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# Torts

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Where desired, this practical coercion can be transferred to the noticed motion simply by appending to the notice a warning, as strongly worded as necessary, to the effect that an order may be entered at the hearing which will bind the notice recipient under pain of contempt of court for failure to obey. In this way the noticed motion can assume the desirable aspects of the show cause order while doing away with the practical disadvantages. There remains little, if any, reason for retaining the show cause order procedure.

In summary, the show cause order has no more legal coercive effect as the show cause order, it eliminates the ex parte hearing, and is a less complex procedural device. Abandonment of the show cause order, with the two noted exceptions,[7] would seem to be amply justified.

C. DAVID SHEPPARD

## TORTS

**Warrantless Arrest.** The Washington Supreme Court in the case of *Plancich v. Williamson*,[1] has indicated that the police of this state will receive judicial protection in suits instituted by private individuals because of arbitrary and unreasonable police action. In the *Plancich* case, the court sustained the right of the police to arrest a citizen of this state without a warrant, on the barest of circumstances supporting the police contention that there was probable cause for the arrest. The *Plancich* case is more remarkable than other decisions of the court on this point, since neither the court nor the police department could decide if the facts which were relied upon to support a warrantless arrest of the suspect justified a suspicion that he had committed a felony, or that he was dangerously insane. It is submitted that the following facts, upon which the court and the police department relied, support neither contention.

About 10:30 one Sunday evening, Jerry Plancich, father of Louis Plancich, the plaintiff, came into the Olympia Police Station, and in very erratic and broken English told the acting desk sergeant that his son, armed with two guns, a small one and a big one, had knocked on his bedroom door and threatened to kill him. Acting upon the complaint, the sergeant and one other officer went to the Plancich home. The officers knocked on the door but received no response. They then looked through a window and observed Louis Plancich sitting at a

[7] Note 4 *supra*.

[1] 157 Wash. Dec. 265, 357 P.2d 693 (1960).

table in the kitchen. The house at that time was lighted by a single candle. Louis' appearance, according to the testimony, was somewhat odd. He had a very heavy growth of beard, disheveled hair, and was staring off into space. After shouts and threats which Louis did not answer, the officers called the assistant chief of police who soon arrived with additional reinforcements, including a detachment from the fire department. Repeated demands produced no response from Louis, who retired to his bedroom and locked his door.

The police officers entered the house through the father's bedroom window, and from the outside of Louis' bedroom door told him to throw out his guns and open the door, or it would be broken down. Louis answered (his first words to the police) that he had no guns. Thereupon the police broke a hole in the door, and released one bolt. There was, however, a second bolt, which apparently escaped the notice of the police squad. Louis released the second bolt. The police rushed into the room, threw Louis to the floor (injuring him), handcuffed him, and removed him to the Olympia Police Station. The Plancich home was searched by the police, but no guns were found.

Louis was held in the city jail from 1:45 Monday morning until approximately 2:00 the next afternoon, when he was removed to the Thurston County Jail, where he remained until 6:00 p.m. the following Wednesday. He was not allowed to communicate with persons outside the jail until Tuesday afternoon, and persons on the outside were not allowed to contact him. He was finally released, after a total of 52 hours of confinement when a psychiatrist pronounced him "grossly sane." Louis himself was required to furnish the psychiatrist for the examination that resulted in his release. No information was ever filed, no warrant was issued, and he was never allowed to go before a magistrate to clear his name.

Louis brought suit for false arrest and imprisonment against the police officers responsible for the indignity. The police attempted to justify the arrest on the ground that they had a reasonable belief that Louis had committed a felony by threatening or attempting to kill his father with a deadly weapon, or in the alternative that he was dangerously insane. Louis' arrest was entered in the station's books on the ground of "inv. sanity." Evidence produced at the trial revealed that Jerry Plancich, the father, was emotionally upset because of his wife's death the year before; that he had nightmares and imagined that the dead would come back to haunt him; that he was addicted to wandering away from home; and that he was excitable and senile.

(The record does not indicate when this knowledge first came to the attention of the police officers.)

The trial judge sitting without a jury found that the arrest and imprisonment were unjustified, and awarded Louis real and compensatory damages (Louis had been required to undress at the police station, and his clothes and keys were never returned to him). The supreme court reversed.

That the police of the State of Washington have the authority to arrest a person on reasonable suspicion of the commission of a felony without a warrant, there can be no doubt.[2] When such an arrest is made, however, the police officer must be acting under a justifiable belief that the accused is guilty. The definition of the probable cause that is necessary to support such an arrest has been set forth by the court: "Proper cause for arrest has often been defined to be a reasonable bound of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in believing the accused to be guilty."[3] The court has further elucidated the requirements to validate a warrantless arrest by saying:

> [An officer] ... has no authority to arrest on the mere belief that a person has been guilty of an offense, if such belief has no foundation in fact or sufficient circumstances on which to rest, or if he unreasonably acts at the request of a third person who himself has a mere suspicion of the guilt of the one who is arrested.[4]

Where an officer arrests without the necessary probable cause the arrest without the warrant is invalid,[5] and the arresting officer subjects himself to civil liability.[6]

The police not only have the power to arrest without a warrant where there is reasonable belief that the accused has committed a felony, but also have the power to restrain a person when they have reasonable cause to believe that he is so mentally ill as to be dangerous to himself or others or to property.[7]

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[2] State v. Hughlett, 124 Wash. 366, 214 Pac. 841 (1923); Eberhart v. Murphy, 113 Wash. 449, 194 Pac. 415 (1920); Greenius v. American Surety Co., 92 Wash. 401, 159 Pac. 384 (1916).

[3] State v. Hughlett, *supra* note 2, at 368, 214 Pac. at 843.

[4] 4 AM. JUR. *Arrest* § 48 (1936), cited with approval in Kalkanes v. Willestoft, 13 Wn.2d 127, 130, 124 P.2d 219, 220 (1942).

[5] State v. Kinnear, 162 Wash. 214, 298 Pac. 449 (1931).

[6] Kalkanes v. Willestoft, 13 Wn.2d 127, 124 P. 2d 219 (1942); Taylor v. Shields, 183 Ky. 669, 210 S.W. 168 (1919).

[7] The appellants in the *Plancich* case relied upon the provisions of RCW 71.02.120 which provided: "In emergencies requiring immediate apprehension and restraint, or at times when superior courts are not open for business, any sheriff or other police officer, may, when he shall have reasonable cause to believe any person is so mentally

The power to arrest or restrain without a warrant is the exception in our constitutional form of government which seeks to establish and protect the rights of the individual citizens.[8] Normally the police officer is required to present his evidence to an unbiased magistrate who weighs the rights of the individual citizen against the desirability of having him incarcerated for the good of the public and the effective enforcement of the law. If the arrest is justified in the eyes of the magistrate, a warrant is issued, and the accused is then legally taken into custody. To clothe the police officer with the power to make a warrantless arrest is to take away from the individual a protection from arbitrary and unreasonable police action. For this reason, that power should be restricted and narrowed to those situations where it is most obviously needed. No wider latitude should be allowed in making an arrest without a warrant than is allowed in securing one.[9] Expansion of the power to arrest without a warrant is the only step needed to lead to police state rule.

If the consciences of the police officers or the departmental policy and discipline are not sufficient to restrain individual police officers from rash and unreasoned action resulting in the deprivation of private citizens' rights, then the duty falls upon the courts. The Washington court, however, in recent years has sustained the validity of warrantless arrests where the existence of probable cause at the time of the arrests was doubtful.[10] The *Plancich* case is an example of this position.

ill as to be unsafe to be at large, apprehend such person without warrant, wherever found...."

This provision was deleted by the legislature in an amendment to RCW 71.02.120 (Wash. Sess. Laws 1959, c. 196). A new provision was added in RCW 71.03.020 which provides: "Whenever any person becomes so mentally ill as to be dangerous to himself or others, or to property, and to require immediate care, treatment, or restraint, any sheriff, peace officer, superintendent, or chief medical officer in charge of a hospital licensed by the state of Washington, who has reasonable cause to believe such is the case, may apprehend and/or detain such person in custody for his best interest and protection pursuant to the provisions of this chapter."

[8] U.S. CONST. amend. IV, provides that the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. The Supreme Court in Palko v. Connecticut, 302 U.S. 319 (1937), held that specific guarantees in particular amendments are valid as applied to state action through the force of the fourteenth amendment. The Court has pointed out that the state action to which the fourteenth amendment applies includes action of state courts and state judicial officials. Shelley v. Kraemer, 334 U.S. 1 (1947). WASH. CONST. art. 1, § 7, provides only that a "person shall not be disturbed in his private affairs, or his home invaded, without authority of law."

[9] State v. Miles, 29 Wn.2d 921, 190 P.2d 740 (1948).

[10] In State v. Brooks, 157 Wash. Dec. 320, 357 P.2d 735 (1960), a police officer, while questioning an occupant in a car concerning the ownership of the car, noticed some uncuffed pants in the front seat. The officer immediately arrested the defendant on suspicion of burglary. In State v. Smith, 156 Wash. Dec. 384, 353 P.2d 155 (1960), the police officers had earlier investigated the scene of a burglary where a safe and

The court stated that there were two questions to be resolved: the reasonable beliefs of the police officers concerning Louis' actions, and their reasonable beliefs as to his mental condition. It was decided that considering all the circumstances, including the complaint of Jerry, Louis' odd appearance and behavior, and the obvious apprehension of the police as evidenced by the large number of police officers, firemen, and fire trucks present, the officers had reason to believe that probable cause existed for the arrest on either the ground that Louis was not safe to be at large, or that a felony had been committed. Significantly, the court did not indicate what part of the evidence led them to either conclusion.

The police suspected Louis of the commission of a felony (probably first degree assault, assault with a deadly weapon[11]) on the basis of an uncorroborated and unsworn statement of Jerry Plancich. Nothing indicates that Jerry was questioned by the police as to whether he had in fact seen a gun (and from his own statement he could not have, since the alleged threats were made through a closed door). The court itself indicates that the accusation of Jerry was not sufficient to support a warrantless arrest: "We do not imply that Jerry Plancich's statement to the acting desk sergeant should have been taken fully and completely at face value."[12]

On arrival at the Plancich home the police officers found Louis disheveled, bearded and staring into space by candle light. To find a man in this condition may be unusual, but it has no relation to the commission of a felony. Louis, sitting quietly in his own home, refused to answer the shouts of the police officers (a man is privileged to resist an unlawful arrest[13]), but he made no attempt to run away or escape. It is difficult to see how the court could conclude that this was a circumstance indicating that Louis had committed a felony.

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power tools, including a red power lawn mower, had been stolen. Later that same day the same officers acted in response to a complaint by a Mr. Fruetal that he had been awakened by loud noises coming from his neighbor Tomlin's home. Fruetal reported the noises *sounded like* someone pounding on a safe. The police officers went to the Tomlin home and noticed a new red law mower in the garage. Apparently no effort was made to establish whether it was the stolen item. They found the defendant Smith asleep in a house trailer near the garage and arrested him immediately. In State v. Young, 39 Wn.2d 910, 239 P.2d 858 (1952), a police officer, acting in response to a general description of a robbery suspect broadcast over the police radio, arrested the defendant for driving in the general vicinity of the robbery in an automobile of the same make and color of the getaway vehicle. No effort was made to establish a connection between the defendant and the robbery.

