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Recent Decisions

Thomas B. McNeill

Patrick F. McCartan

R. L. Cousineau

William J. Harte

RECENT DECISIONS

CIVIL PROCEDURE — JURISDICTION — JURISDICTIONAL AMOUNT DETERMINED BY THE AGGREGATE AMOUNT OF PROPERLY JOINED CLAIMS. — The Plaintiff filed a complaint containing five counts, the first four charging the defendant with assault and battery, the fifth with slander. Each of the five counts claimed damages of $3,000, the maximum jurisdictional amount allowed to the trial court. D.C. CODE ANN. § 11-755 (1951). The complaint was dismissed at pretrial since the aggregate claim was $15,000. Appellant argued that each claim should be considered separately for the purpose of determining jurisdiction, and that jurisdiction was not defeated by virtue of the total amount sought to be recovered since the rules of the trial court permitted joinder of claims. *Held,* affirmed. Joinder cannot be used to enlarge statutory jurisdiction, and the aggregate amount of the claims exceeded the jurisdictional limitation. *Reeves v. Yale Transp. Corp.*, 128 A.2d 792 (Munic. Ct. App.D.C. 1957).

The opinion concerns itself with two perpendicular notions: joinder and jurisdiction. Joinder rules have been liberalized and serve as a procedural device by which multiple suits may be avoided. FED. R. CIV. P. 18 (a); see *Leimer v. Woods,* 196 F.2d 828 (8th Cir. 1952). However, the rules can not be construed to extend or limit jurisdiction of the court. FED. R. CIV. P. 82. Jurisdiction may be limited by the amount in controversy. *E.g.,* D.C. CODE ANN. § 11-755 (1951) ($3,000 maximum); 28 U.S.C. §§ 1331, 1332 (1952) ($3,000 minimum).

State decisions reflect two contrary approaches in calculating the amount in controversy where the complaint alleges more than one claim or cause of action. Apparently the approaches are adopted without the court first making a determination as to whether the language of the statute is pitched in terms of minimum or maximum jurisdiction. Some states prefer the use of the aggregate test, *Hartford Min. Co. v. Home Lumber & Coal Co.,* 61 Nev. 17, 114 P.2d 1093 (1941) ($3,000 minimum jurisdiction); *Marcus v. Bader,* 156 Misc. 730, 282 N.Y.Supp. 503 (1935) ($3,000 maximum jurisdiction); *Langham & Gentry v. Boggs,* 1 Mo. 262 (1824) ($90 minimum jurisdiction), while others treat each claim or cause of action separately, the aggregate notwithstanding. *Denison v. Denison,* 16 Conn. 34 (1843) ($70 maximum jurisdiction); *Berry v. Linton,* 1 Ark. 252 (1838) ($100 minimum jurisdiction). Thus it is apparent that in each jurisdictional situation (maximum or minimum), where the complaint alleges more than one claim or cause of action, the court is faced with an identical problem, that is, whether the amount in controversy is dependent upon each claim or cause of action considered separately or the aggregate of all properly joined claims. Added problems are presented with the use of counterclaims and cross claims. See Note, *Counterclaims in Courts of Limited Jurisdiction,* 44 HARV. L. REV. 273 (1930).

The federal courts appear to use the aggregate test when faced with minimum jurisdiction statutes, even though the claims are separate and distinct, *Kimel v. Missouri State Life Ins. Co.,* 71 F.2d 921 (10th Cir. 1934) (dictum), but disregard that test when dealing with maximum jurisdiction under the Tucker Act. 28 U.S.C. § 1346 (a) (2) (1952).

Oliver v. United States, 149 F.2d 727 (9th Cir. 1945). However, if it is determined that the plaintiff is merely attempting to split a cause of action jurisdiction is destroyed. *Sutcliffe Storage & Warehouse Co., v. United States*, 162 F.2d 849 (1st Cir. 1947); *LeJohn Mfg. Co. v. Webb*, 91 A.2d 332 (Munic.Ct.App. D.C. 1952).

An evaluation of the two approaches necessitates a closer analysis of the federal decisions in this area. The aggregation of separate and distinct claims of several plaintiffs in order to exceed the minimum jurisdictional amount is not allowed, *Clark v. Paul Gray, Inc.*, 306 U.S. 583 (1939), nor is aggregation by a single plaintiff against several defendants. *Walter v. Northeastern R.R. Co.*, 147 U.S. 370 (1893). But it is unequivocally stated that "where the plaintiff has several demands which he may join in one action, the aggregate of those demands . . . is the amount in controversy." *Kimel v. Missouri State Life Ins. Co., supra* at 924 (dictum). See also *Gray v. Blight*, 112 F.2d 696 (10th Cir. 1940); MOORE, FEDERAL PRACTICE ¶ 18.07 (2d ed. 1948, Supp. 1956). It would appear that where only one plaintiff and one defendant are involved the federal courts are construing the jurisdiction statute liberally, while the statute is strictly construed where more than two parties are involved. Similar distinctions have been made by state courts. *E.g., Taylor v. Yellow Cab Co.*, 53 A.2d 691 (Munic. Ct. App. D.C. 1947); *Navarro v. Martin*, 22 N.J. Misc. 291, 38 A.2d 691 (1944); *Marcus v. Bader, supra.*

There remains, however, the apparent conflict between the situation presented in the instant case and that arising under the Tucker Act. The act provides for original jurisdiction of claims against the United States in any District Court where the sum in controversy does not exceed $10,000. 28 U.S.C. § 1346 (a) (2) (1952). It has consistently been held that separate claims, none of which is in excess of $10,000, can be joined without the consequent loss of jurisdiction. *United States v. Louisville & Nashville R.R. Co.*, 221 F.2d 698 (6th Cir. 1955); *Oliver v. United States, supra; Sutcliffe Storage & Warehouse Co. v. United States, supra* (by implication). The decisions arising under the Tucker Act may be reconciled with those adopting the aggregate test, as does the instant case. The Tucker Act cases are peculiarly dependent upon the act's two-fold purpose. The act was designed to accomodate plaintiffs with relatively small claims by allowing them to bring the action in their local District Court, but also to retain exclusive jurisdiction in Washington for claims in excess of $10,000 so that department heads may be present to protect the interests of the government. *Oliver v. United States, supra.* The practical harmlessness of favoring liberal joinder in this area was accentuated by one court:

> . . . We cannot believe that the head of a Department in Washington, who does not need to consider each claim if pleaded in three separate suits, becomes interested if the three claims are pleaded in a single suit. *Oliver v. United States, supra* at 729.

