.[42] Having made these determinations, the court concluded that a cause of action for breach of warranty may lie against the blood bank and declined to dismiss as a matter of law on the mere "Sales-Service" distinction.[43]

It should be noted that the court in *Carter* did not postulate the blood bank's liability as a matter of law. Rather, it stated that the facts must be "developed at a trial so that public policy and interest may be considered."[44] Up to the time of the *Carter* decision, the courts have had to balance the social interest for the safety of the individual with the interests of the hospital and blood bank (in light of the absence of an adequate test to determine the presence of hepatitis in the blood) and the interests of the general public in assuring the ready availability of blood for medical treatments.[45] Conditions are changing, however. The traditional belief that risk of loss should be borne by those best able to do so, the availability of insurance and other means of protection[46] for hospitals and blood banks and the very recent disclosure of a workable, although still experimental, test[47] to determine the presence of the virus in the donor's blood, will no doubt be matters heavily weighed by the court in future decisions.

The *Carter* court decision is a welcome attack on *Perlmutter*. It might be critized, however, for not going far enough and holding that an action for breach of warranty might also lie against the hospital.[48] Since the public policy con-

41. "'Merchant' means a person who deals in goods of the kind . . . ." N.Y. U.C.C. § 2-104(1) (1964).

42. 60 Misc. 2d at 736, 304 N.Y.S.2d at 101.

43. In so holding, the court, recognizing the important policy considerations involved stated that, "[w]hile on the face of the pleadings . . . there seems to exist a cause of action for breach of warranty . . . the approach taken . . . in Jackson . . . is correct. All factors in regard to public policy must be considered and there must be a weighing of interest between the unfortunate patients who contract the disease and the general public who are in constant need of blood from these commercial blood banks." 60 Misc. 2d at 737, 304 N.Y.S.2d at 101.

44. Id. at 737, 304 N.Y.S.2d at 102. The appropriateness of the court's approach is further indicated when it is considered that even if this transaction be deemed a "sale" that, when policy is considered, a "usage of the trade" could be found, which would amount to an exclusion of the warranty within the meaning of section 2-316(3)(c) of the code.

45. See generally Jackson v. Muhlenberg Hosp., 53 N.J. 138, 249 A.2d 65 (1969); Note, Liability for Blood Transfusion Injuries, 42 Minn. L. Rev. 640 (1958); 18 Okla. L. Rev. 104 (1965).

46. With regard to the possible liability of the hospital, courts must also consider that a hospital found liable should in many cases be able to recover its loss from the blood bank supplying the "bad" blood.

47. N.Y. Times, Oct. 19, 1969, § 1 at 1, col. 2. An improved version of this test is now being put into general use in at least one New York blood bank. Id., Feb. 4, 1970, at 12, col. 1.

48. The court summarily granted the motion to dismiss by the hospital, on the basis of

siderations were as equally important for the hospital as it was for the blood bank, the better course would have been to hold that a possible warranty action might also exist against the hospital[49] and allow the facts as to its warranty to go to trial also.[50] Three facts would have warranted such action: the ever increasing criticism in New York of the *Perlmutter* doctrine, the decisions in other jurisdictions directly contrary to *Perlmutter*, and most importantly, the fact that the *Carter* court in recognizing that the transfer of blood to the hospital by the blood bank was a sale within section 2-314 of the Uniform Commercial Code, had already struck at the basis of *Perlmutter*.

Perlmutter, with but a brief consideration of the case and its subsequent history with regard to the liability of hospitals. 60 Misc. 2d at 734, 304 N.Y.S.2d at 98-99.

49. Charitable Immunity would not bar recovery against the hospital in New York. Bing v. Thunig, 2 N.Y.2d 656, 143 N.E.2d 3, 163 N.Y.S.2d 3 (1957) (overruling prior cases to contrary); 15 Am. Jur. 2d Charities § 158 (1964).

50. The extension of the warranty in the instant case would not create difficulties for the New York courts. Absent statute, under the rule of Greenberg v. Lorenz, 9 N.Y.2d 195, 173 N.E.2d 773, 213 N.Y.S.2d 39 (1961), "judge-made" law can be unmade or corrected by the courts themselves when the court finds "inequity."