[11] RCW 9.11.010.

[12] 157 Wash. Dec. 265, 272, 357 P.2d 693, 697 (1960).

[13] State v. Rousseau, 40 Wn.2d 92, 241 P.2d 447 (1952).

From the police officers' description of Jerry Plancich, they could well expect that his son also would be somewhat unusual. Louis looked odd to the police officers peeping through the windows of the Plancich home. The police had every reason to expect that Louis' behavior would be odd.

The presence of a large number of highly excited police officers and firemen with trucks (as noted twice by the court in its opinion) does not add to the existence of probable cause for believing Louis Plancich had committed a felony, or that he was dangerously insane, since the onslaught of police and firetrucks upon the scene was a result of the police department's hasty and inaccurate judgment of the situation. The police should not be allowed to establish probable cause for a warrantless arrest simply by calling in reinforcements, including the fire department and their trucks.

Louis' conduct was odd, but eccentricity is not a crime, nor does it indicate that the eccentric has committed a crime. All that can be said is that Louis did not conform to the general standard of neatness, cleanliness, and electric lighting. But in the United States Louis has the right to be eccentric, and he should not be *more* subject to arrest because of it.

As to Louis' arrest on the charge of being dangerously insane, there is nothing in the record to indicate that he was in such a mental state. His actions endangered no one. No emergency existed that would justify an arrest under the statute in force at that time.[14]

The extraordinary power to arrest without a warrant should be held only to those occasions where it is most needed. Not only are the rights of individual citizens at stake (particularly the right to *be* an individual), but effective law enforcement is involved. Under our system of government, where the police are not clothed with plenary powers, effective police protection depends to a large extent upon the cooperation of the public. If the police are allowed to lawlessly take from the people those rights which the police are employed to protect, and if they are not held responsible for their foibles, the public will lose faith in the police, disrespect for police action will increase, and indifference or outright hostility will result, all at the cost of effective police protection.

The supreme court's justification of Louis Plancich's arrest because he looked and acted odd gives the police of this state judicial permission to arrest an eccentric person on the basis of a complaint from an

[14] See statutes cited, note 7 *supra*.

uncorroborated witness who need not be reliable. To reach this result the court overruled the verdict of the trial judge who heard the testimony given by the parties. When there is no conflict in the evidence, the question of probable cause for arrest is one of law, and the supreme court can decide the question.[15] But the question of whether probable cause existed is one that is unsupported by a history of judicial precedents. Each case is decided on its own facts and merits. The trial judge who presides at the taking of the evidence is in the best position to make legal determinations which are controlled wholly by the facts of the particular case. The procedure of the Washington court in the past has been to give weight to the trial judge's findings.[16]

The court further decided that if the arrest of Louis was justified, his 52 hour incarceration (the first approximately 30 hours of which were incommunicado) without being taken before a magistrate or formally charged was also justified. The majority made no mention that the period of incommunicado incarceration was absolutely illegal.[17]

The decision of the court refusing to sustain the right of an individual to be free from, and to obtain redress for, arbitrary and unreasonable police action cannot fail to destroy public confidence in the police and consequently reduce efforts toward cooperation between police and public. As a result the police will have to lean even more heavily upon unreasonable actions to achieve that same standard of effective protection that they could attain with the full cooperation of the public. This decision places too high a price upon the police protection in this state.[18]

DALE KREMER

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[15] Eberhart v. Murphy, 113 Wash. 449, 194 Pac. 415 (1920).

[16] State v. Green, 43 Wn.2d 102, 260 P.2d 343 (1953).

[17] RCW 9.33.020. Rosellini, J., in his dissenting opinion points out the illegality of this procedure on the part of the Olympia Police Department.

[18] A federal remedy for damages is open to Louis Plancich as provided in Rev. Stat. § 1979 (1875), 42 U.S.C. § 1983 (1958), which provides: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

The United States Supreme Court has held that the guarantee against unreasonable searches and seizures contained in the fourth amendment has been made applicable to the states by reason of the fourteenth amendment. Wolf v. Colorado, 338 U.S. 25 (1948). In Monroe v. Pape, 81 Sup. Ct. 473 (1961), the Court, in a situation similar to the Plancich case, held that the petitioner stated a cause of action under the federal statute set out above. The Court declared that acting "under color of any state statute, ordinance..." includes misuse of power possessed by virtue of state law and made possible only because the wrongdoer is clothed with authority of law; and that it is no defense to say that the actions were in fact violations of state law.

**Contributory Negligence—Absolute Right to Stop at a Yellow Light.** The effect to be given to a yellow traffic signal, often perplexing to the driver who faces one while approaching an intersection, was recently considered by the Washington Supreme Court. It would not be surprising to the average driver that the court divided five to four when it made the decision that a driver has an absolute right to stop at a yellow light, and could not be negligent in doing so.

The pronouncement was made in the case of *Brummett v. Cyr*,[1] which arose from a rear-end collision at a traffic-light controlled intersection in Yakima. The streets were covered with packed snow and ice. As the plaintiff approached the intersection, the traffic signal changed from green to yellow. The plaintiff, desiring to test how effectively his just-mounted snow tires would stop his car,[2] applied his brakes and made a sudden stop with all but two and one-half feet of his car beyond the intersection crosswalk. The defendant's car could not stop and rammed the rear end of the plaintiff's car. The jury found for the defendant, but the supreme court reversed, agreeing with the plaintiff's contention that it was error to submit the issue of contributory negligence to the jury. The court held as a matter of law that the forward driver could not be negligent in stopping at a yellow light. The decision was made under the Yakima city ordinance which provides:

> 2. Yellow alone or the word "Caution" when shown following green or "Go" signal: Vehicular traffic facing the signal is thereby warned that the red or stop signal shall be exhibited immediately thereafter, and such vehicular traffic shall not enter or be crossing the intersection when the red or stop signal is exhibited.[3]

Both the majority and minority opinions interpret the ordinance to give a driver an option upon display of the yellow light. He may proceed through the intersection if he can do so before the light turns red, or he may stop. If he exercises his right to stop, the majority would allow him to do it without consideration of following vehicles. The

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[1] 156 Wash. Dec. 919, 355 P.2d 994 (1960).

[2] "Under ordinary circumstances I might have went [sic] through that light . . . I just got a new set of snow tires put on my car . . . I just wanted to see if I could stop the whole car." Brummett v. Cyr, *supra* note 1, at 923, 355 P.2d at 996.

[3] Yakima, Wash. Ordinance No. B-1526, ch. V, § 24(a). This ordinance is taken verbatim from RCW 46.60.230 (1951). This is the usual procedure in adopting city traffic codes. Seattle, Wash. Ordinance 80998, art. V, § 33 (1952), in effect at the time of the accident was identical. But notice that RCW 46.60.230 was amended in 1959 and now reads in part: "However, if such stop cannot be made in safety, a vehicle may be driven cautiously through the intersection." SEATTLE, WASH., CODE § 21.20.082 (1959) has now adopted this wording.

absolute right to stop is not reasoned from the statute. That result, which is decisive of the case, is merely stated.

The minority argued that both the forward and the following driver have a duty to operate their car in a reasonable and prudent manner.[4] Even when exercising an "absolute right" to stop in compliance with the law, the minority felt that the circumstances may have been such that the compliance does not fulfill the statutory standard of reasonable care,[5] and that the jury rightly was given the determination of the factual issue of the exercise of due care by the plaintiff.

The rule in Washington governing vehicles traveling in the same direction is that the following driver has the duty of avoiding a collision. "In the absence of an emergency or unusual conditions, he is negligent if he runs into the car ahead."[6] Thus, while the following driver is presumed to be negligent, he is not an insurer to be held liable in every rear-end accident.

The defendant attempted to escape liability by employing the emergency doctrine,[7] arguing that the sudden stop of the plaintiff created an emergency which relieved the defendant from the standard of care just as when he had adequate time for reflection. The court properly dismissed this argument by stating that the driver of a forward vehicle does not create an emergency when he stops at a yellow light. The following driver must be cognizant of the traffic signal and must anticipate that the forward driver may stop on an amber light.[8]

[4] RCW 46.48.010 provides: "Every person operating or driving a vehicle of any character upon the public highways of this state shall operate the same in a careful and prudent manner . . . ."

[5] "It must be borne in mind that statutory regulations relative to the conduct of drivers of motor vehicles do not attempt to define what reasonable care is. They set up certain rules of conduct, violation of which carries a presumption of negligence, but a compliance with which does not necessarily fulfill the obligation to exercise reasonable care under given circumstances." Curtis v. Perry, 171 Wash. 542, 547, 18 P.2d 840, 843 (1933).

[6] Miller v. Cody, 41 Wn.2d 775, 778, 252 P.2d 303, 305 (1953); Tackett v. Milburn, 36 Wn.2d 349, 218 P.2d 298 (1950). Yakima, Wash., Ordinances, tit. X, ch. 10-21, § 383: "Spacing when in motion. It shall be unlawful for the operator of a motor vehicle to follow more closely than is reasonable and prudent, having due regard for the speed of the vehicle and the traffic upon and the condition of the highway." This is copied from RCW 46.60.080.

[7] The best statement of the emergency doctrine in this context is in Kelly v. Kittitas County, 29 Wn.2d 383, 395, 187 P.2d 297, 303 (1947): "[A]n automobile driver who, by the negligence of another and not by his own negligence, is suddenly placed in a situation of emergency and compelled to act instantly to avoid a collision or injury, is not guilty of negligence if he makes such a choice as a person of ordinary prudence placed in such a position *might* make, even though he did not make the wisest choice or one that would have been required in the exercise of ordinary care, but for the emergency."

[8] This argument for the emergency doctrine would appear to have greater validity when an abrupt stop is made without any hand signal at a place other than a controlled intersection. For a comprehensive discussion of the duty of the forward driver to signal before stopping, see Annot., 29 A.L.R.2d 5 (1953).

Thus, it would appear that at a traffic-light controlled intersection, the following driver may not escape the presumption of negligence under the present facts, and would be barred from recovering damages from the forward driver. It is the question of whether the forward driver also may be barred from obtaining damages by stopping in a negligent manner which caused the division of the court. The position of the majority that the following driver may not claim that the other was contributorily negligent in his method of stopping is unsupported by citation in the opinion and difficult to support under principles of tort law.

It has been clearly stated that contributory negligence or assumption of risk are defenses to negligence per se.[9] One doing an act which he has an absolute right to do would seem to be barred from recovery for injury from the negligence of another, if he performs the act without due regard to the safety of others or to his own safety, just as he would be barred if he had assumed the risk of injury. One would suspect that had the plaintiff been towing the defendant, had he jammed on his brakes at the yellow light, and had he been hit from behind because the defendant negligently failed to apply his brakes, the plaintiff would be unable to collect damages. Even though he had an absolute right to stop, he would have assumed the risk[10] of a rear-end collision. In addition, the same duty of reasonable care owed to other drivers would be owed to a paying passenger in the car,[11] for if, in exercising this absolute right to stop, he failed to use reasonable care toward his passenger, he would generally be liable to the passenger.[12] Thus, the negligence of the forward driver would not necessarily have to rest on violation of a duty to watch out for following drivers.[13] It would be based on whether the forward driver met his duty of due care under the circumstances. If the jury could have found that reasonably pru-

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[9] Skarpness v. Port of Seattle, 52 Wn.2d 490, 326 P.2d 747 (1958), noted, 34 WASH. L. REV. 252 (1958).