It appears the Tucker Act lends itself to a statutory interpretation which, though not consonant with the established "aggregate" jurisdictional amount test, is apparently the will of Congress.

The court in the instant case alludes to the federal courts' "two-test" system; but not feeling any compulsion to follow the decisions of the

federal courts in the exercise of their analogous limited jurisdiction under the Tucker Act, the court clearly adopts the aggregate test. It is submitted, however, that the real *meaning* of the case is not so clear. The plaintiff's complaint disclosed an obvious attempt to split a cause of action for assault and battery, which is substantial ground for a dismissal. Complaint for Damages, Civil Action, No. M21408-56, filed July 17, 1956. The terse opinion fails to consider this infecting characteristic.

Nevertheless, the adoption of one test, applied consistently to both jurisdictional maximum *and* minimum situations, is sound judicial policy. The application of different tests would tend to make the choice of a forum whimsical. Jurisdictional limits are in terms of "amount in controversy" and should be dependent upon the total amount claimed by the plaintiff under the liberal joinder of claims rule. In the more complex situations the court need only be mindful of the nature of the claims, whether they are separate and distinct, joint, or an attempt to split a single cause of action—remembering the court's discretionary power to consolidate or separate claims for trial, *e.g.*, FED. R. CIV. P. 42, while thinking in terms of the one proper court for the plaintiff.

Thomas B. McNeill

CIVIL PROCEDURE — NEW TRIAL — TIMELY MOTION FOR JUDGMENT NOTWITHSTANDING VERDICT WILL NOT SUPPORT COURT ORDER FOR NEW TRIAL AFTER TEN DAYS FROM ENTRY OF JUDGMENT. — In an action for personal injuries plaintiff obtained a jury verdict against defendant and judgment was entered for plaintiff. Defendant filed a timely motion for judgment notwithstanding the verdict pursuant to FED. R. CIV. P. 50(b), but failed to incorporate the alternative motion for new trial, as permitted by the rule. Some weeks later the court denied the motion for judgment *n.o.v.*, but granted a new trial on its own initiative. Plaintiff moved to set aside the order granting a new trial since a timely motion for a new trial had not been filed and since the court, in exercising its own initiative, failed to do so within ten days as provided in FED. R. CIV. P. 59(d). The motion was denied and the plaintiff appealed. *Held,* reversed. Where ten days has elapsed from entry of judgment and the evidence does not warrant a judgment *n.o.v.*, the trial court is without jurisdiction to grant a new trial on its own initiative. *Jackson v. Wilson Trucking Corp.*, 243 F.2d 212 (D.C. Cir. 1957).

The Supreme Court has viewed the alternative motion provision in Rule 50(b) as an effective means for expediting litigation and preventing unnecessary retrials. See *Montgomery Ward & Co. v. Duncan;* 311 U.S. 243 (1940). Although there has been some problematical litigation concerning the disposition of the alternative motions when both are presented, *Montgomery Ward & Co. v. Duncan, supra; Marsh v. Illinois Cent. R.R.*, 175 F.2d 498 (5th Cir. 1949), the exact concern of the instant case has failed to appear in such authoritative courts.

Under FED. R. CIV. P. 59 (b), (d), a motion for a new trial must be presented within ten days from entry of judgment, or the trial court, acting on its own initiative, must order the new trial within this period. See *Greenwood v. Greenwood,* 16 F.R.D. 366 (E.D. Pa. 1954), *appeal dismissed,* 224 F.2d 318 (1955). The majority in the instant case held that no new trial may be granted under a timely motion for judgment *n.o.v.* pursuant to Rule 50(b) where the evidence is insufficient to warrant judgment *n.o.v.,* and that the ordering of a new trial under these circumstances would be governed by Rule 59(d). Although it was unnecessary to so decide, the court stated that it would permit a new trial order under a timely motion for judgment *n.o.v.* if the evidence warranted granting of the latter motion. By this admission the court assumes postures of contradiction.

The use of alternative motions permitted by Rule 50(b) does not alter the nature of the respective alternate motions; each is entitled to be decided according to the principles applicable to it standing alone. *Montgomery Ward & Co. v. Duncan, supra; Marsh v. Illinois Cent. R.R., supra.* It is well established that a motion for judgment *n.o.v.* requires the court to determine a question of law. The verdict will be reconsidered by the judge construing all evidence and conflicts in a light most favorable to the party not moving. See *O'Day v. Chicago River & Indiana R.R. Co.,* 216 F.2d 79 (7th Cir. 1954). In contradistinction the trial court has great latitude of discretion when confronted with a motion for a new trial. Here the trial court may act upon its opinion as to the weight of the evidence or generally grant a new trial where it believes the ends of justice so require. *Snead v. New York Cent. R.R.,* 216 F.2d 169 (4th Cir. 1954).

According to the majority opinion in the instant case, a trial court, when granting a new trial for reasons aside from those stated in a timely motion, is acting on its own initiative, *Kanatser v. Chrysler Corp.,* 199 F.2d 610 (10th Cir. 1952), *cert. denied,* 344 U.S. 921 (1953); *Freid v. McGrath,* 133 F.2d 350 (D.C. Cir. 1942), and should be restricted to the ten day limit imposed by Rule 59(d). The majority fails to recognize that the unrequested granting of a new trial by a court confronted with a motion for judgment *n.o.v.,* although there is sufficient reason to support such a motion, is an act of discretion upon the court's own initiative the same as granting a new trial for reasons other than those contained in a timely motion. In granting a new trial where the evidence would warrant a judgment *n.o.v.* the court is acting for reasons other than those contained in the motion for judgment *n.o.v.,* namely, that the ends of justice would be better served by a new trial than judgment *n.o.v.* By referring to this action as the power of lesser remedy the court draws a distinction without a difference. In both instances the action is upon the court's own initiative and to be consistent with the holding in the instant case, should be controlled by Rule 59(d). This incongruous position of the majority opinion a priori admits the fundamental proposition of the dissent that the granting of motions under Rule 50(b) can be a discretionary prerogative of the trial court not controlled by Rule 59(d). Rule 6(b), concerning the extension of time for action under these

particular rules, lends substance to this conclusion in that it explicitly prohibits any extension of time under Rule 50(b) except under conditions contained within the rule itself.

The dissent further argues that the majority is ignoring the spirit and substance of the Federal Rules by a rigid and formal interpretation of Rule 50(b). In 1946 the Advisory Committee on Rules for Civil Procedure offered amendments to Rule 50(b) which strongly suggest that the trial court, when presented solely with a motion for judgment *n.o.v.*, may grant the lesser remedy of a new trial if it is satisfied that a termination of the proceedings at that point would not serve the ends of justice. See REPORT OF PROPOSED AMENDMENTS TO RULES OF CIVIL PROCEDURE FOR THE DISTRICT COURTS OF THE UNITED STATES at 62, 66 (1946); see also Rule 1 which states that the rules ". . . shall be construed to secure the just, speedy, and inexpensive determination of every action." FED. R. CIV. P. 1. Considering the question of appellate discretion under Rule 50(b), the Supreme Court in *Cone v. West Virginia Pulp & Paper Co.*, 330 U.S. 212 (1946), relied upon the committee report when it mentioned that the rule does not compel a trial judge to enter judgment *n.o.v.* instead of ordering a new trial, but permits him to exercise an unfettered discretion to choose between the two alternatives. It should be noted that in contrast to the majority in the instant case, the Supreme Court preferred not to condition the new trial order upon the evidence requirements for judgment *n.o.v.* The general proposition of the Supreme Court is a desirable one as the trial judge can better exercise this discretion with a fresh and personal knowledge of the issues and evidence involved unhampered by rigid technicalities. The Advisory Committee on Rules for Civil Procedure clarified their position in 1954 advising that a motion for judgment *n.o.v.* be presumed to include the alternative motion for a new trial. PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO RULES OF CIVIL PROCEDURE FOR UNITED STATES DISTRICT COURTS at 42 (1954). Commenting on the proposed amendment the committee said, "The amendment . . . should thus protect the rights of the parties without resort to technical procedures. The addition . . . safeguards the reasonable expectations of the lawyer without regard to a precise form of words." *Id.* at 44. The situation envisioned by the committee is analogous to that presented by the majority in the instant case when it grants the power of lesser remedy. Upon this thesis the greater motion should include the lesser.

The proposition is not without authority. Where one ground stated in a motion for judgment *n.o.v.* is applicable only to a motion for a new trial the court may deny the motion and grant a new trial. *Gillis v. Reicks*, 7 F.R.D. 205 (D.D.C. 1947). In *Howard v. United States*, 1 F.R.D. 361 (E.D. Tenn. 1940), where there was substantial evidence which, if believed by the jury, would have entitled the plaintiff to verdict, the trial court denied defendant's motion for judgment *n.o.v.* under Rule 50(b) and ordered a new trial. The *Howard* ruling is in direct opposition to the supporting resolution of the majority in the instant case. *Cf. Robinson v. Isbrandtsen Co.*, 203 F.2d 514 (2nd Cir. 1953); *but see Moomaw v. Reading Co.*, 66 F. Supp. 636 (E.D. Pa. 1946).

In states which allow alternative motions there is division. Minnesota rejects the order for new trial pursuant to motion for judgment *n.o.v.* unless the alternative motion is properly presented. See MINN. STAT. ANN. § 605.06 (1947). When a motion for judgment *n.o.v.* is presented the moving party waives all errors which would be grounds for a new trial. *Eichler v. Equity Farms, Inc.*, 194 Minn. 8, 259 N.W. 545 (1935); *but see Building Ass'n of Duluth Odd Fellows v. Van Nispen*, 20 N.W.2d 90 (Minn. 1945). California explicitly states that the motion for a new trial must be presented in the alternative or it shall be waived. See CAL. CODE CIV. P. § 629 (1955). In Illinois the failure to include a motion for new trial in a post trial motion is a waiver of the right to apply for a new trial unless the jury failed to reach a verdict. ILL. ANN. STAT. c. 110, § 68.1 (Smith-Hurd 1956). Pennsylvania apparently permits the trial court to order a new trial where judgment *n.o.v.* is denied. PA. STAT. ANN. tit. 12, § 682 (Purdon 1953); see *March v. Philadelphia & West Chester Traction Co.*, 285 Pa. 413, 132 Atl. 355 (1926).

It would be presumptuous to say that the factual situation of the instant case provided the frame of reference for the many commentaries, and even decisions, concerning Rule 50(b). The general language of the commentaries and absence of the decisive time factor in the decisions provide a weak basis for a determinative resolution either way. These opinions do, however, lend more to an interpretation of the purpose of the Federal Rules rather than to specific requirements for their implementation. In this respect the dissent is a more appropriate deduction from authority. The technical inconsistency of the majority's attempt to apply Rule 59(d) as a control device on Rule 50(b) demands an original interpretation of the time limitations and discretionary powers inherent in 50(b). If in the last analysis the problem is one of proper procedure in arriving at a suitable remedy, the spirit of the Federal Rules would imply that the remedy should control.

Patrick F. McCartan

CIVIL PROCEDURE — SEPARABILITY OF THE ISSUE OF DAMAGES FROM THE ISSUE OF LIABILITY. — Plaintiff was prosecuted under federal criminal laws for using the mails and instruments of interstate transportation in an alleged conspiracy to defraud the defendant and others in transactions involving oil properties and a gasoline plant. Following acquittal, plaintiff instituted a civil action for malicious prosecution. During trial, plaintiff, a doctor, attempted to show injury to his professional reputation and standing. Further, plaintiff proved without dispute that, in contesting the criminal action, his attorneys' fees and other necessary expenditures exceeded $19,000. Under Tennessee law, attorneys' fees and other expenses incurred in defending a criminal action are proper elements of damages in a civil action for malicious prosecution. *Miller v. Martin*, 10 Tenn. App. 149 (1929). The jury found for plaintiff and awarded compensatory damages of $500.00 and punitive damages of $1.00. Judgment was rendered on the verdict; motion for new trial denied. On appeal, plaintiff

attacked the inadequacy of the amount and asked for a new trial on the single issue of damages. *Held*, judgment as to compensatory damages set aside and new trial ordered upon that issue only. Since the verdict was less than the amount of the undisputed loss shown, the motion for new trial should have been granted; inasmuch as the amount of damages has no probative connection with the issue of liability, the sole issue to be retried is that of damages. *Devine v. Patteson*, 242 F.2d 828 (6th Cir. 1957).