[10] The distinction between assumption of risk and *volenti non fit injuria* remains as enunciated in Walsh v. West Coast Coal Mines, 31 Wn.2d 396, 197 P.2d 233 (1948). The result would be the same whether or not a contractual relationship existed.

[11] The same analogy could be made with a guest, when the driver did not meet the standard of care required by the guest statute.

[12] Annot., 65 A.L.R. 952, 954 (1930).

[13] The majority indicates that "intolerable confusion as to one's duty would result from requiring a forward driver to watch out for following vehicles." Brummett v. Cyr, 156 Wash. Dec. 919, 921, 355 P.2d 994, 995 (1960). The court did not refer to the statement in Curtis v. Perry, 171 Wash. 542, 547-48, 18 P.2d 840, 843 (1933), which states that "while the paramount duty of the driver of a motor vehicle is to keep a lookout ahead, and while he may assume that drivers of vehicles following from the rear will observe the laws of the road, he cannot entirely ignore such vehicles. *This is merely a more general statement of reasonable care . . .*" (Emphasis added.)

dent person knowing of traffic behind him; knowing of the slick, icy streets; and knowing that an extremely abrupt stop would have to be made, would have proceeded through the intersection, it would appear that the defendant would have been entitled to have the issue submitted to the jury.[14]

The determination that there is an absolute right to stop at a yellow light appears incongruous with Washington holdings that the right of way granted by RCW 46.60.150[15] is not an absolute right, but rather must be exercised with due regard to the circumstances. The favored driver must exercise due care after he realizes, or should have realized, that the disfavored driver is not going to yield the right of way.[16] The right to assume that the right of way will be yielded does not excuse the driver from the consequences of his own contributory negligence.[17] Interestingly, the driver with the right of way may be negligent by deceiving the disfavored driver into thinking he has relinquished the right of way, and then by continuing into the intersection, causing a collision.[18] One wonders whether a driver might not deceive a following driver into thinking he was going to proceed through the intersection.

It should be noted, too, that Washington follows the usual rule that there is no absolute right to proceed on a green light. Here again, there is a right to comply with the traffic signal only if it is with due care under the circumstances.[19] Some distinction by the court would have been helpful as to why the standard of due care is present when responding to a green light, but is not necessary when responding to a yellow light.

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[14] De Koning v. Williams, 47 Wn.2d 139, 141, 286 P.2d 694, 695 (1955). See also 5 AM. JUR. *Automobiles* § 317: "A motorist who has approached an intersection in a lawful and reasonable manner at a time when a traffic signal was in his favor is under no duty to come to a stop upon a change of the signal after he has entered the intersection *or when he is so close that he cannot safely stop,* but instead has the right *and even the duty* of proceeding through the intersection." (Emphasis added.) *But see* Bass v. Stockton, 236 S.W.2d 229 (Tex. Civ. App. 1951).

[15] "Every operator of a vehicle on approaching highway intersections shall look out for and give the right of way to vehicles on his right . . . whether his vehicle first reaches and enters the intersection."

[16] Bos v. Dufault, 42 Wn.2d 641, 257 P.2d 775 (1953); Bennett v. Karnowsky, 24 Wn.2d 487, 166 P.2d 192 (1946); Finical v. McDonald, 185 Wash. 121, 52 P.2d 1250 (1936); See also Comment, *The Duty of the Favored Driver under the Right of Way Statute to Maintain a Reasonable and Proper Lookout,* 29 WASH. L. REV. 73, 78 (1954).

[17] Sebastian v. Rayment, 42 Wn.2d 108, 254 P.2d 456 (1953); *contra,* Morris v. Bloomgren, 127 Ohio 147, 187 N.E. 2 (1933).

[18] Key v. Reiswig, 55 Wn.2d 512, 348 P.2d 410 (1960); Smith v. Laughlin, 51 Wn. 2d 740, 321 P.2d 907 (1958).

[19] Lanegan v. Crauford, 49 Wn.2d 562, 304 P.2d 953 (1956).

Perhaps the most interesting aspect of the problem is the future application of the rule laid down by the majority, inasmuch as three years after the accident RCW 46.60.230 was amended to read:

> Yellow alone or the word "Caution," when shown following the Green or "Go" signal: Vehicular traffic facing the signal shall stop before entering the nearest crosswalk at the intersection or at such other point as may be designated by the proper traffic authority. However, if such stop cannot be made in safety, a vehicle may be driven cautiously through the intersection.[20]

It is unfortunate for those with academic interests that counsel for the defendant did not call this amendment to the attention of the court, for it raises the involved and interesting question of its retrospective application to a previous accident.[21]

The ordinances of most cities now vary from the current state statute. But, RCW 46.08.020 allows local authorities to adopt traffic rules and regulations only when they are not in conflict with the state statutes. In *City of Bellingham v. Schampera*,[22] a case of first impression decided after the *Brummett* case, the court held that a city traffic ordinance was not in conflict with the state statute and was valid. The contention was that RCW 46.56.010, by making it ". . . unlawful for any person who is under the influence of . . . liquor . . . to drive or be in actual physical control of any vehicle upon the public highways" precluded a city from passing ordinances against the same offense. The court cited cases showing a division of authority on preemption by state statutes and adopted what they considered the better reasoned position, which upholds such ordinances as not preempted

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[20] Wash. Sess. Laws 1959, c. 135 § 1. The traffic code of the City of Seattle was amended in 1959 to adopt the wording of the state statute. SEATTLE, WASH., CODE § 21.20.082 (1959).

[21] The general rule that laws will not be applied retrospectively appears riddled with exceptions. Some authorities speak of an exception when the statute effects a remedy only, as opposed to a right. *E.g.*, Hammack v. Monroe Street Lumber Co., 54 Wn.2d 224, 237, 339 P.2d 684, 691 (1959) (dissent). Other cases indicate that when a tort action may be brought only by virtue of a statute, there can be no vested right therein prior to final judgment, and that the legislature may take away the right at any time. Hansen v. West Coast Wholesale Drug Co., 47 Wn.2d 825, 289 P.2d 718 (1955); Robinson v. McHugh, 158 Wash. 157, 291 Pac. 330 (1930). For an excellent discussion of the status of retroactivity in Washington as affected by the *Hammack* case, see Note, 35 WASH. L. REV. 237 (1960). It would be expected that the amended statute in the instant case would fall within the general rule of prospective application, for it would appear to deal with the substantive rights of the parties, in this case determining whether the common law defense of contributory negligence is available. It could also be argued that the statute has effected no change in requiring the driver to proceed through the intersection, for the wording of the statute is permissive only. This may be countered by the requirement of stopping before entering the crosswalk.

[22] 157 Wash. Dec. 1, 356 P.2d 292 (1960).

by state law, though they operate concurrently.[23] The court adopted the test of the Utah court which stated:

> In determining whether an ordinance is in "conflict" with general laws, the test is whether the ordinance permits or licenses that which the statute forbids and prohibits and vice versa. . . . Judged by such a test, an ordinance is in conflict if it forbids that which the statute permits. . . . Unless legislative provisions are contradictory in the sense that they cannot coexist, they are not to be deemed inconsistent merely because of mere lack of uniformity in detail.[24]

The court concluded that by RCW 46.08.020 the state had not preempted the field and that the ordinance was not in conflict with the statute.[25]

While the court has recognized a need for local autonomy in the traffic control field, the Yakima ordinance as construed by the court in the *Brummett* case appears to license that which is prohibited by the amended RCW 46.60.230. The state law now requires that a driver faced with a yellow light stop before he reaches the crosswalk, which the plaintiff could not do in the *Brummett* case. The ordinance was interpreted as allowing the driver to stop, even though he had passed the crosswalk, as had Brummett. The ordinance thus would appear to be invalid, having been preempted by the new state law.[26] If a driver is unable to stop safely, the amended statute allows him to proceed cautiously through the intersection. This provides an additional argument that the legislature had anticipated that a stop at a yellow light may create an unsafe situation, which may require the driver to cautiously proceed through the intersection to meet the standard of due care.[27]

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[23] For an excellent discussion of the problem in other jurisdictions, see Rhyne, *Statutory Construction in Resolving Conflicts Between State and Local Legislation*, 3 VAND. L. REV. 509 (1950).

[24] Salt Lake City v. Kusse, 97 Utah 113, 119, 93 P.2d 671, 673 (1939).

[25] The court also found that the state has preempted the licensing field by statute; hence a city cannot revoke a motor vehicle operator's license. However, penalties provided by a city ordinance in excess of those allowed by the state statute do not make the entire ordinance invalid. The penalties may be enforced up to the extent that they are within the statutory limitations.

[26] It may be expected that city ordinances will be changed to adopt the amendments to the State Motor Vehicle Act as they have in the past. See SEATTLE, WASH., CODE, § 21.20.082 (1959). An additional problem of interpretation remains in the amended act. It is not clear to whom the term "with safety" applies. When the driver must stop before he reaches the crosswalk, it could be argued that it must apply only to the driver himself, or to following cars. It is usually directed toward the situation where the driver cannot stop without entering the intersection, creating an unsafe situation for cars approaching from intersecting streets.

[27] It must be remembered, however, that the statute is only permissive, not mandatory.

The *Brummett* case appears to be an example of substitution by the court in a civil action of the standard of a criminal statute for the reasonably-prudent-man criterion of tort law.[28] It may be appropriate for the court to utilize the amended statute as a vehicle to return to the due-care standard as a basis for determining contributory negligence in intersectional accidents.

WALTER C. HOWE, JR.

**Warning Lights on the Highway—Absolute Duty v. Reasonable Measures.** The standard of "the reasonably prudent man in the same or similiar circumstances" is often used by courts in formulating instructions to juries.[1] That standard is particularly appropriate to guide juries in their determinations of the negligence and contributory negligence issues involved in tort actions. However, in *Albert v. Krause*,[2] the Washington Supreme Court refused to follow the common practice, rejecting a jury instruction that was expressed in those terms.

The *Albert* case was a wrongful death action brought by the widow of the deceased, on behalf of herself and her two minor children. The decedent's death resulted from the nighttime collision of his vehicle with the defendant's stalled truck and trailer, which was obstructing a state highway. About three hours after dark, the defendant entered the twenty-two-foot highway from a side road, driving a truck and thirty-three-foot trailer. While turning onto the highway, the defendant's truck stalled, so that the truck and trailer completely obstructed the paved portion of the highway. Less than two minutes after the truck had initially stalled on the highway, the defendant noticed the approaching headlights of the decedent's Volkswagen panel truck. The defendant's companion left the truck and ran down the highway about

[28] For an interesting discussion of the application of standards of criminal statutes to civil actions, see Morris, *The Role of Criminal Statutes in Negligence Actions*, 49 COLUM. L. REV. 21 (1949). He concludes at 47: "Often . . . a criminal proscription operates as a desirable, more exact standard that smooths up civil procedure. Nevertheless there are many situations in which substitution of the criminal proscription for the reasonably-prudent-man criterion effects substantive change—either because the particular case entails special facts or because the judgment of the legislature is misguided."