The federal rules of civil procedure permit a new trial limited to those issues incorrectly determined. FED. R. CIV. P. 59 (a). See 3 BARRON AND HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 1307 (1950). At common law, such procedure was usually not permitted. See 39 AM. JUR., *New Trial* § 21; *e.g., Hyler v. Heyer*, 177 Misc. 68, 29 N.Y.S.2d 233 (1941). Since the verdict was but 1/40 of the actual losses, the majority held it was inadequate. The dissent readily admitted the inadequacy but was persuaded that the verdict, inconsistent on its face, was one of compromise; that is, not all the jurors believed that plaintiff was liable and had settled on the smaller amount merely to reach a decision.

The submission of a case for redetermination of a single issue confronted Anglo-American courts for centuries, but was resolved in the federal system by *Gasoline Products Co. v. Champlin Refining Co.*, 283 U.S. 494 (1931), where the court held that a new trial of a single issue would not violate the right of trial by jury because all the issues had once been decided by a jury. Only those issues erroneously decided need be retired. A new trial on a lone issue is permitted provided that the issue is clearly distinct and singular. In cases where the various issues are so interwoven that they cannot be separated the new trial must be on all issues. *Gasoline Products Co. v. Champlin Refining Co., supra; Southern Ry. Co. v. Madden*, 235 F.2d 198 (4th Cir. 1955), *cert. denied*, 352 U.S. 953 (1956); *Bass v. Dehner*, 21 F. Supp. 567 (D.N.M. 1937). A few states will not allow a new trial upon a single issue, but hold that all questions must be relitigated. *E.g., Stout v. Oliveira*, 153 S.W.2d 590 (Tex. Civ. App. 1941); *Hyler v. Heyer, supra.*

Where the verdict is excessive, federal and some state courts readily permit retrial of a single issue of damages. *Southern Ry. v. Neese*, 216 F.2d 772 (4th Cir. 1954), *rev'd on other grounds*, 350 U.S. 77 (1955); *Scuddy Mining Co. v. Couch*, 295 S.W.2d 553 (Ky. 1956). There is no problem in the excessive verdict case for plainly, the jury has affirmatively found liability. Although new trials on the single issue of damages have been granted where damages were inadequate, *Chesevski v. Strawbridge & Clothier*, 25 F.Supp. 325 (D.N.J. 1938); *Borgstede v. G. H. Wetterau & Sons*, 337 Mo. 1205, 116 S.W.2d 179 (1938), it is in this area that serious conflict arises since an inadequate verdict is closely associated with a compromise verdict. The jury may genuinely determine liability, yet award inadequate damages. A compromise verdict is one in which some jurors have conceded liability against their judgment in order to arrive at agreement with the rest of the jury, the concession given in return for a reduction in the estimate of damages. *Padayao v. Severence*, 116 N.J.L. 385, 184 Atl. 514 (1936); *Murray v. Krenz*, 94 Conn. 503,

109 Atl. 859 (1920). A compromise verdict is actually no verdict as the issue of liability has not been determined:

> Such a verdict cannot be divided into good and bad. It cannot be sanctioned in respect to the issue of negligence and set aside as to that of damages with a new trial limited to the latter question. *Bass v. Dehner, supra* at 568.

In each case separability of issues is determined from the trial record, and the question of new trial is ordinarily within the wide discretion of the trial court. *Fairmont Glass Works v. Cub Fork Coal Co.*, 287 U.S. 474 (1933). Granting a partial new trial on the issue of damages is also within this discretion, and the decision of the trial judge should not be upset on appeal unless that discretion has been abused. *Fortier v. Newman*, 78 N.W.2d 382 (Minn. 1956). While the discretion of the trial court should not be upset on appeal unless its findings are wholly unwarranted, *Sundgren v. Leiker*, 180 Kan. 617, 305 P.2d 843 (1957), that argument is inapposite in this instance because the appellate court felt free to upset the findings of the trial court on the single issue of damages.

Three principal approaches have been utilized by the courts in determining whether or not an inadequate verdict is one of compromise. Washington holds that where there is a general verdict, the new trial must be on all the issues, but where the verdict is special the new trial may be confined to those issues incorrectly decided. *Cramer v. Bock*, 21 Wash.2d 13, 149 P.2d 546 (1944). In Tennessee, paucity of the verdict indicates compromise, because the jury must doubt either the defendant's liability or the proof on the extent of the plaintiff's injuries. If the defendant has not conceded liability, the new trial must be on all issues. *W. T. Grant Co. v. Tanner*, 170 Tenn. 451, 95 S.W.2d 926 (1936). California decisions indicate that nominal awards for general damages or inadequate verdicts for special damages strongly evidence a compromise. *E.g., Hamasaki v. Flotho*, 39 Cal.2d. 602, 248 P.2d 910 (1952). If the damages pleaded were only general and the verdict was inadequate, the new trial may be limited to the single issue of damages. *Hughes v. Schwatz*, 51 Cal. App.2d 362, 124 P.2d 886 (1942). The failure of the verdict to include undisputed medical expense and loss of earnings sufficiently indicated compromise to the court in *Murphy v. Wilson*, 141 Cal. App.2d 538, 297 P.2d 22 (1956).

The California approach is most satisfactory where actual damages are uncontested and the amount of the verdict is less than that proven, since, excepting the element of credibility, the jury returns a verdict necessarily inconsistent with the evidence. All issues in the instant case should have been relitigated because the uncontested actual damages were $19,000 and the award for compensatory damages was but $500. See *Hughes v. Schwatz, supra.* Analogically, uncontested damages are equivalent to the proven special damages of a negligence action, *i.e.*, loss of earnings, and medical expenses. See *Davison v. Monessen Southwestern Ry. Co.*, 144 F. Supp. 599 (W.D. Pa. 1956). The attempted distinction by the majority that analogies from personal injury cases are inapplicable, since the issues of damages and liability are more interwoven there, falls short of hitting the mark; it should be enough that the verdict returned is inconsistent with the evidence—to inquire into the possible grounds of compromise

verdicts in personal injury cases, as did the majority, is only to speculate. Where there is evidence to suspect that the inadequate damages were the result of compromise, such doubt should be resolved in favor of a new trial on all issues (liability and damages). See *Sayegh v. Davis*, 56 R.I. 375, 128 Atl. 573 (1925). Under any of the three above mentioned approaches, a new trial should have been ordered on all issues.