[1] "On the whole the rules of accident law are so formulated as to give the jury considerable scope in deciding what the parties should have done, in each specific case, as well as what they did do. The cardinal concept is that of the reasonably prudent man under the circumstances. . . ." James, *Functions of Judge and Jury in Negligence Cases*, 58 YALE L.J. 667, 676 (1949).

[2] 156 Wash. Dec. 748, 355 P.2d 327 (1960).

four hundred feet, waving a flashlight with a green plastic shield,[3] in an attempt to warn the approaching driver of the fact that the roadway was obstructed. The deceased merely swerved around him without decreasing his rate of speed and drove into the side of the trailer. Evidence at the trial indicated that the deceased was traveling at a lawful rate of speed at the time of the accident. The opposing counsel differed in their statements of fact as to the exact position of the defendant's truck and trailer on the roadway. The respectively alleged positions made it either possible or impossible for the deceased to have seen some of the various lights on the truck. The case was submitted to a jury who returned a verdict in favor of the defendant.

The plaintiff appealed to the supreme court, citing the following instruction as the sole assignment of error:

> You are instructed, as a matter of law, that one driving outside cities and towns can assume that the traveled portion of the road ahead of him is unobstructed and safe for travel, *unless he receives such warning as would cause an ordinarily careful and prudent person to be placed on notice that such road may be obstructed.*[4] (Emphasis added.)

The Washington Supreme Court, in a 5 to 4 decision, with the majority opinion written by Judge Rosellini, reversed the trial court for having granted the instruction. The court held that the trial judge erred in not granting the instruction proposed by the plaintiff, which contained a more rigid standard of care than the reasonable man standard embodied in the rejected instruction. The instruction proposed by the plaintiff and upheld by the supreme court was a follows:

> You are instructed as a matter of law that one driving at night outside cities and towns, *in the absence of a light to warn him to the contrary,* can assume that the traveled portion of the road ahead of him is unobstructed and safe to travel.[5] (Emphasis added.)

The court cited *Bailey v. Carver*[6] as a precedent for granting the instruction requested by the plaintiff. The instruction in the *Bailey*

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[3] The appellant placed great emphasis on this fact. The shield was a cylindrical piece of plastic attached to the lighted end of the flashlight, but it did not interfere with the beam of light emitted. The appellant contended that even if the deceased had seen the light, he would have seen a green light which can normally be interpreted as a signal to proceed. The respondent contested the validity of the appellant's contention, and also noted that no such theory had been advanced by the plaintiff during the trial. But the appellant was apparently successful, because the court noted his contention and agreed with it at 156 Wash. Dec. 748, 751-52, 355 P.2d 327, 330 (1960).

[4] Albert v. Krause, 156 Wash. Dec. 748, 749, 355, P.2d 327, 328-29 (1960).

[5] *Id.* at 749, 355 P.2d at 329.

[6] 51 Wn.2d 416, 319 P.2d 821 (1957).

case was almost identical to the instruction proposed by the plaintiff, the only difference being that the proposed instruction used the word "light" rather than "red or other light" as was used in the *Bailey* instruction. The dispute in that case was whether a red light was the only legally sufficient warning of an obstruction in the roadway. The court rejected the contention that the warning must be by a red light, and upheld the validity of warnings by lights which were not red.[7] It appears implicit in that decision that the court was concerned with a case in which the only possible warnings were lights, and thus in the absence of light one driving outside a city at night could assume the highway was unobstructed. The question of the effectiveness or validity of warnings given by means other than by lights was not considered by the court in the *Bailey* case. Thus the problem presented by the granted instruction in the *Albert* case, which permitted the jury to consider factors other than lights in determining the effectiveness of a warning, was not present nor was it considered in reaching the decision of the *Bailey* case. The court in the *Albert* decision implicitly recognized that due to a lack of such consideration in the *Bailey* case the mere citation of the case would not be a sufficient basis for rejecting the instruction granted by the trial judge.

The court then discussed the rule that constituted the underlying basis for the *Bailey* decision, that is the rule giving a nighttime driver the right to assume that the highway ahead of him is unobstructed and safe for travel unless he is warned to the contrary. In Washington this rule apparently originated in *Morehouse v .Everett,*[8] which was quoted by the court in its opinion. The court's reliance on the *Morehouse* case is some what ironic, as that decision involved the rejection of a rigid standard while the present case involves the maintenance[9] or formulation of such a standard. In the *Morehouse* decision the court refused to adopt the rule that a driver must operate his car so that he can stop within the radius of his headlights, and stated the applicable rule as follows:

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[7] The plaintiff's contention that the light had to be red was based upon Greisen v. Robbins, 36 Wn.2d 64, 216 P.2d 210 (1950). In that opinion the court cited Morehouse v. Everett, 141 Wash. 399, 252 Pac. 157 (1926) and Coins v. Washington Motor Coach Co., 34 Wn.2d 1, 208 P.2d 143 (1949), as authorities for the requirement that the warning light must be red. The court in the *Bailey* decision simply stated that the *Morehouse* and *Coins* cases recognized the possibility of having lights which were not red.

[8] 141 Wash. 399, 252 Pac. 157 (1926).

[9] It may be considered to be the maintenance of the standard requiring that warnings could be effective only if given by lights. That is, interpreting *Bailey v. Carver,* as precluding all other forms of warnings from being considered as legally sufficient.

> One driving at night has at least some right to assume that the road ahead of him is safe for travel, unless dangers therein are indicated by the presence of red lights; . . . . We believe that, generally speaking, where the statutes or the decisions of the courts require red lights as a warning of danger on any object in the highway and such lights are not present, *it is a question for the jury to determine whether the driver at night should have seen the obstruction, notwithstanding the absence of red lights.*[10] (Emphasis added.)

The court has relied upon the first sentence of that statement in subsequent cases[11] to establish a requirement that a warning to be legally sufficient must have been given by either a red or other colored light. But the majority opinion in the *Albert* case recognized the possibility of effective warnings being given by means other than lights, as was referred to in the italicized portion of the proceding quotation from the *Morehouse* case. That recognition is evidenced by the following statement from the *Albert* case:

> If there are not red lights so placed as to warn of the presence and position of the obstruction, *and its presence is not otherwise revealed,* other users of the highway at night are entitled to assume that it is unobstructed.[12] (Emphasis added.)

Although the majority opinion recognized the possibility of other forms of warnings, the court then proceeded to ignore that possibility by holding that it was error to refuse an instruction which did not contain that qualifying phrase.

In the *Albert* case the court interpreted this "right to assume" as meaning that the assumption that the highway is safe must be overcome by a warning light which is sufficient in fact to inform the driver that the road *is* obstructed. The instruction granted by the trial judge provided that a warning was sufficient if it placed the driver on notice that the road *may be* obstructed. The court stated, " . . . a user of the highways is always warned that they may be obstructed, for the possibility is inherent in the use to which highways are put and for which they are designed."[13] From that basis the court contended that

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[10] Morehouse v. Everett, 141 Wash. 399, 408-09, 252 Pac. 157, 160 (1926). When the court rejected the "headlight rule," there were a number of jurisdictions following it, and a few cases indicated that Washington was one of them. See Annot., 58 A.L.R. 1482, 1493 (1929).

[11] Bailey v. Carver, 51 Wn.2d 416, 319 P.2d 821 (1957); Greisen v. Robbins, 36 Wn.2d 64, 216 P.2d 210 (1950); Coins v. Washington Motor Coach Co., 34 Wn.2d 1, 208 P.2d 143 (1949); O'Neil v. Gruhn, 197 Wash. 557, 85 P.2d 1064 (1938).

[12] Albert v. Krause, 156 Wash. Dec. 748, 752, 355 P.2d 327, 330 (1960).

[13] *Id.*, at 750, 355 P.2d at 329.

the "may be obstructed" instruction effectively deprived the driver of the benefit of the rule providing him with the right to assume. The court failed to draw the distinction which juries would be certain to draw under the disputed instruction. That is, that there is a difference between the vague, ever present possibility that some part of the highway may be obstructed and the immediate probability that a specific portion of the highway may be obstructed. In light of that difference, the utilization of the standard of the reasonably prudent driver would not result in a deprivation of the "right to assume" but merely the imposition of a reasonable restriction upon that right.

The court apparently overlooked the statement in the *Morehouse* case that, ". . . if it [the rule requiring one to drive so that he is able to stop with the radius of the car's headlights] holds that he must see any object which an ordinarily prudent driver under like circumstances would have seen, then we think it states the law correctly."[14] Following that rationale in the past, the court has approved the submission of the issue of contributory negligence to the jury even in the absence of any warning lights,[15] and on one occasion the court held the plaintiff contributorily negligent as a matter of law, even though the defendant's truck had no lights whatsoever to warn the plaintiff.[16] This modified version of the "headlight rule" permits the submission of the issue to the jury in light of the conditions surrounding the accident. The standard of "the reasonably prudent man" permits the jury to examine such factors as visibility, speed, topography of the road, and color of the vehicles.[17]

Various authorities have stated that the driver must exercise reasonable vigilance or be barred from recovery.[18]

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[14] Morehouse v. Everett, 141 Wash. 399, 407, 252 Pac. 157, 160 (1926).

[15] Helf v. Hansen & Keller Truck Co., 167 Wash. 206, 9 P.2d 110 (1932); Griffith v. Thompson, 148 Wash. 243, 268 Pac. 607 (1928); McMoran v. Associated Oil Co., 144 Wash. 276, 257 Pac. 846 (1927).

[16] Millspaugh v. Alert Transfer & Storage Co., 145 Wash. 111, 259 Pac. 22 (1927). The plaintiff was held contributorily negligent due to a defective headlight upon his car. He failed to show that his defective headlight was not a cause of the accident. The requirement that the plaintiff make an affirmative showing that his negligence was not a cause of the accident, demonstrates the proposition that a driver may be guilty of contributory negligence as a matter of law, even in the absence of a light to warn him of the obstruction. Apparently one may only make the assumption that the highway is unobstructed when his own vehicle has the required lights. The authority of this case is weakened by the fact that the accident occurred on the outskirts of a small highway town, rather than on the open highway.

[17] See Note, 27 N.C.L. Rev. 153, 155 (1948).

[18] *E.g.*, "If the defendant wrongfully deals with a highway so as to make it dangerous for public travel, *a traveler injured thereby is barred from recovery by his failure to exercise reasonable vigilance to ascertain the condition of the highway.* . . . [T]his section applies not only when the defendant's wrong consists in his unauthorized interference with the highway but also when his interference is authorized, but he fails to

One scholar has remarked, "Since a motorist is entitled to assume that a vehicle ahead of him will show the statutory lights, it is not contributory negligence as a matter of law to collide with an unlighted vehicle, but the question is one for the jury under all the circumstances of the case."[19] The general consensus seems to be that the "right to assume" is a limited right because there is a correlative duty to maintain a vigilance.[20] And the best method by which to judge a driver's conduct, in relation to the apparently contradictory "right to assume" and "duty to maintain a vigilance," is submission of the issue to the jury on the basis of the "reasonably prudent man" standard.

The trend in the law of torts has been to employ flexible standards, such as that of the reasonably prudent man, so that the law will remain more responsive to human needs.[21] When a rigid standard is established, "there is danger that the standard itself will in time become a mechanical rule and embodied in our law as such to the exclusion of a rule of reason under the pressure of these decisions."[22] Generally it is felt that rigidity in tort law results in a restriction of accident liability,[23] and hence undue harshness in the law.[24] The application of a rigid standard may be referred to as being harsh, even when it tends to encourage recovery. The application of the rigid standard espoused in the *Albert* case results in such harshness to the defendant in the present case by making it extremely difficult to establish contributory negligence.

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exercise reasonable care to provide the guards or lights which are necessary to make the highway safe for travel." (Emphasis added.) RESTATEMENT, TORTS § 474 & comment *b* (1934).

[19] 17-18 HUDDY, CYCLOPEDIA OF AUTOMOBILE LAW § 152 (9th ed. 1931).

[20] See, *e.g.*, SCHWARTZ, TRIAL OF AUTOMOBILE ACCIDENT CASES 114 (2d ed. 1941).

[21] See, *e.g.*, James, *op. cit. supra* note 1; BOHLEN, STUDIES IN THE LAW OF TORTS, 601-13 (1926); Nixon, *Changing Rules of Liability in Automobile Accident Litigation*, 3 LAW & CONTEMP. PROB. 476 (1936).

[22] See Note, 27 N.C.L. REV. 153, 157 (1948).

[23] See, *e.g.*, 2 HARPER & JAMES, TORTS §§ 17.1-17.6 (1956); James, *Accident Liability: Some Wartime Developments*, 55 YALE L.J. 365, 374-5 (1946).

[24] "Perhaps the classic example of this unfortunate tendency is an old, ill-fated rule of contributory negligence that required a motorist at a railroad crossing to 'stop, get out of the car, and reconnoitre' before proceeding. It was adopted from a broad factual statement by Justice Holmes in Baltimore & Ohio R.R. v. Goodman, 275 U.S. 66 (1927), noted 26 MICH. L. REV. 582 (1928): 'In such circumstances it seems to us that if a driver cannot be sure otherwise whether a train is dangerously near he must stop and get out of his vehicle, although obviously he will not often be required to do more than to stop and look.' Pokora v. Wabash Ry., 292 U.S. 98 (1934), noted in 33 MICH. L. REV. 457 (1934), repudiated the rule with a strong warning of 'the need for caution in framing standards that amount to rules of law,' for: 'They are then, not the natural flowerings of behavior in its customary forms, but rules artificially developed and imposed from without." Note, 35 WASH. L. REV. 257, 259 (1960).

**Automobiles — Dangerous Instrumentality Doctrine — Negligence.** In *Moody v. Goodson*[1] the court held that by reason of the dangerous character of automobiles, the owner-driver thereof was chargeable at law with knowledge of operational limitations; therefore lack of knowledge furnished no defense to liability.

The case arose in the following manner. Defendant backed her automobile out of a parking space on a steep Seattle hill and had proceeded part way down the hill when she observed a red light at an intersection. She applied her foot brake, with no result. Her vehicle collided with one driven by plaintiff Moody, injuring him and forcing his automobile into the crosswalk, where it struck and killed a pedestrian, the intestate of plaintiff Wood. Defendant's car was equipped with power brakes, and expert testimony was introduced tending to prove that such brakes on the make and model car driven by defendant would not function if the motor was not running, due to a defect in the design of the braking system, and that this was the reason for the brake failure on the occasion in question.

Defendant denied negligence in the operation of the automobile, and affirmatively pleaded unavoidable accident due to a latent defect of which she had no prior knowledge. The jury verdict for defendant at the trial of the consolidated actions was reversed on appeal, and a new trial granted.

The appellate court found error in submission to the jury of instructions relating to the defense of latent defect, since the mechanical condition alleged to exist at the time of the accident did not conform to well-established judicial definitions of such defects.[2] The court took note of a statutory duty to equip vehicles with adequate brakes,[3] but did not expressly ground liability upon the theory that violation of this statutory duty constituted negligence per se, although such a result had been reached in *McCoy v. Courtney*,[4] subsequently cited in the opinion on a different point. Rather, the court adverted to the "dangerous instrumentality" doctrine, and reasoned that since an automobile can be classified as such an instrumentality, the driver should be charged at law with knowledge of any operational defects present, regardless of the absence of actual knowledge.

Does this reasoning permit a conclusion that the court is manifesting a trend toward imposition of strict liability in such situations, or

[1] 55 Wn.2d 687, 349 P.2d 731 (1960).
[2] Jacklin v. North Coast Transp. Co., 165 Wash. 236, 5 P.2d 325 (1931).
[3] Wash. Sess. Laws 1955, c. 269 § 34.
[4] 25 Wn.2d 956, 172 P.2d 596 (1946).

is it merely a redefinition of existing standards of negligence as applied to automobile owners, essentially retaining the elements of foreseeability of harm as a requisite of liability? The position heretofore taken by the Washington court has indicated that liability for operating defectively equipped vehicles will be imposed only where the owner knew or should reasonably be expected to have known of the existence of the defect, and of the reasonable likelihood that it would cause injury.[5]

The so-called dangerous instrumentality doctrine historically has been employed as an adjunct of agency theory. It has been stated to apply in situations where a master, having under his control some specially dangerous instrumentality which he is under a duty to keep with care, delegates this duty to a servant or agent. If the duty is breached, the master will be liable, even though injury resulted from the negligence, wantonness or malice of the servant or agent.[6] Traditionally included within this category are such objects as steam locomotives, torpedoes, and poisons.[7]

The applicability of the dangerous instrumentality doctrine to automobiles has been considered in a number of Washington cases.[8] The court has consistently refused to apply it as a foundation for vicarious liability in cases presenting classic master-servant fact patterns, where to do so would extend the liability beyond usual respondeat superior concepts.[9] If the doctrine is accepted as analogous to the strict liability imposed for the keeping of dangerous substances on land,[10] it would seem that the court has clearly denied its validity as to automobiles.

In cases involving bailor-bailee situations, language may be found similar to that used in *Moody v. Goodson* to the effect that an automobile may under certain circumstances be a dangerous instrumentality.[11] Thus qualified, it is apparent that the classification of an automobile as potentially dangerous falls far short of imposition of strict liability, and refers only to one element considered in determin-

[5] Nawrocki v. Cole, 41 Wn.2d 474, 249 P.2d 969 (1952).
[6] MECHEM, AGENCY § 470 (4th ed. 1952).
[7] PROSSER, TORTS § 63 (2d ed. 1948).
[8] See, *e.g.*, Robbins v. Hansen, 184 Wash. 677, 52 P.2d 908 (1935); Eastman v. Silva, 156 Wash. 613, 287 Pac. 656 (1930); Trotter v. Bullock, 148 Wash. 516, 269 Pac. 825 (1928); Moore v. Roddie, 103 Wash. 386, 174 Pac. 648 (1918), *aff'd on rehearing* 106 Wash. 548, 180 Pac. 879 (1919).
[9] Jones v. Hoge, 47 Wash. 663, 92 Pac. 433 (1907).
[10] See, *e.g.*, discussion in Horack, *The Dangerous Instrument Doctrine*, 26 YALE L.J. 224 (1917).
[11] See, *e.g.*, Trotter v. Bullock, 148 Wash. 516, 269 Pac. 825 (1928); Jones v. Harris, 122 Wash. 69, 210 Pac. 22 (1922).

ing negligence in fact in a given situation. Typical fact patterns involve lending an automobile to one known to be intoxicated,[12] or lending an automobile known to be dangerously in need of repair.[13] In such cases liability is based on actual negligence in entrusting to a known incompetent.

The court has seldom referred to the dangerous instrumentality doctrine in cases which, like *Moody v. Goodson,* involve no element of vicarious liability. In the course of the *Moody* opinion, the court referred to *Allen v. Schultz*[14] in connection with the proposition that defendant was charged with knowledge that the brakes would not function while the motor was not in operation. The *Allen* case also involved personal injuries inflicted by an automobile on which the braking system was inadequate. However, in that case the defendant had testified to actual knowledge of the defective condition of his brakes; thus liability clearly rested upon negligence in driving under the known conditions.

*Wellons v. Wiley*[15] is somewhat analogous on its facts to the instant case. There a car driven by the defendant owner left a highway as a result of a tire blow-out. The court there said that an automobile is not such a dangerous agency within the rule that one engaged in an activity which involves a high degree of risk of harm to others, in spite of all reasonable care, is strictly liable for the harm it causes. This position is in accord with the majority of other jurisdictions.[16]

Looking again to the position taken by the court in *Moody v. Goodson,* it is suggested that the language may be interpreted, in the light of past holdings, as going no farther than to impose the normal duty of care as to instrumentalities within one's exclusive control, the nature of that instrumentality being simply one circumstance to be considered in determining whether the risk involved was forseeable. Thus it would be negligent to operate a vehicle without knowledge of the specific functional limitations it possessed, since it is forseeable that harm may occur if loss of control results from such lack of knowledge. Such a construction would be in harmony with the prior position of the court.

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[12] Mitchell v. Churches, 119 Wash. 547, 206 Pac. 6 (1922).
[13] Robbins v. Hansen, 184 Wash. 677, 52 P.2d 908 (1935).
[14] 107 Wash. 393, 181 Pac. 916 (1919).
[15] 24 Wn.2d 543, 166 P.2d 852 (1946).
[16] Annot., 16 A.L.R. 270 (1922).

**Tort Liability of Building Contractor to Third Persons Injured After Completion of Work.** In *Andrews v. Del Guzzi*[1] the Washington court has made a small step in what Mr. Justice Cardozo has called "the assault upon the citadel of privity (which) is proceeding in these days apace."[2]

A church in Forks, Washington contracted with Bruno and Jack Del Guzzi for the construction of a home to be used by its pastor. During a night some two years after the house was completed and accepted by the church, poisonous gases from the propane gas heating system escaped into the bedroom where the pastor and his wife were sleeping. They later sued the contractors on the grounds that the gases escaped as a result of defective construction of the heating exhaust system. The trial court found that the chimney by which the waste products were carried away was of insufficient height, and the absence of a cap on it to control air currents descending into the chimney permitted fumes to pour down through the draft diverter for the furnace and ultimately into the house. The primary problem faced by the court was whether the building contractor could be held liable for his negligent workmanship to the injured persons who were not parties to the construction contract.

The general rule in this type of situation is based on the often criticized but historically influential case of *Winterbottom v. Wright*,[3] in which it was held that the manufacturer of a stage coach was not liable to one not a party to the contract of sale who was injured by a negligently created defect in the coach. Subsequently, privity of contract was not only held a requisite to recovery in cases involving defective chattels but it was generally extended to situations involving real property and fixtures.[4] The current status of the "real property situation" rule is expressed as follows:

> It is a well-established general rule that, where the work of an independent contractor is completed, turned over to, and accepted by, the owner, the contractor is not liable to third persons for damages or injuries subsequently suffered by reason of the condition of the work, even though he was negligent in carrying out the contract. . . .[5]

This rule is subject to a number of well-recognized exceptions which

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[1] 156 Wash. Dec. 396, 353 P.2d 422 (1960).
[2] Ultramares Corp. v. Touche, 255 N.Y. 170, 180, 174 N.E. 441, 445 (1931).
[3] 10 M. & W. 109, 152 Eng. Rep. 402 (Ex. 1842).
[4] Ford v. Sturgis, 14 F.2d 253 (D.C. Cir. 1926); Curtain v. Somerset, 140 Pa. 70, 21 Atl. 244 (1891).
[5] 65 C.J.S. *Negligence* § 95 (1950); *accord,* Annot., 13 A.L.R.2d 195, 201 (1950).

are sufficiently broad in their application to modify it substantially. Where the contractor has knowledge of the defect and he nevertheless conceals it in such a manner as to approach fraud;[6] where there is an implied invitation to third persons to use the facility;[7] where the use by third parties was expectable;[8] where the defect amounts to a nuisance;[9] where there is an implied warranty of safety;[10] or where the condition negligently created is inherently or imminently dangerous,[11] liability can be found.