R. L. Cousineau

COURTS—INJUNCTION—COURT MAY NOT ENJOIN THE USE OF SECRETLY RECORDED CONVERSATIONS BY LEGISLATIVE INVESTIGATING BODY. —Plaintiffs, an attorney and his client, sought to enjoin a New York Legislative committee from divulging the contents of a secretly recorded conversation. The recording allegedly contained a confidential communication between the attorney and his client taken without their knowledge or consent, in a prison's counsel room. The committee planned to use the recording at a public hearing concerning the client's parole violation. The appellate division, reversing the trial court, denied plaintiff's motion for an injunction *pendente lite* and granted defendants' cross motion to dismiss. On further appeal, *held*, affirmed, three judges dissenting. A court is powerless to restrain a legislative investigating body from disclosing, at a public hearing, secretly recorded confidential communications between an attorney and his client. *Lanza v. New York State Joint Legislative Comm.*, 3 N.Y.2d 92, 143 N.E.2d 772, *cert. denied*, 78 Sup. Ct. 85 (1957).

Two competing policies confronted the court. While the entire court agreed that interference with the client's right to confer privately with counsel was repulsive and repugnant, the majority decided that the issuance of an injunction would be an infringement by the judiciary upon the legitimate power of the legislature. Plaintiffs claimed that the disclosure of the recording would violate the attorney-client privilege, N.Y. CIV. PRAC. ACT § 353, and would impair plaintiff Lanza's constitutional right to counsel.

The statute restates the common law privilege relating to confidential communications between attorney and client. Historically, the privilege was created at common law in order to dispel a client's apprehension of the attorney's compelled disclosure of their confidential consultations. 8 WIGMORE, EVIDENCE § 2291 (3d ed. 1940). The statute prohibits an attorney, and his employees, from disclosing confidential communications from a client unless the privilege has been waived by the client. N.Y. CIV. PRAC. ACT § 353. But, known presence of a third person during the meeting, not an agent of client or attorney, may vitiate the privilege. *Doheny v. Lacy*, 168 N.Y. 213, 61 N.E. 255 (1901). It has been held that it is the attorney and the client who are incompetent to testify and that the communication itself is admissible. *Erlich v. Erlich*, 278 App. Div. 244, 104 N.Y.S.2d 531 (1st Dep't 1951); *accord, Clark v. State*, 159 Tex. Crim. 187, 261 S.W.2d 339 (1953). However, the factual situation in *Lanza* is unlike the usual case in which a third person has overheard

the conversation. There was no third person present, merely an electronic device, the presence of which was unknown; further, the testimony sought to be enjoined was not that of a third person, but a transcription of the actual conversation between the plaintiffs. The majority ignored these distinctions, and implied that the presence of the recording device was tantamount to the presence of a third party. 143 N.E.2d at 775.

Together with the above, the majority narrowly construed N.Y. CIV. PRAC. ACT § 354: "The last three sections apply to any *examination of a person as a witness* . . . ." 143 N.E.2d at 774. (Emphasis supplied by court.) It then found that the statute did not create a right to prevent disclosure when neither the attorney nor the client is examined as a witness. But the underlying purpose of the statute is to protect the confidence reposed in the attorney as well as to enhance the professional relationship between attorney and client. See *Baumann v. Steingester,* 213 N.Y. 328, 107 N.E. 578 (1915). The decision in the instant case fails to recognize the purposes of the privilege in that the court applies technicalities inappropriate where a secretly recorded conversation has been made. *Cf. People v. Cooper,* 307 N.Y. 253, 120 N.E.2d 813 (1954).

Plaintiffs' second contention — that a violation of the right to counsel — involved the perennial problem of abusive investigatory methods employed by legislative committees. The majority agreed that plaintiff Lanza's right to confer privately with counsel *had been violated,* but refused to grant a remedy, distinguishing the mode of obtaining information from the manner of its use. If the recording were to be used in a criminal trial or proceeding against Lanza, his contention would have been well-founded. *Coplon v. United States,* 191 F.2d 749 (D.C. Cir. 1951), *cert. denied,* 342 U.S. 926 (1952); *People v. Cooper, supra.* However, the majority held that since this recording was "used" by the legislative committee, whose findings were to bind no one, in the pursuit of a legitimate legislative object, action by the court would be a usurpation of a legislative function.

The majority relied upon *Hearst v. Black,* 87 F.2d 68 (D.C. Cir. 1936). There a Senate committee was allowed to use and disclose certain telegrams illegally seized, upon the theory that "legislative discretion in discharge of its constitutional functions, whether rightfully or wrongfully exercised, is not subject for judicial interference." *Hearst v. Black, supra* at 71; *but see Watkins v. United States,* 354 U.S. 178 (1957).

The exceedingly broad language of the *Hearst* case must be taken with some qualification. Although no one denies the legislature is as much the guardian of the liberties of the people as the courts, legislative committees are not omnipotent. See Taylor, *Judicial Review of Legislative Investigations,* 29 NOTRE DAME LAW. 242, 252 (1954). The illusion that legislative committees of the federal government were not subject to the first Ten Amendments in the treatment of a witness has been effectively obliterated. *E.g., Watkins v. United States, supra* at 188; *Quinn v. United States,* 349 U.S. 155 (1955).

The minority in the instant case felt that the committee's use of the recording would be a violation of plaintiff's constitutional right to confer privately with his attorneys. They would extend this right not only to a

criminal trial or proceeding against him, but also to a legislative committee's investigation. This step the majority refused to take. The manner in which legislative investigating committees have abused witnesses unfortunate enough to testify before them has been decried. See *Legislative Investigations: Safeguards for Witnesses — A Symposium,* 29 NOTRE DAME LAW. 157 (1954). The conflict between investigative power and constitutional rights is highlighted by a recent attempt to strip the Supreme Court of appellate jurisdiction in subversion and congressional contempt cases. S. 2646, 85th Cong., 1st Sess. § 1258 (1957). In order to function properly, investigative committees must have considerable freedom of action but this necessity imports no license to abuse witnesses. It cannot be denied that the reputations of innocent witnesses have been greatly harmed by the adverse publicity resulting from these investigations. See *Watkins v. United States, supra.*

It is submitted this court has unwisely refused to grant a remedy where an individual's right to private consultation with his attorney was imminently endangered through an overly timorous regard for legislative functions. *Compare Colegrove v. Green,* 328 U.S. 549 (1946) (political question). The litigant is asked to look to the legislature for his remedy, or, in other words, to his anticipated violator for aid to prevent the violation.