The general rule was accepted as the law in Washington in *Thornton v. Dow*,[12] a case which involved a defective railing around the balcony of a public building which collapsed when a number of people leaned over it to see the finish of a race in an indoor trackmeet. There the court recognized the exception to the general rule in the case of things of a noxious or dangerous kind, but said, "the thing built or constructed here—the armory—of course, was not of a noxious or dangerous kind."[13] It appeared that the court considered the "imminently or inherently dangerous" exception to apply only to those things which are highly dangerous even in the absence of negligent construction or production, such as explosives or poisons in the field of chattels. If a defective balcony railing, designed to keep people from falling to the floor below, cannot be considered imminently dangerous, then it is difficult to envision any type of real property that could be so classified. This is as strict a definition of "inherently or imminently dangerous" as it is possible to find. Just three years later, however, the court found a situation in which that exception could be applied to a real property situation. A contractor had graded and surfaced a street, leaving under its surface an unexploded charge of dynamite set during the blasting operation. A power company workman was injured when he detonated the charge while drilling a hole for the installation of a pole. The court did not use the reasoning reflected in *Thornton v. Dow, i.e.*, that a street is not inherently dangerous, but rather said that a construction contractor is liable regardless of the absence of privity where his negligent act is imminently dangerous to the lives of

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[6] Holland Furnace Co. v. Nauracaj, 105 Ind. App. 574, 14 N.E.2d 339 (1938).
[7] Colbert v. Holland Furnace Co., 331 Ill. 78, 164 N.E. 162 (1928).
[8] Grodstein v. McGivern, 303 Pa. 555, 154 Atl. 794 (1931).
[9] Schumacher v. Carl G. Neumann Dredging & Improvement Co., 206 Wis. 220, 239 N.W. 459 (1931).
[10] Berger v. Standard Oil Co., 126 Ky. 155, 103 S.W. 245 (1907).
[11] Hunter v. Quality Homes, Inc., 45 Del. (6 Terry) 100, 68 A.2d 620 (1949).
[12] 60 Wash. 622, 111 Pac. 899 (1910).
[13] *Id.* at 634, 111 Pac. at 904.

third persons.[14] It should be noted, however, that the case involved an explosive, a product specifically mentioned in the leading case which established the "inherently or imminently dangerous" exception in the field of chattels.[15]

In the instant case, the court reasoned that the propane gas heating system was inherently dangerous for two reasons: it is, under certain conditions, explosive[16] and its waste gases contain carbon monoxide which is extremely poisonous. The language of the court indicates that it used the definition of inherently dangerous when negligently constructed, rather than inherently dangerous when properly constructed. "It would naturally follow that any defect in the construction of the chimney which would allow carbon monoxide gas to escape into the living quarters of respondents' house would constitute an inherently or imminently dangerous condition."[17] This is not entirely clear, however, as in the previous sentence the court said, "in constructing a chimney to serve a furnace using propane gas as fuel, appellants were dealing with a dangerous product."[18] It is hoped that the court did not intend to adhere to the stricter minority standard, and in the total context it appears that the broader definition was used.

Recognizing this extension of liability by the court, the writer of the dissenting opinion (three other judges concurring) objected, stating:

> Items which qualify as exceptions to the general rule have been limited by the courts to those having known dangerous propensities, such as dynamite, gunpowder, dynamite caps, and firearms. The majority cite no authority, nor have I been able to find any, for extending the exception to the general rule of negligence to encompass facts such as are here presented.[19]

This statement ignores a great body of case law and the reasoning and opinions of almost all writers in the field. True, there is no direct authority in Washington case law, but there seem to have been no appropriate cases during the last forty-seven years, the time in which strict requirements of privity have fallen into disfavor and disuse in most other jurisdictions. The landmark decision in this "assault on the citadel of privity" was that written by Mr. Justice Cardozo in *MacPherson*

[14] Wilton v. City of Spokane, 73 Wash. 619, 132 Pac. 404 (1913).
[15] Thomas v. Winchester, 6 N.Y. 397, 57 Am. Dec. 455 (1852), (where a druggist carelessly mislabeled poison as a medicine).
[16] This reasoning is of little validity as the injury was from asphyxiation, a result not within the risk created by an explosive.
[17] Andrews v. Del Guzzi, 156 Wash. Dec. 396, 403, 353 P.2d 422, 427 (1960).
[18] *Ibid.*
[19] *Id.* at 407, 353 P.2d at 429.

*v. Buick Motor Co.*[20] In it he said that if a thing becomes dangerous when negligently made and it is known that it will be used by others than the purchaser, then the maker may be held liable to the third persons for their injuries. This decision has been greatly influential throughout the United States. By 1943 this reasoning as applied to chattels had been adopted wholeheartedly by the Washington court, as manifested by its decision in *Bock v. Truck & Tractor, Inc.* in which it quoted from *MacPherson* at length with approval, concluding that,

> It thus appears to be well established in this state, and elsewhere, that a manufacturer may be held liable, not only to his immediate vendee, but also to third persons, for damages resulting from noxious, *dangerous, or defective* articles of merchandise which are unsafe for the purposes to which they ordinarily would be put by the consumer or user of them, or by the person who expectantly [*sic*] would come in contact with them.[21] (Emphasis added.)

The court quoted Mr. Justice Cardozo's definition of dangerous: "If the nature of a thing is such that it is reasonably certain to place life and limb in peril when negligently made, it is then a thing of danger."[22] Thus it is clear that a defectively constructed chattel need not be found inherently and imminently dangerous in order for a third person to recover against the maker in the state of Washington. Once this step has been taken there seems little reason not to apply the same reasoning to fixtures and to buildings, for in respect to this problem, at least, distinctions between them are largely fictional.[23]

> New York has finally carried the *MacPherson v. Buick* doctrine to its logical conclusion by removing the technical distinction between real and personal property. By destroying completely the initially irrational exception to tort law of nonliability for manufacturers, contractors, and architects, based on privity, the court has established that the foreseeability of the injury complained of should be the test and the classification of object or tortfeasor should have no bearing on the plaintiff's right to recover.[24]

Before analyzing further authorities supporting an extension of liability, it would perhaps be helpful to notice the varying degrees of liability in the field of producers and contractors: (1) complete non-

[20] 217 N.Y. 382, 111 N.E. 1050 (1916).
[21] Bock v. Truck & Tractor, Inc., 18 Wn.2d 458, 467, 139 P.2d 706, 710 (1943).
[22] MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050, 1053 (1916).
[23] Lambert, *Personal Injury (Tort) Law*, 18 NACCA L.J. 273, 284 (1956). The same conclusion was reached in Dow v. Holly Mfg. Co., 49 Cal. App. 2d 720, 321 P.2d 736 (1958).
[24] Note. 26 FORDHAM L. REV. 689, 694 (1958).

liability in the absence of privity (the *Winterbottom v. Wright* rule); (2) liability only where the condition or instrumentality is inherently dangerous in the absence of negligence (as with explosives or poisons); (3) liability where the condition or instrumentality is inherently dangerous as a result of negligent construction (the position of the court in the instant case); (4) liability where it can reasonably be foreseen that negligent construction or production will cause injury to a third person (*MacPherson* position and current Washington position in relation to chattels); and (5) absolute liability for injury (as with suppliers of food).

In only a few cases[25] decided in the past fifteen years have courts applied either of the first two of these standards. By far the majority of recent decisions have fallen within the third and fourth categories. Those reasoning as the Washington court did in the *Andrews* case (the third category)[26] are about as numerous as the others, but the more progressive view seems to be the fourth, applying the *MacPherson* reasoning.[27] That is the view which is adopted by the American Law Institute in the *Restatement of Torts*.[28]

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[25] Watts v. Bacon & Van Buskirk Glass Co., 20 Ill. App. 2d 164, 155 N.E.2d 333 (1959) (glass door which shattered when opened); Miller v. Davis & Averill, Inc., 61 A.2d 253 (N.J. 1948); Price v. Johnston Cotton Co. of Wendell, Inc., 226 N.C. 758, 40 S.E.2d 344 (1946) (absence of allegation that defect was hidden may have been reason for decision); Delaney v. Supreme Inv. Co., 251 Wis. 374, 29 N.W.2d (1947) (ignored all exceptions to the rule of nonliability except where the defect creates a nuisance).

[26] Del Gaudio v. Ingerson, 142 Conn. 564, 115 A.2d 665 (1955) (defective oil burner imminently dangerous); Hunter v. Quality Homes, Inc., 45 Del. (6 Terry) 100, 68 A.2d 620 (1949) (defective oil burner imminently dangerous); Cox v. Ray M. Lee Co., 100 Ga. 333, 111 S.E.2d 246 (1959) (inclined sidewalk slick when wet may be found by jury to qualify); Holland Furnace Co. v. Nauracaj, 105 Ind. App. 574, 14 N.E.2d 339 (1938) (defectively installed furnace); Kendrick v. Mason, 234 La. 271, 99 So. 2d 108 (1958) (sewer line which allowed seepage of natural gas); Holmes v. T. M. Strider & Co., 186 Miss. 380, 189 So. 518 (1939) (insecurely fastened guard rail on bridge); Greenwood v. Lyles & Buckner, Inc., 329 P.2d 1063 (Okla. 1958); Roush v. Johnson, 139 W. Va. 607, 80 S.E.2d 857 (1954) (faulty wiring).

[27] Moran v. Pittsburgh-Des Moines Steel Co., 166 F.2d 908 (3d Cir. 1948) (Ohio law); Pastorelli v. Associated Engineers, Inc., 176 F. Supp. 159 (D. R.I. 1959); McCloud v. Leavitt Corp., 79 F. Supp. 286 (E.D. Ill. 1948); Tomchik v. Julian, 171 Cal. App. 2d 138, 340 P.2d 72 (1959) (inherently and imminently dangerous terminology is confusing to the jury); Dow v. Holly Mfg. Co., 49 Cal. App. 2d 720, 321 P.2d 736 (1958); Freeman v. Mazzera, 150 Cal. App. 2d 61, 309 P.2d 510 (1957); Hale v. Depaoli, 33 Cal. App. 2d 228, 201 P.2d 1 (1948) (expressly rejected the contention that the condition must be imminently dangerous); Slavin v. Kay, 108 So. 2d 462 (Fla. 1958); Wright v. Holland Furnace Co., Inc., 186 Minn. 265, 243 N.W. 387 (1932); Inman v. Binghampton Housing Authority, 3 N.Y.2d 137, 143 N.E.2d 895, 164 N.Y.S.2d 699 (1957) (accepted the *MacPherson* reasoning but held there was no liability because the defect was not hidden); Strothman v. Houggy, 186 Pa. Super. 638, 142 A.2d 769 (1958); Foley v. Pittsburgh-Des Moines Co., 363 Pa. 1, 68 A.2d 517 (1949).

[28] "One who on behalf of the possessor of land erects a structure or creates any other condition thereon is subject to liability to others within or without the land for bodily harm caused to them by the dangerous character of the structure or condition

Most of the writers and scholars in the field of tort law favor the application of this standard,[29] a step beyond what the Washington court was willing to go in the *Andrews* case. Dean Prosser in his work lists three reasons why the broader rule should be extended to construction contractors: (1) the contractor, for his own economic benefit, is engaged in a course of conduct which may affect adversely the interests of others; (2) negligent performance of his work makes injury to a particular class of people foreseeable; and (3) the owner's reliance on the skill of the contractor will foreseeably prevent him from taking special precautions.[30] He further argues[31] that the inherently or imminently dangerous approach (used by the Washington court) is merely a step in the dismissal of the old general rule against liability and the adoption of a rule analogous with that of the *MacPherson* case.

Various reasons have been given for not allowing a third party to collect from a construction contractor and for adhering to the old rule of nonliability. It has been said that there must be a present duty on the part of the tortfeasor, and where the premises are in the possession and control of another there cannot be such a present duty.[32] The problem of a present duty, however, is met and dismissed in the case of chattels. The old threat that such a rule would give rise to endless litigation has been raised,[33] but seems without effect in those jurisdictions which have adopted *MacPherson* reasoning. It has been contended that protection must be given to the building industry for without such protection responsible builders will not remain in a business imposing such risks.[34] Another reason given is that a contractor has no ability to rectify the wrong after acceptance by the owner who then assumes the duty to inspect and repair.[35] At times it is contended that injury cannot be foreseen to others than the contractee[36] or that

after his work has been accepted by the possessor under the same rules as . . . (determine) the liability of one who as manufacturer or independent contractor makes a chattel for the use of others." RESTATEMENT, TORTS § 385 (1938).

[29] See, *e.g.*, Note, 19 LA. L. REV. 221 (1958); Note, 8 MERCER L. REV. 375 (1957); Note, 4 ST. LOUIS U.L.J. 344 (1956); (Note, 8 SYRACUSE L. REV. 95 (1956); Note, 31 TUL. L. REV. 374 (1957); Note, 42 VA. L. REV. 403 (1956).

[30] PROSSER, TORTS § 85, at 518 (2d ed. 1955).

[31] *Id.* at 518-519.

[32] Annot., 13 A.L.R.2d 195, 206 (1950).

[33] *Id.*

[34] Galbraith v. Illinois Steel Co., 133 Fed. 485, 489 (7th Cir. 1904). There seems to be no evidence of such an effect in jurisdictions imposing liability.

[35] Casey v. Hoover, 114 Mo. App. 47, 89 S.W. 330, 334 (1905); 13 A.L.R.2d 196, 200 (1950). Where liability is imposed, it would seem that an offer by a builder to correct a dangerous situation created by him should absolve him from further responsibility. See, Ford Motor Co. v. Wagoner, 183 Tenn. 392, 192 S.W.2d 840 (1946).

[36] Husett v. J. I. Case Threshing Mach. Co., 120 Fed. 865, 867 (8th Cir. 1903).

maintenance of the condition by the contractee is an intervening cause.[37] At best these are makeweight arguments. One writer does not find any of the usual reasons convincing, saying, "the various reasons advanced in justification of such a result are reminiscent of the arguments formerly offered in the case of manufacturer's of goods."[38]

There are, however, a few well-accepted and seemingly valid exceptions to the allowance of liability. It would appear only just to exempt the contractor from liability where the accident or injury is due primarily to defective plans or specifications furnished by the employer contractee unless the defect is so obvious as to be discoverable on a reasonable examination; otherwise the contractor would have to determine for himself, at his own peril, whether or not the work required by him under the contract would result in a safe structure.[39]

Where it can be shown that the condition causing the injury was an obvious one, or one of which the injured party knew or should have known, then the contractor is generally not held liable for the resulting injury.[40] Though this seems clearly to be the majority rule, the *Restatement is contra.*[41] Some attempt seems to have been made by the dissenting judges in the *Andrews* case to use this defense, by saying that the height of a chimney was obvious, so the defect was one that was or should have been known. However, the adequacy of a chimney is not only a matter of physical dimension, but also of specialized knowledge, and though the height of the chimney was obvious, its defectiveness as a vent was not.

Hence it would seem that none of the valid defenses applies to the *Andrews* case, and that it was an appropriate one in which to find liability. Unquestionably, in its decision the court was in accord with the majority of other jurisdictions. However, the court adopted what is now a minority rationale or at best that of a declining and out-of-

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[37] Grodstein v. McGivern, 303 Pa. 555, 154 Atl. 794 (1931).

[38] PROSSER, TORTS § 85, at 518 (2d ed. 1955). See also 2 HARPER & JAMES, TORTS § 18.5 (1956). *But see* Annot., 13 A.L.R.2d 195, 196 (1950).

[39] Annot., 13 A.L.R.2d 195, 196-97 (1950); *accord,* Belk v. Jones Constr. Co., 272 F.2d 394 (6th Cir. 1959); Thornton v. Dow, 60 Wash. 622, 111 Pac. 899 (1910).

[40] Roman Catholic Church v. Keenan, 74 Ariz. 20, 243 P.2d 455 (1952) (pile of pipes); Hogan v. Miller, 153 Cal. App. 2d 107, 314 P.2d 230 (1957); Leveridge v. Lapidus, 105 So. 2d 207 (Fla. 1958) (drain in the middle of an aisle-way); Benton Harbor Malleable Indus., Inc. v. Pearson Constr. Co., 348 Mich. 471, 83 N.W.2d 429 (1957) (one using proper care would have discovered defect); Wilson v. North Central Gas Co., 163 Neb. 664, 80 N.W.2d 685 (1957) (pile of dirt); Sarnicandro v. Lake Developers, Inc., 55 N.J. Super. 475, 151 A.2d 48 (1959) (injured party knew of defect, but occupied and used anyway); Clyde v. Sumerel, 233 S.C. 228, 104 S.E.2d (1958) (display case sitting on incline).

[41] RESTATEMENT, TORTS §§ 385, 388 (1938).

date majority. It is unfortunate that the court did not take this opportunity to approve the *MacPherson* reasoning in construction contract situations. Further, it is most disturbing that the four dissenting justices still would adhere to the strict reasoning that there can be liability only where the instrumentality is imminently dangerous when properly constructed. This position, currently rejected by most courts, is one which should be subjected to a searching re-evaluation and should be abandoned at the first opportunity.

There are problems, however, in connection with the application of the modern rule, which must be considered. That they are generally ignored is illustrated by the following comment, which though perhaps somewhat extreme, can be characterized as generally representative of the reaction of writers to the death of the rule of nonliability in the absence of privity.

> Obviously the contractor can protect himself by using his utmost skill to avoid building defective structures or following defective designs and plans. There is, in addition, the familiar fact that he can procure liability insurance to shift his losses caused by accidents that do occur. It is a truism to repeat that the cost of this greater degree of care and of liability insurance can be included in the expense of the operation and thereby be absorbed by the public.[42]

The lasting nature of structures, as distinguished from most chattels, introduces the possibility that injury may occur a considerable length of time after construction. The first problem which this creates is that a construction contractor may be held liable for negligence after he has left the business. No contractor should be expected to maintain expensive liability insurance after he has left the business, but he has no assurance that he will not be sued after that time for defects created years before. This situation is a result of the fact that in Washington, and generally elsewhere, the statute of limitations does not begin to run at the time of the negligent construction, but at the time the defect actually causes injury. In Washington this rule was established in a case in which an oil stove was negligently installed, but no injury occurred for seven years. The court held that the two-year statute of limitations did not begin to run until the date of the damage.[43] Hence all of the valid reasons supporting statutes of limitations are of no efficacy in protecting construction contractors. The problem is not

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[42] Note, 24 IND. L.J. 286, 291 (1949).

[43] Theurer v. Condon, 34 Wn.2d 448, 209 P.2d 311 (1949); *accord,* Foley v. Pittsburgh-Des Moines Co., 363 Pa. 1, 68 A.2d 517 (1949).

extreme in the *Andrews* case as the injury occurred only two years after construction, so no criticism should be directed at the court for its failure to consider the problem. But in other jurisdictions the problem is arising; in one case liability was found for an injury which occurred eighteen years after the defective building was constructed.[44] The situation thus created would make it impossible to determine whether a builder had been a financial success or failure until claims could no longer be filed against his estate.

The second problem arises from the fact that in most if not all jurisdictions the doctrine of *res ipsa loquitur* (or a counterpart) is available to the plaintiff, shifting the burden of producing evidence to the defendant.[45] Add to this the fact that cases involving defective building or manufacture are "naturals" for the application of that doctrine, and the sum is rather alarming. It is not improbable that an uninsured, retired building contractor could be forced, practically speaking, to prove an absence of negligence in a project completed many years earlier, without the aid of witnesses (as the labor force in the building industry is highly mobile) and without any clear personal recollection of the circumstances.

One jurisdiction, some years ago, held that five years of safe use of a machine constituted a conclusive presumption that the machine was not imminently dangerous.[46] That court has recently retreated from that holding, saying,

> A reappraisal of the problem in the light of subsequent decisions persuades us to recede from the rule in *Lynch,* and to hold that prolonged use of a manufactured article is but one factor, albeit an important one, in the determination of the factual issue whether the negligent manufacture proximately caused the harm.[47]

Such a retreat is no doubt wise, as there are latent defects causing real and substantial danger which nonetheless need not and do not injure immediately. The later position of the court seems to be the general rule.[48] Further, however, than just considering the passage of time as

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[44] Hale v. Depaoli, 33 Cal. App. 2d 228, 201 P.2d 1 (1948). See also International Derrick & Equip. Co. v. Croix, 241 F.2d 216 (5th Cir. 1957) (seven years); Inman v. Binghampton Housing Authority, 3 N.Y.2d 137, 143 N.E.2d 895, 164 N.Y.S.2d 699 (1957) (six years).

[45] For an explanation of the Washington position see Comment, 13 WASH. L. REV. 215 (1938). See also, 35 WASH. L. REV. 249 (1960).

[46] Lynch v. International Harvester Co., 60 F.2d 223 (10th Cir. 1932); *accord,* Solomon v. White Motor Co., 153 F. Supp. 917 (W.D.Pa. 1957).

[47] Pryor v. Lee C. Moore, Corp., 262 F.2d 673, 675 (10th Cir. 1958).

[48] Fredericks v. American Export Lines, Inc., 227 F.2d 450 (2d Cir. 1955); Gorman v. Murphy Diesel Co., 42 Del. 149, 29 A.2d 145, 147 (1942); Kuhr Bros. Inc. v.

an important factor in the determination of proximate causation or imminent danger, the courts should give the contractor greater protection by allowing such safe protracted use to rebut the presumption of negligence raised by the doctrine of *res ipsa loquitur* where used, and where not used perhaps to raise a presumption of reasonable care. This would still leave the way to recovery open for the injured party with a bona fide cause of action and some degree of proof upon which to base it.