William J. Harte

CRIMINAL LAW — EVIDENCE — FAILURE TO PRESENT FORMAL EVIDENCE OF AGE WHERE AGE IS ESSENTIAL ELEMENT OF CRIME.—Petitioner was convicted of armed robbery under a statute which provides that the accused must have been at least sixteen years of age at the time of the crime. IND. ANN. STAT. 10-4709 (1956). At the trial no formal evidence was adduced by the prosecution as to the age of the defendant. He was identified by witnesses, but never took the stand to testify. The jury was instructed that they could determine the age of the defendant from their observation of him during the trial. Defendant was convicted, the jury finding that he was thirty-eight years of age. On appeal, *held,* reversed. Mere identification of a defendant before a jury, without further evidence of age, is insufficient proof of age where that is an element of the crime; obesrvation of defendant by the jury does not satisfy the requirement of proof. *State v. Watson,* . . . Ind. . ., 140 N.E.2d 109 (1957).

While the decision required that the prosecution establish the material element of age by means more formal than mere identification of the defendant and observation of him by the jury, it rejected an early Indiana case, *Stephenson v. State,* 28 Ind. 272 (1867), which held that the appearance of an accused could not be used under any circumstances. The decision reflects two fundamental concepts inherent in Anglo-American criminal law: the burden of the prosecution, 1 WHARTON, CRIMINAL EVIDENCE 19 (12th ed. 1955), and the presumption that the accused is innocent until guilt is established beyond a reasonable doubt, *id.* at 183. When the clearly established intent of the legislature is that no person

under the designated age is to be convicted under the statute, the state is bound to establish age by substantive evidence. See *Quinn v. People,* 51 Col. 350, 117 Pac. 996 (911); *Commonwealth v. Walker,* 33 Pa. Super. 167 (1907).

The usual presentation of evidence on the question of age, *i.e.,* by document or testimony, avoids difficulties which would inhere if the jury were allowed to base findings of material fact upon its informal observations. During trial of the instant case defense counsel was not given notice that the appearance of the accused was to be used as evidence. Consequently, there was no opportunity for the defense to controvert the question of age. *Commonwealth v. Walker, supra.* Where there is a close question of age the lack of evidence other than the appearance of the defendant coupled with an instruction similar to that given by the trial court in the instant case might seriously prejudice the defense. Even where appearance is properly put into evidence it is entitled to little weight in a close case as to the question of age. *Quinn v. People, supra; Commonwealth v. Walker, supra.* If the appearance of defendant is brought in as evidence of age, it should be so indicated during the course of testimony so that the jury may uniformly consider the appearance of the accused. Chance observation will not then control the verdict.

However, the failure of defense counsel to make timely objection has been held to be a waiver of the deficiency. See *People v. Cruz,* 113 Cal. App. 522, 298 Pac. 556 (1931). Here the length of a gun was material to the crime. The weapon itself was identified, but the prosecution failed to elicit any testimony as to length. The jury was allowed to base a conviction on their observations of the gun during the course of the trial. The appellate court criticized such a procedure but refused to reverse since defense counsel failed to object in the trial court. Thus casual observance by the jury provided the basis for a decision on a material element of the crime. The defendant should be convicted under methods more certain than whether or not his counsel apprehends the failure of proof.

In the context of the instant case, the prohibition against observation by the jury as a substitute for proof of a material element of the crime is correct, but it is necessary and inevitable that the jury be allowed to rely upon their observations when determining credibility of witnesses during the trial. *Boykin v. People,* 22 Col. 496, 45 Pac. 419 (1896); *State v. Hutchinson,* 95 Iowa 566, 64 N.W. 610 (1895). In the area of credibility it has even been held that the jury has a duty to observe the conduct of a witness while not on the stand. *Henriod v. Henriod,* 198 Wash. 567, 89 P.2d 222 (1938); *Walker v. United States* 179 Fed. 810 (8th Cir. 1910).

Where the jury has been instructed that they are allowed to base findings upon informal observations during the trial, the propriety of the instruction is dependent upon the nature of the anticipated finding, *i.e.,* whether it will establish a substantive element of the crime or will determine the credibility of witnesses. In the former instance the instruction is improper for it leads to possibilities of prejudice against the defendant and conviction by casual observation, thus relieving the prosecution of the

burden of proving every essential element of the crime. In the latter instance, the instruction is proper, for the jury in determining credibility must necessarily observe the demeanor of the witness in an informal fashion.

William D. Bailey, Jr.

STATUTES — INTERPRETATION — RULE OF EJUSDEM GENERIS HELD INAPPLICABLE TO FALSE PRETENSE STATUTE. — Defendant bought a shotgun, falsely representing himself to be one Clyde Dukes. The salesman, after checking Dukes' credit, released the gun to defendant who signed Dukes' name to an invoice. Defendant was convicted under the following statute: "Whoever . . . by . . . any false pretense . . . obtains from any person . . . any money, or the transfer of any bond, bill, receipt, promissory note, draft, or check, or thing of value, . . . shall, on conviction, be imprisoned . . ." IND. STAT. ANN. § 10-2103 (1956). The defendant contended that the rule of *ejusdem generis* should be applied to this statue, limiting the meaning of the phrase "thing of value" to a species of commercial paper. On appeal, *held,* affirmed. *Ejusdem generis* is not applicable and therefore a shotgun is included within the meaning of "thing of value." *Woods v. Indiana,* . . . Ind. . . , 140 N.E.2d 752 (1957).

The rule of *ejusdem generis* is a rule of statutory construction which states that where there are general words of classification which follow an enumeration of particular and specific items, the general words are applicable only to things of the same kind as those enumerated in the preceding particular classes. *Walling v. Peav-Wilson Lumber Co.,* 49 F. Supp. 846 (W.D.La. 1942). In the instant case, the general phrase "thing of value" followed the words "bond, bill, promissory note, draft or check." The rule is but a guide in ascertaining the true intent enacting legislature, *United States v. McMenamin,* 58 F. Supp. 478 (E.D. Pa. 1944), so that if the court feels the intent was to have the generality mean literally what it says without the silently implied "of the same kind," the rule will not be applied. *City of Lexington v. Edgerton,* 289 Ky. 815, 159 S.W.2d 1015 (1941).