A final problem is that, under current reasoning, duties placed upon a builder are higher than those imposed upon a landlord with respect to tenants. Under the *Andrews* case a builder is liable for dangers of which he knew or should have known,[49] whereas in Washington a landlord has no duty "to discover and disclose obscure defects or dangers"[50] but only to disclose those that are actually known to him. This would indicate a need for re-evaluation of the obligations imposed upon landlords.[51]

In all other respects, current progress in the elimination of nonliability to persons not in privity with the contractor is salutary. The original rule of nonliability has always been much criticized, the reasons given by its apologists in the main unconvincing, and the results reached under it often harsh. In the future when a situation arises wherein a person not in privity with the building contractor is injured by a negligently created condition, which though dangerous cannot be considered imminently dangerous, it is hoped that the Washington court will not allow itself to be shackled to the dead remains of privity restrictions, but rather that it will clearly and articulately apply the *MacPherson* principles and reasoning.

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Spahos, 89 Ga. App. 885, 81 S.E.2d 491, 494-95 (1954); Beadles v. Servel Inc., 344 Ill. App. 133, 100 N.E.2d 405, 412 (1951). *Contra,* Miller v. Davis & Averill, Inc., 61 A.2d 253 (N.J. 1948). See also Kolburn v. P. J. Walker o., 38 Cal. App. 2d 545, 101 P.2d 747 (1940); Travis v. Rochester Bridge Co., 188 Ind. 79, 122 N.E. 1 (1919); Daugherty v. Herzog, 145 Ind. 255, 44 N.E. 457 (1896); Hewitt v. General Tire & Rubber Co., 3 Utah 2d 354, 284 P.2d 471 (1955).

[49] Andrews v. Del Guzzi, 156 Wash. Dec. 396, 404, 353 P.2d 422, 427 (1960).

[50] Howard v. Washington Water Power Co., 75 Wash. 255, 261, 134 Pac. 927, 930 (1913). See also, Bidlake v. Youell, 51 Wn.2d 59, 315 P.2d 644 (1957); Mesher v. Osborne, 75 Wash. 439, 134 Pac. 1092 (1913).

[51] Erosion of that rule, already occurring is illustrated by the stretching of the term "wanton" in Greetan v. Solomon, 47 Wn.2d 354, 287 P.2d 721 (1955).

**Silence as Fraudulent Concealment—Vendor and Purchaser—Duty to Disclose.** In *Obde v. Schlemeyer*,[1] the Washington court held a vendor of real property liable in damages for failure to disclose to his purchaser, absent inquiry, the existence of a latent termite infestation in the subject property.

Vendors concededly were aware of the presence in the residence of the termite condition, and in fact had employed an exterminator, although the recommended eradication process was not carried through to completion. The decayed state of the dwelling was not observable by the usual surface inspection of the premises. Plaintiffs bought the residence several months after the initial pest control treatment, making no inquiry as to the possible presence of termites. Upon discovery of the condition, this action was brought against the sellers for damages represented by the difference in actual market value of the house in its defective condition and the value of the same property if sound. The lower court granted judgment for the plaintiffs, and the supreme court affirmed, holding that the vendors were under a duty to disclose the fact of termite infestation to the purchasers, and their silence constituted fraudulent concealment.

In reaching this result, the court adhered to a disinclination, enunciated in the past,[2] to accord a rigid interpretation to the maxim *caveat emptor*. Beyond this, however, the court predicated the imposition of a positive duty of disclosure upon the exception to the rule of nonliability for mere silence, such exception being embodied in circumstances entailing a latent condition "dangerous to life, health or property." Implicit in this rather brief rationale is an underlying philosophy of a heightened sense of ethical responsibility, with a consequent demand that relief be granted in situations not traditionally within the protected ambit. The "dangerous to health, life or property" exception thus provided a convenient peg upon which to hang the liability dictated by what might be termed public conscience.

The issues here involved raise two questions: May silence alone be the basis for an action for fraud and deceit, and if so, under what circumstances?

The general requisites for maintenance of an action on the theory of fraud are well settled in this state[3] as necessitating (1) representations as to a material matter; (2) which matter is in fact false; (3) knowl-

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[1] 156 Wash. Dec. 463, 353 P.2d 672 (1960).
[2] Wooddy v. Benton Water Co., 54 Wash. 124, 102 Pac. 1054 (1909).
[3] Hamilton v. Mihills, 92 Wash. 675, 159 Pac. 887 (1916).

edge of the maker as to its falsity; (4) intent on the part of the maker that the other party should act upon such representations; and (5) actual reliance by the other party, to his injury.

A representation may be by means of words spoken or written, or any other conduct which amounts to an assertion not in accordance with the truth.[4] "Any other conduct" could conceivably be interpreted as including silence; however, conventionally the rule is stated to be that silence alone is not representation—to constitute fraud by concealment or suppression of the truth there must be something more.[5] In the case of *Kelley v. von Herberg*[6] the Washington court declared itself firmly committed to the doctrine that as between parties dealing at arm's length, silence on the part of one having knowledge is not actionable. In the same case, however, the court conceded that concealment of a material fact *may* constitute fraud, although only, of course, where there is a duty to speak.[7] And in a later case[8] the court, by way of dicta, remarked that a duty to speak sometimes does arise even when the parties are dealing at arm's length. The duty is readily apparent in situations involving fiduciary or confidential relationships,[9] and has been imposed generally in situations where a partial disclosure has been made.[10] The *Restatement of Torts* adds situations where subsequently acquired information requires that a representation previously made be corrected, or where it appears that the other party is about to rely on information not imparted for that purpose.[11]

The court in the *Obde* case cited *Perkins v. Marsh*[12] as authority for the imposition of a duty to speak. That case involved an action by a landlord for rent due under a lease, to which was interposed the defense of constructive eviction, and a cross-complaint for damages suffered by reason of the defective condition of the premises. A building had been leased as an automobile salesroom, the basement to be used for storage of used cars. The lessor knew that the basement was continually flooded during the rainy season, but this fact could not be discovered by the tenant's inspection during the summer. On appeal the court held that although there is no implied warranty of fitness for use

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[4] RESTATEMENT, TORTS § 525, comment *b* (1938).
[5] Farmers State Bank v. Lamon, 132 Wash. 369, 231 Pac. 952 (1925).
[6] 184 Wash. 165, 50 P.2d 23 (1935).
[7] *Id.* at 174, 50 P.2d at 27.
[8] Oates v. Taylor, 31 Wn.2d 898, 904, 199 P.2d 924, 928 (1948).
[9] See, *e.g.*, Oates v. Taylor, 31 Wn.2d 898, 199 P.2d 924 (1948).
[10] See, *e.g.*, Ikeda v. Curtis, 43 Wn.2d 449, 261 P.2d 684 (1953).
[11] RESTATEMENT, TORTS § 551 (1938).
[12] 179 Wash. 362, 37 P.2d 689 (1934).

of demised premises, a landlord has a duty to disclose to a prospective tenant the existence of concealed defects in the premises dangerous to the property, health or life of the tenant, where the landlord knows of the condition and a careful inspection by the tenant would not disclose it. The holding in the *Perkins* case, however, went no further than to excuse the tenant from liability for rent under the lease. Although the court stated that it was the duty of the landlord to disclose these defects, the defendant was denied recovery on his cross-claim for damages. Hence by using the *Perkins* case as a basis for the instant decision, the Washington court has adroitly stepped from a defensive to an affirmative posture.

The decision in the *Obde* case therefore represents a broadening of the duties of a vendor with respect to disclosure. The standard furnished by the court for imposition of this duty to speak, in the court's words, "whenever justice equity and fair dealing demand it,"[13] presents a somewhat nebulous standard, praiseworthy as looking toward more stringent business ethics, but possibly difficult of practical application.

Although no Washington cases have been found dealing with the precise fact situation presented by the *Obde* case, numerous examples have confronted courts in other jurisdictions. The Washington court expressly refused to follow the case most often cited on the point—*Swinton v. Whitinsville Sav. Bank*.[14] In that case a purchaser was refused relief in damages due to a concealed termite condition known to the vendor. The result is characterized by Dean Prosser as "outrageous,"[15] but Massachusetts courts have continued to follow it.[16] An opposite result was reached in a Michigan case;[17] however, that holding could have been based on the "partial disclosure" exception to the rule of nonliability for silence,[18] since evidence appeared from which it could have been found that the prospective purchaser had inquired regarding termite possibilities and had been given an ambiguous answer. Perhaps the most extreme result is furnished by a Florida case[19] in which the court refused to allow damages even though an express representation had been made to the purchaser that the structure was

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[13] Obde v. Schlemeyer, 156 Wash. Dec. 463, 467, 353 P.2d 672, 675 (1960), quoting from Keeton, *Fraud—Concealment and Non-Disclosure,* 15 TEXAS L. REV. 1, 14 (1936).
[14] 311 Mass. 677, 42 N.E.2d 808 (1942).
[15] PROSSER, TORTS § 87 n. 23 (2d ed. 1948).
[16] Yaghsizian v. Saliba, 338 Mass. 794, 155 N.E.2d 874 (1959).
[17] Sullivan v. Ulrich, 326 Mich. 218, 40 N.W.2d 126 (1949).
[18] Ikeda v. Curtis, 43 Wn.2d 449, 261 P.2d 684 (1953).
[19] Davis v. Dunn, 58 So. 2d 539 (Fla. 1952).

free of termites. The Florida court took the position that an independent examination should have been made by the purchaser despite these representations, even to the extent of breaking into stucco walls.

In the cases above referred to, the proposition reflected in the *Obde* case, that concealed defects dangerous to health, life or property impose a duty of disclosure upon a vendor of real property, was not discussed. However, the argument has been pursued successfully in a line of Kentucky cases, culminating in *Kaze v. Compton.*[20]

The holding in the *Obde* case appears to emphasize a willingness on the part of the court to transcend the traditional limitations on liability for nondisclosure in arm's length transactions. The case, if viewed as being limited to its facts, stands only for imposition of a duty on the part of a vendor to disclose to a prospective purchaser of real property the presence of non-apparent termite infestations, such infestations constituting per se defects which are dangerous to life, health or property. The case might be viewed, however, as a concrete manifestation of the court's ability to place liability where considerations of fair dealing indicate it should lie, by the mechanism of labeling specific factual patterns arising in the vendor-purchaser interchange as constituting conditions dangerous to life, health or property. The practitioner confronted with a purchaser-client who has been defrauded through silence might well investigate the possibility of utilizing the danger-to-property route to recovery.

VIRGINIA LYNESS

## TRUSTS

**Doctrine of Cy Pres—General Charitable Intent.** In the recent case of *Puget Sound Nat'l Bank v. Easterday*[1] the Washington Supreme Court, for the first time, applied the doctrine of judicial cy pres. The doctrine provides that

> If property is given in trust to be applied to a particular charitable purpose, and it is or becomes impossible or impracticable or illegal to carry out the particular purpose, and if the settlor manifested a more general intention to devote the property to charitable purposes, the trust will not fail but the court will direct the application of the property to some charitable purpose which falls within the general charitable intention of the settlor.[2]

In the *Puget Sound* case, the testator provided in his will that a cer-

[20] 283 S.W.2d 204 (Ky. Ct. App. 1955).

[1] 155 Wash. Dec. 898, 350 P.2d 444 (1960).

[2] RESTATEMENT (SECOND), TRUSTS § 399 (1959).