The rule of *ejusdem generis* is based on the inference that the legislature would not have mentioned particular classes if it intended the general words to be used in their unrestricted sense. *In Re Bush Terminal Co.,* 93 F.2d 659 (2d Cir. 1938). Without the rule, criminal laws and those relating to criminal process could be dangerously vague; *State v. Brantley,* 201 Ore. 637, 271 P.2d 668 (1954); *State v. Certain Contraceptive Materials,* 126 Conn. 428, 11 A.2d 863 (1940); the legislature's attempted use of general words to close loopholes may result in the courts' extension of the law's application beyond its intended limits.

Since it is a restrictive rule, it is especially appropriate in the interpretation of penal statutes, *People v. Thomas,* 25 Cal.2d 880, 156 P.2d 7 (1945), because penal laws are to be interpreted strictly in favor of the accused. *United States v. Resnick,* 299 U.S. 207 (1936). On the other

hand, if the particular enumeration exhausts all the possibilities within a class so that the general words must include other classes or become nugatory, it must be presumed the legislature intended the all inclusive meaning. *Blake v. State,* 210 Md. 459, 124 A.2d 273 (1956). *Ejusdem generis* is not a rule of mandatory application; its use is restricted by other rules formulated to discover legislative intent. *State v. Wells,* 146 Ohio St. 131, 64 N.E.2d 593 (1945).

In the instant case, the court, while conceding that a shotgun is not *ejusdem generis* with "bond, bill, receipt, promissory note, draft or check," decided that "thing of value" should have an unrestricted meaning and not be limited by the rule to mean some species of commercial paper. History supports the conclusion of the court. The present false pretenses statute was reenacted in 1907, IND. STAT. ANN. § 10-2103 (1956), and employed the same enumeration of commercial paper followed by the general term "thing of value" as had its predecessors originating as far back as 1852. IND. REV. STAT. 1852, vol. 2, c. 5 § 27. Although the question of *ejusdem generis* had never been specifically raised as an issue under any of the statutes, convictions had been sustained for obtaining by false pretense everything from a team of horses, *Pinney v. State,* 156 Ind. 167, 59 N.E. 383 (1901), to jewelry, *Chappell v. State,* 216 Ind. 666, 25 N.E.2d 999 (1940). This was sufficient to justify the court in reasoning that the legislature by its inaction had condoned an unrestricted interpretation of "thing of value." Continuous inaction by a legislature over an extensive period raises an implication of its intent, see *United States v. Elgin, Joliet, & Eastern R.R.,* 298 U.S. 492 (1936), so that where the legislature enacts an old phrase into a new law or reenacts an old law without any substantial change, it follows that the legislature intended to incorporate the interpretation placed upon the words by previous judicial construction. *Coates v. United States,* 181 F.2d 816 (8th Cir. 1950); *Shapiro v. United States,* 335 U.S. 1 (1948). Stare decisis and legislative silence then, combine to establish an interpretation binding upon the courts, *Heffner v. White,* 221 Ind. 315, 47 N.E.2d 964 (1943), even though the court may be in sympathy with a contrary interpretation. *Danis v. New York Central R.R.,* 160 Ohio St. 474, 117 N.E.2d 39 (1954).

But if it were the intention of the legislature that "thing of value" should have its broad, general meaning, the question arises why the legislature, in drafting the statute, used phraseology which at first glance demands the application of *ejusdem generis.* The answer lies in the involved history of common law cheat and larceny and the subsequent enactments of false pretense statutes.

False pretense statues were designed to overcome two substantial defects of the common law. CLARK AND MARSHALL, CRIMES § 358 (5th ed. 1952). Obtaining property under false pretenses was not indictable as a common law cheat unless a false token, measure, or writing was used, because, without one of these, there was no public fraud or conspiracy, but merely a breach of contract. *Rex v. Wheatley,* 2 Burr. 1125, 97 Eng. Rep. 746 (K.B. 1761). Secondly, there could be no crime of larceny where the owner intended to pass title in the property, which

is normally the case in false pretenses situations. See *Kellogg v. State,* 26 Ohio St. 15 (1874). In addition to these two defects, choses in action were not considered subjects of larceny since they were only evidences of rights to property and not property itself. *Warner v. Commonwealth,* 1 Pa. 154 (1845). In view of the existing common law, it would seem natural that in remedying the first two evils by making the obtaining of property under false pretenses a crime, the legislature would, with the same stroke, remedy the third evil and include choses in action as subjects of this new crime where common law theory would not. This fact that choses in action were not considered at common law to be subjects of theft explains the enumeration of specific commercial paper before the phrase "thing of value." This explanation for the use of the particular words is more feasible than the one which follows from appellant's contention, *viz.,* the legislature must have intended to make choses in action the only subjects of the crime of obtaining property under false pretenses.

The court's historical analysis is verified by the fact that no one had raised the issue of *ejusdem generis* in past cases; the inference is that it had been a foregone conclusion that all personal property was intended to be included under the statute. See GILLET (assistant attorney general of Indiana), CRIMINAL LAW § 276, 296 (1888); *State v. Reiff,* 14 Wash. 664, 45 P. 318 (1896) (summarily disposing of issue under a similar statute). The conclusion in the instant case is neither unexpected nor controversial, but the opinion does bring two principles of statutory interpretation against each other: *ejusdem generis* against legislative silence and stare decisis. Even assuming that the argument for the non-application of *ejusdem generis* had not been fortified by the historical analysis of common law crimes, the court appears to indicate that legislative silence and stare decisis throughout numerous past convictions would be strong enought to override an otherwise valid application of that rule.

John E. Kennedy

TORTS — CHARITABLE IMMUNITY — HOSPITAL LIABLE FOR NEGLIGENT ACTS OF EMPLOYEES WHETHER MEDICAL OR ADMINISTRATIVE. — Plaintiff, a patient at defendant hospital, was severely burned during an operation when a flammable antiseptic fluid was applied to the person of the plaintiff by nurses, employees of the hospital, as a pre-operative measure. Although the nurses were aware of the combustible qualities of the fluid, they failed to inspect for contamination the linen upon which plaintiff was lying. The plaintiff's burns were incurred when fire resulted from the heat of an electric cautery. The liability asserted against the hospital was predicated on an independent act or omission of the hospital-employed nurses, and not on any conduct ordered by the surgeon. There was a verdict and judgment against the hospital on the basis that the doctrine of charitable immunity was inoperative since the nurses were considered engaged in an "administrative" act. The Appellate Division reversed, finding

that the nurses were engaged in a "medical" act. 1 App. Div. 2d 887, 149 N.Y.S. 2d 358 (2d Dep't 1956). On appeal to the Court of Appeals of New York, *held*, reversed. The doctrine according charitable hospitals immunity for the negligence of its employees is no longer fair and just, and a hospital's liability must be governed by established rules of agency. *Bing v. Thunig*, 2 N.Y.2d 656, 143 N.E.2d 3 (1957).

The New York Court of Appeals distinguished, in *Schloendorff v. Society of New York Hospital*, 211 N.Y. 125, 105 N.E. 92 (1914), acts of an employee-nurse ordered by a physician from her acts which related to hospital administration. In the first instance, the nurse was under the control of the surgeon and the hospital was not liable for her torts. In the latter, the principle of respondeat superior applied and the hospital was considered liable. Courts of New York developed and expanded this decision until the words "medical" and "administrative" became the criteria for deciding whether or not a hospital was liable for the torts of employees. *Phillips v. Buffalo Gen. Hospital*, 239 N.Y. 188, 146 N.E. 199 (1924); *Necolayff v. Genesee Hospital*, 270 App. Div. 648, 61 N.Y.S.2d 832 (4th Dep't 1946), *aff'd*, 296 N.Y. 936, 73 N.E.2d 117 (1947); *Cadicamo v. Long Island College Hospital*, 308 N.Y. 196, 124 N.E.2d 279 (1954).

The refinement of the *Schloendorff* distinction created the problem of differentiating between "medical" and "administrative" acts. *Compare Necolayff v. Genesee Hospital, supra, with Berg v. New York Soc'y*, 286 App. Div. 783, 146 N.Y.S.2d 548 (1st Dep't 1955); *Kaps v. Lenox Hill Hospital*, 269 App. Div. 830, 51 N.Y.S.2d 791 (Sup. Ct. 1944), *aff'd* 57 N.Y.S.2d 843 (1945) and *Phillips v. Buffalo Gen. Hospital, supra, with Iacano v. New York Polyclinic Hospital*, 269 App. Div. 955, 58 N.Y.S.2d 244 (2d Dep't 1945), *aff'd mem.*, 296 N.Y. 501, 68 N.E.2d 450 (1946). The court in the instant case highlighted this evil as a reason for taking leave of the non-liability doctrine. There are few acts which hospital employees perform for patients that do not relate in some manner to their medical care and treatment. *Berg v. New York Soc'y, supra.* Thus few situations exist in which courts could not grant a charitable hospital immunity simply by deciding that the employee's tort was "medical" rather than "administrative" in nature.

The scope of decisions in other jurisdictions range from complete immunity, *Landgraver v. Emanuel Lutheran Charity Board*, 203 Ore. 489, 280 P.2d 301 (1955); *Dille v. St. Luke's Hospital*, 355 Mo. 436, 196 S.W.2d 615 (1946), to complete liability, *Ray v. Tuscon Medical Center*, 72 Ariz. 22, 230 P.2d 220 (1951). For instances of qualified immunity, see *Tucker v. Mobile Infirmary Ass'n*, 191 Ala. 572, 68 So. 4 (1915); *Simmons v. Wiley Methodist Episcopal Church*, 112 N.J.L. 129, 170 Atl. 237 (1934); *Tolchetti v. Johnson Memorial Hospital*, 130 Conn. 623, 36 A.2d 381 (1944). The diversity of judicial opinion is partly occasioned by the variation in legalistic formulae advanced to support immunity. See *President of Georgetown College v. Hughes*, 130 F.2d 810 (D.C. Cir. 1942).

Regardless of the rationale advanced to substantiate immunity, the underlying reason is based upon broad grounds of public policy. *Haynes*

v. Presbyterian Hospital Ass'n, 241 Iowa 1269, 45 N.W.2d 151 (1950); *President of Georgetown College v. Hughes, supra.* Policy changes with the times, and that of one era may not be the policy of another, *Landgraver v. Emanuel Lutheran Charity Board, supra,* and even where immunity is denied, the courts admit that public welfare formerly demanded immunity. Courts find liability only because of an inversion of public policy, necessitated by changed social and economic conditions. *Avellone v. St. John's Hospital,* 165 Ohio St. 467, 135 N.E.2d 410 (1956); *Pierce v. Yakima Valley Memorial Hospital Ass'n,* 43 Wash.2d 162, 260 P.2d 765 (1953); *Haynes v. Presbyterian Hospital Ass'n, supra.*

The dissent in *Avellone v. St. John's Hospital, supra,* points out that in the Cleveland area alone there are approximately one hundred charitable activities which will be vitally affected in their financial structure by the change. Yet the supreme court held that public policy toward charitable institutions had shifted to liability without giving other charities a chance to controvert the charge. The identical question was recently before the Oregon supreme court. It stated that because the immunity policy affected so many charities and had become so firmly established, the legislature had the right to assume that the rule would not be changed unless the legislature itself acted. *Landgraver v. Emanuel Lutheran Charity Board, supra* at 303. Not only is the authority of the court to revise public policy drawn in question, but so is the advisability of eradicating an established policy. The courts of many jurisdictions feel the public is greatly benefited by immunity, for a substantial number still grant at least partial immunity to charities. Annot., 25 A.L.R.2d 29, 142 (1952).

The majority in the instant case emphasizes, as do most courts declaring non-immunity, the effect of liability on the large, efficiently run, well endowed hospital that can easily afford liability insurance or has other means to protect itself against destructive liability. *Pierce v. Yakima Valley Memorial Hospital Ass'n, supra; Haynes v. Presbyterian Hospital, supra; accord, Mississippi Baptist Hospital v. Holmes,* 214 Miss. 906, 55 So.2d 142 (1951). But see, *Dille v. St. Luke's Hospital,* 355 Mo. 436, 196 S.W.2d 615 (1946) (hospital immune although insured).

The distinction between "medical" and "administrative" acts, developed from an unwarranted refinement of the *Schloendorff* rule. was often difficult to make, and the results were often harsh. While the decision in the instant case rightly criticizes further use of an almost meaningless distinction, the extension of tort liability to all charitable hospitals was unjustified in that the court could not postulate that public policy toward all charitable hospitals had changed. Perhaps *Landgraver v. Emanuel Lutheran Charity Board, supra,* suggests the proper course of action. If a statement of public policy is to be made, it should be the legislature that does so, for the court cannot hear representatives of all communities and charities affected. It is only through public representation that broad policy can be fairly established.

Daniel W. Hammer